IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & MUSINGA, JJ.A.)

ELECTION PETITION APPEAL NO. 1 OF 2018

BETWEEN

STANLEY MUIRURI MUTHAMA .....APPELLANT

VERSUS

RISHAD HAMID AHMED.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 2ND RESPONDENT

ABDALLAH MWARUWA CHIKOPHE.....3RD RESPONDENT

CONSOLIDATED WITH

ELECTION PETITION APPEAL NO. 3 OF 2018

BETWEEN

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION .....1ST APPELLANT

ABDALLA MWARUA CHIKOPHE .....2ND APPELLANT

VERSUS

RISHAD HAMID AHMED .....1ST RESPONDENT

STANLEY MUIRURI MUTHAMA.....2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Korir, J.) dated 21st February, 2018

in

Election Petition No. 1 of 2017)

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JUDGMENT OF THE COURT

INTRODUCTION

1. In the general election held on 8th August, 2017, **Stanley Muiruri Muthama,** the appellant herein, was elected member of the National Assembly for Lamu West Constituency (the Constituency), having garnered **11,084 votes. Rishad Hamid Ahmed**, the 1st respondent herein, got **10,939 votes.**

2. **Rishad Hamid Ahmed** filed an election petition to challenge the said election results, citing violation of various constitutional principles and irregularities in the conduct of the said election. After a full hearing of the petition, the trial court held that there were illegalities or irregularities that affected the results of the election and therefore the appellant had not been validly elected and nullified the election.

3. Being aggrieved by the said judgment, **Stanley Muiruri Muthama**, the appellant, filed **Election Petition Appeal No. 1 of 2018** before this Court. The Independent Electoral and Boundaries Commission (I.E.B.C.) and **Abdalla Mwarua Chikophe** (the Returning Officer) were similarly dissatisfied with the said judgment and filed **Election Petition Appeal No. 3 of 2018**. When the appeals came up for hearing, a consent order was recorded to the effect that the two appeals be consolidated and heard together.

SUMMARY OF THE PETITIONER'S CASE BEFORE THE HIGH COURT

4. In his petition, the 1st respondent alleged, *inter alia*, that the I.E.B.C. and the Returning Officer, (2nd & 3rd respondents), abdicated their duty to administer the election in an impartial, neutral, efficient, accurate and accountable manner contrary to **Article 81** of the **Constitution** as read together with **sections 39, 44 and 44A** of the **Elections Act**, the Regulations made thereunder and **section 25** of the **Independent Electoral and Boundaries Commission Act,** leaving the electoral process open to manipulation, malpractice and inaccuracies, and rendering the outcome thereof shambolic.

5. The 1st respondent further claimed that the I.E.B.C. and its agents caused and/or denied lawfully registered voters within the Constituency their constitutional right to vote by refusing to resort to the printed register of voters where it was not possible to identify a voter through the electronic voter identification device, thus violating **Articles 38 and 81** of the **Constitution** and **regulation 69** of the **Elections (General) Regulations, 2012.**

6. The 1st respondent further alleged that pre-marked ballot papers were used at the two polling stations located at Mapenya Primary School; that his agents were ejected from polling stations; that ballots for voters who needed assistance were not marked according to their wishes; and that the counting of ballot papers was not open, fair or transparent, resulting in the suppression of his votes and the inflation of the votes of the appellant.

7. There were several other complaints that were raised by the 1st respondent but for purposes of this appeal they are not relevant as the trial court found them unproved and consequently rejected them. The High Court allowed the petition on the basis that there were some discrepancies in the entries in Forms 35A and 35B in respect of two polling stations. As there was no cross-appeal in respect of all the rejected complaints, we do not deem it necessary to set them out in this judgment.

THE 2ND AND 3RD RESPONDENTS' REPLY TO THE PETITION

8. In their response to the petition, the 2nd and 3rd respondents denied the 1st respondent's allegations and stated that the said election was conducted transparently; and was administered in an impartial, neutral, efficient, accurate and accountable manner.

9. The 3rd respondent asserted that the results he declared represented and correctly captured the sovereign will of the people of the Constituency; that the election was conducted in strict accordance with the provisions of **Articles 81, 86** and **88(5)** of the **Constitution**, the **Elections Act** and the **Regulations** promulgated thereunder.

10. The Returning Officer said that no voter was denied his constitutional right to vote as alleged; that it was a requirement that every voter be first identified by use of the KIEMS Kit before being allowed to vote, and where a voter's biometrics could not be identified in that manner, identification was through the alphanumeric system using the voter's identification card or passport.

11. As regards assisted voters, the Returning Officer stated that all presiding officers discharged their obligations appropriately; that all assisted voters were accorded opportunity to vote and the assisting persons signed a declaration of secrecy before the presiding officer.

12. Regarding declaration of the results, the Returning Officer stated that after he declared them in accordance with **section 39** of the **Elections Act,** he realized that there were differences in the contents of Forms 35A and the ones posted in Form 35B; that the error was as a result of a mix-up of Forms 35A used in Lamu County Assembly Hall 2 and Lamu Fort Hall 1 polling stations, which error was notified and explained to the candidates and agents.

13. The 2nd and 3rd respondents denied that there was any alteration, modification, amendment or falsification effected on Forms 35A in any of the polling stations; he said that the 1st respondent's agents were allowed access to the duly completed, signed and stamped vote tallies as recorded in Forms 35A. The 2nd and 3rd respondents urged the court to dismiss the petition.

THE APPELLANT'S REPLY TO THE PETITION

14. The appellant denied that there were any irregularities in the conduct of the said elections. He contended that the election was held in compliance with the constitutional and legal principles governing elections.

15. As regards Forms 35A, the appellant stated that the forms were filled and signed at the polling stations in the presence of agents of all the candidates, without any coercion or intimidation.

16. The appellant stated that he was declared the winner upon declaration and verification of results from all the 122 polling stations. He added that the information in Forms 35A was consistent with the information in Forms 35B. The appellant urged the trial court to dismiss the petition in its entirety.

SCRUTINY & RECOUNT

17. The trial court allowed the 1st respondent's application for scrutiny of the ballots cast and the electoral material in respect of Majembeni Primary School Polling Stations Nos. 1 and 2 and recount of all the votes in all the 122 polling stations. The scrutiny and recount exercise was conducted by the court's Deputy Registrar.

18.The Deputy Registrar's report disclosed various posting, transposition, arithmetical errors and irregularities in respect of thirteen polling stations. The said errors were appropriately adjusted. However, there were no errors as to the number of votes cast for each candidate in respect of 109 polling stations. The recount gave the appellant **11,088** votes and the 1st respondent **10,947** votes.

DETERMINATION BY THE TRIAL COURT

19. In his judgment, **Korir, J**. held that there was no merit in the petitioner's allegation that some registered voters were disenfranchised; that there was no evidence of use of pre-marked ballot papers in favour of the appellant; that there was no evidence that the petitioner's agents were unlawfully ejected or removed from 21 polling stations; that assisted voters were properly facilitated; that although polling in respect of one station was extended by two hours and in another station polling closed two hours before the official closing time, there was no evidence that the results were affected by any breach of **regulation 66** which provides for eleven hours of voting on an election day.

20. The learned judge also dismissed further grounds of the petition which alleged failure to prepare and provide the petitioner with accurate, complete, signed and stamped Forms 35A; intimidation and coercion of the petitioner and/or his agents into signing electoral returns; voter bribery; and engagement of one **Khadija Mohamed**, a Deputy Returning Officer in the Constituency, who had been gazetted as the Deputy Returning Officer for Lamu East Constituency. The trial court observed that the said irregularity did not of itself affect the validity of the election.

21. The learned judge allowed the petition on one ground – that there were discrepancies in the results captured in Forms 35A and 35B in respect of Lamu Fort Hall polling station Nos. 1 of 5. The petitioner (1st respondent) had submitted that his votes were reduced by 63 while the appellant's votes were inflated by 28 votes.

22. The recount of votes for Lamu Fort Hall polling station No. 1 of 5 returned the same results as captured in Form 35A that had been printed for that station, except that the polling station name had been altered by hand to read Lamu County Assembly Hall polling station No. 3 of 3. The same results were attributed to Lamu County Assembly Hall polling station No. 3 of 3 in Form 35B.

23. In respect of Lamu County Assembly Hall Polling Station No. 3 of 3, the results are the same as those found by the Deputy Registrar during the recount exercise. Form 35A that was availed to the Court by the IEBC for Lamu Fort Hall Polling Station No. 1 of 5 showed that the Petitioner received 241 votes and appellant 36 votes. However, Form 35B showed that the Petitioner got 178 votes and the 3rd respondent 64 votes.

24. Annulling the election, the learned judge delivered himself as follows:

"147. A perusal of the forms presented to the court by the 2nd respondent show that in Lamu Fort Hall polling station No. 1 of 5, the Petitioner lost 63 votes when his votes were reduced from 241 in form 35A to 178 in form 35B. On the other hand, the 3rd respondent gained 28 votes when his votes were increased from 36 to 64 during the transposition of the results from form 35A to form 35B. By that act alone, the 3rd respondent gained an advantage of 91 votes. In the recount, the Deputy Registrar established that the Petitioner garnered 259 votes and the 3rd respondent had 31 votes in Lamu Fort Hall polling station No. 1 of 5. This again confirms that the Petitioner lost 91 votes when his votes were reduced from 259 to 178 in form 35B. Of course, the Petitioner gained 18 votes in Lamu County Assembly Hall polling station No. 3 of 3 when his votes were increased from 241 in form 35A to 259 in form 35 B. The 3rd respondent's votes were reduced from 36 to 31 in this station. The 3rd respondent was therefore disadvantaged by 23 votes but this cannot be compared to the loss of 91 votes suffered by the Petitioner through the action of the 1st and 2 nd respondents. When the 23 votes lost by the 3rd respondent is deducted from the 91 votes lost by the

Petitioner, it is clear that 68 votes cast for the Petitioner could not be accounted for. This is a significant number of votes considering that that form 35 B indicates that the 3rd respondent received 11,084 votes followed by the Petitioner who garnered 10,939 votes".

25. In his concluding remarks, the learned judge stated:

"153. In an election that is closely contested, it is the little things that really count. Small mistakes whether intended or accidental can distort the will of the people. It is the duty of the courts to ensure that those who occupy elective offices do so on the strength of clean electoral processes. In the circumstances of this case, one cannot confidently say that the impugned election reflected the will of the people of Lamu West Constituency. In deference to their democratic right to elect their Member of National Assembly in a free and fair election, I allow the Petition".

26. Having arrived at that conclusion, the learned judge awarded the petitioner costs of Kshs.3,000,00/=, Kshs.1,500,000/= to be paid by the 2nd and 3rd respondents and Kshs.1,500,000/= to be paid by the 1st respondent, although the court had found that the 1st respondent was not to blame at all for the mistakes and/or irregularities committed by the 2nd and 3rd respondents.

APPEAL TO THIS COURT

27. Being aggrieved by the said judgment, the appellant preferred an appeal to this court, being Election Petition Appeal No. 1 of 2018. The I.E.B.C. and the Returning Officer also filed a joint appeal, being Election Petition Appeal No. 3 of 2018. As earlier stated, the two appeals were, by consent of all the parties, consolidated and heard together.

28. In his appeal, **Stanley Muiruri Muthama** stated in all the ten (10) grounds of appeal that the learned judge **"erred in law and fact**" in holding: that the election contravened the constitutional and statutory provisions governing elections; that the election did not reflect the will of the people of Lamu West Constituency; that the appellant was not validly declared the elected member of the National Assembly for the Constituency; that the isolated hand alteration of Polling Station names and human error of interchanging Forms 35A for two Polling Stations was a deliberate suppression of the 1st respondent's votes; that the 1st respondent suffered a loss of **91** votes; that **68** votes cast for the 1st respondent could not be accounted for; and for awarding costs of Kshs. 1.5 million to the 1st respondent as against the appellant.

29. The appellant urged this Court to allow the appeal, set aside the High Court judgment and award costs of the appeal to him.

30. In their joint memorandum of appeal, the 2nd and 3rd respondents raised more or less the same grounds of appeal as the appellant in appeal No.1 of 2018. Out of their thirteen (13) grounds of appeal, eleven (11) of them alleged that the learned judge **"erred in law and fact"** in various aspects of his decision. In the other two (2) grounds, it was contended that the learned Judge relied on irrelevant considerations in arriving at his decision; and that he erred in law by failing to evaluate and analyze all the evidence placed before him before arriving at the impugned decision.

31. When the appeals came up for hearing, all the parties through their respective advocates sought to rely on their written submissions and authorities that they had filed. The submissions were briefly highlighted.

THE APPELLANT'S SUBMISSIONS

32. The appellant was represented by **Mr. William Mogaka** and **Mr. Titus Kirui**. Although the appellant raised ten grounds of appeal, the summary of his arguments, according to Mr. Mogaka is that:

"(i) Whereas the Trial Court cited proper provisions of the Constitution, Electoral Law statutes, binding precedents from the Court of Appeal and Supreme Court, it did not properly apply the legal principle/test on the effect of the errors or irregularities on the contested result;

(ii) The conclusions made by the Trial Court on discrepancies of entries in Form 35As and 35Bs on two [2] isolated polling stations of Lamu County Assembly Hall 3 of 3 and Lamu Fort Hall 1 of 5 are bad in law, unreasonable and perverse in nature taking into account the applicable law on the set of facts/evidence on record;

(iii) The conclusions made by the Trial Court were not supported by the facts or evidence on record."

33. Mr. Mogaka submitted that it was not disputed that the Deputy Registrar's scrutiny and recount report disclosed various posting, transposition and arithmetical errors and irregularities in respect of 13 Polling Stations. There were no errors in respect of 109 Polling Stations. The said errors were adjusted by the Deputy Registrar and that having been done, the appellant still emerged the winner, having garnered **11,088** votes, while the 1st respondent was the runner up with **10,947** votes.

34. Although the winning margin was 141 votes compared to 145 as per the declared results, Mr. Mogaka submitted the margin was immaterial.

Counsel cited the Supreme Court's decision in **ZACHARIA OKOTH OBADO v EDWARD AKONG'O OYUGI & 2 OTHERS [2014] eKLR** where the Court stated:

"[146] The Constitution requires that a candidate in a gubernatorial election who gets the majority vote is declared the winner. It is immaterial that the margin of the votes, as between candidates, is narrow indeed, even a margin of one vote will entitle the candidate who has the majority to be declared as the elected Governor."

35. Mr. Mogaka further submitted that the errors and/or irregularities regarding the entries in Forms 35A and 35B did not affect the outcome of the election or the integrity thereof. He cited the Supreme Court's decision in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR** where the court held:

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

[218] Where, however, it is shown that irregularities were of such magnitude that they affected the election results, 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 in the same plane as the learned Judges in Morgan, Opitz and Nana".

36. Counsel submitted that although the learned judge cited the aforesaid Supreme Court decision, which was binding upon him, he failed to apply it, even after perusing the scrutiny and recount report by the Deputy Registrar which revealed that the appellant was the winner of the election.

THE 2ND & 3RD RESPONDENTS' SUBMISSIONS

37. **Mr. Lumatete Muchai** appeared for the 2nd and 3rd respondents. Counsel substantially adopted Mr. Mogaka's submissions.

38. Regarding the learned judge's direction that "the determination of the court shall be transmitted to the Director of Public Prosecutions for action on the criminal aspect of the identified election malpractice," Mr. Lumatete submitted that no evidence was adduced to prove any electoral malpractice. In the absence of such evidence, the learned judge was wrong in relying on conjecture in arriving at the conclusion that the 2nd and 3rd respondents were involved in any malpractice; counsel added.

39. Mr. Lumatete further submitted that the learned judge's views in rejecting the defence of human error that was advanced by the 2nd and 3rd respondents in respect of the transposition errors as earlier stated was not supported by any evidence. It was not shown that there was any deliberate move by the said respondents to suppress the 1st respondent's votes. He urged this Court to overturn the impugned judgment.

40. The 1st respondent was represented by **Mr. Ahmednasir Abdullahi**, Senior Counsel, (SC), **Mr. Luqmaan Ahmed** and **Mr. Abdalla Busaidi**.

The 1st respondent's submissions were limited to the jurisdiction of this Court to hear the two appeals. The 1st respondent did not make any submissions to challenge the merits of the appeals in respect of all the grounds raised by the appellants.

41. In his submissions, Mr. Ahmednasir, SC, argued that the jurisdictional parameters that guide this Court in hearing election petition appeals is set out under **Article 87 (1)** of the **Constitution** as read with **section 85A** of the **Elections Act** which provides that appeals from the High Court shall lie to this Court on matters of law only.

42. Senior Counsel submitted that in the two memoranda of appeals, all the grounds therein invoke factual errors on the part of the trial court, as they all commence with a standard expression that: "**the judge erred in fact and law**" or **the learned Judge erred in law and in fact**".

43. In support of that submission, Senior Counsel cited several Supreme Court decisions as well as decisions of this Court, among them is **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI** (supra), where the Court stated:

"[63] ……..

By limiting the scope of appeals to the Court of Appeal to matters of law only, section 85 A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes".

44. Similarly, the Supreme Court in **ZACHARIA OKOTH OBADO v EDWARD AKONG'O OYUGI & 2 OTHERS [2014] eKLR** stated:

"[110] ……

The appellate court exceeded its mandate, by its conclusions of fact, thus contravening section 85 A of the Elections Act. The Court of Appeal accorded no deference to the High Court's findings on facts, and the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, with the exception of two polling stations..."

45. This Court's decision in **HON. MOHAMED ABDI MAHAMUD v AHMED ABDULLAHI MOHAMAD & 4 OTHERS [2018] eKLR** was also cited. In that decision, the Court stated:

"… in electoral matters, there is no such thing as 'questions of mixed law and fact and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent."

The Court went on to say that:

"…for a memorandum of appeal to pass muster and be compliant with section 85A, it must raise only questions of law which must be distinctly, concisely and precisely set forth. Anything short is deserving only of dismissal."

46. The Court was therefore urged to find that it lacks the requisite jurisdiction to hear and determine the appeals as drawn.

RESPONSE TO THE 1ST RESPONDENT'S SUBMISSIONS

47. Responding to the 1st respondent's submissions that this Court had no jurisdiction to hear and determine the appeals simply because of th manner in which the grounds of appeal had been couched, Mr. Mogaka submitted that the 1st respondent had not made an application to strike out the appeal in terms of **rule 19** of the **Court of Appeal (Election Petition) Rules, 2017** which states as follows:

"19 (1) A person affected by an election petition appeal may, within seven days from the date of service of the notice of appeal or record of appeal, as the case may be, apply to the Court to strike out the notice or the record of appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the time prescribed by these Rules.

(2)Where no application is filed within the period stipulated under sub-rule (1), a person may not raise the issue later".

48. Mr. Mogaka further submitted that only one point of law is sufficient to enable this Court allow the appeal; that some of the grounds of appeal were purely on points of law, and lastly, that drafting errors in a memorandum of appeal should not deprive a litigant of justice.

49. Mr. Lumatete told the court that grounds 4 and 7 in Election Petition No. 3 of 2018 raised issues of law only; that even if the Court were to strike out the rest, those two would remain, and are sufficient to enable this Court overturn the trial court's judgment.

50. Lastly, Mr. Lumatete submitted that by stating in the memorandum of appeal that the learned judge **"erred in law and fact**", the word "**and**" is conjunctive, such that this Court could consider and determine the issue of law in any ground of appeal and decline to consider the factual part thereof.

ANALYSIS OF THE SUBMISSIONS & DETERMINATION

51. The 1st respondent, having contested this Court's jurisdiction to hear and determine these appeals, we must of necessity proceed to consider that issue first. It is trite law that jurisdiction is everything and without it, a court cannot do anything. See **OWNERS OF MOTOR VESSEL "LILLIAN S" v CALTEX OIL (KENYA) LIMITED [1989] KLR 1**.

52. Both Mr. Mogaka and Mr. Lumatete submitted that since the 1st respondent had not filed any application to strike out the appeal or any ground thereof in terms of **rule 19** of this **Court's Election Petition Rules**, he was estopped from raising such an objection, since the appeal had already been admitted for hearing. Mr. Mogaka made reference to paragraph 81A of the Supreme Court's decision in **MUNYA'S** case where the Court stated:-

"[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the principles, before admitting the same for hearing and determination".

53. It is trite law that an issue of jurisdiction, as the one that was argued by the 1st respondent's counsel, can be raised at any time, in any manner, and even by the Court itself. See **ANAMI SILVERSE LISAMULA v INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2014] eKLR.**

54. We are satisfied that the issue of this Court's jurisdiction was properly raised by the 1st respondent's Senior Counsel, even in the absence of a formal application to strike out the petition. Having so held, we must now make a finding on the preliminary objection as regards this Court's jurisdiction to hear and determine the consolidated appeals.

55. It is not disputed that all the ten 10 grounds of appeal in the memorandum of appeal by **Stanley Muiruri Muthama** allege that the learned judge "**erred in law and fact**" in making various findings. And in the memorandum of appeal by the **I.E.B.C.** and **Abdalla Mwaruwa Chikophe,** only grounds 4 and 7 raise pure issues of law.

56. It is also a common ground that **section 85A** of the **Elections Act** limits the jurisdiction of this Court in appeals arising from Election Petitions to matters of law only. See **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI** (supra). In that matter, the Supreme Court, in considering the remit of this Court's jurisdiction under **section 85** of the **Elections Act,** stated 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 conclusion 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".

57. The aforesaid guiding principles of interpretation of **section 85A** of the **Elections Act** as propounded by the Supreme Court have been applied variously by this Court. In some instances, the Court has strongly deprecated the practice of mixing issues of law and fact in grounds of appeal in election petition appeals.

58. In **PIUS YATTANI WARIO v INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & ANOTHER, Election Petition No. 10 of 2018,** this Court stated:

"As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge* "erred in law and in fact"** ***in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds of appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented."

59. The Court went on to say:

"Where we are invited to determine whether the conclusions of fact by the trial court are based on the evidence on record or are so perverse that no reasonable tribunal, properly directing itself, would have come to the conclusion reached by the trial court, the approach that we shall adopt is that articulated by the Supreme Court of India in Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015. In that case it was held that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. The court expressed the proposition as follows:

"Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity."

60. In other instances, the Court has taken a more liberal interpretation of the guiding principles to **section 85A** as spelt out in **MUNYA's** case. In **WAVINYA NDETI & ANOTHER v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER [2018] eKLR**, this Court delivered itself thus:

"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."

In **MUNYA's** case, the Supreme Court said that it is for this Court to determine whether a memorandum of appeal conforms to the guiding principles set out in that decision. It is on that basis that we shall proceed to consider whether the two memoranda of appeal meet the threshold.

61. Regarding the first appeal, although all the grounds allege errors of law and fact, it is apparent that some of them directly relate to the application of constitutional and statutory provisions to a set of facts or evidence. For example, the first ground of appeal reads as follows:

"(i) The learned judge erred in law and fact in holding that the election of the member of National Assembly for Lamu West Constituency held on 8th August 2017 contravened the constitutional and statutory provisions governing elections."

62. There are also other grounds that relate to the conclusion arrived at by the trial judge concerning the appellant's membership of the National Assembly; such as ground (iii) which states that:

"(iii) The learned judge erred in law and fact in holding that the appellant, STANLEY MUIRURI MUTHAMA was not validly declared the electoral member of National Assembly for Lamu West Constituency."

63. Grounds (iv) and (v) allege that the learned judge erred in law and fact by decreeing that a certificate shall issue to the I.E.B.C. and the Speaker of the National Assembly, conveying the trial court's determination; and a direction that a fresh election be held. Ground (vi) relates to the trial court's interpretation of the discrepancies in Forms 35A and 35B in respect of the two polling stations aforesaid, which led to the nullification of the appellant's election.

64. Surely, all the above are clearly matters of law. We think it would be pedantic to summarily reject the entire appeal that raises such clear issues of law simply because the appellant's learned counsel did not craft the grounds as elegantly as required.

65. There are, however, some grounds of appeal that raise factual issues which we must decline to deal with, such as grounds (vii) and (viii) that allege that the learned judge erred in law and fact in holding that the 1st respondent suffered loss of 91 votes and

that his 68 votes could not be accounted for.

66. Turning to the joint memorandum of appeal by the I.E.B.C and the Returning Officer, it is only grounds 4 and 7 that are on issues of law. The two grounds are as follows:

"4. The Honourable judge relied on irrelevant consideration on arriving at his decision.

7. The learned judge erred in law by failing to evaluate and analyze all the evidence placed before him and in particular failing to consider the evidence of the 1st and 2nd respondents."

67. All the other grounds allege that the learned judge "erred in law and fact" in making various findings. But as we have said of the appellant's appeal, I.E.B.C. and the Returning Officer have also raised issues about the trial court's interpretation of constitutional and statutory provisions which therefore fall within this Court's jurisdiction.

68. In grounds 4 and 7, the 2nd and 3rd respondents argued that the learned judge took into account irrelevant considerations in arriving at the decision to nullify the election; and that the learned judge erred in law by failing to evaluate and analyze all the evidence placed before him before arriving at the impugned decision. The appellant also raised similar issues.

69. The learned judge's decision to nullify the election was based on discrepancies in the entries in Forms 35A and 35B. The discrepancies came to the fore upon completion of the scrutiny and recount exercise.

70. In summary, the Deputy Registrar's report that was adopted by the learned judge showed that the 1st respondent lost **63** votes in Lamu Fort Hall Polling Station No. 1 of 5; that the appellant gained **28** votes when his votes were inflated from **36** to **64** during the transposition of the results from Form 35A to Form 35B, which implied that the appellant gained a total of **91** votes while the 1st respondent gained 18 votes in Lamu County Assembly Hall Polling Station No. 3 of 3 when his votes were increased from **241** in form 35 A to **259** in form 35 B; that overall, the appellant was disadvantaged by **23** votes compared to the 1st respondent's loss of **91** votes. The learned judge concluded that "**68 votes cast for the Petitioner could not be accounted for. This is a significant number of votes considering that form 35 B indicates that the 3rd respondent received 11,084 votes followed by the Petitioner who garnered 10,939 votes"**.

71. In arriving at that conclusion and thereby nullifying the election of the appellant as member of the National Assembly for Lamu West Constituency, the learned judge made an error of law by failing to take into consideration the purpose of the scrutiny and recount exercise. In **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS** (Supra) the Supreme Court held that the purpose of recount and scrutiny is, *inter alia*, to determine who actually won the election, the validity of the votes, and the integrity of the election.

72. Even after taking into account all the transposition errors that were committed, the appellant was still the winner, though with a reduced margin of 141 votes, compared to the original one of 145 votes.

73. In **ZACHARIA OKOTH OBADO v EDWARD AKONG'O OYUGI & 2 OTHERS** (supra), the Supreme Court reiterated the constitutional Principle that a candidate who gets the majority of the votes is declared the winner, irrespective of the margin of votes.

74. Likewise, in **MUNYA'S** case, the Supreme Court observed:

"...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 a recount that reverses an election results against the candidate who had been declared a winner, would occasion the annulment of an election."

75. We agree with the appellant and the 2nd and 3rd respondents that in nullifying the said election, the learned judge took into account an irrelevant consideration. The discrepancy in the entries in Forms 35A and 35B was not sufficient cause to negate the will of the voters in Lamu West Constituency. It is not every irregularity or infraction of the law that is sufficient to nullify an election. See **RAILA AMOLO ODINGA v**

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 2 OTHERS [2017] eKLR.

76. Had the learned judge carefully considered whether the variation of the results as contained in Forms 35A and those in Forms 35B altered the results of the election after all the adjustments were made, following the scrutiny and recount exercise, he would have come to a different conclusion.

77. Lastly, the 2nd and 3rd respondents explained that the discrepancies between the results as contained in Forms 35A and 35B were due to human error. The learned judge rejected that explanation and held:

"151. It is my view that the defence of human error is not available to the respondents in this case as there was a deliberate move by the 1st and 2nd respondents to suppress the votes of the Petitioner".

78. With great respect to the learned judge, he did not allude to any evaluation and/or analysis of relevant evidence that led him to make such a profound finding. For a court to hold that an electoral official or body deliberately suppressed the votes of a candidate so as to deny him or her victory in a political contest, thus negating the will of the electorate, which is a grave election offence if sufficiently proved, there must be clear evidence to that effect. Such evidence must be clearly recorded so that it can be acted upon by the Directorate of Public Prosecutions. Although the learned judge cited this Court's decision in **MUNYA's** case, as to what constitutes human error and whether it is an absolute excuse for tallying mistakes or errors, we do not think that he rightly applied the principles enunciated therein. In that matter, this Court stated:

"137. ..... is human error an absolute excuse and justification for any tallying mistakes or errors in collating and tallying the results of elections" What is human error" Human error can simply be described as an error made by a human. However, people make mistakes, but why they make mistakes is important. In considering whether human error is an excuse for mistakes or error in electoral tallying, the basic premise is to determine whether the errors or mistakes are random, persistent, multiple or systemic. If the mistakes are premeditated and persistent, multiple and systemic, substantial and reveal a pattern or cause prejudice to any particular candidate, or affect the will of the people; then the integrity and credibility of the declared results comes into question".

79. The Court went on to state:

"141. It is our considered view that whereas human error may be an excuse for tallying mistakes, a party that raises this excuse must prove the existence of human error. Human error is not a blanket excuse that justifies and excuses any arithmetic, collating or tallying mistakes. Human error is neither an excuse for all errors or mistakes in transposition nor is it an excuse for failure to have the statutory forms duly signed by authorized persons. Simply stating that human error is responsible for the mistakes is not proof of existence of the error. The burden to prove the existence of human error rests on he who asserts. Human error must be proved. Human error is excusable if it is a single, isolated and random occurrence. . When the mistakes or errors

are multiple and persistent such mistakes cease to be human errors and point towards an inefficient, negligent, careless or even deliberate occurrence of the errors and this affects the credibility of the declared results. In the instant case, the mistakes on record do not reveal a pattern in favour of any one candidate but shows that there were multiple errors and mistake that go towards the overall integrity and credibility of the figures entered for each candidate. It is our considered view that due to the multiplicity of the mistakes, there are indications that human error is not a plausible explanation for all the irregularities identified. We cannot say that human error was the cause of the mistakes with certainty because there is no evidence. We find that the 2nd and 3rd respondents raised human error as an excuse but failed to discharge the burden to prove its existence."

80. There was a total of 122 Polling Stations in the Constituency and it was in only two of them that there were transposition errors. It was not shown that the mistakes were multiple and persistent or pre-meditated. We do not think, in the circumstances, there was any basis for directing that the trial Court's decision be transmitted to the Director of Public Prosecutions for action against the 2nd and 3rd respondents and/or their agents.

81. As regards costs, the trial court completely exonerated the appellant from all blame relating to the discrepancies in Forms 35A and 35B in the two polling stations. The learned judge stated:

"A perusal of the evidence presented to the court does not link him to the activity. I will therefore not make any adverse findings about this."

That finding notwithstanding, the trial court still slapped the appellant with an order to pay the 1st respondent costs of Kshs.1,500,000/=! To the extent that there was no other ground for nullifying the election apart from the aforesaid one, for which the appellant was not to blame at all, the order of costs against him was unwarranted, we so find.

82. Having carefully considered the entire record of appeal, submissions by counsel and the various authorities cited, we have come to the conclusion that the irregularities and/or non-compliance with electoral law complained of by the 1st respondent did not affect the result of the election of the appellant as member of the National Assembly for Lamu West Constituency. The order by the trial Court nullifying his election and ordering a fresh election is hereby quashed and set aside. We find that the said election was conducted in accordance with the required constitutional and statutory provisions. A certificate confirming that the appellant was duly elected as member of the National Assembly for Lamu West Constituency during the elections held on 8th August, 2017 shall issue in accordance with **section 86(1)** of the **Elections Act** and shall be forwarded to the I.E.B.C. and to the Speaker of the National Assembly.

83. We hereby allow the appeals, set aside the trial court's judgment in its entirety and substitute therefor an order dismissing the 1st respondent's Election Petition in the High Court. The 1st respondent shall bear the costs of the petition in the High Court, which are capped at

Kshs.3,000,000. The appellant shall be paid Kshs.1,500,000 and the 2nd and 3rd respondents shall be paid the other Kshs.1,500,00. The appellant as well as the 2nd and 3rd respondents are also awarded costs of this appeal as against the 1st respondent, which we cap at 1,500,000. The costs shall be shared equally between the appellant on the one hand and the 2nd and 3rd respondents on the other.

Dated and Delivered at Mombasa this 19th day of July 2018.

ALNASHIR VISRAM

…….....

JUDGE OF APPEAL

W. KARANJA

…….....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

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