REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 548 OF 2017

KATIBA INSTITUTE.....1ST PETITIONER

AFRICA CENTER FOR OPEN GOVERNANCE.....2ND PETITIONER

OKIYA OMTATAH OKOITI.....3RD PETITIONER

DAVID OUMA OCHIENG.....4TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST REPONDENT

GOVERNMENT PRINTER.....2ND RESPODNENT

NATIONAL ASSEMBLY.....3RD RESPODNENT

JUDGMENT

Introduction

1. On 8th August 2017 the country held elections for various elective posts including that of the president of Kenya in which ***Uhuru Kenyatta*** was declared the winner. His closest challenger, ***Raila Odinga*** challenged that win in the Supreme Court in accordance with the Constitution. On 1st of September 2017, the Supreme Court delivered its verdict annulling the presidential election for failing to meet constitutional and legal threshold of a free and fair election and ordered a fresh election to be held under Article 140(3) of the Constitution.

2. That annulment triggered the introduction of ***Election Laws Amendment Bill*** 2017 in Parliament to amend the ***Elections Act, 2011, The Independent Electoral and Boundaries Commission Act 2011*** and ***The Election offences Act, 2016***. The Bill was published on 27th September 2017 and despite strong opposition from a section of Kenyans, it had been passed by 11th October 2017 it was then placed before the Senate and passed and was finally transmitted to the President for Assent. The President neither assented to the Bill nor returned it to parliament as required by ***Article 115(2)*** of the ***Constitution.*** After 14 days the Bill became law by virtue of ***Article 116*** of the ***Constitution.*** It was published in the Kenya Gazette on 2nd November 2017 thus become effective as the ***Election Laws Amendment Act No. 34 of 2017.*** It introduced significant changes in the management of election results, declaration of results and annulment of election results.

The petition

3. ***Katiba Institute,*** a Constitutional research, Policy and Litigation Institute and ***Africa Centre for Open Governance*** (***Africorg***) a Non-profit Organization who were joined by ***Okiya Omtatah Okoiti*** and ***David Ouma Ochieng',*** public interest litigants, instituted this petition against the ***Attorney General,*** the Chief legal advisor to the national government, and who represents the national government in civil proceedings, with the duty to promote, protect and defend public interest, (the 1st respondent), and the ***Government Printer,*** responsible for publication of Official government information and documents, (the 2nd respondent). Also joined in these proceedings as the 3r respondent, is the ***National Assembly*** which is responsible for enacting laws of the Republic.

4. In their petition dated 1st November 2017 the petitioners challenged the ***ELAA, 2017*** which was enacted by the 3rd respondent to amend various provisions of the Elections Act, 2011, The IEBC Act, and the Election Offences Act contending that the amendments are unconstitutional. The amendments under challenge include amendment to ***section 2*** of the IEBC Act which introduced a new definition for the ***Chairperson*** to include the vice chairperson and a member elected by Commissioners, ***section 3*** of the ***ELAA Act*** which amended section **7A of *IEBC Act*** by introducing new ***subsections 4, 5*** and ***6*** relating to a vacancy in the office of the Chairperson and Vice of Chairperson of IEBC. Subsection (4) provides that in the event a vacancy occurs in the office of the Chairperson the Vice Chairperson will

perform the functions of the chairperson until a new one is appointed. Subsection (5) provides that where the positions of the chairperson and vice chairperson are vacant, a member elected by Commissioners shall act as Chairperson. Subsection (6) provides that in the case of the Vice Chairperson or a Commissioner acting as Chairperson, section 6(1) of the IEBC Act relating to qualifications of the Chairperson shall not apply. The petitioners contended that these amendments are unconstitutional.

5. The petitioners further challenged the constitutionality of the amendments introduced by Section 3A of the impugned Act which introduced section7B to the IEBC Act to the effect that whenever the chairperson and vice chairperson are absent members of the Commission shall elect a member from among themselves to act as the chairperson and in that case, section 6(1) of the IEBC Act shall not apply; and Section 4 which amended paragraphs 5 and 7 of the ***Second Schedule*** to the IEBC Act on the quorum of the Commission for purposes of meetings making the quorum of the Commissioners to be half the members but not less than three members and further that that unless a unanimous decision is reached, a decision on a matter shall be decided by majority of those commissioners present and voting.

6. Further challenge was against section 5 which deleted Section 29 of the Elections Act and section 6 which amended section 39 by deleting subsection (1C), and introduced a new subsection (1C) and new subsections (1D), (1E), (1F),and (1G) to the Elections Act on the transmission of Presidential election results. Also amended was section 39(2) of the Elections Act so that Presidential Elections results may be declared before receipt of results from all constituencies if the remaining results will not affect the election results and section 39(3) of the Election Act by deleting the word ***"provisional"*** to provide that final results will be announced in the order in which tallying of the results is completed, section 7 deleted and substituted sections 44(5) and deleted sub sections 6, 7 and 8 of section 44 of the Elections Act.

7. Section 8 of the impugned Act deleted section 44A of Election Act and substituted it with a new section 44A on introduction of a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent for purposes of complying with Article 38 of the Constitution; section 9 deleted sections 83 of the Elections Act and introduced a new section 83 so that an election cannot be voided except for failure to comply with constitutional principles and the law ***and*** the non-compliance substantially affected the results of the election. The section also saved forms that may deviate from the requirements of the Act or regulations.

8. Section 10 was also impugned for introducing a new section 86A to the Elections Act on the holding of fresh Presidential Election under Article 140(3) of the Constitution in case of invalidation by the Court; section 11 which amended section 6 of the Election Offences Act by enhancing the fine from two million shillings to five million shillings and imprisonment from tree years to five years. While section 12 deleted section 14(2) of the Election Offences Act.

9. The petitioners averred that these amendments violate a number of Articles of the Constitution and negate national values and principles in the Constitution. They contended that the amendments were meant to compromise the values and principles of electoral process in the country and should be invalidated. They sought the following reliefs:

> ***i. A declaration be and is hereby issued that the election Laws (Amendment) Act as passed through national Assembly Bill No 39 of 2017 on October 12, 2017 in its entirely is unconstitutional.***
>
> ***ii. An order be and is hereby issued that the election Laws (amendment) Act as passed through National Assembly Bill No 39 of 2017 on October 12, 2017 is invalid.***
>
> ***iii. An order permanently restraining the 2nd respondent from Gazetting or publishing passed The Election Laws (Amendment) Act as passed through National Assembly Bill No. 39 of 2017.***
>
> ***iv. Any other just or expedient order the court may deem fit to make.***
>
> ***v. Costs of and incidental to this petition.***

3rd Respondent's response

10. The 3rd respondent filed a replying affidavit by ***Michael Sialai,*** Clerk to the National Assembly, sworn on 16th November and filed in Court on 20th November 2017. It was deposed that following the decision of the ***Supreme Court*** in the case of ***Raila Odinga & Another v Uhuru Kenyatta & Others [2017]eKLR*** which successfully challenged the 2017 presidential election, the ***Supreme Court*** pointed out a number of issues that required legislative reform to avoid future challenges with regard to the conduct of presidential elections.

11. ***Mr. Sialai*** deposed that the 8th August 2017 General election exposed lacuna in the Electoral Laws that needed urgent amendments to align them with the Constitution and the principles governing free and fair elections. He deposed that the purpose of the ELAA, 2017 was to provide for the proper conduct of affairs and business of the IEBC and to address the concerns raised following the August 8th 2017 general elections and therefore the amendments were intended to address those aspects.

12. It was his deposition that the amendments introduced to the ***IEBC Act***, the ***Elections Act,*** and the ***Election Offences Act*** were neither unconstitutional nor were they intended to interfere with the handling of General Elections including that of transmitting results. ***Mr. Sialai*** further stated that for the Court to determine the constitutionality of a statute or statutory provisions, it must look of the object and purpose of the impugned statute or statutory provision, and that the petitioner's contention that the amendments introduced by the impugned legislation are unconstitutional is unfounded.

13. According to ***Mr. Sialai***, the impugned statute, sought to give effect to the opinion of both the majority and minority decisions of the ***Supreme Court*** in the ***Raila Odinga & Another v Uhuru Kenyatta & Others (supra).*** It was ***Mr. Sialai's*** further deposition that there was public participation, that Parliament invited and received both oral representations and written memoranda in accordance with ***Article 118*** of the Constitution and the National Assembly Standing Orders. He deposed that the 1st petitioner though invited failed to present its views

hence this petition was presented in bad faith. He therefore contended that the Parliamentary Committee of the National Assembly considered the views, prepared and tabled a report before the National Assembly following which the Bill was eventually passed by both the National Assembly and the Senate.

Petitioners' submissions

14. ***Mr. Waikwa,*** learned counsel for the petitioners, submitted highlighting their written submission dated 14th December 2017 and filed in Court on the same date, that the petition challenges the constitutionality of the Election Laws Amendment Act, No. 34 of 2017 published on 2nd November 2017 with a commencement date of 28th December 2017. Counsel abandoned rightly so, prayer (c) in their petition which had in any case been overtaken by events.

15. Learned Counsel submitted that the object of the amendments as is clear from the objects of the Bill, was to respond to the ***Supreme Court's*** judgment in the case of ***Raila Odinga and another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR*** on how IEBC should conduct presidential elections. According to learned counsel, the ***Supreme Court*** never indicated that there was any inadequacy in the electoral laws but only stated that IEBC should conduct elections in accordance with the Constitution and election laws.

16. ***Mr. Waikwa*** contended that in enacting the impugned legislation, the 3rd respondent was trying to give effect to the minority ***Supreme Court*** judgment instead of that of the majority. Learned counsel pointed out to the 3rd respondent's replying affidavit more so the memorandum submitted by Jubilee Party in which Raphael Tuju explained that the amendments were in line with the opinion expressed by ***Her Ladyship Justice Njoki Ndungu*** in her dissenting opinion. According to learned counsel, this made it clear why Jubilee Party wanted the laws amended. Counsel argued that the memorandum by Mr. Tuju was important when read together with the Memorandum of objects and reasons in the Bill. According to the Bill, principal object of the Bill ***was to amend the IEBC Act, the Elections Act and The Election offences Act to provide for the proper conduct of the affairs and business of the IEBC and for effective management of elections.***

17. Counsel went on to refer to the Judgment of the Supreme Court at paragraph 392 to contend that the ***Supreme Court*** never suggested that there was inadequacy in the existing election laws and pointed out at page 175 (paragraph 24) of the 3rd respondent's response to show that the Supreme Court never suggested that there was lack of a complementary mechanism. He contended that the affidavit by ***Michael Sialai*** never pointed out where the ***Supreme Court*** recommended amendments to the election laws. In counsel's view, the amendments were intended to down play the importance of the Supreme Court majority judgment in the ***Raila Odinga's*** case.

18. ***Mr. Waikwa*** went on to submitted that the Court's comments on sections 39, 44 and 83 of the Elections Act pointed out the applicable election laws and therefore, could not be the basis of amendments to give a minority judgment prominence that goes to against the majority reading of the Constitution. He submitted that Parliament can amend the law in order to align it with the Constitution but not otherwise. Learned counsel contended that the Constitution has set a very high threshold of what constitutes a free and fair election in terms of Articles 81 and 86 of the Constitution and the Supreme Court emphasized the need for elections to meet that standard. He referred to paragraphs 231, 236 and 237 of the Supreme Court judgment in ***Raila Odinga & another v Independent Electoral Commission & others (supra)*** to reinforce his submissions.

19. Learned counsel went on to contend that the amendments do not meet the constitutional requirements; that some provisions are vague and over board, and that the amendments go against transparency and accountability as contemplated in ***Articles 10, 81*** and ***86*** of the Constitution. According to counsel, the amendments on the Elections Act are intended to defeat and infringe on the electoral transparency, accountability and verifiability thus minimize the credibility demanded by Articles 81 and 86 of the Constitution.

20. Regarding ***sections 39***, 44 and ***44A*** of the Elections Act, learned counsel submitted that the Supreme Court had considered and given its interpretation on them, and therefore the amendments were intended to take away that verifiability aspect of the elections. According to counsel, amendments introduced in ***sections 39 (1C)*** was disingenuous round-about way of rendering useless and of no effect electronically transmitted results. In counsel's view, subsections (1D), (1E), (1F), and (1G) further diluted the element of verifiability of election results and as a result, upgraded manual transmission of results above electronic transmission yet they should ***rank in peri passu,***. He argued that the amendment rendered electronically transmitted results useless and elections manual transmission of results more important. According to counsel, electronic transmission of results was made central in elections and referred to the case of ***Independent Electoral and Boundaries Commissions v Maina Kiai & Others [2017] eKLR*** to support the submission on the centrality of electronic transmission of election results.

21. ***Mr. Waikwa*** further submitted that ***sections 2*** and ***3*** of the impugned Act are vague hence unconstitutional. He contended that a vague law is over board and misses certainty, cannot be implemented and is therefore a ground for declaring it unconstitutional. He contended that ***section 2*** expanded the definition of Chairperson and argued that ***section 3*** which amended section 7A of the IEBC Act by introducing subsections 4, 5 and 6 on the filling the position of Chairperson in case of a vacancy is also unconstitutional. He contended that the qualifications of Chairperson are supported by the Constitution thus the provision is too broad and unconstitutional. He relied on the case of ***Keroche Industries Limited v Kenya Revenue Authority & 5 others*** [2007] KLR 240 for the submission that certainty of law is one of the ingredients of the rule of law, ***Coalition for Reforms and Democracy & others v Attorney General & others*** petition No. 628 of 2014 for the submission that a law should not be so vague as to leave the persons required to abide by it in doubt as to what was intended to be prohibited and ***Dawood v Minister of Home Affairs; Shalabi & another v Minister of Home Affairs ; Thomas v Minister of Home Affairs*** 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at par 47 for the proposition that it is an important principle of law that rules be stated in a clear and accessible manner.

22. Regarding section 9 which amended section 83 of the Elections Act, counsel submitted that section 83 provided the standard which Courts use to decide whether or not to annul elections. He argued that the section had been interpreted to be disjunctive and, in his view, the amendment seeking to make the test conjunctive makes it much more onerous, and in effect amends the Constitution. This, counsel argued, interferes with ***Article 81*** of the Constitution. Learned counsel further contended that the ***Supreme Court*** had properly interpreted section 83 and rendered its opinion (at paragraph 194 and 212) after testing that section against the Constitution and found it in harmony hence there was no need for the amendment. He relied on other decisions and urged that the petition be allowed.

3rd Respondents Submissions

23. The respondents agreed that counsel for the 3rd respondent's takes the floor first and therefore ***Mr. Mwendwa,*** learned counsel for the 3rd respondent took the floor and submitted, highlighting their written submissions, that the National Assembly exercised its legislature authority under the Constitution, that it exercises that authority through committees or directly through members in accordance with ***Articles 118*** and ***124*** of the Constitution.

24. Learned counsel contended that the impugned laws were introduced through a member's Bill, was not a Jubilee Party Bill and argued that the purpose of the Bill is clear in the memorandum of objects and reasons. ***Mr. Mwendwa*** submitted that the Affidavit by ***Mr. Sialai,*** the Clerk to the National Assembly, satisfactorily explained the process leading to the enactment of the impugned Act. according to learned counsel, the jurisdiction of the Court under Article 165(3) (d) is limited when it comes to considering legislation to checking whether the law is in conformity with the Constitution or not. ***Mr. Mwendwa*** submitted that the law was published as required, went through public participation where various people and groups presented views to the Committee of the National Assembly and therefore, the amendments were done in compliance with the Constitution.

25. Learned counsel went on to contend that even the 1st petitioner was invited to present views to the committee but did not do so and for that reason, it is estopped from complaining otherwise it will be acting in bad faith. Counsel argued that it is not true that the President did not support the Bill because he did not assent to it. In ***Mr. Mwendwa's*** view, if the President had any reservations, he would have expressed them in a memorandum by returning the Bill to the National Assembly. He contended that the fact that the President did not assent to the Bill did not mean he was opposed to it. Counsel argued that having failed to send reservations to the National Assembly, Article 116 of the Constitution activated the finalization of the law making process.

25. ***Mr. Mwendwa*** further submitted that the power and authority of the Court is to interrogate the constitutionality of the impugned legislation but cannot do a legislative audit as contended by the petitioners. Learned Counsel relied on the decision in the case of ***The Commission for Implementation of the Constitution v Parliament of Kenya & 5 Others*** [2013] eKLR to contend that the petition before Court does not meet the threshold for challenging the legislative enactment and submitted that amendments are constitutional.

27. ***Mr. Mbaraka,*** who appeared together with ***Mr. Mwendwa,*** took over and submitted that the burden of proof that a law is unconstitutional is on the petitioners. He relied on the case of ***Council of governors v Inspector General, National Police Service & 3 others*** [2015] for that submission. Counsel contended that the role of the Court is to consider whether the law which has been enacted is unconstitutional. He submitted that there is a presumption that the law is constitutional until the contrary is proved. He also submitted that the Court must look at both the purpose and effect of the legislation before declaring the law unconstitutional He relied on the case of ***Institute of Social Accountability & another v National Assembly & 4 others*** [2015] eKLR for the proposition that in determining whether a statute is unconstitutional, the Court must determine its object and purpose.

28. Learned counsel went on to contend that section 6 of the impugned legislation is aimed at creating an additional accountability layer of transparency by establishing an obligation on the IEBC for live-streaming results announced at polling stations which must then be transmitted to the constituency tallying centre as well as the national tallying centre the aim being to cure failure of technology. He submitted that in case of failure of technology, verified manual results ***visa vice*** the electronic results, the one verified shall prevail. He contended that sections 2 and 3,of ELAA which amend sections 2 and 7A of the IEBC are constitutional since their purpose is to avoid a vacuum in the office of the Chairperson by providing for an acting Chairperson to exercise powers of the Chairperson should a vacancy arise.

29. Counsel submitted that section 4 of the impugned legislation amended paragraphs 5 and 7 of the Second schedule to the IEBC Act by lowering the quorum necessary for the Commission's meetings. He contended that the purpose, object and effect of the amendment is to allow the Commission carry out it functions whenever there is deficiency in its numbers. He submitted with regard to section 5 of ELAA which deleted section 29 of the Election Act that the amendment did not undermine the Constitution and in particular Article 137 (1) (c) on the qualification for nomination as a presidential candidate. Article 137 (1) (c) provides that ***(1) A person qualifies for nomination as a presidential candidate if the person (c) is nominated by a political party, or is an independent candidate;*** That amended, counsel contended, serves to enrich democracy within political parties and enhances political participation by independent candidates..

30. On section 8 which amended section 44A of the Elections Act, on the complimentary mechanism for identification of voters, counsel saw no unconstitutional effect thereof. Regarding the amended section 83 of the Elections Act, ***Mr. Mbaraka*** submitted that Parliament amended the section to remove the word ***"or"*** and introduce the word ***"and"*** in place thereof arguing that the law was not amended to override the Supreme Court decision. He also contended that the introduction of the word ***"and"*** in place of "***or"*** in section 83 was not intended to water down the provisions of the Constitution. In learned counsel's view, in doing so, Parliament exercised its legislative mandate.

31. Learned counsel referred to the position in the USA where Congress had amended the Voting Rights Act of 1985 to overrule a narrow majority in the ***case of Mobile v Bolden***. He also referred to an article which of their submissions on comparative jurisdiction in an article "***The case for Legislative Override"*** by ***Nicholas Stephanopoulos*** to submit that the legislature can overturn a Court's judgment which is the essence of democracy. He submitted that there is no violation of the Constitution. In counsel's view there is also no vagueness in the legislation as enacted. Counsel contended with regard to Section 10 that it amended introduced section 86A (1) and (2) in the Elections Act to provide procedure for conducting fresh presidential election in case of annulment a procedure that did not exist thus remove uncertainty and therefore it did not amount to contrary interpretation of Article 140 from that of the Supreme Court in the ***Raila Odinga*** case. Counsel relied on several authorities in support of their position.

1st and 2nd Respondents' submissions

32. ***Mr. Kuria***, learned counsel to the 1st and 2nd respondents, agreed with the submissions made on behalf of the 3rd respondent and added that Parliament can amend the law in reaction to a Court's judgment. Learned Counsel further contended that there was no vagueness in the amended laws and in particular ***section 2*** thereof especially when the law is read in terms of ***Article 259(3)*** of the Constitution on what

happens when a seat falls vacant. Article 259 (3) states that every Article of the Constitution should be construed according to the doctrine that the law is always speaking and that (a) a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. He contended that the amendment to section 2 of the IEBC Act gives effect to that Article. Learned Counsel argued that a Court should not entertain arguments that raise political questions since the Court does not, in exercising its jurisdiction deal with political questions. In counsel's view, the amendments did not amount to an amendment to the Constitution through the back door. He relied on a number of decisions to support his position.

Mr. Waikwa in Reply

33. In a short rejoinder, ***Mr. Waikwa*** submitted that in terms of ***Article 250(2)*** of the Constitution, a Chairperson should be identified and nominated as provided for by an Act of Parliament. He submitted that ***section 2*** as amended, allows any member of the Commission to act as Chairperson which is not in tandem with ***section 6*** on the qualifications of the Chairperson. He also argued that what is raised in the petition is not a political question and that even under ***Article 165*** the Court has to decide whether what Parliament had done, had been done in accordance with the Constitution.

34. Learned Counsel went on to contend that the values and principles of good governance under Article 10 require that a majority party acts responsibly but not in breach of or to undermine the Constitution. He submitted that under ***Article 73*** members of the National Assembly are state officer, who should act in accordance with the constitution.

35. Regard the submission by the respondents that there is presumption of constitutionality of Acts of Parliament ***Mr. Waikwa*** contended that where a law is challenged for being unconstitutional, the challenge is subject to proof hence the principle of legality cannot be sustained. On the submission that Parliament can amend the law in reaction to a Court's judgment, ***Mr. Waikwa's*** take was that the amendment can only be in accordance with the majority decision and not that of minority. He urged the Court to weigh carefully the authorities relied on by the 1st and 2nd respondents since they were foreign, arguing that ***Mr. Kuria*** did not show that the situation addressed by the foreign decisions was similar to ours

36. Learned counsel submitted that it was up to the respondents to show that the amendments were in tandem with the Constitution given that ours is a constitutional supremacy and not parliamentary supremacy. On public participation and views presented, learned counsel argued that most of those who presented views opposed the enactment of the impugned legislation and as an example, pointed at the submissions by the ***Catholic Justice and Peace Commission Parliamentary Liaison Desk*** attached in ***Mr. Sialai's*** affidavit to support his submission that majority of those who presented views opposed the amendments.

37. Regarding ***section 6*** of the impugned legislation, learned counsel submitted that sections 39 (1E) and (1F) significantly altered the value of electronic transmission of election results in that according to section 39(1F) live transmitted electronic results are merely for public information and does not affect the final result. He referred to the Supreme Court arguing that there is need for electronic transmission of results.

Analysis and Determination

38. I have carefully considered the pleadings herein, submissions by counsel for the parties and authorities relied on. The petition invokes the jurisdiction of this Court under Article 165 (3) (d) (i) of the Constitution to determine whether a law is inconsistent with the constitution. The question that has been raised in this petition is on the constitutional validity of the Election Laws (Amendment) Act, No. 34 of 2017. The petitioners have contended that the amendments introduced after the annulled 2017 Presidential election violate national values and principles in Articles 10, 81 and 86 of the Constitution in that they tend to inhibit rather than enhance transparency and accountability of the electoral process. They argued that these amendments are unconstitutional and violate not only Articles 10, 81 and 86 of the Constitution, but also were intended to circumvent the majority Judgment of the ***Supreme Court*** in ***Raila Odinga and another v Independent Electoral and Boundaries Commission & 2 others (supra)***

39.The respondents on their part took the position that the amendments are constitutional and that Parliament exercised its mandate in enacting those amendments. In principle, the respondents saw nothing unconstitutional in the amendments either in purpose or effect. It was their contention that the amendments were necessary in aligning election laws with the Constitution. They in particular denied the petitioners' contention that the amendments were intended to circumvent the majority opinion of the ***Supreme Court*** in favour of that of the minority.

40. In my view, the proper approach in dealing with the issue raised herein is to consider each amendment and determine its constitutional validity. This is so because the amendments having become law and taken effect, the views expressed by either side support or oppose the constitutionality of these provisions. This therefore calls for interpretation of the Constitution ***visa Vis*** each of the impugned provisions in order to determine whether they pass the constitutionality test. In doing so, it behooves the Court lays each of the impugned provisions alongside the Articles of the Constitution alleged to be offended and determine their constitutional validity. It is important however that that we briefly consider the Principles applicable in constitutional interpretation

41. When it comes to the interpretation of the constitution, the starting point should be Article 259 (1) of the Constitution itself which lays down the principles that Courts must bear in mind when interpreting it. Article 259(1) provides that ***(1) This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.*** The values and principles of the Constitution that is; the rule of law, human rights and fundamental freedoms development of the law and good governance must permeate the process of constitutional interpretation.

42. Courts have also over the years developed principles of constitutional interpretation through judicial pronouncements which are useful aids in the exercise of constitutional interpretation. First; as was stated in ***State v Acheson 1991 20 SA SOS;***

"The Constitution of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion"

43. Second, the Constitution should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people. In the case of ***The Government of Republic of Namibia*** v *Cultura 2000,* 1994 (1) SA 407 at 418 the Court stated that;

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation."

44. This principle was emaciated in the case of ***Njoya & 6 Others v Attorney General & another [2004]eKLR*** where the Court stated;

"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."

45. Third, a Constitution has various provisions which should be given a holistic interpretation. It should be read as one document and not as several and or separate provisions. Each provision should be read as supporting the other and not one provision destroying the other. They should be given a harmonious reading as one document. In the case of ***Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC*** the Constitutional Court put it thus;

"The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness."

46. The ***Court of Appeal of Tanzania*** while agreeing with this view in the case of ***Attorney General of Tanzania v Rev. Christopher Mtikila [2010] EA 13*** observed that the principle of harmony requires that the entire Constitution be read as one entity. The ***Supreme Court*** also advocated a holistic interpretation of the Constitution ***In the Matter of Kenya National Human Rights Commission,*** (Supreme Court Advisory Opinion Ref. No.1 of 2012) stating;

"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

47. Fourth, there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This view is based on the fact that as peoples' representative, parliament usually enacts laws to serve people and therefore, Parliament understands why such laws are enacted and the problems they are intended to solve. Advancing this view in the case of ***Hambardda Dawakhana v Union of India*** **Air (1960) AIR 554**, the ***Supreme Court*** of India stated;

"In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation."

48. It was stated in ***Ndyanabo v Attorney General of Tanzania*** **[2001] EA 495, that** it is the duty of the person alleging constitutional invalidity of a statute or statutory provision to prove that invalidity.

49. Fifth, the Court must also consider the cause- effect in interpreting the Constitution. The purpose of enacting a statute and the effect of implementing the statute will also determine the constitutionality of a statute. In the case of ***R v Big M Drug Mart Ltd*** [1985]1 SCR 295, the ***Supreme Court*** of Canada observed;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity." (See Olum ***and another v Attorney General*** **[2002] 2 EA** 508).

50. And In ***Ng Ka Ling & Another v The Director of Immigration (1999)*** **1 HKLRD 315.the Court stated;**

"It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them,

the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."

51. Guided by the above principles, we now turn to consider whether the impugned provisions go against Articles of the Constitution as contended by the petitioners. In doing so the Court should bear in mind the principle stated in ***US v Butler 297 US*** 1 [1936] that;

"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked besides the statute which is challenged and decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the constitution; and, having done that, its duty ends."

1. The IEBC Act

52. The amendments concern three statutes. The first is the ***IEBC Act 2011*** whose ***sections 2, 7A (4), 7A (5) 7A (6) 7B*** and ***paragraphs 5*** and 7 of the ***Second Schedule*** to the Act are in issue. Section 2 was amended with regard to the definition of ***Chairperson. "Chairperson"*** is now defined to mean ***"the Chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the Vice chairperson or a member of the Commission when discharging the functions of the chairperson"***. Prior to the impugned amendment, ***"Chairperson"*** was defined as ***"the chairperson of the Commission appointed in accordance with Article 250(2) of the constitution".***

53. The petitioners have argued that this amendment is overboard and violates the Constitution on who is the Chairperson of the Commission. According to the petitioners, there is only one chairperson who is appointed in accordance with the Constitution and therefore, the definition to include any other person as chairperson is erroneous and unconstitutional.

54. The Constitution, in ***Article 250(2),*** provides that there should be a chairperson identified and appointed in accordance with a national legislation. In the case of IEBC, the chairperson must have been identified in accordance with the IEBC Act and appointed in accordance with the Constitution. Once appointed, the chairperson performs constitutional functions that only the person appointed in accordance with the Constitution should perform.

55. In that regard therefore, there can be only one chairperson who is appointed in the manner provided for by the Constitution and the IEBC Act. The Vice Chairperson or any other member, however appointed, cannot be defined as ***"Chairperson".*** In determining such an issue one has to look at the object, purpose and effect of defining any other person as chairperson of the Commission when such a definition gives an unintended effect.

56. In my considered view, the definition in the amended section 2 is too broad and overboard. It confers a title and status on a person who is not intended by the Constitution. This is because section 6 (1) of the Act provides for qualifications one must have be appointed chairperson of the Commission. He must be qualified to hold the office of ***Judge of Supreme Court***. Article 166(3) of the Constitution provides for qualifications for appointment as Judge of Supreme Court, namely; at least 15 years' experience as judge of a Superior Court; or at least 15 years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field or has held the qualifications as judge of Supreme Court or distinguished academic, judicial officer legal practitioner or experience in other relevant legal field.

57. Only a person, who possesses these qualifications, should qualify to be appointed chairperson of the Commission. And only a person appointed as required by the Constitution should fall in the definition of chairperson. In that case therefore, the definition of chairperson should be limited to the person who meets the qualifications and has been appointed in accordance with the Constitution. Anyone else, whether in acting capacity, or not cannot be defined as chairperson. I have for comparison purposes, perused the definition of "chairperson" in the legislations for other Commissions but none has a definition similar to that in the impugned section 2. There would be no justification to have a different definition assigned to the chairperson of IEBC. The former definition was in line with the Constitution as opposed to new one.

58. The petitioners next challenged amendments introduced in Section 7A; that is introduction of subsections (4), (5) and (6) which deal with filling of a vacancy in the office of chairperson. Section 7A (4), 7A(5) and 7A(6) provide:-

"(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section."

59. The import of the amendment introduced by section 7A (4) is that the vice chairperson will act as chairperson and discharge the full constitutional responsibilities of the chairperson should a vacancy occur in that office. Although this may on the face appear a simple issue, one has to bear in mind that the chairperson appointed in accordance with the Constitution, performs some critical constitutional functions only reserved for the chairperson. The role and authority of the chairperson emanates from the Constitution. In a nutshell, he is the head and spokesperson, provides leadership and direction to the Commission. On being appointed, he/she takes the oath of office to execute his

mandate as such. The question that arises is whether a person who does not meet the qualifications required should assume and perform such constitutional functions.

60. In my respectful view, and from the reading of the Constitution, this is not possible. Ordinarily, the vice chairperson would perform certain minimal administrative functions in the absence of the chairperson. That would not however entitle him/her to assume the full duties and perform critical functions including constitutional mandate of the Chairperson when he does not meet the qualifications to be chairperson, and has not been appointed in accordance with the Constitution. When the Constitution provides that chairperson be appointed in a particular manner, there can be no shortcut but to stick to the constitutional dictates. An appointment done in any other manner would be unconstitutional.

61. There is an even more fundamental problem with regard to section 7A (5) which provides that in the event "***the positions of both the chairperson and vice chairperson fall vacant, a member elected by Commissioners shall act as the chairperson and exercise the powers and responsibilities of the chairpersons until such time as the chairperson is appointed".*** Section 7A (6) goes further to provide that section 6(1) of the Act (on qualifications of chairperson) shall not apply to the vice chairperson or member acting as chairperson under section 7A (4) or 7A (5).

62. The petitioners contended that these amendments are unconstitutional since they give constitutional mandate of the chairperson to a person appointed in a manner otherwise than as provided by the Constitution and most likely without qualifications. These amendments present a number of constitutional and legal problems. The chairperson is supposed to be identified as provided by the IEBC Act and appointed as contemplated by the Constitution. Article 250(2) of the Constitution provides that ***(2) The chairperson and each member of a commission, and the holder of an independent office, shall be— (a) identified and recommended for appointment in a manner prescribed by national legislation; (b) approved by the National Assembly; and (c) appointed by the President.*** It is even more important that Article 250(3) emphasizes that ***(3) to be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.***

63. In that regard, the qualifications for the chairperson set out in section 6(1) are anchored in the Constitution and are mandatory. A person without these qualifications cannot by any means be chairperson whether in acting capacity or not, since the Constitution leaves no option. Some of the chairperson's mandate are clearly spelt out in the Constitution (Article138 (10)-to ***declare Presidential result***. This is a responsibility that only the chairperson identified, recommended and appointed as required by the Constitution should perform.

64. The purpose and effect of the sections 7A (4) and 7A (5) is to allow a person who is not the chairperson, has no qualifications required by section 6(1) and not appointed in accordance with the Constitution to take over leadership of the Commission and perform constitutional functions of the chairperson. This is a clear violation of the Constitution and in particular Articles 138(10) and 250(2) and (3).

65. It is of more intriguing that section 7A (6) suspends section 6 (1) of the Act with regard to qualifications of the chairperson at that time section 7A (4) and 7A (5) become applicable notwithstanding that the person will perform and exercise full responsibilities of the chairperson. In essence, section 7A (6) read purposively, has the singular effect of suspending Article 250 (3) of the Constitution regarding the qualifications of the chairperson. When the framers of our Constitution included sub Article 3 in Article 250, they had no illusion that it would be followed. Their wish must be respected.

66. Where the Constitution provides the manner of appointment and goes further to state in a plain and unambiguous language that the qualification contained in the national legislation that one must meet to be appointed to a particular position, must be strictly followed. Parliament, as the legislative organ of state, has only one option- to obey and observe that constitutional decree. It cannot, and must not, in the exercise of its legislative authority, enact a law whose effect is to circumvent that constitutional command. Short of this, such a law would fall to be declared unconstitutional as demanded by Article 2(4) of the Constitution.

67. It was contended by the respondents that these amendments are in line with Article 259(3) (a) which provides that a function or power conferred by the constitution on an office may be performed or exercised as occasion requires, by the person holding the office. This Article must be read purposively and in harmony with Article 250 of the Constitution. In the case of IEBC the person holding the office must have been placed in that position as required by the Constitution and the law. Article 259(3) cannot be the motivation for enacting a legislation that overrides the Constitution. Moreover, the chairperson's appointment should be differentiated from that of the vice chairperson who is elected by Commissioners under Article 250 (10) and a vacancy in that office filled in accordance with Article 250(11). If the Constitution provides how a vacancy in the vice chairperson's position should be filled, that of the Chair person must, in the same vain, be filled in accordance with the Constitution as read with the Section 6(1) of the Act to give the Constitution a harmonious reading. In that regard therefore, section 7A (6) is unconstitutional.

68. The petitioners further took issue with the introduction of section 7B to the effect that***"(l) Whenever the chairperson is absent, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson; (2) Whenever the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson; (3) The provisions of section 6(1) shall not apply to the vice chairperson or a member acting as chairperson under this section".***

69. A reading of section 7B has a similar effect as section 7A (4), (5), and (6). Even though a dully appointed chairperson may be in office, the section empowers the vice chairperson to exercise the chairperson's functions for reasons other than inability to discharge his functions under the Constitution and the law. The same applies to a situation where both the chairperson and vice chairperson are ***"absent'*** which would allow members of the Commission to elect an unqualified member of the Commissioner to act as chairperson and exercise responsibilities of the chairperson. The Act does not define the word ***"absent."*** However, taken in its ordinary meaning and context; that ***"absent"*** means not being present in a place, at an occasion or as part of the meeting, the section creates mischief. Section 7B (3) also suspends section 6(1) of the Act in such an eventuality.

70. Section 7B does not only flies in the face of Article 250(2) and (3) of the Constitution just like section 7A (4) (5) and (6) but also

generally makes nonsense of the Constitution and the Act on the importance of the office of chairperson of the Commission. IEBC is an independent Commission that discharges critical mandate under Article 88(4). The framers of the Constitution were clear when they stated in Article 88 (5) that ***the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation***. They also tasked Parliament with the responsibility of enacting legislation to operationalize Article 88. They said in plain language in Article 250 (3), that the qualifications for the chairperson should be strictly followed. Parliament was therefore alive to this when it enacted section 6(1) providing the qualifications one would have to meet to be appointed to the position of chairperson. It is inconceivable that the same Parliament would suspend operations of the same provision at some convenient time.

71. One of the principles of statutory interpretation is that a statute should be read as a whole and given a holistic interpretation to avoid distortion. (SeeThe ***Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013). Weighing section 7B as read with section 6 of the Act against the Articles of the Constitution, it emerges clearly that it is not only unconstitutional but will also have unintended negative consequences. It will engineer divisions, fights, disharmony and cause disorientation within the Commission in the discharge of its constitutional mandate. The provision will also weaken the position of the Chairperson and cause unnecessary tension. Members of the Commission may take advantage of the chairperson's absence to make fundamental decisions with serious ramifications to the Commission and the country, taking into account the divisive nature of politics in the country ***visa viz*** the important role the Commission plays in the management of elections. It cannot be in the best interest of Commission to allow commissioners to choose one of their own, albeit unconstitutionally, to exercise constitutional mandate of the chairperson who is lawfully in office.

72. The law must be certain and support the functioning of an independent constitutional Commission given that the tenure of the chairperson once appointed, is guaranteed by the Constitution. Allowing Commissioners to choose one of them to act a chairperson, is to allow them to oust the chairperson and or his vice from office should an opportunity present itself despite the fact that chairperson's tenure and independence is constitutionally protected. A provision such as section 7B weakens the Commission. It will most certainly affect its institutional independence guaranteed by the Constitution and emphasized under section 26 of the Act. It also exposes the Commission to external pressure or direction in violation of the Constitution.

73. Lastly, there is the question of quorum for meetings of the Commission which has been introduced by paragraph 5 of the Second Schedule to the Act. Prior to the impugned amendment, paragraph 5 of the Second Schedule to the Act provided that the quorum was five, stating; ***"the quorum for the conduct of business at a meeting of the commission shall be at least five members of the commission."*** After the amendment, the paragraph now provides that ***"the quorum for the conduct of business at a meeting of the commission shall be at least half of the existing members of the commission, provided that the quorum shall not be less than three members."*** Paragraph 7 was also deleted and a new one inserted. The deleted paragraph provided that unless a unanimous decision was reached, a decision on any matter before the Commission was to be by concurrence of a majority of all the members. This was however deleted and the following new paragraph inserted to the effect that ***"Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting."***

74. The Commission is currently composed of 7 members including the chairperson. The quorum for purposes of conducting business is half of the members but not less than three. This means the Commission can comfortably conduct business with three out of seven members, a minority of the Commissioners. Taking into account the new paragraph 7 which requires that if there is no unanimous decision, a decision of the majority of the Commissioners present and voting shall prevail, has one fundamental flaw. With a quorum of three Commissioners, there is a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. This would not auger well for an independent constitutional Commission that discharges very important constitutional mandate for the proper functioning of democracy in the country. Such a provision, in my respectful view, encourages divisions within the Commission given that the Commission's decisions have far reaching consequences on democratic elections as the foundation of democracy and the rule of law.

75. Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else would be invalid. For that reason paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional.

76. The respondents, in supporting the amendments, submitted that they were meant to address a lacuna in the event there was a vacancy in the Commission with respect to the chairperson. Even though that may be so, one of the rules of interpretation of statutes requires that a statute be holistically interpreted. In the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** (supra) the Court of Appeal observed;

> ***"One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."*** *(Emphasis)*

77. Looking at the amendments and reading the Act as a whole, from the definition of chairperson, election of a member to exercise powers and functions of the chairperson, to the quorum of the Commission for purposes of meetings, it is obvious that these amendments have a negative and unconstitutional effect to the functioning of the Commission. As the Supreme Court of Canada stated in R ***v Big M Drug Mart Ltd (supra)***, an unconstitutional purpose or an unconstitutional effect is enough to invalidate legislation. This was emphasized in Olum ***and another v Attorney General*** **(supra), that** if the effect of implementing a statute or provision infringes a right, the impugned statute or section should be declared unconstitutional. With the above in mind, and considering the effect of implementing these amendments, I find and hold that the amendments to the IEBC Act are unconstitutional.

The Elections Act

78. The next challenge was directed at the amendments made to the Elections Act 2011. The amendments relate Sections 39, 44, 44A, 83 and 86A of the Act They deal with transmission of election results, voter identification, declaration of election results, annulment of election results and holding of fresh presidential elections under Article 140(3). Section 39 was amended by deleting section 39 (1C) and introducing a new subsections (1C), (1D), (1E), (1F) and (1G).The previous subsection (1D) was renumbered subsection (1H).

79. The impugned section39(1C) now provides;

> ***"For purposes of a presidential election, the Commission shall-***
>
> ***(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;***
>
> ***(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and***
>
> ***(c) publish the polling result forms online public portal maintained by Commission."***

80. Prior to the amendments the subsection, introduced in September 2016, required the Commission to ***electronically transmit, in the prescribed form***, the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission.

81. The difference between the old subsection (1C) and the new subsection is, first; that whereas the results were to be transmitted only electronically, the new subsection requires that election results be not only transmitted electronically but also delivered physically from the polling stations to the constituency tallying centres and the national tallying centre. Another notable difference is that whereas the results were to be transmitted in the prescribed form, there is no requirement for any particular form for purposes of transmission of results.

82. The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C) (a). First, there is no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.

83. Speaking about the gains brought about by the former section 39(1C) before its amendment, the ***Court of Appeal*** observed in the case of ***Independent Electoral and Boundaries Commission & another v Maina Kiai & 5 others*** [2017] eKLR;

> ***Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre….From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results."***

84. The Supreme Court, commenting about the same reforms in ***Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** (supra) observed;

> ***"…these changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the Constitution and the electoral jurisprudence that had been developed by the Courts. The cumulative effect of these changes was the establishment of what is now referred to as the Kenya Integrated Election Management System (KIEMS). Henceforth, technology would be deployed to the process of voter registration, voter identification and the transmission of results to the Constituency and National Tallying Centres"***

85. The above decisions confirmed that the changes had been introduced in line with the dictates of the Constitution. For that reason, a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.

86. The petitioners also took issue with Subsection (1D) which provides that ***the Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.*** The subsection merely states that the Commission should verify that the results transmitted under Section 39 (1C) (a) are an accurate record of the results tallied, verified and declared at the Polling Stations. This, on the face of it, would appear to be in line with Article 138 (3) (c)of the Constitution which requires that after counting the votes at the polling stations, the Commission should, tally, verify the count and declares result..

87. However, section 39(1D) presents a problem when read together with section 39(1E) which provides that "***where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail."*** A reading of the two Sub-sections creates a potential tension between physically transmitted results and those transmitted electronically. First, the results are supposed to be from the same process, they should have been counted, tallied and verified before being transmitted. They therefore ought to be the same. To my mind, the way these sub-sections are crafted is not only vague and ambiguous but also creates a conflict between the two modes of transmission of results thus opens a window for tinkering with election results.

88. Ambiguity or vagueness in a statutory provision makes that provision void. A provision is said to be vague and or ambiguous when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality. In the case of ***Aids Law Project v Attorney General & 3 others*** [2015] eKLR the Court stated that overboard legislations are to be deprecated and the spirit of the Constitution and its principles frowns upon such overboard enactments.

89. The Supreme Court of Canada observed in ***Osborne v Canada (Treasury Board)*** [1991] 2 SCR 69, 1991 that;

> ***"Vagueness can have constitutional significance; one such significance is that a law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. That uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools."***

90. ***Lord Diplock,*** on his part commented in ***Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG*** [1975] AC 591, 638 that: ***"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."***

91. The constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.

92. Section 39 (1F) is also contentious. It provides that;***" Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.*** The petitioners contended that this Sub-section negates the whole purpose of electronic transmission of results. The Sub-section absolves presiding or returning Officers who, though without justification, fail to transmit or publish election results in an electronic format. The country's experience over tinkered results is well known and would not like to go back there. It adopted electronic transmission of election results as a way of guaranteeing free, fair, accurate, transparent and accountable elections as required by the Constitution. The Election laws were enacted to ensure that counting was done at polling stations and presiding and returning officers electronically transmitted verified elections results in conformity with the spirit of the Constitution.

93. The enactment of section 39(1F) is clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in the Constitution. Free and fair election is the process towards electoral democracy and the highway to a democratic state. Rather than a move forward, section 39(1 F) is a backward step in so far as the requirements for free and fair elections are concerned. Juxtaposed against ***Articles 10, 81 a***nd ***86*** of the Constitution, it is obvious that section 39(1F) strikes at the heart the principles of our electoral system in the Constitution, for saving results that have not been transmitted as required by law. This is violates constitutional principles and is invalid.

94. The amendments further introduced subsection (1G) whose Constitutional validity has also been questioned. The sub Section provides that "***the Commission shall, to facilitate Public information, establish mechanisms for the live streaming of results as announced at Polling Stations, and the results so streamed shall be for purposes of public information only, and shall not be the basis for a declaration by the Commission."*** Learned counsel for the Petitioners took issue with this provision submitting that it renders live streaming of election results insignificant. It was submitted that the amendment would make live transmission useless and in a way circumvent the Court of Appeal decision in ***The Independent Electoral and Boundaries Commission & Others v Maina Kiai & others*** **(supra)** and that of the Supreme Court majority in ***Raila Odinga & another V Uhuru Kenyatta & Others*** **(Supra).**

95. Live transmission of election results announced at the polling stations to the Constituency and national tallying centres is critical when it comes to openness, transparency and accountability of the electoral process. Live transmission of election results was adopted after reforms were introduced in election laws as a means of avoiding situations where election results announced at the polling station would later significantly differ from those declared at the constituency and national tallying centres. The results announced at the polling stations form the basis of any other results declared either at the constituency or national tallying centres.

96. The import of the new subsection is to make live streaming of results from polling stations of no value when it comes to the finality of the declared results. If the intention of the legislature was that results streamed live from the primary source should not matter when it comes to the final tally, why should the country invest heavily in technology as provided for in section 44 of the Act, have results streamed live from polling stations for public information only? Live streaming of election results is one way of conforming to the constitutional principles of transparency and accountability. Citizens should be able to compare the live transmitted results with the final declared results to confirm the accuracy of the election results.

97. When Parliament enacts a law that significantly erodes the element of transparency and accountability in the electoral process, such a law overrides the constitutional principles of the electoral systems contemplated in Articles 10, 81 and 86 of the Constitution. You cannot have results that are streamed live from polling stations but which are of no value when it comes to declaration of final results. The results streamed live from polling stations are the primary source of those finally declared. Final results are a product of the same process. One process cannot have two different results. Live streamed results play a significant role in determining the final results. Those results should be as much correct as those finally declared. I am persuaded that sub-section (1G) is a mockery of the requirements for free, fair and credible elections. It violates the principles of electoral systems in the Constitution. In that regard therefore, this amendment cannot hold in our transformative constitutional dispensation.

98. Looking at the effects of the amendments introduced by section 39 (1C) (a), 39(1D), 39(1E), 39(1F) and 39(1G), I am persuaded that they have the effect of weakening rather than strengthening our electoral process. Any amendments that would have the effect of circumventing constitutional principles are unconstitutional.

99. There was also an amendment to section 39(2) to the effect that the chairperson of the Commission may declare a candidate elected president before all constituencies have transmitted their results if satisfied that the remaining results will not affect the result of the election. Prior to the amendment section 39(2) provided that before determining and declaring the final results of an election, under subsection (1), the Commission could announce ***"provisional"*** results of an election. Section 39(3) was also amended by deleting the word ***"provisional"*** so that now the Commission should announce final results in the order in which the tallying of results is completed. It was contended on behalf of the petitioners that this amendment disfranchises voters given that the Commission is required to hold elections in the 290 constituencies.

100. The Constitution requires that the Commission holds elections in all the 290 Constituencies in the case of Presidential Elections. It must therefore, discharge its mandate by holding elections in each constituency and ensure that voters in the constituency have had an opportunity to vote. In that regard, the reading of section 39(2) is not that elections have not been held, but that the Commission has held elections, received election results and is satisfied that results from the Constituencies that are yet to transmit, will not change the election results. The Chairperson may in such circumstances declare a person elected president. The mandate of the IEBC is to declare the winner of the presidential contest after tallying the results received and determining that those remaining are such that they would change the position regarding the winner.

101. A plain reading of the two subsections, in my view, does not disclose any unconstitutionality. Section 39(2),(3) has removed provisional results so that the Commission is only to announce final results and made it clear that the chairperson can declare a person elected president if results from the yet to transmit constituencies will not affect the final tally. There is really nothing unconstitutional if final results are announced when it is clear that those from the remaining constituencies will not change the election result as to who the winner is. There is no constitutional invalidity in these provisions. However, it is desirable that all results be received and tallied before a declaration of the winner is made.

102. Section 44(5) of the Act was deleted and a new subsection introduced to the effect that ***the Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section***. The petitioners attacked this amendment arguing, generally, that the amendments are unconstitutional. Section44 deals with ***use of technology*** and establishes an ***integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results***. Subsection 44(5) only requires the Commission, in consultation with stakeholders, comes up with regulations on the implementation of the Integrated Biometric Voter Registration, Electric Voter Identification and Electronic Transmission of results ***(KIEMS)***. The petitioners have not demonstrated how, if at all, this provision violates the Constitution to require that it be declared unconstitutional. I find neither unconstitutional purpose nor effect in the implementation of this provision.

103. The impugned Act deleted section 44A and inserted a new section 44A which provides that notwithstanding the provisions of section 44, the Commission shall put in place a complimentary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution. The petitioners contended that this was in a way doing away with the electronic system.

104. The complimentary mechanism contemplated in this section is, as the name suggests, only complimentary. It does not replace the electronic voter identification system. The word ***"complimentary",*** in the context in which it is used in this section, can only mean to assist or aid. It can only be resorted to in the event the principle voter identification system has failed. That is; it is to be used only when there is technology failure. To that extent, therefore, I do not see how this provision violates Articles 10, 38, 81 and 86 on the values and principles transparency and accountability of the electoral system. Rather, it is intended to aid and or complement the main voter identification system in the event there is failure and ensure that the electoral process continues.

105. Finally, there was a submission that the amendments introduced to Sections 83 and 86A of the Act have an unconstitutional effect. Prior to the impugned amendments, Section 83 provided that ***"no election shall be declared to be void by reasons of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the noncompliance did not affect the results of the election.***´ The Section had a disjuncture word "or" that gave two test for purposes of annulling an election.

106. The amended section 83 now provides;

> ***"(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-***
>
> ***(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and***
>
> ***(b) the non-compliance did not substantially affect the result of the election.***

(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead."

107. This amendment was introduced after the ***Supreme Court*** by Majority, annulled the 2017 Presidential election on 1st September 2017 holding that the election failed to comply with the Constitution and Election laws. The petitioners contended that by amending the law from a disjunctive test to a conjunctive one, it would be difficult to challenge an election even when there was violation of the constitutional principles. The petitioners further contended that the amendment was intended to circumvent the Constitution and the ***Supreme Court***'s judgment on how elections should be conducted, thus make it impossible to annul a faulty election.

108. The Supreme Court while dealing with Section 83 in ***Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** (Supra, observed at paragraph 194 that the provision (the then section 83) was different from provisions in other jurisdictions in that the Act did not have the word ***"Substantially"***, which was in many of the other countries 'legislations. It also observed that our Elections Act, 2011 including Section 83 of the Act, had been harmonized with the Constitution. It was the Majority's opinion that for elections to be valid, they had to be conducted in strict compliance with the principles laid down in the Constitution, given that the retired Constitution did not contain any constitutional principles relating to elections. The majority emphasized that in interpreting Section 83, it had to pay due regard to the meaning and import of the envisaged constitutional principles.

109. The Supreme Court therefore gave section 83 an interpretation that was in line with the principles in our transformative Constitution and the electoral laws. While interpreting section 83, the Supreme Court made reference to several comparative jurisprudence including the opinion expressed by ***Prof. Justice Tibatemwa Ekirikubinza*** in the case of ***Col. Dr. Kizza Besigye v Attorney General (***Constitutional Petition No. 13 of 2009) where the learned Judge observed that a Court can annul Presidential election results if the evidence adduced before it showed substantial departure from the Constitutional imperatives.

110. With this holding the Supreme Court underlined one fact; that Section 83 was in harmony with the 2010 Constitution and that it was different from the previous election laws. The amendment to section 83 which removed the disjunctive word '***or'*** and introduced the conjunctive word ***'and'*** together with the word ***"substantially",*** is a departure from the constitutional requirements for free, fair and transparent election and a draw back in the electoral reforms.

111. When interpreting the import of this amendment visa viz the Constitution, the court must remain alive to the general principles that the Constitution is a living instrument with a soul and consciousness of its own reflected in the preamble and fundamental objectives and its directive principles. The Court must therefore endeavour to avoid crippling the Constitution by construing it technically or in a narrow sense. It must be construed in tune with the purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. **(**See ***Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another (***Nairobi High Court Misc. Appl. No. 890 of 2004).

112. It is true as submitted by the respondents' counsel that Parliament exercises its mandate under the Constitution when enacting legislation. However, Parliament has a constitutional obligation to enact laws that are in tandem with the Constitution. Article 81 of the Constitution contains principles of our electoral systems which elections must comply with including ***free and fair elections that are by secret ballot, free from violence, intimidation, improper influence or corruption; that are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner***. Article 82 further provides that Parliament should enact laws that ***will facilitate conduct of free and fair elections and referenda and ensure that the voting is simple and transparent also taking into account the needs of persons with disabilities and special needs***. Article 86 also demands that(a) ***whatever method of voting is used, it should be simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and that (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials***.

113. Taking these constitutional imperatives into account and juxtaposing them with the amended section 83 of the Elections Act, it is clear that even though the Constitution values the quality of elections, and the amendment has the effect disregarding these principles when it comes to considering whether or not to annul an election. In my considered view, that must not have been the intention of the framers of our Constitution when they included these principles of electoral system in the Constitution. These principles are part and parcel of the Constitution and are important in holding free, fair, open, transparent, impartial and accountable elections. We must appreciate that these are constitutional and not statutory requirements. Parliament could not enact a legislation that had the effect of whittling down constitutional principles that had been harmonized and embodied in section 83 prior to its amendment by demanding that failures in complying with the Constitution or the law must be ***"substantial"*** as to affect the result for an election to be annulled.

114. The Supreme Court observed at paragraphs 23 and 237 of the Judgment that all the legislative enactments had one objective; to ensure that in conformity with the Constitution, the elections are free, fair, transparent and credible and that the terms "*simple, accurate, verifiable, secure, accountable and transparent"* engrafted into the provisions of those enactments, are the self- same constitutional principles in Articles 10, 38, 81 and 86 that the (presidential) election had to be conducted in accordance with the principles laid down in the Constitution and the law. An election could be annulled if it failed to comply with constitutional principles and the election laws ***or*** the non-compliance substantially affected the results.

115. The amendment now means that for an election to be annulled there must not only be failure to comply with the Constitutional principles and election laws but also the failures must substantially affect the result of the election. The essence of this amendment is to allow violation of constitutional principles and election laws as long as they do not substantially affect the result. Any amendments must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process. It is my holding that there was no constitutional compulsion or rational in amending section 83 of the Act to remove the disjunctive word ***'or'*** and introduce the conjunctive word ***'and'*** so that only where there are failures in complying with the constitution and election laws and they ***substantially*** affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our

transformative Constitution that there should be free, fair, transparent and accountable elections.

116. I take guidance from the holding in ***Doctors for Life International vs. Speaker of the National Assembly and Others*** (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC, that:

> ***"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And in so far as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty…. 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…"***

117. I so find with regard to the amended section 83 of the Elections Act. Parliament has a duty to defend and protect the Constitution and enact laws that are in conformity with its values and principles. Section 83(2) cannot invite the aid of the Statutory Interpretations Act to shield violations of the Elections Act and Regulations enacted to enforce the Constitutional principles.

118. The respondents submitted that the Supreme Court had decided on the constitutionality of section 83 as amended hence this Court has no jurisdiction to deal with the issue. I have perused the judgment of the Supreme Court in ***John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*** [2017]. What is clear is that the Supreme Court declined to take up jurisdiction and decide that issue because it was pending before this Court stating; "…***we leave the issue of the unconstitutionality or invalidity, or otherwise, of Section 83 of the amended law to the determination of the High Court, where the matter is currently under consideration."*** However, ***Lady Justice Njoki Ndungu*** was of the opinion that Parliament had not invaded the judicial realm in amending section 83.

119. All this Court can say is that ***Lady Justice Njoki Ndungu's*** opinion on the amendment to section 83 was ***obiter dictum***. The Supreme Court having decided to leave the issue for this Court's determination, it was not an issue falling for determination by the Supreme Court and therefore, there was no decision by the Supreme Court on the matter that is binding on this Court. This was one of those situations where the Supreme Court was faced with the question of co- shared jurisdiction on the interpretation of the Constitution. It declined jurisdiction and left the matter for this court's decision. (see***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** [2012]eKLR)

120. The impugned Act also introduced Section 86A to the effect that where the Supreme Court annuls presidential elections under Article 140(3) of the Constitution, the Commission has to publish a gazette notice within seven days indicating that no candidate had been elected following the nullification, announce the date of the fresh election, and names of candidates and political parties to take part in the fresh election. The section further provides that the Commission will not hold fresh nominations pursuant to Article 140(3); that an eligible candidate under Article 140(3) may withdraw from the election by giving a notice to the Commission, and that where there remain more than two candidates, election will proceed but where only one candidate remains after such withdrawal, no elections shall take place, but the remaining candidate shall be declared president-elect.

121. The introduction of this section was in response to the challenges the Commission faced after annulment of the 2017 presidential election and the subsequent disputes that followed, more so on who was eligible to participate in the fresh election. In my view, section 86A clears a lacuna that made the holding of the 2017 fresh presidential election a challenge to the Commission. The section clarifies what should happen and the timelines. It also makes it clear what should happen when only one candidate remains after withdrawal of the other candidates which is in tandem with Article 138(1) of the Constitution. The section is for necessary clarity and efficiency. I see no constitutional invalidity.

122. The other amendments involved the sections 6 and 14(2) of the Election offences Act. The fine and sentence in section 6 was enhanced while section 14(2) was deleted. There is not much the Court can say on this. There was also no submission that there was no public participation.

Conclusion

123. In conclusion therefore, having considered the petition, the responses and submissions by counsel for the parties, the authorities relied on by parties and those by the Court, and also having considered the applicable law, I am persuaded that certain amendments introduced through the ***Election Laws (Amendment) Act No. 34 of 2017*** failed the constitutional test of validity. All the amendments made to the Independent Electoral and Boundaries Commission, namely; section 2, on definition of the word ***"chairperson"*** , section 7A(4),7A(5), and7A(6), the entire section 7B and paragraphs 5 and 7 of the Second Schedule to the Act on the quorum for purposes of meetings of the Commission are unconstitutional.

124. With regard to the Elections Act, 2011, the petitioners have succeeded to persuade the court that amendments introduced to section 39(1) (C) (a), 39(1D), 39(1E), 39(1F), 39(1G) and the entire section 83 have failed the constitutionality test. I however find no fault in the

amended sections, 39(2), 39(3), 44(5), and 44A of the Elections Act, 2011.

125. In the premise therefore, this petition partially succeeds and I make the following orders which I find appropriate;

i. ***A declaration be and is hereby issued that sections 2, 7A (4), 7A (5), 7A (6) of the IEBC ACT, 2011, and Paragraphs 5 and 7 of the Second Schedule to the Act are constitutionally invalid.***

ii. ***A declaration be and is hereby issued that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 are constitutionally invalid.***

iii. ***As this was a public interest litigation, I order that each party do bear own cots***.

Dated, Signed and Delivered at Nairobi this 6th Day of April 2018

E C MWITA

JUDGE