REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: M.W. Mutunga, C.J. & President; K.H. Rawal, DCJ & V-P; Tunoi, Ojwang, and Njoki, SC.JJ.)

PETITION NO. 23 OF 2014

–BETWEEN–

NICHOLAS KIPTOO ARAP KORIR SALAT.....APPELLANT

–AND–

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. WILFRED ROTICH LESAN

3. ROBERT SIOLEI
RETURNING OFFICER, BOMET COUNTY

4. KENNEDY ONCHAYO
5. WILFRED WAINAINA
6. PATRICK WANYAMA
7. MARK MANZO
8. ABDIKADIR SHIEKH

.....RESPONDENTS

(Being an Appeal from the Judgment and Orders of the Court of Appeal (Kairu and M'Inoti, JJ.A.; Kiage, JA dissenting) in Nairobi Civil Appeal No. 228 of 2013 delivered on 28th February, 2014)

JUDGMENT

A. BACKGROUND

[1] The appellant was a contestant for the position of Senator, Bomet County, during the general elections of March, 2013 in which the 2nd respondent was declared the duly elected Senator, by the 1st respondent. The appellant thereafter

filed a petition contesting the declaration of the 2nd respondent as the duly elected Senator (Kericho High Court Election Petition No. 1 of 2013). He sought Orders as follows:

(i) a recount and scrutiny of all votes cast in the Senatorial elections in Bomet County;

(ii) a declaration that the 2nd respondent had not been validly elected as Senator;

(iii) a declaration that the appellant had been duly elected as Senator, and an Order directing the 1st respondent to issue him with a certificate to that effect, and thereafter issue a *Gazette* notice accordingly;

(iv) the 2nd respondent be disqualified from participating in any elections conducted pursuant to the Elections Act, 2011 (Act No. 24 of 2011), for a period of five years, on grounds of electoral malpractices; and

(v) costs of the petition.

[2] During the pre-trial conference held on 4th June, 2013, the parties agreed on a set of issues for determination by the High Court. One of these was: whether a sufficient basis had been laid to support an Order for scrutiny and/or recount – and for which polling and/or tallying stations? Notwithstanding that this point was agreed, the appellant filed a formal application for scrutiny and recount

(dated 24th June, 2013), seeking that the same be effected in all the polling stations in Bomet County; and in the alternative, a partial scrutiny and recount be conducted in respect of certain polling stations in Bomet Central, Sotik, Konoin, Chepalungu, and Bomet East constituencies.

[3] This application was limited to the elements cited in Rule 33(4) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, namely: an examination of written statements made by the presiding officers under the provisions of the Act; copy of the register used during the elections; copies of the results of each polling station in which the results of the election are in dispute; written complaints of the candidates and their representatives; packets of spoilt papers; marked copy register; packets of counterfoils of used ballot papers; packets of counted ballot papers; packets of rejected ballot papers; and, statements showing the number of rejected ballot papers.

[4] The application was based on the grounds that: voter turn-out had been inflated in favour of the 2nd respondent at certain polling stations; the respondents had fraudulently manipulated documents to conceal irregularities and electoral malpractices; the 1st respondent did not conduct the election in an impartial, neutral, efficient, accurate and accountable manner; there were manifest variations in the results announced and declared in terms of documentation and records, in certain polling stations. The appellant urged that

unless Orders for scrutiny and recount were granted, he would suffer irreparable loss and damage.

[5] The High Court (*Muchelule, J*), in a Ruling delivered on 10th July, 2013, observed that Section 82(1) of the Elections Act gave the Election Court the power to conduct scrutiny, with clear objectives as spelt out under Rule 33 of the Election Petition Rules, 2013. The Court took the position that the appellant had to establish a sufficient basis to justify scrutiny and recount, under Rule 33(2). In this respect, the Court held that the standard in establishing 'sufficient basis' for scrutiny and recount, was much lower than that required to prove the allegations in the petition. The Court considered the margin of vote-count between the appellant and the 2nd respondent (17,895 votes), and observed that the difference negated the possibility of a "sufficient basis" in law, to call for scrutiny and recount. The Court held that, despite making allegations of bribery, the appellant had not satisfied the standard of proof required as a basis for an Order of scrutiny, or for the exclusion of the alleged tainted votes from the final tally. In consequence, the application for scrutiny and recount was disallowed.

[6] Having settled the issue of scrutiny and recount, the Court considered other issues: whether election malpractices, irregularities or offences were committed during the election, and by whom; whether any such malpractices, irregularities or electoral offences substantially affected he outcome of the final results;

whether the 2nd respondent was validly elected as the Senator for Bomet County; whether the appellant won the elections; and the issue of costs. The High Court gave its Judgment on 19th August, 2013 dismissing the petition with costs to the respondents.

[7] Aggrieved by that decision, the appellant filed an appeal at the Court of Appeal (Nairobi Civil Appeal No. 228 of 2013), alleging that the trial Court erred, by: considering the margin of votes in determining the petition; failing to determine various discrepancies in the statutory Forms 35 and 36; allowing incomplete tallies in some of the polling stations; failing to consider the evidence provided by the appellant in his further affidavit filed on 24th May, 2013; declining to consider the report of the Deputy Registrar; declining to grant Orders of scrutiny and recount of votes; and finally, upholding the election of the 2nd respondent as the Senator for Bomet County.

[8] In a Judgment delivered on 28th February, 2014 the Court of Appeal upheld the decision of the High Court, dismissing the appeal with costs to the respondents. This decision further aggrieved the appellant, and so he lodged the instant appeal before this Court. He moved first by virtue of Article 163(4)(b) of the Constitution (Civil Application Sup. Ct. No. 5 of 2014 (UR 2014)), seeking a certification in the Appellate Court, that his case involved "matters of general public importance", and therefore appealable to the Supreme Court. On 9th April, 2014, the day set for hearing, and following recusal by one of the Justices

of Appeal, the Appellate Court took the matter out of the hearing list, and asked counsel for the appellant to consider making the application for leave directly before this Court.

[9] On 24th April, 2014, the appellant filed in this Court an application seeking extension of time to file an appeal outside the 30-day period prescribed by the Supreme Court Act, 2011 (Act No. 7 of 2011). In a Ruling delivered on 4th July, 2014, this Court (*Ibrahim, Wanjala, SCJJ*) granted the application, and allowed the appellant to file the appeal within 14 days of the date of the Ruling.

[10] The appeal rested on the ground that: the Appellate Court erred in its application of Articles 38, 81 and 86 of the Constitution, by concluding that the irregularities during the tallying, collation and announcement of the election results were as a consequence of human error and fatigue – elements that had not materially affected the results of the election. The appellant had contended that his rights under Articles 25(c), 27(1) and 50(1) of the Constitution were infringed by the trial and Appellate Courts, specifically by failing to issue Orders of scrutiny and recount of votes in terms of Articles 81 and 86 of the Constitution. On that basis, the appellant sought relief as follows:

> (i) that the entire Judgment and Orders of the Court of Appeal be set aside, and the appeal allowed;

(ii) that as a consequence of prayer (i) above, a declaration be made that the 2nd respondent was not validly elected as Senator for Bomet County; and

(iii) costs of the proceedings before this Court, the Court of Appeal and the High Court be ordered accordingly.

B. SUBMISSIONS FOR THE PARTIES

[11] Learned counsel, Mr. Mwenesi together with learned counsel, Mr. Koceyo appeared for the appellant; learned counsel, Mr. Yego appeared for the 1st, 3rd, 4th, 5th, 6th, 7th & 8th respondents; and learned counsel, Mr. Lilan together with learned counsel, Mr. Langat appeared for the 2nd respondent.

(i) Appellant

[12] Counsel submitted that there had been substantial irregularities, and material alterations in the posting of votes, evidenced by Forms 35 and 36. He contended that the trial Judge erred in dismissing the application for recount and scrutiny. Counsel depicted as the crux of the appeal the issues set out at the Appellate Court by *Kairu, JA* (para.36):

> ***"...I think the central question is whether the election Court erred in declining to order scrutiny and recount of votes. Collateral to that are the issues whether the appellant established that the election was fraught with material***

irregularities that adversely affected the outcome of the election and whether the election substantially complied with the Constitution, election laws and regulations."

[13] Counsel submitted that even though the respondents had contended that the appeal was incompetent, for lack of a notice of appeal following the Ruling on the question of scrutiny and recount, this element had not been an issue before the Appellate Court, and could not now be raised before the Supreme Court. In the alternative, counsel urged, there were past decisions which allowed the canvassing of appeals arising out of interlocutory Rulings in election cases, in the course of the main appeal.

[14] Learned counsel submitted that the appellant's case provided an opportunity to expand the principles of scrutiny and recount, already laid out by this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** S.C. Petition No. 2B of 2014; [2014] eKLR. He asked this Court to expound on the import of Section 82(1) of the Elections Act, and Rule 33 of the Election Petition Rules, in view of the High Court's determination on scrutiny and recount, thus:

"***It follows that the purpose of scrutiny is to identify votes by people who were ineligible to vote, and those who were eligible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number. This is my understanding of Section 82(2) of the Act***

and Rule 77(1) [sic] of the General Rules. A petitioner seeking scrutiny must, therefore, bring himself within section 82(2) or Rule 77 [sic] or both. He should in the application, identify, for purpose of exclusion, votes by people who were not eligible to vote or votes which were included in the count but which the presiding officer should have rejected."

[15] Counsel's argument was that the *ratio* of the High Court decision was contrary to the principles set by this Court in the ***Munya*** case, because an unnecessary burden of scrutinising relevant documents before seeking Orders for scrutiny, was placed upon the appellant. He further urged that both the trial Court and the Appellate Court had placed too heavy a burden upon the appellant, to show that the disputed issues would materially affect the election outcome, and to his detriment. He urged that the trial Judge had erred in his application of Section 82(1) of the Elections Act, and Regulation 77 of the Election (General) Regulations, 2012.

[16] Learned counsel urged that in light of Section 82(2) of the Elections Act, as well as this Court's guiding principles in the ***Munya*** case, the appellant, at the petition stage, had provided *sufficient reasons* to warrant an Order for scrutiny and recount – for he had outlined the disputed polling stations in the petition and the accompanying affidavits; and he had specified his reasons for disputing the said election results. Counsel submitted that the 1st respondent had not availed the statutory forms used in the election, at the beginning, to allow the

appellant to conduct a proper analysis, and that it became necessary to obtain the Court's directions, after which the appellant filed a further affidavit detailing the disputed polling stations.

[17] Counsel contested the majority decision of the Appellate Court declining to interfere with the discretion of the High Court. He submitted that the High Court and the Appellate Court did not consider Rule 33 of the Election Petition Rules, in making their determinations. It was urged that the appellant had duly complied with the provisions of Rule 33 of the Election Petition Rules, by providing details of the disputed polling stations; but that the trial and appellate Courts had not evaluated the appellant's evidence in the context of Rule 33. In the circumstances, counsel urged that the appellant's rights under Article 50 (1) of the Constitution had been compromised.

[18] It was submitted that the oral and documentary evidence given in Court had satisfied the required standard of proof, so as to warrant the nullification of the election; and that the transposition errors had affected the declared results, giving a clear basis for the Court to order scrutiny and recount.

[19] Counsel submitted that the trial Judge had improperly considered the margin of votes between the appellant and the 1st respondent in arriving at his conclusion, urging that the margin of votes was by no means a measure of the free expression of the electoral voice; and that the trial Judge's approach to

'margin of votes' between the appellant and the 1st respondent, suggested that it was the prime consideration in determining an election petition. He urged that the trial Court had negated the principle that an election is a "process", and not an "event". Counsel submitted that the trial Judge ought to have considered the reported discrepancies in the tallying process. He urged that neither the trial Court nor the Appellate Court had made a determination on the admissions by the 4th and 5th respondents, with respect to inaccurate tallying, and to the existence of multiple statutory Forms 35 and 36. Counsel urged that, in view of such disparities, the trial Judge was in error in not permitting scrutiny and recount.

[20] Counsel submitted that the disputed polling stations had been outlined concisely in a further affidavit filed with leave of the Court, granted on 6th May, 2013; and that the trial Court and the Appellate Court were bound by law to make findings on that affidavit, as the appellant had even been cross-examined upon it.

[21] Counsel urged that the evidence from the 5th respondent contradicted that presented in Court, in view of the directions for discovery. He submitted that statutory Forms other than those signed on the day of the election, had been produced in evidence; and that such inconsistency ought to have been reflected in the Court's decision, in relation to scrutiny and recount.

[22] Counsel submitted that the declared votes at the Olbutyo Secondary School polling station, in Chepalungu Constituency, were exaggerated in favour of the 2nd respondent, and that the total number of votes cast exceeded the number of registered voters. According to counsel, the incidents at the tallying centre were of questionable standing, because the 4th respondent, who was the Constituency Returning Officer, disappeared after announcing a vote-count that exceeded the number of registered voters; and he then reappeared after six hours, at the offices of the 3rd respondent, and with fresh results.

[23] Counsel submitted that the elections did not meet the threshold laid out in the Constitution, the Elections Act and the Regulations thereunder; and that the changes to vote-tally substantially and materially affected the outcome of the elections. He asked the Court to sustain the line of jurisprudence emerging from the ***Munya*** case, with regard to scrutiny and recount; set aside the Orders of the High Court and the Appellate Court; nullify the Bomet County Senate elections; and grant him costs of litigation.

(ii) 1st, 3rd, 4th, 5th, 6th, 7th and 8th Respondents

[24] Learned counsel Mr. Yego, for the respondents, underlined five issues falling for this Court's determination: whether this appeal was competent; whether the Appellate Court properly interpreted the relevant provisions of the Constitution, the Elections Act and other laws governing the conduct of the

election; whether the Appellate Court improperly applied the relevant law to the evidence on record; whether the Appellate Court made erroneous conclusions of fact; and who shall bear the costs of this appeal.

[25] Counsel submitted that this appeal was incompetent, as the appellant filed an originating petition pursuant to Section 12 of the Supreme Court Act, rather than a petition of appeal. He urged that the appeal should have been instituted pursuant to the provisions of Rule 33 of the Supreme Court Rules, 2012; and that the petition was irregular, and meriting striking-out, because it purported to invoke this Court's original jurisdiction.

[26] Counsel submitted that the Judges of Appeal properly interpreted and applied the law relating to elections, and that their conclusion was based on the evidence on record. Counsel urged that in light of this Court's decision in the ***Munya*** case, the trial Court is vested with a discretion to issue Orders of scrutiny or recount: the terms being that, in exercising this discretion, the Court is to be furnished with sufficient reasons in the context of pleadings or evidence or both. Counsel submitted that the right to scrutiny and recount did not lie as a matter of course, because the party claiming it was required to establish a basis for the claim, and to the satisfaction of the trial Court – such a basis being established by way of pleadings, depositions, or by way of evidence adduced at the hearing of the petition. Counsel submitted that specificity in the request for

scrutiny and recount was vital, and a prayer for scrutiny and recount failing this test, was not to be entertained.

[27] Counsel submitted that this Court in the ***Munya*** case, had held that there was no inconsistency between Rule 33 (1) of the Election Petition Rules and Section 82 (1) of the Elections Act; and that an Order for scrutiny and recount was discretionary, and this Court could not substitute the trial Court's exercise of discretion with its own. Counsel submitted that the purpose of scrutiny and recount is not to determine who actually won the election, but to appraise the validity and integrity of the election. Counsel submitted that an application for scrutiny and recount ought to be premised upon disputed results, or an impugned electoral process.

[28] Counsel submitted that the majority decision of the Court of Appeal could not be faulted, as the learned Judges made proper conclusions of fact and law, based on the evidence on record. Counsel complimented the Appellate Court's reluctance to interfere with the discretion of the trial Judge, on the grounds that the appellant had not proved that the perceived errors and discrepancies went beyond simple administrative shortcomings. In the words of the Appellate Court Judges:

> ***"Having regard to the number of polling stations complained of, the total number of votes complained of by the appellant, the nature of the complaints, the***

margin of votes separating the 2nd respondent from the appellant, I like the trial Judge, [am] not satisfied that the errors are such as would have an impact on the final results as tallied and announced. In my view the appellant failed to lay [a] sufficient basis for the Court to order for scrutiny and recount and the trial Court rightly rejected the prayers for orders of scrutiny and recount and cannot be faulted for doing so."

[29] The respondents submitted that the tallying errors had been skewed against the 2nd respondent and, in fact, had prejudiced his lead over the appellant – by reducing the margin of votes from over 18,000 to 17,895 votes. Counsel urged that such prejudice notwithstanding, the errors in question were minor, insignificant, honest, and not premeditated. He submitted that the evidence adduced showed that all the tallying errors were adjusted before the final tally.

[30] Counsel submitted that the evidence on record confirmed that there was no dispute in respect of the results from Bomet East, Konoin, and Bomet Central; and the complaints only related to Chepalungu and Sotik Constituencies, and such tallying errors had been duly adjusted by the County Returning Officer before announcing the results. He further submitted that in Chepalungu Constituency, such discrepancies were recorded in only five polling stations. It was submitted that the tallying errors had affected all candidates equally.

[31] It was submitted that the Appellate Judges were right in holding that the electoral allegations and complaints had been accorded due attention by the trial Judge. Counsel relied on the decision of this Court in ***Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission & 3 Others,*** Sup Ct. Petition No. 5 of 2013, urging that a petitioner seeking to nullify an election had a duty to clearly and decisively demonstrate that the conduct of the election was so devoid of merit, and so distorted in its conduct, as to compromise the expression of the people's electoral intent; and furthermore, the petitioner should demonstrate that the evidence discloses profound irregularity in the management of the electoral process. Counsel submitted that the Appellate Court had relied on this principle to affirm the trial Judge's conclusion.

[32] Learned counsel submitted that the dissenting opinion of *Kiage JA* in the Court of Appeal, was based on wrong foundations of law, and on a misinterpretation of Section 82(1) of the Elections Act, and Rule 33 (2) of the Election Petition Rules.

(iii) 2nd Respondent

[33] Learned counsel, Mr. Lilan for the 2nd respondent, submitted that mere evidence of human fatigue, or error, did not give a basis for annulling an election, and that fatal errors had to be so material as to negate the overall

outcome. He relied upon this Court's decision in ***Nathif Jama Adam v. Abdikhaim Osman Mohammed & 3 Others***, Sup Ct. Petition No. 13 of 2014.

[34] Learned counsel submitted that it was no longer apposite, before this Court, to undertake an evaluation of primary fact and evidence – a task duly undertaken at the trial Court.

(iv) Appellant – in Response

[35] Learned counsel, Mr. Mwenesi urged the Court to apply Article 159 of the Constitution, to cure any procedural shortfalls alluded to by the respondents, with respect to the pleadings. He also urged the Court to broaden the principles set out in the ***Munya*** case, as regards the essence of scrutiny and recount in electoral dispute resolution.

C. ISSUES FOR DETERMINATION

[36] The following issues arise for determination:

(a) whether the appeal is competent;

(b) whether the Appellate Court properly interpreted the provisions of Section 82 of the Elections Act, 2011; Rule 33 of the Elections

(Parliamentary and County) Petition Rules; and Regulation 77 of the General Elections Regulations;

(c) *whether the Appellate Court properly applied the aforesaid provisions to the evidence on record;*

(d) *whether the Appellate Court arrived at proper conclusions, based on the facts and evidence on record; and*

(e) *costs of the petition.*

D. ANALYSIS

[37] Our analysis will proceed from two focal points in the submissions of counsel: the competence of the appeal; and the law on scrutiny and recount – and whether it was properly applied by the High Court and the Court of Appeal.

(a) Competence of the Appeal

[38] The appellant contested the decision of the Appellate Court, and asked this Court to review that Court's interpretation of Section 82 of the Elections Act; Rule 33 of the Election Petition Rules; and Regulation 77 of the General Elections Regulations.

[39] The main question, as to whether the election of Senator for Bomet County substantially complied with the Constitution, and the Election Laws and

Regulations, was before the first two superior Courts, and thus, properly engages this Court's jurisdiction, in terms of Article 163(4)(a) of the Constitution. Any question as to the competence of the cause, therefore, falls under "form", as opposed to "jurisdiction". *Was the filing of this appeal irregular?* As submitted on behalf of the 1st and 3rd-to-8th respondents, the appellant had filed a petition akin to an originating petition contemplated by Section 12 of the Supreme Court Act, 2011 and Rule 9 of the Supreme Court Rules, 2012 – instead of a petition of appeal pursuant to Rule 33 of the Supreme Court Rules, 2012. The argument by counsel for the 1st, 3rd-to-8th respondents was that, the originating petition which bore a statement of facts, grounds of argument, and reliefs sought – accompanied by an affidavit – contained elements reserved for this Court's original jurisdiction, and therefore, exceeded the ambit of Article 163(4)(a) of the Constitution. The appellant in response, submitted that the issues in the appeal were confined to questions raised in the election petition, and to those determined by the superior Courts; and as such, the appeal fell squarely to this Court's appellate dispensation.

[40] We are clear that an appeal of this kind should not be held to fail on mere account of form. Although the Rules of this Court give guidance on the form which an appeal should take, we are cognizant of the fact that Article 159(2)(d) of the Constitution accords precedence to substance, over form. Rule 3(5) of the Supreme Court Rules, 2012 empowers us to invoke our inherent power to make

such Orders and directions as are necessary for the attainment of ends of justice, and to prevent abuse of Court process. In this regard, and in order to serve the sanctified task of interpreting the Constitution, and for the purpose of resolving this protracted electoral dispute, we are guided by Article 159(2)(d) – towards saving this appeal for determination on merits. The presentation form in this appeal, by no means violates the mandatory tenets of the Constitution, or the law, so as to compel the striking out of the appeal *in limine*. Though the petition is presented in its current form, our determination of the appeal will focus only on the issues canvassed, and as determined by the other superior Courts.

(b) *The Law on Scrutiny and Recount*

[41] The law on scrutiny is set out under Section 82 of the Elections Act, 2011 which empowers the election Court, acting *suo motu*, to make an appropriate Order; and allows any party to the petition to make an application for scrutiny. The relevant provision thus stipulates:

> ***"(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.***
>
> ***"(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off –***

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;
(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person who, by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

"(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters".

[42] Rule 33 of the Election Petition Rules, 2013 lays down the principles to be applied by the Court, where a party to the proceedings makes an application for scrutiny. It provides as follows:

> ***"(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
>
> ***"(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.***
>
> ***"(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.***
>
> ***"(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—***
>
> ***(a) the written statements made by the presiding officers under the provisions of the Act;***
> ***(b) the copy of the register used during the elections;***
> ***(c) the copies of the results of each polling station in which the results of the election are in dispute;***
> ***(d) the written complaints of the candidates and their representatives;***
> ***(e) the packets of spoilt papers;***
> ***(f) the marked copy register;***
> ***(g) the packets of counterfoils of used ballot papers;***

(h) the packets of counted ballot papers;
(i) the packets of rejected ballot papers; and
(j) the statements showing the number of rejected ballot papers."

[43] In earlier cases, this Court has analysed the compatible decisions of the superior Courts, and developed certain cross-cutting principles with respect to the scrutiny and recount of votes, in an election petition. In the ***Raila Odinga*** case, we invoked Section 82 of the Elections Act, and ordered a scrutiny of Forms 34 and 36 which had been used in the country's 33,400 polling stations during the Presidential elections of 2013. The purpose of the scrutiny exercise was to give the Court a better understanding of the vital details of the electoral process, and to gain impressions on the broad integrity thereof. We thereafter made the findings of this exercise available to counsel, so they could make relevant submissions to inform our determination of the matters before the Court.

[44] In the ***Munya*** decision (paragraph 153), we set out the following guiding principles with respect to the scrutiny and recount of votes in an election petition:

"(a) The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an

election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

"(b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order ***on its own motion*** *for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In* ***exercising this discretion****, the Court is to* ***have sufficient reasons*** *in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

"(c) The right to scrutiny and recount does not lie as a matter of course. ***The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition****.*

"(d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in ***specific polling stations*** *in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules"*[emphases supplied].

[45] In that case, the Court thus remarked (paragraph 159):

> *"On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be* ***couched in specific terms****, and clothed with* ***particularity****, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained"*[emphasis supplied].

[46] The Court further held (paragraph 163):

> *"The authority granted to the election Court is* ***discretionary*** *in nature. In this regard, the Court may order for scrutiny on its own motion or upon application by a party to the election petition. This necessarily entails that the Court may decline to grant an order for scrutiny following an application seeking one. The Court may also grant an order for partial scrutiny, even where a party has applied for scrutiny in a wider electoral area.* ***In exercising this discretion, however, the Court must act judiciously****. An order for scrutiny must be rationalized on the basis of evidence, or sufficient account in the pleadings. As we have noted, the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes, and the integrity of the election. Therefore, it is only logical that* ***recount and scrutiny follows 'disputed results', or 'impugned electoral processes.'*** *If an election Court were to order for scrutiny and recount in the*

absence of a specific dispute, then such order would amount to an abuse of discretion and an act in vain" [emphasis supplied].

[47] The Court, in the foregoing case, thus concluded (paragraph 170):

"The limiting of scrutiny to polling stations enables the ***election Court to focus on the determination of the contested facts****, and not to be turned into a large-scale tallying centre. It is well known that scrutiny is often an arduous and laborious process"* [emphasis supplied].

[48] As in existing authority, so will it be in this case: we are disinclined to countenance a scrutiny process that becomes open season for petitioners who would turn it into a forum for gathering all such information as they would fancy.

[49] In ***Nathif Jama****,* this Court thus held (para 75):

"It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been ***pleaded in the petition****; and whether a* ***sufficient basis has been laid*** *– to warrant the grant of the application for scrutiny"*[emphasis added].

[50] In the foregoing case (paragraph 79), this Court indicated that such polling stations as may properly be the subject of scrutiny, would already have been signalled in the pleadings:

"We are of the opinion that the trial Judge's exercise of his discretion is, in most respects, meritorious; and that his error in stating that scrutiny has to be pleaded, did not lessen the propriety of his decision; for the application before him covered polling stations that were not pleaded with specific details. Moreover, the Judge's exercise of discretion was also in consonance with the constitutional principle of curtailing unnecessary delay in the resolution of electoral disputes. Though scrutiny can be directed *suo motu,* ***a trial Court is not to be impugned for being disinclined to exercise this discretion. With respect, we find that the Court of Appeal lacked sufficient cause for interfering with the exercise of discretion by the trial Judge."***

[51] The Supreme Court's approach to Orders of scrutiny in election dispute-resolution, thus, is by no means precipitate: *it follows a clear pattern that is rational, familiar, and judicious*. Testimony to this effect is found in our earlier decision in the ***Munya*** case, in which we cited with approval the decision of *Odunga, J* in ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others*** (paragraph 26):

"*The aim of conducting scrutiny and recount is not to enable the Court [to]* ***unearth new evidence*** *on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words* ***a party should not expect the Court to make an order for scrutiny simply because he has sought such an***

order in the petition. *The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition"* [emphasis supplied].

[52] The foregoing principles are the basis for certain specific questions which we have to consider: *did the appellant provide a sufficient basis for the trial Court to make Orders of scrutiny and recount? did the denial of an Order for scrutiny compromise the appellant's case? should this Court interfere with the discretion of the trial Judge, and overturn the decision of the Appellate Court upholding the trial Judge's findings?*

[53] By an application dated 24th June, 2013, the appellant moved the Court for an Order of recount of all votes cast in Bomet County, or, in the alternative, a partial recount in respect of 79 polling stations in Bomet Central, Sotik, Konoin, Chepalungu and Bomet East Constituencies. He also sought Orders for scrutiny of the votes in the aforementioned Constituencies. In the application, the appellant indicated that such scrutiny would be limited to: statements made by

the presiding officers; a copy of the register used in the elections; copies of the results for each polling station at which results were disputed; the written complaints of the candidates and their representatives; the packets of counterfoils of used ballot papers; the packets of rejected ballot papers; and the statements showing the number of rejected ballot papers. The grounds of the petition were as limited by Rule 33(4) of the Election Petition Rules, namely: the voter turnout in the senatorial election was exaggerated, with a view to inflate the votes in favour of the 2nd respondent; the respondents fraudulently manipulated documents, to conceal irregularities and electoral malpractices; the elections lacked fairness and transparency; the Independent Electoral and Boundaries Commission did not conduct the elections in a neutral, efficient, accurate and accountable manner; and, there were variations in the declared results in terms of documentation and records. Learned counsel urged that the trial Judge had erred, by declining to grant an Order for scrutiny.

[54] The trial Judge evaluated the application for scrutiny and recount against the pleadings and affidavits presented before him. The Elections Act empowers the election Court to employ the tool of scrutiny and recount to verify the *general integrity of the electoral process*. Comparative jurisprudence signals the importance of this mechanism in instances where the margin of votes is so narrow as to be affected by any transposition or tallying errors. In such instances, Courts have ordered scrutiny and recount *suo motu,* and without the

requirement that a sufficient basis be laid – though it is the exception rather than the rule, in practice.

[55] The Supreme Court of India, in the case of ***Chanda Singh v. Shiv Ram Verma,*** AIR 1975 SC 403*,* signals the centrality of scrutiny and recount in instances of a *narrow margin of votes*. The Court held thus:

> ***"If the lead is relatively little and/or other legal infirmities or factual flaws hover around, recount is proper, not otherwise. In short, where the difference is microscopic the stage is set for a recount given some plus point of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting. Of course, even if the difference be more than microscopic, if there is a serious flaw or travesty of the rules or gross interference, a liberal repeat or recount exercise, to check on possible mistakes, is a fair exercise of power."***

[56] *Had the appellant laid a sufficient basis to warrant an Order for scrutiny?* In the petition dated 26th March, 2013 and the supporting affidavit, the appellant had specified certain discrepancies in various polling stations in Chepalungu, Bomet East and Sotik Constituencies. The record shows that, at a pre-trial conference held on 4th June, 2013, the parties had agreed that the Returning Officer for Bomet County would surrender the ballot boxes to the Deputy Registrar, with the materials used during the elections. On 6th June,

2013, counsel for the appellant, and for 4th-to-8th respondents sought and obtained leave to file further affidavits. The appellant filed an affidavit (sworn on 24th June, 2013) in support of the application for scrutiny and recount, listing 103 polling stations as showing variations between Forms 35 and 36. He averred that in these polling stations, there were discrepancies with respect to the Voter-Register. We find that the appellant had, indeed, outlined the disputed polling stations, in the pleadings and accompanying affidavits, with the required specificity; and this, *prima facie,* provided a basis for the grant of Orders of scrutiny and recount. The question outstanding was simply this: *was such a basis sufficient?*

[57] The determination of *sufficiency* is a task reserved to the *discretion of the election Court*. *Muchelule J.* in a Ruling delivered on 10th July, 2013, remarked that the purpose of scrutiny was not to identify votes cast by persons who were eligible or ineligible to vote, but to identify votes that were void, on account of being not properly marked, unmarked, or bearing a wrong serial number. Such an impression was drawn from a reading of Section 82(2) of the Elections Act, 2011, which indicates the votes to be excluded when scrutiny is done. The learned Judge, quite aptly, thus held:

> ***"Pursuant to Rule 33(4) the Petitioner should specify the polling stations in respect of which he seeks scrutiny, and the materials and documents that he wishes the Court to scrutinize. Reasons have to be given why the stations***

should be subject to scrutiny. Similarly, reasons should be given why the materials and documents in question should be scrutinized."

[58] *Muchelule J.* found that the evidence provided with respect to Bingwa Location, Siongiroi Ward, was insufficient as a basis for grant of Orders of scrutiny. The learned Judge held that *the appellant should identify the persons who corruptly received money, or those who were pecuniarily influenced, and should indicate the polling station at which such persons voted.* The Judge relied on Regulation 77(1) of the Election Regulations, in making this determination.

[59] Section 82 of the Elections Act, and Rule 33 of the Election Petition Rules, are the guiding provisions on the question of scrutiny, even though *Muchelule J.* held that any party seeking Orders of scrutiny had to bring the relevant question within the terms of Section 82(2) of the Elections Act, and/or Regulation 77 of the General Regulations. The Regulation in question, with respect, deals with the rejection of ballot papers during an election, rather than scrutiny, as a process initiated or allowed by the election Court, in the course of electoral dispute-settlement. Regulation 77 thus provides:

" (1) At the counting of votes at an election, any ballot paper—

(a) which does not bear the security features determined by the Commission;

(b) on which votes are marked, or appears to be marked against the names of more than one candidate;

(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;

(d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

(e) is unmarked, shall, subject to sub-regulation (2), be void and shall not be counted.

"(2) A ballot paper on which a vote is marked—

(a) elsewhere than in the proper place;

(b) by more than one mark; or

(c) which bears marks or writing which may identify the voter, shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby."

[60] It is clear that Regulation 77 applies to the voting process itself. The Commission is required to identify valid ballots, through certain mechanisms such as proper serialisation, superintended by presiding officers.This constitutes the first stage in the sifting process. The second stage is executed by way of Section 82 of the Elections Act, 2011, through the procedure of *scrutiny*. It is a narrower process, as reflected in the more limited mandate of the Court. The scrutiny exercise is pegged upon the register, maintained by the Commission – this to be produced as part of the discovery process. Any vote cast by a person whose name does not appear on the register, ought to be excluded from the final tally. Similarly, a person who votes at a polling station other than that at which he or she is registered, ought to be excluded from the tally. Therefore, the process of scrutiny has a broader intent than the singular event of actual recount. Votes proved to have been procured through bribery, treating, or undue influence, also ought to be excluded, on Court orders. In this instance, if a petitioner proves that there were such election offences as bribery, treating, personification, or undue influence, the election Court ought to exclude the relevant votes from the final tally, either upon application by a party to the proceedings, or on its own motion.

[61] While we are in agreement with the dissenting Opinion of *Kiage JA,* that the trial Court's view of the purpose of scrutiny, by virtue of Regulation 77, was inordinately restrictive, we would observe that the trial Judge had the discretion

to determine whether the basis laid was sufficient to warrant the issuance of an Order for scrutiny and recount. The learned Judge, certainly, had the advantage of relevant fact and evidence, as he determined the question.

[62] The appellant also sought recount in various polling stations, in respect of which it was alleged that the votes cast in his favour were understated, and those in favour of the 2nd respondent, overstated. The Judge applied the materiality test to this application for recount. There is a difference between laying a basis for scrutiny, meant to evaluate the overall features of the election – in relation to the electoral code – and recount, which is restricted to ascertaining the outcome: – and for this to be granted, the Court is to be convinced that the disparities in the final tallies if considered, will materially affect the overall outcome.

[63] As an organising framework for electoral dispute-resolution, the Commission is required to forward election reports to the Court trying an electoral cause (Elections Act, 2011, Section 82). These reports are drawn from the reports by the presiding and returning officers, and are the raw material for the scrutiny process. In ***Hassan Mohamed Hassan & Another v. IEBC & 2 Others,*** High Court Election Petition No. 6 of 2013, *Onyancha J* outlined the three instances in which scrutiny may be sought: (i) *before the petition trial – in which case the petitioner would be seeking to persuade the Court to grant*

Orders by affidavit evidence; (ii) during the trial – where the petitioner adduces evidence to support a scrutiny while the trial proceeds; and (iii) at the end – where the petitioner has adduced all the evidence, and calls for scrutiny or recount, based on the evidence on record. Scrutiny within any of those categories, in our opinion, will serve to ascertain the constitutional integrity of the electoral process. *The Court, besides, may require, by virtue of its discretion, that a scrutiny of votes be conducted, to ascertain the issues in dispute.*

[64] We find no flaw with the Appellate Court's majority decision, which rightly in law, in effect, upheld the trial Judge's exercise of discretion, in relation to the application for scrutiny and recount. The appeal, therefore, fails.

E. CONTRETEMPS AFFLICTING JUDGMENT-DELIVERY: APPREHENSIONS OF COUNSEL

[65] The timing of delivery of this Judgment is the subject of two letters which have come to our attention, one addressed to the Hon. The Chief Justice and President of the Supreme Court, and the other to the Registrar of the Supreme Court by learned counsel for the appellant [Ref. No. K. & C./001/15 dated 25th September, 2015 and Ref. No. K. & A./MCL/01/12 of 8th October 2015, respectively], Mr. Koceyo, on the issue of delay. His apprehension is thus expressed:

"The appeal was heard on 7th July, 2015 by a five-Judge Bench [Tunoi, Ibrahim, Ojwang, Wanjala, and Njoki, SCJJ] and has been pending Judgment to be delivered on notice.

"Your Lordship, the appellant is concerned on the legal ramification that may ensue, should the Judgement be delivered after the lapse of 60 days as contained in Order 21 of the Civil Procedure Rules, and the fact that it is now in the public domain that the Judicial Service Commission [JSC] has directed Judges over 70 years [of age] not to preside over matters.

"The delivery of the pending Judgment may be affected by [ongoing] legal challenges.

"Your urgent consideration of the matter will be highly appreciated."

[66] Learned counsel's letter touches on certain fundamental constitutional issues, in particular:

(i) the citizen's guaranteed right "to have any dispute that can be resolved by the application of law", "decided in a fair and public hearing before a court" [The Constitution of Kenya, 2010, Article 50(1)];

(ii) the trust held by the Judiciary as custodian of the people's sovereign power [The Constitution of Kenya, 2010, Article 1(3)]; and

(iii) the right and obligation of a Judge who is over 70 years of age and still in office, to preside over matters in Court – in view of the directive of the Judicial Service Commission.

[67] This, it is evident to us, is a matter of judicial notice – qualifying for cognizance before this Court, and so, attended with appropriate, responsible judicial Orders.

[68] Article 160 of the Constitution of Kenya, 2010 thus stipulates:

> *"(1) In the Exercise of judicial authority, the Judiciary ["the Judges of the superior courts, magistrates, other judicial officers and staff (Article 161(1)]...shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."*

[69] The cause in the instant, ultimate appeal was heard and determined by a Bench of five Judges, one of whom, contrary to the prescribed constitutional safeguards, the Judicial Service Commission – just as learned counsel states – is purporting to debar from further participation in the discharge of the matter.

[70] An Advocate's communication coming to the Chief Justice and to the Registrar of the Supreme Court, on a matter of such vital significance in the due discharge of the judicial mandate; an issue so intimately touching on the standing and responsibility of this Supreme Court, is for the due taking of

judicial notice under the law – and we hereby take full judicial notice of the same.

[71] *The Oxford Dictionary of Law* (ed. Jonathan Law and Elizabeth A. Martin), 7th ed. (Oxford University Press, 2009) (at page 306) thus defines "judicial notice":

> *"The means by which the court may take as proven certain facts without hearing evidence. Notorious facts…may be judicially noticed without inquiry."*

[72] Judicial notice is important to the effective discharge of the judicial mandate, as contemplated by the Constitution of Kenya, 2010. Vindication of this perception is crystal-clear, from the case-law experience worldwide.

[73] In ***Commonwealth Shipping Representative v. P. & O. Branch Service*** [1923] A.C. 191 at p. 210, Lord Sumner in the English House of Lords thus observed:

> *"Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."*

[74] Kenya's Evidence Act (Cap. 80, Laws of Kenya) expressly provides [Section 60 (1)] that:

"The courts shall take judicial notice of the following facts:
(a) ....

(o) all matters of general or local notoriety [things that everyone knows]..."

[75] There are many cases in which judicial notice has commended itself to Kenya's Courts. Here is a typical example. In ***Republic v. Simon Wambugu Kimani & 20 Others*** [2015] eKLR, the learned trial Judge thus observed:

"In my view, the Court was fully entitled to take judicial notice of notorious prevailing facts in the public domain, even where the same were not formally brought to the attention of the Court by either the prosecution or the defence."

[76] This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of

the Superior Courts, issued by the Judicial Service Commission, is a nullity in law.

[77] Responding to the issues raised by learned counsel, as regards obligations vested in this Supreme Court [The Supreme Court Act, 2011 (Act No. 7 of 2011), Section 3(a) and (b)], we hereby signal that the Court's Bench, as constituted by the learned Justices who rendered service in this case, indeed bears the constitutional mandate to hear and determine the cause in hand – notwithstanding the apprehensions of learned counsel. Accordingly, we hereby conclude the Court's determination with the Orders set out in paragraph 112 of this Judgment.

F. THE JUDGMENT OF MUTUNGA, CJ & PRESIDENT

[78] I have read the majority judgment by my learned sisters and brothers. I agree with the final decision as enunciated in paragraphs 1-64 of the judgment. I agree with the orders of the majority in the petition of appeal. I, however, write separately to dissent on the analysis and determination with regards to **Part E**, namely, paragraphs 65-77, elegantly entitled **CONTRETEMPS AFFLICTING JUDGMENT-DELIVERY: APPREHENSIONS OF COUNSEL.**

[79] The Bench majority has reproduced in paragraphs 65-66 the contents of the letter by Counsel Koceyo for the appellant addressed to the *Chief Justice and*

President of the Supreme Court, and not the Supreme Court, dated 25th September, 2015. I will not repeat its contents. With greatest and profound respect to my learned sisters and brothers my very humble opinion is the contents of the said letter should neither have been treated as part of proceedings in this appeal nor been the basis for comment, holding, and finding in the judgment.

[80] We lack the jurisdiction to entertain the contents of the said letter. The apex Court must be properly moved within the confines of our jurisdiction provided in **Articles 163 (3), (4), (5) and (6)** of the Constitution.

[81] With utmost respect to my learned sisters and brothers we not only lack jurisdiction, the Bench majority have also subverted established precedents of this apex Court on its jurisdiction.

[82] In the case of ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** Sup. Ct. Petition No. 2 of 2012; [2012] eKLR this Court stated (paragraph 30):

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical***

complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court. "

[83] In ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** Sup. Ct. Application No. 2 of 2011; [2012] eKLR, this Court stated that it cannot expand its jurisdiction through judicial craft or innovation. It held that (paragraph 68):

"Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

[84] With greatest and utmost respect to my learned sisters and brothers, the Bench majority by invoking the rule of common law of judicial notice and by invoking the provisions of Section 60(1) (o) of the Evidence Act (Cap 80 of the Laws of Kenya) to comment, make a finding and a holding on the basis of the said letter, have violated and subverted fundamental rights and freedoms of the parties to the appeal and third parties who were not part of the proceedings in the Appeal. They have also violated and subverted values and principles of the Constitution.

[85] Article 20 (3) (a) and (b) of the Constitution provides:

"(3) In applying a provision of the Bill of Rights, a court shall-

(a) develop the law to the <u>extent that it does not give effect</u> to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom." (Emphasis added.)

The Bench majority by invoking the rule of common law of judicial notice and the provisions of the Evidence Act have failed to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms enshrined in **Articles 21(1), 27 (1) and 50(1) of the Constitution**. They have also not adopted an interpretation of the Evidence Act that favours the enforcement of a right or fundamental freedom.

[86] These articles provide:

Article 50(1) stipulates that–

"<u>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</u> before a court or, if appropriate, another independent and impartial tribunal or body." (Emphasis added.)

Article 27(1) provides that–

> ***"Every person is equal before the law and has the right to equal protection and equal benefit of the law."***

Article 21 (1) reads:

> ***"It is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."***

[87] By invoking the rule of common law of judicial notice and the provisions of the Evidence Act, the Bench majority failed to develop both the principle and the provisions of a statute to the ***extent that both do not give effect*** to the Articles of the Constitution stated. The provisions of **Article 20 (3) (a) and (b)** have, indeed, torn away the last shreds of that perhaps comforting illusion, especially in the context of human rights, that judges in the common law system do not make law. As I read these provisions they mean that if any existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop the rule so that it does comply. Additionally, the court has the obligation to interpret statute in a way that also complies with the Bill of Rights.

[88] In mainstreaming the theory of interpreting the Constitution in our decision in ***Communications Commission of Kenya & 5 Others v.***

Royal Media Services Limited and 5 Others Sup. Ct Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR, we have clearly held (paragraphs 355 and 358) that rules of common law do not subvert the provisions of the Constitution which is the supreme law of the land. It is also clear that no statute can subvert the provisions of the supreme law.

[89] By arriving at a finding and a holding premised on a letter addressed by one party to the Chief Justice and President of Supreme Court in his administrative capacity, the Bench majority did not consider the respondents' right of a fair hearing under Article 50(1) of the Constitution. There was no hearing on the contents of the letter. The other parties were not given the opportunity to respond to the letter, and hence were not heard. Therefore, in arriving at a finding and a holding on the contents of the letter, they violated fundamental principles of due process of the law pertaining to the parties to the appeal, and the Judicial Service Commission, which was not a party to the appeal, also had its rights to be heard violated.

[90] In ***Judicial Service Commission v. Gladys Boss Shollei & Another***, Civil Appeal No 50 of 2014; [2014] eKLR, the Court of Appeal pronounced itself on Article 50(1) of the Constitution and highlighted the several aspects of this right as follows (paragraph 87):

"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, ... the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."

[91] Prior to the promulgation of the 2010 Constitution, the right to a fair hearing was a component of the rules of natural justice. This right is now entrenched in the Constitution under Articles 47 (fair administrative action) and Article 50. The principles of the right to a fair hearing and the rules of natural justice had been acknowledged in the pre-2010 Constitution judgments.

[92] In *Republic v. Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua* Nairobi HCMCA No. 1298 of 2004; [2010] eKLR the High Court expressed itself thus:

"The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. <u>The hypothesis</u>

on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regards its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. ...[A]s part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated...." (Emphasis added.)

[93] In ***Justice Amraphael Mbogholi Msagha v. Chief Justice of the Republic of Kenya & 7 Others*** Nairobi HCMCA No. 1062 of 2004; [2006] 2 KLR 553; [2006] eKLR, the Court, in discussing the rules of natural justice, cited **De Smith and Brazier, Constitutional and Administrative Law 6th Edition (Penguin United Kingdom: 1989**) (pages 557-558) which states**:**

"The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case...." (Emphasis added.)

[94] These cases, whose jurisprudence is enshrined in **Article 50 of the Constitution**, illustrate that courts have a duty to uphold reasonable, fair and

just procedures, in order to avoid the violation of an individual's rights. The right to a fair hearing also includes the right to be heard and be accorded due process of the law. Therefore, in all court cases, judicial officers are mandated to ensure that due process of the law is followed. The apex Court is no exception to these principles.

[95] With deepest respect to my learned sisters and brothers, commenting, making a finding and a holding on the basis of a letter that was not part of the proceedings in the appeal violated and subverted the national values and principles articulated in **Article 10** of the Constitution and the authority and principles of justice under **Article 159 (1) and 159(2) (e)**. **Article 159 (1)** makes it abundantly clear that judges derive their authority from the people of Kenya and the Constitution.

[96] Article 1(1) of the Constitution provides that ***"All sovereign power belongs to the people and shall be exercised only in accordance with this Constitution."*** Courts derive their authority from this Article and also **Article 159 (1)**. They are also commanded to adhere to the national values and principles enshrined in **Article 10** of the Constitution. **Article 10** expressly states:

> ***"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them–***

(a) applies or interprets this Constitution;
(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.

(2) The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and;

(d) sustainable development."

[97] All Courts must consider ***the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability***. This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing requires that both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue. The Bench majority, with greatest respect, in commenting, making a finding and a holding based on the said letter violated all these constitutional national values and principles. This action on the part of my learned sisters and brothers smacks of "***judicial utado?***" a worrying form of judicial impunity.

[98] This Court endorsed the right to be heard, in ***George Mike Wanjohi v. Steven Kariuki & 2 Others*** Sup. Ct. Petition No. 2A of 2014; [2014] eKLR. In that case, one of the complaints was that counsel for the applicant had, after the close of pleadings, but before judgment was delivered at the Court of Appeal, written a letter to the Registrar of the Court of Appeal asking that a further list of authorities containing two relevant cases be brought to that court's attention. The Court of Appeal notified the other parties. The other parties responded to the letter and presented their submissions. This Court held that the parties at the Court of Appeal were not prejudiced because they were allowed to submit on the issue. It also held that (paragraph 65 and 68) –

> ***"[65] Counsel for the 2nd and 3rd respondents argued that the Court of Appeal should not have taken the Joho case into consideration because the relevant cycle of the constitutional and judicial process was already exhausted, and the matter was no longer live. We are not inclined to uphold this argument. In bringing the two cases to the attention of the Court of Appeal, counsel for the 1st respondent was merely carrying out his professional obligation under the Advocates Act. And indeed, it is to be noted that counsel for the 2nd and 3rd respondents had requested a hearing on Joho's applicability to the matter before the Court of Appeal. It is now too late in the day for him to reprobate the inclusion of that case in this Court's deliberations.***
>
> ***…***
>
> ***[68] In this case, the introduction of the further bundle of authorities did not require the reopening of the facts before the Court, and it was not of any prejudicial effect upon the parties, particularly where the parties were allowed to address the Court on a binding decision of the***

Supreme Court, and on its effect upon them.” (Emphasis added.)

[99] In my considered opinion, this is yet another example of the Bench majority subverting an existing precedent. I have always argued that judicial officers should not even decide cases on the sole basis of an authority they dig up in the comfort of their chambers without allowing counsel to address them on the said authority. Due process is a fundamental pillar of the rule of law and our progressive constitutionalism.

[100] In a ruling of this Court (***CCK and Others v. Royal Media Services Limited and Others*** Sup. Ct. Petition No. 14 of 2014), premised on an application dated 23rd May 2014, we pronounced that this Court should resist encroaching the independent mandate of the High Court to deal with issues that were also raised before us. *Ojwang and Wanjala SCJJ* held thus, (paragraph 40):

> ***“Where litigation is properly commenced, the High Court has the professional aptitude to deal with the issues before it, and it is our obligation to sustain such constitutional mandate.”***

[101] With utmost respect to my learned sisters and brothers, two learned Judges of the Bench majority are parties in two separate cases currently pending in the High Court on issues that may touch on the contents of the letter. They have sued the Judicial Service Commission. The seriousness of this matter is

gleaned by reading the finding and the holding in Paragraph 76. Yet again, the Bench majority has chosen to disregard an existing precedent of this Court. Pronouncements that are premature on issues pending before other courts also disrupt the constitutional set up of the hierarchy of courts. This Court has on several occasions affirmed the competence and jurisdiction of other courts.

[102] This Court has recently held that it will not take up a matter that is not yet ripe for its admission and determination. In ***Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others***, Sup. Ct. Petition No. 27 of 2014; [2014] eKLR, *Ibrahim SCJ* held as follows (paragraph 16):

> ***"This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; ...The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review."***

[103] This ***ripeness principle*** is one that we have to zealously guard and avoid falling into the trap of pronouncing ourselves on matters that are not properly before us, more so those that are still finding their way up the judicial

hierarchy. (See the discussion of the Supreme Court's application of the ripeness doctrine in **Godfrey Nathan Kitiwa and Kaira Nabasenge, 'Civil Litigation: Striking the balance between Procedural Technicality and Substantial Justice: A Case Study of the Kenya Supreme Court's Rules and Procedure'** ***The Law Society of Kenya Journal*** **Volume II: 1,2015, pages 27-48**).

[104] The comments, finding, and holding on the letter in question formed extraneous questions defined as those that are beyond or beside the point to be decided [***Black's Law Dictionary***, ***8th ed. [2004]*** at page 665]. In my opinion, **Part E** of the majority judgment deals with extraneous issues that should not be included in the judgment. These issues are neither found in the submissions of the parties nor did they form the issues framed by this Court for determination. Moreover, no party before the Court sought any reliefs in this regard. For a court to arrive at a finding and hold on a matter, that matter must have been fully canvassed by all the parties concerned. (See ***Benjoh Amalgamated Limited and Another v. Kenya Commercial Bank*** Civil Appeal No. 239 of 2004; [2006] eKLR and ***Sheik t/a Hasa Hauliers v. Highway Carriers Ltd*** [1982-88] KLR 306).

[105] In deference to my learned sisters and brothers I wanted to be sure they were not invoking the ***epistolary jurisdiction*** a hallmark of the Indian Supreme Court's invention and innovation. The Supreme Court of India adopted

epistolary jurisdiction for matters concerning public interest litigation and in order to determine cases touching on the fundamental rights in the Constitution. (See ***People's Union of Democratic Rights and Others v. Union of India and Others*** 1982 AIR 1473, 1983 SCR (1) 456).

[106] Neuborne notes in **[Burt Neuborne, The Supreme Court of India *International Journal of Constitutional Law*, Volume 1, Issue 3 (2003) pp. 476-510 at page 502]** that in relation to epistolary jurisdiction, the Supreme Court did away with the requirement that parties file formal pleadings in public interest litigation cases. He states that:

> ***"[T]he Court treated letters, even newspaper clippings, as [A]rticle 32 petitions for the protection of fundamental rights. Although the initial burst of informal epistolary pleading diminished somewhat over time, in part because the Court has evolved somewhat more formal procedures to process PIL cases, the pleading rules remain extremely flexible."***

[107] However, flexibility in pleading rules does not subvert the parties' right to a fair hearing. The Judges if they deem it expedient may require a report from the concerned party before being registered as a writ petition and setting it down for hearing. The process of accepting letter petitions is in (***Bibhuti Bhushan Bose ed., The Supreme Court of India Practice and Procedure Handbook*** **(3rd Edition) 2010]** at page 52. It is stated:

> ***"Petitions received by post even though not in public interest can be treated as writ petitions if so directed by the Honourable Judge nominated for this purpose. Individual petitions ... can be registered as writ petitions, if so approved by the concerned Honourable Judge. If deemed expedient, a report from the concerned authority is called before placing the matter before the Honourable Judge for directions. If so directed by the Honourable Judge, the letter is registered as a writ petition and is thereafter listed before the Court for hearing."***

[108] Clearly, even if my learned sisters and brothers sought to invoke the ***epistolary jurisdiction*** they would not have made comments, a finding and a holding without hearing the parties.

[109] **Article 163(7)** of the Constitution provides that **all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court**. Section 3 of the Supreme Court Act, (Act No. 7 of 2011) while confirming the Supreme Court "***as a court of final judicial authority"*** decrees that the Court "***asserts the supremacy of the Constitution and the sovereignty of the people of Kenya***"; and "***provides authoritative and impartial interpretation of the Constitution.***" This authority and power is derived from the people of Kenya. This is a great constitutional responsibility that lies heavily on the shoulders of the Supreme Court. Clearly, the comments, finding, and holding on the basis of the letter are at best ***obiter dicta***.

[110] Again, in deference to my learned sisters and brothers in my dissent I found it useful to reflect on a learned scholarly article penned by Professor Margaret L Moses **['Beyond Judicial Activism: When The Supreme Court Is No Longer A Court' in *Journal of Constitutional Law* [Volume 14: 1, October 2011, 161-214]**. Professor Moses in decrying the Supreme Court's practice of deciding issues that were not based on the record in the courts below; issues that had not been the subject of decisions by the courts below; and at times not even briefed by parties or *amici curiae*, argues (page 163) that –

> ***"The Court no longer acts as a court when it changes the nature of the case the parties brought in order to create an opportunity to change the law, when it reaches out to decide issues not properly before it and not based on a record or decisions below, and when it is less than candid about its reasoning."***

[111] It is my considered opinion that the final judicial authority of the Supreme Court is sacrosanct and should not be exercised by violating any provisions of the Constitution.

G. ORDERS

[112] The pertinent Orders of this Court are as follows:

(a) This appeal is disallowed.

(b) The appellant shall bear the costs of proceedings before this Court.

DATED and **DELIVERED** at **NAIROBI** this 19th day of October, 2015.

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

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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA