



**Odinga & another v Independent Electoral and Boundaries Commission & 2 others
(Election Petition 1 of 2017) [2017] KESC 32 (KLR) (1 September 2017) (Determination)**

*Raila Amolo Odinga & another v Independent Electoral
and Boundaries Commission & 2 others [2017] eKLR*

Neutral citation: [2017] KESC 32 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITION 1 OF 2017
DK MARAGA, CJ & P, PM MWILU, DCJ & VP, JB
OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
SEPTEMBER 1, 2017**

BETWEEN

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

H.E UHURU MUIGAI KENYATTA 3RD RESPONDENT

*(Determination Of Petition Without Reasons Pursuant to Rule
23(1) of the Supreme Court (Presidential Election) Rules, 2017)*

Presidential Election results annulled for failing to conform with the Constitution and the Elections Act.

Reported by John Ribia

***Electoral law** – presidential election – validity of a presidential election - petition challenging the validity of the president elect - allegations of non-compliance with the Constitution and electoral laws - allegations of various irregularities and illegalities during the conduct of the elections – what are the principles of free and fair elections - whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution of Kenya, 2010 and the written laws relating to elections - whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election and if in the affirmative, what was their*



impact, if any, on the integrity of the election - Constitution of Kenya, 2010, articles 81, 86,138, Elections Act 2011, sections 39 (1c), 44, 83; Elections (General) Regulations, 2012 Regulation 87(1)(b).

Brief facts

On August 8, 2017, a general election was held in Kenya. Following the election, the 1st respondent declared the 3rd respondent as the President-Elect. Aggrieved by the pronouncement, the 1st and 2nd petitioners filed the instant petition in which they sought for the presidential election to be annulled for failure to comply with laid out constitutional principles and the provisions of the Elections Act. The petitioners based their petition on grounds that the presidential election was tainted by illegalities and irregularities and consequently it lacked integrity.

Issues

- i. Whether the 2017 presidential election was conducted in accordance with the principles laid down in the Constitution and the provisions of the Elections Act.
- ii. Whether there were irregularities and illegalities committed in the conduct of the 2017 presidential election.
- iii. Whether the irregularities and illegalities, if any, affected the integrity of the 2017 presidential election.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 10

National values and principles of governance

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

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

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

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

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

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

(d) sustainable development.

Article 38

Political rights

(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party or

(c) to campaign for a political party or cause.

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

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

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

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

(a) to be registered as a voter;

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



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

Article 81

General principles for the electoral system

The electoral system shall comply with the following principles—

- a) freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 86

Voting

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

Elections Act

Section 39(1C)

Determination and declaration of results

(1C) For purposes of a presidential election the Commission shall —

- (a) 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.

Section 44

Use of technology

- (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
- (2) The Commission shall, for purposes of subsection(1), develop a policy on the progressive use of technology in the electoral process.
- (3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
- (4) The Commission shall, in an open and transparent manner —



(a) procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and

(b) test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for —

(a) the transparent acquisition and disposal of information and communication technology assets and systems;

(b) testing and certification of the system;

(c) mechanisms for the conduct of a system audit;

(d) data storage and information security;

(e) data retention and disposal;

(f) access to electoral system software source codes;

(g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;

(h) telecommunication network for voter validation and result transmission;

(i) development, publication and implementation of a disaster recovery and operations continuity plan; and

(j) the operations of the technical committee established under subsection (7).

(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

(a) be restricted to the process of voter registration, identification of voters and results transmission; and

(b) be procured at least one hundred and twenty days before the general election.

(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.

Section 44A

44A. Complementary mechanism for identification of voters Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

Section 83

83. Non-compliance with the law

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

Held

Majority: D. Maraga CJ, P. Mwilu DCJ, S. Wanjala and I. Lenaola, SCJJ

Dissenting: J. Ojwang and S. Ndung'u, SCJJ

1. The 1st respondent failed, neglected or refused to conduct the presidential election in a manner that was consistent to articles 10, 38, 81 and 86 of the Constitution of Kenya, 2010 and in a manner that was consistent with sections 39(1C), 44, 44A and 83 of the Elections Act.



2. The 1st respondent committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which would be given in the detailed and reasoned judgment of the court. However, there was no misconduct on the part of the 3rd respondent.
3. The irregularities and illegalities committed by the 1st respondent affected the integrity of the election and thereby impugned the integrity of the entire presidential election.

Dissenting opinion

Per J Ojwang, SCJ (Dissenting)

1. Whereas the substance of the case was founded on illegality and irregularity rested on the voting results electronic transmission process, there was substantial information showing that, by law, the conduct of the election should have been mainly manual, and only partially electronic. Hardly any conclusive evidence had been adduced in that regard which demonstrated such a manifestation of irregularity as to justify the invalidation of the election results.
2. As regarded the invocation of the Constitution as a basis for annulling the electoral process, only general attributions had been made without adherence to the prescription that the task of interpreting the Constitution with finality rested with no one but the courts.
3. Much of the evidence which the majority opinion adopted was largely unascertained, apart from standing in contradiction to substantial, more credible evidence.
4. In such a marginal state of merits in the case that challenged the conduct of elections on August 8, 2017, it was clear beyond peradventure, that there was not an iota of merit in invalidating the clear expression of the Kenyan people's democratic will, which was recorded on August 8, 2017.
5. The procedural law for assuring the integrity of elections was abundantly set out in the Elections Act, 2011 and in the Electoral Code of Conduct; and the relevant provisions were conscientiously applied by the Independent Electoral and Boundaries Commission, which fully provided for the role of international and local observers, as well as agents, in the conduct of the presidential election. The resulting electoral process had all the vital features of merit, as all the observers publicly acknowledged.
6. To disregard such outstanding features of merit in the elections on August 8, 2017, was to overlook the most basic democratic principles which safeguard the electors' entitlement to choose their public office-holders.
7. The instant petition was devoid of requisite supporting evidence, it did not rest upon the pillars of the Constitution, the ordinary law, or the pertinent elements inherent in the configuration of a democratic election.

The petition would have been dismissed

Per N Ndung'u SCJ (dissenting)

1. At the heart of democracy were the people, whose will constituted the strand of governance that Kenya had chosen. On August 8, 2017 millions of Kenyans from all walks of life yielded to the call of democracy and queued for many hours to fulfil their duty to Kenya by delegating their sovereign power to their democratically elected representatives. That was an exercise that was hailed by many regional and international observers as largely, free, fair, credible and peaceful. That duty stood sacred and was only to be upset if there was any compelling reason to do so. That reason had to affect the outcome of the election.
2. The election was conducted in accordance with the Constitution and the law. The 1st and 2nd respondents demonstrated that they had adhered to the directions given by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy* [2017] eKLR (the *Maina Kiai* case) where the Court of Appeal cautioned, that the results declared at the polling station were final. The polling station was at the heart of any election. It was what happened there that was to be assessed and that was why its outcome was final.



3. In any election, the ordinary Kenyan voter would ask themselves the following questions:-
 - a. Was there a problem with registration of voters?
 - b. Were voters properly identified at the polling station?
 - c. Were voters allowed to cast their ballots peacefully and within good time?
 - d. Were the votes cast-counted, declared and verified at the polling station to the satisfaction of all parties?
4. If the answer to all the instant questions was in the affirmative, then the election had been conducted properly.
5. The petitioners did not present material evidence, to the standard required, to upset the results returned to the National Tallying Centre by the presiding officers in Forms 34A. Those results, counted and agreed upon by agents at the polling station were not challenged.
6. What was fiercely contested was the mode through which those results were transmitted from the polling station to the National Tallying Centre. That process yielded the results that were streamed onto the portal and which, were not sufficiently impugned during the trial. The decision of the voter at the primary locale of the election, the polling station, was unchallenged. How then could a process used to transmit those results for tallying upset the will of the electorate? It was not proved that the voter's will during the conduct of elections, was so affected by any irregularities cited so as to place the instant court or the country in doubt as to what the result of the election was. Challenges were to be expected during the conduct of any election, however, those challenges which occurred, (none of which occurred deliberately or in bad faith, and which fell particularly outside the remit of the voter and his/her will) ought not to supplant the voter's exercise of their right of suffrage.

The dissenting court would have dismissed the petition.

Petition allowed

Orders

Order by the majority of the Court (with J. B. Ojwang and S. Ndung'u, SCJJ, dissenting)

- i. *Declaration issued that the presidential election held on August 8, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.*
- ii. *Declaration issued that the 3rd respondent was not validly declared as the President-elect and that the declaration declaring him President was invalid, null and void.*
- iii. *Order issued that directed the 1st respondent was to organise and to conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within 60 days of the instant determination under article 140(3) of the Constitution.*
- iv. *Each party was to bear its own costs*

Citations

Cases

Kenya

Independent Electoral & Boundaries Commission v Kiai & 4 others Civil Appeal 105 of 2017; [2017] KECA 477 (KLR); 2017] 2 KLR 1136 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 10, 38, 81, 86, 140(2)(3); 88; 138(10) - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) sections 39(1C); 44; 44A; 83; Schedule 2 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 22, 23(1) - (Interpreted)
4. Supreme Court Act, 2011 (cap 9B) sections 26(2) - (Interpreted)



Advocates

None mentioned

DETERMINATION

Determination of Petition Without Reasons Pursuant to Rule 23 (1) of the Supreme Court Presidential Election Rules 2017

1. The hearing of this petition was concluded on Tuesday, August 29, 2017 well after 9.00 pm. The judges thereafter retreated to deliberate on the following issues for determination as crafted by the court:
 - (i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.
 - (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election.
 - (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?
 - (iv) What consequential orders, declarations and reliefs should this court grant, if any?
2. Having carefully considered the above issues, the following is the majority decision of the court with two judges (JB Ojwang and NS Ndung'u, SCJJ) dissenting:
 - i. As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections, upon considering *inter alia* articles 10, 38, 81 and 86 of the Constitution as well as, sections 39(1C), 44, 44A and 83 of the Elections Act, the decision of the court is that the 1st respondent failed, neglected or refused to conduct the presidential election in a manner consistent with the dictates of the Constitution and *inter alia* the Elections Act, chapter 7 of the laws of Kenya.
 - ii. As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st respondent committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned judgment of the court. The court however found no evidence of misconduct on the part of the 3rd respondent.
 - iii. As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire presidential election.
3. Consequent upon the above findings, and as to what orders, declarations and reliefs this court should grant, the following are the orders of the court pursuant to article 140(2) and (3) of the Constitution and rule 22 of the Supreme Court (Presidential Election) Rules:
 - i. A declaration is hereby issued that the presidential election held on August 8, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;
 - ii. A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;



- iii. An order is hereby issued directing the 1st respondent to organize and conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination under article 140(3) of the Constitution.
- iv. Regarding costs, each party shall bear its own costs.
4. A detailed judgment containing the reasons for this decision and the dissents will be issued within 21 days of this determination in conformity with rule 23(1) of the Supreme Court (Presidential Election Petition) Rules, 2017 as it is otherwise impossible with the limited time the court has, to do so.
5. It is so ordered.

Summarised Dissenting Opinion of Ojwang, SCJ.

1. It is not necessary in this summarized judgment – which is to be followed by a fully detailed and reasoned decision on an occasion already signalled by the Chief Justice and President of the court – to give the comprehensive facts, submissions and legal principles bearing upon the instant petition.
2. The important petition, which seeks the annulment of Kenya’s presidential election results emanating from the General Elections of August 8, 2017, is focussed on a limited number of contentions:
 - (a) That the said Presidential Election was not conducted in accordance with the relevant principles of the Constitution;
 - (b) That the said Presidential Election was compromised by certain illegalities and irregularities;
 - (c) That, consequently, the said General Election lacked integrity, and ought to be invalidated.
3. Whereas the substance of the case founded on illegality and irregularity rests on the voting-results electronic transmission process, there is substantial information showing that, by law, the conduct of the election should have been mainly manual, and only partially electronic. Hardly any conclusive evidence has been adduced in this regard, which demonstrates such a manifestation of irregularity as to justify the invalidation of the election results.
4. As regards the invocation of the Constitution as a basis for annulling the electoral process, only general attributions of impropriety have been made, and furthermore, without adherence to the prescription that the task of interpreting the Constitution with finality, rests with no one but the courts – in this case, with this Supreme Court.
5. Much of the evidence which the majority opinion adopts, is largely unascertained, apart from standing in contradiction to substantial, more credible evidence.
6. In such a marginal state of merits in the case challenging the conduct of elections on August 8, 2017, it is clear to me beyond peradventure, that there is not an iota of merit in invalidating the clear expression of the Kenyan people’s democratic will, which was recorded on August 8, 2017.
7. The procedural law for assuring the integrity of elections is abundantly set out in the Elections Act, 2011 (Act No 11 of 2011), and in the Electoral Code of Conduct; and the relevant provisions were conscientiously applied by the Independent Electoral and Boundaries Commission, which fully provided for the role of international and local observers, as well as agents, in the conduct of the presidential election. The resulting electoral process had all the vital features of merit, as all the observers publicly acknowledge.



8. To disregard such outstanding features of merit in the just-concluded elections, is to overlook the most basic democratic principles which safeguard the electors' entitlement to choose their public office-holders.
9. In summarized form, I hereby record, without equivocation, my dissent from the judgment given by the numerical majority of the Supreme Court Bench. For my part, I would dismiss in its entirety the petition which came up before us, as it was devoid of requisite supporting evidence, just as it did not rest upon the pillars of the Constitution, the ordinary law, or the pertinent elements inherent in the configuration of a democratic election.
10. In accordance with the terms of section 26(2) of the Supreme Court Act, 2011 (Act No 7 of 2011), I hereby reserve the detailed, reasoned edition of my opinion, to be delivered within the next 21 days.

Summarised Dissenting Opinion of Njoki Ndungu, SCJ.

1. The court has rendered its judgement by a majority. I am however, of a different opinion. At the heart of democracy are, the people, whose will constitute the strand of governance that we have chosen as a country. On August 8, 2017, millions of Kenyans from all walks of life yielded to the call of democracy and queued for many hours to fulfil their duty to our Republic by delegating their sovereign power to their democratically elected representatives. This was an exercise that was hailed by many regional and international observers as largely, free, fair, credible and peaceful. That duty stands sacred and is only to be upset if there is any compelling reason to do so. That reason must affect the outcome of the election.
2. The election was managed by the 1st respondent chaired by the 2nd respondent who were assisted by hundreds of others to execute the mandate of the Commission under article 88 of the Constitution. At the end of the process, the 2nd respondent, in accordance with article 138 (10) of the Constitution, declared the result of the election. Having received more than half of all the votes cast in the election and at least twenty-five percent of the votes cast in each of more than half of the Counties, the 3rd respondent was declared President-elect.
3. The case revolved around three fundamental questions:
 - (i) Whether the election was conducted in accordance with the Constitution and the law?
 - (ii) Whether there were irregularities and illegalities committed during the conduct of the election and
 - (iii) If there were irregularities and illegalities, what was the integrity of the election?

In answer to these three issues, my opinion is that the election was indeed conducted in accordance with the Constitution and the law. In fact, the 1st and 2nd respondents to my satisfaction demonstrated that they had adhered to the directions given by the Court of Appeal in the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Civil Appeal No 105 of 2017 (the Maina Kiai case). The Court of Appeal in this case cautioned, and I agree, that the results declared at the polling station are final. In fact, the polling station is at the heart of any election. It is what happens there that is to be assessed and that is why its outcome is final.

4. In any election, the ordinary Kenyan voter will ask themselves the following questions?
 - (1) Was there a problem with registration of voters?
 - (2) Were voters properly identified at the polling station?
 - (3) Were voters allowed to cast their ballots peacefully and within good time?



- (4) Were the votes cast-counted, declared and verified at the polling station to the satisfaction of all parties?

If the answer to all these questions is in the affirmative, then the election has been conducted properly.

5. The petitioners in my view did not present material evidence, to the standard required, to upset the results returned to the National Tallying Centre by the presiding officers in Forms 34A. Those results, counted and agreed upon by Agents at the polling station were not challenged. What was fiercely contested was the mode through which those results were transmitted from the polling station to the National Tallying Centre. The 1st and 2nd respondents urged that transmission was conducted in line with the directions by the Court of Appeal in the *Maina Kiai* case. This process yielded the results that were streamed onto the portal and which, were not sufficiently impugned during the trial. The decision of the voter at the primary locale of the election, that is the polling station was unchallenged. How then can a process used to transmit those results for tallying upset the will of the electorate? It was not proved that the voter's will during the conduct of elections, was so affected by any irregularities cited so as to place this court or the country in doubt as to what the result of the election was. Challenges which are to be expected during the conduct of any election. However, those challenges which occurred, (and in my opinion, none of which occurred deliberately or in bad faith, and which fell particularly outside the remit of the voter and his/her will) – ought not to supplant the voter's exercise of their right of suffrage.
6. In summary, I respectfully disagree with the decision of the majority, and in accordance with section 26(2) of the *Supreme Court Act, 2011*, and will issue my full dissenting judgment within 21 days.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF SEPTEMBER, 2017

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. S. NDUNG'U

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JUSTICE OF THE SUPREME COURT

I. LENAOLA

JUSTICE OF THE SUPREME COURT



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

REGISTRAR

SUPREME COURT OF KENYA

