



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, (P), WARSAME & GATEMBU, JJA)**

**ELECTION PETITION APPEAL NO. 8 OF 2018**

**BETWEEN**

**WAVINYA NDETI.....1<sup>ST</sup> APPELLANT**

**PETER MATHUKI.....2<sup>ND</sup> APPELLANT**

**AND**

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

**THE COUNTY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**ALFRED NGANGA MUTUA.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Machakos (Hon. Justice A. O. Muchelule) dated 9<sup>th</sup> February, 2018 in the High Court Election Petition No. 1 of 2017)*

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment of the High Court at Machakos (Muchelule, J) delivered on 9<sup>th</sup> February 2018 dismissing the appellants' election petition seeking the nullification of a declaration by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the 3<sup>rd</sup> respondent was duly elected the governor of Machakos County in the general elections held on 8<sup>th</sup> August 2017. The central question in the appeal is whether the election court erred in concluding that the election was conducted in accordance with constitutional principles.

**Background**

2. During the general elections held on 8<sup>th</sup> August 2017, four candidates vied for the position of governor, Machakos County (the County). The candidates were the 1<sup>st</sup> appellant, Wavinya Ndeti (with the 2<sup>nd</sup> appellant, Peter Mathuki, as a running mate for the position of deputy governor), the 3<sup>rd</sup> respondent, Alfred Nganga Mutua, Jeremiah Muia Lemi and Bernard Tom Kiala Muia. At the end of the election, the 2<sup>nd</sup> respondent (the county returning officer), declared the results of the elections as follows: that the 3<sup>rd</sup> respondent garnered 249,603 votes; the 1<sup>st</sup> appellant 209,141 votes; Jeremiah Muia Lemi 6,657 votes; and Bernard Tom Kiala Muia 4,006 votes. Based on those results, the county returning officer declared the 3<sup>rd</sup> respondent as the duly elected governor of the County. The 1<sup>st</sup> respondent (IEBC) proceeded to gazette the 3<sup>rd</sup> respondent as such.

3. The appellants were dissatisfied with the manner in which the election was conducted as well as with the declared result. In a lengthy petition presented before the High Court at Machakos (the election court) the appellants invoked constitutional, statutory and regulatory provisions on elections and complained that the election was riddled with serious irregularities, malpractices and offences. They asserted in that petition and in affidavits in support that IEBC irregularly appointed Machakos County Government workers to conduct the election; that considering that the 3<sup>rd</sup> respondent was the then incumbent governor of the County, such workers would not be impartial in the discharge of their functions; that in violation of the law, public officers served as agents of the 3<sup>rd</sup> respondent or his political party in the election; that there were inconsistencies and anomalies including lack of security features in Forms 37A, 37B and Form 37C; that there were deliberate omissions in vote counting and transmission of results and misstatement of results; that, more than one of the 3<sup>rd</sup> respondent's agents were admitted in numerous polling stations and tallying centres while the appellants' agents were denied entry; and that election offences, including voter bribery, undue influence, and use of public resources were committed during the election.

4. Based on those grievances, the appellants sought reliefs from the election court in the form of declarations that: the 3<sup>rd</sup> respondent was not validly elected as governor of the County; the declaration of the 3<sup>rd</sup> respondent as the duly elected governor was invalid, null and void; the 3<sup>rd</sup> respondent is not and was not eligible to contest the election having knowingly aided in the contravention of Section 15(1) of the Elections Act; the non-compliance, irregularities and improprieties in the election substantially and significantly affected the results; the election was not conducted in accordance with the constitutional principles under Article 81 of the Constitution thereby rendering the election void; the 1<sup>st</sup> appellant was validly elected as governor of the County in the 8<sup>th</sup> August 2017 election or alternatively an order to issue directing IEBC to organize and conduct fresh gubernatorial election for the County in strict conformity with the Constitution and the Elections Act.

5. In their respective responses, the respondents denied the appellants' claims of non-compliance, irregularities and improprieties. They pleaded that the election was conducted in accordance with the dictates of the Constitution, the Elections Act and the Regulations; that the election was free and fair; and that the result was a true reflection of the free will of the people of the County.

6. After conducting a trial, the election court dismissed the petition in the impugned judgment dated 9<sup>th</sup> February, 2018 and upheld the declaration by IEBC that the 3<sup>rd</sup> respondent was the duly elected governor of the County. At the same time, the election court ordered the appellants to "*jointly and severally pay Kshs. 5,000,000.00*" to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and a similar amount to the 3<sup>rd</sup> respondent as costs of the petition. Dissatisfied, the appellants lodged the present appeal.

### **The appeal and submissions**

7. The appellants' memorandum of appeal contains 39 grounds of appeal. However, during the hearing of the appeal those grounds were condensed into the following complaints: that based on the evidence presented before it, the election court should have held that the appellants discharged their burden of proof in establishing that the election was not conducted in accordance with the constitutional principles under Articles 81 and 86 of the Constitution; that having regard to the appointment by IEBC of county workers as returning and polling officers, the election was not, in effect, conducted by an independent body and was accordingly not free and fair; and that in light of election offences committed, the election court should have upheld the appellants' plea that the 3<sup>rd</sup> respondent is not and was not eligible to contest the election having knowingly aided in contravention of Section 15(1) of the Election Offences Act.

8. During the hearing of the appeal, Mr. Ahmednasir Abdullahi, SC, Mr. Willis Otieno and Mr. Martin Gitonga appeared for the appellants. Mr. Kimani Muhoro and Mr. Daniel Muchoki appeared for the IEBC and for the county returning officer. Mr. Waweru Gatonye, Mr. Benjamin Musau, Mr. Wilfred Nyamu, Mr. Dennis Mung'ata and Mr. Leonard Rono appeared for the 3<sup>rd</sup> respondent. Counsel relied on their respective written submissions, which they highlighted.

9. For the appellants, it was submitted that the election was not free and fair; that the electoral process was opaque and not verifiable; that IEBC abdicated its constitutional role of conducting the election by subcontracting employees of the County and the 3<sup>rd</sup> respondent to conduct the election; that as a result Articles 81 and 86 of Constitution were not complied with; and that the declared result is therefore unconstitutional.

10. Expounding on the argument that the election was not verifiable, counsel submitted that the county returning officer admitted that she did not, when declaring results, make any reference to Forms 37A's from the 1332 polling stations in the County; that the declaration in Form 37 C should be generated through a tally, announcement and declaration of results as reflected in Form 37A; that where Form 37C is not generated using the primary source document, namely Forms 37As, then such results are a nullity as they do not conform to the law.

11. It was argued that the Form the county returning officer used to declare results was not in the prescribed Form 37C and did not comply with the law; that it was incumbent upon the county returning officer to declare what each candidate got in every polling station in the County; that in failing to make the declaration in that manner and form, IEBC violated Article 86(a), (b),(c) of the Constitution, Section 39(1)(B) of the Elections Act, Regulations 79(2), 87(1)(a), 87(2)(b)(iii) of the Elections ( General) Regulations, 2012; that the election court therefore erred in law in holding that the county returning officer was not expected to deal with Forms 37 A"s when declaring the election results.

12. To support those arguments, counsel cited the case of *Ahmed Abdullahi Mohamad vs. Mohammed Abdi Mohamed and others, Election Petition Number 14 of 2017 [2018] eKLR* where the High Court held that gubernatorial election results must contain the results of each polling station in the county. The decision of this Court in *Clement Kungu Waibara vs. Bernard Chege Mburu & 2 others, CA No. 205 of 2011[2011] eKLR* was also cited for the argument that if any one of the activities in an election process is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and depending on the nature of such flaw, it is bound to affect the election results.

13. It was submitted that the admission by the county returning officer before the election court that she did not receive any Forms 37A"s and that she only used Forms 37B to tally and declare results begs the question how Forms 37B were generated. It was urged that the county returning officer was under a duty to verify results of the elections before making a declaration; that as she failed to do so, the constitutional command under Article 86 of the Constitution that the electoral process must be verifiable, was breached.

14. Counsel took issue with the finding by the Judge that the appellants" complaints relating to Form 37C were not pleaded. It was submitted that it was incumbent on the election court to address all issues raised in the pleadings as well as those that would arise up during the hearing, whether pleaded or not, which had the potential of adversely affecting the final result of the election. In that regard, counsel cited a High Court decision in *Twaheer Abdulkarim Mohammed vs IEBC & 2 Others [2014]eKLR*; *Justus Mungumbu Omiti vs Walter Enock Nyambati Osebe & 2 others EP No. 1 of 2008*; and the decision of this Court in *Moses Masika Wetang'ula vs Musikari Nazi Kombo & 2 others [2014]eKLR*. Furthermore, it was argued, quite apart from the fact that the complaints relating to irregularities in the Form 37C in question were in fact pleaded, the complaints are matters of law that need not be pleaded.

15. Counsel further submitted that all results declaration forms must have security features. In that regard, reliance was placed on the Supreme Court decision of *Raila Odinga & another vs. IEBC & 2 Others, Presidential Petition No. 1 of 2017[2017] eKLR* (hereafter referred to as *Raila 2017*)and to the High Court decision in *Ahmed Abdullahi vs. Mohammed Abdi Mohammed and others* (above). It was pointed out that with respect to Machakos Town Constituency, an unofficial and non-compliant Form 37 B without security features was used to declare results for that constituency; and that the irregularity affected the final result considering that Machakos Town Constituency has approximately 109,000 registered voters; and that the Judge erred in law in concluding that security features could only be found in Forms 37A.

16. Counsel contended that the election court erred in concluding that the appellants" claims in relation to engagement of public officers as agents for the 3<sup>rd</sup> respondent or his political party were not substantiated. It was submitted that the appellants discharged their burden of proof and established that public officers, namely workers of the County, were engaged as agents for a candidate in the elections contrary to Section 15(1) of the Elections Offences Act; that considering that the appellant provided evidence of the names, national identity card numbers, payroll numbers and job descriptions of the public officers who acted as agents in the elections, the learned Judge erred in failing to hold that the evidentiary burden to prove otherwise had shifted to the respondents. In that regard, reference was made to Section 112 of the Evidence Act.

17. As an example, counsel urged that the appellant gave the particulars of one Urbanus Wambua Mutisya, a chief officer of the County Government of Machakos who acted as an agent and as such signed Form 37 B for Mavoko Constituency, yet the 3<sup>rd</sup> respondent, who confirmed having appointed him as a Chief Officer in the County Government, did not adduce any evidence to rebut the appellant's allegation. Counsel urged that IEBC simply ignored the appellants complaints in that regard while the 3<sup>rd</sup> respondent claimed that he was not familiar with the employees of the County and had no role in recruitment of his officers.

18. It was also submitted that the Judge erred in failing to find that employment of the County workers as officials of IEBC in the election negatively affected the integrity, impartiality and independence of the election contrary to the constitutional principle of free and fair elections under Article 81 of the Constitution. Counsel argued that with the object of attaining independence of IEBC, Regulation 5 (2) of the Elections (General) Regulations, 2012 requires IEBC to provide political parties and candidates with the list of proposed presiding officers before their appointment; and that in this case the county returning officer confirmed in her testimony that that regulation was not complied with. In support, counsel cited the decision in Republic vs. IEBC Ex parte Khelef Khalifa & another [2017] eKLR where the High Court held that the failure by IEBC to provide a list of persons proposed for appointment to political parties and independent candidates at least 14 days prior to the proposed date of appointment to enable them make representations violated the comparable regulation 3(2) of the Elections (General) Regulations, 2012 as read with Articles 38 and 81 of the Constitution.

19. It was the appellant's further contention that the learned Judge erred in taking the view that the opportunity to test the allegations regarding irregularities and breaches of electoral law was lost when the appellants abandoned their application for scrutiny. It was argued that under Section 82 of the Elections Act the court had the mandate to order scrutiny of its own motion.

20. According to counsel, the learned Judge also misinterpreted Section 83 of the Elections Act; that the Judge misdirected himself by proceeding on the basis that there is no presumption that elections were properly conducted; that consistently with the Supreme Court decision in Raila 2017, Section 83 of the Elections Act must be interpreted in the context of constitutional provisions.

21. On election offences, it was submitted that there was evidence that public officers participated in the election as agents of the 3<sup>rd</sup> respondent; that names of officers were provided; that the 3<sup>rd</sup> respondent confirmed that his chief officer was indeed an agent; that in light of Section 45 of the Political Parties Act under which principal officers of a political party are held to account, the 3<sup>rd</sup> respondent as the party leader of his party must bear responsibility; and that under Sections 12 of the Political Parties Act and Section 15 of the Election Offences Act a candidate who aids in the commission of such offence should be barred from contesting.

22. The appellants also faulted the Judge for discounting the evidence of alleged election offences committed at Athi River Vocational Training Centre on the basis that the 1st appellant did not personally witness the incidents. Counsel urged that the 1st appellant had in fact testified that she visited the tallying center and that the offences were admitted by IEBC and the county returning officer.

23. Opposing the appeal, counsel for IEBC and the county returning officer submitted that the appeal is incompetent; that under Section 85A (1) of the Elections Act, the jurisdiction of this Court is limited to matters of law; and that this appeal does not raise any matters of law. Counsel referred to the Supreme Court of Kenya decision in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others [2012] eKLR for the proposition that a court can only exercise such jurisdiction as is conferred by the Constitution or by statute or both. Reference was also made to decisions of this Court in Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga and 2 others [2013]eKLR and Timamy Issa Abdalla vs Swalleh Yasin Twaha and 3 others [2014]eKLR.

24. According to counsel, the appellants did not present any tangible evidence before the election court to support the claims made in the petition. Counsel urged that during the pretrial conference, it was agreed that all deponents of affidavits filed in the petition would attend court and be subjected to cross examination; that despite that agreement, and although the appellants had filed 35 affidavits in support of the petition, they only called two witnesses; and that the allegations made in the petition were therefore not substantiated.

25. It was submitted that the Judge correctly rejected the appellants' complaints in relation to Form 37C as the same was not

pleaded. Counsel argued that a party is bound by its pleadings and evidence cannot be led on matters that are outside the pleadings. Reference was made to the High Court case of Jackson Nyanungo Ranguma vs IEBC & 2 others [2018] eKLR and to a decision of this Court in IEBC & another vs Stephen Mutinda Mule and others [2014] eKLR for the argument that a petitioner is not permitted to make a case outside the pleadings and his affidavits and that testimony must be consistent with, and support the case pleaded.

26. As to the claim that the county returning officer did not make reference to Forms 37A's when declaring results in Form 37C, counsel submitted that the role of a county returning officer in gubernatorial elections is different from that of the national returning officer in a presidential election; that the role of county returning officer is to get results as announced by the constituency returning officer while the national returning officer must get results as announced at the polling station. It was submitted that the Form 37C that was used to declare results in this case contained results from every constituency and the same was duly signed by an agent of the political party, Wiper, that sponsored the appellants. It was also submitted that while appreciating that no election can be perfect, the allegation that Form 37B for Machakos Town Constituency lacked security features was not proved.

27. As to the complaint that public officers acted as agents for the 3rd respondent, it was submitted that the claim was contained in an affidavit filed on 6th September 2017 sworn by Chris Mutinda Mutu; that the list of alleged county employees was however not annexed to that affidavit; that the only list of alleged county employees that had been provided was an annexure marked WN 27 that was struck out; and that the allegation that public officers were engaged as agents of the 3<sup>rd</sup> respondent was therefore not proved and the finding by the court that there was no evidence to support those allegations was well founded.

28. As to whether County workers acted as officials of IEBC, it was submitted that a list of persons proposed for appointment as presiding officers was published and shared with political parties in advance and no objections were raised; that in any event no evidence was presented to show that the IEBC officials were employees of the County or how they influenced the outcome of the election.

29. It was submitted, on the strength of the Supreme Court decision in Raila Amolo Odinga and 2 others vs IEBC and 3 others [2013] eKLR, (Raila 2013) that the burden to prove the alleged violations, illegalities and irregularities lay with the appellants and that they failed to discharge that burden.

30. As to the claim that election offences were committed, it was submitted that the standard of proof in relation to such allegations of a criminal or quasi criminal nature is one beyond reasonable doubt. In that regard reference was made to the Supreme Court decision in Raila 2017 and the decision of this Court in Khatib Abdalla Mwashetani vs Gideon Mwangangi Wambua [2014] eKLR. It was submitted that no witnesses testified regarding the allegations that polling clerks issued more than one ballot paper to voters or that there was bribery.

31. As to the complaint that the Judge ought to have ordered scrutiny, counsel urged that the appellants did not, as the law requires, lay any basis for the same despite having filed an application which they failed to prosecute.

32. For the 3rd respondent, it was submitted that by dint of Section 85A of the Elections Act that limits the jurisdiction of this Court to matters of law, the appeal, based, as it is on matters of fact, is incompetent and intended to vex the 3<sup>rd</sup> respondent; that based on the grounds of appeal, the appellants have wrongly invited this Court "to re-examine the probative value and calibrate on evidence tendered" before the election court and thereby seek, wrongly, to convert this Court into a trial court. In that regard, reference was made to decisions of this Court in Timamy Issa Abdalla vs Swaleh Salim Swaleh Imu & 3 others (above) and the Supreme Court decision in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR.

33. Counsel submitted that the election court properly interpreted and applied Section 83 of the Elections Act; that the conclusion by the Judge that the Machakos gubernatorial election was conducted in a free, fair, credible and transparent manner is well founded; and that bearing in mind that elections can never be perfect, the declared results reflected the will of the people of the County.

34. It was submitted that there is a presumption that elections have been conducted in accordance with the law; that under Section 107(1) of the Evidence Act, whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist; that it was incumbent on the appellants to prove the allegations they made; that in a ruling delivered on 14th December 2017, the election court struck out affidavits filed by the appellants on 5th September 2017 together with the annexures with the result that the allegations made in the petition remained unsubstantiated. Relying on Raila 2017 it was argued that the burden of proof remained with the appellants to prove their case on the "intermediate standard;" and that the burden could only have shifted had the appellants adduced cogent and credible evidence in support of the petition.

35. As regards the alleged irregularity in Form 37C, counsel submitted that the matter was not pleaded and the judge correctly declined to entertain that complaint on that basis; that in any event, an allegation of use of a wrong format of an election declaration form without evidence of alteration of results cannot amount to an illegality; that at worst, it is a mere irregularity that does not, by reason of Section 83 of the Elections Act, affect the result; that there was substantial compliance with the law and it should be borne in mind that Forms 37B and 37C were supplied in excel format while only Forms 37A were supplied in its original form; that the candidates agents signed Form 37C without expressing any disagreement with the figures; and that under the Interpretation and General Provisions Act, Cap 2 the format used was acceptable considering that it was not intended to mislead and did not in fact mislead.

36. Counsel further submitted that the election court was right in holding that the county returning officer does not deal with Forms 37A's when putting together Form 37 C; that the decision of this Court in IEBC vs Maina Kiai & 5 others [2017]eKLR emphasized the finality of results at the polling station; that the appellants did not challenge any results as declared in Forms 37A emanating from all 1332 polling stations in the County neither did they challenge the tallied constituency totals as tallied in Forms 37B; that it would therefore be absurd to challenge Form 37C which contains the aggregate of the results declared at the polling station as tallied in Forms 37 B.

37. It was submitted that the mandate of the county returning officer is spelt out in Section 39(1B) of the Elections Act and is limited to tallying the results from the constituencies and not from the polling stations. This is in contrast, it was urged, to the role of the national returning officer in a presidential election who is required to tally results from all polling stations in accordance with Section 39(1C) of the Elections Act. In addition, it was submitted, the Form 37C that was used to declare Machakos gubernatorial results captured the aggregate of all the results from the 8 constituencies as captured in Form 37B and all of those forms, which captured results from all the polling stations, were attached in substantial compliance with Regulation 87(2)(b)(iii).

38. As to alleged absence of security features and that the Forms 37B did not have serial numbers, it was submitted that this matter was not pleaded and was raised for the first time in the appellants' submissions before the election court; that the appellants did not appeal on any ground relating to the alleged determination and neither was a determination made by the election court on that matter.

39. As regards scrutiny, counsel reiterated arguments by counsel for IEBC and the county returning officer and urged that under Section 82(1) of the Elections Act, the election court could not properly have ordered scrutiny *suo moto*, as that would have amounted to a cover up, by the election court, of the appellants own failures and omissions.

40. Regarding the claim that public workers were agents for the 3rd respondent and acted as officials of IEBC, it was submitted that a list of prospective election officials was supplied to political parties; that the appellants were sponsored by Wiper Party to whom such list was supplied; that no challenge was made regarding the proposed officials; that no evidence was tendered of county employees who acted for IEBC and no evidence of bias or impartiality was particularized or tendered; that under Section 15(1) and (3) of the Elections Offences Act, it was necessary for the appellants to prove, beyond reasonable doubt, that public officials acted as agents of the 3rd respondent and the findings of the Judge in that regard are well supported by the evidence.

41. A weak effort was made by the appellants, it was argued, to demonstrate that employees of the County were indeed engaged by IEBC to conduct the elections; that the only list of employees of the county government who allegedly served as officials of IEBC in the elections was struck out by the court following an objection by the respondents. Counsel went on to say that the Court should take judicial notice that IEBC officials are invariably public officials.

42. According to counsel, it would have been easy, in light of Article 35 of the Constitution on the right of access to

information, for the appellants to seek confirmation from the County regarding the identity of the persons in question absent which the Judge was right in expressing doubts as to whether county workers were involved in the elections.

### **Analysis and determination**

43. We have considered the appeal and the submissions by counsel. The first issue that we address is whether the appeal is properly before us in light of Section 85A of the Elections Act that limits our mandate to matters of law. The second issue is whether the election court erred in holding that the election of governor of Machakos County held on 8<sup>th</sup> August 2017 was conducted in accordance with Articles 81 and 86 of the Constitution. Within that, we address the questions: whether public workers were engaged by IEBC in the conduct of the election and if so, whether the election was conducted by an “independent body” and administered in an “impartial”, “neutral”, and “accountable manner” and was free and fair; whether the results declared by the county returning officer were verifiable and whether the election court erred in rejecting the appellants’ claim that public officers acted as agents of the 3<sup>rd</sup> respondent or his sponsoring political party in breach of Section 15 of the Election Offences Act.

44. We begin with the question whether the appeal is properly before us. As indicated, the respondents contend that the appeal is based on matters of facts, that are outside the jurisdiction of this Court. As the Supreme Court stated in *Samuel Kamau Macharia and another vs. Kenya Commercial Bank and 2 others* (above), “a court’s jurisdiction flows from either the Constitution or legislation or both” and “can only exercise jurisdiction as conferred by the Constitution or other written law” and that “it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

45. Under Section 85A of the Elections Act, the jurisdiction of this Court in relation to appeals arising from election petitions is confined to matters of law. The relevant part of Section 85A provides that:

*“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only.”*

46. As to what amounts to matters of law, it was held in *The Attorney General vs. David Marakau [1960] EA 484* (a holding cited with approval by this Court in *Timamy Issa Abdalla vs Swaleh Salim Swaleh Imu & 3 others*) (above) that a decision is erroneous in law if it is one to which no court could reasonably come; which is the same thing as a decision of fact in which there was no evidence to support.

47. With specific reference to Section 85A of the Elections Act, the Supreme Court pronounced itself on what constitutes matters of law in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (above) as follows:

*“[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.”

48. Recently, this Court expounded further on the same question in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR where it stated that “matters of law” mean:

*“... the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”* [Emphasis]

49. We are aware and appreciate that an appellate court like ours would rarely interfere with a factual determination of a trial judge unless the trial judge has clearly failed on some material point, to take into account particular circumstances, probabilities material to an estimate of the evidence tendered before it, or that the judge failed to appreciate an important and relevant point in the case, or that he misapprehended or misapplied the law on the facts thereby arriving at an outrageous conclusion which is inconsistent or a departure from the evidence adduced by the parties. Section 85A is not a blanket „no entry zone" for this Court not to consider and address its mind on grounds of appeal simply on account of a plea in the memorandum of appeal that the trial judge „erred on facts and law.”

50. We are mindful that drafting of pleadings is a technical matter. If the judge had deduced an unknown legal principle from the facts of the case to arrive at his decision, it would be preposterous to shut out a litigant simply on account of inelegance in drafting. The Court has to ensure that justice prevails at all times and that Section 85A is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. In essence the Court has to undertake a delicate examination to ensure that appeals are not outrightly and without proper investigation rejected. In the same breadth, we underscore the importance of compliance with Section 85A but we are mindful that often times points of law may inescapably be difficult to separate from factual determination. The line is opaque and therefore circumspection is necessary. In an appeal such as this, the burden is on the appellant to prove how the decision under appeal is wrong. To succeed the appellant must go beyond asking the Court to re-assess the evidence, because that is not the role of this Court. The appellant must demonstrate that the assessment of the evidence by the trial court was wrong.

51. That said, and to the extent that this appeal raises questions whether the election court properly considered whether the principles laid down in the Constitution were violated during the impugned election; whether there were illegalities and irregularities in the conduct of the election and if so whether the results were affected; whether the declaration of results is itself constitutional and valid; and whether election offences were committed and the impact on the validity of the election, these issues are in our view within the province “matters of law” under Section 85A of the Elections Act and in compliance with the pronouncements by the Supreme Court in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (above). We hold that this appeal is properly before the Court.

52. We next consider whether the trial Judge erred in holding that election of governor of Machakos County held on 8<sup>th</sup> August 2017 was conducted in accordance with Articles 81 and 86 of the Constitution. In that regard, the Judge found: that the allegation by the appellants that public workers were engaged by IEBC in the conduct of the election was not proved; that the issue of a non-compliant Form 37C not having been pleaded, could not be raised and that, in any event, the county returning officer was not concerned with Forms 37A's in declaring gubernatorial election results. In effect we consider here whether there is merit in the complaint that the election was not conducted by an “independent body” and administered in an “impartial”, “neutral”, and “accountable manner”; whether the election was free and fair and whether the results declared by the county returning officer were verifiable, transparent and accurate.

53. We have already set out above the rival arguments by counsel on those questions. The constitutional standard against which the election is to be judged is set out in Article 81 and 86 of the Constitution as amplified in the Elections Act and the Regulations

made thereunder. Article 81 of the Constitution demands, among other things, that for elections to pass the test of being free and fair, they should be conducted by an independent body; must be transparent and administered in an impartial, neutral efficient, accurate and accountable manner.

54. Under Article 86 of the Constitution, IEBC is enjoined to ensure, among other things, that at every election, the electoral system is simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; and that the results from the polling station are openly and accurately collated and promptly announced by the returning officer.

55. The Supreme Court summed up those principles at paragraph 200 of its judgment in *Raila 2017* as follows:

***“The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.”***

56. The functions of IEBC are subject to the norms of fairness and it cannot act arbitrarily. It is in furtherance of free and fair elections to ensure no party is given or accorded undue advantage. In our view the Constitution contemplates and places substantial premium on a free and fair elections by vesting comprehensive responsibilities of direction, control and management of the conduct of elections in IEBC and decrees that it acts in conformity with, and not in violation of Articles 81 and 86 of the Constitution. Fairness and impartiality does import a responsibility to see that no party derives an unfair benefit by virtue of the acts or omissions IEBC.

57. Against that background we address the question whether the election of governor of Machakos was conducted in accordance with those principles and whether the declaration of results by the county returning officer was valid" We examine first the appellants complaints relating to alleged engagement of public officers as officials of IEBC and as agents of the 3<sup>rd</sup> respondent.

58. As to the alleged engagement of public officers as officials of IEBC during the elections, the appellants complained that over 300 employees of Machakos county government were engaged as returning officers, presiding officers and polling clerks; that the 300 employees were working under the 3<sup>rd</sup> respondent as the incumbent governor and could not therefore impartially manage the process; that consequently the independence of IEBC was compromised and the election was not free and fair.

59. On their part, the respondents denied the claim and asserted that the recruitment of returning officers, presiding officers and polling clerks was undertaken publicly and an opportunity given to political parties and candidates to challenge the proposed appointees prior to appointment and no objection was raised.

60. In its judgment, the election court took the view that *“the petitioners called Christopher Mutinda (PW2) to testify in a bid to prove this ground”* and went on to say that, that witness did not provide the list of the alleged 300 workers and the court could not therefore determine who the alleged 300 workers were, where they served, who among them were presiding or returning officers and who were the clerks. The Judge then concluded:

***“In short, on the evidence, I am not able to find that it has been proved to the required standard that the 1<sup>st</sup> respondent engaged the employees of the Machakos county government to work as returning officers, presiding officers or polling clerks in the gubernatorial election held on 8th August 2017. Even if such employees were engaged, it was not proved what it is they did or did not do that compromised the election or put to doubt the independence of the 1<sup>st</sup> respondent while conducting the election.”***

61. Beyond the testimony of PW2, it is not apparent from the judgment that in reaching that conclusion the Judge considered the appellant's pleading in the petition and the 1<sup>st</sup> appellant's evidence as set out in the supporting affidavit on the matter. Had the Judge done so, it would have been apparent that the list of employees of the County; their names; their identification numbers; the polling stations at which they were allegedly deployed; the position or designation they held as presiding officer or deputy presiding officer or as clerks at the polling stations was particularized under paragraph 64 of the petition and also in the 1<sup>st</sup> appellant's supporting affidavit to which she made reference when she was cross examined. Although the particulars of County employees given by the appellants relate to 167 as opposed to 300 employees, we are satisfied that there was sufficient evidence before the

election court to demonstrate that IEBC used County staff in the conduct of the election.

62. We are, however, unable to fault the Judge for taking the view that the appellants did not demonstrate that the engagement of County workers in the election by IEBC, by itself and without more, compromised the election or put in doubt the independence of IEBC while conducting the election. There was no evidence presented to show that any of the alleged workers did anything that they should not have done or omitted to do something that they should have done that suggested lack of impartiality. Further, our attention was not drawn to any provision of the law or regulations that bars IEBC from engaging public officers as either returning officers, presiding or deputy presiding officers or as clerks for purposes of conducting elections. This ground, for these reasons must fail.

63. We hasten to point out that in appointing presiding officers or deputy officers or polling clerks as mandated under Regulations 5 and 6 of the Elections (General) Regulations, 2012, IEBC must exercise diligence not to engage persons who might have conflicts of interest and who might undermine its independence and the integrity of the election. It is the constitutional and statutory duty of IEBC to ensure candidates are given equal treatment. In that regard the process of recruitment or employment of presiding officers or deputy officers or polling clerks must be open, transparent and accountable. IEBC should, as a matter of policy require its potential recruits to disclose details pertaining to their current employment.

64. As regards the appellants' complaint regarding engagement of public officers as agents for the 3<sup>rd</sup> respondent, it is an offence under Section 15(1)(a) of the Election Offence Act for a public officer to engage in the activities of any political party or candidate or to act as an agent of a political party or a candidate in an election. Under Article 260 of the Constitution, public office is defined to include an office in the county government. [See also the Leadership and Integrity Act, Act No. 19 of 2012]

65. In that regard, the appellants pleaded in their petition that the 3<sup>rd</sup> respondent enlisted or caused to be enlisted several public officers of the County to act as his agents or as agents of his political party. The appellants gave a list of 26 "senior staff" of the County; their names; national identity card numbers; positions in the County; and the polling stations at which they allegedly served as agents during the election. A list of additional 33 employees of the County who were said to be agents of the 3<sup>rd</sup> respondent was also supplied. The claims were repeated in the 1<sup>st</sup> appellant's supporting affidavit and under cross examination, the 1<sup>st</sup> appellant maintained that the persons listed were employees of the County and that they served, as indicated in the petition, as "agents of governor."

66. The appellants' witness, Christopher Mutinda Mutua, (PW2) who stated that he is a trade unionist representing the workers of the County as Secretary General stated in his testimony that employees of the County, though he did not have a list of who they were, were agents of the 3<sup>rd</sup> respondent's sponsoring political party, Maendeleo Chap Chap Party (MCCP).

67. In his evidence, the 3<sup>rd</sup> respondent denied that he had appointed public officers as his agents. He asserted that he had in fact warned the County employees against engaging in election politics. He stated in evidence that while he was aware that "*public officers should not participate on (sic) elective politics*" and that he "*would find it irregular for public officials of the county to be appointed as agent*", he did not know "*any county officials who were appointed as agents of my party*"; that the appointment of agents was done by the secretariat led by the chief executive officer of the party, Mary Mutuku; and that the party agents represented all the party candidates in the polling station.

68. Under cross-examination, the 3<sup>rd</sup> respondent accepted that one Urbanus Wambua Musyoka, had, as an agent of his sponsoring political party, MCCP, signed Form 37B in respect of Mavoko Constituency. He could however not confirm whether the said Urbanus Wambua Musyoka was one and the same person as the one whose name, national identity card number, and position held in the County was itemized as number 20 in the appellants' list of employees who served as agents of the 3<sup>rd</sup> respondent. He stated that the names Urbanus, Musyoka, and Wambua are common names in the County.

69. In addressing that issue, the election court concluded that "*the circumstances presented by the [appellants] on this issue*" did not "*irresistibly point to the fact that the agent in question was the chief officer, and to no one else and to nothing else.*" The Judge concluded thus:

***“I was wondering, what if the petitioners had under Article 35 of the Constitution sought from the county government the employment records of chief officer Urbanus Wambua Musyoka” Would such records not have shown whether or not he was the holder of ID -Card No. 20326674” Is there a possibility the records would have shown a different ID card” Secondly, is there a possibility that the Urbanus Wambua Musyoka who was the agent of the party at Mavoko carried a name similar to that of the chief officer at the county” In the face of these possibilities, I find that it was not proved beyond doubt that the 3<sup>rd</sup> respondent engaged as his agent a public officer employed by the county.”***

70. In so stating, the trial judge was of the view that it was incumbent upon the appellants to seek the support of Article 35 of the Constitution in order to corroborate or verify the evidence tendered before court. We think the trial judge misconstrued the import and scope of Article 35 of the Constitution and the right of an individual to enlist the support of the court in accessing information. Article 35 of the Constitution provides that a citizen can access information either held by the State or by another party to be provided to him for the exercise and protection of any right or freedom. With respect the appellants were in possession of evidence that one Urbanus Wambua Musyoka ID NO. 20326674 was employed as agent of the 3<sup>rd</sup> respondent's sponsoring party and did actually sign Form 37B in respect of Mavoko Constituency. Whether the records of the County Government would show a different person with a different Identity Card was shifting the burden of proof and putting unreasonable standards upon the party who provided the names and identity card of the said person. With profound respect the trial judge had to look at the evidence tendered by the parties and determine the truth or otherwise of the said allegation without creating possibilities not raised by the respondent. The existence of Mr. Urbanus Wambua Musyoka as an agent was established by the appellants and the burden shifted to the respondents to rebut that evidence.

71. We are persuaded, as submitted by counsel for the appellants, that by proceeding on that basis, the learned judge misdirected himself on the burden of proof. In their pleading and in evidence, the appellants demonstrated that one Urbanus Wambua Musyoka, whose national identification they gave as 20326674, was indeed the same person who, as an agent of the 3<sup>rd</sup> respondent's sponsoring party, signed Form 37B in respect of Mavoko Constituency. Indeed, the appellants went ahead to identify the said Urbanus Wambua Musyoka as a senior staff member of the County holding the position of Chief Officer, Public Works, within the County.

72. The Supreme Court in *Raila 2017* was categorical in its pronouncement that a petitioner who seeks nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. The Supreme Court stated:

***“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”***

73. The Supreme Court did not stop there. It went on to say that:

***“[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”***

74. The appellants adduced cogent and credible evidence that a public officer, namely one Urbanus Wambua Musyoka, had, as an agent of the 3<sup>rd</sup> respondent's sponsoring party, been engaged as such and had in that capacity signed Form 37B in respect of Mavoko Constituency. In our view, the burden then shifted to the respondents, who stood to “lose if no further evidence were

introduced” to prove compliance with the law. The 3<sup>rd</sup> respondent did not discharge that burden but merely claimed that the individual names, Urbanus or Wambua or Musyoka are common names in the community. Indeed, he confirmed that such a person was an employee in the County. Contrary to the finding by the Judge, it behoved the respondents to show that the Urbanus Wambua Musyoka with respect to whom the appellants led evidence was a person other than who they claimed to be. We find on this ground that the appellants proved that Urbanus Wambua Musyoka, a Public Officer, contrary to the law acted as an agent to the 3<sup>rd</sup> respondent's party.

75. Turning to the matter of Form 37C on the basis of which the county returning officer declared results, it was contended for the appellants that the Judge erred in holding that the county returning officer was not concerned with Forms 37 A's in declaring gubernatorial election; that it was imperative for the county returning officer to use the prescribed format of Form 37C; and that the results as declared without reference to Form 37A's were therefore not verifiable and are unconstitutional.

76. The respondents on their part maintained that the appellants did not plead the grievance relating to Form 37C; that in any event the results as declared were verifiable; and that there was substantial compliance with the regulations in declaration of results.

77. The learned Judge summed up the contentions in his judgment thus:

**“Mr. Otieno's other complaint was that, as required by Regulation 87(2) of the Elections (General) Regulations, 2012, DW 2 had not in Form 37C completed and declared results of all polling stations for each candidate; that all polling stations, codes and candidates, constituency subtotals and county totals should have been reflected in Forms 37C, and, now that this had not been done, the declaration in Form 37C was not valid. Mr. Kimani Muhoro's response was that this issue had not been pleaded and evidence given thereon, and therefore could not be raised in the submissions.”**

78. While agreeing with the respondent that the issue of validity of Form 37C could not be raised as “it was not one of the grounds on which the petition was based”, the Judge stated that the results in Form 37C were acknowledged by the appellants' sponsoring party. Furthermore, the Judge went on to say, Form 37A that contains the primary results in gubernatorial elections cannot be varied by the Constituency returning officer in Form 37B or the County Returning officer in Form 37C.

79. Making reference to the decision of this Court in **IEBC vs Maina Kiai & 5 others** (above), the learned Judge concluded that:

**“Form 37B contains the tallying and collation of Forms 37A, and Form 37C contains the tallying and collation of Forms 37B. The county returning officer does not deal with Forms 37A when putting together Form 37C.”** [Emphasis]

The Judge went on to say that it was not the role of the County Returning Officer “to receive, tally and collate results from the polling stations as contained in Forms 37A.”

80. Before us, the appellants took issue with those findings and submitted that the Judge misdirected himself. It was submitted that the admission by the county returning officer in her testimony before the election court that she did not make reference to Forms 37A's from 1332 polling stations when she declared results in Form 37C was the clearest indicator that the election results were not verifiable; that the declaration of results without reference to the primary source was a violation of Article 86 of the Constitution, Section 39(1)(B) of the Elections Act, and Regulation 87(2) of the Elections (General) Regulations, 2012 which demand that the county returning officer must declare the number of votes that each candidate got in each polling station and which require that Form 37C as prescribed should contain results from all polling stations in order to form a basis for the results declaration.

81. Counsel for the appellants maintained that the grievance was well covered in the pleadings; that in any event the complaint is in the nature of a point of law that need not be pleaded; that the acknowledgment of the results by signing of Form 37C by the agent is of no consequence as estoppel cannot operate against statute.

82. On their part, counsel for the respondents argued that the issue of invalidity of Form 37C was not before the election court as it was not pleaded and the judge correctly held that a party is not permitted to make a case outside its pleadings. The respondents submitted that the Judge correctly held that the county returning officer has no business with Form 37A when declaring results in Form 37C; that the role of the county returning officer is distinct from that of a national returning officer in a presidential election; and that the decision of the Supreme Court in Raila 2017 invalidating presidential election results on the basis that the national returning officer could not declare results without Forms 37A cannot apply in gubernatorial elections.

83. As to whether Form 37C used by the county returning officer was in the prescribed form, counsel submitted that only Form 37A was in the prescribed form while Forms 37B's and 37C were supplied in excel format.

84. We first address the question whether the Judge erred in upholding the respondents' contention that the matter of validity of Form 37C was not pleaded. It is a requirement under rule 8 of the Election (Parliamentary and County Elections) Petition Rules, 2017 that the grounds on which an election petition is presented should be stated and as correctly submitted by the respondents, a petitioner is not permitted to make a case outside the pleadings. See IEBC & another vs Stephen Mutinda Mule and others (above). Undoubtedly, pleadings play a critical role in defining the scope of the dispute on which the court is called upon to adjudicate. The functions of pleadings include setting out the case to be established at trial (See Rimer, J in East v Tomkins and other and others [2004] EWHC 1825 (Ch)); they serve to give a party sufficient notice of the opponent's case (See Lucas-Box News Group Newspapers Ltd [1986] 1 All ER 177); they define and clarify the issues between the parties (Newland v Boardwell [1983] 3 All ER 179 and Six Continents Ltd and another v Commissioners of Inland Revenue and another [2016] EWHC 169 (Ch)).

85. In their petition before the election court, the appellants pleaded that IEBC is required to exercise its powers and perform its functions in the conduct of elections in accordance with the Constitution and national legislation. Specific reference was made in the petition to Articles 38, 81, 88 of the Constitution, Section 39 of the Elections Act (that relates to determination and declaration of results) and to Regulations. While asserting that results of gubernatorial elections in one of the constituencies, Mwala Constituency, were fake and inaccurate, the appellants averred that:

***“The results are not verifiable and do not meet the constitutional threshold of accuracy, verifiability, accountability and transparency as required under Articles 81(e) and 86(c) of the Constitution.”***

86. Expounding further on the grievances in reference to Mwala Constituency, the appellant averred at paragraph 73 of the petition that:

***“It is instructive to note that the 1st Respondent relied on the said wrong total votes cast for the Petitioner and the 3rd Respondent in declaring the results of the Machakos County gubernatorial elections in the Form 37C thereby rendering the said results inaccurate and out rightly invalid.”***

87. At paragraph 76 of the petition, the appellants pleaded:

***“That the first respondent failed to use standardized statutory forms to declare the results of the said elections and instead relied on fake documents to irregularly and illegally declare the results.”***

88. Based on those averments, it is difficult to accept the view taken by the respondents that the matter was not raised in the pleadings. We are satisfied that the complaints regarding the validity of Form 37C and the declaration of results were anchored in the petition and the respondents had due notice of the grievances. Indeed, the learned Judge correctly acknowledged elsewhere in his judgment that *“the gubernatorial results for Machakos County were declared in Form 37C. This Form contains the results that the petitioners are challenging through the petition.”* Our conclusion on this ground is that the issue of validity of Form 37C was sufficiently pleaded.

89. We next turn to consider whether the results as declared by the 2<sup>nd</sup> respondent met the constitutional threshold of verifiability; whether the county returning officer was under a duty to make reference to Forms 37A's in her declaration of gubernatorial results; and whether the declaration was, or ought to have been in the prescribed form.

90. Article 86 of the Constitution requires that at every election, IEBC 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.”**

91. That Article sets out fundamental principles upon which presiding officers and returning officers are required to discharge their functions at every election. Article 86(b) requires that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station. Article 86(c) requires that the results from the polling station are openly and accurately collated and promptly announced by the returning officer. Under Article 86(d), IEBC is enjoined to put in place appropriate structures and mechanisms to eliminate electoral malpractice.

92. Section 39 of the Elections Act deals with determination and declaration of results. It provides, under sub-sections 1A and 1B, for appointment by IEBC of constituency and county returning officers respectively. Section 39(1A) of the Act provides that IEBC shall appoint constituency returning officers to be responsible for:

***“(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;***

***(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and***

***(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.”***

93. Section 39 (1B) provides that:

***“39(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.”***

[Emphasis]

94. Further provisions regarding the roles of constituency and county returning officers in that regard are contained in the Elections (General) Regulations, 2012. Under regulation 3(3) of those regulations, the responsibility of the constituency returning officer as set out under Section 39(1A) of the Act is reiterated with the further clarification that the county returning officer is required to submit in Form 37B, the collated results for the election of county governor. Under regulation 4(1)(b) of those regulations, the responsibility of the county returning officer in tallying results from constituencies in the county and declaration and announcement of results tallied as set out under Section 39(1B) of the Act is reiterated.

95. Regulations 87(1) of the regulations requires the constituency returning officer to deliver the collated results to the county returning officer in Forms 37B, who upon receipt of those results “*shall tally and announce the results of the county governor*” and complete Forms 37C set out in the Schedule in which the county returning officer shall declare, as the case may be, the –

(i) *name of the respective electoral area;*

(ii) *total number of registered voters;*

(iii) *votes cast for each candidate or referendum side in each polling station;*

(iv) *number of rejected votes for each constituency;*

(v) *aggregate number of votes cast in the respective electoral area; and*

(vi) *aggregate number of rejected votes; and*

(c) *sign and date the relevant forms publicly and declare the results for the position of—*

(i) *County Governor;*

(ii) *...”*

96. Based on those provisions, we agree with the appellants that the verification role entrusted to the county returning officer includes the task of verifying that the results delivered to him or her by the constituency returning officer in Form 37B are an accurate record of the results tallied, verified and declared at the respective polling stations. To that extent, the county returning officer is concerned, and must be concerned with the Forms 37A's being the primary documents that capture the results at the polling station.

97. Form 37C, in its prescribed form, is accordingly designed to ensure that the results from the polling stations are captured in that form. We agree with the view expressed by High Court (Mabeya, J) in *Ahmed Abdullahi Mohamad & another vs. Mohamad Abdi Mohamed & 2others* (above) where he stated, in reference to Form 37C, that the Regulations “*makes it mandatory for each polling station to be named and the results in each entered*” and that anyone looking at Form 37C should be able to discern for which polling stations the results relate and that the omission to reflect results from the polling stations in Form 37C “*makes those results unaccountable and unverifiable.*”

98. In our view, the statement by the Supreme Court in *Raila 2017* in reference to the presidential election that, “*the Maina Kiai decision, made it clear that Form 34A being the primary document, becomes the basis for all subsequent verifications*” applies with equal force to gubernatorial elections. It was in the *IEBC vs Maina Kiai & 5 others* (above), that this Court stated that:

**“Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of an electoral contest. Numbers therefore are not only unimpeachable but they are everything in an election...The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded.”** [Emphasis]

99. The county returning officer must be able to verify results based on the primary document. It is precisely for this reason, as we have stated, that Form 37C is designed in such a way so as to capture the results from each polling station. The county returning officer in this action was under a duty to have regard to the primary document in her verification role. It is inconceivable to declare results in Form 37C without linking those results to the source, Forms 37A's. We are not persuaded, as was urged by the respondents that the national returning officer's duty, in as far as verification of a presidential results is concern, is any different from that of a county returning officer. Both are enjoined to pay homage and have regard to the results as declared at the polling station.

100. Underscoring the constitutional principles in Articles 81 and 86 of the Constitution, the Supreme Court in *Raila 2017* stated that verifiability involves “*an election with a proper and verifiable record made on the prescribed forms...*” and with specific reference to the presidential election stated that:

*“The said verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with Section 39 (1C) of the Elections Act. Given the fact that all Forms 34 B were generated from the aggregates of Forms 34A, there can be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, this primary document (Form 34A), was completely disregarded.”*

The underlying principle expressed therein by the Supreme Court applies equally in a gubernatorial election.

101. It is noteworthy that Parliament has, by Act No. 34 of 2017, amended Section 39 of the Elections Act by introducing Section 1D which provides that IEBC:

*“Shall verify that the results transmitted under this section [Section 39] are an accurate record of the results tallied, verified and declared at the respective polling stations.”*

102. While we appreciate that that amendment was made subsequent to the 8<sup>th</sup> August 2017 elections, it captures the constitutional principle expressed by this Court in *IEBC vs Maina Kiai & 5 others* (above) that the polling station is the true locus for the free exercise of the voters will.

103. The respondents submitted that the complaint in relation to Form 37C is simply a matter of form. We do not think so. Section 72 of the Interpretation and General Provisions Act, (Cap. 2) to which reference was made provides that:

*“Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”*

104. Had the form in excel format that was used by the county returning officer in this case contained the essential substance, namely all the required information including information from the polling stations, perhaps Section 72 aforesaid would have come to the respondents' aid. Furthermore, beyond the statement that Form 37C was provided in excel form, no explanation appears to have been offered why the prescribed form was not used. It may well be that IEBC opted to use the excel forms on account of convenience it might offer in terms of ease of entering, calculating and analysing the data, but it is not for the court to speculate. The law provides that the results of the election shall be declared in the manner provided by the Act or the Rules made thereunder, the declaration should be made in that manner unless there are, subject to Section 72 of the Interpretation and General Provisions Cap. 2, good reasons for not doing so. None were proffered.

105. The forms used in the elections are “prescribed” by legislation. The content and design will depend on the purpose. Forms are therefore an integral part of an election and an election outcome will depend largely on the information contained in the forms used in the process. Indeed many electoral disputes have been fought around the forms. In *Raila 2017* the Supreme Court cited this passage from *IEBC vs Maina Kiai & 5 others* (above):

*“We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers (read 1st respondent) can vary or even purport to verify those results ...”*

106. The Supreme Court went further to explain need for propriety in the prescribed Forms 34A, 34B and 34C used in the Presidential elections stating that;

*“[282]..... Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:*

*(a) an accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results; an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media; a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage.”*

107. Because of the importance of statutory forms, Parliament has enacted the Statutory Instruments Act, 2013 whose section 2 defines “statutory instrument” to mean, among other things;

*“any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament ...”* (Emphasis).

108. One of the object of the Act, according to section 4 is to promote the “legal effectiveness, clarity and intelligibility” of the instruments. The prescribed forms must conform to this criteria. Section 26 is key. It provides, in terms more or less like section 72 of the Interpretation and General Provisions Act that;

*“26 (1) Where an enabling legislation confers power on any person to prescribe any form, then unless that person prescribes such form, any form approved for the purpose by that person may be used.*

*(2) Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead.”*

109. This provision is significant in two respects as highlighted in the sub-sections above. The form must either be the one prescribed or if it is in any other form that other form must be approved by the person authorized to make the prescribed form, and secondly, any form that deviates from the prescribed form will only be void if it affects the substance thereof or if it is calculated to mislead.

110. In our judgment therefore, the election results declared by the county returning officer for the position of governor Machakos County failed the constitutional test of verifiability and the declaration made by him that the 3<sup>rd</sup> respondent was duly elected had no legal basis. Consequently, the learned Judge erred in holding that that election was conducted in accordance with the constitutional principles under Articles 81 and 86 of the Constitution.

111. Finally, the appellants invited us to declare that the 3<sup>rd</sup> respondent is not and was not eligible to contest in the 8<sup>th</sup> August 2017 Machakos County gubernatorial election having knowingly, it was contended, aided in the contravention of Section 15(1) of the Election Offences Act contrary to Section 15(3) of that Act. Section 15(1)(a) of the Election Offences Act provides that a public officer who engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election commits an offence and is liable on conviction, to a fine or imprisonment or both. Section 15(3) of that Act provides that, **“a candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.”**

112. In the case of *Frederick Otieno Outa vs. Jared Odoyo Okello & 4 others, Petition No. 6 of 2014* the Supreme Court stated that:

*“Election offences are, therefore, quasi-criminal in nature; and the Court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such offence was, indeed, committed, or by whom. The commission of an election offence if proved, will not only lead to the election being set aside, but also to the disqualification of the perceived culprit, from standing as a Parliamentary-election candidate, given the terms of Article 99(h) of the Constitution. The offender is also liable to criminal penalty, under the Elections Act. In these circumstances, the person alleging the commission of the offence, is required to prove the ingredients of the offence. And such proof of an offence takes a higher level than the mere preponderance of probabilities.”*

113. And subsequently in Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others [2015] eKLR the Supreme Court re-affirmed the same principle thus:

*“The legal framework for electoral dispute-settlement confers upon the Court a quasi-criminal jurisdiction which is not part of the established criminal code. Being derived from the fundamental elements of the criminal law, which imposes strict penalty in respect of prohibited acts, and which is attended with established trial safeguards, such quasi-criminal offences as are provided for in the electoral law, too, are required to be strictly proved, as a basis for any penal consequences.”*

114. In his testimony, the 3<sup>rd</sup> respondent stated that the recruitment of agents was a party affair undertaken by the chief executive officer of the sponsoring political party and that he had no role in the recruitment. In our view, the evidence presented before the election court did not establish, to the required standard, beyond reasonable doubt, that the 3<sup>rd</sup> respondent knowingly aided in the contravention of Section 15(1)(a) of the Election Offences Act. We therefore decline to make the declaration sought that the 3<sup>rd</sup> respondent is not and was not eligible to contest in the elections.

115. We think we have said enough and exhaustively addressed the germane grounds in this appeal to show that this appeal is meritorious and ought to succeed. Consequently we arrive at the conclusion that this appeal must succeed in term of prayers 1,2,3,6,7,8 and 9 of the Memorandum of Appeal dated 8<sup>th</sup> March 2018 with the result that the judgment of the High Court given on 9<sup>th</sup> February 2018 is hereby set aside in its entirety. We substitute therewith a declaration that the Machakos County gubernatorial election was not conducted in accordance with the constitutional principles thereby rendering the election void. We direct IEBC to organize and conduct a fresh gubernatorial election for Machakos County in conformity with the Constitution, the Elections Act and the Regulations.

116. As regards costs, we have no reason to depart from the general principle that costs follow the event. Consequently, the appellants shall have the costs of the appeal as well as the costs of the proceedings in the High Court, which shall be taxed. The appellants costs in the High Court shall not exceed and are capped at Kshs. 1,500,000.00 as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Kshs. 1,500,000.00 as against the 3<sup>rd</sup> respondent. The appellants costs of the appeal shall not exceed and are capped at Kshs. 1,000,000.00 as against 1<sup>st</sup> and 2<sup>nd</sup> respondents and at Kshs. 1,000,000.00 as against the 3<sup>rd</sup> respondent.

117. Final Orders:

**A. The appellants’ appeal is allowed and the judgment and order of the High Court given on 9<sup>th</sup> February 2018 is hereby set aside.**

**B. It is hereby declared that the 3<sup>rd</sup> respondent was not validly declared as the Governor of Machakos County.**

**C. IEBC is hereby directed to organize and conduct a fresh election for the position of governor Machakos County in conformity with the Constitution the Elections Act and the relevant Regulations.**

**D. The certificate issued by the Election Court pursuant to Section 86 of the Elections Act is hereby set aside and substituted with a Certificate that the**

**3<sup>rd</sup> respondent was not validly declared as having been elected as governor during the elections held on the 8<sup>th</sup> August 2017.**

**E. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall pay the appellants costs incurred before the election court, to be taxed, but not to exceed Kshs. 1,500,000.00.**

**F. The 3<sup>rd</sup> respondent shall pay the appellants costs incurred before the election court, to be taxed, but not to exceed Kshs. 1,500,000.00.**

**G. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall pay the appellants costs of this appeal to be taxed, but not to exceed Kshs. 1,000,000.00.**

**H. The 3<sup>rd</sup> respondent shall pay the appellants costs of this appeal, to be taxed, but not to exceed Kshs. 1,000,000.00.**

Orders accordingly.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of June, 2018.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**



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