



**Konchellah v Mbogo & another (Petition 21 of 2018)  
[2018] KESC 3 (KLR) (21 December 2018) (Judgment)**

*Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR*

Neutral citation: [2018] KESC 3 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 21 OF 2018  
MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ  
DECEMBER 21, 2018**

**BETWEEN**

**GIDEON SITELU KONCHELLAH ..... PETITIONER**

**AND**

**ELIJAH MBOGO ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

*(An appeal from the judgment and order of the Court of Appeal sitting at Nakuru (Makhandia, Musinga and Gatembu JJA) delivered on 31st July, 2018 in Civil Appeal No. 11 of 2017)*

**Supreme Court upholds the election of Member of the National Assembly for Kilgoris Constituency.**

Reported by Chelimo Eunice

***Jurisdiction*** - jurisdiction of the Supreme Court – appellate jurisdiction – appeals involving interpretation or application of the Constitution – conditions precedent – conflict on the election of member of the National Assembly Kilgoris Constituency – whether an appeal against the nullification of the election of a member of National Assembly by the Court of Appeal raised matters of constitutional interpretation to warrant an appeal before the Supreme Court - Constitution of Kenya articles 81, 86, and 163(4); Supreme Court Act (cap 9B) section 15; Elections Act (cap 7) section 85

***Electoral Law*** – principles of a fair election - electoral irregularities - considerations a court should take into place in determinations on whether an election was conducted substantially in accordance with the law - allegations of non-compliance with the Constitution and electoral laws - whether there were irregularities and illegalities committed in the conduct of the election of Member of National Assembly Kilgoris Constituency – whether the presence of irregularities in the conduct of an election in and by of itself would lead to an election result being invalidated – what was the extent to which electoral irregularities and non compliance with election law would



*lead to the nullification of the election of a Member of National Assembly - Constitution of Kenya articles 38, 81(a), 81(d), 81(e), 86, and 87; Elections Act (cap 7) sections 39, 44, 44A, 83, 84, 85A*

### **Brief facts**

The appellant appealed against the Court of Appeal decision setting aside the trial court's decision and annulling his election. The trial court had confirmed the appellant's election. The appellant blamed the Court of Appeal, for among others, nullifying his election in the absence of substantive non-compliance with the Constitution or irregularities of such magnitude as to affect the outcome of the election.

### **Issues**

- i. Whether an appeal against the nullification of the election of a member of National Assembly by the Court of Appeal raised matters of constitutional interpretation to warrant an appeal before the Supreme Court.
- ii. Whether there were irregularities and illegalities committed in the conduct of the election of Member of National Assembly Kilgoris Constituency.
- iii. Whether the presence of irregularities in the conduct of an election in and by of itself would lead to an election result being invalidated.
- iv. What was the extent to which electoral irregularities and non-compliance with election law would lead to the nullification of the election of a Member of National Assembly?

### **Held**

1. The primary issue revolving around the petition against the appellant's election was whether the election was conducted following the principles of the Constitution. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of whether the violation was substantial enough to nullify the election and whether the trial court failed to make vital findings of fact and abdicated its judicial duty and responsibility, the main issue of the application of articles 81 and 86 of the Constitution to the dispute was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of the impugned election, the Court of Appeal applied the provisions of article 86(a) of the Constitution. Thus the appeal fell within the ambit of article 163(4) (a) of the Constitution.
2. The general principles to guide the electoral system in Kenya were captured in article 81 of the Constitution. On political rights, article 38(2) of the Constitution made it clear that every citizen had the right to free, fair and regular elections. Article 86 of the Constitution on the other hand imposed an obligation on the Independent Electoral and Boundaries Commission to ensure that the stipulated conditions were met, in any election process conducted in the country. Section 83 of Elections Act was also applicable.
3. The practical realities of election administration were such that imperfections in the electoral process were inevitable. On that account, elections should not be lightly overturned, especially where neither a candidate nor the voters had engaged in any wrongdoing.
4. On the effect of proven irregularities in an election petition, judicial practice ought not to make it burdensome to enforce the principles of properly conducted elections which gave fulfilment to the right of franchise. Where a party alleged non-conformity with the electoral law, the petitioner ought not to only prove that there was non-compliance with the law, but that such failure of compliance did affect the validity of elections.
5. There was an error apparent in the Court of Appeal's judgment. The Court of Appeal did not apply the principles established on nullification of an election based on constitutional violations, namely, the substantial effect of the irregularity on the conduct of the contested results. Irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, or that the results of the election were unaffected.
6. The Court of Appeal ought to have considered the fact that the election for the Member of National Assembly in the whole of Kilgoris Constituency in all polling stations, save for Endoinyo Nkopit



- Polling station, was conducted in compliance with the laid down constitutional principles and applicable laws; and the fact that even in Endoinyo Nkopit Polling station, all the electoral processes preceding the diversion complied with the constitutional principles and applicable electoral laws. Had the Court of Appeal properly applied that test, it would have reached a different conclusion than it did.
7. The Court of Appeal arrived at an inconsistent determination of the law. The election, despite the isolated cases of irregularities which did not affect the result of the election, was essentially free and fair. The fact that the election went on smoothly in all 165 polling stations, save for one, the alleged violation of article 86(a) of the Constitution did not substantially affect the outcome of the election. The Court of Appeal also contravened article 163(7) the Constitution by not applying the binding precedent set by the court.
  8. An election was not to be annulled except on cogent and ascertained factual premises. It was by that principle that the Constitution protected the voter's enfranchisement under article 38(1). Section 83 of the Elections Act was the definitive statement of the standard that an election court ought to apply, in verifying the election results. As to the effect of irregularities, and the point at which a court should overturn an election, courts had to only act on ascertained facts, not conjecture, and had to demonstrate how the final statistical outcome had been compromised.
  9. The court took note of the right of voters from 164 other polling stations where the elections were conducted in compliance with the Constitution, and whose political rights were similarly guaranteed under article 38(2) of the Constitution. Thus, where a voter had made his choice known, having been registered in accordance with articles 82 and 83, 138(3)(a) of the Constitution, having voted in accordance with articles 81 and 83 of the Constitution and his vote counted at the polling station and the result announced at the polling station in accordance with the law and the outcome was known and uncontested (the results in 164/165 polling stations in Kilgoris Constituency were not contested), his rights should not be ignored especially where the alleged violations did not affect the outcome of the election.
  10. The Court of Appeal erred in failing to apply the quantitative test in its interpretation and application of article 86(a) of the Constitution against the political right of the citizens of Kilgoris Constituency to free, fair elections based on universal suffrage and the free expression of the will of the people. The stated irregularities did not affect the outcome of the election, when all other factors were taken into account.
  11. A petition which required the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invited the appellate court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. Those principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial court and the trial record, on the one hand, and the trial court's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.
  12. The Supreme Court could not address the questions on discrepancies regarding the scrutiny report, without delving into matters of fact because its hands were tied by article 163(4)(a) of the Constitution.
  13. Section 85A of the Elections Act was not an inconsequential provision. As much as the appellate court was free to navigate the evidential landscape, it ought to maintain fidelity to the record. The appellate court, when examining matters of law may thus not completely ignore the evidence on record. The Court of Appeal erred in finding that the trial court failed to address issues raised before him, thereby exceeding its mandate provided for under section 85 of the Elections Act.
  14. Costs followed the event and a court had the discretion in awarding costs. The appellant did not submit on the issue before the other courts and had raised the question of the *ultra vires* nature of rule 30 of the Elections Petitions Rules, 2017 for the first time at the Court. There was no explanation by the appellant as to why the same was not addressed at the Court of Appeal or why it did not form part of



the appellant's grounds of appeal. Respecting the hierarchy of the judicial system was paramount, and thus the issue of costs was rejected.

15. The alleged and proven irregularities did not have the effect of nullifying the outcome of the election of Member of the National Assembly for Kilgoris Constituency.

*Petition allowed.*

### **Orders**

- i. *The Judgment of the Court of Appeal sitting at Nakuru, dated July 31, 2018 annulling the election of Gideon Sitelu Konchellah as Member of National Assembly for Kilgoris Constituency, was quashed and set aside.*
- ii. *The petition of appeal dated August 8, 2018 was allowed.*
- iii. *For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat of Member of National Assembly Kilgoris Constituency, was restored.*
- iv. *The 3<sup>rd</sup> respondent was to bear the costs of the appellant, 1<sup>st</sup> respondent's costs at the High Court, Court of Appeal and Supreme Court.*

### **Citations**

#### **Kenya**

1. *Adam v Mohamed & 3 others* (Petition 13 of 2014) [2014] KESC 48 (KLR) - (Explained)
2. *In the matter of the principle of gender representation in the National Assembly and the Senate Advisory Opinions Application 2 of 2012*; [2012] KESC 5 (KLR) - (Explained)
3. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)
4. *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* Petition 13A of 2014 & 14 & 15 of 2013 (Consolidated); [2014] KESC 9 (KLR) - (Followed)
5. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Explained)
6. *Mungai, Michael v Housing Finance Co. (K) Ltd & 5 other* Civil Appeal (Application) 9 of 2015; [2017] KESC 47 (KLR) - (Explained)
7. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
8. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Followed)
9. *Mutegi, Mercy Kirito v Beatrice Nkatha Nyaga & 2 others* Civil Appeal 48 of 2013; [2014] KECA 697 (KLR) - (Explained)
10. *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* Election Petition 2 & 4 of 2017; [2017] KESC 54 (KLR) - (Explained)
11. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Followed)
12. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR); [2012] 2 KLR 419 - (Explained)
13. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR); [2013] 1 KLR 63 - (Followed)
14. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 32 (KLR) - (Explained)
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) - (Explained)
16. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
17. *Republic v George Okumu Adera & 2 others* Criminal Case 714 of 2017 - (Explained)



18. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Followed)
19. *Waibara, Clement Kungu v Annie Wanjiku Kibeh & another* Petition 15 of 2013 ; [2013] eKLR - (Followed)

### **Uganda**

*Kizza Besigye v Electoral Commission & another* [2007] UGSC 24 - (Explained)

### **Namibia**

*Rally for Democratic & 17 others v Electoral Commission of Namibia* SA 12 of 2011); [2012] NASC 21 - (Explained)

### **Ghana**

*Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & others* Presidential Election Petition No. J1/6/2013 - (Explained)

### **United Kingdom**

1. *English v Emery Reimbold & Strick Ltd* [2002] WLR 2409; [2002] 3 All ER 385 - (Followed)
2. *Flannery and another v Halifax Estate Agencies Ltd* [2000] 1 WLR 381; [2000] 1 All ER 373 - (Followed)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 1, 2, 4, 10, 38, 38(2); 81( e)(v); 84; 86(a)(d); 87; 138(3)(c);163(4)(a); 259(1) - (Interpreted)
2. Election (Parliamentary & County Elections) Petition Rules, 2017 (cap 7 Sub Leg) rules 30, 30(2)(b) - (Interpreted)
3. Elections Act (cap 7) sections 39, 44, 44A, 83, 84, 85A - (Interpreted)
4. Independent Electoral and Boundaries Commission Act (cap 7C) section 25(e) - (Interpreted)
5. Supreme Court Act (cap 9B) section 15(1)(2) - (Interpreted)

### **Advocates**

1. *Mr. Kilukumi and Gibson Kimani* for the petitioner.
2. *Mr. Omwanza Ombati and Mr. Ondari Nyabuti* for the 1<sup>st</sup> respondent.
3. *Mr. Morara Apiemi* for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.

## **JUDGMENT**

### **Introduction**

1. This is an appeal against the judgment of the Court of Appeal sitting at Nakuru (Makhandia, Musinga and Gatembu JJA), delivered on July 31, 2018 in Civil Appeal No. 11 of 2018, and which set aside the decision of the High Court (Muya J), in H.C (Narok) Election Petition No 1 of 2017. In doing so, the Court of Appeal invalidated the election of the appellant as the duly elected Member of the National Assembly for Kilgoris Constituency.

### **B. Background**

#### **(a) Proceedings in the High Court**

2. The appellant was declared the duly-elected Member of the National Assembly Kilgoris Constituency following the General Election held on August 8, 2017. He received a total of 23, 812 votes. Aggrieved,



the 1<sup>st</sup> respondent, who came second with a total of 17, 160 votes, filed Election Petition No 1 of 2017 at the High Court in Narok, dated September 4, 2017, challenging the election of the appellant. The 1<sup>st</sup> respondent alleged that the declared margin of votes of the appellant over the 1<sup>st</sup> respondent was 6, 652 votes; the election was badly conducted, administered and managed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as they failed to comply with the governing principles found in articles 1,2,4,10,81 and 86 of the Constitution, the Elections Act and the regulations made thereunder; the election was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to article 81 ( e) (v) as read with sections 39, 44, and 44A of the Elections Act, the regulations made thereunder and Section 25 (e) of the Independent Electoral and Boundaries Commission Act; the election was mannered with violence, intimidation, improper influence or corruption and the election results were not announced in time; the 1<sup>st</sup> respondent was denied access to polling stations; diversion of electoral materials and unsigned forms 35As.

3. In response to the petition, the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents argued that the election was free and fair, conducted in accordance with the Constitution, Elections Act and the regulations made thereunder save for one polling station. They thus urged the court to dismiss the petition.
4. The court, Muya J, on February 27, 2017, dismissed the petition and held that the 1<sup>st</sup> respondent had failed to prove either of the two limbs stated in section 83 of the Elections Act. The learned judge also came to the conclusion that even though the 3<sup>rd</sup> respondent had failed to secure the election for Endoinyo Nkopit polling station, the said results were not factored in the eventual counting and since this affected all the candidates across the board, including the 1<sup>st</sup> respondent, the same did not substantially affect the results. The trial court further condemned the 3<sup>rd</sup> respondent to pay the costs of the petition to the appellant and the 1<sup>st</sup> respondent. Consequently, the court confirmed the appellant as the Member of the National Assembly for Kilgoris Constituency.

#### **(b) Proceedings in the Court of Appeal**

5. The 1<sup>st</sup> respondent, being aggrieved by the decision of the High Court, filed an appeal, Election Petition Appeal No. 11 of 2018, at the Court of Appeal at Nakuru. The court of Appeal crystalized the issues for determination as follows: whether the judge erred in law by upholding the election after declaring it to be unconstitutional, subjecting the constitutionality test to the statutory test of a valid election and merging the materiality and substantial non-compliance test in section 83 of the Elections Act; whether the trial judge failed to make vital findings of fact and in the process abdicated his judicial duty and responsibility which occasioned injustice; whether the trial judge failed to take judicial notice of the information contained in the Kenya Gazette; whether the judge failed to find that there was bribery and corrupt practices on the eve of the election; whether the judge misapprehended the principles of evidential burden, burden of proof and standard of proof; whether the trial judge failed to draw adverse and spoliation inferences; whether the trial judge erred in failing to allow scrutiny of the ballot boxes from Endoinyo- Nkopit polling station ; whether the judge failed to determine that an election offence had been committed regarding the diversion of the ballot boxes; and the issue of electronic transmission of results.
6. On the first issue, the Court of Appeal held that a violation of the Constitution was merely that-a violation. They thus faulted the trial judge for failing to annul the appellant's election despite finding that there was substantial breach of article 86(a) of the Constitution. In the court's view, the trial judge's conclusion that the violation did not affect the result was wrong in principle as this finding alone was sufficient to nullify the election.



7. On the second issue, the learned judges faulted the trial court for failing to address all pleaded issues without salient explanation. Consequently, the court found merit in the complaint that the judge failed to address issues raised before him.
8. The rest of the issues were dismissed by the court, subsequently upholding the trial court's determination on those issues.
9. We note that the 3<sup>rd</sup> respondent had filed a cross-appeal on the award of costs of the petition to the 1<sup>st</sup> respondent and the appellant which was determined as a separate issue by the Court of Appeal stating that;

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“Having given the issue considerable attention, we are satisfied that the judge appreciated the principles enunciated in the above case and therefore arrived at a correct decision with regard to the award of costs. The costs so awarded were neither punitive nor excessive. Accordingly, our intervention is uncalled for.”

10. Consequently, the learned judges of appeal set aside the election court's decision and annulled the election of the appellant. The cross-appeal was conversely dismissed and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were condemned to pay the costs of the appeal and cross-appeal.

### **(c) Proceedings in the Supreme Court**

#### **The Appellant's Case**

11. Aggrieved by the decision of the Court of Appeal, the appellant filed Petition 21 of 2018 seeking to appeal the Court of Appeal's decision of July 31, 2018. The petition raises eight (8) grounds of appeal namely, and in summary, that the learned judges of appeal erred in law and in fact in: misapplying the provisions of article 86(a) of the Constitution to the evidence on record thereby reaching a perverse verdict; ignoring a factual finding of the trial judge that the criminal diversion of electoral materials “did not substantially affect the results”, accordingly, the contravention of article 86(a) of the Constitution was not substantial; failing to balance competing constitutional rights namely, the right to vote and to be elected under article 38 of the Constitution and the right to have electoral materials kept safely and secure under article 86(d) of the Constitution; not applying the constitutional nullification test spelt out in section 83 of the Elections Act as derivative of the Constitution; nullifying the appellant's election in the absence of substantive non-compliance with the Constitution or irregularities of such magnitude as to affect the outcome of the election; misapprehending the decision of this honourable court in the case of Raila Odinga vs IEBC & 2 others, SC Pet 5 of 2013 eKLR (Raila 2013), Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others, SC Appl No 5 of 2014, [2014.eKLR (Munya 2) and Clement Kungu Waibara v Annie Wanjiku Kibeh & another SC Pet 15 of 2013 ; [2013.eKLR (Clement Waibara case) and thereby wrongly allowing the appeal before them exceeding its jurisdiction as set under section 85A of the Elections Act derived from article 87 of the Constitution; and exceeding its jurisdiction under section 84 of the Elections Act does not confer such discretion in electoral disputes.
12. The appellant itemized the following issues for determination:
  1. Whether violation of article 86(a) of the Constitution per se is sufficient to nullify an election;.
  2. Whether violation of article 86(a) of the Constitution must be substantiated before an election can be nullified;.



3. Whether the election results declared by the 2<sup>nd</sup> respondent for the Member of the National Assembly for Kilgoris Constituency was an accurate reflection of the will of the electors in the said constituency;
  4. Whether the Petitioner was validly declared as Member for the National Assembly for Kilgoris Constituency.
13. The appellant seeks this court to allow the appeal and set aside the decision of the appellate court, declare he was validly declared as the Member of the National Assembly Kilgoris Constituency, issue him with a certificate of the court pursuant to section 86 of the *Elections Act*; and grant him the costs of the petition.
14. Counsels present for the parties were as follows: Mr Kilukumi and Gibson Kimani for the Petitioner; Mr Omwanza Ombati together with Mr Ondari Nyabuti for the 1<sup>st</sup> respondent; and Mr Morara Apiemi for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

### C. The Parties' Respective Cases

#### i. The Appellant

15. On constitutional nullification test, Mr Kilukumi, counsel for the appellant, relied on the written submissions filed on September 4, 2018 and September 20, 2018. Counsel submitted that the Court of Appeal nullified the petitioner's election on one ground only, namely, that there was a violation of article 86(a) of the *Constitution* by the electoral body when ballot boxes from one polling station were diverted in a criminal enterprise.
16. In his oral submissions, learned Counsel faulted the Court of Appeal on its finding that any violation of the Constitution automatically leads to nullification of an entire election. He also faulted the Court of Appeal for finding that there was substantial breach of article 86(a) of the *Constitution*, contrary to the High Court's finding that the contravention of article 86(a) of the *Constitution* was not substantial.
17. While citing this Court's decisions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, Presidential Election Petition No 1 of 2017; [2017]eKLR (*Raila 2017*) and *Munya 2*, where it was held that there must be substantial violation of the Constitutional principles before an election can be nullified, learned counsel submitted that the alleged violation even if true was not substantial.
18. Counsel urged further that the elections in Kilgoris Constituency was peacefully conducted in 164 out of 165 polling station save for one polling station, Endoinyo Nkoipit polling station where the results were not delivered to the Constituency Tallying Centre, and that those involved in the diversion of the results were charged in a criminal court. Counsel urged therefore, that, as registered voters in Endoinyo Nkoipit polling station (666 voters) comprised of 0.1 % of the registered votes in the entire Constituency, citing *John Harun Mwau & 2 others v IEBC & 2 others*, Presidential Petitions Nos 2 and 4 of 2017; [2017. eKLR (Harun Mwau case), he submitted that that exclusion of votes from the affected polling station in the final tally did not affect the result of the election.
19. Finally on this issue, counsel submitted that the violation alleged by the 1<sup>st</sup> respondent was in relation to article 86(d) and not article 86(a) of the *Constitution* which they pleaded. On this point, counsel submitted that the word secure as used in article 86(a) of the *Constitution* is in respect of the voting method and not the safe keeping of electoral materials. Counsel concluded by submitting that the corporate obligation to keep electoral materials safe was not breached by the 3<sup>rd</sup> respondent as a corporate entity, that criminal responsibility is personal and not corporate and that neither the 2<sup>nd</sup> nor



the 3<sup>rd</sup> respondent's name appeared in Criminal Case No. 714 of 2017, Kilgoris, *Republic v George Okumu Adera & 2 others* where those responsible for diverting electoral materials were charged with criminal offences relating to that diversion.

20. On the approach to Constitutional interpretation and application, counsel submitted that by addressing the single issue of breach of article 86(a) of the *Constitution* and invalidating the appellant's election, the Court of Appeal undermined the principle of universal suffrage provided for under articles 38(2) and 81(d) of the *Constitution*. Counsel urged further that the proper approach to constitutional interpretation is to adhere to the rule of harmony whereby all articles of the *Constitution* are given their true value in the hierarchy of rights. Counsel anchored his submissions on a decision of the Supreme Court of Ghana, *Nana Addo Dankwa Akufo-Addo & others v John Dramani Mahama & others* Presidential Election Petition No J1/6/2013(Nana Addo Case), where it was held that visiting the sins of a public official on innocent citizens, who have expressed their choice freely, would run contrary to the principle of universal adult suffrage, one of the pillars of democracy, and perpetuate an injustice. Counsel also cited various decisions of this Court, namely, *In the Matter of the Principle of Gender representation in the National Assembly and the Senate*, Supreme Court Advisory Opinion Reference No.2 of 2012; [2012] eKLR, *Speaker of the Senate & another v Attorney-General & 4 others*, Supreme Court Advisory Opinion Reference No 2 of 2013; [2013] eKLR; and *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* S.C Pet No 13A as consolidated with 14 and 15 of 2013; [2014] eKLR in support of this submissions.
21. On the issue of the trial court's determination of issues before it, counsel submitted that the appellate court erred in its finding and contravened what was on the record contrary to section 85A of the *Elections Act*. At paragraph 50 of his submissions, counsel added that the trial judge considered all matters raised by the appellant and rendered a verdict as to whether the issues were pleaded or not and if pleaded, whether evidence to the required standard was adduced.
22. On the issue of costs, counsel submitted that statute does not confer discretion in the award of costs and that an unsuccessful party in an election petition cannot be awarded costs; that an election court cannot deny a successful party costs. Counsel anchored this submission on section 84 of the *Elections Act, 2011* and rule 30 of the *Petitions Rules, 2017*. He further submitted that rule 30 was *ultra vires* section 84 of the *Elections Act* on the award of costs as it confers discretion on the award of costs contrary to the latter provision in the parent *Act*.

## ii. 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

23. As to whether the appeal is proper before us, learned Counsel Mr. Morara associated himself with the submissions of the appellant, with regard to this court's jurisdiction to hear and determine this matter under the provisions of article 163(4)(a) of the *Constitution*. Counsel urged that the appeal lies as of right as it raises issues of constitutional interpretation and application since the Petition at the trial court revolved around non-compliance with the *Constitution*. Counsel in addition submitted that in resolving the main issue for determination, the trial court applied and interpreted the relevant provisions of the *Constitution*, namely, articles 81 and 86(a) in arriving at its findings.
24. Counsel in support of his submissions on jurisdiction cited the case of *Munya 2* and *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR (Lawrence Nduttu case) in which this court held that only appeals arising from cases involving the interpretation or application of the constitution can be entertained by the Supreme Court. He also cited this court's decision in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Pet No 20 of 2014; [2014] eKLR (*Kidero* Case) where it was stated that only election appeals arising from



the decision of the Court of Appeal in which questions of constitutional interpretation or application arise, lie to the Supreme Court.

25. On the issue of the criteria for nullifying an election, counsel in his written submissions faulted the Court of Appeal's finding that the trial court erred in finding that the election substantially breached article 86(a) of the Constitution yet failed to annul the election on that ground alone. Counsel urged that the Court of Appeal misinterpreted the finding of the trial judge whose finding was that the undisputed fact of diversion of electoral materials by the presiding officer of Endoinyo Nkopit polling station was "a contravention of article 86(a) of the Constitution on the part of the 3<sup>rd</sup> respondent." Counsel submitted that the only way the Court of Appeal would have arrived at a conclusion that there was substantial violation, was by reconsidering the entire evidence, reevaluating the same and properly applying the nullification test of an election.
26. Counsel submitted further that the Court of Appeal failed to apply the principles set by this court in Raila 2017 and Munya 2 which determined that an election can only be nullified where there is substantial violation of the Constitution, or that the said violation affects the result of such an election. Counsel maintained that diversion of electoral materials in one polling station cannot amount to substantial violation of the Constitution. He cited the case of Dr Kizza Besigye v Electoral Commission & another, Election petition No. 1 of 2006 (2007) UGSC24 where it was held that substantial non-compliance can only arise where such non-compliance significantly influences the result in a substantial manner that the will of the people cannot be said to have been upheld. He urged that the Court of Appeal did not make such a finding, since it only relied on the determination of the High Court, which did not hold that there was substantial violation of the Constitution or relevant laws.
27. Counsel submitted further that no single election can be said to be perfect and referred to Raila 2017, on the issue; the Nana Addo case, on visiting the sins of public official on innocent citizens who have expressed their choice contrary to the principle of universal suffrage; the Harun Mwau case, where it was held that even though voters in 25 constituencies had not voted the declaration of the results by the Independent Electoral and Boundaries Commission was in perfect accord with the terms of the Constitution; and Nathif Jama Adam v Abdikhaim v Osman Mohammed & 3 others, SC. Petition No 13 of 2014; [2014]eKLR (Nathif Jama case) , where this court held that the fundamental issue in electoral disputes is the constitutional franchise of the electorate, which should be protected, and failures by electoral officials in their duties should not be used to curtail such rights.
28. On the correct approach in Constitutional interpretation and application, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents associated himself with the submissions made by counsel for the appellant and added that the Court of Appeal erred in adopting a trajectory approach as opposed to applying the binding principles set out by this court on the constitutional application test for nullifying an election. He maintained that by taking that route, the Court of Appeal limited the right to elections based on universal suffrage and the free expression of the will of the electors as per article 38(2) of the Constitution.
29. On the allegation that the trial court failed to determine all issues before it, counsel associated himself with the submissions of the appellant and added that the Court of Appeal erred by addressing strange issues that were neither pleaded nor proven during the course of the hearing by the trial court. Counsel also urged that the Court of Appeal was bound to pronounce itself on the said issues and draw a nexus on their impact on the election if at all as per article 164(3) of the Constitution.



### iii. The 1<sup>st</sup> Respondent

30. The 1<sup>st</sup> respondent opposed the appeal by filing a replying affidavit sworn on September 3, 2018 as well as grounds of objection dated September 3, 2018.
31. On jurisdiction, the 1<sup>st</sup> respondent challenged this court's jurisdiction in his grounds of opposition and claims that this court lacks jurisdiction to determine whether there was a violation of the Constitution since that issue has already been determined by both the election court and the Court of Appeal.
32. On the appellate court's interpretation and application of article 86(a) of the Constitution, Mr. Omwanza, counsel for the 1<sup>st</sup> respondent, began by stating that the 1<sup>st</sup> respondent's case has always been anchored on the alleged violation of the Constitution by both the appellant and the 2<sup>nd</sup> respondent in the conduct of the election for member of the National Assembly for Kilgoris Constituency. Counsel in that regard invited the court to consider its finding in Raila 2017 and Munya 2 where it was decided that an election which contravenes the Constitution cannot stand. Counsel supported the Court of Appeal's interpretation of article 86(a) of the Constitution on that issue.
33. On the question of undetermined issues before the trial court, counsel submitted that the learned judge abdicated his judicial duty to make findings on facts and provide reasons on specific issues pleaded including, the absence of data entries in Form 53B for some polling stations, bribery, non-identification of 110 votes, announcement of results without forms 35A, preparation of form 35A without data, use of public resources by the appellant; and the claim that the election was not verifiable. While citing the case of English v Emerybold & Strick [2002] WLR 2409 and Flannery v Halifax Estate Agencies Ltd [2000] 1WLR, at 381 7382, counsel thus urged that failure to make a finding of fact will deny the losing party justice. Counsel also faulted the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's submissions that undetermined issues were findings of fact and not law. Instead, counsel support the manner in which the Court of Appeal exercised its jurisdiction in making legal conclusions from the trial court's findings. He buttressed this submission by citing Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR, where the Court of Appeal stated that where it has to re-evaluate a trial judge's conclusions on facts and the law, the matter becomes a point of law.
34. On costs, the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents never cross-appealed against the trial court's award of costs to the appellant as well as the 1<sup>st</sup> respondent. counsel thus submitted that the award of costs was fair, justifiable and reasonable pursuant to section 84 of the Elections Act and rule 30(2)(b) of the Election (Parliamentary & County Elections) Petition Rules, 2017. He cited the decision of the Supreme Court of Namibia, Rally for Democratic & 17 others v Electoral Commission of Namibia, Unreported judgment [2011], where it was held that a successful party can be deprived of costs if it is proven that he or she was guilty of reprehensible and discreditable conduct in the electoral process. In this case, the counsel maintains that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent neglected their constitutional obligations and were rightfully condemned to pay costs.
35. In conclusion, counsel submitted that as award of costs is discretionary, the appellant ought to demonstrate that the trial court abused its discretion in that regard. In addition, that, having convinced the trial court that there was violation of article 86(a) of the Constitution, the 1<sup>st</sup> respondent was entitled to costs.

### D. Issues For Determination

36. From filed pleadings, written and oral submissions by parties, the following issues emerge for determination:



- (i) Whether the appeal before this court meets the Constitutional threshold under article 163(4) (a) of the Constitution.
- (ii) Whether the Court of Appeal erred in nullifying the election based on violation of article 86(a) of the Constitution.
- (iii) Whether the Court of Appeal erred in finding that the trial court failed to determine certain issues which would have nullified the election.
- (iv) Whether the Court of Appeal erred in its finding on costs.

## E. Analysis

### (a) Does the appeal before this court meet the constitutional threshold under article 163(4)(a) of the Constitution?

37. Whereas, it is Mr. Omwanza's submissions that this court lacks jurisdiction to determine whether there was a violation of the Constitution since that issue has been determined by both the election court and the Court of Appeal, Mr. Kilukumi thinks otherwise, and argues that this appeal is properly before this court within the ambit of article 163 (4) (a) of the Constitution.

38. In that regard, the appellate jurisdiction of this court is aptly captured in article 163(4) of the Constitution of Kenya which states as follows:

“ [ Article 163 (4)]

(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

- a) As of right in any case involving the interpretation or application of this Constitution; and
- b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”

39. Section 15 (1) of the Supreme Court Act also provides that appeals to the Supreme Court shall be heard only with the leave of the court. Section (15) (2) on the other hand provides that Sub-Section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

40. In that context, this court has endlessly stipulated the boundaries of its jurisdiction under article 163(4) (a) of the Constitution in several decisions, which decisions are still applicable. In the case of Lawrence Nduttu case, a two-judge Bench of this court (Tunoi and Wanjala SCJJ) set the guiding principles were affirmed as follows:

“[28.] The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting



the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163 (4) (a).”

41. Further, in the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, Sup.Ct. Petition No 10 of 2013(*Jobo* case), this court observed as follows:
  - 37.: “In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution...” [emphasis added].
42. The same principle was affirmed in this court’s decision in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, S.C App. No. 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:
  - [69]: “The import of the court’s statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”
43. In order to determine whether this appeal is proper before us therefore, we must investigate the nature of the issues from which this appeal has arisen. In doing so, we have taken note of the issues identified by the trial court as issues for determination at page 1087 of the Record of appeal they are the following:
  - (i) Whether the election for the Member of National Assembly for Kilgoris Constituency were conducted in accordance with the principles laid down in the Constitution and the applicable laws: and
  - (ii) Whether the elections for Member of National Assembly for Kilgoris Constituency was marred with irregularities and illegalities which were so substantial as to affect the integrity of the elections; and
  - iii) Costs.
44. Further, the record at pages 102 and 103 shows that on appeal, the appellate court identified three issues as being central in the appeal before it namely:
  - (i) Whether the trial judge erred in law by upholding the election after declaring it to be unconstitutional, in subjecting the constitutional requirement to the qualitative test of an election to the statutory test of a valid election and merging the materiality and substantial non-compliance tests in section 83 of the *Elections Act*; and
  - (ii) Whether the trial judge failed to make vital findings of fact and in the process abdicated his judicial duty and responsibility, which occasioned an injustice; and
  - (iii) Whether the trial judge erred in awarding costs to the appellant and the 1<sup>st</sup> respondent.
45. While the High Court upheld the appellant’s election in finding that although there were isolated cases of irregularities, the same were not sufficient to vitiate the result of the election, and dismissed



the petition, the Court of Appeal found to the contrary, and allowed the appeal. In setting aside, the judgment of the High Court, the appellate Court stated [at paragraph 109. as follows:

“A violation of an article of the Constitution is just that-a violation. It was therefore an error and completely untenable for the judge to have found that the election substantially breached article 86(a) of the Constitution and fail to annul the election on that ground alone.”

46. In putting the above finding into context, we do not agree with the 1<sup>st</sup> respondent’s submissions that this court lacks jurisdiction by fact of an issue having been decided by the superior courts. What we must decide is whether this appeal has arisen from a decision of the appellate court in which issues of interpretation and application of the Constitution were at play. In other words, is the appellant faulting the interpretation or application of the Constitution by the Court of Appeal in reaching the decision to set aside the judgment of the High Court, that had declared him to be validly elected?
47. We also note that, right from the election court, the primary issue revolving around the petition against the appellant’s election was: whether the election was conducted in accordance with the principles of the Constitution. The operative principles in question, in our view, were the provisions of articles 81 (e) and 86 of the Constitution. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of whether the violation was substantial to nullify the election and whether the election court failed to make vital findings of fact and abdicated his judicial duty and responsibility, the main issue of the application of articles 81 and 86 to the dispute, was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of the impugned election, the Court of Appeal was applying the provisions of article 86(a) of the Constitution. This is illustrated by the court’s own conclusion at page 109 (quoted above) of its judgment.
48. Consequently, we hold that this appeal, indeed, falls within the ambit of article 163(4) (a) of the Constitution.

**b. The Nullification test: Did the Court of Appeal misinterpret and apply Article 38, 81 and 86(a) of the Constitution?**

49. Both counsel for the appellant and for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents urged that this was the primary issue upon which the appellant’s election was annulled by the appellate court. They also urged that this issue goes to the application of the Constitution and whether a breach of the Constitution in and by itself is enough to invalidate an election. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent urged that the Court of Appeal singled out only article 86(a) and failed to address itself to articles 38 and 81 of the Constitution provide for political rights and universal suffrage rights. Counsel for the 1<sup>st</sup> Respondent, by contrast, urged us to affirm the decision of the appellate Court, and find that the single instance of violation of article 86(a) was substantial to nullify an election and thus, having failed to comply with the constitutional and statutory requirements, the declared election results had to be nullified
50. The general principles to guide the electoral system in Kenya is captured in article 81 of the Constitution which provides as follows:

[Article 81.

“The electoral system shall comply with the following Principles –

- (a) freedom of citizens to exercise their political rights under article 38;

...



- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are—
  - i. by secret ballot;
  - ii. free from violence, intimidation, improper influence or corruption;
  - iii. conducted by an independent body;
  - iv. transparent; and
  - v. administered in an impartial, neutral, efficient, accurate and accountable manner.”

51. On political rights, article 38(2) of the Constitution provides that:

“Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors...”

52. Article 86 imposes an obligation on the Independent Electoral and Boundaries Commission to ensure that the stipulated conditions are met, in any election process conducted in the country. The article thus provides:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that —

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

53. The Elections Act provides in section 83 that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law, or that the non-compliance did not affect the result of the election.”

54. This court has in past decisions pronounced itself on the manner articles 81(e) and 86 of the Constitution are to be applied in determining whether the conduct of an election followed the



provisions of the Constitution, and in view of the application of section 83 of the [Elections Act](#). One such case is [Munya 2](#) where we specifically stated as follows:

- “(216) ... an election should be conducted substantially in accordance with the principles of the [Constitution](#), as set out in article 81 (e). Voting is to be conducted in accordance with the principles set out in article 86. The [Elections Act](#), and the [Regulations](#) thereunder, constitute the substantive and procedural law for the conduct of elections.
- (217) If it should be shown that an election was conducted substantially in accordance with the principles of the [Constitution](#) and the [Elections Act](#), then such election is not to be invalidated only on the ground of irregularities.
- (218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned judges in Morgan, Opitz and Nana.
- (219) By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”

55. We stated further as follows:

- (211) In *Morgan v. Simpson* (1975) 1 Q.B 151, Lord Denning summarized the essence of Section 37 of *Britain’s Representation of the People Act, 1949* (which is couched in similar language to section 83 of Kenya’s *Elections Act*) in three propositions:
- a. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
  - b. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.
  - c. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and it did affect the result- then the election is vitiated.
- (212) In *Opitz C v. Wrzesnewskyj* (2012) 3 S.C.R 76 a candidate who lost in a close federal election in Canada petitioned for the setting aside of that election. The petitioner had asked the Court to disqualify several votes, on account of administrative mistakes. Rothstein and Moldaver JJ had the following to say about the effect of irregularities upon an election.

“At issue in this appeal are the principles to be applied when a federal election is to be challenged on the basis of ‘irregularities. We are dealing here with a challenge



based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrong-doing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time-frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

56. At paragraph 213 of *Munya 2*, this court further noted that the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

57. Earlier on, in *Raila 2013*, this court had pronounced itself on the effect of proven irregularities, in an election petition. At paragraph 203 we stated as follows:

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

58. It is in that context and reading page 107 of the Record of Appeal that we note the error apparent in the Court of Appeal’s judgment. It is evident to us that the Court of Appeal did not apply the principles established by this court on nullification of an election based on Constitutional violations. The Court of Appeal specifically stated as follows:

“[Page 107 from line 10]

How can an election where ballot boxes are diverted by Presiding Officers, who are employees of 3<sup>rd</sup> respondent for reasons unknown, and even without the knowledge of the Returning Officer, accompanied by falsification and alterations of the same be said to have been accurate, verifiable, secure, accountable, transparent and free from electoral malpractice? There was obviously breach of article 86(a) of the Constitution. All parties to the petition and indeed in this appeal concede to that fact. The Constitution has itself proclaimed pursuant to article 2(4) thereof that any act or omission in contravention of the Constitution is invalid. In *Munya*, *Raila 2017* and *Waibara* cases, the Supreme Court was firm that an election which substantially contravenes the Constitution cannot be allowed to stand...[emphasis supplied]”

59. Although the Court of Appeal cited the decisions of this court in *Raila 2017*, *Munya 2* and *Waibara* case, it did not apply the principle that a court should consider, namely, the substantial effect of the irregularity on the conduct of the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, or that the results of the election are unaffected. The Court of Appeal ought to have considered the fact that the election for the Member of National Assembly in the whole of Kilgoris Constituency in all polling stations, save for Endoinyo Nkopit Polling station, was conducted



in compliance with the laid down constitutional principles and applicable laws; and the fact that even in Endoinyo Nkopit Polling station, all the electoral processes preceding the diversion were in compliance with the constitutional principles and applicable electoral laws. We are convinced that had the Court of Appeal properly applied that test, it would have reached a different conclusion than it did.

60. Consequently, it is our finding that the Court of Appeal arrived at an inconsistent determination of the law. We also agree with the trial court's appreciation of the evidence presented before it that the election, despite the isolated cases of irregularities which did not affect the result of the election, was essentially free and fair. We therefore find that in view of the fact that the election went on smoothly in all 165 polling stations, save one, the alleged violation of article 86(a) of the *Constitution* did not substantially affect the outcome of the election. The Court of Appeal also contravened article 163(7) the *Constitution* by not applying the binding precedent set by this court.

### **The quantitative test**

61. On the question of marginal victory, this court has previously held that as a principle of electoral law, an election is not to be annulled except on cogent and ascertained factual premises. It is by this principle, that the *Constitution* protects the voter's enfranchisement under article 38(1). This was so in the *Nathif Jama* case where this court stated as follows:

“(85) Section 83 of the *Elections Act* is the definitive statement of the standard that an election court must apply, in verifying the election results. That section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.

(87) As to the effect of irregularities, and the point at which a court should overturn an election, we stated that courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised.”

62. The Constitution in article 259(1) also clearly sets out the framework of applicable principles while interpreting the *Constitution*.

This article provides that;

“259

- (1) This Constitution shall be interpreted in a manner that—
  - (a) promotes its purposes, values and principles;
  - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - (c) permits the development of the law; and
  - (d) contributes to good governance.
- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...” [Emphasis added]

63. Further, the *Constitution* provides under article 20(3):

20



- (3) In applying a provision of the Bill of Rights, a Court shall-
- (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
  - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. [Emphasis.

64. While weighing the 1<sup>st</sup> respondent's claim that the impugned election did not comply with article 86 of the *Constitution*, we cannot close our eyes to the right of voters from 164 other polling stations where the elections were conducted in compliance with the Constitution, and whose political rights are similarly guaranteed under article 38(2) of the same *Constitution*. Thus, where a voter has made his choice known, having been registered in accordance with articles 82 and 83, 138(3) (a), having voted in accordance with articles 81 and 83 thereof and his vote counted at the polling station (art 138(3)(c) and the result announced at the polling station in accordance with the *Constitution* and the law - and the outcome is known and uncontested (the results in 164/165 polling stations in Kilgoris Constituency were not contested), his rights should not be ignored especially where the alleged violations did not affect the outcome of the election.

65. We also note from the record that the question of diversion of electoral materials in one polling station has not been disputed, and that those responsible have been charged in a court of law. Who then bears responsibility for the criminal acts of diverting electoral materials? Should innocent voters, especially those from 164 polling stations be punished? The answer to these questions can be found at paragraph 297, of this court's decision in the case of *Harun Mwau case* where we specifically stated as follows:

“(297) In a nutshell, it is our finding that neither the State nor the IEBC bears responsibility for failure of voting in certain regions of the country. Such failure ought to be attributed to unidentified private citizens and political actors, who actively caused the offending situations, directly or indirectly. The validity of the fresh election, however, cannot be successfully challenged on that ground alone.”

66. In that context, we hold that the learned judges of appeal erred in failing to apply the quantitative test in its interpretation and application of article 86(a) of the *Constitution* against the political right of the Citizens of Kilgoris Constituency to free, fair elections based on universal suffrage and the free expression of the will of the people. We consequently uphold the trial judge's finding, that the stated irregularities did not affect the outcome of the election all other factors taken into account.

**c. Whether the Court of Appeal erred in finding that the trial court failed to determine certain issues which would have nullified the election?**

67. Learned counsel for the 1<sup>st</sup> respondent submitted that the trial court abdicated his judicial duty to make findings of facts and provide reasons on the missing data entries in Form 35B for some polling stations, bribery, non-identification of 110 votes, announcement of results without forms 35A, preparation of form 35A without data, use of public resources by the appellant; the findings on discrepancies disclosed by the scrutiny report; and the claim that the election was not verifiable. The appellant on the other hand maintained that all pleaded issues were addressed by the trial court save for un-pleaded issues. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's counsel was of the view that the Court of Appeal ought to have determined all issues placed before it and come up with its own finding.



68. In that regard, section 85A of the *Elections Act* No. 24 of 2011 limits the Court of Appeal’s jurisdiction on election appeals to matters of law only. The specific Section states as follows:

- “(1) A appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county government shall lie to the Court of Appeal on matters of law only and shall be-
- (a) filed within thirty days of the decision of the High Court; and
  - (b) heard and determined within six months of the filing of the appeal.
- (2) .....

69. This court discussed section 85A of the *Elections Act* in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 3 others*, Petition No. 2B of 2014; [2014] eKLR (*Munya 2B*). The decision emphasized the objective of limiting electoral appeals to questions of law as follows:

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

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

70. Consequently, in that decision, we set the principles for determining whether a matter involves questions of law or not. We specifically stated as follows:

- “80. From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

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

- (81) Now with specific reference to section 85A of the *Elections Act*, it emerges that the phrase “matters of law only”, means a question or an issue involving:

- a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;
- b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an



election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

- c. the conclusions arrived at by the trial judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial judge would probably have arrived at a different conclusion on the basis of the evidence.”

71. This court furthermore stated as follows:

“(82) Flowing from these guiding principles, it follows that a petition which requires the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record, on the one hand, and the trial judge’s commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.”

72. On the appellate court’s conclusion(at page 111 of the record) that not all issues were addressed by the trial court, we have interrogated the judgment of the High Court dated February 27, 2018 (appearing at page 1075 to 1102 both pages inclusive of Volume V of the Record of Appeal) and confirm that the trial judge made findings on each of the issues alleged not to have been decided as follows: on announcement of results without form 35A, the court held that it would have been impossible if not impractical for the returning officer to have announced all results for the five candidates (p1094); on preparation of form 35A without data, the court found that the respondents’ submission that the forms were available in the public portal was not contested(p1094); on the allegation that there was no data entry in the portal for some polling station, the court found that there was no legal requirement for transmission of electronic results in the public portal(p1095); on claims of missing Form 35B for some polling stations the court agreed that in as much as missing forms would affect the materiality test, it would not substantially affect the election as the forms were from one polling station with 666 registered voters(p1095). There was also a finding by the appellate court that the trial court did not address the discrepancies in the scrutiny report.

73. We agree, there is no ultimate finding by the trial court on discrepancies on the scrutiny report. But before faulting the trial judge on not rendering his decisions and reasons on the same, we need to ask ourselves some pertinent questions; What were these discrepancies? Did the discrepancies form part of the pleaded issues? Did the discrepancies substantially affect the result of the election? In answer thereto, we note from the record that the appellate court did address these two questions and stated that it was not clear why the trial court did not address and determine the issues raised before him, thereby upholding this ground of appeal. Having reflected on our jurisdiction, we are certain that this court cannot address these questions at this level without delving into matters of fact yet our hands



are tied by article 163(4)(a) of the Constitution. Assuming the Court of Appeal had addressed the said questions, would it have done so without appreciating the probative value of the evidence presented before the trial court and still remain within the boundary set under article 85A of the Elections Act? We do not think so.

74. In that context, in Munya 2, we held [para 93. that section 85A of the Elections Act is not an inconsequential provision, and that as much as the appellate court is free to navigate the evidential landscape, it ought to maintain fidelity to the record. The appellate court, when examining matters of law may thus not completely ignore the evidence on record. As a result, we hold that the Court of Appeal erred in finding that the trial judge failed to address issues raised before him, thereby exceeding its mandate provided for under section 85 of the Elections Act.

#### **d. On the Question of Costs**

75. At the Court of Appeal, the 3<sup>rd</sup> respondent filed a cross-appeal to challenge the award of costs of the petition to the appellant as well as the 1<sup>st</sup> respondent capped at Kshs 2.5 million for each one of them. The Court of Appeal (at page14) in upholding the decision of the trial court held as follows:

At Page14 of the judgementof the Court of Appeal

“....., the same lack of exercise of diligence and due care was manifest in this case, following the diversion of ballot boxes from Endoinyo Nkopit polling station to the house of the Presiding Officer, as well as events at Enenkeshui Primary School polling station, which were a contravention of Article 86 of the Constitution and which, in any event, were criminal in nature. Of course, this conduct was discreditable and reprehensible as it amounted to willful mischief by the 3<sup>rd</sup> respondent’s employees to subvert the will of the people as expressed in the election. They interfered with the electoral mechanism, polling equipment and the voting process in general. That was the basis upon which the judge awarded the aforesaid costs against the 3<sup>rd</sup> respondent.

We have no reason to fault the reasoning of the judge. The conduct of the 3<sup>rd</sup> respondent had to be looked into. At the end of the day the award of costs is discretionary. It has not been demonstrated to us that in reaching the decision the judge applied wrong principles or that he exercised the discretion capriciously or whimsically.”

The Court of Appeal stated further as follows:

“....Having given the issue considerable attention, we are satisfied that the judge appreciated the principles enunciated in the above case and therefore arrived at a correct decision with regard to the award of costs. The costs so awarded were neither punitive nor excessive. Accordingly, our intervention is uncalled for.”

76. The appellant has now challenged the Court of Appeal’s determination on costs and has argued, that, while an award of costs is discretionary, section 84 does not confer discretion in the award of costs in election petitions and that rule 30 of the Elections Petitions Rules, 2017 is *ultra vires* the Elections Act. The 1<sup>st</sup> respondent thinks otherwise.
77. Section 84 of the Elections Act provides for costs and states that:

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”



78. The *Elections Petitions Rules, 2017*, provide as follows:

“Rule 30.

- (1) The election court may, at the conclusion of a petition, costs, make an order specifying –
  - (a) the total amount of costs payable;
  - (b) the maximum amount of costs payable;
  - (c) the person who shall pay the costs under paragraph (a) or (b);
  - (d) the person to whom the costs payable under paragraphs (a) and (b)
- (2) When making an order under sub-rule (1), the election court may –
  - (a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and
  - (b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense...”

79. This court has previously settled the law on award of costs, that costs follow the event, and that, a judge has the discretion in awarding costs. This was the decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014. eKLR (*Jasbir Singh* case) where it was stated as follows:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

“[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

80. We note that none of the parties has challenged the manner in which the appellate court exercised its jurisdiction on award of costs. However, the appellant has an issue with rule 30 of the *Election Petition*



Rules, which rule he claims is ultra vires section 84 of the Elections Act. According to learned counsel for the appellant, the rule confers discretion in the award of costs contrary to the Act.

81. It is clear from the record that the Court of Appeal, affirmed the trial court’s exercise of discretion on award of costs. The 3<sup>rd</sup> respondent then challenged the trial court’s award on costs to the appellant and the 1<sup>st</sup> respondent on the ground that the same was excessive, punitive and non-justifiable; that no explanation whatsoever was given as to how the court arrived at the figure. The record shows that the appellant did not submit on this issue before that court and has raised the question of the ultra vires nature of rule 30 for the first time at this court. There is no explanation by the appellant as to why the same was not addressed at the appellate court or why it did not form part of the appellant’s grounds of appeal.
82. This court has in previous decision emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the Peter Oduor Ngoge v Francis Ole Kaparo & others [2012] eKLR we stated thus:
- “In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”
83. Further, in Michael Mungai v Housing Finance Co. (K) Ltd & 5 other, Appeal/Application 9 of 2015; [2017] eKLR, we specifically stated as follows:
- “(14) The powers of this court have to be exercised within and in accordance with a specific jurisdiction as provided for in article 163(3) of the Constitution. One cannot ask the court to exercise its powers in a carte blanche manner. A litigant’s plea must be precise and targeted. One cannot make omnibus prayers to the court with the expectation that the court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this honourable court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy.”
84. Therefore, on this issue, we reject the same as a ground of appeal on the matter. The Jabir Singh case also remains the binding law on costs in this and other superior courts.
85. We thus concur with the trial court that the alleged and proven irregularities did not have the effect of nullifying the outcome of the election of Member of the National Assembly for Kilgoris Constituency.

**Orders:**

86. Consequently upon our findings above, the final orders are that;



1. The judgment of the Court of Appeal sitting at Nakuru, dated July 31, 2018 annulling the election of Gideon Sitelu Konchellahas Member of National Assembly for Kilgoris Constituency, is hereby quashed and set aside.
2. The Petition of Appeal dated August 8, 2018, is allowed.
3. For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat of Member of National Assembly Kilgoris Constituency, is hereby restored.
4. The 3<sup>rd</sup> respondent shall bear the costs of the appellant, 1st respondent's costs at the High Court, Court of Appeal and Supreme Court.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER 2018.**

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**M.K IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**J.B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

