REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga CJ & P; Rawal, DCJ & V-P; Ibrahim, Ojwang, Wanjala, Njoki, SCJJ)

PETITION NO. 10 OF 2014

-BETWEEN-

FREDERICK OTIENO OUTA.....APPELLANT

-AND-

1. JARED ODOYO OKELLO
2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
3. THE RETURNING OFFICER, NYANDO CONSTITUENCY
4. DAVID MBUI
5. ODM PARTY
.....RESPONDENTS

(Being an Appeal from the Judgment and Order of the Court of Appeal sitting in Kisumu (Waki, Maraga & Ole Kantai JJA), delivered on 28th March, 2014 in Kisumu Civil Appeal No. 46 of 2013)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the Judgment of the Court of Appeal, which nullified the election of the appellant as Member of the National Assembly for Nyando Constituency.

[2] The Petition of Appeal to this Court, filed on 7th April, 2014 was premised on six grounds:

(i) that, the learned Judges of Appeal were wrong in their interpretation and application of Articles 12, 27, 33(1) and 38 of the Constitution, as they held that these were subservient to, or limited by the provisions of Sections 2 and 66 of the Elections Act (Cap. 7, Laws of Kenya) (the Elections Act);

(ii) that, in interpreting Sections 2 and 66 of the Elections Act as they did, the Court of Appeal disregarded the clear provisions of Article 24 of the Constitution;

(iii) that, the learned Judges of Appeal were wrong in their interpretation and application of Sections 2 and 16 of the Public Officer Ethics Act (Cap. 183, Laws of Kenya) in such a manner as to limit and amend the clear and unequivocal provisions of Article 260 of the Constitution;

(iv) that, the Court of Appeal breached the appellant's inviolable right enshrined under Article 50(1) of the Constitution as read together with Article 25(c) thereof, to have a dispute that can be resolved by the application of law decided in a fair hearing;

(v) that, the learned Judges of Appeal erred in law, by considering matters of fact and evidence that were extraneous to their jurisdiction, and as such acted contrary to the provisions of Article 87 (1) of the Constitution as read together with those of Section 85A of the Elections Act;

(vi) that, the Court of Appeal erred in law in criminalizing the disbursements of the Nyando Constituency Development Fund, and failed to appreciate that the Fund is a streamlined disbursement process under an Act of Parliament and, therefore, must be done in accordance with the values the spirit of Article 10 of the Constitution.

[3] The appellant sought the following reliefs:

(i) that the Judgment/Orders of the Court of Appeal, nullifying the election of the appellant as the Member of the National Assembly for Nyando Constituency, be set aside;

(ii) that the certificate issued by the Court of Appeal on 28th March, 2014 be quashed as it was issued without jurisdiction;

(iii) that a declaration do issue that the elections in Nyando Constituency held on the 4th March, 2013 were concluded in accordance with the Constitution of Kenya;

(iv) that a declaration do issue that the appellant was duly elected as the Member of the National Assembly for Nyando Constituency;

(v) that a declaration be made that the provisions of Sections 2 and 16 of the Public Officer Ethics Act, and Sections 2 and 66 of the Elections Act, are inferior to the provisions of Article 260 of the Constitution, in terms of Article 2(4) of the Constitution;

(vi) that a the costs of this appeal, and the costs of proceedings in the Court of Appeal and in the High Court, be awarded to the appellant;

(vii) that any other orders that this Court may deem fit, in the circumstances to grant, be granted.

B. BACKGROUND

[4] On 4th March, 2014, the 2nd and 3rd respondents conducted the General Elections, including the Parliamentary elections for Nyando Constituency. The

appellant and 1st respondent were both contestants for the position of Member of the National Assembly for that Constituency.

[5] After the counting and tallying of votes, the appellant was declared the duly elected Member of the National Assembly for Nyando Constituency, having garnered a total of 24,558 votes, as against the 1st respondent's 23,815 votes; and accordingly, he was declared the winner, on 5th March, 2013 and duly sworn in on 28th March, 2013.

[6] On 2nd April, 2013, the 1st respondent filed a petition (Kisumu High Court *Election Petition No.1 of 2013*), challenging the validity of the election of the appellant as the Member of the National Assembly for Nyando Constituency, on grounds, *inter alia,* that the election *was marred with irregularities*; and that some of the 2nd respondent's officials together with the appellant, were involved in *election malpractices and offences* which substantially compromised the integrity of the election.

[7] On 30th September, 2013 the Election Court (*Muchelule, J.)* dismissed the Election Petition, and upheld the election of the appellant as the duly elected Member of the National Assembly for Nyando Constituency.

[8] Aggrieved by the decision of the High Court, the 1st respondent appealed to the Court of Appeal, on two broad grounds (summarized in the Judgment of the Court of Appeal): (a) that the learned Judge erred, in upholding an election conducted in violation of the Constitution, and the law relating to elections; and (b) that the learned Judge was biased, and selective in his appraisal of the evidence and authorities tendered in Court. The appellant filed a cross-appeal, faulting the Court for awarding him only minimal costs (amounting to Kshs. 750,000), for the petition.

[9] On 28th March, 2014, the Court of Appeal allowed the appeal and nullified the election of the appellant as Member of the National Assembly for Nyando Constituency, upon finding that the appellant *had committed the election offence of bribery*. The Court of Appeal thereupon, issued a report under Section 87 (1) of the Elections Act, to the Director of Public Prosecutions, the Independent Electoral and Boundaries Commission, and the Speaker of the National Assembly. The Court also dismissed the Notice of Cross-Appeal by the appellant, and ordered him to pay the costs of the 1st respondent, capped at Kshs.2 million for the High Court, and Kshs.1 million for the Court of Appeal.

[10] Aggrieved by the decision of the Court of Appeal, the appellant now seeks reprieve from this Court, on the grounds set out hereinabove. Pending the hearing and determination of this appeal, this Court allowed an application by the appellant (dated 7th April, 2014), and granted conservatory orders against the Speaker of the National Assembly or any other person issuing a writ to the 2nd respondent, regarding the conduct of fresh election; and against the 2nd respondent announcing and/or conducting fresh elections for Nyando Constituency.

C. THE PARTIES' RESPECTIVE CASES

(a) The Appellant's Case

[11] Mr. Wasuna, learned counsel for the appellant, commenced his submissions by addressing the jurisdiction of the Court of Appeal, pursuant to Article 164 (3) of the Constitution and Section 85A of the Elections Act. He submitted that the general jurisdiction of the Court of Appeal is derived from Article 164 (3) of the Constitution; and that within that framework, that Court has a specific jurisdiction, conferred upon it by Section 85A of the Elections Act, to entertain *matters of law only*.

[12] Counsel submitted that the Court of Appeal had strayed beyond its authorized jurisdiction under Section 85A of the Elections Act, thus acting in breach of the Constitution. He drew the Court's attention to Section 2 of the Elections Act, which defines an "Election Court" to include the High Court. Counsel urged that all appeals arising from the High Court, sitting as an "Election Court," to the Court of Appeal fall under Article 164(3)(b) of the Constitution, which provides for appeals to the Court of Appeal from *"any other Court or tribunal as prescribed by an Act of Parliament"*.

[13] Counsel submitted that the Court of Appeal had founded its decision to nullify the election of the Member of the National Assembly for Nyando Constituency upon two issues: *bribery* and the *use of public resources*. He submitted that the Court of Appeal misdirected itself, the moment it determined that it could examine and re-evaluate the *evidence which was purely factual*. Counsel urged that the Court of Appeal, by questioning the use or otherwise of monies held by the Constituency Development Fund (CDF), to influence the election process, had undertaken a purely factual inquiry; for the trial Court had already addressed its mind to use of CDF money – and *found* that the appellant could not have used CDF money to campaign.

[14] Counsel submitted that the finding by the trial Judge on the use of public resources marked the logical conclusion to the relevant matters of fact. However, counsel noted, the Court of Appeal had re-evaluated the evidence, holding that the trial Judge had no basis for disbelieving the evidence of PW7, PW10, PW13 and PW14, and for preferring that of DW8 and DW9. He cited as a speculative remark emanating from the Court of Appeal, that DW9 as a supporter of the appellant in his campaign, together with DW8, had "all the reasons to lie", "to cover their friend and benefactor". In taking such an approach, counsel urged, the Court of Appeal *substituted its own reasons for that of the trial Judge*, though without suggesting

that the trial Judge's conclusion was *unreasonable or perverse*. Counsel relied on the decision of the Nigerian Supreme Court in the case of ***Action Congress of Nigeria v. Sule Lamido & Others, Supreme Court at Abuja*** (24th February, 2012)*, **[Mahmud Mohammed J, para. 21]:***

> ***"the law is quite clear that merely close relationship like employer/employee does not make a person a tainted witness."***

In any case, counsel urged, it was the trial Judge who had the *benefit of examining the witnesses*, with the opportunity to gauge their demeanour; hence the appellate Court had no valid basis for making a determination on the credibility or otherwise of the witnesses.

[15] He observed that although the Court of Appeal had properly warned itself as to how to approach findings of fact by the trial Court, it went on to misdirect itself, by believing one set of witnesses, as opposed to other witnesses. It was urged that the Court of Appeal, besides, engaged itself upon facts which had not even come up before the trial Judge. He cited paragraph 25 of the Court of Appeal Judgement, where that Court observed that the appellant was the "Chairman of the CDF Committee." This, counsel urged, is not an issue that was in evidence before the trial Judge, and indeed the Court's supposition stands contrary to the Constituency Development Fund Act (Cap. 425A, Laws of Kenya), which stipulates how the CDF Committee is to be formed, and who is to be its Chairperson.

[16] Counsel submitted that, the determination by the Court of Appeal that the appellant had bribed voters, was also an issue of primary fact, well in the sights of the trial Court; and by making such a determination, the appellant was denied a fair trial, contrary to Article 50(1) of the Constitution – as the appeal was conducted

and concluded on an improper foundation, in regard to the governing set of *ascertained facts*.

[17] Counsel submitted that the Court of Appeal erred in determining the appeal on a non-existent, *un-pleaded ground*. This is the issue whether the appellant used public resources to campaign; counsel urged that it was not a ground of appeal in the Memorandum of Appeal, even though *it was one of the determinations in the High Court Judgment*. He submitted that even assuming the issue was a ground of appeal, the question then would be whether a CDF Treasurer is a "Public Officer", and therefore a person barred from campaigning for a candidate in any election. Were such to be the case, counsel submitted, it would become a relevant question, *whether it was the intention of the Constitution to take away the rights of a CDF Committee member to engage in political activities, such as are safeguarded under Article 38 of the Constitution*.

[18] Counsel invoked Article 260 of the Constitution, which defines a "Public Officer" as ***"any person, other than a State Officer, who holds a public office"***. A Public Office is defined as, ***"an office in the National government, a County government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.***" Counsel submitted that, to be a "Public Officer", one must be drawing both remuneration and benefits, and not one to the exclusion of the other. He submitted that, in the instant case, there was no evidence to show that the CDF Treasurer was earning remuneration and benefits. Counsel submitted that, even assuming that the Committee members earned "allowances", that would fall short of "remuneration", and of "benefit."

[19] As regards the definition of a "Public Officer", under Section 2 of the Public Officer Ethics Act, counsel urged that the provision should be declared void, for

being inconsistent with the Constitution – by defining an officer administering Constituency Development Fund as a "Public Officer". He submitted that the Elections Act is in compliance with the Constitution, as it provides that "Public Officer" has the meaning assigned to it in Article 260 of the Constitution. He submitted that the Public Officer Ethics Act had been enacted before the promulgation of the Constitution, 2010; and that in accordance with Section 7(1) of the Sixth Schedule of the Constitution, all laws in effect before the effective date of the Constitution (27th August, 2010) continued in force and ought to *be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution*. Counsel urged this Court, on that basis, to adopt a restrictive interpretation of the term "Public Officer", so as to adhere to the definition in the Constitution.

[20] Counsel termed the Court of Appeal's finding that a human being is a "public resource", as unsustainable in principle. He cited Section 68 (6) of the Elections Act, which gives power to the Independent Electoral and Boundaries Commission to impound any State resources found to be unlawfully used in an election campaign. He urged that a "Public Officer", as a human being, fell outside the range of *State resources* which the Commission would be entitled to impound.

[21] Learned counsel, Mr. Otieno for the appellant, submitted that a statute can only limit a constitutional right, if it meets the parameters of Article 24 of the Constitution; and he urged that Sections 2 and 16 of the Public Officer Ethics Act, and Sections 2 and 66 of the Elections Act, fall short of the threshold for a limitation to safeguarded rights under Article 24.

[22] Counsel submitted that the Constitution, under Article 159 (2) (c), promotes Alternative Disputes Resolution (ADR), in appropriate circumstances; and that the CDF Act (s.52), similarly, creates a dispute-resolution mechanism. But as observed

by the Court of Appeal, neither the 1st respondent nor his agents had lodged any formal complaints for ADR before the Independent Electoral and Boundaries Commission (IEBC), especially as to the application of CDF monies in Nyando Constituency, prior to the elections. Counsel submitted that all disputes touching on elections, and occurring prior to the General Elections, should have been determined by the IEBC pursuant to Section 74 of the Elections Act. Therefore, counsel submitted, the Court of Appeal had no legal basis to adjudicate claims related to CDF, by the 1st respondent. Learned counsel invoked Section 72 of the Elections Act, which provides that a candidate who engaged in bribery, violence or intimidation shall be disqualified *by the Commission,* and shall not be eligible to participate in elections. He submitted that the IEBC has not only the legal mandate to adjudicate over such claims, but also has the power to enforce its findings.

[23] Learned counsel further highlighted the provisions of Section 72 (3) of the Elections Act, to the effect that where the offence is discovered after a candidate has been elected, that candidate shall be disqualified by the Commission, and shall not be eligible to contest in the next election. Counsel sought to reinforce his argument that the offence of bribery which the appellant was being accused of, ought to have been reported to the IEBC, and not the Election Court, since the alleged occurrence-date was *before the election was conducted*. This, he submitted, was in line with Article 88 (4) (e) of the Constitution which outlines the powers of the IEBC as including the settlement of electoral disputes – including disputes relating to or arising from nominations, but excluding election petition, and any disputes subsequent to the declaration of election results.

(b) The 2nd and 3rd Respondents' Cases

[24] Mr. Mukele**,** learned counsel for the 2nd and 3rd respondents, submitted that the respondents were not accorded a fair hearing at the Court of Appeal, and that

the Court of Appeal made a determination on issues not raised in the Memorandum of Appeal. He submitted that the issues as to whether the appellant used CDF to influence the election, and whether DW9 as the Nyando Constituency Development Fund Treasurer, was by virtue of that position a "Public Officer", were not among the grounds of appeal. Counsel urged that the Court of Appeal's finding was contrary to Article 50 (2) of the Constitution, on the "right to be informed of the charge, with sufficient details to answer it."

[25] Counsel also urged that the Court of Appeal had no jurisdiction to hear and determine *issues of fact*. He submitted that, the jurisdiction of the Court of Appeal is limited to *issues of law* only, and it is a misdirection for the Court of Appeal to believe one witness, as opposed to the other; for it is the *Election Court* which has the benefit of assessing the witnesses' credibility or otherwise, by perceiving their demeanor.

[26] Counsel further submitted that since the Court of Appeal is not the "lection Court", it had no jurisdiction to certify to the Commission its determination under Section 86 (1) of the Elections Act, and to issue a report to the Director of Public Prosecutions in accordance with Section 87 (1) of the Elections Act, certifying that *an election offence* had been committed. He submitted that Section 2 of the Elections Act does not classify the Court of Appeal as an "Election Court".

[27] Counsel urged the Court to make a determination on whether the Court of Appeal could expand the definition of a term applied in the Constitution. He submitted that the Court of Appeal, in breach of Section 2 of the Elections Act, expanded the definition of the term '*public resources*,' by stating that a witness (DW9) can be termed as "public resource," hence classifying him as an object, yet *objects* are not entitled to rights safeguarded under the Constitution.

[28] Learned counsel submitted that the CDF Act has an in-built mechanisms for protecting the disbursement of funds. Sections 23, 24 and 25 of the CDF Act, he urged, limit all expenditure to the annual budget. Accordingly, it was submitted, implementing a duty under the law cannot amount to bribery; and in any case, if an issue were to arise as to the use or misuse of funds, it would be considered under Section 68 of the Elections Act. Counsel submitted that there is an established mechanism, through the Minister, for the determination of disputes under the CDF Act. In one respect counsel agreed with the Court of Appeal, in its finding that:

> ***"It is trite law that where the Constitution or an Act of Parliament provides for a mechanism for resolving certain disputes in specified tribunals or bodies, no person can be allowed to ignore such tribunal and bring his dispute to Court..."***

He submitted that the Court of Appeal improperly departed from its own well-articulated principle, by ignoring the special mandates of non-judicial agencies, and entertaining claims vested by law elsewhere.

(c) The 4th Respondent's Case

[29] Mr. Ochieng', learned counsel for the 4th respondent, submitted that the dispute regarding the misuse of public resources should not have been entertained by the appellate Court, in the first place. For Article 159 (2) (c) of the Constitution expressly provides for *alternative forms of dispute resolution,* and this was given effect by Section 52 of the CDF Act, which provides that all complaints should be forwarded to the CDF Board. He urged that Article 88 (4) (e) of the Constitution mandates the IEBC to resolve disputes arising out of the nominations, but excludes disputes that would ordinarily be the subject for the Election Court. Counsel

submitted that, subject to Section 74 (3) of the Elections Act, disputes occurring before the election date, would fall to the jurisdiction of the IEBC.

(d) 1st Respondent's Case

[30] Mr. Issa, learned counsel for the 1st respondent, urged the Court to hold that Section 85A of the Elections Act is inconsistent with Article 164 (3) of the Constitution. He argued that the Court of Appeal has *unlimited powers to hear appeals from the High Court,* and that this position could not be qualified by virtue of Section 85A of the elections Act. He contrasted the Court of Appeal's jurisdiction with that of other Courts established under Article 162 of the Constitution (which are of the same status as the High Court). He submitted that Article 162 (3) provides that Parliament shall determine the jurisdiction of such other Courts; and that those are the Courts contemplated under Article 164 (3) (b), which provides that appeals may lie to the Court of Appeal *'from any other courts or tribunal as prescribed by an Act of Parliament'*.

[31] Learned counsel submitted that Articles 105 and 164 (3) of the Constitution are to be read together, and that Article 105 provides that the High Court shall determine any question as to whether a person was validly elected. He urged that the question as to whether a person was validly elected, depends on the standards set out under Article 81 (e) (ii) of the Constitution, on the principles of free and fair elections: elections free from violence, intimidation, improper influence or corruption. He urged that the High Court, therefore, has a constitutional duty to determine whether a person is validly elected as a Member of National Assembly in terms of Article 81 (e) (ii); and that any election tainted with improper influence, or corruption, is inconsistent with electoral principles of the Constitution; so the High Court has a constitutional duty to invalidate such a wrongly-conducted election.

[32] Against that background, learned counsel submitted that the Court of Appeal *was right to look at the evaluation of the evidence by the High Court*, together with the interpretation of the relevant law, *to assess whether the High Court properly evaluated the evidence.* It was his view that the Court of Appeal had a duty to re-evaluate that evidence. He urged that if it was intended that the right to appeal under Article 105 be limited to *matters of law only*, then Article 164 (3) would have expressly limited such jurisdiction.

[33] Counsel submitted that, within the broad terms of Article 260 of the Constitution, the Court of Appeal had properly interpreted the term "public officer" and, accordingly, properly directed itself under Section 68 of the Elections Act, by relying on the meaning of the term as provided in the Public Officer Ethics Act.

[34] Counsel further submitted that, as Article 259 of the Constitution requires interpretations that promote its purpose, the Court of Appeal was right in taking into consideration the broader definition contained in the Public Officer Ethics Act. He submitted that the Act was enacted to ensure that public resources are applied only to purposes intended by Parliament.

[35] On the contention that the issue of "public officer" had not been one of the issues at the Court of Appeal, counsel submitted that all parties were given equal opportunity to submit on that issue, and hence there was no basis to the allegation that there was denial of the right to a fair hearing. Counsel submitted that it had been urged for the 1st respondent that DW9 had admitted having campaigned for a candidate in the election, yet he was the CDF Treasurer for the Nyando Constituency. Counsel urged that DW8 who was the CDF Chairman, had admitted that they [of the CDF Committee] are "considered as public servants" and hence, are not allowed to campaign. *These admissions*, counsel urged *are what the Court*

of Appeal noted, and so found that the two witnesses were public officers; so they cannot now claim that their rights were infringed.

[36] On the proposition that the High Court had no jurisdiction to determine disputes that arise before election is held, learned counsel submitted that Article 88 (4) (e) of the Constitution as read together with Section 74 of the Elections Act, provides that IEBC has jurisdiction to determine all disputes including disputes relating to nominations, but excluding election petitions, and disputes subsequent to the declaration of election results. He urged that it was not the intention of the framers of the Constitution to oust the jurisdiction of the Election Court, where there are disputes on facts that go to the credibility of any candidate, if those facts were not known prior to the elections.

[37] Learned counsel submitted that an election is not an event but a process, and he urged that Section 74 of the Elections Act does not contemplate a scenario where all wrongs committed before the election are to be determined by the IEBC. He submitted that the disputes presented to the CDF Board under Section 52 of the CDF Act do not ordinarily deal with *bribery,* which is an offence created under Section 64 of the Elections Act. He urged that those kinds of disputes are strictly within the purview of the *Election Court*. He submitted that the Constitution requires the High Court to hear all disputes revolving around the elections, except those that are in respect to the *nominations,* which ought to be handled by the IEBC.

[38] Counsel submitted that the High Court, under Article 105, has the mandate to determine first, whether the whole process was valid and, if it was invalid, whether it was vitiated by any *criminal actions* by any person. This is the reason, he urged, why Sections 86 and 87 of the Elections Act confer a two-fold jurisdiction upon the Election Court: to issue a certificate on the validity of the elections, and to

issue a report to the DPP, the Commission, and the relevant House Speaker, where there is proof of commission of an *election offence*.

[39] Counsel submitted that the Election Court is the proper forum for determining whether an election offence has been committed, where such offence is proved *beyond reasonable doubt*. He relied on Section 87 (2) of the Elections Act which provides thus:

> ***"Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported by an election court, the election court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported."***

Counsel perceived that provision as bearing the safety device, that the persons adversely mentioned in relation to the commission of any election offence, are given an opportunity to present their case. He contended that once a report had been issued to the DPP, it now falls to the DPP to exercise his constitutional mandate under Article 156 of the Constitution, and determine whether further investigations ought to be carried out, and whether a suspect is to be charged with any additional offences.

[40] Counsel submitted that the Court of Appeal, in holding that DW9 was a public officer, merely made inferences from the fact-findings of the High Court, fact-findings that had not been the subject of appeal after they were made. He referred to the statement appearing in the High Court Judgment, in relation to DW9 and "public-officer" status:

"Maybe this is an area that both the Commission and Director of Public Prosecutions may want to look at as public officers can have, and sometimes actually have, profound influence on the electioneering process."

[41] In response to the appellant's proposition that a person's *political rights under Article 38* cannot be limited on grounds of being a public officer, counsel submitted that under Article 24 of the Constitution, it is in *the public interest to limit the rights of Public Officers*, as regards campaigns, and public resources, during the electioneering period.

[42] As to the definition of "Public Officer", counsel submitted that Article 259 of the Constitution indicates that one of the elements of "public office", is that the remuneration and benefits are directly drawn from money provided by Parliament. He submitted that CDF money is provided by Parliament, and so, is public money. He urged that the lack of definition of "CDF Committee member" by the Constitution, under the definition of "Public Officer," is cured by Article 259 (3) which provides that the law is always speaking and, in this context, Section 2 of the Public Officer Ethics Act was enacted.

[43] Counsel submitted that the 1st respondent had framed 11 grounds for determination by the Court of Appeal, but only three grounds featured in that Court's summary – leaving out some, such as scrutiny and recount of votes. He urged that his entire case fell within the Court's jurisdiction, and that the Court of Appeal, in the case of ***Jared Odoyo Okello v IEBC & Others (2014) eKLR,*** had held that nothing ousted its jurisdiction, even in view of Section 85A of the Elections Act.

[44] Learned Counsel, **Mr. Odeny** for the 1st respondent, cited the Zambian case, ***Michael Mabenga v Sikota Wina & Others, (Supreme Court of Zambia No. 15 of 2003).*** Zambia has a CDF Act similar to that of Kenya. The Court in the said case, held that the use of CDF money during political campaigns amounted to bribery, and was a criminal offence. In the present case, counsel averred, CDF funds were disbursed 10 days to the election, with the last disbursement being only three days prior to the election. He submitted that, as regards one of the intended projects (as per the affidavit of PW13), there had been no approval, but funds amounting to 1 million shillings were disbursed for it. Counsel urged that this was contrary to Section 43 of the CDF Act, which prohibits the commencement of new projects three months before elections. In these circumstances, counsel urged that money had been used to sway voters, in favour of the appellant. Learned counsel submitted that his client (1st respondent) could very well take advantage of what amounted to "admission evidence" from a witness of the appellant herein; and he called in aid a Nigerian Court to support his strategy, ***Dr. John Olukayode Fayemi v. Olesugun Adebayo Oni & Others*****, CA/ IL/EP/GOV/25/2008,** where the Court of Appeal had thus held:

> ***"When the evidence of a witness supports the case of its opponent against whom he purports to give evidence the opponent can take advantage of the evidence to strengthen his case. If it is consistent with and corroborates his case that will be admission against interest of the party that called the witness and the admission is relevant and admissible evidence."***

D. ISSUES FOR DETERMINATION

[45] The following issues have crystallized for our consideration:

(a) whether Section 85A of the Elections Act is ultra-vires the Constitution;

(b) whether the Court of Appeal exceeded its jurisdiction by considering matters of fact and evidence, in breach of Section 85A of the Elections Act;

(c) whether the Court of Appeal erred in finding that the appellant had committed the election offence of bribery;

(d) whether Constituency Development Fund (CDF) Members are "public officers" and public resources, under the Constitution;

(e) whether the CDF Committee officials' conduct in the period before elections contravened the Constitution and election laws, with the effect of vitiating the appellant's election as the Member of the National Assembly for Nyando Constituency.

(a) Whether Section 85A of Elections Act, 2011 is unconstitutional

[46] Learned counsel for the 1st respondent, Mr. Issa**,** submitted that Section 85A of the Elections Act is inconsistent with Article 164(3) of the Constitution. He took the view that the right to appeal from the High Court to the Court of Appeal, under Article 164(3) of the current Constitution, cannot be restricted. He cited and compared Section 64(1) of the repealed Constitution [of 1969] to Article 164(3) of the current Constitution [of 2010]; and urged that under the repealed Constitution, jurisdiction and powers in relation to appeals from the High Court to the Court of Appeal were as conferred *by law*, unlike under the current Constitution, which vests in the Court of Appeal *unrestricted powers to consider matters of law and fact*, under Article 164(3)(a).

[47] Counsel submitted that Article 105 of the Constitution confers upon the High Court powers to determine questions relating to the validity of the election of a

Member of Parliament – a task that entails both constitutional duty, and statutory duty. It was submitted that an error in the discharge of that duty moves the Court of Appeal to intervene under Article 164 (3) (a) of the Constitution. Counsel submitted that, had it been the Constitution's intent that the jurisdiction of the Court of Appeal be limited *to questions of law* only, this would have been expressly stated in *Article 164 (3).* He urged that there is a limitation to the jurisdiction of the Court of Appeal, by Section 85A of the Elections Act, which is unconstitutional as from the date of enactment; and that the Constitution does not restrict the Court of Appeal's powers to hear appeals from the High Court, in the *electoral matters*.

[48] Section 85A of the Elections Act thus provides:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senator or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:***
>
> ***(a) filed within thirty days of the decision of the High Court; and***
>
> ***(b) heard and determined within six months of the filing of the appeal to the Court of Appeal."***

[49] Our apprehension of learned counsel's argument is that the perceived unconstitutionality of Section 85A of the Elections Act, relates only to the restriction of the jurisdiction of the Court of Appeal to *'matters of law only,'* in election-dispute appeals. We will, therefore, focus our evaluation upon this particular dimension.

[50] It is to be recognized that Section 85A found its way into the Elections Act by way of a *Miscellaneous Amendment Act, No. 47 of 2012*. The Act, in its original

design, was silent on the issue of appeals to the Court of Appeal. Section 85 had only provided that an election petition was to be heard and determined within a *period specified in the Constitution*. That period is specified in Article 105(2) of the Constitution: a question relating to the validity of the election of a Member of Parliament is to be heard and determined *within a period of six months by the High Court*. The Act, as initially enacted, gave no room for appeals to the Court of Appeal, with respect to *election petitions*.

[51] However, the miscellaneous amendment introduced Section 85A, the constitutionality of which is now being challenged. Learned counsel, Mr. Issa submits that it was not constitutionally justifiable for Parliament to restrict appeals from the High Court to the Court of Appeal in election claims, to *matters of law* only.

[52] Article 105(1) of the Constitution vests in the High Court powers to consider whether a Member of Parliament has been validly elected, or the seat has become vacant. The clear intent of this provision, is that a first-instance claim challenging the validity of an election, or questioning whether a parliamentary seat has been rendered vacant, has to be lodged in the *High Court*. Such a dispute, by Article 105(2) of the Constitution, must be resolved within a period *of not more than six months*.

[53] The Court of Appeal, under Article 164 (3) of the Constitution, exercises the jurisdiction of the first appellate Court; and in its broad design in the judicial scheme, the Court of Appeal has *general jurisdiction to review matters in dispute*, in a proper case – be they matters of law or matters of fact. Learned counsel builds his case on such a broad design of the judicial mechanism, when he lodges his case on *the purposes of the Constitution of Kenya, 2010*, impugning the regulatory appellate framework for elections, introduced by Section 85A of the elections Act.

[54] Such a line of inquiry had featured in an earlier decision of this Court, in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Application No. 5 of 2014, where we had to determine whether interpretation of the Elections Act and the regulations thereunder, by the Court of Appeal, could be said to entail *"constitutional application or interpretation,"* and thus meriting appeal as a matter of right to the Supreme Court, under Article 163(4)(a) of the Constitution. The following passage appears in our Judgment [para 77]:

> ***"While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution."***

[55] In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the *constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election*. The realization of this goal is partly attainable through universal franchise, expressed in a *voting exercise guided by appropriate legislation*, that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution. Thus, it is for certain, that electoral contestations will *involve constitutional interpretation or application*. When such disputes are adjudicated upon by the High Court, new contests may emerge, that require resolution within the judicial system. Such further disputes are, in our view, directly appealable to the Court of Appeal. *The*

Court of Appeal, therefore, is vested with jurisdiction under the Constitution, to hear and determine appeals from the High Court, in respect of decisions made pursuant to Article 105(1) of the Constitution.

[56] Like any other constitutional claims, over which the High Court has jurisdiction under *Article 165(3)*, electoral dispute resolution under Article 105 cannot be a one-stop adjudicatory process. The legitimate expectation of the Kenyan people, as founded upon the Constitution, is that they will not be deprived of the right to have electoral disputes resolved through the hierarchy of judicial mechanisms, and the system of justice known to the Constitution. The right to question the validity of an election, entails an examination by the High Court whether the electoral provisions, the principles of the Constitution, and the requirements of law have been satisfied. First-instance determinations of such questions, are amenable to appeal before the Court of Appeal, in accordance with the provisions of Section 85A of the Elections Act; and this is by no means, subversive of the hierarchical setting of the Court system in Kenya.

[57] The Constitution's intent, in our view, is that a comprehensive appellate system be in place, to crystallize a uniform and settled authority of the law, to be applied fairly, in the administration of justice. For the resolution of *electoral disputes,* an appeal serves an even a more invaluable objective: it ensures that through the judicial process, it is ascertained that a particular candidate is seen to be validly and popularly conferred with the electoral mandate, to lead and represent the people. The appeal process also serves to impart credence, by affirming the place of certainty and predictability in the law, as the appellate Court lays down precedent-setting norms, to be applied by lower Courts.

[58] We take judicial notice of the fact that, in Kenya's new dispensation, the Constitution has given enhanced standing to the electoral process, and conferred

thereby greater legitimacy in the functioning of public institutions. In particular, the Constitution entrenches in Articles 81 and 86 a wide range of principles and values governing the electoral system, and its administration.

[59] The Constitution of 2010 may, indeed, be seen as the foundation of *a regime of "electoral law"*, which, even though sharing common principles of justice and fairness with the normal civil and criminal jurisdictions, bears a new ingredient that is underlined by objects of democracy, good governance, and efficiency of public institutions. This is the context in which Article 105 set afoot the process of enacting new electoral legislation, and the making of attendant rules and regulations. This is the context in which we would perceive the specific terms of the Elections Act – in a broad sense, a context of compatibility, rather than of discord.

[60] The Elections Act, 2011 governs the institution of suits at the High Court, prescribes the relevant timelines, and lays out an avenue for appeal to the Court of Appeal (under Section 85A). In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Petition No. 2B of 2014, we took the view that Section 85A is the legislative mechanism intended to effectuate the constitutional principle of *timely resolution of electoral disputes, enshrined in Article 87(1)*. We gave the historical context of Section 87(1) of the Constitution as follows:

> ***"Article 87 (1) grants Parliament the latitude to enact legislation to provide for 'timely resolution of electoral disputes.' This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional***

sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation."

[61] Besides this historical justification for a constitutional commitment to expeditious resolution of electoral claims, we recognize the special demands of the electoral process, which justify the conception of a sensitive legislative regime – one endowed with a well-defined appellate procedure, to meet the demands of time dictated by the terms of Article 87(1). Thus, we affirmed the constitutionality of Section 85A, in the ***Munya*** Case, as follows [paragraphs 63-64]:

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

"Section 85A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: 'Limit your appeals to the Court of Appeal to matters of law only'."

[62] Since it is not in doubt that the Court of Appeal has jurisdiction to entertain appeals from the High Court, in electoral disputes determined under Article 105 of the Constitution, can such a jurisdiction be limited, fettered or restricted in scope, manner, procedure, or confined to only a particular category of questions? Does the Constitution envisage a limitation of the right of appeal?

[63] Similar to Article 87(1) is Article 105 (3), which confers upon Parliament a mandate to enact separate and special legislation giving it full effect. As noted above, Article 105 (1) makes the High Court the first-instance forum for resolving electoral disputes, where any challenge to the election of a Member of Parliament should be directed. Article 105(2) prescribes the timeline within which such a dispute must be resolved. By Article 105(3) the Constitution, Parliament was mandated to design and enact a special legislative mechanism, to enable the realization of two objects: the judicial duty of the High Court to hear and determine causes of action in electoral contests, in the first instance, and, where required, provide an avenue of appeal to the Court of Appeal; and secondly, the specification of jurisdiction and timelines.

[64] The main object of that legislation, in our view, was to vindicate the individual's right of action against parties who would claim electoral victory in contravention of the Constitution. The framers of the Constitution considered it appropriate to leave it to Parliament to define in an elaborate statutory text, all the mechanisms and procedures attendant upon the right to bring an action, and to pursue an appeal to its conclusion, in the context of efficacious, expedient, fair and free elections.

[65] For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in

this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case-management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the Civil Procedure Act, the Criminal Procedure Code, the Appellate Jurisdiction Act, the Supreme Court Act, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.

[66] To give effect to the right to judicial redress in electoral claims, the Elections Act, 2011 had to incorporate certain essential rules and norms. In our view the Elections Act, 2011 was conceived by Parliament as the statutory framework for governing, *inter alia*, the conduct of adjudication on questions touching on the validity of elections, or the occurrence of vacancy in the office of Member of Parliament; as well as to facilitate the expeditious resolution of electoral claims, within a defined period of time. It can be said, in the circumstances, that *the Elections Act, 2011 is the law envisaged by Article 105(3).* This is clear from the objective stated in the Act:

> *"...to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda**; to provide for election disputes resolution and for connected purposes.***" [emphasis supplied].

[67] A contrary argument was raised by counsel for the 1st respondent, that the *Appellate Jurisdiction Act* is the law applicable for all appeals to the Court of Appeal. Mr. Issa cited Section 3 of that Act, which provides that:

"(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.

"(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

"(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

[68] In aid of that argument, learned counsel invoked Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules. This rule provides that an appeal against a Judgment and decree of the High Court shall be governed by the Court of Appeal Rules. It thus provides:

"An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules".

[69] Counsel urged that Section 85A of the Elections Act is unconstitutional, as it limits the jurisdiction of the Court of Appeal to determine questions of law only in appeals on *electoral disputes* from the High Court. With respect, we do not agree. What meaning is to be attached to the word "unconstitutional?" According to ***Black's Law Dictionary*** 9th ed. (2009), the term "unconstitutional" means:

"contrary to or in conflict with a constitution...."

A statutory provision can be said to be unconstitutional only if it contravenes an express provision of the Constitution. A reading of Section 85A of the Elections Act shows that there is nothing in it that runs into conflict with the constitutional provision conferring appellate jurisdiction upon the Court of Appeal, or with any other constitutional provision. To allow Section 85A to be impugned, without a cogent forensic ground, would open up improper avenues for contests to yet other statutory provisions: such as Section 75 of the Elections Act, which limits the appellate jurisdiction of the High Court (on appeals from a Resident Magistrate Court, on the validity of the election of a County Assembly Member) to *matters of law only;* and Section 71A of the Civil Procedure Act, which also limits the appellate jurisdiction of the High Court to matters of law only.

[70] It is clear to us that Article 105 (3) of the Constitution mandated Parliament to enact *a distinct regime, within the terms of the Constitution, for the judicial resolution of electoral disputes*. The regime is elaborately defined under the provisions of the Elections Act, and the Election Petition Rules.

[71] From insights gained by reading election-dispute cases from other countries, and from our own experience in "electoral-litigation" matters, we would recognize that this category of dispute – so profoundly weighing on active public, political interests, while concurrently bearing upon the rights, interests and expectations of the election candidates themselves – falls in a special class of litigious matter. On this account, it makes, in our perception, eminent sense that the ordinary rules of procedure, in their full tenor and effect, tend to be ill-suited to the effectuation of substantive aspects of the Elections Act, and the Rules made thereunder. It is clear to us, for instance, that Rule 35 of the Elections Petition Rules, insofar as it makes the Court of Appeal Rules applicable to appeals in election-dispute matters, is to be

construed only as a *supplement to* – and not a substitute to – the provisions of the Election Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules into the conduct of electoral appeals *via* Rule 35 of the Election Petition Rules, cannot oust the clear provisions of Section 85A of the Elections Act.

[72] The Elections Act is an elaborate and comprehensive statute, regulating a broad spectrum of issues in electoral processes. It is concerned with registration of voters, nominations, and procedure for all cadres of elections, as well as the declaration of results; recall of a Member of Parliament; procedure for the conduct of referendum and election offences; and election-dispute resolution. Sections 74-87 of the Act cover aspects of dispute resolution, in the terms of Article 105 of the Constitution.

[73] This Court's perception of the configuration of the governing electoral law has been clearly signalled in the recent ***Munya*** Case. From that foundation, we would observe that Section 85A manifests Parliament's intention to regulate the scope of appeals to the Court of Appeal to '*matters of law only'*. We decline, with respect, the 1st respondent's contention that the provision should be struck out, as an undue limitation on the Court of Appeal's jurisdiction as conferred by Article 164 (3) (a) of the Constitution. We reaffirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to "matters of law," is not a limitation to, or a restriction of the Court of Appeal's jurisdiction under Article 164 (3) (a). It is our view that the appellate jurisdiction in electoral disputes, is donated not simply by virtue of Article 164 (3) (a), but also by *legislation contemplated under Article 105 (3) of the Constitution*.

[74] The Constitution often leaves open space for legislation, for the purpose of specifying the details of how the constitutional aspirations and requirements are to

be effectuated. It is on this account, that Article 94 of the Constitution confers upon Parliament the legislative authority, exercisable on behalf of the people, to enact laws that govern the conduct and affairs of governance, the State organs, as well as the citizens, throughout the Republic.

[75] Parliament has exercised this mandate, and come up with the Elections Act, 2011: a legislative framework for giving effect to persons' rights to the adjudication of electoral disputes, safeguarded in Article 105(1). What Section 85A does is to give effect to the tenor of Article 105, to have an electoral dispute determined by the High Court, with room for further appeal on matters of law, to the Court of Appeal.

[76] In short, we recognize that a right to judicial redress cannot be attained in a legal vacuum. As a constitutional guarantee, its pursuit and attainment *can only be realized through detailed procedure,* the prescription of which falls to normal legislation. In the making of such legislation, Parliament is not to limit or inhibit the right of access to judicial recourse. If it does, this would offend the Constitution.

[77] We hold that the law can regulate or confine the time within which, or the scope or nature of questions that, an appeal Court may accord a hearing – as long as that restriction does not negate or defeat the essence of the right of appeal, or diminish the spirit of the fundamental right to adjudication of electoral disputes. Any such restrictions embodied in statute law, we would hold, are not to be regarded as a breach of the Constitution. We hold, accordingly, that Section 85A of the Elections Act entails no qualification to the terms of the Constitution.

(b) Whether the Court of Appeal acted in Excess of its Jurisdiction, by considering Matters of Fact and Evidence

[78] It was urged for the appellant that the Court of Appeal exceeded the scope of its jurisdiction, the moment it determined that it could *examine and re-evaluate*

the evidence, especially as regards the use of CDF money to influence voters. On the issue of bribery, learned counsel, Mr. Wasuna contended that the Court of Appeal erred by choosing to believe the 1st respondent's witnesses PW7, PW9, PW10, PW13 and PW14, and to disbelieve the appellant's witnesses, DW8 and DW9 in respect of their testimonies on the appellant's presence at campaign rallies where CDF cheques were distributed. Counsel urged that even though the learned Judges of Appeal properly warned themselves, as to how to approach findings of fact made by the trial Court, they fell into error by believing one set of witnesses as opposed to others. In summary, the contention of the appellant, along with that of 2nd and 3rd respondents, is that these are *matters of fact,* which the Court of Appeal considered in breach of the appellant's *right to a fair trial.*

[79] The 1st respondent on his part, submitted that the Court of Appeal was right to consider how the High Court evaluated the evidence. Under Section 85A of the Elections Act, the Court of Appeal has a mandate to determine appeals on the basis of *matters of law only*. This same provision of the Elections Act was the preoccupation of the ***Munya*** case, which accorded us an opportunity to undertake a comparative study on "issues of law" *vis-à-vis* "issues of fact." This led us to give meaning to the phrase "a matter of law" as, a question or an issue involving:

> ***"(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***
>
> ***(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an***

election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence."

[80] Applicable to the issue before us is the third element set out in the foregoing paragraph. In arriving at its statement that the appellant committed the *offence of bribery, the Court of Appeal stated that the task before it was to consider the evidence,* bearing in mind that:

"...on a first appeal, an appellate court is obliged and has power to examine and re-evaluate the evidence on record, where that becomes necessary, and interfere with the trial court's finding of fact if it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding."

[81] It was therefore quite proper, as counsel for the respondents duly observed, for the Court of Appeal to warn itself on the limitation of its powers of reviewing the *conclusions of fact by the trial Judge.* As to whether the Court kept to this jurisdictional limitation, in considering the evidentiary aspect of *matters of law*, is

an issue subject of our inquiry. Did the Court of Appeal, in reversing the *trial Court's findings or conclusions of fact*, contravene the jurisdictional limitations, founded on the evidentiary question, in terms of Section 85A?

[82] In the Judgment of the High Court, one of the issues for determination was framed as follows:

> ***"c. whether there were election malpractices and offences committed during election and whether such compromised the integrity of the election."***

[83] The trial Judge (at page 7 of the Judgment) then embarked on an examination of alleged use of CDF money to sway voters in favour of the appellant. The question before the Court was, whether the CDF committee officials campaigned for the appellant, and whether the appellant himself participated in the issuance and distribution of the cheques to various institutions within the Constituency, in the period preceding the General Elections of 4th March, 2013 with a view to soliciting votes. One fact that was not in dispute, was that the CDF committee members issued and distributed cheques to various institutions *between 18th January, 2013 and 4th March, 2013*.

[84] The trial Judge took note of the petitioner's (1st respondent herein) witness testimonies, *to wit*, Gordon Odhiambo Gwata (PW7), Paul Odhiambo Apamo (PW10), Festo Ochieng Ondiek (PW13) and George Onyango Ngore (PW14) – regarding the alleged participation of the appellant in the distribution of cheques at campaign rallies where the CDF officials were present. He evaluated the petitioner's witnesses' account against those of the appellant. *Muchelule J.* observed that as regards the allegations of issuance and distribution of CDF money, the response from the appellant's witnesses, i.e. Mr. Stanley Omega (DW8), Geoffrey Yogo (DW9) and Amos Osieko, was that indeed, cheques were distributed by CDF

officials, but only in respect of the named projects; and that the appellant who had ceased to be patron of the committee, did not attend the functions. The learned Judge recorded a witness account, that the cheques given out were meant for development projects, and not to support the appellant's campaigns. The Judge also noted that the distribution of the cheques had been decided upon by the national CDF Management Board.

[85] On the appellant's own testimony regarding the use of CDF funds to campaign, the trial Judge reproduced a paragraph of the appellant's sworn statement, refuting allegations levelled against him, as regards breach of electoral law on the use of public resources. In the affidavit, the appellant stated that he had the right of use of print, social and visual media to propagate his ideals to the electorate. The trial Judge censured the appellant in relation to the subject of a radio announcement on the use of CDF in the following terms:

> ***"It was a serious matter for the 3rd respondent to go on air and announce that he was going to use public resources to campaign and then actually do so."***

[86] After this statement of reprimand, the trial Judge blamed the 1st respondent's laxity in reporting the appellant's misconduct to lawful authority, and concluded that he was *"unable to find that the 3rd respondent used CDF money to campaign."*

[87] It was, however, established before the Election Court that DW9, an Advocate of the High Court of Kenya and the treasurer of the CDF committee, admitted that he was a principal supporter and campaigner for the appellant and the ODM party, and had signed the appellant's nomination papers, despite being a CDF committee member. The trial Judge, however, rejected Jacob Okello Onditi's testimony as

unsubstantiated evidence, that DW9 gave Kshs. 300,000/= to influence the voters of Kakola, to vote for the appellant.

[88] These were the trial Court's conclusions of fact, as established on the basis of the evidence at the trial. In other words, the trial Court made a factual finding, based on the tendered evidence, that no CDF money was used to influence voters in favour of the appellant; and therefore the allegations of bribery, or undue influence were not tenable. *These were the conclusions appealed against,* in a Memorandum of Appeal lodged in the Court of Appeal Registry at Kisumu, on 22nd day of October 2013. Since the appellate Judges had clearly outlined the evidential dimension of Section 85A of the Elections Act, as the premise upon which the appeal would be entertained and disposed of, it is clear to us that our duty in this appeal, is to consider whether the Court of Appeal, in reversing the *trial Court's findings on facts on the election process in question,* had properly considered and determined that the trial Court's conclusions were *based on no evidence,* or that the conclusions were *not supported by the established facts or evidence on record,* or that the *conclusions were so perverse, or so illegal, that no reasonable tribunal would arrive at the same* (see the ***Munya*** case at paragraph 81 (c)).

[89] The learned Judges of Appeal decided that they could examine and re-evaluate the *evidence on record*. They did so by examining and re-evaluating the *witness account of the 1st respondent's witnesses PW7, PW10, PW13 and PW14 against the appellant's DW8 and DW9*. Paragraph 24 of the Judgment is instructive, with regard to the complaint of bribery to voters:

> *"Having re-evaluated this evidence and counsel's rival submission on this complaint,* ***we find that the learned Judge had no basis for disbelieving the evidence of PW7, PW10, PW13 and PW14 and instead preferring that of DW8 and DW9. This is because DW8***

and DW9 were members of the Nyando Constituency Development Fund Committee which was accused of having used CDF money to assist the 3rd respondent's supporter in the nomination to contest the Nyando Parliamentary seat and had campaigned for him. The two therefore had every reason to lie, first and foremost to cover themselves and their friend and benefactor, the 3rd respondent" [emphasis supplied].

[90] This conclusion by the Court of Appeal, with much respect, is disturbing. It is disturbing because the learned Judges of Appeal dislodged the *trial Judge's finding on the credibility of one set of witnesses*, a matter of fact that they were precluded from engaging in unless it could be shown that the trial Judge *had no evidential basis* for such a conclusion, or made a conclusion *unsupported by the evidence on record*, or that the conclusion was *perverse or illegal*.

[91] The issue of credibility or implausibility of witness testimony is a *question of fact* and was not open to the Court of Appeal to consider. We benefit, in this regard, from the learned Judgment of the Supreme Court of the Philippines, in the cases of ***Republic v. Malabanan,*** G.*R. No. 169067, October 632 SCRA 338, 345* and ***New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan*****;** *G.R No. 161818 (2008),* where it was thus held:

"The Petitioner would have us delve into the veracity of the documentary evidence and truthfulness of the testimonial evidence presented during the trial of the case at bar…We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the

doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. ***Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court….*** *absent any showing that there are significant issues involving questions of law."*

[92] Similarly, the ***Munya*** case affirms that credibility or veracity of witness statements is a *factual conclusion that only the trial Court can make*; and that an appellate Court should treat with a degree of deference the trial Judge's findings on the record, thus according due primacy to a trial Judge's special knowledge derived from first-hand perception - an approach that upholds the integrity and dignity of the judicial process in electoral matters. In that case we observed as follows:

> ***"Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."***

[93] We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. *Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact.*

[94] The Court of Appeal's conclusion that the appellant's witnesses (DW8 and DW9) had "all the reasons to lie," on grounds of friendship and beneficial relationships with the appellant, with respect, not only departs from the foregoing principle, but errs by constructing the scaffolding of an important decision upon mere suppositions of fact, instead of the evidentiary fact professionally arrived at by the trial Court. We hold such a position to have been a misdirection, under the terms of Section 85A of the Elections Act.

[95] Another question of fact that the Court of Appeal Judges were said to have considered (paragraph 25 of the Court of Appeal Judgment), was expressed in their remark, that the appellant was the "Chairman of the Nyando Constituency CDF committee." This, as learned counsel, Mr. Otieno submitted, was not an issue that was in evidence before the trial Court; but that had it been, it would be contrary to Section 3 of the CDF Act, under which the Member of Parliament does not select committee members. We believe this to have been a misapprehension of the record by the Court of Appeal. The Chairman of the Nyando CDF committee, by the record, was one Stanley Omega, while the appellant was the patron (by virtue of being the Member of Parliament). The record shows that, prior to the elections of 4th March, 2013 – during which time the cheques were being distributed to various institutions and projects – the appellant had ceased to be even the patron of the fund.

(c) Did the Court of Appeal err in finding the Appellant to have committed the Election Offence of Bribery?

[96] The appellant contended that the Court of Appeal had erred, in criminalising disbursements from the Nyando Constituency Development Fund, whereas the same had been duly authorised. He contended too, that the Court of Appeal had fallen into error, in finding that the he was guilty of the offence of bribery. The real issue here, as we perceive it, is *whether CDF funds were used to swing the election-outcome in favour of the appellant, during the 2013 elections – so that the offence of bribery by the appellant was disclosed*.

[97] The offence of bribery, as depicted in Section 64 of the Elections Act, carries certain elements that have to be proved, before the guilt-verdict can be pronounced. How was this offence pleaded at the High Court? And how did the Court of Appeal deal with the question? At paragraph (n) of the Election Petition (dated 2nd April, 2013), the 3rd respondent (petitioner) thus averred:

> ***"The 3rd respondent [appellant herein] and his agents together with the agents of the 4th Respondent used undue influence, bribed voters both before and on the Election Day in that the 3rd Respondent disbursed cheques from Nyando Constituency Development Fund kitty to the institutions in the following polling stations during the campaign period: Disi Secondary School, Wang'ang'a Primary School, Alendu Mixed School, Bwanda Girls Secondary, Yogo Primary School, Sare Primary School, Ayweyo, Ayier Gweng Dam (for Luora Ayueyo Primary School polling station), Kaluore Primary School, Kochogo Youth Polytechnic (for Obugi Primary School polling station), Awasi***

Primary School, Osino Primary School (for Kowuor Primary school polling station).”

The petitioner in that case, sought a determination that the appellant herein had used undue and improper influence on voters, in the above-mentioned polling centres. On that basis, he sought the nullification of the results in those polling stations.

[98] As a Court sitting to hear a second appeal, we have an obligation not to tamper with the *trial Judge's findings of fact*. However, as that matter of evidence touches on bribery – a phenomenon not always marked by tell-tale structural outlines – it is proper that we re-evaluate the relevant evidence, as a task falling under the notion of “matter of law.” In the ***Munya*** case, we considered the interplay between *fact* and *law,* in election cases, and in particular the elements of the phrase, “matters of law.” The Court, in that case, thus held (paragraph 80):

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

- ***(a) the*** *technical element****: involving the interpretation of a constitutional or statutory provision;***
- ***(b) the*** *practical element****: involving the application of the Constitution and the law to a set of facts or evidence on record;***
- ***(c) the*** *evidentiary element****: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”***

We will apply the third element, to examine how the evidence adduced at the trial Court was applied by both the trial Court and the Court of Appeal, and whether this Court will be inclined to uphold, or set aside the findings made by the Court of Appeal regarding the *offence of bribery*.

[99] Upon evaluating the evidence, the *trial Court* found that the 1st respondent's allegations of bribery had not been substantiated. The trial Judge determined that where there is an allegation that an *election offence* has been committed, the *standard of proof is higher,* and the Court has to be satisfied that the evidence called to prove the allegation is *cogent, certain, and compelling*.

[100] The trial Court determined that the crucial question for determination was: whether CDF money was used to sway the election in favour of the 3rd respondent**.** The allegation that money drawn from the CDF account was disbursed by the appellant, was itself anchored upon *further allegations:* that these disbursements were aided by DW8 and DW9, who according to the petitioner, were CDF officials, as well as ardent supporters and agents of the appellant herein.

[101] The trial Judge determined that, *in the absence of any complaint that the appellant had gone on air and announced that he was going to use public resources to campaign, he was unable to find that the 3rd respondent had used CDF money to campaign*. Thus, the learned Judge clearly considered the evidence adduced before his Court, and took a deliberate, recorded judicial decision, declining to hold that *the appellant* herein had used CDF money in his campaign.

[102] *Evidence,* in instances where an election offence is alleged, is crucial to the making of a proper judicial finding. This evidence should be clear, cogent, and certain. At paragraph 23 of the affidavit in support of the High Court petition, the 1st respondent herein alleged that the appellant, his agents, as well as the

Independent Electoral and Boundaries Commission, engaged themselves in the use of public resources, in bribery, and in acts of undue influence upon the voters. At paragraphs 24 and 25 of the same affidavit, the 1st respondent averred that he had heard the appellant on radio, declaring that he would be distributing CDF cheques to various parts of the constituency. He then relied on information from his witness, Mr. Gordon Odhiambo Gwada (PW7), regarding various cheques that had, allegedly, been distributed to various parts of the Constituency.

[103] At paragraph 20 of its Judgement, the Court of Appeal reproduced PW7's evidence-in-chief, to the effect that he had been present at Kochogo Youth Polytechnic, and Disi Secondary School where cheques of Kshs. 400,000 and Kshs.500,000 respectively, were given out. While 1st respondent had annexed a letter that was obtained by PW7 from Kochogo Youth Polytechnic, bearing strict guidelines as to how the fund was to be administered, the record shows the same PW7 to have admitted to having identified the project at Kochogo for funding, and at the time of the hearing, the development that he had favoured was still ongoing. Neither the Court of Appeal nor the trial Court addressed itself to these issues. The appellate Court also considered the evidence of PW10, who unlike PW7, consistently maintained that the date of issue of the cheques was 18/01/2013, contradicting the date given by PW7, i.e. 18/02/2013. The appellate Court evaluated the evidence of PW13 and PW14, who only testified to having been present when the alleged cheques were presented.

[104] At paragraph 24 of the Judgment, the Court of Appeal held that upon a re-evaluation of the evidence, it had found no basis for the trial Judge to have disbelieved the evidence of PW7, PW10, PW13 and PW14, and instead preferred that of DW8 and DW9. In the Court of Appeal's opinion, DW8 and DW9 had every reason to lie, to protect themselves and the appellant in light of the allegations. Upon such a frail basis (paragraph 42 of the Judgement), the Court held that the

appellant had committed the offence of bribery, by using CDF money to influence his re-election.

[105] As already remarked, the High Court, with respect, had by no means established a clear-enough evidentiary basis that could be evaluated by the Court of Appeal, and established to prove the offence of bribery, as against the appellant. But, while the High Court, quite properly, held that such an indictment would not stand, the appellate Court, notwithstanding the context, was to declare that the offence of bribery had been disclosed, as against the appellant.

[106] What is the essence of the offence of *bribery,* under the electoral law? Section 64 of the Elections Act thus provides:

> ***" (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 an 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 an 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."

[107] By Section 67(2) of the Elections Act, the offence of bribery is cognizable: a person alleged to have committed it is liable to arrest, without warrant. It shows the gravity of the offence, and signals that a high standard of proof is required. Accordingly, an allegation that an election offence has been committed has to be specific, cogent, and certain. This requirement guarantees the *right of fair trial*, for the person(s) against whom such allegations are made.

[108] In the light of the gravity of the matter, we have sought to benefit from comparative judicial experience. In ***Hardwari Lal v. Kanwal Singh*** *AIR [1972] SC 515*, the Supreme Court of India decided that a petition which alleges a corrupt practice, ought to contain the *material facts*, and *full particulars* of the corrupt practice alleged. The Court, in that case, thus held:

"It is therefore apparent that the appellant who was charged by the election petitioner with corrupt practice should be told in the election petition as to what assistance he sought. The type of assistance, the manner of assistance, the time of assistance, the person from whom the assistance is sought are all to be set out in the petition."

[109] The principle thus conveyed, is that the pleadings must be clear, the allegations elaborate, and the evidence adduced, focused and clear-cut. The foundation is clear: election offences bear the mark of a *criminal conduct* within the framework of an election petition, yet outside the normal criminal jurisdiction. Election offences are, therefore, *quasi-criminal* in nature; and the Court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such an offence was, indeed, committed, or by whom? The commission of an election offence if proved, will not only lead to the election being set aside, but also to the *disqualification of the perceived culprit*, from standing as a Parliamentary-election candidate, given the terms of Article 99(2)(h) of the Constitution. The offender is also liable to *criminal penalty*, under the Elections Act. In these circumstances, the person alleging the commission of the offence, is required to prove the *ingredients of the offence*. And such proof of an offence takes a higher level than the mere preponderance of probabilities.

[110] This principle is meritoriously expressed in the decision of the Supreme Court of India, in ***Amolok Chanad Chhazad v. Bhagwan Das Arya and Another,*** *A.I.R (SC) 813* [*Bhagwati, CJ* at page 818]:

> ***"The Election Petitions alleging corrupt practices are proceedings of a quasi-criminal nature and the onus is on the person who challenges the election to prove the allegations beyond reasonable doubt."***

[111] So in the instant matter, we must ask ourselves whether the record bears sufficient evidence to sustain the finding of *bribery*, as entered by the Court of Appeal. In our decision in the ***Raila Odinga*** case, regarding the burden of proof in election petitions, we thus determined:

"……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."

[112] In ***Bwana Mohamed Bwana v. Silvano Buko Bonaya and 2 Others,*** Malindi High Court Election Petition No. 7 of 2013**,** the validity of the election of the Woman Representative for Lamu County had been challenged. ***Muchemi J.,*** on burden of proof, thus held:

"The burden of proof of an election offence lies on the petitioner. It is trite law that the standard of proof is beyond any reasonable doubt."

[113] In the case of ***Abdulrahman Hassan Halkano v. Abdi Nasir and 2 Others,*** Election Petition No. 6 of 2008**,** there were allegations that the 1st respondent, or his agents used violence and other means to disrupt the tallying process. ***Azangalala, J***. (as he then was) held that the petitioner failed to discharge the burden of proof, which was *beyond any reasonable doubt*. He held thus:

"Election offences are criminal in nature and must be proved beyond any reasonable doubt".

[114] In ***Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu & 3 Others*****,** High Court at Bungoma, Election Petition No. 2 of 2013, the petitioner alleged that the electoral offences of bribery, treating of voters, and using public resources for campaigns had been committed. ***Gikonyo J.*** held as follows (paragraph 36):

"...It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases, although it does not assume the standard of beyond-reasonable-doubt. However, where the Petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt.

.....

"Upon deep consideration of the evidence and the submissions of the parties on this issue, I am of the view that every essential element of bribery must be proved in relation to the use of CDF cheques' to bribe and influence voters. The standard, it is worth restating, is beyond reasonable doubt. It is quite high and specific details of bribery must be provided. The intention to bribe and the act of bribery [are to be established]. I say so because issuance of cheques is a statutory obligation and mandate of CDF Committee. Discharge of that function can never be illegal* per se *simply because it was during a campaign period declared by IEBC. Without doubt, operations of CDF activities are not affected by an electoral cycle or election. I therefore, agree with counsel for the Respondents that the bona fide activities of CDF are not limited or affected by the election campaign period declared by the IEBC. Much more than simple issuance of CDF cheques during a campaign period is needed. There was no evidence that the 4th Respondent was responsible for the issuance of those cheques in person...

"What was critical was to demonstrate to the required standard that he issued the cheques and the intention was to induce or influence voters to vote for the 1st Respondent or a particular political party, or to induce or influence voters to refrain from voting for a particular [candidate], or particular candidates or political party. That was not done."

[115] In ***Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba and Another***, High Court at Malindi, Election petition No.9 of 2013, *Githua J.* thus held:

"As regards the standard of proof, it is settled law that the standard of proof in election petitions is higher than the balance of probabilities required in civil cases but lower than proof beyond reasonable doubt demanded in criminal cases.

"However, where there are allegations of commission of electoral offences, a very high degree of proof similar to that of proof beyond reasonable doubt is required."

[116] Such an emerging line of electoral-process jurisprudence may be perceived in a comparative framework, so as to draw on apt adopted practices in other countries. In ***Razik Ram v. J.S Chauhan*** AIR 1975 SC 667**,** the Supreme Court of India thus held:

*"A charge of corrupt practice is substantially taken to be a criminal charge. The trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action****, the standard of proof is the same as in a criminal trial.*** *Just as in a criminal case so in an election petition the Respondent against whom the charge of corrupt practice is levelled, is* ***presumed to be innocent unless proved guilty.***

A grave and heavy onus, therefore, rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt. A charge of corrupt practice cannot be established by a mere balance of probabilities *and, if after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the court is left rocking with reasonable doubt, it must hold the same as not proved"* [emphases supplied].

[117] In **Rarmnbhai v. Jasvan Sing** 2 AIR 1978 S C 1162, it was thus held:

"We may state that the charge of bribery is in the nature of a criminal charge and has got to be proved beyond doubt. The standard of proof required is that of proving a criminal or a quasi-criminal charge. A clear cut evidence wholly credible and reliable is required to prove the charge beyond doubt. Evidence merely probabilising and endeavouring to prove the fact on the basis of preponderance of probability is not sufficient to establish such a charge".

[118] On the scope of the offence of bribery, the Supreme Court of India, in ***Mohan Singh v. Banwari Lal*** AIR 1964 SC 1368, set out relevant parameters, thus:

"If the candidate pays money to a V.I.P. of the locality to use his good offices and canvass votes for him, it is a borderline case but if the money is paid as consideration for votes promised to be secured by him using his sway, it is bribery even though indirectly exercised. If the Mulla had been paid the money striking a bargain for getting the votes in his ambit of influence, it is electoral corruption. On the other hand, if it is money

received for the purpose of organising affectively the election campaign by hiring workers going round to places in cars, visiting people and persuading them to vote for the candidate, it is proper election expense. In between these two extremes lies the case of a man who just receives a large sum of money pockets it himself and promises to use his good offices to secure votes. This is a grey area. We are not called upon to pronounce on it is this case. We have no doubt that a mammoth election campaign cannot be carried on without engaging a number of workers of a hierarchical sort. Many of them may be men commanding influence through goodwill in the locality. Some of them may be village V.I.P's, social or religious, our country being still feudal in many rural areas. The touchstone in all these cases of payment or gratification is to find out whether the money is paid in reasonable measure for work to be done or services to be rendered. Secondly, whether for votes or merely to do propaganda or to persuade voters to vote for the candidate, it being left to the voters to respond, or not to respond to the situation. It is a plain case if a voter is paid for his vote. It is direct. It is equally plain if the payment is made to a close relation as inducement for the vote. The same is the case if it is paid to a local chief on the understanding that he will get polled the votes in his pocket borough, in consideration for the payment. The crucial point is the nexus between the gratification and the votes, one being the consideration for the other, direct or indirect. Such being the contours of the corrupt practice of bribery....”

[119] Now in the instant case, the offence of bribery ought to have been pleaded clearly and with specificity. The 3rd respondent ought to have adduced sufficient evidence to prove that the purpose for distributing the CDF cheques was to *influence the voters to vote for the appellant, directly or indirectly*. As the evidence of the *appellant's presence* during the distribution of cheques was controverted, the 3rd respondent ought to have provided evidence, not emanating from his own agents or even supporters. The record reveals that most of those who gave evidence were politically inclined to support either of the candidates. The scenario is closely depicted in the Indian High Court case, ***Jata Shanker Singh v Fazlur Rahman Ansari & Ors***, High Court of Judicature in Allahabad, ELR, Vol LXIV 1987 [p.231]:

> ***"The charge of bribery is in the nature of a criminal charge and has got to be proved beyond doubt. The standard of proof required is that of proving a criminal or a quasi-criminal charge. A clear-cut evidence wholly credible and reliable, is required to prove the charge beyond doubt. It is also to be remembered that the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process must be prescribed and maintained.***
>
> ***"The valuable verdict of the people at the polls must be given due respect and endure and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. At the same time it is necessary to protect the purity and sobriety of the election by ensuring that the candidates do not secure the valuable votes of the people by undue influence, fraud,***

communal propaganda, bribery or other corrupt practices as laid down in the Act. Where the election petitioner seeks to prove the charge by purely partisan evidence consisting of his workers, agents, supporters and friends, the court would have to approach the evidence with great care and caution scrutiny and circumspection and should as a matter of prudence though not as a rule of law require corroboration of such evidence from independent quarters unless the court is fully satisfied that the evidence is [creditworthy and true], spotless and blemish-less, cogent and consistent, that no corroboration to lend further assurance is necessary."

[120] The Court of Appeal, in the instant case, erroneously determined that DW8 and DW9 were *appointed* by the appellant as members of the Nyando Constituency Development Committee; and this was a reversal of the trial Court's *finding of fact,* that the appellant merely *nominated* them to serve on the Committee. The factual finding made by the trial Court, was that this appointment was done by the CDF National Management Board. Based on the record, we are unconvinced that the evidence adduced, regarding the offence of bribery, by the appellant, was *beyond reasonable doubt*. It was insufficient to return a finding of guilt on the allegations of *bribery*. Bribery is a grave matter, with criminal connotation, and one that should be reported for *criminal prosecution under Section 87(1) of the Elections Act*. It should, therefore, be proved *beyond reasonable doubt*.

[121] Having re-evaluated the evidence; and having considered the Election Court's stand on matters of evidence; and having reappraised the manner in which the appellate Court applied it to find the appellant guilty of the offence of bribery, we are not convinced that there was a basis to support the conclusion that the evidence adduced at the trial Court was of such a degree as to sustain such a finding of guilt.

The 1st respondent was under obligation to adduce convincing evidence on how, when, where, and in what circumstances, the CDF cheques were issued for the various centres, showing how this act influenced voters to vote for the appellant. With such details missing, in our view, the conclusion reached by the appellate Court lacked a basis in law.

[122] As we observed in the case of ***George Mike Wanjohi v. Steven Kariuki and 2 Others,*** Supreme Court Petition No. 2A of 2014, the law of evidence, in the common law tradition, has always begun with the initial presumption that the public authorities will undertake a duly-assigned task – a position no less reflected in the mandates, principles and values of the Constitution:

> ***"omnia praesumuntur rite et solemniter esse acta:*** *all acts are presumed to have been done rightly and regularly."*

The presumption would be that the CDF officials were acting in the normal course of their duties, and that the funds were channelled towards the development of the Constituency, as envisaged under the relevant laws and regulations. Thus, the burden to sufficiently rebut this presumption, through *factual evidence*, was upon the 1st respondent. It was not discharged, in this case, in relation to the appellant; and there was in our opinion, no basis for a finding of guilt. We therefore, quash that finding, and will make appropriate orders.

(d) Are Constituency Development Fund Committee Members "Public Officers" or "public resources" under the Constitution?

[123] The relevant question raised in the Petition of Appeal is: whether the Court of Appeal interpreted and applied Sections 2 and 16 of the Public Officers Ethics Act (Cap. 183, Laws of Kenya) so as to limit and amend the clear and unequivocal

provisions of Article 260 of the Constitution. This issue is integrally linked to certain sub-themes: whether the Court of Appeal erred in interpreting and applying Articles 12, 27, 33(1) and 38 of the Constitution as if they were subservient to the provisions of Sections 2 and 66 of the Elections Act, and whether in interpreting Sections 2 and 66 of the Elections Act as it did, the appellate Court disregarded the clear terms of Article 24 of the Constitution.

[124] In considering the broader issues, certain more limited questions come up for appraisal: (a) who is a public officer? (b) did the appellant engage public officer(s) in his campaigns? (c) did the appellant use public resources in his campaign?

[125] It was submitted that the Court of Appeal, having outlined the definition of **'public resources'** as provided in *Section 2 of the Elections Act* (paragraph 37 of the Judgment), thus held:

> "*It is crystal clear that this definition is not exhaustive. Although State or public officers are not referred to in this definition of 'public resource', it is common knowledge that human beings are a very important resource of any country, government or institution State and public officers are therefore a public resource forbidden from engaging in politics. That is why Section 66 of the Elections Act criminalizes the use of public officers to galvanize support for any candidate. It reads:*
>
> ***'A candidate, or any other person who uses a public officer, or the national security organs to induce or compel any person to support a particular candidate or political party commits an offence and is liable on conviction to a fine not exceeding ten***

million shillings or to imprisonment for a term not exceeding six years or to both'."

[126] The appellant contended that this finding had ignored the clear provisions of Article 260 of the Constitution which, in defining "public office**",** underlines payment of remuneration and benefits directly from the Consolidated Fund, or money provided by Parliament.

[127] *Article 260* of the Constitution defines "*public officer"* as follows:

"'Public officer' means –
(a) any State officer; or
(b) any person, other than a State Officer, who holds a public office."

It defines public office as follows:

"'Public Office' ***means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament."***

[128] It was submitted that the *public resources* in question, in the instant matter, were CDF monies. It was urged that the Court of Appeal had erroneously found DW9 to have been a "public resource", by virtue of being a *public officer*. It was submitted that the intent of the Constitution was not to take away rights of the CDF Executive Committee members, to participate in political activities.

[129] In ascertaining who a *public officer* is, we have to take into account the plurality of laws emanating from the Constitution, statutory law, and regulations in relation to public service.

[130] As was submitted by learned counsel for the appellant, the definition of "*public officer"* under the Elections Act, foreshadows that in the Constitution. Section 2 of the Elections Act, defines 'public officer' as follows:

> *"'public officer'* ***has the meaning assigned to it in Article 260 of the Constitution;"***

It further defines 'public resources' thus:

> ***"'public resources' include—***
> ***(a) any vehicle, or equipment owned by or in the possession; or***
> ***(b) premises owned or occupied by, any government, state organ, statutory corporation or a company in which the Government owns a controlling interest…"***

[131] It was contended that the Court of Appeal's finding that the appellant used a public officer in his campaign was inaccurate, because DW9 who was the CDF treasurer in Nyando Constituency, was not a public officer and for the purposes of an election, CDF officials are not public officers. At the appellate Court, as in this Court, the appellant urged that the CDF accounting officer was not included in the definition of "public officers" in Section 2 of the Public Officer Ethics Act.

[132] The Court of Appeal set out (paragraph 29 of the Judgment) to determine whether or not DW9 was a "public officer", by virtue of his position, and whether

he was involved in the appellant's campaign. The Court of Appeal (paragraph 31) held thus:

> "***the definition of the term public officer in Section 2 of the Public Officer Ethics Act [2003], is even wider,";***
>
> "***as*** *[para.32]* ***it is not in dispute that the CDF Funds, from which CDF officers like CDF treasurers are paid and which fund they administer, … is public money provided by Parliament, it follows from the above definitions that a CDF treasurer is a public officer."***

[133] Still on the question whether DW9 was a public officer, the Court of Appeal made reference to his affidavit opposing the petition, where he swore to being the Presidential Election chief agent for the Orange Democratic Movement (ODM) in Nyando Constituency. He had concurrently sworn to being the *Treasurer of Nyando Constituency CDF Committee*. During cross-examination at the trial Court DW9 admitted to supporting the appellant in his campaigns (this is evident from pages 148 and 149 of volume 5 of the Record of Appeal).

[134] It was urged by the appellant that the Public Officer Ethics Act had been in existence prior to the promulgation of the Constitution, and so must be read subject to the Constitution. The appellant urged this Court to limit the definition of "public officer" to those who hold offices in respect of which *"remuneration and benefits [were] paid directly from the Consolidated Fund, or directly out of money provided by Parliament."*

[135] Section 2 of the Public Officer Ethics Act defines "public officer" thus:

"'Public Officer' ***means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, or any of the following*** *–*

(a) the Government or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or ***undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;***

(e) a co-operative society established under the Co-operative Societies Act (No. 12 of 1997):

Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act;

(f) a public university;

(g) any other body prescribed by regulation for the purposes of this paragraph…" [emphasis supplied].

[136] It was contended that the foregoing provisions stand in conflict with the Constitution, and were on that account, void. The appellant submitted that the Court of Appeal had relied on this definition, that is, on a void provision of the law. Thus we have to address the question whether Section 2 of the Public Officer Ethics Act is in contravention of the Constitution, and therefore *void*.

[137] The 1st respondent urged that the appellant had misused public resources (Nyando CDF Funds, and Committee Members), and thereby voluntarily forfeited the privilege of leadership, or of holding public office as a Member of Parliament. It was not in dispute that CDF monies had been disbursed between the periods *of 18th February, 2013 and 4th March, 2013*, just a short period to the General Elections – and this is shown in the Court of Appeal's re-evaluation of the record of the trial Court.

[138] In addressing this issue, it is necessary to consider what may be regarded as the "public code of conduct", in the form of legislation developed after the promulgation of the Constitution of Kenya, 2010.

[139] In the ***Munya*** Case, this Court made an evaluation of the "electoral code" which has taken shape on the basis of the provisions in Articles 81(e)(v) and 86 of the Constitution. Of those two Articles, we thus observed in the ***Munya*** case (paragraph 210):

> ***"These two Articles establish the constitutional threshold against which the conduct of elections is to be measured, to determine whether it meets established standards of democratic franchise."***

[140] Is it the case that the participation of a CDF official in active campaigns for the appellant, compromised the integrity of the elections, and therefore infringed standard set by Article 81(e)(v) of the Constitution?

[141] Section 2 of the Political Parties Act (Cap 7B, Laws of Kenya) defines "public officer" in line with the meaning assigned to it under Article 260 of the Constitution. Section 12 of that Act subjects "public officers" to certain restrictions, as regards political-party activities. *Section 12(1)* of the Act provides as follows:

> *"(1) A public officer shall not—*
> *(a) be eligible to be a founding member of a political party;*
> *(b) be eligible to hold office in a political party;*
> ***(c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person's office; or***
> ***(d) publicly indicate support for or opposition to any political party or candidate in an election"*** [emphasis supplied].

This provision recognizes the vital role that public officers hold, in the general scheme leadership. Thus, such officers are restrained from engaging in political activities such as may compromise, or be seen to compromise the political neutrality of their office.

[142] Section 2 of the Leadership and Integrity Act **(**Cap. 182 Laws of Kenya) also assigns to "public officer" the meaning given by Article 260 of the Constitution. This Act incorporates the provisions of the Public Officer Ethics Act into a general code. Section 6 of the Act thus provides:

> *"(1) This Part prescribes a general Leadership and Integrity Code for State officers.*
> *(2) The provisions of Chapter Six of the Constitution shall form part of this Code.*
> ***(3) Unless otherwise provided in this Act, the provisions of the Public Officer Ethics Act (No. 4 of 2003) shall form part of this Code.***

(4) If any provision of this Act is in conflict with the Public Officer Ethics Act, 2003 this Act shall prevail" [emphasis supplied].

Section 23 of the Act reinforces the call for *political neutrality*, specifying as follows:

"(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties —

(a) act as an agent for, or further the interests of a political party or candidate in an election; or

(b) manifest support for or opposition to any political party or candidate in an election.

"(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

"(3) Without prejudice to the generality of subsection (2) a public officer shall not—

(***a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;***

(b) publicly indicate support for or opposition against any political party or candidate participating in an election" [emphasis supplied].

[143] *Section 52* of the Act reinforces the application of Chapter Six of the Constitution to public officers, generally. It provides as follows:

Pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 ***shall apply to all public officers as if they were State officers"*** [emphasis supplied].

This demonstrates that public officers in general, are also required to adhere to high standards of conduct, in the terms of Chapter Six of the Constitution. On that basis, Article 73 of the Constitution guides our interpretation as to the duty held by a public officer. This Article provides as follows:

"(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

"(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people" [emphasis supplied].

[144] *Section 4* of the Constituencies Development Fund Act, 2013 (Act No. 30 of 2013) establishes the CDF in the following terms:

> *"(1) There is established a fund to be known as the Constituencies Development Fund which shall—*
>
> *(a) be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of* ***all the national government ordinary revenue collected in every financial year;***
>
> *(b) comprise of any moneys accruing to or received by the Board from any other source;*
> *(c) disbursed by the national government through the Board to constituencies as a grant to be channeled to constituencies in the manner provided for by this Act;*
> *(d) be administered by the Board;*
>
> ***"(2) All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to Article 206(2)(c) of the Constitution to be administered according to section 5.***
>
> ***"(3) The Fund established under this section shall be the successor to the Constituencies Development Fund established by section 4 of the Constituencies Development Fund Act, 2003"*** [emphasis supplied].

[145] With a new constitutional dispensation that extols principles of dedicated public service, based upon progressive values and recognized good practices, statutory provisions such as those of the CDF Act disclose the clear intent that the duties and responsibilities of those bearing the relevant mandate, are to be effected in conditions of public trust and confidence. Hence the entire code of public

conduct is informed by certain values: integrity, professionalism, accountability, neutrality, impartiality, and good governance. The Constitution affirms these values in various Articles: 10, 81, 129, 175, 201, 232 and 238. These values are to condition the conduct of every individual, office-bearer, agency or institution entrusted with day-to-day execution of public duty. There are thus, common values that pervade a large set of public-service-oriented laws founded upon the declared constitutional principles. Is this the proper basis for determining the meaning of specific words, such as "public officer", which attract specified legal consequences for particular persons who are, otherwise, bearers of rights declared in the Constitution? That has to be determined on a case-by-case basis. It is relevant, in this respect, that Article 24(1) of the Constitution thus provides:

> ***"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors...."***

That safeguard is to be read alongside the Constitution's protection for political rights, in the following terms (Article 38(1)):

> ***"Every citizen is free to make political choices, which [include] the right –***
>
> ***(a) to form, or participate in forming, a political party;***
> ***(b) to participate in the activities of, or recruit members for, a political party, or***
> ***(c) to campaign for a political party or cause."***

[146] Such is the context in which the position of the appellant, and indeed, that of the CDF officials under the CDF Act, is to be understood. The criss-crossing scenario of rights, and the scope for qualification of such, dictates that *it will fall to the Legislature to enact more comprehensive legislation dealing with the management of CDF, in relation to the conduct of public elections.*

[147] The CDF, otherwise, presents special problems, as regards its disbursement of money during election periods. As it is clear that CDF is a potent political campaign reference-point, especially for a sitting Parliamentarian, it presents a double-edge sword for the campaign process. Where the funds have *not* been disbursed, it could be portrayed as indicia of political failure – a contention which might be forthcoming also when such funds *have* been disbursed. Therefore, under the current state of the law, each case is to be treated on its own facts, bearing in mind the full context in which the election campaigns in question have taken place.

[148] Strictly speaking, the proper meaning of "public officer", for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of "public officer" currently is: *(i) the person concerned is a State officer; or (ii) any other person who holds "public office" – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.*

[149] We are not, thus, in agreement with the learned Judges of Appeal, that the CDF officials, at the moment, qualify under the term "public officer" as this appears in the Constitution, and in the relevant body of law. Accordingly, Mr. Geoffrey Yogo, the Treasurer of Nyando Constituency CDF Committee at the material time,

was not to be regarded as a public officer. We do, of course, recognize, as the Court of Appeal clearly did, that he had the capacity, by his public actions, to compromise the electoral process. But *the concern in this regard raises broader issues which ought to be the subject of suitably designed legislation*.

(e) CDF Official's Conduct in the Run-up to Election: Did it Contravene the Constitution and Electoral Law, so as to vitiate the Appellant's Election?

[150] The Court takes judicial notice that electoral campaigns for Parliamentary seats attain their crescendo towards the last days before polling-day. At this stage, the candidates and their political parties endeavour to make their greatest impression as they woo voters through public meetings, processions, rallies, corner meetings, live broadcasts, personal contacts by candidates and their agents and supporters. It is essential for the realization of free and fair elections, at such a time, that candidates desist from such conduct as the misuse of public office or public resources, to the detriment of their opponents.

[151] How is neutrality to be maintained during the campaign period? What influence could the public display of State or public power, and especially the power of financial endowment, have upon a voter? In Martin Gilbert's ***The Will of the People: Winston Churchill and Parliamentary Democracy*** (Random House of Canada, 2010), the English statesman, Winston Churchill, is quoted as diagnosing the essence of the democratic election, thus: "at the bottom of all tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a cross on a little bit of paper." By the democratic undertaking of Kenya's new Constitution, we have to guard the "little" actions that make the very purpose of Election Day. We do it by curtailing deliberate schemes to blind the "little man," employed by candidates and/or their agents, especially those so placed

as to cast undue influence upon the "little man's" freedom and inner conviction. Such is the intent of the Constitution, and the plurality of laws constituting the public code of conduct, that embody the principle of free and fair election. By the act of polling, the common man or woman transfers his or her sovereignty to his or her democratically elected representatives – a process secured under Article 1 of the Constitution of Kenya, 2010. Such a process of transfer of sovereignty is to be protected by this Court, by assuring the integrity of election. Neither the State machinery, nor its resources, are to be allowed to corrupt this process of transfer of inherent sovereignty, and, when this commitment is successfully conducted, it is only then that the Republic will rest upon a democratic framework, lodged in free choice, honour and respect. Such a foundation is essential for the safeguard of the national values and principles of governance ordained by Article 10 of the Constitution.

[152] Churchill's "little man," the veritable judge of the political campaigns, is replicated in Fari Nariman's ***The State of the Nation in the Context of India's Constitution*** (New Delhi: Hay House Publishers, 2013) [p.6], as the "little Indian"; and the Kenyan replica is, of course, *Wanjiku*. She is the ultimate judge in electoral choice; and it falls to this Court to safeguard her status.

[153] It is universally recognized as a condition of good governance, that no impediments should lie in the way of such expression of free choice. As held by the Supreme Court of India in ***Patangrao Kadam v. Prithviraj Sayajirao Yadav Deshmukh*** AIR 2001 SC 1121:

> *"Fair and free elections are essential requisites to maintain the purity of election and to sustain the faith of the people in election itself in a democratic set up. Clean, efficient and benevolent administration are the*

essential features of good governance which in turn depends upon persons of competency and good character. Hence ***those indulging in corrupt practices at an election cannot be spared and allowed to pollute the election process***……..” (emphasis supplied).

[154] *Did DW9's conduct, by being both his public campaigner and a CDF official, compromise the appellant's election?* It is clear from the record that DW9 was a nominee of the appellant to the CDF Committee, and an appointee of the CDF National Management Board thanks to this nomination. It is also clear from the record that DW9 particularly campaigned for the appellant and, in the course of these campaigns, *disbursed numerous cheques represented as forming part of approved CDF disbursements,* to various institutions within Nyando Constituency. Having portrayed in great detail the established facts depicting conflict between the CDF functions, and the political inclinations of the appellant's agent(s), the learned trial Judge found – a finding departed from that by the Court of Appeal – that:

> ***"It was a serious matter for the 3rd Respondent to go on air and announce that he was going to use public resources to campaign and then actually do so. The vigilance with which the petition was prosecuted, and the knowledge that the petitioner and his chief agents had on electoral process, would not have allowed the 3rd Respondent to do the alleged things without a formal protest or complaint being lodged against him to the Commission, or to the police. I am unable to find that the 3rd Respondent used CDF money to campaign."***

[155] We would agree with the Court of Appeal on one point, as regards the foregoing remark by the learned trial Judge. The statement in the learned Judge's record carries a notable inconsistency. While it is essential that judicial

pronouncements should bear profiles of patent regularity, the trial Court's rightly-reprehending stand, regarding the confirmed fact that public resources had been deployed in aid of the appellant's campaign, is downplayed by the Judge's exoneration of an electoral mischief perpetrated "without a formal protest or complaint being lodged…."

[156] The situation recounted in the foregoing paragraph has caused us concern, especially insofar as it touches on the overall quality and integrity of the election in question – whether or not the appellant is the right person to bear responsibility. We have noted from the evidence, however, that the mischief, as it would link up with the appellant directly, does not feature in the facts on record. A careful reading of the Election Court Judge's remarks would suggest a malapropism of expression: and from this, we get the impression that the learned Judge had not believed the appellant herein to have gone on air, and announced that he would use public resources in the conduct of his campaigns. This will be our stand, as we assess the position of the appellant.

[157] Otherwise, the rational principle should, in our view, have been that which focuses on the substance of the electoral wrong, as aptly depicted by the Supreme Court of India, in ***Ghasi Ran v. Dal Singh,*** *AIR 1968 SC 1191:*

> *"Election is something which must be conducted fairly. To arrange to* ***spend money on the eve of the elections in different constituencies, although for general public good, is when all is said and done, an evil practice, even if it may not be corrupt practice.*** *The dividing line between an evil practice and a corrupt practice is a very thin one. It should be understood that energy to do public good should be used not on the eve of the elections but much earlier and that even slight evidence might change this evil practice into corrupt practice.*

Payments from discretionary grants on the eve of the elections should be avoided" [emphasis supplied].

[158] We are perturbed by the conduct of the CDF officers, and in particular that of DW9 as treasurer (page 148 of Vol.5 of the Record of Appeal). He admitted to wearing conflicting cloaks: that of Chief Agent of ODM for Nyando Constituency during the impugned elections; and that of financial accounting officer or treasurer of CDF, Nyando Constituency. This link was further evinced (page 149 of Vol. 5 of the Record of Appeal), when DW9 averred in cross-examination, that he was the appellant's "Supporter Number One."

[159] There are innumerable ways in which finances or other resources, whatever their origins and pathways, will have impacts upon the expression of electoral choice by W*anjiku*. For the unpredictability of such dynamics of inappropriate influence upon the elections, *we would urge that the Legislature should initiate systematic inquiries as a preventive strategy, by way of its appropriate committees; and it should thereafter conceive and enact legislation to sustain the purity of elections*. Such legislation should, in principle, proceed on the basis that the contestants themselves are also duty-bearers, who must emancipate and protect the franchise and the electoral process.

[160] As signalled in Mutunga, C.J. & P's concurring opinion in the ***Munya*** Case, every party has a role to play in the political sphere of this country, and particularly with regard to elections. The following inspiring counsel is expressed by the learned Chief Justice (at paragraph 247):

"Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the

Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote" [*e*mphasis supplied].

The framework for such a comprehensive oversight over the pubic interest in governance issues and in public elections, *should be established in the shape of a comprehensive set of parliamentary enactments*.

[161] Pending the establishment of such a broad framework for ensuring the quality of the pubic election, the Court has, in resolving a dispute such as the instant one, to construct its evaluation around the principle of safeguarding the vested rights of citizens. That gives the context in which we must resolve the instant case. The trial Court record bears no evidence showing the direct involvement of *the appellant* in any corrupt conduct, nor in the perceptible procurement of public office personnel or resources for the cause of his election – and in that way actually influencing the voting outcome.

(f) Do "Public Officers" fall under the Category of "Public Resources?"

[162] Section 2 of the Elections Act defines public resources as follows:

> ***"public resources" include –***
>
> ***(a) any vehicle, or equipment owned by or in the possession; or***
>
> ***(b) premises owned or occupied by, any government, state organ, statutory corporation or a company in which the Government owns a controlling interest****…*"

It is not in doubt, as held by the Court of Appeal (*Waki, Maraga and Murgor, JJA*) in ***Karanja Kabage v. Joseph Kiuna Kariambegu Ng'ang'a and 2 Others***, Civil Appeal No. 301 of 2013, that:

"...the Constituency Development Fund (CDF) is public money provided by Parliament for faster development at the grass roots. They are public resources. The use of it by a candidate or other individual for campaigns during elections constitutes a punishable election offence."

[163] *Are "public officers" also "public resources", as held by the Court of Appeal in the instant matter?* The electoral code of conduct, and the provisions of the law regarding public office and public officers, make it clear that while public officers are individuals entrusted with the mandate of service to the people, public resources are *tangible assets, possessions or items of material worth,* that are in the control of the public, or owned by the public collectively. It was, therefore, incorrect for the Court of Appeal to include public officers within the category of "public resources".

E. THE CONCURRING OPINION OF NDUNGU, NJOKI, SCJ

[164] I concur with the final decision and orders of the majority in this matter. However, I am of a different opinion with regard to the fourth issue that fell for determination by this Court in this matter, which poses the question – whether Constituency Development Fund members are public officers under the Constitution? My brothers and sister Judges, give meaning to the words 'public officer' as follows:

[148] Strictly speaking, the proper meaning of "public officer", for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the

Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of "public officer" currently is: (i) the person concerned is a State officer; or (ii) any other person who holds "public office" – an office within the national government, county government, or public service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.

[149] We are not, thus, in agreement with the learned Judges of Appeal, that the CDF officials, at the moment, qualify under the term "public officer" as this appears in the Constitution, and in the relevant body of law. Accordingly, Mr. Geoffrey Yogo, the Treasurer of Nyando Constituency CDF Committee at the material time, was not to be regarded as a public officer. We do, of course, recognize, as the court of Appeal clearly did, that he and the capacity, by his public actions, to compromise the electoral process. But the concern in this regard raises broader issues which out to be the subject of suitably designed legislation."

What is the Context to be given to a definition of the words 'public officer' in the Constitution?

[165] With respect, I find that such meaning given to the words 'public officer' is narrow and limiting; particularly when it involves the interpretation of a constitutional provision. A more comprehensive definition is appropriate and

desirable if one is to meet the laid down guidelines for the construction and interpretation of the Constitution as laid out in Article 259, which states:

> ***"Construction of the Constitution"***
>
> ***259. (1) This Constitution shall be interpreted in a manner that—***
> ***(a) promotes its purposes, values and principles;***
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
> ***(c) permits the development of the law; and***
> ***(d) contributes to good governance."***

[166] It follows therefore that the meaning given to the words 'public officer' goes beyond the ordinary meaning of the word itself; more towards a definition that is orientated in a value system to be expected in democratic society. These guidelines are further reinforced by the introductory rider in the definitions section, of Article 260, which reads;

> ***"Interpretation.***
>
> ***260. In this Constitution, <u>unless the context requires otherwise</u>- " (emphasis added);***

The said Article then goes on list a number of definitions of words, used in the Constitution.

[167] As such, one must examine if there is a context within which the word 'public officer' as defined in the Constitution, should be considered. I find that there is: The history of our country's constitutional making journey spans the entire life of the Nation born in 1963. However, intensive efforts to bring to fruition a people oriented dispensation began in earnest in the 1990's, with major milestones made through piecemeal amendments to the former Constitution. The first of these was in 1990 with the repeal of Section 2A; this was followed by the Inter Parties parliamentary Group – IPPG amendments to the electoral framework in 1997.

[168] Each of these steps opened up democratic space, allowing the Legislature to make progressive laws in the area of public sector reform with particular emphasis on public service accountability and the principle of servant leadership – the Public Officer Ethics Act of 2003 was one of these; detailing in precise terms the scope and definition of public office and attendant responsibilities including ethical conduct. The Act carries over many of these principles and values reflected in several provisions of the Constitution; clearly providing a historical and institutional context within which to read those provisions.

[169] Thus, while today the cornerstone and foundation of our democracy is to be found in the Constitution of Kenya 2010, progressive and reform based Acts of Parliament made before and after its enactment, form the bricks of the walls of the institutional architecture of our country. An interpretation of the Constitution in a situation where the Constitution and statute complement one another must be

done, so that the positive attributes of the latter are not lost. More importantly, the two should be read together when they share a common value base such as that provided for under Articles 10 on National values, and Article 232 on the values and principles of Public service of the Constitution.

Who is a public officer?

[170] In addressing the question as to who is a public officer, it is also worthy of note to look at the different but closely related concepts of public office found in statute, legal dictionaries and case law.

[171] According to the Black's Law Dictionary (9th ed) ***"public office is a position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period."***

It further defines public service as:

> **"a *service provided or facilitated by the government for the general public's convenience and benefit. Government employment; work performed for or on behalf of the government; broadly any work that serves the public good, including government work and public interest."***

Section 3 of the Interpretation and General Provisions Act defines a public office as:

> "***an office or employment the holding or discharging of which by a person would constitute that person a public officer"*** and goes on to define a public officer as:

"a person in the service of or holding office under the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid."

[172] The Public Officers Ethics Act, 2013 defines a public officer as:

"any officer, employee or member, including an unpaid part-time or temporary officer, employee or member of any Government department, service or undertaking of the Government and any corporation or state organ operating under any written law and/or administering any public funds."

[173] There is a considerable amount of international and local case law that also informs the subject. I cite only a few:

Lord Mansfield in ***R v Bembridge*** (1783)3 Dong K.B described a public officer as, ***a person having an office of trust concerning the public especially if attended with profit by whoever and in whatever way the officer is appointed."***

[174] In the English case of ***R v Belton*** [2011]2 WLR the English and Wales Court of Appeal, Criminal division held that remuneration was indicative of the holding of public office or liability to prosecution for misconduct in public office, but not determinative. The defendant herein was an unpaid volunteer member of a monitoring board and had been convicted for misconduct in a public office contrary to the common law. On appeal the main issue before the Court was whether one

must be remunerated in order to be a public officer, the Court held that remuneration was not an indispensable requirement for the holding of a public officer. It observed that the fact that a person was a volunteer, as opposed to a person remunerated, might have a bearing in the consideration of whether there had been wilful misconduct, but it did not follow that it was a requirement for the holding of public office or liability to prosecution for misconduct in public office.

[175] In ***R v Whitaker*** (1914) K.B it was held that it was a misdemeanour in common law for a public officer, to accept a bribe as an inducement to him to show favour or disfavour to any person towards whom an impartial discharge of the officer's duty demands that he should show no favour or that he should show disfavour. The Court stated that a pubic officer is, ***"an officer who discharges any duty in the discharge of which the public are interested more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer."***

[176] In ***Geoffrey Makana Atsanyo v Nakuru Water & Sanitation Services Co. & 6 others*** [2014] eKLR**,** One of the questions for determination was whether the matter related to the employment of a public officer for which resolution was within the jurisdiction of the Court. The Industrial Court in Nakuru took judicial notice of the fact that persons serving in public bodies serve the people

within defined payments, be it salary or allowances, and such pay qualified for wage or remuneration of their services.

[177] It is my understanding, therefore, that the definition of 'public officer' cannot be strictly confined to the singular definition clause in Article 260; there are other constitutional stipulations, and statutory and common law provisions that speak to the definitions, values, principles, and the institutional framework of public service that must apply. This therefore calls for the Constitution to be read in a holistic manner when it comes to the interpretation of any one clause.

[178] This was the position taken by this Court, in the Matter of the Principle of ***Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012 [para.83], which said:

> ***"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of this Constitution."***

[179] This principle was underscored again in the matter of ***Kenya National Commission on Human Rights v. The A.G & Another,*** SC Reference No. 1 of 2012**,** in which we said (at paragraph 26)***:***

> ***"...Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through "a holistic interpretation". But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances."***

[180] The point, was further emphasized by Chief Justice Willy Mutunga, when he said, in his concurring opinion in ***In the Matter of the Senate,*** Advisory Opinion No. 2 of 2013:

> ***"If an interpretive framework were required to buttress this position, it would be the one reflected in the Ugandan case, Tinyefuza v Attorney-General Const. Pet. No 1 of 1996 (1997 UGCC 3). The Court of Appeal thus stated:***
>
> ***"[T]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***

[181] Such that**,** even if one was to look at the definition of 'public officer' under Article 260, it would be imperative to look at its singular definition in conjunction with those assigned to the words 'public office' and 'public service' which are used interchangeably in the normal course of business.

[182] Article 260 of the Constitution defines a public officer as:

> ***(a) any State officer; or***
> ***(b) any person, other than a State Officer, who holds a public office."***

It continues to define public office as;

> ***"an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament."***

Although the Constitution itself, does not define what the terms remuneration or benefits mean, The Black's Law Dictionary defines remuneration as follows:

1. *Payment; compensation*
2. *The act of paying or compensating.*

Further, according to Section 2 of the Employment Act, 2007, *remuneration means the total value of all payments in money or kind made or owing to an employee arising from the employment of that employee."*

[183] Additionally, Article 260, defines the public service, as:

"***the collectivity of all individuals, other than State officers, performing a function within a state organ.***"

A clear reading of the Constitution as a whole brings to the fore, Article 232, in which the values and principles of the public service are laid out. It states as follows:

> ***" 232 (1) The values and principles of public service include-***
> ***(a) high standards of professional ethics;***
> ***(b) efficient, effective and economic use of resource;***
> ***(c) responsive, prompt, efficient, impartial and equitable provision of services;***
> ***(d) involvement of the people in the process of policy making;***
> ***(e) accountability for administrative acts;***
> ***....***
> ***(2) The values and principles of public service apply to public service in –***
> ***(a) State organs in both levels of government; and***
> ***(b) all State Corporations.***
> **(3) Parliament shall enact legislation to give full effect to this Article." (Emphasis added)**

[184] Finally, it is important to look at the meaning of 'public officer' under the former Constitution of Kenya (revised edition 2008 (2001), and to ascertain if it had a meaning that was carried over into the current Constitution. Article 123 of the former Constitution stated that:

> ***"public officer" means a persons holding or acting in an office in the public service"***

"Public service" included the public service at any time before 12th December 1963"

[185] What, became then, of public officers under the new constitutional dispensation established on 28th August 2010? A transitional mechanism was built into the Sixth Schedule of the Constitution of Kenya 2010 that speaks to this question. Section 31 of the Sixth Schedule states:

> ***"31. (1) Unless this Schedule provides otherwise, a person who immediately before the effective date held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person."***

In effect then, the meaning of public officer in the former Constitution, was carried over into the current Constitution, and remains applicable.

[186] Thus, in arriving at the true meaning of 'public officer' under the Constitution, then, and in line with the provisions of Article 259, one must then fully examine the different concepts carried therein. In the instant matter, four key questions in determining whether any person is a public officer, within the meaning of the Constitution, will apply:

(a) Is the person concerned in an office in the national government, the county government or the public service?

(b) Does that person receive remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament?

(c) Does that person perform a function within a state organ or a state corporation?

(d) Was the person holding public office under the terms of the former Constitution?

If one or more of those questions were answered in the affirmative, then the person concerned would rightly be considered within the proper meaning of the term 'public officer'.

Are CDF Officials Public Officers?

[187] How would an official of a Constituency Development Fund fare upon the application of the above test or principles?

An immediate observation is that all CDF officials appointed before the promulgation of the constitution on August 28th 2010, were public officers under the former Constitution and therefore the transitional Clause in Section 31 of the Sixth Schedule would apply to them.

[188] The Constituency Development Fund Committee is established pursuant to **Section 24** of the **Constituencies Development Act, No. 30 of 2013** (the **CDF Act, 2013**). Previously, the administration of the Constituencies Development Fund was governed by the **Constituencies Development Act, Cap 425A of the Laws of Kenya** (repealed Act), which was repealed by Act No

30 of 2013. In the instant matter, the repealed Act was in force at the time the 2013 Nyando Constituency Parliamentary Elections were held, but stood repealed immediately thereafter. I shall therefore make reference to both Statutes in order to address the position before and after the 2013 Parliamentary Elections regarding the public status of CDF Officers.

[189] Section 5 of Cap 425A (repealed), reads:

(1) There is established a fund to be known as the Constituencies Development Fund.
(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name be capable of -
(a) Suing and being sued;
(b) Taking, purchasing, or otherwise acquiring, holding, charging or disposing of movable and immovable property
(c) Borrowing money or making investments; and
(d) Doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

[190] Section 2 of the State Corporations Act CAP. 446 Laws of Kenya, provides:

> **"state corporation" means—**
> **(a) a state corporation established under section 3;**
> **(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—**

(i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury(Incorporation) Act (Cap. 101);
(ii) a local authority established under the Local Government Act (Cap. 265);
iii) a co-operative society established under the Co-operative Societies Act (Cap. 490);
(iv) a building society established in accordance with the Building Societies Act (Cap.489);
(v) a company incorporated under the Companies Act (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;
(vi) the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap.491);
(vii) deleted by to Act No. 2 of 2002, Sch.;
(c) a bank or a financial institution licensed under the Banking Act(Cap. 488) or other company incorporated under the Companies Act (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;
(d) a subsidiary of a state corporation;"

[191] Consequently, the CDF Board, a body corporate established under an Act of Parliament ***is*** a State corporation within the meaning of that Act, and therefore also in the Constitution. All State Corporations, have national outreach by nature and design, fall squarely under the auspices of the National Government. This also means that the CDF Board is also a public service institution that was in existence

under the former constitution and its officials and employees would be considered 'public officers' under it. The effect of the transactional clause in Section 31 of Schedule 6 of the current constitution would also apply.

Having established that the Constituency Development Fund Board is and was a State Corporation falling under the meaning of public office under the previous Constitution, I set out to examine the role of the Constituency Development Fund Committee particularly with regard to the administration of the allocated funds.

[192] Section 23 of the repealed Act listed the Members of the Constituency Development Fund Committee as follows:

> *(1) There shall be a Constituency Development Committee for every constituency, which shall be constituted and convened by the elected Member of Parliament within the first sixty days of a new Parliament or a by election and shall have a maximum of fifteen members, comprising of—*
> *(a) the elected member of Parliament;*
> *(b) two councillors in the constituency;*
> *(c) one district officer in the constituency;*
> *(d) two persons representing religious organizations in the constituency;*
> *(e) two men representatives from the constituency;*
> *(f) two women representatives from the constituency;*
> *(g) one person representing the youth from the constituency;*
> *(h) one person nominated from among active NGOs in the area if any;*
> *(i) a maximum of three other persons from the constituency such that the total number does not exceed fifteen;*
> *(j) an officer of the Board seconded to the Constituency Development Fund Committee by the Board, who shall be ex officio*

[193] Section 45(3) of the repealed Act also provided that:

> *At least three signatories shall be required for every cheque or instrument for actual payment or withdrawal of funds from a constituency account and the signing instructions shall be such that there shall be at least one signature of a nominee from the District Projects Committee and at least one signature of a nominee of the Constituency Development Fund Committee and none of the signatories shall be members of Parliament or councillors.*

[194] Section 18 of the CDF Act, 2013 gives the Constituency Development Fund Committee the discretion to allocate funds to various projects in the constituency similar to **Section 17** of the repealed Act and provides:

> *The* ***allocation of funds to various projects in each constituency is the responsibility of the Constituency Development Fund Committee*** *to be exercised at its own* ***discretion*** *within the provisions of this Act.*

The Committee is also under the direct supervision of the Constituencies Development Fund Board established under the Act. The Board is required to forward any policy issues arising to the **Cabinet Secretary** who is a State Officer and a member of the Cabinet. The Constituency Development Fund as can be discerned from the objects of the Act provided under Section 3 of the CDF Act 2013, is to ensure that a specific portion of the national annual budget is devoted to the

constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level.

As such, the Constituency Development Fund Committee facilitates this purpose in furtherance of the functions of the National government. Various provisions of the CDF Act, 2013 and its predecessor the repealed Act signal the direct involvement of Members of the Constituency Development Fund Committee in the administration of the allocated funds. Collectively therefore, the actors facilitating the administration of the Constituency Development Fund including CDF Officers are officers within a state corporation, established by statute, within the National government.

[195] The members of CDF committees also receive emoluments and allowances for their efforts: the administrative costs of the Committee are borne out of the Fund and paid out as projects. According to **Section 21 (7)** of the repealed Act:

> *Notwithstanding the provisions of subsection (3), up to a maximum of* ***three per centum*** *of the total annual allocation for the constituency may be used for* ***administration*** *and such use shall be listed in the Second Schedule as a project.*

This provision was reinforced by **Section 48** which provided:

> *(1)The* ***expenditure for running the Board*** *and* ***related purposes*** *shall be set aside at the beginning of the financial year and not more than* ***three per centum*** *of the total allocation of the Fund in the financial year may be used for this purpose, the annual budget*

of which shall be approved by the Minister with the concurrence of the Constituencies Fund Committee, and expenses shall not be incurred until such approval is accorded.

.....

(1) ***Sitting and other allowances for the members of the District Projects Committee and Constituency Development Fund Committee*** *shall be fixed by the Board with the concurrence of the Constituencies Fund Committee and shall be* ***paid out of the funds set aside for the Board under subsection (1).***

This provision was increased to **6%** in the CDF Act, 2013. **Section 22(7)** of the Act provides:

Notwithstanding the provisions of subsection (3), up to a maximum of ***six per centum of the total annual allocation*** *for the constituency may be used for* ***administration****, recurrent expenses of vehicles, equipment and machinery and* ***such use shall be listed in the First Schedule as a project***.

Section 45(3) provides:

Sitting allowances for the members of the County Projects Committee shall be paid out of the funds set aside for the Board under subsection (1) and the ***sitting allowances for the Constituency Development Fund Committee shall be paid out from funds set aside in section 22 (7).***

[196] The implementation of all projects (including the payment of sitting allowances of committee members, are to **be processed in accordance with**

government regulations for the time being in force. **Section 30(1)** of the Repealed Act was thus instructive:

> *Projects under this Act shall be implemented by the project committee in each case, with the assistance of the relevant department of Government and all payments through cheques or otherwise shall be processed and effected in accordance with government regulations for the time being in force.*

[197] It is my opinion, therefore, that the government regulations attendant to public finance as provided under the Constitution and the relevant *"public code of conduct*" are applicable where Constituency Development Funds are concerned. The allowances paid to the CDF Officers constitute, as elaborated above, part of the Fund. As such, these allowances are paid directly out of money provided by Parliament. However, an even more pertinent question to ask is, *what constitutes the Fund?*

[198] Section 4 of the CDF Act, 2013 provides that:

> *(1) There is established a fund to be known as the Constituencies Development Fund which shall—*
>
> *(a) be a national fund consisting of moneys of an amount of not less than 2.5% (two and half per centum) of all the* ***national government ordinary revenue collected in every financial year****;*

(b) comprise of any moneys accruing to or received by the Board from any other source;

*(c) **disbursed by the national government** through the Board to constituencies as a grant to be channelled to constituencies in the manner provided for by this Act;*

(d) be administered by the Board;

*(2) All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to **Article 206(2)(c) of the Constitution** to be administered according to section 5*

(3) The Fund established under this section shall be the successor to the Constituencies Development Fund established by section 4 of the Constituencies Development Fund Act, 2003

[199] It is clear from this section, that the Funds are allocated pursuant to **Article 206 (2)(c)** of the Constitution. Article 206 (2)(c) provides that:

(2)***Money may be withdrawn from the Consolidated Fund only—***

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with Article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.

[200] Therefore, since the allowances paid to the CDF Officers are drawn from the Fund, these allowances are essentially drawn from the Consolidated Fund pursuant to **Article 206(2)(c)** of the Constitution. This therefore qualifies any office held in the administration of the Constituency Development Fund as a public office within the meaning given by **Article 260** of the Constitution. As such, a CDF officer is a public officer.

[201] A clear reading of all the above constitutional and statutory provisions and analysis makes apparent the fact that DW9, Geoffrey Yogo, the Treasurer of Nyando CDF Committee, was at the relevant time, a public officer. He was serving in an office in the national government and public service. He was receiving his allowances and benefits from the consolidated fund and from moneys provided by Parliament. He was performing a function within a state corporation in the national government and in the public service. Finally, he was a public officer within the meaning of the former Constitution. His status effectively answers in the affirmative, all four questions set out it the test of defining whether or not he is a public officer within the meaning of Article 260. All legal and factual considerations confirm that he indeed was and is a public officer, and that the Court of Appeal finding that CDF officials are Public Officers, is the correct position in law.

Does a public officer's have the right to participate in the political process?

[202] It was argued by counsel Wasunna, that Article 38 of the Constitution provides for political rights of every citizen to amongst other things, campaign for a political party or cause. He took issue with Section 66 of the Elections Act and 16 of the Public Officer Ethics Act that prevent public officers from actively participating in politics without meeting the set parameters of limitation of rights under Article 24 of the Constitution.

[203] Article 24 of the Constitution is instructive to the following extent:

> ***"Limitation of rights and fundamental freedoms.***
> ***24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

[204] Article 24 permits the limitation of certain rights but under a strict and elaborate scrutiny anchored upon the test of *reasonability and justifiability*. In the case of ***S v. Makwanyane and Another (CCT3/94) [1995] ZACC 3***, Justice Chaskalson P held as follows:

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on

freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

[205] As such, it is clear that the reasonable and justifiable duty would be, in deference to the Constitution and the public code of conduct, to ensure that a strict separation of public duty and partisan politics is maintained. I am of the opinion that the limitation therefore on public officers vis-à-vis political participation, as cited in the Elections Act, the Public Officer Ethics Act, the Leadership and Integrity Act and any other related legal provisions, is well within the allowance for limitation within the constitutional framework. It is important to note that the limitation only extends to appointed and not elected public officials leaving an avenue for those public officials who wish to exercise their political rights, to do so by *running f*or public office. However, those who choose to remain in the public service in politically neutral positions must remain impartial.

[206] What then are the consequences of a CDF official, a public official, in actively participating in a political campaign? The Leadership and Integrity Act (Cap. 182 Laws of Kenya) provides in Section 23(2):

"(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

"(3) Without prejudice to the generality of subsection (2) a public officer shall not—

(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) publicly indicate support for or opposition against any political party or candidate participating in an election" [emphasis added].

[207] The sanctions for violation of the provisions of this Act are spelt out, including those provided for under Chapter Six of the Constitution and the Public Officer Ethics Act. It would appear to me, that the legal framework for deterring public officials from partisan activity is solidly in place. However it appears there is a failure by the relevant authorities to implement the same. Unless policing institutions shake off their lethargy regarding this, valiant attempts to nurture the culture of neutrality within the public service will come to naught. It is apparent to me, that few lessons have been learnt, from the national election crises in 2007 and 2008, particularly those based on the recommendations of the Commission Investigating Post Election Violence (CIPEV), for the need to have a *neutral non-partisan* public service. Unless sanctions begin to apply to errant officers, the necessary change will not take

effect.

[208] I do agree with the majority decision that there is no evidence to show, that the behavior of DW 9, Geoffrey Yogo, the Treasurer of Nyando CDF Committee, who was at the relevant time a public officer, had any effect on the outcome of the election in the instant matter. The allegations that he used CDF funds to campaign for the Appellant are unproven. The standard of proof to be met in such an instance includes a number of steps – a chain of events, so to speak - which must be shown by the evidence: that the person involved is a public officer; that the said public officer used public resources for the purposes of political campaigns; that there was intention of the part of the public officer to influence the outcome of the election to favour an individual running for office or a party participating in an election; or that the said resources were used to commit an election offence. This is not the case in this matter. In line, with findings in the ***Raila Odinga*** and ***Peter Munya*** cases - even where irregularities have been shown, in this case, they are not sufficient to affect the outcome of the election.

[209] I am duty bound however to point out that even if the chain of events referred to above is broken or incomplete, legal consequences for misuse of public funds are to be found under Section 51 of the CDF Act 2013 which provides as follows:

"Any person who misappropriates any funds from the Fund, or assists or causes any person to misappropriate or apply the funds otherwise than in the manner provided in the Act, shall be guilty of an offence and shall upon conviction, be liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding two hundred thousand shillings or to both."

[210] Similarly, as pointed out earlier, there are legal sanctions and penalties that will apply where an appointed public officer has behaved impartially and participated in political activity. It is clear, from the facts of this case and applicable law on the conduct of public officers, that Mr. Geoffrey Yogo, as a public officer has contravened the law on a number of ethical transgressions, and for which he should be found individually liable.

F. ORDERS

[211] On the basis of our examination of the complex questions of law and fact raised in this appeal, and of the Court's emerging lines of persuasion, we have arrived at certain conclusions that spell out our final Orders, in the following terms:

(a) The appeal is allowed, and the determination by the Court of Appeal nullifying the election of Frederick Otieno Outa, is set aside.

(b) The finding by the Court of Appeal that the appellant, Frederick Otieno Outa committed the election offence of bribery, is hereby overturned.

(c) The Certificate and Report issued by the Court of Appeal, on the basis of its finding pursuant to Sections 86(1) and 87(1) of the Elections Act, is hereby annulled.

(d) The appellant's costs at the High Court, the Court of Appeal and the Supreme Court shall be borne by the 1st respondent.

The 2nd and 3rd respondents shall bear their own costs at the High Court, the Court of Appeal and the Supreme Court.

(e) These Orders shall be forthwith served upon the parties and upon the Speakers of the two Houses of Parliament, for appropriate legislative initiates as recommended herein.

DATED and DELIVERED at NAIROBI this 3rd day of July, 2014.

.....	.....
W. M. MUTUNGA	K.H. RAWAL
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT
.....	.....
M. K. IBRAHIM	J.B. OJWANG
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

.....	.....
S. C. WANJALA	S. N. NDUNGU
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT