# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, SCJJ.)*

## PETITION NO. 12 OF 2014

**-BETWEEN-**

**MOSES MASIKA WETANGULA.....APPELLANT**

**-AND-**

**MUSIKARI NAZI KOMBO .....1st RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 2nd RESPONDENT**

**MADAHANA MBAYAH ..... 3rd RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Kisumu (Maraga, Azangalala, and Mohammed, JJA)dated the 14th March, 2014 in Kisumu Civil Appeal No. 43 of 2013)*

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# JUDGMENT

## I. INTRODUCTION

**[1]** The appellant filed his petition of appeal to this Court on 25th April, 2014 contesting the Judgment of the Court of Appeal of 14th March, 2014 which upheld the decision of the High Court (*Gikonyo, J*) rendered on 30thSeptember, 2013: particularly, the finding that the appellant had committed the election offences of bribery and treating of voters.

**[2]** The Petition is premised on nine grounds, as follows:

*(a) the High Court sitting as an election Court pursuant to Article 105(1) of the Constitution, did not have jurisdiction to hear and determine the petition dated and filed on 8th April, 2013;*

*(b) the Court of Appeal erred in law in holding that allegations of commission of an election offence against a respondent in an election petition are sufficient notice to the respondent, that the petitioner intends to prove criminal charges against him;*

*(c) the Court of Appeal erred in holding that a respondent in an election petition, upon service of the petition, must be prepared to defend himself in both the election petition, and in a trial for electoral offence;*

*(d) the Court of Appeal erred in law in holding that once an election Court makes a finding and reports the commission of an election offence to the Independent Electoral and Boundaries Commission (IEBC),the IEBC assumes a mandatory powerto disqualify the affected candidate from contesting in the next General Election, under Section 72(3)(b) of the Elections Act;*

*(e) the Court of Appeal erred in holding that the appellant had given the sum of Kshs.260,000/= to the pastors and bishops who were assembled at the Red Cross offices at Kanduyi, on 22nd February,2013;*

*(f) the Court of Appeal erred in law in holding that the ingredients of the two offences of bribery and treating, were established and proved against the appellant, beyond reasonable doubt;*

*(g) the Court of Appeal erred in law in ignoring the glaring contradictions in the evidence of the 1st respondent's witnesses, in respect of the bribery and treating allegations against the appellant;*

*(h) the Court of Appeal erred in assuming certain facts which were not contested by the 1st respondent in the Court of Appeal, but which were not in issue before that Court—an assumption which was in contravention of Section 85A of the Elections Act;*

*(i) the Court of Appeal erred in law in holding that the election Court had the jurisdiction to delegate judicial duties to the Deputy Registrar, or any officer of the Court, to carry out an inquiry, scrutiny or recount.*

**[3]** The appellant seeks the following reliefs:

*(a) the appeal herein be allowed;*

*(b) the findings of the Court of Appeal in Kisumu Civil Appeal No.43 of 2013, that the appellant committed the offences of bribery and treating, be set aside;*

*(c) the Judgment and Decree of the High Court rendered in Bungoma High Court Election Petition No.3 of 2013, be set aside in its entirety;*

*(d) the petition dated 8th April, 2013 and filed in Bungoma High Court Election Petition No. 3 of 2013,* ***Musikari Nazi Kombo v. Moses Masika Wetangula & 2 Others*** *be dismissed;*

*(e) the appellant be awarded costs of this appeal, and of the proceedings in the Court of Appeal and the High Court.*

**[4]** In response, on 23rd May, 2014 the 1st respondent filed a notice of cross-appeal, seeking the following Orders:

*(a) the petition herein be dismissed;*

*(b) the 1st respondent's cross-appeal be allowed as prayed;*

*(c) the appellant be held to have violated Section 72(3)(b) of the Elections Act;*

*(d) the appellant be held to be lacking in personal integrity, character, and suitability to hold any public or State office, including that of Senator for Bungoma County, pursuant to Article 73(1) and (2)(a) of the Constitution of Kenya, 2010;*

*(e) the Director of Public Prosecutions be notified that the appellant was properly adjudged to be guilty of the election offences of treating of voters, contrary to Section 62 of the Elections Act, and bribery of voters, contrary to Section 64 of the Elections Act;*

*(f) the election of the Senator of the County of Bungoma, during the March 4, 2013 general elections as conducted by the 2nd respondent, was not conducted substantially in accordance with the Constitution of Kenya and all relevant laws, including the Elections Act, and the Elections (General) Regulations, 2012;*

*(g) that the costs of, and incidental to the cross-appeal, be awarded to the 1st respondent, as against the appellant.*

## II. BACKGROUND

**[5]** This matter arises from the general elections held on 4th March, 2013. Both the appellant and the 1st respondent were among candidates who contested the

Bungoma senatorial election. After the counting and tallying of votes, the appellant was declared the winner, having garnered a total of 154,469 votes, against the 1st respondent's 125,853 votes.

**[6]** The 1strespondent was dissatisfied with the conduct of the elections, and filed a petition in the High Court at Bungoma, seeking to nullify the appellant's election.On 30th September, 2013 the election Court (*Gikonyo J)* allowed the petition and nullified the election of the appellant.

**[7]** Aggrieved by the Judgment of the election Court, the appellant filed *Civil Appeal No. 443 of 2013* at the Court of Appeal in Kisumu. On the 14th of March, 2014 the Court of Appeal delivered its Judgment and held, *inter alia,* that:

*(a) the allegations of commission of an election offence against a respondent in an election petition is sufficient notice that the petitioner intends to prove criminal charges against him;*

*(b) once an election Court reports the commission of an election offence to the Independent Electoral and Boundaries Commission, the IEBC is enjoined to disqualify such a candidate from contesting in the next elections, under Section 72(3)(b) of the Elections Act, without the need for conducting a separate trial;*

*(c) the proof of commission of any one act or incident of election offence vitiates an entire election;*

*(d) the appellant gave Ksh.260,000/= to the pastors and bishops who were assembled at the Red Cross offices at Kanduyi on 22nd February,2013;*

*(e) the appellant was identified as the donor, or one of the donors of the said Kshs.260,000/=; the recipients were pastors and bishops at the Red Cross meeting, and the purpose of the donation was the mobilizing*

*of colleagues and followers, to vote for the appellant and other candidates of his party coalition; the ingredients of the two offences of treating and bribery were present, and those offences were proved beyond any reasonable doubt;*

*(f) the commission by the appellant of the election offence of bribery and treating, amounted to the election being conducted contrary to the election law, and this vitiated the election;*

*(g) the election Court had the jurisdiction to delegate judicial duties to the Deputy Registrar or any officer of the Court, to carry out an inquiry, scrutiny or recount.*

**[8]** This Court of Appeal decision further aggrieved the appellant, who now seeks reprieve from this Court. The appeal was canvassed before this Court on the 29th of October, 2014.

## III: SUBMISSIONS FOR THE PARTIES

### *(a) The petitioner*

**[9]** The petitioner's legal team comprised learned counsel, Messer's Oduol, Masinde, Makokha, and Ouma. Mr. Oduol defined three issues as forming the crux of the appeal: jurisdiction; criminal liability for election offences; and disqualification from candidacy in future elections.

*Jurisdiction*

**[10]** This question is two-fold: firstly, whether this Court has the jurisdiction to admit and determine this appeal; and secondly, whether the election petition filed at the High Court met the jurisdictional threshold.

**[11]** Mr. Oduol invoked Article 163(4)(a) of the Constitution, and submitted that this Court has jurisdiction to hear and determine appeals from the Court of Appeal, *as of right in any case involving the interpretation or application of the Constitution*. He urged that this Court has laid down the test to be applied when moving the Court under Article 163(4)(a), in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal& 2 Others,*** *Petition No. 10 of 2013,* thus [paragraph 29]:

> ***"the test that remains … is whether an appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution…"***

**[12]** Counsel also cited ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others****, Application No. 5 of 2014* **[*Munya 1*]** in which it was held [paragraph 69]:

> ***"where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."***

**[13]** It was urged that this appeal meets the test set by the Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others,*** **Petition No. 2B of 2014 [*Munya 2*]**. Hence the appellant submitted that he had met the jurisdictional threshold for appealing as a matter of right, as the election petition was filed under Articles 38, 81 and 87 of the Constitution, and it had been claimed

that the election was not conducted in compliance with the values and principles of the electoral process as set out in the Constitution of Kenya, 2010.

**[14]** In the Court of Appeal, it was urged that the trial Court had addressed certain specific issues:*alleged non-conformity with electoral law; commission of electoral offences; and, whether the irregularities that were admittedly committed in the election, affected the results; and whether the Constitution's terms had* illuminated the paths of both the Court of Appeal and the election Court, in their analysis of the issues in contention, and in their respective conclusions which form the basis of the appeal herein.

**[15]** Learned counsel contended that the election Court had no jurisdiction to admit and determine the petition. He cited ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989]KLR,*** and urged that the said Court lacked lawful mandate to entertain the question lodged before it.

**[16]** It was submitted that an election petition, by the terms of Article 87(2) of the Constitution, has to be filed within 28 days after the declaration of the election results by the IEBC, where the election is not a Presidential election. Counsel urged that Section 76(1)(a) of the Elections Act which provided for such petitions to be filed within 28 days after the publication of the election results in the *Gazette*, had been declared unconstitutional by the Supreme Court in the ***Joho*** case, which was reaffirmed in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others [2014] eKLR.***

**[17]** Counsel submitted that the declaration of Section 76(1)(a) of the Elections Act as being unconstitutional left no doubt that any petition challenging the validity of an election, on any grounds at all including corrupt or illegal practice, must be filed within 28 days of the declaration of results, as provided in Article 87(2) of the

Constitution.He submitted that the declaration of senatorial election results for Bungoma County was made on 6th March, 2013 and the appellant issued with a certificate in Form 38 dated 6th March, 2013. The appellant averred that these facts were clear from the affidavit of the 1st respondent, sworn on 8thApril, 2013 in support of his petition.However, it was submitted, the petition at the High Court was filed on 8th April, 2013 which was 33 days after the declaration of the results.

**[18]** Counsel urged that the constitutionally-prescribed 28 days cannot be extended or varied, and hence the petition at the High Court was filed in contravention of Article 87(2) of the Constitution and, pursuant to Article 2(4) of the Constitution, *any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.* In further support of the proposition that the petition was null, counsel cited the Court of Appeal decision in ***Paul Posh Aborwa v. Independent Electoral and Boundaries Commission and 2 Others,*** *Civil Appeal No. 52 of 2013,*especially the following passage:

> ***"The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determine the appeal emanating as it does from the proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution of Kenya 2010."***

**[19]** Counsel submitted that the foregoing authority was affirmed by this Court in the ***Mary Wambui*** case and in ***Anami Silverse Lisamula v. The Independent Electoral & Boundaries Commission & 2 Others,*** *Petition No. 9 of 2014.* Mr. Oduol submitted that Section 3 of the Supreme Court Act, 2011 enjoins this Court to assert the supremacy of the Constitution, provide authoritative and impartial interpretation of the Constitution, and develop a rich

jurisprudence. Consequently, having interpreted the Constitution authoritatively in ***Joho***, ***Mary Wambui,*** and ***Lisamula*** cases, the Court's interpretations bound the parties, and there was no basis for the Court to depart from its stand at this time.

**[20]** The appellant urged that the issue of jurisdiction cannot be waived, especially as it had already arisen in the High Court even though it remained unresolved. He submitted that this issue still remained pertinent, as in the ***Mary Wambui*** case in which it was raised in the Supreme Court for the first time. Counsel submitted that after the issue of jurisdiction was first raised in the High Court, parties on 6thJune, 2013 reached a consent that it be deemed part of the issues for determination by the Court, in its Judgment. However, counsel urged, the election Court abdicated its judicial duty, failing to determine the issue of jurisdiction; and the Court of Appeal too, did not determine the same in its Judgment.

**[21]** Learned counsel, relying on ***Tononoka Steels Limited v. Eastern and Southern Africa Trade and Development Banks [1999] eKLR,*** urged that an issue of jurisdiction is a point of law that can be raised at any stage of proceedings, even on appeal; and indeed, even the Court *suo motu*, may raise it. On that basis, counsel urged the Court to strike out the petition dated 8th April, 2013, and the resultant Judgments and proceedings of the Court of Appeal and the High Court at Bungoma.

*Election offence, and criminal offence*

**[22]** Learned counsel submitted that the Court of Appeal had erred in law, in holding that allegations of commission of an election offence against a respondent, in an election petition, is sufficient notice to the respondent that the petitioner intends to prove criminal charges against him or her, and the respondent must be prepared to defend himself or herself in both the election petition, and in a

criminal trial for electoral offences. Counsel submitted that an election petition is a *sui generis* process, with its own set of rules of procedure, as signalled in ***Ferdinand Ndung'u Waititu v. Independent Electoral & Boundaries Commission & 8 Others [2013] eKLR,*** the Court of Appeal thus holding:*"the Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya."*

**[23]** Drawing a distinction, counsel urged that in criminal trial, prosecutorial powers under Article 157(6) of the Constitution are vested in the Director of Public Prosecutions, who,in executing his mandate is independent, and not subject to the control of any person. He submitted further, that there is a legitimate expectation in a criminal trial, which facts, especially those in the charge statement, will be given to the accused in advance; and the formal charge notifies an accused person of the charges against him or her, to enable him or her to take plea accordingly. Under Article 50(2)(b) of the Constitution, a formal charge must be in sufficient detail, to ensure that the accused person properly understands the charge involved, and is in a position to answer to it; and to that end, the charge is required to be clear and without equivocation or duplicity. Such conditions, it was urged, are missing in an election petition, where a petitioner makes mere allegations against a respondent, including allegations as to the commission of election offences, with no more than the back-up affidavit(s). A respondent is expected, upon service of petition, to file a response, and/or a replying affidavit. Counsel submitted that such a respondent is by no means preparing a defence to a criminal charge brought against him or her by the petitioner.

**[24]** Counsel urged that the appellant herein having been served with a petition (dated 8th April, 2013), at all times knew that he was responding to the election petition, and not to a criminal charge; and he had a legitimate expectation that he would only defend himself against allegations in the petition; so if there be any

finding of an election malpractice/offence, then the same would be reported to the Director of Public Prosecutions under Section 87(1) of the Elections Act; and the DPP would exercise his discretion, preferring any charges against the appellant by the process specified in the Criminal Procedure Code.It was urged that the Court of Appeal had improperly compromised the appellant's rights, by declaring that the allegations in the petition constituted criminal charges, for which the appellant was required to answer. Counsel submitted that the High Court's stand amounted to equating the election petition with a criminal charge, and to making a finding of a criminal nature, with its full consequences.

**[25]** Learned counsel urged that the right to a fair trial under Article 25(c) Constitution is illimitable, and the Appellate Court had erred in attempting to constrict the same. Counsel drew on the decision of this Court in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others,[2014] eKLR*** [paragraph 109], as regards the quasi-criminal nature of election offences:

> "***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 a finding, or if there is any doubt as to whether such an offence was, indeed, committed,or by whom?"***

*Disqualification from candidacy in future elections*

**[26]** Counsel submitted that the Court of Appeal had erred in holding that once an election Court makes a finding, and reports the commission of an election offence to the IEBC, the Commission is under duty to disqualify a named candidate from contesting in the next election, by virtue of Section 72(3)(b) of the Elections Act.As counsel urged, under Article 38 of the Constitution, every adult citizen has the right, free of unreasonable restrictions, to present himself for herself for

election to any elective position; and any law limiting this right if not reasonable and justifiable, falls foul of Article 24(1) of the Constitution. It was submitted that under Article 99(2)(g) of the Constitution, disqualification from candidacy arises only where a person is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election.

**[27]** The appellant urged that it is only a person already charged and convicted by a criminal Court, and who is subject to a sentence of imprisonment for more than six months as at the date of registration as a candidate, or of election,that is disqualified from candidacy in such election.

**[28]** Learned counsel, Mr. Oduol submitted that bribery and treating are election offences under Sections 62 and 64 of the Elections Act; and under Section 67(1)(a) of that Act, they are punishable upon conviction, by fine not exceeding one million Shillings or imprisonment for a term not exceeding six years, or both. He urged that disqualification does not arise, until a respondent has been charged and convicted by a criminal Court, and an appropriate sentence meted out to him or her, running from the time of registration as a candidate, or of the election.

**[29]** Counsel drew related insights from the terms of Article 99(20)(h) of the Constitution, which disqualifies any person who has been found to have misused or abused a State or public office, or contravened the principles in Chapter Six of the Constitution. He submitted that issues falling under Chapter Six, and relating to State or public office, are governed by the Public Officer Ethics Act, 2003 and the Leadership and Integrity Act, 2012 which have specific terms and/or procedures for dealing with the conduct of election candidates. Counsel urged that by virtue of Article 79 of the Constitution, only the Ethics and Anti-Corruption Commission has jurisdiction to ensure compliance with the terms of Chapter Six of the Constitution, the Public Officer Ethics Act, and the Leadership and Integrity

Act. He invoked, in this regard, the High Court's decision in ***International Centre for Policy & Conflict &Others v.Attorney-General & 6 Others [2013] eKLR,*** where the following passage occurs:

> ***"In our view, the key question is whether this Court is the right forum, in the first instance, to undertake an assessment of the integrity of persons presenting themselves for public office. ... In the public sector, enforcement of ethics is, to a large extent, similar to the above procedure in the private sector save that the same is regulated by statute. The mechanisms of inquiry would be set out in the parentstatute. Such institutions, for example the IEBC and Ethics and Anti-Corruption Commission (EACC) are bestowed with the necessary powers to conduct, inquire and take disciplinary action."***

**[30]** Counsel submitted that under the Elections Act, the IEBC has jurisdiction to ensure compliance with the provisions of the Constitution and the Elections Act; and under Section 72, it can disqualify candidates in certain instances: where one engages in bribery, violence or intimidation at the time of nomination or campaigns,and where a political party nominates a candidate who does not meet the requirements of the Constitution, the political party commits an offence, and is apt to be disqualified by the IEBC.

**[31]** From that foundation, learned counsel urged that where a candidate is adjudged by an election Court to have committed an election offence, during the hearing and determination of an election petition, this by itself does not constitute a bar to the candidate contesting the next election under Section 72(3)(b) of the Elections Act. He contested the finding of the Court of Appeal, urging that it amounted to plain judicial law-making. He submitted that the IEBC is the only agency that can bar and/or disqualify a candidate, and that such disqualification

can only be effected when the relevant candidate has "exhausted all avenues for appeal or review provided for by law."

*Questioning the proof of the offences of treating and bribery*

**[32]** It was urged that the Court of Appeal erred in holding that the appellant had given the sum of Ksh.260, 000 to the pastors and bishops who were assembled at the Red Cross offices at Kanduyi on 22nd February, 2013, as this finding ignored glaring contradictions in the evidence of the 1strespondent's witnesses, and also assumed certain facts said to have not been contested by the 1st respondent in the Court of Appeal. Learned counsel submitted that the Appellate Court had erred in holding that the ingredients of the two offences of treating and bribery were established, and proved beyond reasonable doubt against the appellant.

**[33]** Learned counsel submitted that neither of the lower Courts had accorded the claims of bribery and corruption the requisite judicial attention, invoking in aid the persuasive authority from India, ***Rehim Khan v. Khurshidahmed & Others,*** which carries the following passage:

> ***"We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the lightof the evidence with scrupulous care and merciless severity. ... An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial ground and irresponsible evidence..."***

**[34]** Mr. Oduol submitted that, precisely such a principle had been applied by this Court in the **Outa** case [paragraph 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."***

**[35]** Learned counsel submitted that the pleadings, in respect of alleged bribery, must be clear as to the particulars of the offence, and the evidence definitive; the ingredients of the offence must be proved; and such proof is on a level higher than a mere preponderance of probabilities. Counsel cited in this regard, the principles set out in the ***Outa*** case:

"(a) a *petitioner must plead with clarity, specificity,cogency, and certainty the allegations of commission of an election offence;*

*(b) a petitioner must adduce focused, clear-cut and convincing evidence showing how, when, where, and in what circumstances, the alleged bribery and treating was conducted;*

*(c) the petitioner must also adduce focused, clear-cut and convincing evidence showing how this act influenced voters to vote for the appellant;*

*(d) the petitioner must prove all the ingredients of bribery and treating beyond reasonable doubt;*

*(e) where the petitioner's evidence is controverted, the petitioner must adduce evidence, separate from those provided by his witnesses who are primarily his supporters in the election in question; and*

*(f) the Court should not set aside an election unless clear and cogent testimony compelling the Court to [ascertain] the corrupt practice alleged against the returned candidate is adduced by the petitioner."*

**[36]** Counsel submitted that even though allegations made by the 1st respondent regarding the commission of the offences were controverted, the election Court still concluded that the petitioner had proved the offences of bribery and treating, against the appellant, and beyond reasonable doubt— a finding affirmed by the Court of Appeal. The appellant urged that for a bribery offence to be established against an individual, Section 64 of the Elections Act requires that there be a giver of money, or valuable consideration; a recipient of the money or valuable consideration; and a corrupt intention and/or purpose, for which the money was given to the recipient—in this case, given to induce the recipient to vote for, or refrain from voting for a particular candidate.

**[37]** Learned counsel submitted that the 1st respondent had failed to name the person who gave out the Ksh.260,000 bribe, or to specify its purpose, or to identify the recipient (as opposed to bishops and pastors as a generic category). This, he urged made the allegations general, imprecise, unclear and uncertain, contrary to the terms of Article 50(2) of the Constitution. Counsel submitted that there was no clear-cut or convincing evidence showing when, how, or where the bribery and treating took place.

*Election Court: delegation of duty to the Deputy Registrar*

**[38]** The appellant contended that the Appellate Court had erred in holding that the election Court has jurisdiction to delegate judicial duties to the Deputy Registrar or any officer of the Court, to carry out an inquiry, scrutiny or recount.It was submitted that the jurisdiction of an election Court is derived from Article

105(1) of the Constitution and Section 75 of the Elections Act, and is only exercisable by a High Court Judge duly gazetted to hear and determine the particular election petition. It was submitted that while the Deputy Registrar may perform administrative-support functions like a scrutiny or recount, he/she may not assume judicial tasks, and make findings which are then adopted as those of the election Court. It was urged that the Deputy Registrar may not conduct an inquiry on whether a person has committed an election offence by double registration, or double voting.

**[39]** Consequently, it was submitted that the Court of Appeal had erred in upholding an unconstitutional Order of the election Court, of delegating its judicial functions to the Deputy Registrar.

### *(b) The 2nd and 3rdRespondents*

*The Supreme Court:Jurisdiction*

**[40]** Learned counsel, Mr. Gumbo for the 2nd and 3rd respondents, supported the appellant's plea on the question of jurisdiction, particularly on the argument that that this Court has jurisdiction to hear the instant matter. As regards the cross-appeal filed by the 1st respondent, counsel submitted that this was incompetent, and improperly before the Court, as no certification for it has been sought and/or obtained. It was submitted that the issues in the cross-appeal do not involve any matter of general public importance, warranting a determination by the Supreme Court, and that the cross-appeal covertly seeks to re-introduce an earlier one that was struck out by the Court of Appeal. It was submitted in effect, that while the Supreme Court has jurisdiction to entertain and determine the appeal before it, it has no jurisdiction with regard to the cross-appeal filed by the 1st respondent.

**[41]** The 2nd and 3rd respondents framed four issues for determination:

*(a) whether the trial Court and the Court of Appeal had jurisdiction to entertain Petition No. 3 of 2013;*

*(b) whether the filing of a petition with an allegation of commission of an electoral offence constitutes an adequate notice of a charge, and of intended criminal trial, within the context of Articles 50 and 157 of the Constitution;*

*(c) in what circumstances is a candidate liable to disqualification as a candidate, and was that threshold met in the context of the current proceeding?*

*(d) to what extent can a trial Court in election petitions engage the Deputy Registrar in the conduct and hearing of such petitions?*

*The High Court: Jurisdiction*

**[42]** In agreement with the appellant, counsel urged that the petition at the High Court had been out of time: the 3rd respondent had declared the appellant as the duly-elected Senator for Bungoma County on 6th March, 2013 and the petition was filed on 8th April, 2013. Counsel observed that while the declaration of results was made on 6th March, 2013 the Form 36 used in the declaration was undated, due to oversight on the part of the Returning Officer; however, the 1st respondent in his submissions, and in the affidavit in support of the petition, had conceded to the declaration having been made on 6th March, 2013.

**[43]** It was further submitted that the issue of the date of declaration of results was not in dispute, at both the High Court and the Court of Appeal—and so cannot be an issue on appeal at the Supreme Court. Counsel submitted that the petition

having been filed 33 days after the declaration of election results, was a nullity, being time barred, and the proceedings at the High Court and the subsequent Judgment were a nullity.

*Petition alleging election offence: Is this proper notice of criminal charge?*

**[44]** Counsel submitted that a person charged with a criminal offence ought to receive sufficient notice of the charge, and of the criminal trial to be conducted in the context of Articles 50 and 157 of the Constitution. Hence in an election Court, the terms of the Constitution and the law are to be read in harmony, so that the rights declared in the Constitution are not compromised. Counsel submitted that although an election Court is not barred from framing the issues constituting allegations of criminal offence, the *sui generis* proceedings in an election petition, ill-suit a criminal trial, and is not the proper framework for achieving a standard of proof-beyond-reasonable-doubt, as required in criminal trials.

**[45]** Learned counsel extracted the statement in the petition which stood out as the basis of the charge of election offence, in this instance:

> *"On 20thFebruary, 2013 the 1st respondent and his agents attended a meeting held at Red Cross Kanduyi which meeting had brought together several religious leaders from Bungoma County for consultations on the 4thMarch, 2013 elections. The 1st respondent addressed the meeting and asked those in the meeting to vote for him and for all those candidates vying for various positions under the CORD umbrella. He then together with Hon. Alfred Khang'ati gave pastors a total sum of Kshs.260,000 todistribute among themselves and those in attendance. Each of those in attendance was given Kshs. 1,000/=."*

**[46]** Counsel questioned whether the foregoing allegation, by its terms and form, amounted to a charge, with sufficient particulars to enable an accused person to understand the offences facing him or her, so he or she may answer, as contemplated by Article 50 of the Constitution. He submitted that the information as to the giving of money, is vague: was it for transport back home, or a token of appreciation? Who was given, and who gave out the money? Under what law is the charge presented? What are the ingredients of the offence? Who is the complainant? What is the punishment for the offence? What is the factual basis for the charge?

**[47]** Learned counsel also submitted that the 1st respondent's witnesses' testimony was unreliable, as nobody saw the appellant giving out money, and none admitted receiving money. It was submitted that the offence alleged was that money was given out jointly by the appellant and Mr. Khang'ati. However, counsel raised the point, if it is a joint offence and the other party (Mr. Khan'gati) was not heard, could it be said to have been proved beyond reasonable doubt? It was submitted that in criminal proceedings, it is not open to the Court to exercise a discretion not granted by law, and accordingly, if it was the case that the appellant herein was convicted, then the only punishment would have been that prescribed in the specific terms of statute law. Counsel urged that the course taken by the election Court, of picking disparate elements of statutory law, was legally untenable, and amounted to nullity.

*Candidacy in election: Legal terms for disqualification*

**[48]** Mr. Gumbo proceeded on the basis of Article 38 of the Constitution, in the context of Article 24(1), as regards the guaranteed political rights. He submitted that only reasonable and justifiable limitations may be made to these rights, citing the terms of Article 99(2) on the issue of disqualification:

***"A person is disqualified from being elected a Member of Parliament if the person—***

***...***

***(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or***

***(h) is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter six."***

**[49]** Learned counsel submitted that the only ground upon which disqualification of the appellant could arise is under Article 99(2)(g) and (h) of the Constitution; and pursuant to Article 99(3) and Section 24(3) of the Elections Act, such disqualification is only possible upon exhaustion of an appellate process. Counsel urged that once a party files a notice of appeal from the finding of a Court, then the question of disqualification is suspended, or stayed, until the appellate process is complete— even if in the intervening period an election is to be held.

**[50]** As regards Section 72 of the Elections Act (on disqualification), it was submitted that it deals with the period of nomination and campaign; and so does not apply in this case—and notable in this regard is Section 72(3), which applies to a political party, and a candidate cannot be subjected to it without a finding of culpability of the political party under Section 72(2). Counsel submitted that the jurisdiction under Section 72 of the Elections Act falls to the mandate of the IEBC, rather than that of a Court of law. Hence, counsel submitted, any disqualification that does not accord with Article 99(2) and (3) would offend the Constitution.

**[51]** Counsel submitted that the Court of Appeal had erred in law when it held: *"the petition court should therefore boldly go ahead and report such respondent and upon receipt of such report, the IEBC is under section 72(3)(b) of the Elections Act, obliged to disqualify such a candidate from contesting the next elections".*

**[52]** Mr. Gumbo submitted that election offences under Sections 62 and 64 of the Elections Act are punishable under Section 67 of that Act, and that Section 72(3)b) of the Act did not apply in this instance.

*Judicial functions in an election dispute: The place of a Deputy Registrar of the Court*

**[53]** While acknowledging that an election Court may delegate functions to the Deputy Registrar, learned counsel urged that the Courts' jurisdiction to hear and determine an election petition stems from the Constitution and the statutes; and the Court may only direct the Deputy Registrar to carry out administrative functions, particularly the scrutiny and recount of votes, because of the nature of the work involved; but no finding is to be made by the Deputy Registrar.

**[54]** Such a position stood in contrast to the following decision of the Appellate Court:

> *". . . having considered the issue, we hold that there is nothing wrong with the electionCourt directing the Deputy Registrar or any officer of the Court to carry out an inquiry, scrutiny and recount…".*

Counsel submitted that 'inquiry' is too fundamental to the outcome, and to the exercise of jurisdiction by the election Court, to be thus delegated; for inquiry connotes the hearing and taking of evidence by the Deputy Registrar, and

eventually the making of a finding— a function that, under Article 105 of the Constitution, entails determination, a reserved role of the High Court.

**[55]** Counsel submitted that it was fundamentally wrong for the Court to adopt the decision of the Deputy Registrar, moreover, without giving an opportunity to the parties to react to the findings of the inquiry. He submitted further that, the conclusions drawn from the said inquiry were without the input of the respondents, yet importing the findings of the Deputy Registrar into the Judgment, and as such, they negated the concept of fair hearing.

**[56]** As regards the allegations on the appellant's integrity in the cross-appeal, counsel contended that this was an abuse of the jurisdiction of this Court, as such integrity issues had not been raised before the High Court and the Court of Appeal.

**[57]** The 2nd and 3rd respondents supported the appeal, and prayed that the same be allowed, and the cross-appeal dismissed.

***(c ) The 1st Respondent***

*Jurisdiction*

**[58]** Learned counsel, Mr. Ndambiri and Mr. Kanjama had no doubts that this Court has jurisdiction to hear and determine this matter, just as they maintained too that the High Court had jurisdiction.

**[59]** The 1st respondent's position was that this that this appeal was based on incorrect, and misleading facts and points of law. Counsel urged that it was not true that the appellant was declared duly elected as Senator for Bungoma County, on 6th March 2013.

**[60]** The 1st respondent submitted that no evidence was adduced, either in the pleadings or during the hearing of the election petition, at both the High Court and Court of Appeal that a certificate in Form 38 was issued to the appellant on 6th March, 2013, or on any other date. Hence, it was urged, it was not the case that Petition No. 43 of 2013 was filed 43 days after the declaration of results. It was also contended that this ground had not been raised or included in the notice of appeal filed on 27th March, 2014.

**[61]** Learned counsel, Mr. Ndambiri submitted that the question as to when election results were declared, has never been agreed upon; and that this question was raised by the appellant and the 2nd and 3rd respondents in the trial Court, when the two parties filed two sets of Notice of Motion applications, dated 1st June, 2013 and 3rd June 2013 respectively. Hence, counsel contended that this issue was not being raised in the Supreme Court for the first time. He submitted that by consent, the parties before the High Court agreed that the issues raised in the two applications should be deemed as issues for determination by the Court, and be added to issues already framed.

**[62]** It was counsel's position that even though the Court did not determine that issue in its Judgment, it did not abdicate its judicial duty but rather, it is the appellant and the 1st and 2ndrespondents who abandoned their applications, and failed/refused to prosecute the same in accordance with the Orders and directions issued by the election Court when it adopted the consent, leaving the Court with no duty to perform in relation to the issues raised in the applications.

**[63]** Counsel urged that the petition had been properly brought before the election Court, and that the instant petition was different from other petitions which this Court has dealt with, in substance and facts, in that in this petition, the question as to when the election results were declared remains unsettled. It was

urged that as the parties had agreed that the petition properly lay before the election Court, they had acquiesced in the proper status of the petition in that Court. And acquiescence on the appellant's part, counsel urged, was also to be implied from the fact that though the High Court had not dealt with the issue of jurisdiction, the appeal before the Appellate Court, of 16th October, 2013 recorded no dissatisfaction with the High Court's non-consideration of the matter.

**[64]** Learned counsel submitted that this Court's authority in the ***Joho*** case, regarding the vital moment of declaration of election results, was inapplicable, as that moment is marked by the issuance of a certificate in Form 38, which was not issued in the instant case; and that there was thus a proper basis for regarding the date of gazettement of results as the moment from which to operate, in filing a petition. Accordingly, it was urged, the principle of the ***Joho*** case as subsequently applied by this Court in the ***Mary Wambui*** case, regarding the time within which an election petition is to be filed, was inapplicable in this matter.

**[65]** The 1st respondent's essential argument is that the declaration date for the election results was not ascertainable. The date remained in doubt, it was urged, and the appellant and 2nd and 3rd respondents, despite filing applications to challenge the petition on this ground, withdrew these, and acquiesced in the position that the petition was properly before the election Court; and they did not appeal to the Court of Appeal on that ground, and only raised it in the Supreme Court, as an afterthought.

*Election dispute-settlement and the criminal jurisdiction*

**[66]** Counsel submitted that, on the basis of this Court's decision in the ***Raila*** case, in electoral matters, the standard of proof for election offences is "beyond reasonable doubt", and matters of electoral offences fall within the jurisdiction of

the election Court. He submitted that election offences, including bribery under Section 64 of the Elections Act, and treating of voters under Section 62, are to be viewed as criminal in nature. Counsel cited the ***Outa*** case, in which this Court thus remarked: *"election petitions bear a mark of criminal conduct within the framework of an election petition yet outside the normal criminal jurisdiction..."*

**[67]** Counsel however, sought to distinguish the ***Outa*** case from the current one: in the ***Outa*** case, the standard of proof was not met, but in this case both the High Court and the Court of Appeal found that there was evidence of electoral malpractice; in the ***Outa*** case, the allegations of malpractice were not against the candidate personally, as the claim was that he used agents, but in this instance, the allegations are against the candidate personally; and lastly, in the ***Outa*** case, there was inadequate particularization of facts, while in the present case, the facts are particularized as regards the date of the offence, the meeting in question, and the amount of money given.

**[68]** It was submitted that as regards an election offence, both criminal and civil cases may run concurrently: hence, there is a concurrent jurisdiction in the election Court, in respect of matters both civil and criminal.

**[69]** Learned Counsel, Mr. Kanjama submitted that in a case founded on the commission of an election offence, an election Court does not constitute itself into a criminal Court, but while hearing and determining the petition, exercises its jurisdiction as provided under Article 105(1) of the Constitution. Upon hearing, it was submitted, the Court has jurisdiction to pronounce a verdict of "guilty", on the allegations – which verdict gives the Court direction on whether or not to grant the prayers sought in the petition. Hence, as held in the ***Outa*** case, where the Court finds one not to have been validly elected on account of the commission of an election offence, the position is:

***" ... 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 [under] criminal liability under the Act..."***

**[70]** It was submitted that under Article 99(2)(h) of the Constitution, one is disqualified from being elected a Member Parliament, if found to have misused or abused a State office or public office, or contravened the provisions of Chapter Six. Article 73(2) (in Chapter Six) gives the guiding principles on leadership and integrity, and it was submitted that the integrity of a person found to have committed election offences by an election Court becomes relevant and, by Article 99(2) (in Chapter Eight —The Legislature), such a person is disqualified.

**[71]** Counsel submitted that the Appellate Court did not err in its findings, and that during the hearing of the petition all parties, including the appellant, gave their evidence and called witnesses. Learned counsel urged that the election Court had made its finding and, on appeal, the Court of Appeal properly analysed that Court's records and Judgment, finding that the 1st respondent's allegations regarding election offences were constitutionally and legally pleaded and prosecuted.

**[72]** Counsel urged that the prosecution of the appellant for election offences by the election Court, did not violate the prosecutorial powers vested in the office of the Director of Public Prosecutions. It was submitted that the election Court issued a notice, in compliance with Section 87(1) of the Elections Act, thus inviting the DPP to take action in accordance with the power and authority conferred under Article 157(6) of the Constitution.

**[73]** Counsel submitted that the allegations of electoral offence by the appellant had been set out with precision in the Petition filed by the 1st respondent on 8th April, 2013 and in an affidavit giving particulars; and the appellant had filed a response to the petition dated 21st April, 2013 and a replying affidavit, and had called witnesses.

*The Deputy Registrar's part in the Judge's decision-making*

**[74]** Mr. Kanjama submitted that the Court of Appeal had not erred in holding that the High Court could delegate judicial duties to the Deputy Registrar or any officer of that Court, to carry out an inquiry, scrutiny or recount. Counsel urged that assigning to the Deputy Registrar the task of supervising the inquiry, scrutiny and vote-recount, does not amount to delegation of judicial functions. He invoked Rule 32(3) of the Elections (Parliamentary and County Election) Petition Rules, which thus provides (clause 32(3)):

> ***"The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to the direction the court may give."***

*Issues in the cross-appeal*

**[75]** Learned counsel contended that the Court of Appeal had erred in holding that *"because there was no cross-appeal and the issue of reporting the appellant was not canvassed, the Court of Appeal could not report the appellant to the authorities."* Counsel submitted that the Appellate Court having affirmed the election Court's findings and Judgment, that the offence of treating of voters and bribery had been established against the appellant, ought also, without the need for a cross-appeal, to have confirmed and affirmed both the election Court's notice issued on 30th September, 2013 to the DPP to take action, and the letter addressed

to the Speaker of the Senate and IEBC dated 30thSeptember, 2013 notifying them that the appellant was not validly elected pursuant to Section 87(1) of the Elections Act.

*Electoral offences, and the question of personal integrity*

**[76]** It was urged that the appellant is deficient in personal integrity, character, and suitability to hold any public or State office, and that the Supreme Court should hold so. This invitation was founded on the finding that the appellant had committed electoral offences, by the election Court and the Appellate Court.

**[77]** The 1st respondent prayed that the appeal be dismissed, and the cross-appeal be allowed.

### *(c) The Appellant's Reply*

**[78]** Learned counsel, Mr. Oduol submitted that in the supporting affidavit of the 1st respondent, sworn on 8th April, 2013 he had recognised the date of declaration of election results, and that a party cannot concede a fact at the trial Court, and then recant that very fact at the final appellate stage. Counsel contested any perception that acquiescence before the election Court would be a basis of proper assumption of jurisdiction, urging that jurisdiction flowed exclusively from the Constitution and the law. He urged that there is a distinction between the declaration, and the gazettement of election results, and that it is only as from the former, that the time for lodging a petition begins to run.

**[79]** Learned counsel urged the Court not to depart from the principle in the ***Joho*** case, as this case defines the essence of time in election petitions.

**[80]** Learned counsel contested the respondent's stand as to the outflow of election offence, urging that the Elections Act carries no requirement of conviction where an election offence is shown to have been committed; he contested the view that the election Court bears a concurrent jurisdiction in respect of electoral and criminal matters.

**[81]** The appellant stood on the same plane as the 2nd and 3rd respondents, in urging that Section 72(4) of the Elections Act (the stem-provision being set against the marginal note "election offence by candidate or political party") is aimed at the conduct of political parties, rather than individual candidates as such. Learned counsel submitted that the Court lacked jurisdiction to bar a candidate from future elections, and that it fell to the mandate of the Independent Electoral and Boundaries Commission (IEBC) to determine issues of candidacy; and that the decisions of the High Court and the Court of Appeal which sought to regulate candidature in election, were not tenable in law.

## IV. ISSUES FOR DETERMINATION

**[82]** Several issues arise for determination, in this matter:

(a) *whether the petition in the Court was filed out of time, thus taking away that Court's jurisdiction and consequently, depriving the Supreme Court of jurisdiction;*

(b) *whether an election Court in determining election offences, may exercise a criminal jurisdiction;*

(c) *what measure of delegation, if any, may an election Court Judge entrust to the Deputy Registrar of that Court?*

(d) *whether proof of commission of an election offence by a candidate, is a basis for the Court to disqualify that candidate from future elections.*

## V. ANALYSIS

### *(a) Jurisdiction before the Supreme Court*

**[83]** It is apparent that all parties agree that this Court has jurisdiction to determine this appeal. That, however, does not dispose of the preliminary duty that falls on every Court, before delving into the disputed questions: to ascertain that it, indeed, has the jurisdiction to entertain the matter. Although the dispute-resolution mandate, by the terms of the Constitution (Articles 1(3) and 159) falls to the Judiciary, its due discharge requires the proper ascertainment of jurisdictional competence, before any segment of the Judiciary enters upon its task.

**[84]** Does this Court have jurisdiction to determine whether or not the election Court [the High Court] was properly seized of the election dispute? Is it for this Court to adjudge upon the issue as to the convergence of the electoral and the criminal jurisdiction upon the election Court? Does it fall to this Court to determine the extent to which the election Court may delegate its tasks to administrative officers? Is it for this Court to consider the merits of electoral-disqualification Orders issued by the election Court?

**[85]** We find ourselves in agreement with the parties as regards this Court's bearing of jurisdiction in respect of all issues in this appeal. Whether or not the High Court has jurisdiction in respect of the electoral-governance issues raised, is primarily a constitutional question, entailing the interpretation or application of the Constitution, and by Article 163(4) thereof –

*"Appeals shall lie from the Court of Appeal to the Supreme Court –*

*(a) As of right in any case involving the interpretation or application of this Constitution...."*

**[86]** In a wide-ranging consideration of the nature of this Court's jurisdiction, in ***Hon. Lemanken Aramat v. Harun Meitamei Lempaka & Two Others***, Sup. Ct. Petition No. 5 of 2014, we had thus observed (at para. 107):

> ***"The Supreme Court's special jurisdiction merits express recognition.The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which,itself, is a constitutional phenomenon), especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the Constitution—and consequently, issues falling squarely with Supreme Court's mandate under Article 163(4) (a), as well as within juridical mandate of the Court as prescribed in Article 259(1) (c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011 (Act No.7 of 2011)."***

### *(b) Petition in the High Court: Was there Failure of Timeline-based Jurisdiction?*

**[87]** The appellant calls upon this Court to consider the applicability of certain fundamental principles, with regard to election petitions.By the terms of Article

87(2) of the Constitution, a petition contesting an election other than a Presidential election, must be filed within 28 days of the election results being declared. As determined by this Court in the ***Joho*** case, election results are issued through a declaration, made in terms of Rule 87(3) of the Election Regulations,by way of Form 38, issued to the winning candidate. Thereupon, the constitutional time-frame of 28 days starts to run.

**[88]** Learned counsel urged that by the authority of the ***Mary Wambui*** case, a petition filed outside the 28 days is a nullity *ab initio*. This principle has been applied consistently by this Court in previous matters: see the ***Aramat*** and ***Lisamula*** cases. Thus, the appellant urges this Court to make a finding that the election petition at the High Court, the subject matter of these proceedings, was filed outside the constitutional time-lines, and was a nullity— as are any subsequent proceedings that emanated from it.

**[89]** The facts of this case are not settled. There is an apparent dispute as to the date when the declaration of the results was made, and whether the requisite certificate in Form 38 was issued. But why should this be a fundamental question? As already observed above, the date of declaration of results is vital, as it is this declaration that sets forth the counting of time for the filing of petition.

**[90]** The appellant contends that the declaration of results was done on 6thMarch, 2013. Hence, it is his case that the petition was lodged 33 days afterwards, and was a belated petition, a nullity, conferring no jurisdiction upon the High Court or the Court of Appeal. This stand is supported by the 2nd and 3rd respondents— the very persons who were in charge of the elections, and who are expected to know the exact moment when they had declared the results. However, the 1st respondent, denies that the declaration was made on 6th March, 2013 maintaining that the petition was filed in time. He denies that there was any "declaration" of results, at all.

**[91]** Although the governing law on this question is now clear enough, uncertainty emerges from the fact that neither the election Court nor the Appellate Court addressed it, nor made a factual ascertainment as to the moment at which the 3rd respondent (the Returning Officer) had declared the election results.

**[92]** A perusal of the record before this Court reveals the following facts. The Returning Officer, on cross-examination, testified that he had declared the election results on 6th March, 2013: *"I declared results in the evening of 6th March 2013 and issued a certificate."*The record does not show that this evidence was contested by any of the parties. However, in the Returning Officer's affidavit in reply to the petition, he does not mention the date of the declaration of results, nor does he refer to a certificate in Form 38. No copy of a certificate in Form 38 is incorporated in the affidavit.

**[93]** The appellant, in his oral testimony before the election Court, said:
*"On 6thMarch, 2013, I was called to Nairobi and my lawyers were left behind who told me that I had been declared the winner, and they picked [up] my certificate"*. He specifically signified that the said certificate is not attached (to his pleadings).Nothing on record shows whether this evidence was contested.

**[94]** On his part, the 1st respondent in his affidavit deponed: *"I was not satisfied with the results announced and declared by the second respondent, where first respondent was declared the winner"*. He further avers that, because of his dissatisfaction, he filed a petition contesting the said results, as declared. He makes a further material averment in his affidavit:*"the Senate results were* ***re-announced by the County Returning Officer at 7pm on the 6th of March 2013****, [and] it dawned on me that the entire electoral process for Senate elections had been irredeemable compromised, and tilted in favour of the 1st Respondent."*

**[95]** From the foregoing, it emerges that there was some dispute before the election Court, as to when the declaration of results was made. Before this Court, there is common cause that, two Notice of Motion applications were filed in the election Court, seeking to strike out the petition, on the ground that it had been filed out of time. There is no agreement however, as to what befell the two applications. While the appellant faults the election Court for not determining these applications in its final Judgment, the 1st respondent contends that the parties had acquiesced in some version of the timeline-question, leading to it being dropped; and so it is no longer a relevant question.

**[96]** We have no doubt that there is an evidentiary dispute before the Court. The question as to when the declaration of results in this case was made is not settled. Neither Court, coming ahead of us, made a finding on this issue. What is the lawful and appropriate stand to be taken on the question, before this Supreme Court?

**[97]** We have to begin by reminding ourselves of the nature of the jurisdiction that we are exercising in this instance. As this Court held in ***Samuel Kamau Macharia & 2 Others v. Kenya Commercial Bank & 2 Others [2012] eKLR***: "*A Court's jurisdiction flows from either the Constitution or legislation, or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.*"This Court's jurisdiction is defined in the Constitution particularly in Article 163(3).

**[98]** The appellant has invoked this Court's jurisdiction under Article 163(4)(a); and this is an appellate jurisdiction. What is the nature of an appellate jurisdiction? The appellate jurisdiction invoked in this instance is a second one—from the Court of Appeal. Such an appeal is on the whole, concerned with "points

of law" as is clear from our earlier decisions, especially the ***Munya*** cases (see paras. 12 and 13, above).

**[99]** Such are the limits within which this Court would assume or decline jurisdiction under Article 163(4) (a) of the Constitution; and the Court would be mindful in particular of the fact that the established procedures of fact-ascertainment, as an evidentiary regime, would not have been played out before it.

**[100]** It is against this background that we have to perceive the factual matter coming up before us, especially as regards the missing Form 38 in respect of which the Courts coming before us took a position, but in respect of which this Court lacks an opportunity for evidence-testing.

**[101]** The fact-finding jurisdiction on the relevant question falls not to the Court; and we would adhere to our earlier decision in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others [2012] eKLR***, where it was thus held:

> ***"The Supreme Court as the ultimate judicial agency, ought in our opinion to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals."***

In that case, the Court had signalled that only cardinal questions of law are to be the basis for moving the Supreme Court, but not issues of fact.

**[102]** On this perception, we have found consistent positions in comparative jurisprudence. In ***Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*** *2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC),* the South African Supreme Court held that "it is

not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are." And the same Court, in ***Bruce and Another v. Fleecytex Johannesburg CC and Others*** [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC), thus held (at para.8):

> ***"It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised."***

**[103]** Applying the foregoing reasoning to the instant case, we would observe that the legal principle in the ***Joho*** case gives no basis for impugning the legality of the High Court petition. This by no means recants the ***Joho*** principle on electoral time-lines; it is but a statement, on the facts of this case, that the ascertainment of critical moments in an election process is vital in the count of time. This Court is unable to make a finding that the petition before the High Court was filed outside the period of 28 days allowed by the Constitution.

**[103 A]** Moreover, the larger interests of justice, and the safeguard of the those processes which attend the expression of the electoral will, dictate in this case that the propriety of the petition be recognized.

### *(c) Election Court: Election-dispute Jurisdiction-v- Criminal Jurisdiction*

**[104]** The appellant submitted that an election petition is a *sui generis* process, with its own rules of procedure, distinct and different from those associated with criminal and civil processes. Learned counsel, Mr. Oduol urged that in a criminal trial, State prosecutorial powers are vested in the office of the Director of Public Prosecutions, pursuant to Article 157(6) of the Constitution, and that in discharging this mandate the DPP is independent, and not subject to the control of anybody. The appellant contended that he had a legitimate expectation that he would only defend himself against allegations in the petition, and that if there was any finding on election malpractice, then the same would be reported to the DPP in terms of Section 87(1) of the Elections Act, and the DPP would exercise his discretion and prefer charges, if any.

**[105]** The 1st respondent on the other hand, while agreeing that the Elections (General) Regulations indicate that disputes arising from the conduct of elections require a *sui generis* process, submitted that where an election petition raises or is based on allegations of commission of election offences under the Elections Act, its filing, prosecution and determination are governed by the Act and the Elections (Parliamentary and County Elections) Petition Rules; and that under these laws, an election Court does not constitute itself into a criminal Court, and just proceeds to exercise its jurisdiction under Article 105(1) of the Constitution.

**[106]** Learned counsel for the 1st respondent, Mr. Ndambiri urged that the Appellate Court had rightly made a finding that the appellant was afforded a fair hearing, as provided for under Article 50(1) of the Constitution. He submitted that the Court of Appeal having affirmed the election Courts' findings, that the offences of treating of voters and bribery had been established against the appellant, ought to have also confirmed the election Court's notice of 30th September, 2013 that

election offences had been established, in the terms of Section 87(1) of the Elections Act.

**[107]** The description of election petitions as causes *sui generis*, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.

**[108]** The comparative experience, in the Indian Supreme Court case, ***Jyoti Basu & Others v. Debi Ghosal & Others [1982] AIR 983; [1982] SCR (3) 318***, illuminates our perception on the nature of election petitions:

> ***"An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket."***

**[109]** The foregoing perception is reflected in a decision by our Court of Appeal, in ***Murathe v. Macharia [2008] 2KLR (EP) 244 (***at ***249):***

> "***Election petitions are governed by a special self-contained regime and the civil procedure rules were inapplicable except where expressly stated. Moreover, Order 49 rule 3A of the Civil Procedure Rules was a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the Civil Procedure Act and under the rules of statutory interpretation; they could not override the express provisions of an Act of Parliament".***

**[110]** It is reflected also in a decision of the High Court (Mwera, J as he then was), ***Muiya v. Nyagah & 2 Others [2008] 2 KLR (EP) 493:***

> ***"... And for that, election petitions are governed by this Act with its Rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says to itself."***

**[111]** The law that governs election petitions is, primarily, the constitutional provisions; the Elections Act, 2011 (Act No. 24 of 2011); and the Rules and Regulations made thereunder. An election Court carries the important responsibility of securing the integrity of elections, as the avenue to democracy and good governance. Thus in ***William Kinyanyi Onyango v. Independent Electoral and Boundaries Commission & 2 Others*** *[*2013] eKLR, the High Court (*Kimondo, J)* thus remarked:

***"... The election Court has wide and unfettered powers under the Elections Act, 2011 to deal with all allegations in the petition including election offences. It would also be wrong to dictate to the election Court the manner in which to interpret the pleadings before it, how to conduct the trial or of possible reliefs****..."*

**[112]** The overriding objective of the Elections Act is to functionalize and promote the right to vote.This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process. The primary duty of the election Court is to give effect to the will of the electorate; and consequently, the Court is to investigate the nature and extent of any election offence alleged in an election petition. Accordingly, the happenings that touch on the due conduct of the election process, come as proper items of agenda in the tasks of an election Court.

**[113]** Consequently, the proceedings before an election Court are neither criminal nor civil. While the election Court has the competence to look into offences that are criminal in nature, such as bribery and treating of voters, its inquiries on the relevant instances of election offence do not constitute a criminal trial, with its dedicated procedures and safeguards.

### (d) *Electoral Offences of "Bribery" and "Treating": Was there Proof?*

**[114]** The appellant submitted that the Appellate Court had erred, in holding that the two offences of bribery and treating of voters had been proved to the required standard, at the election Court. He submitted that his conviction for these offences, by the election Court, was in violation of his rights of fair hearing under Article 50 of the Constitution.The 1st respondent, by contrast, urged that the requisite

standard of proof had been applied by the election Court, and affirmed by the Court of Appeal. It was also submitted by the appellant that the Court of Appeal had erred in delving into issues of fact, contrary to Section 85A of the Elections Act which restricts that Court's jurisdiction to matters of law only.

**[115]** It is clear to us that the Court of Appeal was alive to the terms of its mandate, as dependent on the distinction between issues of law and issues of fact; the Court thus remarked:

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

**[116]** The Appellate Court after considering the evidence upon which the point of law rested, thus stated:

> ***"After considering the evidence adduced on that allegation, the learned Judge, correctly in our view, dismissed it."***

It also held:

> ***"Having carefully re-evaluated this evidence, we are satisfied that the appellant gave Kshs.260,000/= to the Pastors and Bishops who were assembled at the red Cross offices at Kanduyi on 22nd February 2013…"***

**[117]** As already remarked hereinabove, election petitions fall neither within the realm of civil law nor that of criminal law. However, the legal framework for electoral dispute-settlement confers upon the Court a quasi-criminal jurisdiction which is not part of the established criminal code. Being derived from the fundamental elements of the criminal law, which imposes strict penalty in respect of prohibited acts, and which is attended with established trial safeguards, such quasi-criminal offences as are provided for in the electoral law, too, are required to be strictly proved, as a basis for any penal consequences.

**[117 A]** That such a safeguard in respect of participation in the electoral process emerges clearly from the terms of the political rights of the Constitution, is bespoken by Article 38, thus:

> ***"(2) Every citizen has the right to free, fair and regular elections based on universal adult suffrage and the free expression of the will of the electors for—***
>
> *(a)* ***any elective public body or office established under the Constitution . . . .***
>
> ***"(3) Every adult citizen has the rights, without unreasonable restrictions—***
>
> **. . . .**

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

**[117 B]** Besides, those participating in elections have rights of recourse to the judicial process for a fair hearing, in the terms of Article 50 (1) of the Constitution:

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court . . . ."***

**[118]** It is clear that the Court of Appeal was mindful of the foregoing principles, judging from their pronouncement in the following passage:

> ***"Section 107 of the Evidence Act legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who, on one or more grounds, seeks the nullification of an election. The burden is therefore, upon the petitioner to prove his allegations; and the standard of proof in election petitions is generally to the satisfaction of the Court, higher than a balance of probabilities but not to the level of beyond reasonable doubt. See*** *Raila Odinga v. IEBC & Others* and *Joho v. Nyaga*.
>
> ***"However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see*** *Raila Odinga v. IEBC & Others and Joho v. Nyaga*

**[119]** It is, therefore, necessary to ascertain that the offences in question were duly established. Bribery is a criminal offence in general penal parlance; but besides, it is a specifically-defined electoral offence, recognised as an incident capable of disrupting the due process of the electoral law. In the case of ***Mohamed Ali Mursal v. Saudia Mohamed and Others***, Garissa Election Petition No.1 of 2013, *Mutuku J* described bribery in the context of an election petition, as follows:

> *"Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such,* ***proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition.*** *Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under Section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof…"* (emphasis supplied).

**[120]** Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved *beyond any reasonable doubt*. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged. We may draw analogy with the Supreme Court of India decision in ***M. Narayana Rao v. G. Venkata Reddy & Others,*** 1977 AIR S.C 208, in which it was thus held:

> ***". . . The charge of commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge, but not exactly in the manner of establishment of guilt in the manner of a criminal prosecution***

***giving liberty to the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both sides especially by the petitioner. . .”***

***[121]*** A similar perception was recorded by this Court in the case of ***Frederick Otieno Outa v. Jared Odoyo Okello & 4 Others*** *eKLR,* Petition No. 6 of 2014 (paragraph 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.”***

**[122]** Further, 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. This 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 persons(s) against whom such allegations are made.

**[123]** In the petition at the election Court, the petitioner made several allegations of bribery against the appellant herein. These included the allegation that the appellant gave Kshs.260,000/= to the bishops and pastors who attended a meeting at Red Cross, Kanduyi on 22nd February 2013; and the election Court held the appellant guilty of the offences of bribery and treating. Bribery and treating are among the election offences in Part VI of the Elections Act. Sections 62 and 64 of the Elections Act set out the categories of acts that amount to treating and bribery, respectively:

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

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

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

***(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provisions of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing***

***that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or***

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

***(2)— "64.(1) A candidate who—***

***(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to given 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; … commits the offence of bribery."***

**[124]** A further perspective on the offence of bribery is found in ***Halsbury's Law of England,*** 4th Ed., Vol. 15 (page 534):

***"As a general rule, due proof of a single act of bribery by or with knowledge and consent or approval of the candidate or by the candidate's agents, however, insignificant the act may be, is sufficient to invalidate the election. The Court is not at liberty to weigh its importance nor can it allow any excuse whatever the circumstances may be."***

**[125]** The election Court, after considering the allegations of electoral offences of bribery and treating thus stated (paragraph 172 of its Judgment):

> ***". . . The Court makes a finding that the 1st respondent and Hon. Alfred Khang'ati engaged in treating of voters and bribery of voters contrary to Sections 62 and 64 of the Elections Act. It also makes a finding that Hon. Khang'ati was not a party in the proceedings and was not afforded any opportunity to call evidence to show cause why he should not be reported to the DPP. The offences' were committed on 22.2.2013 at Red Cross, Kanduyi. It was established beyond reasonable doubt that the two gave a sum of Kshs.260,000 to bishops, pastors and other participants in that meeting held at Red Cross, Kanduyi. The corrupt intention of giving the money was to influence and induce voters to vote for the 1st respondent as Senator for the County of Bungoma, and the other CORD Coalition candidates in the other elective seats including Hon. Khang'ati, during the election held on 4th March, 2013. Further, the intention of the bribery and treating of voters was to influence and induce voters to refrain from voting for particular candidates or political parties during the election held on 4th March, 2013 …"***

**[126]** The learned Judges of the Court of Appeal, on their part, thus stated in their Judgment (para. 83):

> ***". . . In the upshot, for the above stated reasons, we find that both the qualitative and quantitative irregularities committed by the IEBC officials in the conduct of the Bungoma Senatorial election did not affect the integrity of result of the elections. However, as we have found, the commission by the appellant of the election***

***offences of bribery and treating, amounted to conducting the election contrary to the election law and that vitiated the election and on that ground, we dismiss this appeal with costs to the 1st respondent against the appellant and the 2nd and 3rd respondents jointly and severally."***

**[127]** We are faced, once again, with the domain of fact—in respect of which the trial Court after due hearing, arrived at certain conclusions; conclusions that subsequently, were upheld by the Appellate Court. By the ordinary course of the judicial system, that matter is at an end, and we in this apex Court should in principle adopt the conclusion upon fact, thus arrived at.

**[128]** As we have already held that election-petition proceedings are not part of the normal criminal process, it is not appropriate for the appellant to invoke the regular scheme of the criminal trial, with its strict substantive and procedural safeguards for the rights of the accused. Such rights-safeguards, it is well known, include the right to silence. That does not apply in relation to the quasi-criminal offences attached to election proceedings—for here, there will be a duty resting upon the respondent, to make requisite averments and to rebut the allegation, so the election Court may dispose of the matter comprehensively.

**[129]** That is the context in which we view the appellant's contention that since the other "accused" (Mr. Khan'gati) was not called to defend himself, the proceedings in which a finding was made against the appellant amounted to nullity. In the light of our observation in the foregoing paragraph it may or may not be the case that the other "accused" (the third party) had been involved in ordinary criminal offence, quite apart from the position under the electoral law. In order that such a possibility be appropriately dealt with, it follows that the Court of Appeal should have made a report to the Director of Public Prosecutions.

**[130]** By the foregoing reasoning, it follows that the appellant cannot avoid liability as determined by the trial Court, only because an alleged "co-accused" had not been present in the election-dispute proceedings.

**[131]** Moreover, we take judicial notice of the centrality of elections in the functioning of established governance bodies, as signalled by the Constitution in both general and specific terms. On that principle alone, a party found on fact to have befouled the electoral process, cannot maintain an argument that his or her offence may not be declared, save alongside that of other parties. Each of such offences stands to be adjudicated upon in its own time, and when the relevant party is the subject of election-dispute proceedings.

**[132]** Consequently, this Court after considering the record of fact before it and the findings of the trial Court, as appraised by the Appellate Court, ought to recognise that the appellant, indeed, had been involved in the offences in question.

### *(e) Election Offences: Penalty*

**[133]** The Constitution of Kenya 2010, and specifically Article 88(4)(e), empowers the Independent Electoral and Boundaries Commission to provide for mechanisms to settle electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results. Section 107(2) of the Elections Act further empowers the Commission to prosecute any offences under the Elections Act, and to impose sanctions against a person who commits such offences. The Elections Act contemplates the filing of election petitions, and provides for reporting of election offences; and in this respect, evidence may be taken that shows whether any person had committed an election offence in terms of Section 87 of the Elections Act. Section 87 (1) of the Act thus provides:

***"An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence".***

**[134]** The intricacies involved in the interpretation of Section 87 of the Elections Act were signalled by *Gikonyo, J* in ***Moses Wanjala Lukoye v. Benard Alfred Wekesa Sambu & 3 Others*** *[2013] eKLR* as follows (at paras. 43-44):

> *". . . Section 87 of the Elections Act may invite legal arguments. The words used in the section....."**proved at the hearing to have been guilty of an election offence'** give room for an argument that, by virtue of that Section, the election Court also sits as a trial (criminal) Court. But that argument will be oblivious of: 1) that an election proceeding is a proceeding **sui generies**; it is not a criminal proceeding; and 2) that an election proceeding is not clothed with the staple criminal protections available in a criminal proceeding. This Court is aware of the requirement under Section 87(1) of the Elections Act, that the person cited in the petition for allegedly having committed electoral criminal offences should be afforded **an opportunity to be heard and to give and call evidence to show why he should not be reported.** However, that requirement alone is not a sufficient protection, as is provided in a real criminal trial. That is not the end of the discourse. More trouble is found in [the] imagination that the words in Section 87(1) of the Elections Act assign the decision of the election Court the vitality of a finding of guilty, as in a criminal trial. If that thinking prevails, the*

*requirement to make a report to the DPP does not make any sense in law. Yet another critical matter: the person so found to have committed an offence may rightly raise a defence of double jeopardy, in the subsequent criminal prosecution by the DPP.*

*"That is not all. Conceptually, the subordinate Court before which the person will be being prosecuted for an offence based on a finding by the High Court under Section 87(1) of the Elections Act, will not [fail] to ponder at least two things: 1) that the matter had been proved before a higher Court; and 2) that proof was on a standard of 'beyond any reasonable doubt', that the person* ***had been guilty of an election offence.*** *Take for instance a practical example in* Kimilli PMCCRC No. 365 of 2013 ***R v. Patrick Wanjala Siketi*** *where an IEBC official was arrested and charged with an election offence which is also an issue before the election Court. The two proceedings—the petition and the criminal trial—are proceeding contemporaneously. Questions abound which I suppose should re-ignite a critical rethink on the way the Section should be couched, in a manner that reconciles all these concerns.* ***My own view is, however, that the finding by the election Court should be understood as a finding within a petition for purposes of a decision in that petition. Which in turn means: the record of the petition and the report to the DPP on commission of election offences, become sources of information which may found a criminal investigation,or prosecution of the person concerned. That way, any legal contradiction, in or objection to the Section may be avoided.*** *Invariably, a legislative recast of the words '...****proved to have been... guilty of an election offence'*** *may be necessary. At the moment, Courts of law are experienced in dealing with such statutory situations by*

*assigning an interpretation that cures the mischief, removes any serious legal objection and gives effect to the intention of Parliament"* [emphases original].

**[135]** There is an apparent difficulty in the interpretation of Section 87(1) of the Elections Act. As the Court observed in ***Moses Wanjala Lukoye v. Benard Afred Sambu***, there appears to be different interpretations to this Section. After considering the merits of such positions, we have come to the position that the nature of the relevant proceedings should be borne in mind: proceedings in an election petition. In such proceedings, what is at stake is the sanctity of a people's expression of their sovereign will. Consequently, all the findings seek in the first place, to establish whether the election was uncompromised by mischief or corrupt action. Election offences have the tendency to undermine the popular will that is the foundation of the governance system declared in the Constitution. The Court, as guardian of the solemn rights of that charter, is duty-bound to set its face firmly against any violation of the Constitution. Within the framework of the electoral law, the proper course of action has been prescribed; but as regards the operation of the ordinary criminal law, it falls to the Director of Public Prosecutions to move the Courts appropriately.

**[136]** The Elections Act, indeed, recognises that an election offence has the trappings of a crime at large, and stands to be further prosecuted within the realm of the general criminal law; hence the provision of Section 87(1) of the Act, that *in addition to any other Orders*, a report has to be sent to the Director of Public Prosecutions, who will then act within the criminal law process. The reference to the DPP, apparently, is by no means compromised by a principle such as double jeopardy. Double jeopardy as a principle, while it has a proper place in criminal law, is inapposite in the domain of election petitions, which are the subject of detailed statute law. Hence a finding by an election Court cannot be subsequently

raised as a shield, when a party has to answer to criminal charges in the ordinary sense.

**[137]** Section 83 of the Elections Act empowers the election Court to declare an election to be valid or invalid, following an election petition, on the basis of certain conditions. The Court cannot appear to condone illegality in the election process, and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial. The office of Director of Public Prosecutions becomes relevant, insofar as evidence of general offence may emerge in election petition proceedings; and the Court then has the duty to forward this for further investigations, and possible criminal charges. The election Court, thus, affords the criminal-prosecution office a special opportunity to take up the relevant matter for possible criminal trial.

**[138]** The election Court's contribution in that regard is that it is a source of relevant information for a possible criminal trial; but whether or not such trial takes place, falls to the prosecutorial discretion of the Director of Public Prosecutions.

**[139]** Such a scenario by no means turns the election Court into a criminal Court; and hence does not amount to a subjection of the affected party to "double jeopardy", in the manner suggested by the appellant herein.

**[140]** The law regarding "double jeopardy" is founded on the signals of Article 50(1) of the Constitution, which relates to fair hearing, and thus stipulates:

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public***

***hearing before a Court or, if appropriate, another independent and impartial tribunal or body".***

**[141]** The Constitution has a more specific provision in Article 50(2) (0):

> ***"[Every accused person has the right to a fair trial, which includes the right—]***
>
> > ***not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted ..."***

**[142]** The foregoing provision captures the well-established safeguard-concept for an accused person, "*autrefois convict*, *autrefois acquit*", which is embodied in Section 138 of the Criminal Procedure Code (Cap.75, Laws of Kenya):

> ***"A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."***

**[143]** In that context it is clear that the earlier proceedings, to be of relevance in subsequent trial, are to have taken place before a Court or judicial tribunal —not just administrative or civil proceedings. Now such proceedings in this instance are *election proceedings* —which are of a *sui generis* nature; such proceedings, in our perception, do not fall in the category of "trial for an offence" and so would not attract the defence of "double jeopardy". The appellant, we believe, is not able to demonstrate that the proceedings before the election Court led to either a conviction or an acquittal.

**[144]** From our perception as indicated above, it follows that "notice of charges", as it applies in criminal-trial safeguards, need not be replicated in a *sui generis* cause such as an election dispute. For offences cited before an election Court, the nature and extent of required notice, therefore, will be dependent on the facts and circumstances of each case.

**[145]** Where allegations of an electoral offence are made before an election Court, and the same go to the root of the petition, it is to be perceived that the respondent has sufficient notice that there will be proof of the offence; and as the respondent is fully aware of the complaint, the relevant sanctions will be applicable if he or she is found culpable. Such sanctions are set out under Section 67(1) of the Elections Act, 2011: "a fine not exceeding one million shillings or . . . imprisonment for a term not exceeding six years or . . . both, and in any other case, . .a fine not exceeding five hundred thousand shillings or . . . imprisonment for a term not exceeding five years or . . . both."

**[146]** On the basis of the foregoing provision, an election Court would quite properly proceed and subject a party found culpable, to the specified sanctions. But it should be clear that even though the election Court has the competence to deal with such offence of criminal character, the trial process itself is not "criminal", and remains one of its own kind. The offences are acted upon within the parameters of the election law, rather than of the Criminal Procedure Code or the Penal Code (Cap.63, Laws of Kenya). Penalty against the person found culpable, in this regard, is for befouling the solemn electoral expression of the people.

**[147]** Another distinguishing factor between the trial of electoral offence, and that of the ordinary criminal offence with its special safeguards, is that the latter requires proof beyond any reasonable doubt, in the context of prescribed safeguards for the accused; whereas the former, though requiring strict proof, does

not run alongside such protective arrangements: all that is required is that the Court be convinced that proof has been effected beyond doubt. *The penalties in respect of election offences are also of a special character, being contingent on actions by the Independent Electoral and Boundaries Commission—disqualifying the culprit from participation in elections (the Elections Act, 2012, Section 72(1)). And the precise remedy deliverable by the Court itself is annulment of the election in question.*

**[148]** It stands to reason, therefore, in the scheme of legislation, that the election Court may send a report to the Director of Public prosecutions to initiate substantive criminal trial in respect of a culpability that originates from election proceedings. So the penalty meted out at the election Court is to be regarded as confined to the wrong of undermining the electoral voice of the citizens.

**[149]** It follows that the finding of the appellant as culpable for election offences, by the election Court, and confirmed by the Court of Appeal, cannot be said to have violated his rights under the Constitution.

### *(f) Election Court's Functions: Scope for Delegation to Deputy Registrar*

**[150]** The appellant objected to the action taken by the election Court, in delegating the task of conducting inquiry to its Deputy Registrar who, it was claimed, lacked jurisdiction. On this question, the Appellate Court thus held:

> ***"After considering the issue, we hold that there is nothing wrong with the election Court directing the Deputy Registrar or any officer of the Court to carry out an inquiry, scrutiny or recount. As long as that is carried out in the presence of the parties'***

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

**[151]** We are in agreement with the Appellate Court. The appellant had urged that delegation of the powers for scrutiny and re-count, by itself, is entirely proper; but that when the Deputy Registrar engages in an inquiry, then he or she lacks jurisdiction.We have examined the nature of the inquiry that the Deputy Registrar was to undertake, and we find it not be inconsistent with the judicial function of the Court. It is not an alien practice for a trial Court to direct the Deputy Registrar, who is part of the senior administrative personnel of the Court, to assist in gathering evidence. This Court in the ***Raila case***, *suo motu,* ordered the Registrar of the Court to carry out a scrutiny of Forms 34 used in the Presidential votes-count from different polling stations in the country. The scrutiny was for the purpose for getting a sampling on registered voters, valid votes cast, and rejected votes.

## VI. THE CONCURRING OPINION OF RAWAL, DCJ &VP

**[152]** I concur with the decision and consequential Orders of the Court as outlined in the majority opinion, but write separately to highlight certain pertinent issues of law emerging from this appeal. This opinion will address the question of

jurisdiction, and the importance of the election certificate in Form 38 in relation to proof of delay in filing an election petition. It will also consider the interpretation of Section 24 of the Elections Act, as read with Article 99 of the Constitution, and the disqualification of a candidate from the electoral process. Lastly, it will consider the nature of electoral offences, and the role of the Court and other agencies of governance such as the Office of the Director of Public Prosecutions in enforcing Part VI of the Elections Act, i.e. provisions relating to election offences.

**[153]** It was urged that the petition at the High Court was filed 33 days after the declaration of the election results, rather than the 28-day period specified in Article 87(2) of the Constitution. Although this averment was made, it was not properly supported by evidence, either at the High Court or at the Court of Appeal. In the ***Joho*** case, this Court had considered the whole set of forms issued by the Electoral Commission, and had ascertained what constitutes a declaration of election results. The Court thus held (at paragraph 72):

> "*Declaration' takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County returning centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The* ***finality of the set of stages of declaration*** *is depicted in the* ***issuance of the certificate in Form 38 to the winner of the election***. *This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.*"

**[154]** Form 38 was the deciding factor in the ***Joho***, ***Mary Wambui***, ***Aramat*** and ***Lisamula*** cases (as indicated in the Judgment of the Court). As such, any

allegation of delay ought to have been considered and determined using Form 38. In the absence of this Form on record, this Court has insufficient factual and evidential material, as a basis for ascertaining jurisdiction. The principles laid out by this Court in the ***Joho*** case ought to guide the lower Courts in determining the question of the validity of an election petition. The trial Court ought to ensure that critical items of evidence, such as Form 38, are placed before it, properly evaluated, and the relevant determination made. The Independent Electoral and Boundaries Commission should also produce a copy of Form 38, where a dispute regarding the filing of the petition arises. This duty is linked to the Commission's constitutional obligation under Article 88(4) of the Constitution, to conduct and supervise elections for any elective body or office established by the Constitution.

**[155]** There were several allegations of bribery and treating made and considered in this matter. The appellant contested the Court of Appeal's finding that directed automatic disqualification by the Commission for a candidate found guilty of an election offence, from contesting in the next election. This, in the submission of counsel, would present undue and unreasonable limitations to the political rights enshrined in Article 38 of the Constitution. The submission by the 2nd and 3rd respondents' counsel was that disqualification of a person from the electoral process, upon a finding of guilt, could only be made pursuant to Articles 99(2) (g) and (h), 99(3) of the Constitution, and Section 24 of the Elections Act, and could only be effected after the completion of an appellate process (on the charge in question), and not before. The provisions of Article 99 and Section 24 (specifically of Article 99(2) (g) and 99 (2) (h)) are incapable of a complex interpretation process and, in my view, clearly appear to govern the process of disqualification at the time of nomination, and of registration as a candidate for the election. *They affect the nomination of persons, and the clearance of those persons by the electoral Commission to contest the seat for Member of Parliament*. Article 99 and Section 24 thus cover pre-existing (at the time of registration) and supervening (at the time of the election) grounds for disqualification.

**[156]** A determination by the Court, activating any of the disqualification-conditions, is to be viewed in the broad constitutional-electoral scheme. While it has been urged that every person has the right to contest in an election, in the terms of Article 38 of the Constitution, this right is not unlimited. Justifiable and reasonable limitations, such as those set out under Articles 24 and 99 of the Constitution, are clearly applicable.

**[157]** Several other issues emerged from this case, such as: *what is the essential character of proceedings in an election Court? what is the nature of the electoral code? how are election offences to be tried, heard and determined?* It is now an indelible principle of law that the proceedings before an election Court are *sui generis*. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute (the Elections Act). As such, while determining an election matter, a Court acts only within the terms of the statute, as guided by the Constitution. This approach is in keeping with the stand taken by the Supreme Court of India in ***Jyoti Basu & Others v. Debi Ghosal & Others*** *1982 AIR 983*:

> ***"An Election petition is not an action at Common Law, nor in Equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to election law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the***

***statute lays down. In the trial of election disputes, the Court is put in a straight jacket."***

**[158]** Befitting the description of the Election Act as a complete code, Part VI of this statute sets out the election offences. Section 62 lays out the offence of treating, specific to "*a candidate*." Section 64 on the other hand lays out the ingredients for the offence of bribery, also specific to "*candidates*". While these two Sections define the ingredients of the cognizable offences of treating and bribery, Section 67 prescribes the sentences for those offences. Sections 62 and 64 need to be read together with Section 67, in order to complete the components of the offences. The specific mention of *"candidate"* in Sections 62 and 64, in my opinion, has a direct bearing on the provisions of Section 87 of the Elections Act, which stipulates under what circumstances, after determination of the election petition, the Court shall make a report to the Director of Public Prosecutions, the Electoral Commission, and the relevant Speaker of the Parliamentary Chamber.

**[159]** Section 87(1) of the Act provides that upon the conclusion of an election petition, the Court is required to take certain actions, namely:

> ***"An election court shall, at the conclusion of the hearing of a petition,*** *in addition to any other orders****, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by*** *any person* ***in connection with the election, and the names and descriptions of the persons, if any,*** *who have been <u>proved</u> at the hearing to have been <u>guilty</u> of an election offence* [emphasis added].

**[160]** Article 50(2) of the Constitution safeguards the right to fair trial. Article 25 (c) provides that the right to a fair trial *shall not* be limited. Section 77 of the

repealed Constitution (of 1969) codified this right, but it was subject to limitations. Based on the centrality of this right to our criminal justice system, Article 50(2) was enacted to afford every accused person, this non-derogable right. Although the principle of fair trial is a common thread in any judicial process, it bears certain essentials when the matter in question is one of a criminal nature. It bears emphasis that the electoral dispute resolution process is fundamentally distinct from criminal trial. While the proceedings before an election Court are *sui generis* (neither criminal nor civil), criminal proceedings require the observance of certain pre-trial processes within certain institutions of the State, such as the police, and the Director of Public Prosecutions.

**[161]** More importantly, the inquiry into the criminal conduct of an elected candidate transcends the interest of the accuser/petitioner, and bears upon that of the entire electorate. Part VI of the Elections Act (specifically, Sections 56, 57, 58, 59, 60, 65, 66 and 67) deals with election offences, and stipulates the sentences, in case of culpability. The finding of conviction or acquittal on any of the charges specified in these Sections, ought to be made within the framework of criminal procedure, in order to meet the strict requirements of fair trial, as stipulated in the Constitution.

**[162]** While the Elections Act creates election offences, and prescribes punishment upon a finding of guilt, it neither delineates the trial forums, nor prescribes the procedure to be followed when the report is handed over to the Director of Public Prosecutions. An accused person ought not to be subjected to double jeopardy. Section 87(1) is unclear, insofar as it signals the possibility of a re-trial, within the criminal process. *This ambiguity ought to be clarified through legislation.*

**[163]** An election Court may however make a finding, after a careful evaluation of the evidence, that an election offence has been committed. The burden and

standard of proof in this instance (election offences) is now well established by this Court [See the ***Raila Odinga*** *(para 203)* and ***Outa*** cases]. Once this is established within the mechanisms of an election Court, which are not equivalent to those of a criminal trial, the inevitable remedy by the Court is the nullification of the election in question, and the handing-over of a report to the Office of the Director of Public Prosecutions for any further action.

**[164]** The learned Judge *(Gikonyo, J)* in the case of ***Moses Wanjala Lukoye v Bernard Alfred Wekesa Sabu And 3 Others*** *(2013) eKLR* rightly depicted the apparent clutter in the electoral laws, in attempting to interpret and implement Part VI of the Elections Act, and Section 87(1) thereof. Apparently till now, by sheer ingenuity of interpretation, the Courts have endeavoured to circumvent the apparent contradictions in the said provisions; but this is not sustainable – the subject being a vital component of our democracy, namely elections. The law should be simple, clear, concise and comprehensible. When ambiguities in the law are likely to compromise the rights and liberties of the people, such ambiguities ought to be remedied.

**[165]** The Constitution, and the Supreme Court Act, 2011 charge this Court with the task of developing an indigenous jurisprudence, and declaring the law with clarity. The legislature bears an equal obligation. From the majority opinion, the complexity of the process of hearing and determining cases of electoral offences is all apparent. It is my view that the Legislature should reconsider Section 87 of the Elections Act, and clearly delineate the manner in which the office of Director of Public Prosecutions acts on the report by the Court giving the name and details of persons found guilty of electoral offence(s).

**[166]** I am aware that other countries with elaborate Constitutions such as ours have undertaken legislative action to remedy complexities and ambiguities in the electoral law. India for instance, undertook legislative action to simplify the

classification of election offences such as *'corrupt practices.'* In addition, certain offences such as bribery and undue influence were incorporated into the Indian Penal Code (Chapter IXA-Offences Relating to Elections). The Indian Penal Code classifies the offence of bribery as non-cognizable, bailable and triable by Magistrate of the first class. As is the practice in India, Parliament should classify the various electoral and criminal offences, the resultant convictions, and how such convictions affect the status of a person in contesting an elective post. Parliament should also revise the Penal Code to incorporate offences relating to elections and which ought to be tried in a criminal Court.

**[167]** It is my considered view that there is a serious gap in legislation, and I recommend that the office of the Hon. Attorney General, and the Kenya Law Reform Commission should consider and attend to this matter with the expedition it deserves. Part VI of the Elections Act and the Penal Code should be reconsidered and re-formulated, adopting best practices from other jurisdictions such as India, so as to ensure the creation of a seamless process in the electoral and penal laws.

## VII. DETERMINATION

**[168]** The design and the terms of this majority opinion are in accord with the particularised content of the concurring opinion of *Rawal, DCJ & V-P,* and the two opinions interlock, in particular, on the detail and deduction amplified in paragraphs 154, 156,159,160,161 and 163 of the concurring opinion.

**[169]** Our Orders flow from the treatment of the cause as rendered in this Judgment, and from the logical inferences and deductions that we have set out. The Court's Orders proceed on the basis of the Supreme Court Act, 2011 (Act No.7

of 2011), Section 3, and the applicable Rules, in particular Rule 3(5) of the Supreme Court Rules, 2012 which thus provides:

> ***"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

**[170]** The Orders are as follows:

***(1) The contest to the election Court's jurisdiction in Bungoma High Court Election Petition No.3 of 2013 is disallowed.***

***(2) The finding of the Court of Appeal in Kisumu Civil Appeal No. 43 of 2013, as regards the commission of an electoral offence, is upheld.***

***(3) The finding of the Court of Appeal in Kisumu Civil Appeal No. 43 of 2013 as regards disqualification of the appellant as an election candidate is hereby quashed.***

***(4) In accordance with Section 87(1) of the Elections Act, 2011 (Act No.24 of 2011) [Rev. 2012], the Registrar of the Supreme Court, by proper form, shall serve a report of the commission of the election offence of bribery by the appellant herein, upon the Director of Public Prosecutions; the Independent Electoral and Boundaries Commission; and the Speaker of the Senate.***

***(5) The apportionment of costs by the Court of Appeal is upheld.***

***(6) As regards costs before this Court, the parties shall bear their own respective costs.***

***(7) This Judgment shall be brought to the attention of the Attorney-General, the Kenya Law Reform Commission, and the Speakers of the two Chambers of Parliament, for information, and to the intent that re-formulated legislation be considered, delimiting the respective mandates of the election Court and the ordinary criminal Court, with due attention paid to the issues of jurisdiction for the different Courts adjudicating upon the two sets of matters.***

**DATED** and **DELIVERED** at **NAIROBI** this 17th day of March, 2015.

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| W.M. MUTUNGA<br>CHIEF JUSTICE & PRESIDENT<br>OF THE SUPREME COURT | K.H. RAWAL<br>DEPUTY CHIEF JUSTICE &<br>VICE-PRESIDENT OF THE<br>SUPREME COURT |
| ..... | ..... |
| P.K. TUNOI<br>JUSTICE OF THE SUPREME<br>COURT | M.K. IBRAHIM<br>JUSTICE OF THE SUPREME<br>COURT |

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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

**DEPUTY REGISTRAR**
**SUPREME COURT OF KENYA**