IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL NO. 299 OF 2013

CORAM: M'INOTI, MURGOR & J. MOHAMMED, JJ.A.

BETWEEN

RICHARD NCHAPI LEIYAGU..... APPELLANT

versus

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION …….. 1ST RESPONDENT

ISHMAEL HASHIM ……..... 2ND RESPONDENT

MATHEW KIDEME LIMPURKEL …..... 3RD RESPONDENT

(Being an appeal from the judgment & decree of the High Court of Kenya at Nyeri (Mabeya, J) dated 4th October, 2013in

HC ELECTION PETITION NO. 4 OF 2013)

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JUDGMENT OF THE COURT

The petition by the appellant, *RICHARD NCHAPI LEIYAGU*, challenging the election of the third respondent, *MATHEW KIDEME LIMPURKEL* as the Member of the National Assembly for Laikipia North Constituency following the March 2013 general elections, has mutated into this appeal after surviving, literally by a whisker, at the High Court.

The petition, which was filed on 10th April, 2013 in the High Court at Nyeri, was scheduled, with the consent of the parties, to be heard from 10th to 13th June, 2013. On the first day of the hearing, only the respondents attended court; the appellant and his advocates did not. After a short adjournment and an unsuccessful effort to get the appellant's advocate in court, the High Court *(Wakiaga, J)* dismissed the petition for non-attendance.

Immediately, the appellant applied to the High Court for reinstatement of the petition, principally on the ground that he and his advocates had erroneously entered in their diaries that the hearing of the petition would commence on 11th June, 2013. On 8th July, 2013, the court dismissed the application on the grounds that it did not have jurisdiction to reinstate a dismissed petition, and that in any event, there

was no valid ground upon which the court could exercise its inherent jurisdiction to reinstate the petition, in favour of the appellant.

Undaunted, the appellant, lodged *Civil Appeal No 18 of 2013*. On 20th August, 2013, this Court allowed the appeal, after finding fault with the manner in which the learned trial judge had exercised his discretion. The Court directed that the petition to be heard before a different judge of the High Court. That task fell upon *Mabeya, J*, sitting in Nairobi.

In his petition, the appellant challenged the election of the 3rd respondent on two broad grounds, namely; (1) the alleged electoral irregularities and malpractices committed by the *Independent Electoral and Boundaries Commission (IEBC)* and its officers and (2) electoral offences allegedly committed by the 3rd respondent.

As against the IEBC and its officers, the specific complaints were that the election officers did not possess the requisite qualifications and were partisan; the said officers colluded with the 3rd respondent and amongst themselves to

manipulate the election; failure to enforce the electoral code of conduct; exclusion of the appellant's agents from polling centers; illegal assistance of illiterate voters by electoral officers; failure to open and close polling stations within the prescribed time; voting by persons whose names were not on the register of voters; failure to avail to the petitioner Form 35s from all the polling stations in the constituency; failure to seal and secure all ballot boxes; and lastly failure to transmit, or transmit accurate results from the polling stations to the constituency and national tallying centers.

The complaints against the 3rd respondent were that on 1st March, 2013, he hosted at least fifteen [15] presiding officers from the constituency, bribed them and strategized with them how to manipulate the elections in his favour; that during the campaign he had endeared himself to (1) Segera Ward by repairing the community dam, (2) Ngenia Witeithie Women Group by purchasing for them 50 plastic chairs, and (3) Ngenia residents by purchasing 2 rolls of fencing wire for Ngenia Dispensary; and lastly that he had, through his agents, bribed voters to vote for him in various polling stations.

On 4th October, 2013, Mabeya, J held that the appellant had not proved his case to the required standard and dismissed the petition with costs, which he capped at KShs.2.5 million, with KShs.1 million to the 1st and 2nd respondent and KShs.1.5 million to the 3rd respondent. Aggrieved by that decision, the appellant lodged the present appeal challenging the entire judgment. On his part, the 3rd respondent filed a notice of cross appeal limited to the award of costs, and grounds for affirming the rest of the decision of the High Court.

In his memorandum of appeal, the appellant listed some 13 grounds of appeal. In our view, those grounds address only four main issues, namely that:

1. The election court erred in law in its findings relating to the recruitment, competence and impartiality of the election officials in Laikipia North Constituency;

2. The election court erred in law in finding that the re-opening of the ballot box and the recounting of the ballot papers therein at Ngenia Secondary School Stream II did not affect the overall conduct and result of the elections;

3. The election court erred in law in:

a. finding that the assistance of voters was not in

contravention of Regulation 72 of the Elections (General) Regulations 2012;

b. failing to find that the repair of Rois Robo dam was undertaken by the 3rd respondent for purposes of unduly influencing the voters contrary to section 63 of the Elections Act;

c. failing to find that the 3rd respondent was guilty of bribery; and;

4. The election court erred in awarding costs against the appellant rather than against only the 1st and 2nd respondents and in capping the costs payable by the appellant at Kshs, 1,500,000, which was inordinately high.

Before us Mr Mansur Issa, learned counsel for the appellant submitted that the 1st respondent (IEBC) was under a constitutional duty, by dint of *Articles 81 and 83* as well as under international human rights instruments ratified by Kenya such as the *United National Declaration of Human Rights, 1948* and the *International Covenant on Civil and Political Rights, 1966*, to deliver a free and fair election. In his view, the totality of the evidence adduced before the election court established that IEBC had failed to live up to its constitutional duty.

Specifically on the recruitment, competence and impartiality of the election officials, counsel faulted the IEBC on the grounds that some of the election officials had been involved in irregularities in political party primaries and were therefore unfit to be recruited as election officials; that some of the election officials were members of the 3rd respondent's clan whose impartiality could not be vouched for; and that IEBC had hired polling officials who were unqualified by reason of failure to meet the qualifications that IEBC had prescribed.

Counsel relied on the decision of the High Court of Uganda in the case of *IDDI LUBAYI KISIKI VS ELECTORAL COMMISSION & 2 OTHERS*, *Election Petition No. 1 of 2011 (unreported)* in which the court stressed the importance of neutrality and impartiality on the part of election officials in light of their duty to ensure conduct of free and fair elections.

On his part, Mr Kagoro Juma, for the IEBC and the 2nd respondent, submitted that the election court had properly considered and fully appreciated the prescribed constitutional and legal standards before concluding that the election was free, fair, accountable and a true reflection of the will of the voters in *Laikipia North Constituency*.

Regarding the election officials, counsel submitted that from the evidence, the appellant's complaint related to conduct of political party primaries which did not involve the IEBC; that *Abraham Lemanyishoe*, the officer alleged to have been a relative of the 3rd respondent's was never a recruitment or deployment officer of IEBC as alleged by the petitioner; that in the polling station where that alleged relative was deployed, the 3rd respondent did not get even asingle vote; that the third respondent had no relatives working for IEBC and there was no evidence to that effect; that IEBC had power to vary the qualifications for election officials if the people in the constituency did not meet the set qualifications; and that even with the variation, the IEBC still had recruited competent, capable and impartial officers.

Learned counsel cited the High Court decision in *FERDINAND NDUNGU WAITITU VS IEBC & 8 OTHERS, Election Petition No. 1 of 2013*, which he understood to stand for the proposition, among others that employment of a relative in the election management body *per se* cannot lead to nullification

of an election. He urged us to find as much in this appeal.

Mr Saitabao Kanchory, learned counsel for the 3rd respondent, associated himself with the submissions made on behalf of IEBC and the 2nd respondent, and stressed that the appellant had not proved the irregularities he had alleged in the petition to the required standard. Counsel submitted that the 3rd respondent was not related to any election official; that under *section 59(1)(k) and (l) of the Elections Act*, partiality on the part of an election official constitutes a criminal offence punishable by three [3] years imprisonment or a fine of KShs.1 million or both; that to prove that allegation therefore required proof beyond reasonable doubt; that once it proved difficult to get within the constituency persons with the advertised qualifications (holders of degrees or diplomas), it was within the discretion of IEBC to revise the qualifications, taking into account the peculiar circumstances of the constituency; and that the officers that were ultimately recruited were competent as the election court had found.

In our view, the provisions of *Article 81 of the Constitution* on the principles that underpin our electoral system are clear and unambiguous enough to entertain disputation. Under the Constitution, our electoral system must, among other things, facilitate the citizens to freely exercise their political rights. It must deliver elections by secret ballot and those elections must be transparent, free and fair; devoid of violence, intimidation, improper influence or corruption. The elections must be administered in an impartial, neutral, efficient, accurate and accountable manner, by an independent elections management body.

Article 81 is a foundational provision as far as the exercise of the sovereign will of the people of Kenya is concerned. At its heart is the burning quest to provide a framework that will enable the people of Kenya to exercise or delegate their sovereignty, which is expressly recognised in *Article 1 of the Constitution*, in accordance with their true free will. To that end, the election management body is under a constitutional obligation not only to deliver free, fair and impartial elections, but also to be seen to do so.

As far as the first ground in this appeal is concerned therefore, it behooves the IEBC, if it has to be seen to be transparent, neutral and impartial as demanded by *Article 81*, to ensure that the recruitment of the officers to superintend over elections, as well as the actual discharge of duties by those officers, truly manifests transparency, neutrality and impartiality and other constitutional values. For it is surely a contradiction in terms to expect election officials recruited through an opaque procedure that promotes cronyism, nepotism and favouritism to deliver a transparent, free and fair election.

The first ground of appeal relates to the election officials who presided over the elections in Laikipia North Constituency who the appellant contends lacked impartiality and were incompetent. The Primary complaint is that Abraham Lemanyichoi was *"a relative"* of the 3rd respondents and the coordinator for recruitment of IEBC officials at Sosian Ward, and was himself deployed as a presiding officer. In addition, Namusungu Lenawasae, who was the deputy presiding officer at Narok Primary School polling station was alleged to be a cousin of the 3rd respondent and, according to the appellant, to add insult to injury she did not possess the required qualifications for appointment as an election official.

The election court found as a fact that Abraham Lemanichoi was not an IEBC coordinator as alleged. He was the presiding officer at Tingamara Administration Police Post. Beyond the bare assertion by the appellant that *Lemanichoi* and *Lenawasae* were *"relatives"* of the 3rd respondent, which the latter strenuously denied under cross examination, there was no elaboration whatsoever on the nature of the relationship between the officials and the 3rd respondent. Before us, Mr Issa laid more emphasis on the fact that some of the officials were members of the 3rd respondent's *"clan"* and that fact by and of itself undermined the constitutional principle on neutrality and impartiality.

Bearing in mind what we have said about the importance of impartiality and neutrality on the part of the election management body and its election officials, we must add that there are realities that also must be borne in mind, without necessarily negating the constitutional principle. In our view, it would be undermining the constitutional principle, if we were to interpret it as narrowly as the appellant invites us to do, so as to exclude sundry and all potential election officials on the basis that some candidates are their clansmen or clanswomen.

In an election like that of Laikipia North Constituency where six candidates, presumably from different clans, were contesting, IEBC would have to disqualify many otherwise professional, honest and impartial Kenyans purely on the basis of their clans. In our view, a more realistic interpretation of the constitutional principle of neutrality and impartiality in elections, as it relates to relatives, would require more than vague allegations of clan ties, to disqualify a person as an election official.

If the appellant were to show, for example, close sibling, filial or similar relationship between the candidate and the officials or that all the election officials in a particular station were exclusively from one clan; that could create a reasonable perception of lack of impartiality and neutrality. However, where the officials are from a mixture of clans, we are not convinced that there is legitimate basis for complaint, without evidence of closer relationship or conduct on the part of the election officials that would be perceived as undermining the officer's impartiality and neutrality. In this particular appeal, the point we make against generalised exclusion is borne out by the fact that at the polling station where Lemanichoi was the presiding officer, his alleged clansman, the 3rd respondent obtained 0 votes against the appellant's 3.

It is in that context that we believe the decision of the High Court in *Ferdinand Ndungu Waititu VS IEBC & 8 Others, (supra)* should be seen. In that petition, one of the complaints before the election court was that two daughters of the Chief Executive Officer of the IEBC had been employed as election officials and had favoured the petitioner's opponent. In rejecting the complaint, the election court held that no evidence had been adduced to show that the appointments were illegal or that the two daughters were not qualified or had otherwise influenced the election to the petitioner's prejudice.

Regarding Lenawasae, the main issue was her qualification. The evidence was that she was a qualified *P1* teacher. It is not disputed that when the IEBC advertised the positions for which she was recruited, the prescribed qualifications for the applicants was a degree or a diploma. The appellant's counsel argues forcefully that to be seen to be transparent and accountable, once the IEBC prescribe qualifications for election officials, it was bound to recruit only persons with those qualifications.

The evidence of the returning officer, Ismael Hashim on this issue was as follows:

"When recruiting the presiding officers and deputy presiding officers, we were given a general direction by IEBC. The presiding officers had to have a degree or diploma. There was a guideline that that was what we should look for but if it was not available, we should work with what was available. The guiding principle was to work with the local available human resource. We could not stop elections if the degrees and diplomas were not there. The qualification was a degree and diploma."

Again, as a general principle, one cannot quarrel with the appellant's submission. The real dilemma arises when you apply the principle to the realities of a part of Kenya like Laikipia North Constituency which, from the evidence, has some of the highest levels of illiteracy with only a handful of local residents meeting the prescribed qualifications. Does IEBC ignore the local community and import qualified people from the rest of Kenya to satisfy the requirement of a degree or diploma holder, or does it look for upright and conscientious locals, otherwise qualified, albeit without degrees or diplomas"

The evidence on record is that IEBC settled for the latter option.The officials were recruited competitively, were trained on their duties and subscribed to the code of conduct. We are unable to fault IEBC for that decision, which we find not to have been arbitrary, capricious or irrational. In discharging its constitutional mandate, IEBC must take into account the peculiar circumstances of all parts of Kenya, but without undermining the values prescribed by the Constitution.

In our view, it does not require much reflection to appreciate that for a myriad of reasons - some political, geographical and historical - it is a struggle in some constituencies in Kenya to get a handful of people with formal education of the level that is easily found in a single location, in other parts of Kenya. The Constitution of Kenya recognises the reality of marginalized communities and peoples in Kenya, and their protection and participation in national life is one of the core national values and principles of governance in *Article 10*. The national values of inclusiveness, sharing and participation of the people are equally relevant in this regard.

It is also not lost to us that devolution, easily recognized as one of the distinguishing and enduring innovations of the Constitution of Kenya 2010, was intended to address these realities of national imbalance. It is precisely for that reason that protection and promotion of the interests and rights of minorities and marginalized communities as well as their self-governance and enhanced participation in the exercise of the powers of state and in decision making, feature prominently as the objects of devolved government. Therefore, importing election officials wholesale from other parts of Kenya to run elections in Laikipia North Constituency due to lack of enough numbers of local degree and diploma holders, as was favoured by the appellant, cannot, in our opinion, amount to protection and participation of the local community or upholding the concomitant national values as demanded by the Constitution.

To the extent that it was possible to get literate, honest and conscientious local officials, IEBC was justified in using in Laikipia North Constituency officials possessed of slightly less qualifications than those of, say Nairobi and other parts of Kenya. In our view, granted these realities, IEBC would be totally remiss if it applied mechanically across the board its set qualifications for election officials.

Accordingly, we do not find any merit in this ground of appeal and the same is accordingly dismissed.

Regarding the ground of appeal concerning the opening of the ballot box at *Ngenia Secondary School,* Mr Issa submitted that the election court had found as a fact that one of the ballot boxes had been re-opened and that in itself was an irregularity. In his view, this finding alone justified nullification of the election and the learned judge erred by failing to do so.

Mr Juma was of the contrary view, submitting that this was an irregularity that did not affect the result of the election. Counsel submitted that the ballot box was opened in good faith and with the concurrence of all the parties in a bid to find out why the cast ballots and the spoilt ballots did not tally; that the box was opened in the presence of the candidates, including the appellant, as well as their agents, and that the opening of the box did not confer an advantage or disadvantage to any of the candidates. Counsel relied on the Supreme Court decision in *RAILA ODINGA VS IEBC & 3 OTHERS, Supreme Court Petition No. 5 of 2013* and submitted that the appellant was obliged to prove not only that there was an irregularity, but also that the irregularity had affected the validity of the election. Counsel concluded that the irregularity in issue here was the kind contemplated by *section 83 of the Elections Act* and which did not affect the outcome of the election.

For his part, Mr Kanchory argued that the appellant was precluded from raising the issue of the opened ballot box because the same had not been pleaded as a ground in the petition. He cited the case

of *MAHAMUD MUHUMED SIRAT VS ALI HASSAN ABDIRAHMAN & 2 OTHERS, (2010) eKLR* and *RICAHRD KALEMBE NDILE & ANOTHER VS DR PATRICK MUSIMBA MWEU & 2 OTHERS, Machakos Election Petition No. 1 of 2013* for the proposition that parties are bound by their pleadings. In addition, counsel relied on the recent decision of this Court in *IEBC & ANOTHER VS STEPHEN MUTINDA MULE & 3OTHERS, Civil Appeal No. 219 of 2013* where the Court reiterated that parties are bound by their pleadings in election petitions, which in turn limits the issues upon which a trial court may pronounce.

It is not disputed that the issue raised in this ground of appeal was not pleaded in the petition as a ground for nullification of the 3rd respondent's election. There are many decisions of our courts, including those cited by the 3rd respondent's counsel, to the effect that parties cannot raise matters that are not in their pleadings. Way back in 1930, *Scrutton LJ* in *BLAY VS POLLARD & MORRIS (1930) 1 KB, 628 at 634* stated that:

"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course."

In *GANDY VS CASPAIR, (1956) 23 EACA 139*, Sinclair V-P reiterated that principle when he stated that: *"as a rule relief not founded on the pleadings will not be given".*

It is clear to us too, that there are equally many clear judicial authorities for the proposition that where the parties have raised an issue and left it for the decision of the court, the court can determine the issue even though it was not pleaded. Thus, in *ODD JOBS VS MUBIA, (1970) EA 476,* the predecessor of this court held that:

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

In *HERMAN P. STEYN VS CHARLES THYS*, *CIVIL APPEAL NO. 86 OF 1996,* this Court expressed itself strongly on the issue as follows:

"First, it was submitted that the learned trial judge erred in failing to appreciate that there was no evidence on which he could find the plaintiff's case proved as pleaded and so also was the finding of the judge that the plaintiff had advanced to the defendant the claimed sums of money in Dollars overseas. It is true that the finding was an obvious and fundamental departure from the pleadings without any amendment of the same. But in our view the appellant himself introduced the unpleaded issue into the evidence, led evidence thereon, cross examined the plaintiff vigorously in relation thereto and acquiesced into the unpleaded issue being canvassed and left to the court for a decision. In addition, the defendant also called witnesses in support of his assertion that the money was loaned in Tanzanian Currency. Written submissions followed in which the advocates for both the parties dealt with this issue in detail. In these circumstances, the determination of that issue became an issue at the trial with neither party objecting and both parties fully participating in it. This ground of appeal, therefore, must fail."

In the present appeal, the record shows that although the issue of the opened ballot box was not pleaded in the petition, the parties addressed it in the evidence that they led and in their submissions. The learned judge pronounced himself on the issue and made findings on it. In short, all the parties proceeded as if the issue had been pleaded. The 3rd respondent should have raised the objection that

is being raised now the moment an unpleaded issue was raised before the election court. But what did he do" He acquiesced in the matter and addressed the issue as if it had been pleaded. With respect, it is too late in the day for the 3rd respondent to claim that the issue was not pleaded.

In *MUTISO VS MUTISO, (1988) KLR 846*, this court held that even though the issue of a resulting trust had not been pleaded in the plaint, it nevertheless was a live issue throughout the trial and it had become an issue upon which the trial court could properly make a finding. Moreover, the Court also found that in the circumstances of the case the party who was complaining

had not suffered any prejudice. In *UGANDA BREWERIES LTD VS UGANDA RAILWAYS CORPORATION*, *CIVIL APPEAL NO. 6 OF 2001*, the Supreme Court of Uganda adopted a similar view. *Oder, JSC*, speaking for the court stated:

"To my mind, the question for decision under ground 2(i) of the appeal appears to be whether the party complaining had a fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining…, or whether the departure was a mere irregularity, not fatal to the case of the respondent, whose evidence departed from its pleadings."

We find that the issue was placed before the learned judge squarely without any objection from any of the parties; it was fully canvassed by the parties, and the learned judge made a determination on the same. We also find that the 3rd respondent had fair notice of the issue, that he responded to the same and he was not occasioned any prejudice.

On page 11 of the judgment, the learned judge found that the 2nd Respondent, Ismael Hashim who was the returning officer, had ordered the ballot box for Ngenia Secondary School Stream II to be opened and the votes recounted, which was an irregularity. However, the learned judge concluded that the irregularity was not substantial as to affect the result of the election. The learned judge was satisfied by the explanation given by the 2nd respondent on the circumstances under which the ballot box was opened. It was that from Form 35, the valid votes did not tally with the rejected votes and the total number of votes cast. The opening of the box was done in the presence and with the concurrence of all the parties and their agents. After recounting of the ballots, the problem was resolved and everybody was satisfied.

The *Elections (General) Regulations, 2012*, in particular Regulations 81, 82 and 83 do not contemplate the opening of the ballot box as was done in this case and we agree with the learned judge that was an irregularity. That all the parties participated or acquiesced in the opening of the ballot box does not make it less of an irregularity. The real question at the end of the day is what was the effect of the irregularity as far as the result of the election was concerned"

The ballot box was opened in the presence of all the parties or their agents. The evidence leaves no doubt that it was a good faith attempt to balance the figures, albeit an undertaking not provided for in the Regulations. There is no allegation that any votes were added or introduced into the ballot box or removed after it was opened. There is even no allegation that the appellant *suspects* something of the sort happened. The appellant's complaint is with the opening of the ballot box *per se*.

At the turn of the last century, Kennedy, J stated as follows regarding irregularities electoral irregularities in *MEDHURST V LOUGH AND GASQUET, (1901) 17 TLR 210, at 230:*

"An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court

is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not, and could not have been, affected by those transgressions."

Even more recently the Supreme Court of Canada in *OPITZ VS WRZENNEWSKY, 2012 SCC 55, 2012 3 SCR 76,* expressed the same view as follows:

"If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election." (Emphasis added).

We have come to the conclusion that the irregularity of opening the ballot box did not vitiate the election or affect the result for Member of Parliament for Laikipia North Constituency. It is the kind of irregularity which under *section 83 of the Elections Act* is an irregularity that does not affect the result of the election.

On the ground relating to assistance of illiterate voters, the appellant's submission was that the learned judge had erred by failing to hold that illiterate voters had been assisted by election officers contrary to *regulation 72(2) of the Elections (General) Regulations, 2012*. In his view, adequate evidence had been addressed to prove that particular irregularity. The cases of *JAMES OMINGO MAGARA VS MANSON ONYONGO NYAMWEYA & 2 OTHERS, (2010) eKLR*, *ALI OMAR VS JULIUS DARAKA MBUZI & ANOTHER, (2006) eKLR*, *KEEFE VS PUKANICH, (2007) NWTSC, 90* and *MORGAN VS SIMPSON & ANOTHER, (1974) All ER 722*, were relied upon to support the submission that non-observance of mandatory provisions of electoral law is fatal and renders an election null and void.

For IEBC and the 2nd respondent, it was submitted that the election court had found as a fact that the witnesses (*Muleyo Lenkasurai, PW 12* and *Joyce Lenaiyara, PW 13*) who complained that their ballots had been marked for them by the presiding officer or his deputy at *Narok polling station* had wanted to be assisted by their party agent, which was contrary to the regulations. Instead, those witnesses were assisted by the presiding officer, *Paul Kariuki Kinyua* or his deputy, in the presence of the agents and observers after indicating the candidate of their choice. Mr Juma further submitted that in Narok polling station, all the agents, including that of the appellant, had signed *Form 35* and that no complaint or protest had been lodged by any of the agents.

Mr Kanchory supported the submissions of the IEBC and the 2nd respondent regarding assisted voters and emphasized that the learned judge had commented positively on the evidence of the presiding officer, which he noted was not shaken and was corroborated by the evidence of another witness. Counsel submitted that this complaint was a pure fabrication or after thought.

The appellant's complaint as well as the evidence that was adduced before the election court to support this ground of appeal related to what happened at Narok polling station. The appellant's main evidence on alleged irregularity was given by Muleyo Lenkasurai, (PW 12) and Joyce Lenaiyara, PW (13). The 1st and 2nd respondents' witness was Paul Kariuki Kinyua, the presiding officer at Narok polling station. The appellant's witnesses were categorical that when they went to the polling station to vote, they specifically asked to be assisted to vote by agents of The National Alliance political party *(TNA),* which request was declined and instead they were assisted by the presiding officer or his deputy.

Regulation 72(1) allows a disabled voter or one who is unable to read or write to be assisted to vote by a person of his or her choice. The rule is very categorical however, that the person to assist the voter cannot be a candidate or an agent. Where a voter under the said disabilities is not accompanied by a person who is to assist him to vote, *Regulation 72(2)* allows the presiding officer to assist the voter, but in the presence of all agents. This is how the learned judge resolved the controversy:

"From the evidence on record, PW12 and PW13 who were assisted voters came to the polling room and asked for TNA agents to assist them to vote. The presiding officer or the Deputy denied them that opportunity and in accordance with the law, assisted the voters themselves. The said voters however complained that their ballot papers were ticked without their being asked whom they wanted to vote for. This was denied by R1W3 who explained the procedure he was undertaking in respect of assisted voters which seemed to agree with Regulation 72 of the Regulations. His testimony was unshaken and was corroborated with (sic) that of R3W1. Whilst I note that PW 12 and PW13 were insisting on the TNA agents to assist them vote which was contrary to law, there was nothing to show that R1W3 or his deputy had any reason to mark the ballot papers without or before the said voters indicated their candidates of choice. This happened in the presence of all agents. Even if the agents of the Petitioner are alleged to have been absent, there was no evidence to show that the agents for the other parties were not present. No complaint was lodged at the polling station in respect of this complaint. In any event, the agents signed the Form 35 and did not record any complaint therein. I am not satisfied that this complaint was proved to the required standard."

From the evidence on the record, we do not see how we can differ with the learned judge, who had the added advantage of seeing and hearing the witnesses testify. He was more impressed by the evidence of the presiding officer than that of PW 12 and PW13. We do not see any basis for interfering with the learned judge's estimation of the evidence or the credibility of the respective witnesses.

The only ground upon which the learned judge truly deserves criticism is that immediately after making the above finding based on the evidence adduced, he suddenly descended, as it were, into the realm of speculation regarding what may or may not have happened in other stations. He expressed himself thus:

"It is however possible that the polling officials in some instances may have marked the ballot papers as is complained of by PW12 and PW13. However, I note that there was no evidence to show that what happened in Narok polling station was replicated in many other polling stations in the constituency."

Having found from the evidence that the election officials had not committed any irregularity pertaining to assisted voters in the polling station where complaints had been raised, it was totally remise of the learned judge to speculate what may or may not have happened in other stations, without the benefit of pleadings and evidence. The election court, like all courts in this land makes its determination on the basis of evidence, not speculation. Speculation becomes particularly untenable where the court has already reached contrary conclusions based on facts.

Mr Issa next addressed the issues of undue influence and bribery by the 3rd respondent. For convenience we shall address these issues together as they are closely intertwined. On undue influence learned counsel submitted that the repair of the *Pois Robo* dam in Segera Wards of Laikipia North Constituency was undertaken by the 3rd respondent to influence voters to vote for him. He contended that credible evidence on the repair of the dam had been given by Jackson Parasian Dhokole *(PW1),* a resident of Pois Robo, and the appellant himself. In counsel's view, that evidence showed that the dam was repaired by the 3rd respondent purely for the purpose of unduly influencing voters contrary to *section 63 of the Elections Act* and that the learned judge had erred in failing to so hold.

The appellant relied on the decision of the Court of Appeal of Tanzania in *AG VS KABOUROU, (1995) LRC, 757* in which Nyalali, CJ and Kisanga and Mfalila, JJ.A held that where undertaking to repair a road in a constituency was given with the corrupt motive of influencing voters, it amounted to electoral bribery and affected the results of the election, rendering it unfair. In addition the judgment of Harbans Singh, J of the Indian High Court of Punjab-Haryana in *TIRLOCHAN SING VS KARNALI SINGH & ANOTHER, (AIR, 1968 PH 416)* was cited for the proposition that a gift or a promise, made by a candidate for a public purpose rather than for the benefit of any individual, but with the object of endearing the candidate amongst a section of the electorate, and thus directly or indirectly induce them to vote in his favour, would constitute bribery contrary to *section 123 of the Representation of the People Act of India*.

Regarding the acts of bribery, learned counsel submitted that there was credible evidence from Rachel Wangui Karuru (PW2) and Jacinta Muthoni Maina (PW3) that the 3rd respondent had endeared himself to voters in *Mukogondo East Ward* by bribing *Ngenia Witeithie* women group with 50 plastic chairs. Counsel also submitted that the evidence showed that the 3rd respondent had donated two rolls of barbed wire to *Ngenia Dispensary* with a similar corrupt motive.

Counsel concluded that the donations were made less than a month to the election date, for the purpose of influencing voters. In counsel's view, even a single act of bribery is sufficient to invalidate an election. He called to the appellant's aid the decision of the Supreme Court of Uganda in *BADDA & ANOTHER VS MUTEBI, Civil Appeal No. 21 of 2007* in which the court held that donation of a cow to a football club in a tournament held during election campaigns was intended to influence the voters in favour of the donor.

Mr Juma, on his part, took a different view submitting that to prove the election offence of undue influence and bribery, it must be established that a gift, money, promise or undertaking was given by a candidate or is duly authorized agent to a voter to induce him to vote in a particular way or to abstain from voting.

In his view, the appellant, who bore the burden of proof, did not adduce any evidence to prove the allegations of undue influence and bribery. Counsel submitted that the appellant's evidence on the alleged bribery was properly found by the election court to be full of contradictions and inconsistencies, whilst the evidence of the respondents that the chairs and the barbed wires were purchased and donated by *Paul Ngobia (R3W2),* was credible and believable.

Counsel cited the decision of Court of Appeal of Uganda in *KAMBA SALEH MOSES VS NAMUYANGU JENNIFER, Election Appeal No. 00027 of 2011* and that of the High Court of Uganda in *NABUKEERA HUSSEIN HANIFA VS KIBUKE RONALD & ANOTHER, HCT-03-CV-EP-00012-2011,* for the proposition that the alleged bribe must be given to a person or persons who are proved to be registered voters and that a corrupt motive on the part of the alleged giver of the bribe must be proved. The same cases was relied upon as authority for the proposition that where the alleged bribe is given by a person other than the candidate, it must be proved that the candidate had sanctioned the giving of the bribe or had knowledge or consented to it.

For the 3rd respondent, Mr Kanchory submitted that, undue influence and bribery, being election offences attracting criminal sanctions under the Elections Act, the standard of proof required is beyond reasonable doubt. Counsel urged that the election court had properly held that the appellant had not proved the alleged election offences to the required standard.

On the repair of the Pois Robo dam, counsel submitted that the election court had found as a fact

that the repairs were undertaken by a Non Governmental Organization, *Ndugu Zangu Christian Community Trust* as part of its ongoing charitable work and not to influence voters in favour of the 3rd respondent. Regarding the alleged bribery of voters with plastic chairs and barbed wire, counsel made submissions similar to those made on behalf of IEBC and the 2nd respondent, concluding that none of the alleged election offences were proved at all or to the required standard.

This last ground of appeal alleged undue influence and bribery against the 3rd respondent. In *JOHO VS NYANGE & ANOTHER, (2008) 2 EPR, 500 Maraga, J (as he then was)*, expressed himself as follows regarding the quality of evidence that is generally required in an election petition:

"Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should e proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made; instances of the bribery should be given."

The standard of proof required in an election is higher than on a balance of probabilities, the normal standard required in ordinary civil disputes. In particular, where the allegations upon which a petition is founded amount to criminal offences, an even higher standard of proof is required. The Supreme Court, in *RAILA ODINGA & OTHERS VS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS, Supreme Court Election Petition No. 5 OF 2013*, expressed itself as follows on the standard of proof in election petitions:

"The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."

In this instance the alleged undue influence and bribery constitutes criminal offences under *section 63(1) and section 64(1) respectively, of the Elections Act*. Those offences are punishable by a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both. Proof beyond reasonable doubt was required.

The main evidence for the appellant regarding repair of Pois Robo dam was given by Jackson Parasian Dokhole (PW1) who testified that after the dam was destroyed by flash floods, the concerted efforts of the residents of Segera Ward to rehabilitate the same came to naught. The residents were pleasantly surprised however to learn from one *Mukta Lenemaita (who was never called as a witness)*, that the 3rd respondent had offered to repair the dam. Subsequently the 3rd respondent officiated at the commissioning of the repaired dam in January, 2013 and in February 2013; he addressed a campaign rally at the dam and asked the resident to vote for him because he had repaired the dam.

The rebuttal evidence, which the trial judge found to be candid and credible, was that in 1996, the 3rd respondent, in partnership with Banzelli Luigi, an Italian missionary, had founded a Non Governmental Organization called Ndugu Zangu Christian Community Charitable Trust to spearhead provision of community services such as provision of water and health services in the area.

The dam was repaired by that NGO, and by virtue of the 3rd respondent's past association with it, he was invited to commission the repaired dam.

The trial judge found that the dam was repaired by the said NGO rather than by the 3rd respondent and that the repair took place in December, 2012, before the official campaign period.

On the alleged bribery of voters by the 3rd respondent through purchase of 50 plastic chairs for Ngenia Witeithie Women Group and 2 rolls of barbed wire for Ngenia Dispensary, the appellant's evidence was given by Rachel Wangui Karuru (PW2) and Jacinta Muthoni Maina (PW3). The learned trial judge, who had the advantage of seeing and hearing the witnesses, was not impressed by the evidence of PW2 and PW3, which he found to be contradictory, lacking in truth and unworthy of belief.

On the other hand, he was impressed by Paul Ngobia (R2W2), the essence of whose evidence was that he was responsible for the purchase of the chairs and the barbed wire for the women group's fundraising occasion *(Magetha),* having been officially invited to the function. The witness produced receipts in his name relating to those purchases and testified that he was not a member of the 3rd respondent's campaign. The learned judge found that the chairs and barbed wires were not purchased by Paul Ngobia on behalf of, or with the approval of the 3rd respondent.

We are not able to disagree with the election court for two reasons. First, the evidence adduced by the appellant to prove election offences is not only way below satisfying a court beyond reasonable doubt; it is also not cogent, credible and consistent. Secondly we have before us conclusions of fact arrived at by the trial judge, which we are being asked to reject off hand and come to our own different findings of fact. With respect, we are of the view that there is a glaring misapprehension of our role as an appellate court in election matters.

While it is true that in an election appeal, this Court is a first appellate court, by dint of *section 85 of the Elections Act*, our jurisdiction is limited to issues of law only. In a sense, in election appeals this court is a first appellate court and also a last appellate court, save for situations under *Art 163(4) of the Constitution* when appeals to the Supreme Court are allowed, which are exceptions to the rule.

Ordinarily when we talk of a first appellate court it is in contradistinction with a second appellate court. In that sense, the duty of a first appellate court is normally to re-hear the case and re-evaluate the evidence. The duty of the second appellate court is however restricted to issues of law only, which is consistent with the whole design of our system of courts, where matters of fact are settled at the lower levels and issues of law become the focus at the higher levels.

Appeals to this court from the election court are therefore peculiar because this court is, subject to *Art 163(4)*, a court of first appeal and also a court of last appeal. By express statutory provision, namely *section 85A of the Elections Act*, our jurisdiction is limited to issues of law. Clearly then, in terms of duty, it should be possible to discern some distinction between the duty of the election court and the duty of this court on appeal; it cannot be exactly the same duty when it comes to addressing the issues of fact.

In our opinion, this Court cannot ignore the fact that its jurisdiction is by statute limited to issues of law only. To that extent, the ordinary authorities on the duty of a first appellate court to re-hear the case and re-evaluate the evidence cannot be applied lock-stock and barrel to appeals from election petitions. In those cases where this Court is the first appellate court in the ordinary sense, there is no restriction of its jurisdiction to issues of law only.

The approach that best commends itself to us is to be faithful to the injunction that our jurisdiction is limited to issues of law, and to uphold the findings of fact by the election court, unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.

For the foregoing reasons, we find that the appellant did not prove to the required standard commission of the election offences of undue influence and bribery by the 3rd respondent and that there

is no basis upon which we can interfere with the findings of the election court on facts.

As indicated at the beginning of this judgement, the 3rd respondent filed a notice of cross appeal and grounds for affirming the decision. We shall dispose of those grounds immediately. With respect, we do not see any new grounds for affirming the decision which are not raised in this appeal or which were not considered and addressed by the election court.

What the third respondent terms *"grounds for affirming the decision"*, in our view, amount to no more than a discourse on the ulterior motivation that informed the appellant's petition, as well as sustained impeachment of the

the event, unless the court, for good cause, orders otherwise. (See *KOHLI VS*

POPATLAL (1964) EA, 219). Being in the discretion of the court, an appellate

court will not readily interfere with the exercise of discretion by the trial court

unless it is satisfied that the court acted on a wrong principle. In *KOHLI VS*

POPATLAL, (supra), Crabbe, JA expressed the proposition in the following terms:

"Having regard to the above authorities it seems to me that where a discretion as to costs has been exercised by a judge, his decision is unimpeachable on appeal unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case, or nonexistent. Further, an appeal will be entertained from the exercise of discretion as to costs where the Court of Appeal is satisfied that the lower court applied a wrong principle of law."

In *STEEL CONSTRUCTION PETROLEUM ENGINEERING (EA) LTD VS*

UGANDA SUGAR FACTORY (1970) EA 141, Spry, JA stated:

"An appellate court will not interfere with assessment of costs by a taxing officer, unless the taxing officer has misdirected himself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference."

To the same end, an appellate court will not interfere with the exercise of jurisdiction merely because it feels it could itself have made a different award. In particular when the appeal relates to questions of quantum, the courts have always regarded that to be an issue best left to the taxing master and will only intervene in exceptional circumstances. *Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2013* empowers the election court, at the conclusion of a petition to make an order specifying the total amount of costs payable; and the persons by and to whom the costs shall be paid. The power of the election court to cap the costs payable was an innovation of the 2013 rules which did not exist in the previous rules.

The clear and eminently rational motivation of that power was the need to rein in the astronomical awards of costs that had come to characterize election petitions in our jurisdiction, thus threatening to discourage poor citizens from questioning the conduct of elections and to turn the election court into the preserve of the very rich.

As we have already noted, the trial judge, in exercise of the powers conferred by *Rule 34* capped the

costs at KShs.2.5 million, with KShs.1 million to the 1st and 2nd respondent and KShs.1.5 million to the 3rd respondent. There is no dispute that when this Court, sitting in Nyeri, reinstated the appellant's appeal after the same had been dismissed for non attendance, it directed that the costs of that appeal do abide the outcome of the petition. The respondents were, however, awarded the costs of the application for the reinstatement of the appeal.

We would have been disinclined to interfere with the exercise of discretion on costs by the election court, but for the fact that in capping the costs payable, the learned judge did not avert to the order that costs of *Civil Appeal No 18 of 2013*, were to abide the outcome of the petition. Accordingly, our final orders are that the appellant's appeal is bereft of merit and the same is dismissed with costs both in the High Court and in this Court. We allow the 3rd respondent's cross appeal on costs before the High Court which we cap at KShs.3.5 million with KShs.1.5 million to the 1st and 2nd respondents and KShs.2 million to the 3rd respondent. We accordingly direct that the costs be verified and taxed by the taxing officer, to the intent that costs in the High Court shall not exceed KShs.3.5 million while costs in this appeal shall not exceed KShs.1.5 million.

Those are our orders.

Dated and delivered at Nairobi this 4th day of April, 2014

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR