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Case Action:	Judgment
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Citation:	Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR
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**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 43 OF 2013**

**BETWEEN**

**MOSES MASIKA WETANG'ULA.....APP  
ELLANT/RESPONDENT**

**AND**

**MUSIKARI NAZI  
KOMBO.....1<sup>ST</sup>  
RESPONDENT/APPLICANT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2<sup>ND</sup>  
RESPONDENT**

**MADAHANA MBAYA.....3  
RD RESPONDENT**

***(An Appeal against the Judgment and Decree of the High Court of Kenya at Bungoma (Gikonyo, J) rendered on 30<sup>th</sup> September, 2013***

*in*

***ELECTION PETITION NO. 3 OF 2013***

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**JUDGMENT OF THE COURT**

1. In the March 4<sup>th</sup>, 2013 general elections in Kenya, Moses Masika Wetangula, (the appellant) contested for the Bungoma Senatorial seat and was declared the winner, having, according to the Independent Electoral & Boundaries Commission (the IEBC), garnered 154,469 votes. His closest rival, Musikari Nazi Kombo, (the 1<sup>st</sup> respondent), who allegedly garnered 125,853 votes, being dissatisfied with that result petitioned the High Court at Bungoma to nullify the appellant's election. After hearing the petition, Gikonyo J, nullified that election thus provoking this appeal. As the by-election arising there from had been scheduled to be held on 16<sup>th</sup> December 2013, after hearing the petition on 10<sup>th</sup> December 2013, we did not have sufficient time to prepare a full judgment. We dismissed the appeal on 11<sup>th</sup> December 2013 but reserved our reasons for that decision. This is therefore our full Judgment on this appeal.

2. The appellant's 57 grounds of appeal revolve around three main issues. One, whether or not the appellant was guilty of the election offences of bribery contrary to **Section 64** of the **Elections Act** and treating contrary to **Section 62** of the same Act. Secondly, whether or not the Bungoma County Senatorial Election (the election) was conducted substantially in accordance with the principles laid down in the Constitution and with the written law of that election. And lastly, whether or not the irregularities allegedly committed in the conduct of the election affected the result of the election.

3. Presenting the appeal before us, Mr. Ochieng Oduol, learned counsel teaming up with Messrs Masinde, Makokha, Wasilwa and Ouma for the appellant, in both his written and oral submissions, argued that the learned Judge had no basis for finding the appellant guilty of either of the offences of bribery or treating. He cited the Supreme Court decision in **Raila Odinga vs. IEBC & 3 others**,<sup>[1]</sup> the Ugandan Supreme Court decision in **Colonel Dr. Kissa Besigye vs. Museveni Yoweri Kaguta**,<sup>[2]</sup> and the majority opinion of the Canadian Supreme Court in **Ted Opitz v Borys Wrzeszewski**<sup>[3]</sup> and submitted that like in ordinary cases where the burden of proof is on the plaintiff, in an election petition, the burden is on the petitioner to prove all his claims. And where the petitioner alleges commission of election offences, the burden is upon him to prove all such allegations beyond reasonable doubt. He added that as was stated in the cases of **John Kiarie Waweru v Beth Wambui Mugo & 2 Others**<sup>[4]</sup> and **Joho v Nyange**,<sup>[5]</sup> findings on criminal offences cannot be based on mere surmise or conjecture but on accurate, succinct and credible evidence.

4. In this case, the 1<sup>st</sup> respondent had made numerous allegations of bribery and treating against the appellant but the court dismissed them for lack of sufficient evidence save for the one allegedly committed on 22<sup>nd</sup> February, 2013 at the Red Cross meeting at Kanduyi (the Red Cross meeting) which it held had been proved to the required standard. Counsel submitted that although the learned Judge had correctly stated the standard of proof of criminal offences committed in the process of an election and set out the ingredients of the offences of bribery and treating, he erred in finding that the allegations made against the appellant that he had bribed and treated the Pastors and Bishops at the Red Cross meeting had been proved to the required standard.

5. Counsel submitted that as the 1<sup>st</sup> respondent conceded that he did not himself witness any incident of bribery and treating, he relied on the evidence of Rev. Joseph Machani Wekesa, PW4, Bishop Judith Nanjala Wechuli, PW6 and Nehemiah Mkubwa Kinisu, PW7. He said the evidence of those witnesses was totally unreliable as it was riddled with "*incurable contradictions*." He argued that whereas PW4, who had perjured himself, claimed that the appellant contributed Kshs. 140,000/= and Hon. Khangati Kshs. 120,000/= as transport for the Pastors and Bishops who attended the Red Cross meeting, PW6 and PW7 said it was the appellant who gave the whole sum of Kshs. 260,000/=. Again while PW6 said the appellant gave that money to Bishop Khaoya, as a token of appreciation for their anticipated support, PW7 claimed that the appellant gave the money to Pastor Musundi and Bishop Macheusi to distribute among Pastors. In the circumstances, instead of demanding for evidence as to who gave what sum of money to who and for what purpose, the learned Judge ignored the evidence of the appellant and his witnesses and erred in concluding that these witnesses gave a succinct account of the appellant and Hon. Khangati bribing and treating Pastors and Bishops with Kshs. 260,000/= to mobilize votes for the appellant and other CORD Coalition candidates. If anything, counsel submitted, there was evidence that it was the 1<sup>st</sup> respondent who bribed one Maurice Makhanu and his wife with Kshs 5000/= each to induce Makhanu to use his network to solicit votes for him which evidence the learned Judges surprisingly dismissed holding that that claim was not proved to the required standard.

6. Citing the Nigerian Court of Appeal decision in **Dr. John Olukayode Fayeni vs. Olusegun Adebayo Oni & Others**,<sup>[6]</sup> counsel for the appellant contended that an election can only be annulled on allegations of bribery if there is proof that the offence was not only widespread but also that it had substantially influenced the outcome of an election. In this case, the learned Judge found as proved only one incident of bribing about 200 Pastors and Bishops but there was no evidence of what effect that incident had on the more than 400,000 registered voters in Bungoma County.

7. Turning to the issue of non-compliance with the Constitution and the law on elections, Mr. Oduol referred us to the common law maxim, *Omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to be done rightly and regularly) and submitted that the onus is upon the one who alleges to prove the impropriety of any public body in the performance of its duties to a degree higher than that of balance of probabilities but not to the standard of beyond reasonable doubt. Besides proof of impropriety or irregularity, as required by **Section 83** of the **Elections Act**, the person making such an allegation must also go further and demonstrate that the alleged impropriety or irregularity actually affected the result of the election. Counsel once again relied on the authority of **Raila Odinga vs. IEBC & 3 Others**, and the cases of **John vs. Nyange** and **Munyao vs. Munuve & 4 Others**<sup>[7]</sup> in support of that submission.

8. Counsel forcefully argued that as the Canadian Supreme Court recognized in **Ted Opitz vs. Borys Wrzesnewskyj**, (supra) irregularities in one form or another are bound to occur in virtually all elections. But in annulling an election and thereby disenfranchising the people, the court should be clear in its determination that the non-conformity with the election law or, adopting the “magic number” test, any regulation thereof actually affected the result of the election.

9. Counsel submitted that in the above Canadian case, an election with a margin of only 6 votes was sustained. In this case, counsel submitted, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents rebutted, by documentary evidence, all the egregious allegations of breaches of the Constitution, the Elections Act and Elections (General) Regulations, 2012 (the Election Regulations) and demonstrated that even with the concession of an arithmetic error which reduced the magic number from **32,616** to **17,839** votes, the irregularities committed in the election did not, in the circumstances, affect the result of the election. Counsel was particularly emphatic that the erasures and alterations on Forms 35 were not on the number of votes garnered by each candidate but on other inconsequential details. Moreover, he said, the learned Judge did not determine, with specificity the multiple and widespread anomalies that he claimed tainted the election.

10. Finally, counsel for the appellant took issue with what he called the Superior Court's illegal delegation of its duty of conducting an inquiry to the Deputy Registrar and reliance on the Deputy Registrar's report on that inquiry. Although, the inquiry and scrutiny were triggered by the evidence of George Sitati, PW5, who testified that there was double registration and double voting by about 40 people, in his affidavit, that witness claimed that only one voter, Christine Nekesa Weswa, had registered twice and voted twice. Without any additional affidavit and thus contrary to rules of amendment of pleadings, PW5 was allowed to produce a list of 40 people he claimed registered twice and voted twice. And this, despite the evidence adduced by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that before the elections, the IEBC had cleaned up the voters register and barred from voting people who had registered twice and the people who were alleged to have been involved in double registration themselves appeared before the Deputy Registrar and asserted that they each registered and voted once.

11. In conclusion, counsel for the appellant urged us to find that the Bungoma County Senatorial Election substantially complied with the Constitution, the Elections Act and the Election Regulations and that even if there were irregularities, they did not affect the result of the election. He therefore urged us to

allow this appeal.

12. Mr. Gumbo, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, supported the appeal and adopted the submissions by counsel for the appellant as summarized above. On the offences of bribery and treating he added that the learned Judge ignored the contradictions in the evidence tendered for the 1<sup>st</sup> respondent. For instance, at one time PW6 said the appellant gave each of the 200 pastors Kshs.2000/= as a token of appreciation but later she said the appellant gave the money to Bishop Khahoya as transport for Bishops and Pastors to share on their way home. PW7 on his part said the money was given to Rev. Musundi and Bishop Macheusi. Despite those contradictions, the learned Judge believed the evidence of these witnesses but did not say why he disbelieved that of Bishop Macheusi who categorically denied receiving or seeing any money change hands.

13. Counsel urged us to dismiss the Deputy Registrar's report on inquiry and scrutiny for three reasons. One, that the Deputy Registrar had no jurisdiction to conduct the inquiry and/or the scrutiny. This is because **Article 105** of the Constitution vests the jurisdiction to determine senatorial election petitions upon the High Court. Secondly, that although, the inquiry was intended to determine if any criminal offences had been committed in the election, it was extended to issues like double registration and double voting thus amending the petition out of time contrary to **Article 87(2)** of the Constitution. And lastly that the report condemned the respondents unheard thus showing open bias against them. He cited the cases of **Kwamba Saleh Moses vs. Namuyangu Jeniffer**<sup>[8]</sup> and **Wavinya Ndeti vs. IEBC & 4 Others**<sup>[9]</sup> in support of this last submission.

14. On malpractices and irregularities, Mr. Gumbo submitted that the petition made general allegations without specifying which election law was flouted. Although he conceded that there were some irregularities, he said those were minor trans-positional and arithmetic errors that did not affect the result of the election. As regards Forms 35, he submitted that the IEBC staff did not have photocopying facilities at polling stations. In completing the required copies of the same form therefore, minor discrepancies were bound to and did occur which the candidates' agents ignored as immaterial and signed those forms. In relying on these minor irregularities, he submitted that the learned Judge did not appreciate the import of **Section 83** of the **Elections Act**. He also urged us to allow this appeal with costs.

15. Mr. Ndambiri, learned counsel for the 1<sup>st</sup> respondent, strongly opposed the appeal. He submitted that the Bungoma Senatorial election was not conducted substantially in accordance with the Constitution, Elections Act and the Election Regulations and there were numerous irregularities committed in the conduct of that election which affected its result. Contrary to the appellant's assertions that the 1<sup>st</sup> respondent did not plead the election law which was flouted, the 1<sup>st</sup> respondent clearly set out in paragraphs 2, 9, 10, 11, 12, 13 and 15 of his petition and in his counsel's submissions **Articles 38, 81(c), 86(a)** and **88** of the Constitution as well as the **Elections Act** and the **Election Regulations** as the law that was violated and this is what led the learned Judge to find that the petition had been *"carefully crafted with sufficient particulars as to disclose triable issues and ...the case the respondents are faced with."*

16. Counsel further submitted that the 1<sup>st</sup> respondent adduced credible evidence to prove that contrary to **Section 4** of the **Elections Act**, there were more than one principal registers in Bungoma County; that contrary to **Sections 57, 58** and **59** of the Elections Act, there was double registration of voters; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents permitted people who had not registered to vote and others to vote twice; and that besides numerous alterations which were not counter signed for and errors, many Forms 35 did not have statutory statements and were not signed by the Presiding Officers and/or the candidates' agents as required. Counsel said the learned Judge was therefore justified in finding that those multiple

malpractices, together with the commission by the appellant of the offences of bribery and treating affected the integrity and validity of the election. That coupled with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's failure to produce Forms 36 as ordered by the court and the announcement of results with admitted arithmetical errors, there is no guarantee that the final results announced were accurate. Those irregularities therefore also affected the results.

17. Counsel for the 1<sup>st</sup> respondent dismissed as unfounded the appellant's contention that the order of inquiry and scrutiny unlawfully widened the scope of the petition. He submitted that the 1<sup>st</sup> respondent had pleaded and applied for scrutiny and following the evidence of George Sitati, PW12, that the election was riddled with many instances of double registration and double voting, the learned Judge was justified to order, *suo moto*, the verification of those claims. He also dismissed as having no basis the contention that the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were condemned unheard. Those parties did not oppose the order of scrutiny. Instead they fully participated in the exercise. They cannot therefore be heard to challenge the basis of its results.

18. On the commission of election offences, Mr. Ndambiri submitted that the appellant gave the Bishops and Pastors at the Red Cross meeting Kshs. 260,000/= with the clear objective of having them influence and mobilize votes for him and other CORD Coalition candidates. He cited the case of **Muliro vs. Mubonye & Another**<sup>[10]</sup> and urged us to find that it is enough if there is evidence that bribes were given with the intention of influencing votes for a particular candidate and that as stated in **Paragraph 113 of Halsbury's Laws of England Volume 15**, one proved incident of bribery suffices to void an election.

19. On those grounds, counsel for the 1<sup>st</sup> respondent urged us to dismiss this appeal with costs.

20. Having considered these rival submissions and carefully read the record of appeal, as we have stated, we find that the 57 grounds of appeal can be consolidated and considered under three major clusters, namely, the alleged non-conformity with electoral law, the commission of electoral offences and whether or not the irregularities that were admittedly committed in the election affected the result of the election.

21. In the first cluster, we shall consider the electoral law that governed the 4<sup>th</sup> March, 2013 general elections in Kenya and the provisions of that law that were allegedly violated. In the second cluster we shall consider whether or not the allegations of commission of electoral offences were proved and if so whether they impacted on the validity and integrity of the elections. In the third cluster, we shall consider if the irregularities and/or malpractices that were allegedly committed in the election affected the results of the election. We shall not necessarily pigeon hole our discussions on these clusters. There may be occasions when we may vacillate between these clusters.

22. On the election law that governed the March 4<sup>th</sup> 2013 elections in Kenya, we wish to start with some International Conventions with universal principles on elections, which are now part of the law of Kenya. These include the **Universal Declaration of Human Rights 1948**, **International Convention on Civil and Political Rights, 1999** and **African Charter on Human and People's Rights** all of which have provisions that every citizen has a right to vote and be elected in periodic elections in his country held on the basis of universal and equal suffrage. For instance **Article 21 of the Universal Declaration of Human Rights 1948** grants;

**“Everyone ... a right to take part in the government of his country, directly or through freely chosen representatives...in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedure.”**

**Article 25** of the **International Convention on Civil and Political Rights, 1999** is even more succinct on the right to vote. It states that:

**“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;**

a. **To take part in the conduct of public affairs, directly or through freely chosen representatives,**

b. **To vote and to be elected at genuine periodic elections which shall be held by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,**

c. **To have access on general terms of equality, to public service in his country.”**

23. These International Conventions, having been ratified by Kenya,[\[11\]](#)are by dint of **Article 2(6)** of the Kenya Constitution 2010, part of the law of Kenya.[\[12\]](#)

24. These universal principles have in one way or another been enacted in **Articles 38, 81** and **86** of the **Kenya Constitution 2010**; **Parts II, III, IV, V and VI** of the **Elections Act**; and the **Election Regulations. Article 38(2)** and **(3)** of the Constitution for instance provides that:-

**(2) “Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for–**

**(a)any elective public body or office established under this constitution; or**

**(b) any office of any political party of which the citizen is a member.**

**(3) Every adult citizen has the right, without unreasonable restrictions –**

**(a) to be registered as a voter;**

**(b) to vote by secret ballot in any election or referendum; and**

**(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, elected to hold office.”**

**Article 81** of the Constitution reads:

***“The electoral system shall comply with the following principles –***

- (a) freedom of citizens to exercise their political rights under Article 38;***
- (b) not more than two thirds of the members of elective public bodies shall be of the same gender;***
- (c) fair representation of persons with disabilities;***
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and***
- e. free and fair elections, which are***

***i. (i) by secret ballot;***

***(ii) free from violence, intimidation, improper influence or corruptions;***

***(iii) conducted by an independent body;***

***(iv) transparent; and***

***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.***

As regards voting, **Article 86** requires that:-

***“At every election, the Independent Electoral and Boundaries Commission shall ensure that –***

***a. whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent;***

***b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.***

***c. The results from polling stations are openly and accurately collated and promptly announced by the returning officer; and***

d. ***appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election material.*** (Emphasis supplied)

25. To effectuate these constitutional requirements, **Parts II, III, IV, V and VI** of the **Elections Act** as well as the **Election Regulations** have elaborate provisions covering the entire electoral spectrum from voter registration, qualification and nomination of candidates, the conduct of elections and what acts amount to election offences the commission of which has dire consequences.

26. It is settled law that any election that is not conducted substantially in accordance with the electoral law of that election is null and void. We have this on the authority of the Kenyan Supreme Court decision in **Raila vs. IEBC & Others** (supra) in which it was also held that to void an election, the petitioner must prove that the non-compliance with the election law impugned the integrity of that election.

27. This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election. Lord Denning succinctly stated this principle in **Morgan v Simpson**<sup>[13]</sup> thus;

***“Collating all these cases together, I suggest that the law can be stated in these propositions:-***

i. ***If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not...***

ii. ***If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls...***

iii. ***But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”***

28. This principle was also reiterated by the Ugandan Court of Appeal in the case of **Kakooza John Baptist v. Electoral Commission & Another**.<sup>[14]</sup>

29. Locally the principle has been applied in the cases of **Joho v Nyange** (supra); **John Kiarie Waweru v Beth Wambui Mugo** (supra) and **Munyao v Munuve & 4 Others**<sup>[15]</sup> to cite but a few.

30. The principle that any election that is not conducted substantially in accordance with the electoral law of that election is null and void has also been legislated in **Sections 83** of the Kenyan **Elections Act, 2011** which states that:

***“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”***

31. Having set out general principles and the electoral law in Kenya, we now wish to turn to the issues that arise for our determination in this appeal. As stated above, the issues are broadly whether or not the impugned election was conducted in accordance with the above stated electoral law or whether or not non-conformity thereof affected the result of the election. In this regard, we wish, once again, to call attention to the wording of **Section 83** of the **Elections Act**. The term used in the demarcation of the two aspects of the governing principles in that provision is “or” not “and” which means that violation of either, and not both, of the two aspects of that provision will void an election.

32. We have already cited authorities to the effect that to meet the legal threshold, any election has to be conducted “*substantially*” in accordance with the electoral law of that election. Why “*substantially*” and not strictly in accordance with the electoral law of that election?”

33. It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however, for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed, it is not “*simple, accurate, verifiable, secure, accountable and transparent*”; as well as if “*appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place*”; and the counting and collation of votes and announcement of the results are not open and accurate. What Section 83 of the Elections Act excuses are minor infractions of these principles or requirements that arise from inadvertent, not deliberate or negligent, human activities in the effectuation of these principles but do not affect the result of the election.

34. With regard to the first aspect of non-compliance with the electoral law governing the election in this matter, the 1<sup>st</sup> respondent’s complaint was the allegation that the appellant committed the election offences of treating and bribery. The clear implication from that allegation is that the appellant, in violation of **Article 81(e)(ii)** of the Constitution, got himself elected as Senator of Bungoma County by “*improper influence and or corruption*”. In this regard, what we are called upon to determine therefore is whether or not the appellant committed either or both of those offences and the effect that commission had on his election as Senator of Bungoma County.

35. In his petition, the 1<sup>st</sup> respondent made several allegations of bribery against the appellant. These included the allegation that on 3<sup>rd</sup> March 2013, the appellant’s agents convened a political meeting disguised as a farmers’ meeting at the home of the late Francis Saranduki, at which each attendee was given Kshs.100/= to vote for the appellant. After considering the evidence adduced on that allegation, the learned Judge, correctly in our view, dismissed it.

36. The 1<sup>st</sup> respondent also made allegations of bribery by the appellant himself. He alleged that at a meeting of Bishops and Pastors held at Nzioa Guest House on 5<sup>th</sup> February 2013, attended by Hon. Eseli Simiyu and Hon. Bifwoli, the appellant gave a bribe of Kshs.2000/=, which he termed as a token of appreciation, to each of the 21 Bishops and Pastors who were in attendance. At another meeting held at St. Peters Pastoral Centre at Kabula on 18<sup>th</sup> February 2013, the appellant again allegedly bribed each of the 300 participants with Kshs.500/=. The learned Judge also dismissed these claims of bribery for lack of credible evidence.

37. The learned Judge, however, found that there was sufficient and credible evidence to prove the allegation that the appellant gave Kshs.260,000/= to the Bishops and Pastors who attended a meeting at Red Cross Kanduyi on 22<sup>nd</sup> February 2013 and accordingly held the appellant guilty of the offences of bribery and treating.

38. Bribery and treating are among the election offences in **Part VI** of the **Elections Act**. **Sections 62** and **64** of the **Elections Act** set out the acts that amount to treating and bribery respectively. For ease of reference, we would like to reproduce verbatim the provisions of these Sections. Section 62 which deals with the offence of treating states:

***“62. (1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election -***

***(a) before or during an election—***

***(i) undertakes or promises to reward a voter to refrain from voting;***

***(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or***

***(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.”***

With regard to bribery, **Section 64** provides:-

***“64(1) A candidate who;***

***(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter -***

***(i) to vote or refrain from voting for a particular candidate;***

***(ii) to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending***

**support to or for any political party or candidate;**

**(iii) corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or**

**(b) directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter**

**(i) to vote for or refrain from voting for a particular candidate; or**

**(ii) corruptly does any such act on account of such voter having voted for or refrained from voting;**

**(c) in any manner unlawfully influences the result of an election;**

**(d) directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to**

**(i) procure or endeavour to procure the election of any person; or**

**(ii) procure the vote of any voter at any election;**

**(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;**

**(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;**

**(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;**

**(h) after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;**

**(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or**

*valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or*

*(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.*

39. **Section 107** of the **Evidence Act** legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who, on one or more grounds, seeks the nullification of an election. The burden is therefore, upon the petitioner to prove his allegations; and the standard of proof in election petitions is generally to the satisfaction of the court, higher than on a balance of probabilities but not to the level of beyond reasonable doubt. See **Raila Odinga Vs IEBC & Others** and **Joho v Nyange** (supra).

40. However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see **Raila Odinga Vs IEBC & Others** and **Joho v Nyange** (supra).

41. There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, **Article 50(2)(a)** of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections.<sup>[16]</sup> This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.

42. In this case, as we have stated, the learned Judge found the appellant guilty of the offences of bribery and treating. Were those offences proved against him beyond reasonable doubt" **Section 85A** of the **Elections Act** permits appeals from the High Court to this Court only on points of law. Whether or not the appellant committed election offences of bribery and/or treating is a point of law. To determine that issue, we have no option but to examine and re-evaluate the evidence on it and that does not in any way foul the provisions of that section. This is because when an appeal is only on a point of law like identification in criminal cases, the appellate court has to examine evidence adduced in such a case to determine the point of law raised.

43. In this case the evidence of the bribery claim came from Rev. Joseph Machani Wekesa, PW4, Bishop Judith Wanjala Wechuli, PW6 and Nehemiah Mkubwa Kinisu, PW7. Rev. Joseph Machani Wekesa, PW4, allegedly swore two affidavits. In the first one sworn on 8<sup>th</sup> April, 2013 he claimed that on 22<sup>nd</sup> February, 2013 he attended a meeting of Pastors and Bishops from the entire Bungoma County at Red Cross Bungoma Branch headquarters at Kanduyi which had been convened by the appellant with the assistance of Hon. Khangati and Hon. Wamunyinyi. He testified that the main agenda of that meeting was to get the church leaders to mobilize their colleagues and followers to vote for the appellant and other candidates of the CORD family. He claimed that at that meeting, the appellant and Hon. Khangati contributed Kshs.260,000/= as a token for transport for Bishops and Pastors to share as they left for their homes. Each church leader got Kshs.1000/=. In the second affidavit sworn on 18<sup>th</sup> April,

2013 he disowned the first affidavit and averred that he attended the Red Cross meeting and that neither the appellant nor Hon. Khangati gave any money to the Bishops and Pastors in that meeting.

44. Basing his evidence in court on the first affidavit, as stated PW4 disowned the second affidavit and testified that on 20<sup>th</sup> April 2013, four people went to his home at about 9.00 pm, beat him up and forced him to thumb print a document after which they took his ID card and left. He later learnt from counsel for the 1<sup>st</sup> respondent that the document he was forced to thumb print was an affidavit. He said he thumb printed it to save his life. He reiterated the averments in his first affidavit that the appellant contributed Kshs. 160,000/= and Hon. Khangati Kshs. 140,000/= at the Red Cross meeting all of which was shared out among the people in that meeting. Although, he did not report that bribery to police, he reported his assault and loss of his ID card to his chief and the police.

45. In her affidavit sworn on 8<sup>th</sup> April 2013, PW6 stated that at the Red Cross meeting the appellant produced Kshs. 260,000/= placed it on the table after which the appellant and Hon. Khangati counted it and handed it to Bishop Francis Khaoya to share it among the Bishops and Pastors to mobilize votes for the appellant and other CORD Coalition candidates. In court she stuck to that statement and denied taking a share of that amount as she is a bishop. She claimed she did not report the bribery to police because she feared for her life.

46. Nehemiah Mkubwa Kinisu, PW7, is neither a Pastor nor a Bishop. He testified that he attended the Red Cross meeting in his capacity as a domestic observer on behalf of Mwatikho National Rehabilitation Centre and a member of the Red Cross Bungoma Branch. At that meeting, according to him, the appellant handed Kshs. 260,000/= over to pastor Musundi and Bishop Macheusi to distribute among the church leaders at that meeting to mobilize their followers to vote for the appellant. He did not take a share of that money as it was meant for Pastors and Bishops and he was neither of those. Although he did not report that bribery claim to police, on 4<sup>th</sup> March 2013 he rang the Bungoma OCPD and reported a different bribing incident he had witnessed at Mupeli Primary School Polling Station. The OCPD went there immediately and chased away the people who were giving bribes and arrested one of them by the name Makwala.

47. Against this evidence is that of the appellant and his witness, Bishop Julius Wafula Macheusi. In his testimony, although he admitted passing by the Red Cross meeting at which he found the appellant, Hon. Khangati and Hon. Wamunyinyi who were allowed to address it, the appellant vehemently denied giving any money or seeing any money change hands at that meeting. He also denied allegations of bribery at other meetings. He testified that he went to the Red Cross meeting at about 10.30am and found Hon. Khangati and his wife as well as Hon. Wamunyinyi there. According to him that was a normal Bishop's consultative meeting and the appellant went there to seek the clergymen's blessings in his campaign.

48. Having carefully re-evaluated this evidence, we are satisfied that the appellant gave Kshs. 260,000/= to the Pastors and Bishops who were assembled at the Red Cross offices at Kanduyi on 22<sup>nd</sup> February 2013. As we have stated, the appellant conceded that he attended that meeting. The 1<sup>st</sup> respondent's witnesses, PW4, PW6 and PW7 as well as the appellant himself and his witness Bishop Macheusi, testified that Hon. Khangati and Hon. Wamunyinyi also attended that meeting.

49. True there were some contradictions in the evidence tendered by the 1<sup>st</sup> respondent's witnesses. For instance while PW6 said the appellant gave the Kshs. 260,000/= to Bishop Francis Khaoya to distribute among the Pastors and Bishops who attended that meeting, PW7 said the appellant gave the money to Pastor Musundi and Bishop Macheusi. On his part PW4 said the sum of Kshs. 260,000/= was contributed by the appellant and Hon. Khangati with the former giving Kshs. 160,000 and the latter

Kshs.140,000/=. In our view these are minor contradictions which are bound to arise in the testimony of more than one witness giving an account of an incident they witnessed. We daily read of numerous newspaper accounts which differ in minor details but in principal carry the same story.

50. Despite the fact that those witnesses did not report that incident to the police, we nonetheless believe their evidence. PW4 said he was forced to thumbprint the second affidavit. That affidavit has a thumbprint and a signature. Why would a literate person thumbprint and sign a document" We believe his evidence. PW6 said that is because she feared for her life. Given the beating PW4 suffered, the others must have also had the same fears. PW7 said he reported the matter to his head office. These two witnesses did not take a share of the bribe. PW6 said as a bishop, her conscience could not allow her to take a bribe. PW7 said the money was meant for pastors and Bishops and he was therefore not given a share of it as he was neither of those. The appellant was identified as the donor or one of the donors of the Kshs. 260,000/=. The recipients were the Pastors and Bishops at the Red Cross meeting and the purpose of the money was for them to mobilize their colleagues and followers to vote for the appellant and other CORD Coalition candidates. That, in our view, satisfied the ingredients of the two offences of treating and bribery and we therefore find that those offences were proved beyond reasonable doubt.

51. **Section 87(1)** of the **Elections Act** requires election courts to report to the Director of Prosecutions (DPP), the IEBC and the relevant Speaker candidates they adjudicate guilty of election offences. We do not therefore, agree with the learned Judge that the petition before him having not been a criminal trial the appellant was not given sufficient notice of the offences he was alleged to have committed hence his failure to report him as required.

52. Where commission of any election offence is alleged against any respondent in an election petition, that, in our view, is sufficient notice to such respondent that the petitioner intends to prove criminal charges against him. Such respondent is put on notice that upon sufficient evidence being adduced against him of commission of an election offence, he is obliged, without assuming the burden of proving himself innocent, to rebut such evidence. All that the petition court is required to do is to afford such respondent a reasonable opportunity to defend himself. So when, after considering all the evidence on record including any evidence adduced by the respondent, an election court finds that an election offence has been proved to the required standard against a respondent who has been afforded an opportunity to defend himself or herself, the trial court does not have to wait until such a respondent is proved guilty in a separate criminal trial. The reporting requirement was not put in the Elections Act as a mere ornamental or lofty aspirational provision.<sup>[17]</sup> It is supposed to be enforced and implemented. It is supposed to and should bite. The petition court should therefore boldly go ahead and report such respondent and upon receipt of such report, the IEBC is, under **Section 72(3)(b)** of the **Elections Act**, obliged to disqualify such candidate from contesting the next election. That is the only way we can tame such vices in our electoral system. By the time the criminal case is mounted and proved against such a respondent, the election court would have closed shop and become *functus officio* and **Section 87(1)**, with the consequences spelt out in **Section 72(3)(b)**, will have been rendered otiose thus encouraging impunity leading to the disaffection among the voters with catastrophic consequences as happened in our country after the 2007 general election.

53. Part VI of the Election Act creates several election offences and provides a sentence for each offence. In our view, the reporting requirement is intended to ensure that the court decision is enforced. The reporting to the DPP of a candidate who has committed an election offence is intended to cause the DPP to institute criminal charges, if he has not yet done so, against such candidate and if such candidate is proved guilty, he should be punished in accordance with the relevant section of the Election Act criminalizing his act or omission. As we have stated, that is over and above the disqualification,

under Section 72 (3)(b), of such candidate from participating in the following election. The report to the IEBC is for it to comply with that section and bar the candidate from participating in the following election. The report to the Speaker is to doubly ensure that such person does not sneak back into his House without first being absolved of the criminal offence(s).

54. Although we have found that the appellant was properly adjudicated guilty of the election offences of treating and bribery, we cannot ourselves report him to the authorities for the simple reason that there was no cross-appeal and the issue of reporting the appellant was therefore not canvassed before us. The 1<sup>st</sup> respondent bungled in his attempt to cross-appeal and raise that point forcing us to dismiss his application to that end.

55. Having upheld the learned Judge's finding of the appellant guilty of election offences, the issue that immediately springs up to mind is the effect of that determination. Unlike the English Representation Act 1983 which automatically voids the election of any person found to have committed an election offence of corruption or illegal practice,<sup>[18]</sup> our Elections Act does not have any such specific provision. **Section 80(4)** of the **Elections Act** forbids the election court from declaring as a winner any person found to have committed an election offence but that is only upon scrutiny and recount of votes. However, under Articles 105 and 140 of the Constitution, anyone can challenge the validity of the election of a Member of Parliament or the President. Under **Section 75(2)** of the **Elections Act**, an election can be challenged on, inter alia, "*the ground of a corrupt practice, and specifically alleging any payment of money or other act ....*" We understand "other act" here to mean any other illegal act or practice. The Act does not define the phrase "corrupt practice" but it defines the phrase "illegal practice" as "*an offence specified in Part VI*" of the Act.

56. Our conclusion from these provisions is that proof of commission of any election offence vitiates an election.

57. In this case there was only one incident of corruption proved against the appellant. The question then is: Is such determination *per se* sufficient to void an election? In other words, does a single incident of bribery and/or treating suffice to annul an election? This is the issue we now wish to address before we move on to consider the alleged irregularities in the election giving rise to this appeal.

58. **Article 260** of the Constitution defines a "State Officer" as "*a person holding a 'State office'*" and a "State office" as including the office or position of a "*Member of Parliament.*" Needless to add that as provided by **Article 93(1)** Parliament consists of the National Assembly and the Senate. **Article 10** has integrity as one of the core national values and principles of good governance and **Chapter Six** of the Constitution requires State Officers to be persons of integrity.

59. The term "integrity" comes from a congruence between thoughts, feelings, words, and actions when all that you are and do spring from your core values. The English Dictionary defines the term "integrity" as honesty and moral uprightness. In his book: *Developing the Leaders Around You*, **John C. Maxwell** defines "integrity" as the trustworthiness and solid character at consistent words and walk.<sup>[19]</sup> True leaders demonstrate integrity by example. Men and women of integrity are those whose word can be depended upon in any situation. Trust and confidence are the foundations of every business relationship they engage in. Mahatma Gandhi was one of the greatest examples of integrity we have seen in modern times, and the many moving stories about his life demonstrate the power of teaching this character trait by example.

60. The opposite of integrity is corruption. **Sections 62** and **64** of the **Elections Act** quoted above include the term "corruption" in the acts that constitute the election offences of bribery and treating.

Corruption is defined the act of “dishonesty in return for money or personal gain.”<sup>[20]</sup> A person who bribes for anything cannot, by any stretch of imagination, therefore be said to be a person of integrity.

61. In election law, when determining the effect of commission of an election offence, a distinction should be drawn between corruption acts committed by agents of a candidate and those committed by the candidate himself. This is because, save where they are shown to have been express which is quite rare, the corrupt acts of an agent have to be shown to have had the implied sanction or blessing of the candidate involved. To prove that nexus, there should be evidence of several corrupt acts of the agent or agents of the candidate which would establish a consistent pattern from which a reasonable inference can be drawn that the candidate concerned must have sanctioned or condoned those acts. In the case of corruption by an agent, care should also be taken to ensure that one is not an agent provocateur i.e. an “agent” planted by the opponent.

62. In the case of corruption by the candidate himself, you do not require a multiplicity of acts of corruption to void an election. What is condemned in this vice is one’s mental attitude or personality. Proof of one act or incident of corruption therefore suffices to demonstrate that one is a corrupt person or one is lacking in integrity. As we have emphasized, our Constitution demands that State Officers should be persons of integrity. Moreover, besides statutory provisions, it is also an established case law that corruption affects the will of the people and if the will of the people is affected, then the election can not be said to have been free and fair and should be set aside. So if one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of “free and fair election” contained in the Constitution, the Elections Act and the Election Regulations. Stating this point of freedom of choice in elections in the case of **Azhar Hussein v. Rajiv Gandhi**<sup>[21]</sup> the Supreme Court of India said:

**“...the results of the Election are subject to judicial scrutiny and control ... to ascertain that the 'true' will of the people is reflected in the results .....**

**“...In order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established...”**

63. In the circumstances, having found that the appellant was correctly adjudicated guilty of commission of offences of bribery and treating, we reject his counsel's contention, based on the Nigerian Court of Appeal decision in **Dr. John Olukayode Fayeni vs. Olusegun Adebayo Oni & Others**,<sup>[22]</sup> that one requires several acts of bribery or evidence and that the bribery or corruption alleged in an election petition should be shown to have actually influenced a substantial proportion of voters to vote the way they did or substantially affected the outcome of the election in order to void an election. As a matter of fact, there was no allegation of bribery in that case. The electoral offences allegedly committed in that case were violence, hijack of voting materials, multiple thumb printing, ballot snatching and stuffing of ballot boxes, and falsification. So that authority is clearly inapplicable in this case.

64. Any election marred by acts of corruption or any illegal practice flouts the principles set out in our Constitution and election law. And, as we have stated, we would accept that proposition when the acts of corruption are those of a candidate’s agent(s); not when they are those of the candidate himself. As a

matter of fact, in some jurisdictions like UK and Zambia, even one act of corruption by a candidate's agent, suffices to void an election.<sup>[23]</sup> The statement at **Paragraph 113 of Halsbury's Laws of England, Vol. 153<sup>rd</sup> Edition** succinctly expresses this point thus:

***“Due proof of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances maybe...”***

For the reasons stated above, we would, on our part, limit the invalidation of an election on proof of commission of only one act of corruption to the act of a candidate himself because such an act impeaches the integrity of that candidate.

65. We also endorse the statement in **Muliro v. Musonye & Another**,<sup>[24]</sup> where it was held that it is not necessary to prove the amount of bribery. *“It should suffice if it is shown that with [the] intention to influence voters to vote for a given candidate, bribes were given to voters.”* It follows therefore that we must dismiss this appeal on the one incident of bribery and treating committed by the appellant himself at the Red Cross meeting at Kanduyi on 22<sup>nd</sup> February, 2013.

66. We now turn to the issue of irregularities in the conduct of the Bungoma Senatorial election on 4<sup>th</sup> March 2013.

67. In his petition, the 1<sup>st</sup> respondent made claims of double registration and double voting; “voting by dead voters”; denial of the right to vote; acts of violence; and multiplicity and erroneous entries as well as omissions on Forms 35 and 36.

68. With regard to double registration and double voting, the 1<sup>st</sup> respondent called George Sitati Wekesa, PW2, who testified that in September, 2012, he was a member of the appellant's steering committee which was charged with the responsibility of devising general strategies and structures that had to be employed in ensuring that the appellant won the Bungoma Senatorial seat. One of the strategies the committee allegedly devised was to ensure that as many people as possible were registered to vote. In this regard, he claimed that the appellant instructed the committee to have as many people as possible register and vote more than once assuring them that nothing would happen to them or to such voters. He further claimed that the appellant advised them how to cheat the computer in the double registration process: by interchanging the names of a voter and omitting from and/or adding a digit to the voter's identity card number. The witness named one Christine Wekesa Weswa as one of the forty people he claimed he knew who registered twice and voted twice. He also produced several voters' cards of people he claimed had registered more than once.

69. On the basis of that evidence, the learned Judge directed his Deputy Registrar to carry out an inquiry to verify those claims of double registration and double voting. We would like, at this stage, to dispose of the issue raised by counsel for the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the Deputy Registrar's jurisdiction to carry out an inquiry to verify those claims.

70. As we have pointed out, counsel for the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents took issue with the learned Judge's direction to the Deputy Registrar to carry out the inquiry contending that the inquiry was null and void as a Deputy Registrar has no jurisdiction to handle any aspect of an election petition supposed to be heard by the High Court. Having considered the issue, we hold that there is nothing wrong with the election court directing the Deputy Registrar or any officer of the court to carry out an inquiry, scrutiny or recount. As long as that is carried out in the presence of the parties' representatives

and in accordance with the directions and under the superintendence of the election court, such an exercise is as good as one carried out by the election court itself. After all, one cannot expect a judge to recount the votes himself. That will take a long time and probably impinge on the timelines set in the Constitution for the disposal of election petitions. While such an exercise is being carried out, the Judge can go on with the rest of the hearing thus expediting the hearing. We therefore find no merit in this contention.

71. After conducting the inquiry, the Deputy Registrar prepared a report which the learned Judge reproduced verbatim in his judgment. The report shows that, other than the said Christine Wekesa Weswa, who surprisingly and audaciously confirmed that she registered twice and voted twice, and one Peter Wanimo Beli who said he was by mistake registered twice but pointed that out to the IEBC officials and voted once, all the other people who appeared before the Deputy Registrar denied double registration or double voting. The scrutiny, however, revealed that an insignificant number of people voted twice and others who were not supposed to vote because of double registration voted.

72. The report also revealed that in quite a number of polling stations, there were more than one Forms 35 and some of them had erroneous entries relating to the number of registered voters and voter turnout; others had cancellations and alterations on those figures that were not countersigned; others were not signed by agents; others did not have the presiding officers' statutory comments; and some had other mistakes.

73. On collation, which is the same thing as tallying, the report indicated that despite the express order of the Judge dated 3<sup>rd</sup> May, 2013 directing the IEBC to supply to the 1<sup>st</sup> respondent with copies of both Forms 35 and 36 used in Bungoma County, the IEBC failed to supply copies of Forms 36. The copies of that form which the parties had exhibited were multiple and in some cases contained erroneous results. In some constituencies like Webuye–East and Tongaren, the learned Judge doubted if any tallying was ever done at all.

74. Taking into account all these irregularities and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' admission that the votes cast for the 1<sup>st</sup> respondent had been understated by **14,777**, the learned Judge reached the conclusion that the cumulative effect of those irregularities fundamentally dented and impeached the integrity of the Bungoma Senatorial election and that the final result announced could not be relied upon.

75. We have already cited and reproduced verbatim herein above the provisions of **Section 83** of the Elections Act which are to the effect that no election can be voided for non-compliance with any written law relating to that election unless it is demonstrated, inter alia, that the non-compliance affected the result of that election. What is meant by "the result of the election"

76. **Section 2** of the **Elections Act** defines "election results" as "*the declared outcome of the casting of votes by voters at an election.*" This, and as was stated in the said Ugandan case of **Colonel Dr. Kissa Besigye vs. Museveni Yoweri Kaguta**,<sup>[25]</sup> and the recent decision of the Supreme Court of Kenya in **Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others, SC Petition No. 10 of 2013**, refers to the quantitative or numerical result of an election. It is, however, trite that the result of an election is not limited to only the numerical or quantitative result. **Section 83** of the **Elections Act** requires the validity of the result of an election to be gauged upon both quantitative and qualitative tests.

77. The quantitative test relates to the figures<sup>[26]</sup> of the votes garnered by the candidates in that election with the one having a simple majority being declared the winner<sup>[27]</sup>, our system being **first-past-the post**. So if the irregularities determined reverse the numerical victory of the winner, that affects the result of an election.

78. The qualitative test, on the other hand, relates to the integrity of the conduct of an election, the criterion being whether or not the process can be said to have resulted in a free, fair and transparent election.

79. As is clear from Section 83 quoted verbatim above, not every irregularity, particularly an inadvertent minor irregularity, will void an election. To void an election, the alleged irregularity or irregularities must impeach the integrity of that election and thus affect its result. So if the irregularity concerned or the cumulative effect of the many irregularities or malpractices shown to have been committed in the conduct of an election are so pervasive and/or so widespread that the integrity of the electoral process is put to question, and there is serious doubt cast on the validity of the numerical magic number and/or the same is indeterminate as was the case in **Richard Kalembe Ndile v. Patrick Musimba Mweu**,<sup>[28]</sup> that also affects the result of an election. In the Kalembe Ndile case, the petitioner won with a margin of 29 votes but there were 409 missing ballots making it difficult for the court to determine who, between the petitioner and the respondent, received all or more of the missing votes. That left the court with no option but to nullify the election to provide an opportunity for the will of the people of Kibwezi-West to be determined with certainty. Such irregularities or malpractices, which make the result of an election indeterminate, can also be said to have affected the result of such an election and the election will be voided. This principle was succinctly stated thus in **Volume 14 of Halsbury's Laws of England, 3<sup>rd</sup> edition, at par. 261:-**

***“An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election if the tribunal is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing law, and that the result of the election, was not and could not have been affected by those transgressions.”***

At page 244 of the same volume, it is stated that;

***“At common law a parliamentary election might be avoided on an election petition on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election ... [or] that the irregularities affected the result.”***

Needless to say that the irregularities which prevent an election from being “a true election” cast doubt on the integrity of such an election. Another good example of a qualitative irregularity that can void an election is failure by the presiding officer to sign Form 35. This is the form on which the votes garnered by each candidate in any polling station are recorded. In other words they are the forms which have the results of an election. As was stated by this Court in **James Omingo Magara v. Manson Nyamweya & 2 Others**,<sup>[29]</sup> doubt will be cast on the authenticity of that form, by the failure of the presiding officer to either to sign it or to countersign against any cancellation on the votes garnered by each or all the candidates. When a document is not signed by its author, it means that the author does not own it. It follows therefore that a presiding officer who does not sign Form 35 does not own such form. Doubt is cast on the authenticity of such a form and the same cannot be relied upon and that affects the result of the election it relates to. If the exclusion of the votes on such form would affect the magic number or make it indeterminate, the result of such an election are also affected.

80. There are a number of cases where elections have been voided on the ground of qualitative irregularities committed in the conduct of elections. For instance in **Manson Nyamweya v. James Omingo Magara & Others**,<sup>[30]</sup> a decision upheld by this Court, and **William Kabogo Gitau v. George Thuo**,<sup>[31]</sup> the elections were voided, inter alia, on the ground of failure by some presiding officers to sign Form 16A which had the results of some of the polling stations in those elections. In both cases, it was

held, quite correctly in our view, that failure by the presiding officer to sign Form 16A (Form 35 in the current Elections Act) which had the result impeached the authenticity of the results of that polling station. In **William Kabogo Gitau v. George Thuo**, in addition to failure by eight presiding officers to sign Form 16A, (currently Form 35) that form was missing in respect to some polling stations thus making it difficult to rely on the results announced.

81. In this case, as we have pointed out, the irregularities found to have been committed in the conduct of elections were double registration and double voting but that was in respect of only one clear case of Chritine Wekesa Weswa. The quantitative error on Forms 35, which had the result of the votes garnered by each candidate, related to only one instance, at Kipsis Primary School (004), in respect of which the appellant's votes were stated as 165 while Form 36 gave him only 65. With the accepted margin of **17,839** votes in this case, even if all the votes in that station were given to the 1<sup>st</sup> respondent, they would not affect the overall victory of the appellant. There was no dispute on any of the others Forms 35 on the actual votes garnered by each candidate. The dispute with regard to the votes cast for each candidate, which, as we have pointed out, had reduced the 1<sup>st</sup> respondent's votes by **14,777** was an arithmetic error on the collation of the votes on Forms 36 and not on the actual votes garnered by each candidate. Even with the correction of that error, the appellant still had a majority of **17,839**. In the circumstances, we find that the irregularities committed in the Bungoma Senatorial election did not affect the numerical result of the election.

82. The alleged qualitative irregularities committed were: having more than one Forms 35 in some polling stations; erroneous entries relating the number of registered voters and voter turnout on some of them; others had cancellations and alterations on those figures that were not countersigned; others were not signed by agents; others did not have the presiding officers' statutory comments; and some had other mistakes. We should here point out that as Mr. Gumbo for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents said, IEBC did not have photocopying facilities in polling stations. As the presiding officers were required to give copies of Form 35 to each candidate's agent, post one on the wall of the polling station and give one to the Returning Officer for collation, it meant that each presiding officer had to complete by hand several copies of that form. In such situation errors are bound to have occurred. On their own, the anomalies alleged in this election, in our respective view, cannot be said to have rendered the Bungoma Senatorial election a sham. In other words the qualitative irregularities committed in the election in this case also did not *"prevent the election [from] being a true election"*<sup>[32]</sup> or one which was not *"an election really and in substance conducted under the existing law."*<sup>[33]</sup> The ground of irregularities affecting the result of the Bungoma Senatorial election therefore fails.

83. In the upshot, for the above stated reasons, we find that both the qualitative and quantitative irregularities committed by the IEBC's officials in the conduct of the Bungoma Senatorial election did not affect the integrity or result of the elections. However, as we have found, the commission by the appellant of the election offences of bribery and treating, amounted to conducting the election contrary to the election law and that vitiated the election and on that ground, we dismiss this appeal with costs to the 1<sup>st</sup> respondent against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally, capped at Kenya Shillings four million (Kshs.4,000,000/=).

**DATED and delivered at Kisumu this 14<sup>th</sup> day of March, 2014.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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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

**REGISTRAR**

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[1]Petition No, 5 of 2013.

[2]Petition No. 1 of 2001.

[3]2012 SCC 55 – 2012 – 10 – 256.

[4][2008] eKLR.

[5][2008] 3KLR (EP).

[6]Nigeria Court of Appeal (Ilorin Division) CA/IL/EP/Gov/25/2008.

[7](2008) 2 KLR 20.

[8] Court of Appeal of Uganda, Election Petition Appeal No. 0027 of 2011

[9] [2013] eKLR

[10](2008) 2KLR (EP).

[11]Kenya ratified the International Convention on Civil and Political Rights on 1<sup>st</sup> March 1972, and the African Charter on Human and People's Rights on 23<sup>rd</sup> October1992.

[12]Article 2(6) of the Kenya Constitution, 2010 states that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya."

[13][1974]3 All ER 722 at p. 728.

[14]Election Appeal No. 11 of 2007.

[15](2008) 2 KLR 20.

[16]Section 87(1) of the Elections Act read together with Section 72(3)(b) of the same Act.

[17]An expression used by the High Court in *Trusted Society of Human Rights Alliance v. The Attorney General & Others*, HC Petition No. 229 of 2012 (The Mumo Matemu case)

[18]The Representation of People Act 1983, Section 159(1).

[19]Thomas Nelson Incorporation, Nashville, Tennessee, USA, 1995.

[20]The Concise Oxford English Dictionary, 12<sup>th</sup> edition, 2011, Oxford University Press, Great Clarendon Street, Oxford ox2 6DP.

[21][1986] AIR 1253, 1986 SCR (2) 782.

[22]Nigeria Court of Appeal (Ilorin Division) CA/IL/EP/Gov/25/2008

[23]See Volume 15 of Halsbury's Laws of England, 3<sup>rd</sup> Edition (Vol. 15, 4<sup>th</sup> ed. p. 425, par. 780) and the Zambian Court of appeal decision in Michael Mabenga v. SikotaWina& 2 Others, SCZ No. 15 of 2003.

[24][2008] 2 KLR EP

[25]Petition No. 1 of 2001.

[26]See Dickson Karaba v. John NgataKariuki& Others, Nairobi HCEP No. 3 of 2008

[27]See Ted OpitzvsBorysWrzesnewskyj, 2012 SCC 55, where there was a margin of only 6 votes and the election was upheld.

[28] [2013] eKLR

[29]Civil Appeal No. 8 of 2010, (CA).

[30][2009] eKLR.

[31] [2010] eKLR.

[32] See Volume 14 of Halsbury's Laws of England, 3<sup>rd</sup> edition, at p. 244.

[33] See Volume 14 of Halsbury's Laws of England, 3<sup>rd</sup> edition, at par. 261.



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