



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO. 25 OF 2018

-BETWEEN-

JAMES LUSWETI MUKWE.....PETITIONER

-AND-

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....

2. BENSON ESUZA LUMWAGI.....

3. EDWARD TALE NABANGI..... RESPONDENTS

(Being an Appeal from the Judgment and Order of the Court of Appeal in Kenya at Kisumu (E.M Githinji, H.M Okwengu & J. Mohammed JJ. A) delivered 26th July, 2018, in Election Petition No. 23 of 2018.)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of appeal dated 24th August, 2018 is brought under the provisions of Article 163(4)(a) of the Constitution. The Petitioner appeals the Judgement of the Court of Appeal dated 26th July, 2018 which nullified his election as the Member of the National Assembly for Kabuchai Constituency and ordered a fresh election to be conducted.

B. BACKGROUND

[2] The Petitioner and the 3rd Respondent were candidates for the position of the Member of the National Assembly for Kabuchai Constituency during the elections held on 8th August, 2017. After the counting of votes, the Petitioner was declared the winner of that election having garnered 18, 485 votes while the 3rd Respondent came second with 18,062 votes.

(a) Proceedings at the High Court

[3] Being dissatisfied with the outcome of that election, the 3rd Respondent filed an election petition at the High Court —**Petition No. 1 of 2017**—seeking a nullification of the election results. He alleged that the election was marred with election irregularities and malpractices and that the Independent Electoral and Boundaries Commission (IEBC) had failed to carry out adequate voters' education. The 3rd Respondent also alleged that the IEBC did not use the Kenya Integrated Electoral Management system (KIEMS Kit) in the identification of voters in several polling stations such as Sirare, Sitila, Kisiwa, Musese and Mukuyuni Cattle Dip, thus people who were not eligible to vote were allowed to vote while others voted more than once. The 3rd Respondent in addition made several other allegations touching on bribery, inaccurate data entry by the IEBC officers at the polling stations and wrong tabulations of the votes cast.

[4] The 3rd Respondent further sought scrutiny and audit of the system and technology used by the IEBC and also a scrutiny and recount of the ballots cast during the said election. That application for scrutiny was later abandoned and even though the Petitioner and the 1st and 2nd Respondents later sought scrutiny of electoral materials for Bwake polling station 2, those applications were disallowed by the High Court. In determining the petition before it, the High Court framed four issues arising for determination as follows:

(a) Whether the election was conducted in accordance with the Constitution, the Election laws and the Regulations thereunder.

(b) Whether the election was marred by mismanagement, malpractices, illegalities and irregularities rendering the same invalid and null and void.

(c) Whether the [Petitioner] was validly elected as Member of the National Assembly for Kabuchai Constituency.

(d) Who pays the costs"

[5] Upon considering the matter, the High Court found that the allegation that there was failure in the operations of the KIEMS Kit was not supported by any evidence. The Court also noted that the alleged malfunction of the KIEMS Kit was occasioned by human error on the part of the polling clerks who failed to press the icon that would have updated the KIEMS Kit with the data of all the voters that had been identified. The Court thus held the view that mistakes are bound to happen in any election and that the failure to update the KIEMS Kit did not affect the results as the counting of results was manual which is actualised by filling in the results in Forms 35A and 35B.

[6] On the issue of non-inclusion of the results from Bwake polling station 2, the High Court held that the 3rd Respondent had failed to show how the said non-inclusion substantially affected the cumulative results. It further observed that the 3rd Respondent had in any event failed to produce a copy of the Form 35A which had the results. As such, the High Court found that the 3rd Respondent had failed to produce credible evidence to confirm his assertion that, had the results for that polling station been included, he would have emerged the winner. The Court also found that no evidence had been produced to support the allegation of bribery. In the end, the High Court (*Ali-Aroni J*) concluded that the election for the seat of the Member of the National Assembly for Kabuchai Constituency was conducted in accordance with the principles laid down in the Constitution and other relevant laws consequently affirming the results as declared.

(b) Proceedings before the Court of Appeal

[7] Being aggrieved by that decision of the High Court, the 3rd Respondent filed an appeal at the Court of Appeal—**Election Appeal No. 23 of 2018**—contesting the decision of the High Court to affirm the Petitioner's win. Before the appeal could be heard, the 1st and 2nd Respondents herein filed a Notice of Motion application seeking an order that the Notice of Appeal dated "8th March, 2018" be struck out on grounds that it was filed out of time and without the leave of the Court. In response, the 3rd Respondent (the Appellant at the Court of Appeal) filed an application seeking extension of time within which to file the Notice of Appeal; leave to file and serve the Notice of Appeal dated 26th March, 2018 out of time and if leave is granted, the Notice of Appeal dated 26th March, 2018 and contained in the record of appeal dated 26th March, 2018 be deemed as duly filed and served. The two applications were heard simultaneous with the hearing of the appeal.

[8] In allowing the late filing of the Notice of Appeal, the Appellate Court observed that even though the Notice of Appeal dated 6th March, 2018 had been filed two days late, it was served within the 5 days prescribed by the Court of Appeal (Election Petition)

Rules, 2017; the late filing did not affect the timelines for the determination of the appeal and that there was no complaint by the affected parties that they had suffered any prejudice. Consequently, the Court held that the Notice of Appeal dated 6th March, 2018 and filed on 9th March, 2018 was properly on record. With regard to the 3rd Respondent's prayer for extension of time to file a proper Notice of Appeal dated 26th March, 2018, the Court of Appeal noted that unlike the Notice of Appeal dated 6th March, 2018, the Notice of Appeal dated 26th March, 2018 did not substantially comply with the Court of Appeal Rules, 2017 and as such any reference to the Notice of Appeal dated 26th March, 2018 was taken as a reference to the Notice of Appeal dated 6th March, 2018 and filed on 9th March, 2018. Hence, the Court admitted the Notice of Appeal dated 6th March, 2018 as being properly on record. Having dispensed with the preliminary applications, the Court of Appeal then went on to consider the merits of the appeal.

[9] With regard to the fact that the KIEMS Kit failed to accurately capture the data that would have confirmed the number of persons who had voted at the six affected polling stations, the Court of Appeal held that for purposes of identification of voters, the KIEMS Kit was supposed to complete all its functions relating to the identification of a voter otherwise it would have failed to serve its purpose and to perform its function as a technology in the electoral system. And hence, it held that in the absence of such data, a voter's ballot could not be accounted for.

[10] The Appellate Court thus disagreed with the finding of the High Court that the said breach did not affect the outcome of the results. In finding so, the Court considered the fact that the winning margin was only 423 votes yet, there was no clear accountability of the people that had voted. The Court of Appeal also held that the actions of the Presiding Officer of taking away elections materials to his house was *prima facie* evidence of breach of the election laws which affected the integrity of the election.

[11] Consequently, the Court of Appeal (*Githinji, Okwengu & Mohammed JJA*) allowed the appeal and nullified the election of the Petitioner herein as the Member of the National Assembly for Kabuchai Constituency and ordered that a fresh election in that Constituency ought to be conducted.

(c) Proceedings before the Supreme Court

[12] Being aggrieved by the decision of the Court of Appeal, the Petitioner filed the present appeal dated 24th August, 2018 and filed on the same day seeking the following orders:

(a) The Judgment and subsequent Orders of the Court of Appeal delivered on 26th July, 2018 be set aside.

(b) The Judgment of the High Court delivered on 28th February, 2018 dismissing the petition be reinstated.

(c) A declaration do issue that James Mukwe Lusweti, the Petitioner herein was validly elected as the Member of the National Assembly for Kabuchai Constituency during the election held on 8th August, 2017 and a certificate to that effect do issue to the Speaker of the National Assembly.

(d) The costs of this Petition be borne by the 3rd Respondent.

(e) The costs of the proceedings in the Court of Appeal and in the High Court be awarded to the Petitioner.

(f) Any other relief that this Court may deem fit to grant.

[13] The summarised grounds of appeal are as follows:

(a) That the learned Judges of the Court of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution in granting the 3rd Respondent extension of time to file and lodge the Notice of Appeal dated 6th March, 2018 and lodged in the High Court on 8th March, 2018 when the 3rd Respondent had in his Notice of Motion dated 26th March, 2018 abandoned the said Notice of Appeal and had instead sought extension of time for a different Notice of Appeal dated 26th March, 2018.

(b) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution

by failing to consider and make a finding on the Notice of Appeal dated 26th March, 2018 which was the subject of the 3rd Respondent's Notice of Motion application for extension of time dated 26th March, 2018 and also by failing to hold that the Notice of Appeal dated 26th March, 2018 which was the subject of the Notice of Motion application dated 26th March, 2018 was never lodged in the Court of Appeal in time or at all and hence could not therefore confer jurisdiction on the Court of Appeal to hear and determine a substantive appeal.

(c) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by wrongly applying the provisions of Regulations 83(1)(c) of the Elections (General) Regulations, 2012 to the functions and data contained in the KIEMS Kit when the Regulation relates to data as contained in the statutory Form 35A which is the official declaration of results from a polling station.

(d) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by holding that by disregarding the results from CDF Musese 1, CDF Musese 2 and Sitila FYM polling stations under Regulation 83(1)(c) of the Elections (General) Regulations, 2012 would have affected the outcome of the election yet the evidence on record as provided in the Form 35As from the said polling stations showed that if the results from the three stations were excluded, the Petitioner would still have emerged the winner.

(e) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by totally ignoring the evidence on record and holding that the KIEMS Kit had failed to identify voters and allowed people who had not been identified to vote at six polling stations when there was no evidence on record to support such a finding.

(f) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by failing to apply the principles of Section 83 of the Elections Act.

(g) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by ignoring the clear and uncontroverted evidence on record on facts that the failure to include the results from Bwake primary school 2 did not affect the outcome of the election and making a finding that the omission affected the outcome without any evidence to support the finding.

(h) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by holding that the incident relating to ballot boxes and election material from Bwake primary school 2 breached the constitutional principles of the electoral system and Elections Act when the evidence on record was clear that not only had the allegation not been proved but also that the incident was not sufficient to vitiate the election for the entire Constituency.

(i) The learned Judges of Appeal erred in law and breached the Petitioner's rights under Articles 25 and 50 of the Constitution by awarding costs against the Petitioner in both the High Court and Court of Appeal when none of the allegations against the Petitioner had been proved in the High Court and when no allegations had been made against the Petitioner in the Court of Appeal.

[14] In response, the 3rd Respondent filed grounds of opposition dated 15th September, 2018 contesting this Court's jurisdiction to hear the appeal. On their part, the 1st and 2nd Respondents filed a replying affidavit dated 6th September, 2018 as well as written submissions dated 17th September, 2018.

[15] Appearing for the Petitioner was learned Counsel Peter Wena, Kenneth Akide for the 1st and 2nd Respondents and A.N. Ndambiri for the 3rd Respondent.

C. RESPECTIVE PARTIES' CASES

(a) The Petitioner's case

i. Jurisdiction of this Court and the competency of the Notice of Appeal at the Court of Appeal

[16] It is the Petitioner's case that the appeal before us involves a question of constitutional interpretation or application. The Petitioner's Counsel urged in that regard that constitutional issues and questions are discernible from the pleadings in the High Court and the Court of Appeal. He also contended that both the High Court and the Court of Appeal made findings of constitutional violations in the conduct of the election for the Member of the National Assembly for Kabuchai Constituency and so the appeal is properly before us.

[17] Counsel furthermore submitted that this Court is also called upon to interpret Articles 81, 86, 87 of the Constitution as well as Section 83 of the Elections Act and to determine whether the election for the Member of the National Assembly for Kabuchai Constituency was held in accordance with the principles of the Constitution as enshrined in Articles 81 and 86. As such, Counsel urged, that the appeal properly falls within the ambit of Article 163(4)(a) of the Constitution.

[18] On the issue of the competence of the Notice of Appeal, Counsel submitted that the jurisdiction of the Court of Appeal to hear and determine an appeal from an Election Court is triggered by the filing of a valid and proper Notice of Appeal. In submitting so, Counsel made reference to the cases of *Boy Juma Boy & 2 Others v. Mwamlole Tchappu Mbwana & Another* Civil Appeal No. 45 of 2013; [2014] eKLR, *Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* Civil Appeal No. 161 of 1999; [2013] eKLR and *Lesirma Simeon Saimanga v. Independent Electoral and Boundaries Commission & 2 Others* Election Petition (Application) No. 7 of 2018; [2018] eKLR where the Court of Appeal emphasized on the centrality of a Notice of Appeal. Counsel also referred to the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* SC Application No. 16 of 2014; [2014] eKLR where we held that the filing of a Notice of Appeal is a pre-requisite without which an appeal cannot be sustained.

[19] In that context, Counsel urged that the Notice of Appeal dated 26th March, 2018 which was the subject of the 3rd Respondent's application for extension of time, was never lodged in the Court of Appeal and was thus invalid. In addition, he submitted that the 3rd Respondent admitted that the Notice of Appeal dated 6th March, 2018, was lodged under the wrong provisions of the law in that it did not comply with Rule 6 of the Court of Appeal Rules, 2017. He further stated that the said Notice of Appeal was headed "*in the High Court of Kenya at Bungoma*" and that it was signed by the Deputy Registry in the Bungoma High Court and as such it could not confer jurisdiction on the Court of Appeal to hear any appeal based on it.

[20] In addition, Counsel impugned the decision of the Appellate Court granting extension of time to file the Notice of Appeal dated 6th March, 2018, yet the 3rd Respondent had abandoned it and it was therefore not the subject of the application for extension of time. He submitted in that regard, that the Court of Appeal erred by treating the 3rd Respondent's application for extension of time as referring to the Notice of Appeal dated 6th March, 2018, which was tantamount to the Court of Appeal deciding for the 3rd Respondent what he wanted. That further, the Court of Appeal did not make any finding with regard to the validity of the Notice of Appeal dated 26th March, 2018 which was the subject of the 3rd Respondent's application. In that regard, Counsel urged that the Petitioner's right to fair hearing was infringed as the Court aided the 3rd Respondent by granting an Order that had not been prayed for and for which he had no opportunity to submit on.

[21] In conclusion on this issue, Counsel emphasized that the Court of Appeal erred by proceeding to hear and determine the appeal on merits when it had no jurisdiction to do so as there was no valid Notice of Appeal on record.

ii. The alleged failure of the KIEMS Kit and the application of Regulation 83(1)(c) of the Elections (General) Regulations, 2012.

[22] Counsel submitted that the Court of Appeal wrongly applied the provisions of Regulation 83(1)(c) of the Elections (General) Regulations 2012 by holding that the results from CDF Musese 1, Musese 2 and Sitila FYM polling stations should have been disregarded because the number of votes cast in those polling stations exceeded the number of voters authenticated by the KIEMS Kit. He urged that the primary function of the KIEMS Kit was to identify voters and not to count, tally or enter the results of a polling station in Form 35A. That casting and counting of votes was in any event manual, as opposed to identification of voters, which was electronic. As a result, the Returning Officer did not use the data from the KIEMS Kit to verify the number of votes cast or even to establish the voter turnout. Thus, he submitted that the only accounting document which contains the total number of the votes cast is Form 35A and not the KIEMS Kit. Therefore, he urged that only Form 35A could be used as a basis for disregarding the results where it is alleged that the total votes exceeded the total number of voters who turned out to vote.

[23] Furthermore, Counsel submitted that there was no evidence on record to support the finding by the Court of Appeal that, if the results in the three named polling stations were disregarded under Regulation 83(1)(c), the outcome of the results would have been

affected. In that context, he took the view that since the Petitioner had a cumulative total of 396 votes from the three affected polling stations while the 3rd Respondent had 387 votes, even if the results were disregarded as suggested by the Court of Appeal, the Petitioner would still have emerged the winner.

[24] Counsel further took issue with the Court of Appeal for disregarding the High Court's finding that the failure to update the KIEMS Kit did not affect the results. He thus submitted that the High Court correctly found that there was no connection between the identification of voters and the counting of votes as counting was manual and so was the entering of the results in Forms 35A and 35B. That furthermore, none of the witnesses alleged that they had voted without their data being captured or that they had voted more than once.

[25] Counsel in addition submitted that the Court of Appeal went beyond its jurisdiction under Section 85A of the Elections Act by interfering with the High Court's finding of fact that there was no proof that the KIEMS Kit had failed to identify voters in six polling stations or that people had voted in the six polling stations without being identified or that some people had voted more than once. He urged in that context that the allegations by the 3rd Respondent were very specific and they were that in Sirare polling station more than 100 unidentified voters were allowed to vote or to vote more than once. And that in Kisiwa, Musese, Sitila and Mukuyuni 70, 40, 102 and 60 votes, respectively, were also affected.

[26] In further support of the Petitioner's case, Counsel urged that the Court of Appeal failed to apply the principles laid down in Section 83 of the Elections Act as enunciated in the case of *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*; SC Petition No. 5 of 2013; [2013] eKLR to the effect that a Petitioner must not only prove non-compliance with the law but must also show that the said non-compliance affected the outcome of the election. And as such, he urged that there was no evidence to support the Appellate Court's conclusion that the improper use of the KIEMS Kit affected the outcome of the elections.

iii. The non-inclusion in the final tally of the election results from Bwake polling station 2.

[27] Counsel submitted that the Court of Appeal wrongly interfered with the High Court's finding of fact to the effect that failure to include the results of Bwake polling station 2 did not affect the outcome of the election. He contended that the evidence by the Returning Officer was that, regarding the said polling station, votes had been counted and the Form 35A generated, but the Presiding Officer did not transmit the said Form to the Constituency Tallying Centre since all the election materials were confiscated by the Police after it emerged that the Presiding Officer had diverted the same materials to his house. That fact notwithstanding, it was established that with respect to that polling station, the 3rd Respondent had obtained 300 votes while the Petitioner had 58 votes. Thus, he urged that even if the 3rd Respondent's tally was increased by the said 300 votes, the Petitioner would still have emerged the winner.

iv. Costs

[28] The Petitioner also challenges the Court of Appeal decision to award costs against him even though none of the allegations against him had been proved. In the circumstances, he asks this Court to overturn that decision and award him costs at both the High Court and the Court of Appeal as well as in these proceedings.

(b) 1st and 2nd Respondent's case

i. Jurisdiction

[29] The 1st and 2nd Respondents supports the Petitioner's submission that this Court has the jurisdiction to hear the appeal as of right under Article 163(4)(a) of the Constitution.

ii. The alleged failure of the KIEMS Kit and the application of Regulation 83(1)(c) of the Elections (General) Regulations, 2012.

[30] On the issue of KIEMS Kit, Counsel for the 1st and 2nd Respondents submitted that the Court of Appeal wrongly interpreted the provisions of Regulation 83(1)(c) of the Elections (General) Regulations, 2012 with regard to the role of the KIEMS Kit in the electoral process by holding that the results from CDF Musese 1, CDF Musese 2 and Sitila FYM polling stations should have been

disregarded because the number of votes cast in those stations exceeded the number of voters authenticated by the KIEMS Kit. Counsel urged that if the KIEMS Kit had accurately stored data of all the authenticated voters, then the manual counting of the votes cast would substantially correlate with the votes recorded by the KIEMS Kit. Conversely, if data is not recorded and stored in the KIEMS Kit, there would be a disparity between the number of votes captured by the KIEMS Kit and the votes recorded in Form 35A. Counsel urged that the duly assigned functions of the KIEMS Kit according to Section 44 of the Elections Act is voter registration, identification and transmission of results. As such, there was no exclusive role of the KIEMS Kit to establish the number of votes cast.

[31] Counsel further submitted that there was no evidence on record to support the finding by the Court of Appeal that the KIEMS Kit had failed to work. He urged that, unlike what was alleged at the superior Courts, there was an error on the part of the polling clerks who failed to press the icon that would have stored data and updated the Kit with the information of voters. He thus urged that the failure to update the KIEMS Kit could not vitiate an election as there are other means of establishing the number of votes cast and further, the Form 35A was not reliant on the data captured by the KIEMS Kit for accuracy of the votes recorded in it. He added that the votes were cast manually, counted manually and results entered manually in Form 35A at the named polling stations and therefore that is the document to be relied upon in verifying the votes cast.

[32] Counsel also disagreed with the finding of the Court of Appeal that, had the results for the three identified polling stations been disregarded under Regulation 83(1)(c), the outcome of the election would have been affected. To support his position, he urged that the Form 35As of the said polling stations indicated that the Petitioner had a cumulative total of 396 votes against the 3rd Respondent 387 votes, hence even if those results were excluded, since there was only a difference of 9 votes, the Petitioner would still have emerged the winner in the totality of all votes cast in the Constituency.

iii. Non-inclusion of results from Bwake polling station 2.

[33] With regard to Bwake polling station 2, Counsel submitted that though the votes cast had been counted at the polling station and the results entered in Form 35A, that Form was not submitted to the Tallying Centre as the election materials had been confiscated by the Police and were being used as an exhibit. In the circumstances, the 2nd Respondent announced the final results to the exclusion of the results from Bwake polling station 2. Counsel then contested the 3rd Respondent's position that, had the results for that polling station been included, he would have emerged the winner. He further urged that the 3rd Respondent had failed to show how the omission of the results from the Constituency tally would have substantially affected the results as announced and if included, he would have won the election. Furthermore, he urged that even though the Presiding Officer was arraigned in Court and charged with an election offence, no evidence of conviction was presented before the High Court by the 3rd Respondent or the effect of the conviction on the election. And also, that the 2nd Respondent, who was the Returning Officer during that election, testified that when he inspected the ballot boxes, the seals were intact hence there was no evidence of tampering with the results.

(c) 3rd Respondent's case

i. Jurisdiction of this Court and the competence of the Notice of Appeal at the Court of Appeal

[34] Counsel for the 3rd Respondent urged that this Court has no jurisdiction to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution. He submitted that the Petitioner is not seeking an interpretation of Articles 25 and 50 of the Constitution and in any case, none of those Articles were the subject of interpretation or application by the Court of Appeal. As such, he opined that this Court should not delve into issues that were not canvassed before the superior Courts.

[35] With regard to the issue of the Notice of Appeal, Counsel urged that unlike what the Petitioner contends, the 3rd Respondent did not abandon the prayer for extension of time to file a Notice of Appeal. He submitted instead that prayer 2 of the 3rd Respondent's application at the Court of Appeal prayed for; "*this Honourable Court do issue an order extending time within which a Notice of Appeal arising from the judgment delivered in Election Petition No. 1 of 2017 Bungoma on 28th February 2018 is to be filed.*" Therefore, he urged that a specific prayer for extension of time to file a Notice of Appeal remained part and parcel of the 3rd Respondent's application.

[36] Counsel disputes the contention that the Petitioner was denied his right to fair hearing. He urged that all parties were fully heard by the Court of Appeal and in the exercise of its' discretion, the Court of Appeal extended the time of filing the Notice of Appeal and deemed the Notice of Appeal dated 6th March, 2018 as properly filed. That therefore this Court should not interfere with the

exercise of that discretion.

ii. The failure of the KIEMS Kit and the application of Regulation 83(1)(c) of the Elections (General) Regulations, 2012.

[37] With regard to the allegation that the Court of Appeal misapplied Regulation 83(1)(c) of the Elections (General) Regulations, 2012, Counsel urged that the evidence on record showed that the 1st Respondent's officers failed to use and apply the KIEMS Kit to identify voters in several polling stations including CDF primary School polling station 1, Sirare primary School polling station 2, Kisiwa primary school polling station 12 & 2, CDF Musese primary school station 1, CDF primary school station 2, Sitila FYM primary School, Mukuyuni Cattle Dip polling station and Bwake primary School Polling Station 2. He also urged that the results produced in Court by the 1st Respondent showed that the number of voters who were biometrically identified and allowed to vote in those stations as compared with the number of votes that were cast, manually counted and recorded in Forms 35As was different. As such, he supports the finding of the Court of Appeal that there was a difference between the number of authenticated voters and the number of votes cast and manually counted at CDF Musese Polling Station 1 (67), CDF Musese Polling Station 2 (1) and Sitila FYM Primary School Polling Station (27).

[38] Consequently, Counsel agreed with the Court of Appeal that the 1st and 2nd Respondents' acts and omissions, when they tampered with the KIEMS kits, were a serious breach of the constitutional principles of transparency, accuracy and accountability of the election system and of the Elections Act.

[39] In further support of the Court of Appeal's finding, Counsel urged that an election where the KIEMS kits did not optimally perform their functions in several polling stations leading to more than 600 people voting without being biometrically identified and their data recorded, could not be said to be efficient, simple and secure and the same applied to an election where voters who had cast their votes were recalled so that their data could be recaptured.

[40] Generally, Counsel agreed with all the findings of the Court of Appeal with respect to all issues that were before the Court. He thus urged the Court to dismiss the appeal with costs.

D. ISSUES FOR DETERMINATION

[41] Arising from the above, the following issues arise for consideration:

(a) Whether this Court has jurisdiction to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution.

(b) Whether the appeal before the Court of Appeal was competent.

(c) Whether the Court of Appeal misapplied the provisions of Regulations 83 of the Elections (General) Regulations, 2012 as read with Article 86(a) of the Constitution.

(d) Whether the Court of Appeal arrived at a correct finding with regards to the status of the votes cast at Bwake polling station 2.

(e) What reliefs should be issued"

(f) Who should bear the costs of the appeal"

E. ANALYSIS

(a) Whether this Court has jurisdiction to hear the Petitioner's appeal under Article 163(4)(a) of the Constitution.

[42] The Petitioner has filed his appeal under Article 163(4)(a) of the Constitution and urges that constitutional issues and questions are discernible from the pleadings at both the High Court and the Court of Appeal. He thus argues that both Courts made findings

as to whether constitutional thresholds were met in the conduct of the election for the Member of the National Assembly for Kabuchai Constituency. As such, he submits that this Court is also called upon to interpret Articles 81, 86 and 87 of the Constitution to determine whether the said election met the constitutional principles of a free and fair election. His position is supported by the 1st and 2nd Respondents.

[43] On his part, the 3rd Respondent argues that this Court has no jurisdiction to hear the appeal as of right under Article 163(4)(a) of the Constitution. He urges that the allegations of breach of the Petitioner's constitutional rights of fair trial and fair hearing have no basis in law and fact and are an abuse of the court process. Furthermore, he submits that none of the superior Courts was invited to interpret or apply Articles 25 and 50 both of which provisions the Petitioner's claims were hinged upon.

[44] On our part, we note that the jurisprudence emanating from this Court is clear on when an appeal meets the jurisdictional threshold under Article 163(4)(a) of the Constitution. We have restated time and again in cases such as *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another* SC Petition No. 3 of 2012; [2012] eKLR, *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, SC Petition No. 10 of 2013; [2014] eKLR, *Aviation & Allied Workers Union of Kenya v. Kenya Airways Limited & 3 Others* SC Petition No. 4 of 2015; [2017] eKLR and *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* SC Petition No. 5 of 2012; (2012) eKLR that a litigant must show that the alleged question of constitutional interpretation or application formed the basis of the superior Courts reasoning so as to transcend to this Court by way of an appeal.

[45] More succinctly in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* SC Application No. 5 of 2014; [2014] eKLR we affirmed that [paragraph 69]:

“The import of the Court’s statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

[46] Therefore, in making a decision on whether an appeal is properly before us, reference must necessarily be made to the decision that is being appealed. In this case, the Petitioner contends *inter alia* that the Court of Appeal erroneously assumed jurisdiction when there was no valid Notice of Appeal capable of triggering the Appellate Court's jurisdiction. In that context, at the Court of Appeal, the 1st and 2nd Respondents had sought to strike out the 3rd Respondent's Notice of Appeal on grounds that it was filed out of time and without leave of the Court. In considering that application, together with the 3rd Respondent's application for extension of time to file a Notice of Appeal, the Court of Appeal took guidance from Rules 5 and 17 of the Court of Appeal (Election Petition) Rules, 2017, which gives the Court power to extend time and to exercise discretion respectively, when considering applications before it. Particularly, the Rules provide that the exercise of the Court's discretion must be subject to the provisions of Article 159(2)(d) of the Constitution which requires adjudicating bodies to administer justice without undue regard to procedural technicalities. That provision therefore was at the centre of the Court of Appeal's reasoning on this issue and forms a key consideration when exercising the discretion recognized by the Court of Appeal Rules, 2017 aforesaid.

[47] The Petitioner also attacks the substantive finding of the Court of Appeal that led to the nullification of the election results on the basis that the election was not conducted in accordance with the principles laid out in the Constitution, the Elections Act and the Regulations thereunder. The Court of Appeal found that the integrity of the election was compromised in a number of polling stations due to the failure of technology, more particularly the KIEMS Kits, as well as the actions of a Presiding Officer in one of the polling stations which led to the disregarding of the results in that polling station. The Court of Appeal thus emphasized on compliance with constitutional principles failure to which the results would be nullified. Equally, we are now being called upon to examine whether the nullification of the election by the Court of Appeal was justified in the light of the facts of the case as tested against the constitutional principles articulated under Articles 81 and 86 of the Constitution.

[48] Considering therefore the extent of our mandate, and flowing from the two decisions of the superior Courts which are now before us, we hold that the Petitioner's appeal properly falls for adjudication before us as of right under Article 163(4)(a) of the Constitution. Before we proceed, however, we note that the Petitioner's appeal as framed also alleges breach of fundamental rights under Articles 25 and 50 of the Constitution. The Petitioner seems to suggest that by virtue of the Court of Appeal's finding on various issues before it, his rights under Articles 25 and 50 were infringed. As correctly observed by the 3rd Respondent, Article 25 contains fundamental rights and freedoms whose exercise may not be limited either by the Constitution or any other law. We note however that neither Article 25 nor 50 formed the basis of any interpretation or application to trigger our jurisdiction under Article 163(4)(a) and even if it were, the Petitioner does not identify which of the four categories of rights in Article 25 was allegedly

infringed by the Court of Appeal. Even if we assume therefore that the reference to Article 25 means 25(c) which is the right to fair trial, the Petitioner has not shown how the Court of Appeal ignored any of the ingredients of a fair trial as provided for under Article 50(2) of the Constitution and how in any case, his case fits within the definition of Article 50(2). To say the least, the invocation of Articles 25 and 50 is irrelevant in the appeal before us. We shall say no more on this aspect of the appeal.

(b) Whether the appeal before the Court of Appeal was competent.

[49] The Petitioner contends that the Court of Appeal proceeded to hear and determine the appeal when it had no jurisdiction to do so since there was no valid Notice of Appeal on record. He urges in that regard that the Notice of Appeal dated 26th March, 2018 which was the subject of the 3rd Respondent's application for extension of time was never lodged at the Court of Appeal. And further that the earlier Notice of Appeal dated 6th March, 2018 had been filed out of time and without the leave of the Court. The Petitioner in addition submits that the Notice of Appeal dated 6th March, 2018 was defective because it did not comply with the provisions of Rule 6 of the Court of Appeal Rules, 2017. As such he submits that only a valid Notice of Appeal could confer jurisdiction on the Court of Appeal and in its absence, the Appellate Court's proceedings were a nullity.

[50] The factual background leading to the Petitioner's contention is as follows: The High Court delivered its decision on 28th February, 2018. According to Rule 6 of the Court of Appeal (Election Petition) Rules, 2017, a party which desires to appeal the decision of the High Court is required to lodge a Notice of Appeal at the Court of Appeal Registry within seven days after the delivery of the High Court decision. As such, in this particular case, the Notice of Appeal should have been filed by 7th March, 2018. However, the 3rd Respondent, being the party aggrieved by the High Court decision lodged his Notice of Appeal dated 6th March, 2018 at the High Court in Bungoma on 8th March, 2018, and further, presented that same Notice of Appeal to the Court of Appeal Registry in Kisumu on 9th March, 2018.

[51] Upon being served with the Notice of Appeal, the 1st and 2nd Respondents filed a Notice of Motion application dated 19th March, 2018 seeking to strike out the Notice of Appeal dated 8th March, 2018 on the grounds that it was filed out of time and without the leave of the Court. We note that the said application referred to a Notice of Appeal dated "8th March, 2018". However, the 3rd Respondent's Notice of Appeal was dated 6th March, 2018 but lodged in the High Court on 8th March, 2018. Similarly, the 3rd Respondent also filed a Notice of Motion application dated 26th March, 2018 urging that the Notice of Appeal dated 6th March, 2018 had been filed under the wrong provisions of the law and as such his application sought extension of time to file a proper Notice of Appeal. For ease of understanding, we set out in verbatim the 3rd Respondent's prayers as contained in the application dated 26th March, 2018 which are as follows:

(1) That this Honourable Court be pleased to certify this matter urgent and to direct that it be heard and determined urgently and on priority basis.

(2) That this Honourable Court do issue an Order extending time within which a Notice of Appeal arising from the Judgment delivered in Election Petition No. 1 of 2017 in Bungoma on 28th February, 2018 is to be filed.

(3) That leave be and is hereby granted to the Applicant to file and serve the Notice of Appeal dated 26th March, 2018 out of time.

(4) That upon granting prayer 3 of this motion, the Notice of Appeal dated 26th March, 2018 and contained in Volume One of the Applicant's Record of Appeal dated 26th March, 2018 at pages 632-640 be deemed to be duly filed and served.

(5) That this Honourable Court be pleased to make any other Order as it may deem just and fair.

(6) That the cost of this application be provided for.

[52] The Court of Appeal therefore was faced with two applications before it, one seeking the striking out of the Notice of Appeal dated 6th March, 2018 (though indicated as 8th March, 2018) and another seeking extension of time to file the Notice of Appeal dated 26th March, 2018. Both applications and the substantive appeal were heard simultaneously. With regard to those interlocutory applications, the Court of Appeal observed that unlike the Notice of Appeal dated 26th March, 2018, the one of 6th March, 2018 substantially conformed to the Court of Appeal Rules, 2017. As such, the Appellate Court decided to treat the 3rd Respondent's application for extension of time to file the Notice of Appeal dated 26th March, 2018 as referring to the Notice of Appeal dated

6th March, 2018. After considering the circumstances why the Notice of Appeal dated 6th March, 2018 was filed two days late, the Court of Appeal allowed the 3rd Respondent's application and deemed the Notice of Appeal dated 6th March 2018 as duly filed and incorporated it in the record.

[53] It is as a result of that decision that the Petitioner submits that the Court of Appeal "purported to decide for the [3rd Respondent] what he wanted" and still failed to make a finding on the validity of the Notice of Appeal dated 26th March, 2018 which was the subject of the 3rd Respondent's application. Consequently, he claims that his right to fair trial was infringed by the Court of Appeal as it aided the 3rd Respondent by granting an Order that had not been sought. He contends that since the 3rd Respondent had expressed that he had abandoned the Notice of Appeal dated 6th March, 2018 he did not focus on it during his submissions before the Court of Appeal but rather concentrated on responding to the 3rd Respondent's application which sought extension of time to file a Notice of Appeal dated 26th March, 2018. He thus urges that there was an unfair advantage given to the 3rd Respondent and also that he was denied his right to a fair hearing in that context.

[54] On his part, the 3rd Respondent submits that he did not abandon, "expressly or otherwise a prayer in respect of extension of time within which to file a Notice of Appeal." In submitting so, he makes reference to prayer No. 2 of his application which asked the Court to *issue an Order extending time within which a Notice of Appeal arising from the Judgment delivered in Election Petition No. 1 of 2017 in Bungoma on 28th February, 2018 is to be filed.* It is therefore obvious to us that the 3rd Respondent's application dated 26th March, 2018, sought *inter alia* an extension of time to file a Notice of Appeal dated 26th March, 2018 out of time and not a Notice of Appeal dated 6th March, 2018. Indeed, the affidavit sworn by Alfred Njeru Ndambiri on 26th March, 2018, in support of the 3rd Respondent's application which had been filed under a certificate of urgency speaks to that fact. The relevant parts of that affidavit read as follows [paragraphs 10-13]:

"10. That we proceeded to prepare the Record of Appeal and it was while in this process we found that the Notice of Appeal dated 6th March, 2018 ought to have been filed under the Court of Appeal (Election Petition) Rules, 2017 and not under the normal Court of Appeal Rules.

11. That we then immediately sought instructions from our client and after explaining the situation and circumstances, he instructed us to file an application seeking the honourable Court's leave to extend time within which to file a proper Notice of Appeal.

12. That we then prepared a Notice of Appeal dated 26th March, 2018 and included the same in the Record of Appeal at pages 632-640.

13. That the error and mistake in filing the Notice of Appeal under the wrong provisions of law was accidental and not intentional."

[55] The above deposition clearly shows that the 3rd Respondent appreciated that the Notice of Appeal dated 6th March, 2018 had been filed under the wrong provisions of the law and so he sought to correct the mistake by seeking the leave of the Court to file a proper Notice of Appeal. The 3rd Respondent does not in that application make a prayer for extension of time to file a Notice of Appeal dated 6th March, 2018. Indeed, as submitted by the Petitioner, the 3rd Respondent had "abandoned" the Notice of Appeal dated 6th March, 2018 and he did not seek any prayer with regard to that Notice of Appeal. It is on that basis that the Petitioner urges that the Court of Appeal erred by treating the 3rd Respondent's application for extension of time as referring to the Notice of Appeal dated 6th March, 2018.

[56] Is the Petitioner now justified to submit that his right to fair hearing was infringed because he was not given an opportunity at the Court of Appeal to submit on issues touching on the Notice of Appeal dated 6th March, 2018" Aside from the fact that neither Articles 25 nor 50 were the subject of interpretation or application by the Court of Appeal, we note that two substantive applications were before that Court. Indeed, the Judges of the Court of Appeal, acknowledged that there were two interlocutory applications before them which were heard simultaneously with the hearing of the substantive appeal. Above all, even though the Petitioner had not filed any of those applications, he was still entitled as he did, to submit before the Court on issues raised in those applications. It has not been claimed that one party had the opportunity to address the Court and another did not. The proceedings as well as the submissions before the Court of Appeal speak for themselves. Consequently, we find no merit in the Petitioner's claim in this regard and we hereby dismiss it. Having so held, we move on to the substantive issue for consideration, under this heading; whether there was a competent appeal before the Court of Appeal by virtue of the Notice of Appeal therein having been filed out of time and

whether the Court of Appeal therefore properly assumed jurisdiction in the matter. If we find that it wrongly did so, then that is the end of the matter and the appeal stands allowed. If not, we shall address the other issues in contest.

[57] In dealing with that issue, the Court of Appeal recognised that it had discretion under Rule 17(2) of the Court of Appeal Rules, 2017 to extend or reduce the timelines prescribed by the Rules. In addition, Rule 5 provides that the determination of the Court's discretion is subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe timelines set by the Constitution or any other written law. As such, in arriving at its decision to extend time, the Appellate Court took into account the reasons proffered by the 3rd Respondent for the late filing and the fact that even though the application for extension of time was filed only two days late, it was served within time and that the late filing of the Notice of Appeal had not affected the timelines for the determination of the Appeal. In the end, the Court of Appeal allowed the 3rd Respondent's application and allowed the Notice of Appeal dated 6th March, 2018 and lodged on 9th March, 2018 and deemed it as filed within time and incorporated it in the record. The Petitioner now challenges this decision of the Court of Appeal.

[58] We note in the above context that the Court of Appeal made that decision in exercise of its discretionary powers conferred to it by Rules 5 and 17 of the Court of Appeal (Election Petition) Rules, 2017. We have held in the past in the cases of *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others*, SC Application No. 16 of 2015; [2015] eKLR and *Deynes Muriithi & 4 others v. Law Society of Kenya & another* SC Application No 12 of 2015; [2016] eKLR that it is only in exceptional circumstances that we can interfere with the discretionary powers of the Court of Appeal.

[59] In the present case, the 3rd Respondent had specifically applied for leave as regards the Notice of Appeal dated 26th March 2018 to file it out of time. At paragraph 51 of this Judgment we have reproduced, *verbatim*, the specific prayer in that regard. Nowhere in that application is reference made to the Notice of Appeal dated 6th March 2018. But what did the Court of Appeal do?"

[60] The Court of Appeal, surprisingly, ignored the specific prayers placed before it, deemed that it was determining the extension of time to file the Notice of Appeal dated 6th March 2018 – a matter not before it – and proceeded to extend time to file the latter Notice of Appeal. It is that action which the Petitioner says is unlawful and conferred jurisdiction to the Court of Appeal outside the law.

[61] We have seen the Judgment of the Court of Appeal and on the issue at hand, it rendered itself as follows:

"[23] We take judicial notice of the fact that the Court of Appeal (Election Petition) Rules 2017 were circulated before they were gazetted and that the provisions of the un-gazetted rules have been used occasionally by both the bench and the bar. Under the un-gazetted rules, a notice of appeal was required to contain the grounds of appeal. The Court of Appeal (Election petition Rules, 2017 were gazetted under Legal Notice No.114 of 2017. There is no requirement under rule 6(3) of the gazetted rules that a notice of appeal should contain the grounds of appeal. Instead, rule 6(5) provides that the notice of appeal shall be substantially in form EPA I set out in the schedule. The Notice of Appeal dated 6th of March 2018 and filed at the Court of Appeal registry at Kisumu on 9th March, 2018 substantially conforms with the 2017 Rules. The Notice of Appeal dated 26th March, 2018 does not. In the premise and in the interest of justice, we treat the appellants' application as referring to the Notice of appeal dated 6th march 2018 and lodged at the Court of Appeal registry on 9th March, 2018.

[24] The Notice of Appeal dated 6th March, 2018 and filed at the Kisumu Court of Appeal Registry on 9th March, 2018 was lodged two days out of time. By rule 15 of the 2017 Rules the Registrar of the Court was entitled to accept it although it was filed out of time. It follows therefore, that by the time the record of appeal was filed on 27th March 2018, there was in existence a Notice of Appeal.

*[25] The Notice of Appeal lodged on 9th March 2018 was served on 12th March 2018 which was within the five days prescribed by the 2017 Rules. The late filing of the Notice of Appeal has not affected the timelines for the determination of the appeal nor is there any complaint by the respondents that the delay has caused any undue prejudice. This Court in *John Munuve Mati v. Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR* extended time for filing a Notice of Appeal in similar circumstances." [Emphasis added]*

[62] The question that we have asked ourselves is this; on what basis did the Court of Appeal "treat" a clear application for extension of time to file the Notice of Appeal dated 26th March 2018 as "referring to the Notice of Appeal dated 6th March 2018"?" If it is in the "interest of justice", as stated, the converse is indeed true. It had no basis for determining a matter not placed

before it and more so where the implications were highly prejudicial to one party.

[63] In stating so, we are aware that the exercise of discretion by one Court is seldom interfered with by another Court, even an appellate one. But where the exercise of discretion is based on whim, is capricious or prejudicial, then it can be interfered with. Indeed, in *Apungu Arthur Kibira v. Independent Electoral and Boundaries Commission and 2 others* SC Petition No.29 of 2018 and *Musa Cherutich Sirma v. Independent Electoral and Boundaries Commission and 2 others* SC Petition No.13 of 2018, decisions we recently delivered, we addressed circumstances in which we can so interfere. In those cases, we did not interfere with the appellate Court's exercise of discretion and stated that the following principles are applicable where discretion may be interfered with:

- i. The appellate Court acted on a whim or that;**
- ii. Its decision is unreasonable; and**
- iii. It is made in violation of any law or the Constitution or that;**
- iv. It is plainly wrong and has caused undue prejudice to one party.**

[64] In the present case however, we have no doubt that, by its actions above, the Court of Appeal with tremendous respect, acted wrongly and flouted all the above principles and to uphold its actions would be an obvious perpetration of the same action. The Ruling delivered as part of the Judgment of the Court of Appeal dated 26th July 2018 is therefore set aside and the orders in respect of the Notice of Appeal dated 6th March 2018 is also set aside. If there is no Notice of Appeal upon which the Appeal before us was predicated, what happens to the Judgment before us"

[65] In *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and others* [2014] eKLR, a 2-Judge bench of this Court stated:

"A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's Notice of Appeal as having been filed out of time is Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 113 stated inter alia:

"As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (sic) the purpose of this requirement is to promote the finality of judgments s by forcing the losing party to take an appeal expeditiously or not at all"."

[66] In applying the above holding to the present case, since there was no valid Notice of Appeal filed, it means that there was no proper appeal before the Court of Appeal and all proceedings on appeal were a nullity. The effect thereof is that the Appeal before us must be allowed for that reason only.

F. CONCLUSION

[67] Having held as above, it follows that the remaining issues set out for determination cannot attract our attention. They are as follows:

"(a) ...

(b) ...

(c) Whether the Court of Appeal misapplied the provisions of Regulations 83 of the Elections (General) Regulations, 2012 as

read with Article 86(a) of the Constitution.

(d) Whether the Court of Appeal arrived at a correct finding with regards to the status of the votes cast at Bwake polling station 2.”

[68] On reliefs, including costs, while the appeal is one for allowing, we are aware that costs ordinarily follow the event unless a Court in its discretion determines otherwise. In the circumstances of the present case, we deem it fit that as regards the present Appeal, each party should bear its own costs.

G. ORDERS

(a) The Petition of Appeal dated 24th August, 2018 is hereby allowed.

(b) The Judgment of the Court of Appeal dated 26th July, 2018 is set aside.

(c) A declaration is hereby issued that the Petitioner was validly elected as the Member of the National Assembly for Kabuchai Constituency during the election held on 8th August 2017.

(d) Each party shall bear the costs of this Appeal.

[69] Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of January, 2019

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



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