**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

***(Coram: Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ)***

**PETITION NO. 17 OF 2018**

**— BETWEEN —**

**1. HON. CYPRIAN AWITI**

**2. HON. HAMILTON ORATA.....PETITIONERS**

**— AND —**

**1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

**2. THE RETURNING OFFICER, HOMABAY COUNTY**

**3. HON. JOSEPH OYUGI MAGWANGA**

**4. HON. JOSHUA ORERO.....RESPONDENTS**

***(Being an appeal from the Judgment and decree of the Court of Appeal (Waki, Sichale & Otieno-Odek, JJ.A) at Kisumu, delivered on 19 July 2018 in Court of Appeal Election Petition No. 5 of 2018)***

**JUDGMENT OF THE COURT**

**A. APPELLANTS' CASE**

**[1]** The Appellate Court, by its decision of 19 July 2018, affirmed the trial Court's decision annulling the petitioners' election as declared by the Independent Electoral and Boundaries Commission (1st respondent); and the petitioners then moved the Supreme Court in an ultimate appeal, resting primarily upon the following pillars:

(a) the Appellate Court, in its proceedings, had misinterpreted the terms of the *jurisdiction* entrusted to it under Section 85A of the Elections Act No. 24 of 2011;

(b) the Appellate Court had improperly interpreted and applied certain *past decisions of this Court*, relating to the conduct of elections;

(c) the Appellate Court had misapplied the provisions of *Articles 81, 86 and 87 of the Constitution;*

(d) the Appellate Court misapplied the terms of *Section 82 of the Elections Act and, in the process, made contradictory interpretation of Articles 81, 86 and 87 of the Constitution;*

(e) the Appellate Court compromised the *petitioners rights under Articles 25(c), 38, 50(2), 81, 86 and 87 of the Constitution,* by defaulting in taking into account *material evidence* that had similarly been *overlooked by the trial Judge* (in a Judgment of 20 February 2018) – and notwithstanding the Appellate Court's acknowledgment that such oversight constituted a *fundamental error of law;*

(f) the Appellate Court erred in law, in violation of Articles 38, 81, 86, 87 and 100 of the Constitution, by failing to consider the Judiciary's Deputy Registrar's *scrutiny report of 24 January 2018* – which report had shown that the Homa Bay County gubernatorial election was *free, fair, transparent and verifiable; and which report did confirm that, indeed, the petitioners herein won the election with a margin of over 21,000 votes;*

(g) in the proceedings of both the trial Court and the Appellate Court, there had been a violation of the petitioners rights under Article 27 of the Constitution, taking form in an application of *different standards of proof;*

(h) the Appellate Court, like the trial Court, had infringed the petitioners' rights under Article 50 of the Constitution – by shifting the *burden of proof* to the petitioners herein and the 1st and 2nd respondents, while failing to ensure that 3rd and 4th respondents had established a claim they were making, that the Independent Electoral and Boundaries Commission had acted in collusion with the petitioners, and authorized a forged set of electoral Forms 37A;

(i) the Appellate Court erred in law and infringed the petitioners' rights under Articles 27, 47 and 50 of the Constitution, by affirming a trial-Court decision made on the basis of *documents that had not been filed nor served upon the petitioners;*

(j) the Appellate Court erred in law and violated the petitioners' rights under Articles 27, 47 and 50 of the Constitution, by affirming a trial Court decision (of 20 February 2018) which had been founded upon a report (of 3rd and 4th respondents herein) wholly unknown to the respondents therein, and thus affirming *a decision which had totally excluded the Deputy Registrar's duly authorized scrutiny report of 24 January 2018;* and

(k) the Appellate Court erred in law by misinterpreting and misapplying the provisions of Section 83 of the Elections Act, and by endorsing the annulment of the petitioners' election, purely on the basis of *generalized allegations.*

**B. APPELLANTS: REMEDIES SOUGHT**

**[2]** The remedies sought by the appellants are as follows:

(a) that the petition of *appeal be allowed;*

(b) that the Judgment and Orders of the Appellate Court, of 19 July 2018, be *set aside;*

(c) that a declaration be made to the effect that the petitioner had been *duly-elected as Governor and Deputy Governor*, respectively, for Homa Bay County;

(d) that the *burden of costs* in this appeal be borne by the respondents; and

(e) that the *cost of the proceedings* in both the High Court and the Court of Appeal, be awarded to the petitioners herein.

**C. BACKGROUND RECORD**

**[3]** Following the tallying and counting of votes cast in the General Elections of 8 August 2017, the petitioners were declared by the 1st and 2nd respondents as the duly-elected Governor and Deputy-Governor respectively, being the first set of candidates in the contest, with 189,060 votes, and with a *winning margin of 21,113 votes.*

**[4]** The declared election outcome was contested by the 3rd and 4th respondents herein, before the trial Court *(Election Petition No. 1 of 2017)* — with the gravamen expressed as *irregularities, illegalities,* and *malpractices* and *infringements* of the provisions of the Constitution and the electoral law.

**[5]** The said contest invoked as the *central evidentiary elements,* such outcome as would emanate from *scrutiny and recount:* and so the *3rd and 4th respondents herein,* at the trial Court, *formally sought the same* — this *being partially allowed by way of judicial Orders,* on 7 November 2017. The said scrutiny culminated in a *Report,* prepared *for the Court* by its Deputy Registrar, and *regularly produced in that Court* on 24 January 2018.

**[5A]** This partial scrutiny, designed to provide a picture of the quality of the electoral process, covered the most material stations based on criteria proposed by 3rd and 4th respondents herein — these being 91 stations out of a total of 1022. It is common cause that the Deputy Registrar's scrutiny report attributes a clean bill of health to the conduct of election at the said polling stations. The report cites only minor or immaterial irregularities at the said polling stations, but — significantly — finds no alterations or improprieties on the Forms 37A, or any other forms. In effect, in the said 91 polling stations, the scrutiny report vindicates the appellants' claim that the election was conducted in accordance with the prescriptions of the Constitution, the Election Act, and the Elections Regulations.

**[6]** For wholly unclarified cause, however, the trial Court made *no reference to such a vital factual element* in arriving at its determination. Yet that Court, on 20 February 107, *annulled the said election,* reversing the declaration of the petitioners as the duly elected Governor and Deputy-Governor, respectively. The trial Court went further to issue the Order that, the public institutions and resources be engaged once again, in mounting *fresh elections* for the gubernatorial and deputy-gubernatorial offices of Homa Bay County.

**[7]** Such disregard of vital evidentiary matter, and consequently, arrival at a *decision not anchored on evidence,* was perceived by the petitioners herein as a distortion of the law governing the verdict of a Court; and they moved the Court of Appeal, seeking a reaffirmation of the law; they sought to set aside the decision emanating from the High Court.

**[8]** Such an initiative coincided with the 1st and 2nd respondents' *cross-appeal.* The two respondents, who were the authorized agents managing the gubernatorial election in question, had taken the definite stand that they had, indeed, conducted the impugned elections quite properly in all respects, and thus, the electoral outcomes as declared ought to be sustained.

**[9]** The Appellate Court, for its part, proceeded on the basis of its own restatement of the questions forming the appellants' gravamen, as follows:

(a) whether the trial Court had properly interpreted and applied Section 83 of the Elections Act, as read with a later amendment (Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017));

(b) had the trial Court exhausted its jurisdiction when it found that the Homa Bay gubernatorial election had not been conducted substantially in accordance with the Constitution and the electoral law"

(c) whether the trial Court *erred in failing to consider the Deputy Registrar's scrutiny and recount report of 24 January 2018;*

(d) whether the trial Court Judgment bears inconsistencies, in the light of Articles 81 and 86 of the Constitution, as read with Section 83 of the Election Act;

(e) whether the trial Court had a basis for declaring that the gubernatorial-election results for Homa Bay County were not accurate, and not credible or verifiable;

(f) whether the trial Court was in error, in *relying on documents emanating from persons who were not part of the duly-authorized electoral agency (from 3rd and 4th respondents herein)* — as bearing true and valid results for the Homa Bay County gubernatorial election;

(g) whether the trial Court erred in annulling the declaration of 1st appellant as the duly-elected Governor for Homa Bay County; and

(h) whether there was merit in the 3rd and 4th respondents' prayer that *they* are the ones to be declared as Governor and Deputy-Governor respectively, for Homa Bay County, on the basis of the General Elections of 8 August 2017.

**[10]** After considering the foregoing questions, the Appellate Court chose to *uphold the trial Court's decision* on most of the issues. The Court held, *inter alia,* that "the trial Court properly considered the qualitative aspect of the conduct of election to determine if the post-balloting process of collation, tallying, transposition and declaration of results substantially complied with Articles 81 and 86 of the Constitution".

**[11]** What was the Appellate Court's stand, regarding the vital *scrutiny report* which had been prepared and submitted to the trial Court, *upon that Court's specific direction"*

**[12]** The Court of Appeal's position was that the scrutiny and recount report *ought to have been considered and evaluated by the trial Court;* but it was evident to the Court that the said report *had not been* considered or evaluated by the trial Court.

**[13]** It was the Appellate Court's finding that some of the trial Court's determinations were *not supported by the evidence* on record: as an instance, *the finding that the election results were indeterminate,* and that the entire process of the counting, tallying and declaration was a "sham".

**[14]** However, notwithstanding such deprecation of the trial Court's legal edict not resting upon *established factual matter,* the Appellate Court held that it lay *beyond its jurisdiction* to consider and render decision upon such a scenario.

**[15]** Not only did the Appellate Court find fault with such non-reliance on evidence as a foundation for lawful edict, it also reprobated the trial Court's apparent recognition of *two sets of election results* — those emanating from the Independent Electoral and Boundaries Commission (1st respondent), the constitutional agency charged with the conduct of elections; and those given by 3rd and 4th respondents, *candidates in the election, and therefore bearers of obvious self-interest.*

**[16]** It is to be noted that, notwithstanding a foundation to the trial cause that did not rest upon the factual evidence emanating from scrutiny and recount, and that lay on an improper *parallel set of electoral results,* the Appellate Court still held that the 3rd and 4th respondents herein had, at the trial, discharged the *initial burden of proof,* so that the task of proof now fell squarely upon the appellants herein.

**[17]** Such is the context in which the Court of Appeal disallowed the appeal by the petitioners herein, holding *inter alia,* as follows:

***"[T]he Judgment delivered on 20 February 2018 in Homa Bay High Court Election Petition No. 1 of 2017 be and is hereby confirmed and upheld in its entirety."***

**[18]** The petitioners herein were aggrieved, and moved this Court to consider the relevant issues and reach a different finding.

**D. FILING OF CROSS-PETITIONS: REVIVING ORIGINAL CASE**

**[19]** That the circumstances attending this electoral cause were remarkable, is attested to by the filing of *cross-petitions* at this ultimate stage. By their cross-appeal of 31 August 2018, the *3rd and 4th respondents* make the following prayers:

(a) it be declared that they, the 3rd and 4th respondents, *were the validly- elected Governor and Deputy-Governor respectively;*

(b) the Director of Criminal Investigation be directed to investigate possible election offences by the appellants or their agents;

(c) the petition of appeal be dismissed;

(d) in the alternative, a declaration be issued that the Independent Electoral and Boundaries Commission is legally competent to conduct *fresh election* for the gubernatorial seat, Homa Bay County, within 60 days.

**[20]** The said cross-appeal bears grounds such as:

(a) the 'evidence' in the earlier elections shows that the cross-appellants *were the winners* of the election contest — and that the appellate Court failed to recognize this position;

(b) the Appellate Court ought to have held that 1st and 2nd respondents *had made electoral errors, and committed illegalities and irregularities, acting in collusion with the appellants herein;*

(c ) the Appellate Court was remiss in failing to hold the *scrutiny report* before the trial Court to have *contained wrong conclusions*, and to have been *formulated by a Deputy Registrar who as overreaching herself*, and *whose report was incurably defective.*

**[21]** Yet *another cross-appeal* came from the authorised electoral agencies, 1st and 2nd respondents (dated 8 August 2018). They asked that:

(a) the Judgment and Orders of the Appellate Court be set aside;

(b) a declaration, in respect of the gubernatorial elections for Homa Bay County, be made that *the genuine election results were those declared, transmitted and maintained by the Independent Electoral and Boundaries Commission;*

(c) a declaration be made that 2nd respondent had *correctly declared the petitioners as Governor and Deputy-Governor respectively*, on the basis of the elections of 8 August 2017.

**[22]** The *two cross-appellants* have stated that: the Court of Appeal failed to take into account the fact that 1st respondent herein is the *legal custodian of electoral materials,* and that the Commission's record *is* the official record, unless there is *proof* of wilful or negligent alteration of, or tampering with the documents or electoral materials kept; the Appellate Court erred in law in making an adverse finding against the Commission, on the basis of *forms or records emanating from 3rd and 4th respondents* — forms or records which fell well outside 1st and 2nd respondents' custody and control; the Appellate Court erred in upholding the trial Court's finding that the petitioners were not validly declared as Governor and Deputy-Governor respectively; the Court of Appeal had failed to recognize that once the Commission complied with the trial Court's Orders on access and scrutiny, and once it supplied the trial Court and the litigants with all electoral material including original documents, it had discharged is statutory duty, as well as the *evidential burden* resting upon it; the Appellate Court failed to comply with the terms of Article 50 of the Constitution, in annulling the election without any proof that 1st and 2nd respondents had altered the results; the Court of Appeal improperly applied Articles 38, 81, 82(2), 86 and 87 of the Constitution, in finding that 1st and 2nd respondents had not complied with electoral laws, in declaring the petitioners as validly elected as Governor and Deputy-Governor respectively; and the Appellate Court improperly applied the terms of Articles 82,86 and 87 of the Constitution, in holding that the electoral outcome declared by 1st and 2nd respondents was "indeterminate".

**[23]** Still evincing the angst evidenced by the cross-appeals, the 3rd and 4th respondents, on 31 July 2018, filed a Notice of Motion, to the intent that the *petition be struck out* under Article 163(4) (a) of the Constitution, for *want of jurisdiction;* and in the alternative the two respondents prayed for a *deposit of the colossal sum of Kshs.20 million*, by the appellants, in the costs account. And furthermore, the 3rd and 4th respondents sought Orders from this Court that the voters of Homa Bay County shall *return to the polling stations*, for the purpose of voting for *no other candidate than those who had been on the ballot listing on 8 August 2017*. The Court, however, was not the beneficiary of the crucial *rationale* of such a preference regarding the exercise of democratic choice.

**[24]** The 3rd and 4th respondents contended that the petition of appeal lacked a basis in law, for not raising any *novel constitutional issues.*

**[25]** The Court found it necessary to dispose of the 3rd and 4th respondents' motion as part of the complete package of the cause on appeal.

**E. CANVASSING THE CASE —IN SUMMARY**

***(a) Jurisdiction***

**[26]** Learned counsel, the Hon. Orengo, S.C. submitted that the Supreme Court's jurisdiction had been quite properly invoked under Article 163(4) (a) of the Constitution: for the appeal involved *issues of interpretation and application* of Articles 25 (c), 38, 47, 50, 81, 86, 87, 88 and 180 of the Constiuti0n — and as such issued had manifested themselves in the course of litigation in both the High Court and the Court of Appeal. (Counsel cited relevant case-authorities in that regard: ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others,*** [2012] eKLR; ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others,*** Sup. Ct. Petition No.10 of 2013; [2014] eKLR**;** and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others,*** S.C. Pet. No.2 of 2014; [2014] eKLR).

**[27]** Learned counsel recalled the issues falling for determination, as these arose from the Appellate Court's Judgment: the reference to Articles 81 and 86 of the Constitution, and Section 83 of the Elections Act — and the question of due compliance. Both the trial Court and the Appellate Court held that the conduct of elections *did* comply with the principles in Articles 81 and 86, but that non-compliance was apparent in relation to Section 83 of the Act, in view of certain *irregularities occurring*. It was the appellants' standpoint that the Supreme Court was being called upon to *interpret* Articles 25(c), 50(1), 81(e), 86, 87(1), 94(1) and 163(7) of the Constitution — all having been in issue before the Appellate Court. Learned counsel urged that it was essential to *interpret and apply* the provisions of the Elections Act and the pertinent rules — and that this was the course taken in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and Others***, [2014] eKLR, where the Supreme Court had thus observed:

***"The Elections Act and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and . . . in interpreting them, a Court of law cannot disengage from the Constitution".***

**[28]** Learned Senior Counsel Orengo, thereafter, broached the truly central *question of law* in this appeal: the *scrutiny report* formulated on the *Orders of the trial Court,* its *place in the evidence package,* and its *application in determining rights and entitlements in law.* He noted that the scrutiny report was ordered by *the trial Court* which thereafter, simply *overlooked its content,* when arriving at a decision bearing significant implications for the *rights and entitlements of parties.* Counsel submitted that *the High Court was in error,* noting that this fact was *duly remarked by the Court of Appeal.*

**[29]** The learned Senior Counsel submitted that it was not devoid of significance that Section 82 of the Elections Act provides for *scrutiny,* and scrutiny is a device of *verification of the integrity of an election,* which directly links up with the vital principles enshrined in Articles 81 and 86 of the Constitution. Counsel submitted that *both the first two superior Courts* were in error, by overlooking the crucial significance of the scrutiny report, and instead laying a premium on just the use of Forms 37A, 37B and 37C in the electoral process — forms in respect of which the Court's remarks rested on no detailed or precise evidence, and around which sheer conjecture formed the guiding factor.

***(b) Scrutiny Report: Questions of Evidence and Questions of Law***

**[30]** Counsel for the appellants urged that the Court of Appeal derives its jurisdiction in election appeals from Section 85A of the Elections Act, which sets limits to the same: to *matters of law* only. He urged that the meaning of the vital clause, "matters of law only", is by no means self-evident; but it is to be apprehended that a question of law is raised, where the *inferences and conclusions embodying edict,* have been drawn from evidence. On that premise, it was urged, a *question of law* is involved in a situation in which a conclusion is drawn which is not supported by established facts or evidence on record. Such a position, counsel submitted, had prevailed in this case, when the Appellate Court drew conclusions "so perverse … that no reasonable tribunal would arrive at the same."

**[31]** Learned Senior Counsel Ojienda submitted that both the High Court and the Court of Appeal had misinterpreted and misapplied Articles 25(c) and 50 of the Constitution, by denying the appellants a *fair hearing,* incorporating the *scrutiny and recount report* (dated 24 January 2018) which had been ordered, upon lawful representations before the High Court —and which "affirmed the appellants' win". It was urged to have been contrary to law and principle, when the Appellate Court held it to be a fundamental *error of law* for the trial Court to have declined to consider the scrutiny report, yet thereafter, mysteriously, declined to pronounce itself on the appellate consequence, invoking *lack of jurisdiction,* and ascribing such a perception to this being a "question of fact." Such a standpoint, counsel submitted, was a distinct *error of law:* "to fold their hands in the … face of a fundamental error of law, having [established the reality of such]."

**[32]** Learned Senior Counsel Ojienda submitted that, the moment the Appellate Court conceded that the failure to consider the scrutiny report was an *error of law,* the Court could not cite *lack of jurisdiction;* in the face of an error of law, it falls mandatorily upon the Appellate Court to rectify the error, "by going further to consider the evidence that was deliberately ignored by the trial Judge."

**[33]** Learned counsel thus depicted the scenario of *denial of fair hearing*: by shutting its eyes to the light of the scrutiny report, the first and second superior Courts failed to accord the appellants the opportunity to disprove the case filed in the High Court by 3rd and 4th respondents — notwithstanding that the High Court itself had ordered the conduct of scrutiny, on the basis that the scrutiny-outcome would establish whether or not the allegations in the petition were true.

**[34]** Learned counsel sought validation for the submissions on the causal relationship of fact-to-law, by drawing from this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others***, Petition No. 2B of 2014, [2014] eKLR (para. 92):

*"It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating evidence is not a mechanical one; …in considering 'matters of law',* ***an Appellate Court is not expected to shut its mind to the evidence on record.*** *We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the inquiry-scope of the appellate Judges, as they determine whether an election was held in conformity with the principles of the Constitution."*

**[35]** Learned counsel submitted that the Appellate Court had improperly shut its mind to the *evidence on record* which as it did concede, had *not* been considered. The import of the Appellate Court's decision would now be, counsel urged, that an election Court is at open-ended liberty to elect which evidence to have in regard — as there will be no judicial remedy even with an outrageous show of bias by the election Court, in the reception of evidence.

**[36]** Counsel submitted that there had been evidence on record, which, had the Appellate Court dutifully considered, it would not have arrived at the conclusion which has given rise to the appeal in the Supreme Court. It had been 3rd and 4th respondents' allegation that there had been a crafty alteration of polling results — with a 100-200-count variance in votes diverted from them to the appellants — and that there were "two sets of results" held by the election agency. In response to such allegation, the appellants had tabulated a comparative analysis of results — firstly, as alleged by 3rd respondent; then those emanating from the Independent Electoral and Boundaries Commission, in Forms 37A — and as carried in the scrutiny report which the trial Court declined to consider — in respect of the eight constituency-units of the entire Homa Bay County, for which the trial Court did order the conduct of scrutiny and recount.

**[37]** Learned counsel submitted that the said tabulation of polling results, which was founded upon the express Orders of a trial Court which subsequently spurned them, revealed that not a single polling station covered by the scrutiny process, disclosed significant vote-enumeration error; and that each and every polling counterfoil was traceable to the ballot papers.

**[38]** Counsel submitted that this Court should consider the fact that the scrutiny of the election process was not only conducted in accordance with Court Orders, but was a vital element in appreciating the integrity of the election, insofar as its object was to give the trial Court a clear picture as to whether the gubernatorial election in Homa Bay County was conducted in accordance with the *electoral laws*, and the pertinent *constitutional principles* incorporated in Articles 38, 81, 86 and 88 of the Constitution. Counsel drew on the depiction of the scrutiny process in ***Halsbury's Laws of England,*** 4th ed. (1990), pp. 12; 45: *scrutiny* is a *Court-supervised forensic investigation into the validity of votes cast, as a basis for determining the crucial question: who ought to have been proclaimed as the winner of the election"*

**[39]** To that very effect, learned counsel invoked the essence of *scrutiny* as typified by a member of this Bench in his extra-judicial reflections: *Chief Justice D. K. Maraga* in his chapter (VIII), "Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective", in Collins Odote and Linda Musumba (eds.), ***Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*** (Nairobi: IDLO and JTI, 2016), pp. 243-275:

***"[T]he principle objective of judicial scrutiny is to determine whether the electoral process was transparent, accountable and verifiable as required by the Constitution."***

**[40]** Such was the firm conceptual foundation upon which learned Senior Counsel Ojienda submitted that the trial Court's and the Appellate Court's choice to overlook the scrutiny report, constituted a violation of the appellants' *right of fair trial* — and bearing sufficient weight to dictate the outcome of this appeal. He urged that only the due compliance with the scrutiny directive would have facilitated the process of ascertainment of the voters' electoral choice; and where the voters' will is discernible from the scrutiny exercise, then the Court ought to preserve that election.

**[41]** To reinforce the submission that both the trial Court and the Appellate Court bore the imperative charge of according to the scrutiny report due consideration, learned counsel called in aid relevant authority: ***Esther Waithira Chege v. Manoah Karega Mboku & 2 Others,*** [2014] eKLR; and ***Musikari Nazi Kombo v. Moses Masika Wetangula & 2 Others***, Civil Appeal No. 43 of 2013. In the latter case, the vitality of such a scrutiny process was underlined in distinct terms:

***"[A]s long as [the scrutiny] was carried out in the presence of the parties' representatives and in accordance with the directions and under the superintendence of the election Court, such an exercise was as good as one carried out by the election Court itself."***

**[42]** To that same effect, learned counsel, the Hon. Amolo, submitted that the deliberate failure by the trial Court to consider vital evidence such as that from the scrutiny process, becomes a *question of law,* within the meaning of Section 85A of the Elections Act: and consequently, the Appellate Court becomes duty-bound to give consideration to such evidence as has been overlooked. Learned counsel reinforced his submission by recalling the principle stated in the Court of Appeal decision, ***Wavinja Ndeti & Another v. Independent Electoral and Boundaries Commission & 2 Others*** [2018] eKLR:

***"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, or probabilities material to an estimate of the evidence tendered before it, or … the Judge failed to appreciate an important and relevant point in the case, or … 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 …"***

**[43]** Learned counsel submitted that, on the basis of case authority, the Appellate Court *did have jurisdiction* — but which it defaulted in taking into account; and that such evidence had established that there had been no deliberate variation of gubernatorial election results for Homa Bay County. It followed, in that context, that the trial Judge's reference to deliberate alteration of results was wholly *unsupported by evidence.*

**[44]** Learned counsel, Mr. Amollo submitted that this Court should determine that the Appellate Court, as well as the trial Court, had erred; and the Court should on that basis, proceed to *rectify the error* — especially as the Supreme Court is not fettered, in the manner the Appellate Court considered itself to be, under Section 85A of the Elections Act.

**[45]** Still on the importance of the *scrutiny report,* learned counsel submitted that it was the veritable reflection of the *will of the voters* of Homa Bay County, and to overlook it would amount to a defeat of the democratic intent of the Constitution. It was urged that, so important was the electoral expression of the voters, that where minor errors were found in the course of scrutiny, this by itself was no basis for annulling an election. The High Court decision *(Majanja, J),* ***Wavinya Ndeti v. Independent Electoral and Boundaries Commission & 4 Others,*** Pet. No. 4 of 2013, was invoked in this regard, with the passage:

***"An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is***

***paramount is that even in the face of such errors, whether advertent or otherwise, … the ultimate will of the electorate is ascertained and upheld at all costs."***

***(c) Generalised Allegations***

**[46]** Counsel for the appellants submitted that the Appellate Court was in error, by annulling the appellants' election solely on the basis of *generalized allegations*, and without specifying the polling stations in respect of which applicable electoral procedures were not observed; and without specifying how the alleged failings affected the results, and constituted an infringement of the terms of Section 83 of the Elections Act — all such failings emerging even as the pertinent scrutiny report was held at bay. In aid of the argument that the trial Court had no basis for annulling the appellant's election, counsel recalled the Appellate Court's finding that *it had not been shown how alleged irregularities had affected the election results.* It was urged that the Appellate Court had specifically invoked such failure to specify the effect of alleged irregularity in respect of: alleged issue of Forms 37A that were not signed; alleged issue of unstamped Forms 37A; alleged issue of photocopies of Forms 37A; alleged issue of Forms 37A, 37B and 37C with differing specifications; and alleged interference with ballot boxes.

**[47]** Learned counsel submitted that the theme of *irregularities* bearing impact upon declared vote-outcomes, runs through the Appellate Court's Judgment: and that this indicates that both the trial and the Appellate Courts had an obligation to make definite findings on *how* any such irregularities had affected the results, and in what manner such would qualify the appellants' winning margin of more than 21,000 votes — and especially in the light of the *scrutiny report,* which in no respect supported the respondents' claims. This argument sought reliance on an earlier decision of the Court of Appeal, ***Bowen David Kangogo v. Sammy Kemboi Kipkeu & 2 Others*** [2018] eKLR, in which the following passage appears:

***"It would have been necessary … to demonstrate how a figure of 3,436 [winning] votes would have so diminished as to reverse the victory-outcome in favour of the petitioner. Without such a demonstration, the scenario is one in which an election was annulled on the ground of 'what might have been' and not necessarily 'what is'. This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts."***

***(d) Right to Fair Hearing***

**[48]** It was the appellant's submission that the failure by both the High Court and the Appellate Court to take into account the most crucial evidence —that *pertaining to irregularities, and lodged within the scrutiny process* — constituted a violation of their *non-derogable right to fair hearing*, in the terms of Articles 25(c) and 50 of the Constitution. In aid of this argument, learned counsel relied on comparative judicial experience, drawing from decisions of the European Court of Human Rights: ***Ruiz Torija v. Spain,*** Application No. 18390/91 and ***Hiro Balani v. Spain,*** Application No. 18064/91 — the former holding that an *erratically conceived Judgment* can occasion breach of the right to fair hearing, within the terms of Article 6(1) of the European Convention on Human Rights. And this Article was urged to be in similar terms to *Article 50(1) of the Constitution of Kenya.*

**[49]** Learned counsel urged that, whenever a Court defaults in considering submissions or evidence presented by a party, the resultant Judgment stands in violation of a litigant's *right to fair hearing,* as provided for in Article 50(1) — a right held inviolable by the terms of Article 25(c) of the Constitution. The violation in this respect, it was urged, took two separate dimensions: the *failure to consider the duly-authorised scrutiny report* of 24 January 2018 — which confirmed that the appellants did truly win the gubernatorial election — and, relying on *parallel and unauthorised documents,* purporting to be Forms 37A and emanating from 3rd and 4th respondents, while disallowing the valid Forms 37A from the Independent Electoral and Boundaries Commission (1st respondent).

***(e) Parallel Sets of Documents: Issues of Constitutionality***

**[50]** Learned counsel submitted that, by the terms of *Article 88 (4)* of the Constitution, only *one agency,* the Independent Electoral and Boundaries Commission (1st respondent), has been charged with the mandate of *conducting election; managing the balloting process; counting the votes cast; and tabulating the election results.* Counsel urged it to be contrary to law, that the trial Court should have annulled the appellants' election on the basis of information contained in *an alien version of Form 37A, produced by 3rd and 4th respondents* — and to the exclusion of the Forms 37A produced by the constitutionally-mandated agency. This, counsel submitted, was a decision in breach of the terms of *Article 88 of the Constitution:* a position clearly recognized by the Appellate Court when it held that "there can never be two sets of results, as the only results recognized in law [are those] announced by the

[Independent Electoral and Boundaries Commission]". The logical expectation, counsel urged, was that the Appellate Court would reverse the trial Court decision which *rested upon the notion of the existence of two sets of election results.* Counsel submitted that the Court of Appeal was in error, in its holding that the Forms 37A produced by 3rd and 4th respondents originated from 1st respondent, even though 1st respondent had categorically disowned such results, and no proof to the contrary was forthcoming.

**[51]** Further indictment of the standpoint of the two Courts was linked to the failure to take account of the *scrutiny report* which had been prepared, as properly directed by the trial Court. This report, counsel urged, had adequately responded to the question as to the authenticity of the content of the version of Forms 37A that emanated from *3rd and 4th respondents.*

**F. BACKING TO APPELLANTS' CASE: STANDPOINT OF 1ST AND 2ND RESPONDENTS**

**[52]** As the formal agencies in electoral motions, 1st and 2nd respondents raised certain issues of relevance before this Court, namely:

· the constitutional threshold for the nullification of election results;

· the status of electoral Forms 37A running in parallel with those emanating from the Independent Electoral and Boundaries Commission;

· the integrity of the irregularity-related considerations leading to the trial Court's and the Appellate Court's annulment of the gubernatorial election for Homa Bay County;

· the irregularity-related *scrutiny report* which, for unknown cause, was passed over by both the trial Court and the Appellate Court.

**[53]** Learned counsel submitted that 1st respondent, as it is *established and mandated under Article 88 of the Constitution,* with the conduct of elections, is to be constantly *presumed* to have duly discharged its tasks: save that a party challenging the outcome of an election may demonstrate a distortion in the election process, in accordance with the provisions of Section 83 of the Elections Act. And such demonstration is set to take the feature already portrayed by this Court, in ***Raila Odinga & Another v. Independent Electoral and Boundaries Commission,*** [2017] eKLR, the election being annulled "if [proof is furnished] that although the election was conducted substantially in accordance with the principles laid down in [the] Constitution as well as other written law on elections, it was *fraught with irregularities or illegalities that affected the result of the election."*

**[54]** Learned counsel urged that the foregoing principle was further reflected in another decision of this Court, ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR: and so the principle was now well settled, that an aggrieved party has to show in what precise manner *the alleged irregularities in the electoral process did affect the results as announced.* This it was submitted, is the crucial standard that must guide all Courts, where it is sought to overturn the results of an election claiming to have been conducted in a free and fair environment.

**[55]** From the foregoing statement regarding irregularity in elections, learned counsel submitted that it was incumbent upon 3rd and 4th respondents to *pinpoint the irregularity said to have afflicted the elections,* and to clearly discharge the *initial burden of proof* resting upon them — this legal burden being twofold: to identify the *shape and form of the irregularity,* and to demonstrate to the required standard, the *impact and effect of the said irregularity on the outcome of the election.* Only upon that premise, counsel urged, would an *evidential burden* shift to 1st and 2nd respondents.

**[56]** Such initial proof, learned counsel urged, had not been provided by 3rd and 4th respondents. More so, indeed, as the two had made the bare allegation that a distortion of the electoral record, especially in relation to Forms 37A, had occurred under the watch of 1st and 2nd respondents. Counsel submitted that, by the terms of the Election Offences Act, Section 6(a) and (k), Section 13(a) and (j) and by the Penal Code, Section 133, it is an *election offence* to make alterations to statutory documents and election materials; and it is established law that proof of such is strictly, *beyond reasonable doubt.* Counsel urged that 3rd and 4th respondents had, by no means, proved such an *offence* against 1st and 2nd respondents: yet it is precisely this notion of alteration of election material, attributed to 1st and 2nd respondents, that led the trial Court and the Appellate Court to annul the gubernatorial election results for Homa Bay County.

**[57]** Learned counsel submitted that the basis of annulment of the gubernatorial election result was distinctly unsustainable, besides, because the trial Court itself acknowledged that it was "unable to establish who, between the 1st and 2nd respondents or the 3rd and 4th respondents", altered the said election documents: and so, no evidence at all had been tendered implicating either the duly-authorised election officials, or the appellants herein, in the distribution of any improper or false election documents.

**[58]** In view of the points recounted in the foregoing two paragraphs, learned counsel have sought the application of two well-established schemes of the *law of evidence.* The first is prescribed in the Evidence Act (Cap. 80, Laws of Kenya), Section 3(4), as follows:

***"A fact is not proved when it is neither proved nor disproved."***

The argument is that 3rd and 4th respondents did not prove that 1st and 2nd respondents had fiddled with, or altered the gubernatorial election records in respect of Homa Bay County. And if they did not so prove, neither did the appellants herein have any obligation to prove otherwise. And therefore, the dependable factual position before the trial Court, the Appellate Court and the Supreme Court, is that there was *no basis for annulling the gubernatorial election* solely on the supposition that the responsible constitutional agency, the Independent Electoral and Boundaries Commission, had made some improper alteration on the Forms 37A.

**[59]** The foregoing argument is attended with a further legal proposition which rests on the established common law concept, *Omnia praesumuntur rite et solemniter esse acta:* "all acts are presumed to have been done rightly and regularly" (see ***Oxford Dictionary of Law,*** 7th ed. (Jonathan Law & Elizabeth A. Martin) (Oxford: Oxford University Press, 2009), p. 384).

**[60]** If the foregoing legal argument would dispose of any validity to the standpoint of 3rd and 4th respondents, learned counsel urged, the trial process in the High Court, and the Appellate Court process, would have no foundations in law, as these, avowedly, rest not on the crucial factual document in the shape of the *scrutiny report*, which was arbitrarily disregarded, as a basis for conclusions of legal significance.

**[61]** On the basis of the submissions and reasoning recounted hereinabove, learned counsel bring to this Court the specific request, that there is a meritorious basis for finding fault with the decision of the trial Court, and that of the Appellate Court which upheld the same: the effect being a finding of extraordinary *error of law* on the part of the latter Court, eminently meriting reversal, and reinstatement of the gubernatorial election results for Homa Bay County.

**G. COUNTERING APPELLANTS' CASE: FORUM FOR EVALUATING MERITS**

**[62]** The thrust of the appellants' case is clear enough; it is from subjecting the same to the test of the other side, that a final determination is to be made.

**[63]** It was the 3rd and 4th respondents' stand, as stated by learned counsel Mr. Kanjama, that the Supreme Court *lacks jurisdiction* in this matter — and so the decisions of the trial Court and the Appellate Court should be held to be final. Counsel urged that the appellants' mere allegations in the pleadings, that their cause fell within the terms of Article 163 (4) (a) of the Constitution, would not clothe this Court with jurisdiction — there being no question of *constitutional interpretation or application* being raised. Counsel made reference to the stated grounds in the memorandum of appeal, urging that, not a single issue of constitutional interpretation or application was entailed.

**[64]** To the question of proof and establishment of the original cause in the trial Court, in respect of which 1st and 2nd respondents had made submissions on governing law, learned counsel, Mr. Kanjama had a striking response: the evidence on record demonstrates how 1st and 2nd respondents worked in cahoots with the appellants herein, in "rigging the appellants into office"; how they "dismantled the safeguards … of the law … [for protecting] the integrity of the elections during tallying, counting and transmission"; how compromised electoral officials were deployed; and similar avowals.

**[65]** Quite in departure from the position taken by counsel for the appellants, Mr. Kanjama submitted that the 3rd and 4th respondents had properly discharged the *burden of proof* devolving to them — and to the required standard. All that was required of 3rd and 4th respondents, it was urged, was to show that the impugned election was not in strict compliance with the law, and was not free, fair, and credible; was not simple, accurate, verifiable, secure, accountable and transparent — and he placed this under the umbrella of a

Supreme Court decision, ***Raila Odinga & Another v. IEBC & 2 Others,*** Election No. 1 of 2017. Counsel submitted that the trial Court had been alive to such broad principles and had duly applied them in its own Judgment (para. 83) which the Appellate Court later affirmed in its Judgment (para. 127). He submitted that his clients' original petition had rested on definite evidence of *irregularities* and *illegalities* which had marked the conduct of the gubernatorial election — and that the trial Court rightly found them to have discharged both the *legal and the evidential burdens* falling due.

**[66]** Counsel maintained that such carbon copies of electoral forms as his clients had — which bore electoral figures differing from those on official record — were a valid and true reflection of the data of the electoral process: but proof of this claim is not an item of record before the trial Court.

**[67]** Is it normal for there to be two perfectly different statistical accounts relating to one and the same vote-enumeration process" It cannot be. To what record, in such a situation, ought *the Court* to resort" It must be the *official one,* emanating from the *duly-authorised agency* — and certainly not the one from *private source.* If, however, the data from the official source is suspect, then a *basis of ascertainment* is to be resorted to, by the *direction of the Court.* How did the trial Court seek to sort out this particular discrepancy" It is clear that the trial Court was alive to the puzzle, and resorted to the *judicious course,* by ordering the *conduct of a scrutiny, as a mode of unraveling the mystery.* Could the Court, then, properly resolve the question on the basis of the election data of *private origin"* That would be injudicious, and is not the lawful mode of resolution. The Court would have to rely on a properly-conducted *scrutiny,* which it should order to be conducted. Such a perception coincides more with the submissions on the appellants' side, than those on the 3rd and 4th respondents' side.

**[68]** Learned counsel did not advert to the fact that the trial Judge, after making an Order for the conduct of scrutiny, *elected to overlook the scrutiny report* — which squarely dealt with the question of *irregularities in polling,* and which *supported the standpoint of the appellants* herein — and to focus his attention on certain *individual instances of irregularity:* lack of stamp-marks on Forms 37A; existence of photocopies; blank Forms 37A; discrepancies between Forms 37C and 37A; use of non-official seals; missing signatures of officials.

**[69]** However, learned counsel, Mr. Kanjama maintained that the trial Judge had no obligation to specify the degree to which such noted irregularities had, in fact, affected the election results, because the Court was then dealing only with *qualitative issues,* and so, merely needed to form a mental impression that the said failings had affected the integrity of the election results.

**[70]** That is the context in which Mr. Kanjama proceeded to urge that the 3rd and 4th respondents had duly discharged the *burden of proof* resting upon them, *shifting the evidential burden* to the appellants herein. Such a position was endorsed by the trial Court, and later affirmed by the Appellate Court. So, learned counsel urged, the task fell to the appellants herein to demonstrate that the impugned election was conducted in compliance with the law, and the irregularities apparent had no effect on the declared results. They failed in this task, in Mr. Kanjama's submission, by way of non-production of some declaration forms, and of non-production of certain particular witnesses.

**[71]** Notwithstanding that the overlooked *scrutiny report* had been judicially authorized during formal proceedings, learned counsel, Mr. Kanjama committed some time to censuring it: as *it related to no more than 91 polling stations, it was no panacea for "all electoral illegalities and irregularities … established"; moreover, the original petition had "raised both qualitative and quantitative issues to impeach the electoral results"; the 3rd and 4th respondents "presented witnesses who were thoroughly cross-examined", laying a proper basis for the petition; the scrutiny report was just one piece of evidence "and does not obliterate … the other pieces of evidence".*

**[72]** Indeed, learned counsel brought forward at least one unusual justification for the disregard of the Court-authorised scrutiny report: *that the High Court's Deputy Registrar had overstepped her remit, and usurped the jurisdiction of the election Court; that the Deputy Registrar should not have recorded certain findings; and the like.*

**[73]** From such an assertion by learned counsel, a significant *inference* falls due: that, at an *essentially private forum* (to which 3rd and 4th respondents would have had access), a resolution, that subsequently found its way into High Court proceedings, was made to *defeat the outcome of the scrutiny.* So the scrutiny, though originally a *Court-decreed process* that would cast bright light upon the judicial process, set in the spirit of *transparent procedure,* was mysteriously diverted from open forum, to the detriment of the appellants herein, and to the advantage of 3rd and 4th respondents. It is pertinent, in the circumstances, to pose the question: Was the trial conducted under the regular motions of the judicial process" Or was it effected at the behest of one party"

**[74]** Of such an apparent scenario, before this Supreme Court which has its position at the apex of the scheme of the crucial socio-political value — justice — it is meet that we register clear deprecation.

**H. ESSENTIAL ISSUES: SUMMARY**

**[75]** The foregoing account, with its pertinent observations at relevant stages, discloses a set of issues for analysis, as a basis for concluding this case. These may be set out as follows:

*(a) Does the Supreme Court have jurisdiction to hear and determine this electoral matter"*

*(b) Was the Appellate Court in error, in failing to consider the scrutiny report, upon finding that the trial Court had passed over the said report"*

*(c) Is it necessary for this Court to undertake an examination of the said scrutiny report"*

*(d) Was there a violation of the appellant's rights of fair hearing, under Articles 25 (c) and 50 of the Constitution, by the first two superior Courts failing to consider material evidence lawfully recorded — and material that would shed light on the condition of irregularity, the primary factor in the trial cause"*

*(e) Was there a violation of Article 88 (4) of the Constitution, in preferring the election data records of 3rd and 4th respondents, in place of the official ones held by the Independent Electoral and Boundaries Commission"*

*(f) What are the appropriate reliefs, and Orders regarding costs"*

**I. ANALYSIS**

***(a) Jurisdiction***

**[76]** This Court's jurisdiction, in its essence, centres on the *interpretation and application of the Constitution,* and, matters falling in such a category have not been demarcated in terms of subject-matter. Any matter that requires the interpretation or application of the Constitution comes within the Court's jurisdiction, and it is of no moment that the immediate contest falls within the domain of civil law, criminal law, electoral law, admiralty law, or any other sphere of law. It is in this context that, to-date, many causes relating to elections have come up for resolution before this Court. (Examples include: ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others***, S.C. Pet. No. 2 of 2014; [2014] eKLR; ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others,*** S.C. Pet. No. 10 of 2013; [2014] eKLR; ***Raila Odinga & Another v. EIBC & 2 Others,*** S.C. Pet. No. 1 of 2017; ***Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others,*** [2014] eKLR; ***Nathif Jama Adam v. Abidkhaim Osman Mohamed & 3 Others,*** [2014] eKLR).

**[77]** Having noted, however, the constant urge among election candidates to go in quest of the Supreme Court forum, we have had to more clearly evaluate the principles of jurisdiction, and to clarify the position in a number of cases. Recently in ***Zebedeo John Opore v. Independent Electoral and Boundaries Commission and 2 Others,*** Sup. Ct. Pet. No. 32 of 2018, we thus clarified the terms of the Supreme Court Jurisdiction in election matters [paras. 56; 57]:

*"We are alive … to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the Constitution, and from the electoral laws. This generality, however, has to be crystallised into* ***clearly-defined normative prescription,*** *before the Supreme Court will take up an election appeal as a matter of course, by virtue of the terms of Article 163 (4) (a) of the Constitution.*

*"Certain* ***principles*** *emerge from the terms of this Judgment, as follows:*

*(a) In election petitions before this Court, a party may not invoke the Court's jurisdiction under Article 163 (4) (a), where the trial*

*Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an* ***application*** *or interpretation of the Constitution.*

***(b)*** *The Articles of the Constitution cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal; in other words,* ***the Article in question must have remained a central theme of constitutional controversy,*** *in the life of the cause.*

*(c) A party seeking this Court's intervention has to indicate* ***how*** *the Court of Appeal misinterpreted or misapplied the Constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial Court.*

(d) *As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision".*

**[78]** Now on the foregoing criteria, does this Court have *jurisdiction* in respect of the instant case"

**[79]** It is clear to us that the core question in the appeal is: *what is the relevance of the scrutiny report of 24 January 2018 to the proper disposal of the election dispute"* It is common cause that the trial Judge passed over the scrutiny report, notwithstanding that he himself had ordered the preparation of the same, as *part of the judicial proceedings,* upon the request of parties (indeed, none other than *3rd and 4th respondents),* seeking fair trial culminating in the dispensation of *justice.* Such a position was rightly confirmed by the Court of Appeal, though it attached no significance to the omission, save that the Appellate Court remarked the *impropriety of such omission,* typifying as *an error.* More significantly, the Appellate Court stated that it *lacked jurisdiction,* under Section 85 A of the Elections Act, to engage in any action whatsoever regarding the scrutiny-evidence which had been excluded in the trial. *Now the appellants' case is that, had the scrutiny report been taken into account, then, quite plainly, it would have been found that the gubernatorial election had been dutifully conducted, substantially in accord with the terms of Article 86 (a) of the Constitution, and that the electoral process was transparent, accountable and verifiable.*

**[80]** This, in our view, is a clear case of *interpretation and application of the Constitution,* notably of the terms of Article 86(a) thereof, though also in relation to the whole set of provisions that guarantee *fair trial* and the dispensation of *principles of justice* — a cardinal principle of the Constitution (Article 10 (2) (2)). And so, the matter, quite properly, falls to *the Supreme Court,* within the terms of Article 163 (4) (a) of the Constitution.

**[80A]** Besides, by dint of Sections 20 and 21 of the Supreme Court Act, 2011 (Act No. 7 of 2011), as well as Rule 3 (5) of the Supreme Court Rules, 2012, this Court, in the interest of justice, has an obligation to consider whether the trial Court's conclusions that the alleged irregularities had affected the election results, carried validity, and warranted the annulment of the election.

**[80B]** The Supreme Court Act, 2011 (s. 20) thus provides

***"Appeals to the Supreme Court may, where the Court considers it necessary, proceed by way of a fresh hearing".***

And Section 21 of the Act thus provides:

***"(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court —***

***(a) may make any order, or grant any relief, that could have been made or granted by the court or tribunal; and***

***(b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163 (4) (b) of the Constitution."***

**[81]** The *scrutiny question,* insofar as it touches upon the *integrity of the electoral process,* and touches on the *political rights* of parties (Constitution, Article 38), points directly to the Supreme Court in relation to the *interpretation* and *application* of a range of provisions of the Constitution. As we have recently noted in another case, ***Alfred Nyaga Mutua & 2 Others v. Wavinya Ndeti &***

***Another,*** Sup. Ct. Pet. No. 11 of 2018, *an appeal based upon the question of verifiability of an election, and upon the terms of Article 86 (a) of the Constitution, verily invokes the Supreme Court's Jurisdiction under Article 163 (4) (a) of the charter.*

***(b) The Court of Appeal, and the Scrutiny Report***

**[82]** It is to be recalled that the 3rd and 4th respondents herein, just after they lodged their petition in the trial Court, challenging the election outcome favouring the appellants, and in quest of larger momentum to their case, filed *two applications* (on 5 and 6 September 2017 respectively): one for the Independent Electoral and Boundaries Commission to produce the originals of Forms 32A, 37A, 37B and 37C relating to the Homa Bay gubernatorial election; the other (which lies at the centre of the instant appeal), that *"there be a scrutiny of votes cast in all, or [in] randomly-selected polling stations [as proposed in] the [original] petition"*.

**[83]** The trial Court, in its Ruling of 7 November 2017, dismissed one of the two applications (that of 5 September 2017), but *allowed partial scrutiny and recount*: this was duly conducted under the superintendency of that Court's Deputy Registrar, who duly compiled a report and filed it in the trial Court, on 24 January 2018.

**[84]** Vital as the *scrutiny report* was, for the evaluation of the 3rd and 4th respondents' charge of *electoral irregularity*; notwithstanding that such a report had originated from *their own formal request* in the course of *regular Court proceedings;* and despite the fact that the said scrutiny report was the culmination of *regular Court process* conducted with the *inputs of all the parties*, the trial Judge, quite inexplicably, made *no reference to it*, when he invoked *electoral irregularity* as a basis for annulling the election in question. The foregoing depiction of the scenario surrounding the trial Judge's Judgment, would bespeak a *definite and glaring error* in the finding that came forth from the High Court — and this is the very essence of the gravamen of the appeal before this Supreme Court. It is being contended that the process of application of evidence embodied in the scrutiny report, to an electoral dispute that focuses on clear terms of the Constitution and the law, is a "question of law" in every respect, and which, therefore, properly came within the *jurisdiction of the Appellate Court.* Learned counsel for the appellants urged that the Court of Appeal was in grave error, by abstaining from resolving questions related to the said *scrutiny report*, on the basis that such a report is only a phenomenon of *fact*, whereas that Court's jurisdiction was limited to resolving questions of *law*. The Appellate Court's position is clearly stated in its Judgment (paras. 99 and 100):

***"In the instant appeal, a question that arises is whether the trial Court ignored and failed to consider the Deputy Registrar's scrutiny and recount report dated 24 January 2018 and thereby arrived at a wrong conclusion based on the evidence on record. Did the trial Court consider and evaluate the Deputy Registrar's Report"***

***" … Our plain reading of paragraph 160 of the trial Court's Judgment shows that the Court did not consider and evaluate the Deputy Registrar's scrutiny and recount report dated 24 January 2018. It is manifest that the trial Court neither considered, nor evaluated this report".***

**[85]** That the Appellate Court appreciated the serious consequence, in relation to the ascertainment of the merits of the case, of the trial Courts failure to take the scrutiny report into account, is clear from the Appellate Court's Judgment (para. 102):

*"[T]he trial Court neither mentioned nor alluded to the existence of the Deputy Registrar's Scrutiny and Recount Report dated 24 January 2018.* ***Emerging jurisprudence shows that a judicial scrutiny and recount report must be considered, evaluated and weighted with all other evidence on recorded.*** *Guided by the emerging jurisprudence, we find that* ***the trial Court erred in law in failing to mention, consider and evaluate the Deputy Registrar's Scrutiny and Recount Report dated 24 January 2018".***

**[86]** Notwithstanding such a specific finding of error of law on the part of the trial Court, the Appellate Court sustained the trial-Court finding, maintaining that it *lacked jurisdiction* to disturb *findings of fact* by that Court. Declining to exercise its appellate jurisdiction, the Court thus observed:

*"The trial Court at paragraph 183 of the Judgment made a finding that the Homa Bay gubernatorial election result was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the 1st and 2nd respondents was a sham. Is this qualitative finding on the integrity and credibility of the declared results supported by the evidence on record" Is there cogent evidence that the declared results were affected by the identified irregularities" Is there evidence that the tallying process was flawed. The answers to these questions are contestations of primary facts and* ***we have no jurisdiction to delve into***

***these issues and interfere with the trial Court's findings of fact".***

**[87]** Such is the basis upon which the Appellate Court proceeded to hold that, even though the trial Court *was in error* when it overlooked the scrutiny report, this was only a *matter of fact*, not falling within its jurisdiction.

**[88]** Just as we have noted the questions of law turning on the scrutiny report, that fell to *the trial Court*, so we attribute the same to the *Appellate Court*. The Appellate Court, however, overlooks the essence of such questions of law, as flow from the *constitutional process*, and from the rights and *obligations annexed to the electoral process.* There would be *no basis*, in such a context, for the Appellate Court to *abdicate jurisdiction*, in particular, *after it has duly ascertained that the trial Court had made errors of law.*

***(c) The Supreme Court, and the Scrutiny Question***

**[89]** The record is abundantly clear, that the trial Court decision proceeded on the basis that the Homa Bay County gubernatorial election had been *vitiated by irregularities*, even though the most crucial evidence in that regard, which could only come through *scrutiny*, had been overlooked, by taking no account of the duly-prepared *scrutiny report.* As already remarked, *the trial Court's decision could not be sustained in law*, especially as it betokened an *unfair trial*, in which the requirements of the Constitution had been overlooked. A determination so *floppily based, one not resting upon the critical evidence*, and one *not according the parties fair hearing*, was a clear instance inviting *annulment;* and the Appellate Court is to be held to have erred as a *matter of law*, in sustaining such a decision. The Appellate Court had overlooked the substantial legal dimensions of findings affecting *constitutional rights*, without considering the *supporting evidence;* and its decision was left resting on *bare claims* originating from speculation.

**[90]** It is to be noted in this context, that it is the appellants' case that the Appellate Court, by overlooking the significance of the *scrutiny report*, which evaluated the reality and cogency of the allegations made against them, had subjected them to *unfair hearing*, in the terms of Article 50 (1) of the Constitution; and had failed to adhere to the constitutional dictate in Article 25 (c) — holding out this right as *inviolable.*

**J. DETERMINATION**

**[91]** Upon close examination of the pillars of the trial-Court decision, and the Appellate Court's perspective on the same, it is evident that a systematic application of established precedent, and of the governing principles of the Constitution and the law, would lead to the inference that both the two superior Courts were in error, and that their decisions *cannot stand.*

**[92]** The treatment of the scrutiny report by the two superior Courts, manifestly stands in departure from both *law and principle.* It is now well established that once a trial Court orders the conduct of scrutiny, the resulting findings are as good as the findings of the Court itself ¾ and that, on this account, the Court *must* take such findings into account. This position was, indeed, duly recognized by the Appellate Court, when it held that the trial Court had committed an *error of law.* Would it be right, in the circumstances, that the Appellate Court was altogether limited in judicial options, in the light of such error of law" And in the circumstances, was it a tenable standpoint, that had the Appellate Court taken a definite stand, and drawn precise conclusions touching on the probative value of the emerging evidence, then that Court would be overstepping its jurisdiction as provided for in Section 85A of the Elections Act, 2011 (Act No. 24 of 2011) (Rev. ed. 2016), by improperly adverting to "matters of fact"" It cannot be so: for, the spectacle of the trial Court making a finding, or an observation on a scrutiny report founded upon its own Ruling and Orders of 7 November 2017, would indeed be a *matter of law* — falling well within the Appellate Court's jurisdiction.

**[93]** That the foregoing proposition portrays the governing law, may be gleaned from this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others,*** Sup. Ct. Pet. No. 2B of 2014, [2014] eKLR which thus states:

***"From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase 'matters of law' as follows:***

**….**

***(c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record….***

***"[T]he 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."***

**[94]** Quite evidently, the conclusions of the trial Judge, in the instant matter, were *not supported by any evidence from the scrutiny report* which had been prepared in compliance with his Orders. It is a tenable proposition that hardly any reasonable tribunal would have arrived at the trial Judge's conclusion, which did not rest on the *irregularity-querying scrutiny report*. So there was, quite plainly, a *question of law*, devolving to the mandate of the Appellate Court.

**[94A]** Moreover, in the absence of the findings of the scrutiny report, the trial Court had no reference-point in judging the magnitude of the impact of any electoral irregularity such as may have prevailed, upon the electoral outcome. Thus, there was no basis in law for the Order of annulment — a crucial issue of law that was overlooked by the Appellate Court as well.

**[95]** It was a distinct error of law for both the trial Court and the Appellate Court to forego the moment that reaffirmed the vitality of the scrutiny process in an election dispute. This Court, in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others***, Sup. Ct. Pet. No. 2B of 2014; [2014] eKLR, had clearly stated the purpose of scrutiny and recount, in an election dispute, as follows (para. 137):

***"In*** *Raila Odinga v. Uhuru Kenyatta and 3 Others,* Sup. Ct. Pet. No. 5 of 2013, ***this Court explained why it had made an Order*** *suo motu* ***for scrutiny …. The Court stated:***

***'The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof'."***

**[96]** Similarly in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others,*** Sup. Ct. Pet. No. 2B of 2014; [2014] eKLR, the Supreme Court restated the emerging jurisprudence on the purpose and essence of scrutiny and recount:

*(i) it enables the Court to ascertain whether the allegations, irregularities or breaches of the law complained of, are valid;*

*(ii) it enables the Court to ascertain the valid votes cast in favour of each candidate;*

*(iii) it is not meant to unearth new evidence to sustain a petition; its purpose is to enable the Court to verify the allegations made by the parties — allegations which must be founded on formal pleadings;*

*(iv) it is one of the devices for enabling the Court to ascertain whether an election has been conducted* ***in accordance with constitutional*** *principles, and to establish that, indeed, the declared result was a reflection of the* ***electorate's will at the time of voting;***

*(v) it is a mechanism of proportionate design, for rectifying election results, and declaring the valid outcome — a process which obviates the necessity to annul the entire election outcome, or, alternatively, the validation of an erroneous electoral outcome.*

**[97]** So, on the basis of the explication in the ***Munya Case***, it is clear that a significant measure of *variation to the election result* can be effected on the basis of *scrutiny and recount*, (para. 202):

*"Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election – outcome.* ***To nullify an election in such a context would fly in the face of Article 180 (4) of the Constitution."***

**[98]** So important is the scrutiny process, the Supreme Court has thus recently indicated, in ***Abdirahman Ibrahim Mohamud v. Mohamed Ahmed Kolosh & 2 Others,*** Pet. No. 26 of 2018 (para. 66):

***"[I]t is clear that the process of scrutiny has not pointed to any contestant as a winner:*** *the position is blurred and distinctly uncertain."*

**[99]** The vital place of *scrutiny* in electoral dispute-settlement has yet again, only so recently, in ***Clement Kungu Waibara v. Hon. Annie Wanjiku Kibeh & 2 Others,*** Sup. Ct. Pet. No. 24 of 2018, been remarked by this Court (para. 52):

*"In view of such considerations, we are in agreement with the Appellate Court's standpoint that* ***the trial Court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election.*** *It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical."*

**[100]** It emerges that the disregard of the scrutiny report by the trial Court, and the effective approbation of such indifference by the Appellate Court, was a grave *error of law,* in the light of the legal principles on the question, as upheld in this Court. In ***Zachariah Okoth Obado v. Edward Akongo Oyugi & 2 Others,*** Sup. Ct. Pet. No. 4 of 2014; [2014] eKLR, the relevant principle had been sanctioned in no uncertain terms:

*"[A]s a principle of electoral law, ….* ***an election is not to be annulled except on cogent and ascertained factual premises. It is by this principle, that the Constitution protects the voters' enfranchisement under Article 38 (1)."***

**[101]** Further reaffirmation of a principle so central to the citizen's political and constitutional entitlement and comfort, is by no means inapposite: a crucial device for ascertaining whether there exist cogent factual premises to support the annulment of an election, is the *scrutiny and recount.* On this account, an Order for scrutiny is a distinctly appropriate, reliable, qualitative and objective process for assuring the credibility, verifiability, transparency and accuracy of the electoral process: and this responds to the terms of the law, apart from constituting the general background of principle and policy that must attend the more structurally-set elements of the electoral process.

**[102]** Had the trial Court kept faith with its Orders for scrutiny, the trial process would have taken the right course, as a genuine picture would have emerged regarding the compatibility of Forms A emanating from 3rd and 4th respondents, with the record posted and published by the Independent Electoral and Boundaries Commission.

**[103]** Neither in the application of the provisions of the Constitution nor of the pertinent law, did the two superior Courts accord deference, firstly, to the *prima facie* legitimacy of official records emanating from the Independent Electoral and Boundaries Commission; secondly, to the established procedure for evaluating evidence bearing upon claims of irregular conduct of election; and thirdly, to the relevant law regarding proof in electoral causes.

**[104]** It is not, at this stage, possible to sustain the findings by the two superior Courts, as they run counter to recognized law — quite apart from constituting an improper compromise to the electoral rights of the voters who turned up on 8 August 2017, and duly cast their votes. Electoral rights take effect on a date legitimately set, by the terms of the Constitution; and thus, such rights are for fulfilment, essentially, on *that particular day.* As has been judicially remarked in a pertinent comparative instance, from the State Supreme Court of Connecticut in the United States of America, ***Steven Bortner v. Town of Town of Woodbudge,*** 250 Conn. 241, 736A 2d. 104:

***"[An election is a snapshot that] reflects the will of the people as recorded on that particular day … as expressed by the electors who voted on that date … [which can never be] duplicated [on any other date]. Thus when a court Orders a new election, it is really ordering a different election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated Election Day."***

**[105]** Precisely such, is the pertinent principle on the instant occasion. The law stands squarely on the side of maintaining the voters' mandate as expressed on 8 August, 2017; and thus Orders fall due accordingly.

**K. QUESTION OF COSTS**

**[105A]** The 3rd and 4th respondents had invited the Court — in the event their position prevailed — to review the costs awarded by the

Appellate Court, still in their favour. They thus urged:

***"The learned Judges of the Court of Appeal erred in law by [failing] to certify costs for four Advocates and by further reducing and*** *capping the petitioners' costs* ***[at] Kshs.5 million subject to taxation, without demonstrating any error of law by the election Court as required by Article 87 of the Constitution … as read together with Sections 84 and 85A of the Elections Act, 2011".***

**[105B]** It was the submission of 3rd and 4th respondents that the trial Court too had improperly failed to certify costs for four Advocates. The basis of this argument was that election petitions are costly processes, which ought to culminate in commensurate compensation to successful parties. They contended that the mounting of election petitions calls for much labour, as well as much care and attention on the party of counsel, quite apart from their significance for the public interest: and so, such proceedings inherently bear elevated values.

**[105C]** Ought this Court to be guided by such points of view on *costs,* in the instant case — even though, quite clearly, the beneficiaries would be different"

**[105D]** We must consider the emerging question, in the context of this Court's earlier standpoints. In ***Suleiman Said Shabhal v. Independent Electoral and Boundaries Commission & 3 Others,*** [2014] eKLR, the following passage appears [para. 55]:

***"Section 21 (2) of the Supreme Court Act grants this Court the discretion to make any ancillary or interlocutory Orders, including any Orders as to costs, as it thinks fit to grant …."***

**[105E]** It is clear that the question of *costs* remains a live issue in the disposal of electoral matters, in view of the overall quest for *justice.* So the Appellate Court, in ***Martha Wangari Karua v. Independent Electoral and Boundaries Commission and 3 Others,*** [2018] eKLR thus observed:

***"In our understanding, the*** *capping of costs* ***provided [for] under Rule 30 of the Petition Rules, 2017 was to ensure that parties approach costs without fear of being subjected to excessive costs …. Capping of costs was intended to*** *curb the practice of awarding large sums in costs. High costs are an impediment to the right of access to justice* ***…."***

**[105F]** Litigation on electoral matters is a commonplace phenomenon in Kenya, and its general implications in terms of *costs* — and so, in terms of ready access to avenues of justice before the Courts — are sufficiently notorious to be an item commending itself to *judicial notice.* On that basis, we deem it meet to formulate a set of guiding principles for the award of costs in electoral matters, as follows:

*(a) the general rule that* ***"costs follow the event"*** *is applicable in election matters in which no special circumstances are apparent;*

*(b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;*

*(c) a discretion vests in the election Court to prescribe a ceiling for the award of costs;*

*(d) in setting a ceiling to the award of costs, the election Court stands to be guided by certain considerations, namely:*

*(i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;*

*(ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;*

*(iii) costs are not to bear a punitive profile;*

*(iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;*

*(v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;*

*(vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;*

*(vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.*

**L. ORDERS**

**[106]** The requisite Orders flowing from our analysis and findings in this case are as follows:

***(a) The 3rd and 4th respondents' prayer in their Notice of Motion of 31 July 2018, seeking —***

*"a declaration that the IEBC as currently constituted is legally competent to conduct a fresh Homa Bay gubernatorial election …"*

***is hereby disallowed.***

***(b) The 3rd and 4th respondents' alternative prayer that —***

*"a declaration be … issued that … fresh election … should … only involve candidates who participated in the original Homa Bay gubernatorial election …"*

***is similarly disallowed.***

***(c) The 3rd and 4th respondents' prayer for a declaration that they were duly elected as Governor and Deputy Governor for Homa Bay County, is hereby disallowed.***

***(d) The 1st and 2nd respondents' cross-appeal of 8 July 2018 is allowed.***

***(e) The petition of appeal dated 23 July 2018 is allowed; and the Appellate Court decision of 19 July 2018 is set aside in its entirety: the effect being that the election results for Homa Bay County, in respect of the offices of Governor and Deputy-Governor as declared by the Independent Electoral and Boundaries Commission (1st respondent), will stand as the valid position under the Constitution and the law.***

***(f) The 3rd and 4th respondents shall bear the appellants' costs in the High Court, the Court of Appeal and the Supreme Court — the details thereof to be in compliance with the principles on costs enunciated in this Judgment.***

***(g) The 1st and 2nd respondents shall bear their own costs.***

***(h) Claims of costs shall be laid before the Deputy Registrar for taxation, in accordance with the law.***

**DATED and DELIVERED at NAIROBI this *7th* day of February, 2019.**

**……..…….. ……..……...…...……**

**D. K. MARAGA** **M. K. IBRAHIM**

**CHIEF JUSTICE & PRESIDENT** **JUSTICE OF THE SUPREME**

**OF THE SUPREME COURT**

**……..……. ……..……..……..……**

**J. B. OJWANG** **S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT** **JUSTICE OF THE SUPREME COURT**

**……..…. …..…….**

**NJOKI NDUNGU** **I. LENAOLA**

**JUSTICE OF THE SUPREME COURT** **JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**

**SUPREME COURT OF KENYA**