Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & N Ndungu, SCJJ)

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

Neutral citation: [2017] KESC 42 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

ELECTION PETITIONS

PRESIDENTIAL ELECTION PETITION 1 OF 2017

DK MARAGA, CJ & P, PM MWILU, DCJ & VP, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

SEPTEMBER 20, 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

UHURU MUIGAI KENYATTA ..... 3RD RESPONDENT

AND

EKURU AUKOT ..... INTERESTED PARTY

MICHAEL WAINAINA ..... INTERESTED PARTY

AND

ATTORNEY GENERAL ..... AMICUS CURIAE

LAW SOCIETY OF KENYA ..... AMICUS CURIAE

The Supreme Court declares the presidential election invalid for not being conducted in accordance with the applicable law

Reported by Kakai Toili

Electoral law *– presidential elections – validity of presidential elections - petition challenging the validity of the president elect – claim that there was non-compliance with the Constitution and electoral laws in the August 2017 presidential elections - claim that there were various irregularities and illegalities during the conduct of the elections – what were the principles of free and fair elections - Constitution of Kenya, 2010, articles 81, 86 and138; Elections Act, Cap 7, sections 39(1c), 44 and 83; Elections (General) Regulations, 2012, regulation 87(1)(b).*

Electoral Law *- presidential elections - electoral process - transmission of results and declaration of results - verification of results - process to be followed -whether the Court of Appeals' decision in the case of Maina Kiai provided a justification for declaring the results of the election of the President by the national returning officer without reference to Forms 34A - whether the Court of Appeal's decision relieved the Independent Electoral and Boundaries Commission from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center - Elections Act, Cap 7, section 39(1C).*

Electoral Law *– elections - election offences - undue influence - what was the meaning of undue influence in the context of an electoral malpractice - Election Offences Act, Cap 66, section 10, 14(1) and (2).*

Electoral Law *- presidential elections - requirements to be met for a candidate to be declared duly elected as President - computation to determine the threshold of 50% +1- what was meant by the "votes cast" to be taken into account in the computation to determine the threshold of 50% +1 - valid versus rejected votes in presidential elections - what was the meaning of "votes", "cast" and "ballot papers" - what was the place of valid versus rejected votes in a presidential election - Constitution of Kenya, 2010, article 138(4); Elections Act, Cap 7, section 2.*

Electoral Law *– elections – role of technology in the election process - transmission of election results – whether technology was a mandatory component of Kenya's electoral transmission process – Elections Act, Cap 7, section 39, 44 and 44A.*

Statutes *- interpretation of statutes - cannons of statutory interpretation - interpretation of section 83 of the Elections Act - where section 83 had two limbs - compliance with the law on elections and irregularities that may affect the result of the election - what was the proper interpretation of section 83 and whether the two limbs in the provision were conjunctive or disjunctive in interpretation - Elections Act, Cap 7, section 83.*

Constitutional Law *– fundamental rights and freedoms – political rights - right to challenge the results of a presidential election petition - whether election petitions were right centric or form centric.*

Constitutional Law *– fundamental rights and freedoms – fundamental rights and freedoms vis a vis directive principle in the Constitution - what prevailed where there was a conflict between constitutional fundamental freedoms and the directive principles in the Constitution.*

Law of Evidence *– burden and standard of proof - burden and standard of proof in presidential election petitions – nature of burden and standard of proof - what amounted to and who bore the burden of proof in presidential election petitions – what were the circumstances under which the evidential burden of proof shifted – what was the standard of proof in election petitions - what was the distinction between the legal burden and the evidentiary burden of proof in election petitions - Evidence Act, Cap 80, section 107.*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine matters pending before the High Court - whether the Supreme Court could adjudicate an issue which was still the subject of judicial determination at the High Court.*

Words and Phrases *– vote – definition of vote - expression of one's preference or option in a meeting or election by ballot, show of hands or other type of communication - Black's Law Dictionary.*

Words and Phrases *– vote – definition of vote – opinion expressed, resolution or decision carried, by voting - Dictionary of Modern Legal Usage.*

Brief facts

On August 8, Kenya held the second general election under the Constitution of Kenya, 2010 (Constitution). It was the first time that a general election was held under article 101(1) of the Constitution which decreed the holding of general elections every five years on the second Tuesday of August in the 5th year. The general election was also held for the first time under an elaborate regime of electoral laws including amendments to the Elections Act made to introduce the Kenya Integrated Electoral Management System (KIEMS) which was a new device intended to be used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC).

On August 11, 2017, the 2nd respondent, exercising its mandate under article 138(10) of the Constitution, as the Returning Officer of the presidential election, declared the 3rd respondent, Uhuru Muigai Kenyatta, the winner of the elections with 8,203,290 votes and the 1st petitioner , Raila Amollo Odinga as the runner's up with 6,726,224 votes. On August 18, 2017, the petitioners, Raila Amolo Odinga and Stephen Kalonzo Musyoka, who were the presidential and deputy presidential candidates respectively of the National Super Alliance (NASA) Coalition of parties, running on an Orange Democratic Movement (ODM) party ticket and Wiper Democratic Movement ticket respectively, filed the instant petition challenging the declared result of that presidential election (the election).

The petition was anchored on the grounds that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the Constitution, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process.

The petitioners argued that the IEBC committed massive systemic and systematic irregularities which went to the very core and heart of holding elections. It was the petitioners' case that the election was marred and significantly compromised by intimidation and improper influence or corruption. The most critical and persistent claim was non-compliance with the law, the argument being that the 1st respondent announced results on the basis of Forms 34B before receiving all Forms 34A. It was also alleged that the results announced in Forms 34B were different from those displayed on the 1st respondents' public web portal.

The petitioners similarly claimed that the IEBC deliberately inflated votes cast in favour of the 3rd respondent. As a consequence, they further argued, it was impossible to determine who actually won the presidential election and/or whether the threshold for winning the election under the Constitution was met.

The petitioners' further case was that the results that were streaming in from August 8, 2017 to August 11, 2017 showed a consistent difference of 11% between the results of Uhuru Kenyatta and Raila Odinga. According to the petitioners, such a pattern indicated that the results were not being streamed in randomly from the different polling stations but that they were being held somewhere and adjusted using an error adjustment formula to bring in a pre-determined outcome of results. Additionally, they claimed that the electronic system of transmission was compromised by third parties who manipulated it and generated numbers for transmission to the NTC. The petitioners also took issue with the large number of rejected votes accounting for at least 2.6% of the total votes cast arguing that that had an effect on the final results and the outcome of the presidential election.

The 1st and 2nd respondents filed a joint response, while the 3rd respondent filed a separate response to the petition. They all opposed the petition and urged the court to find that IEBC conducted a free, fair and credible election. It was the respondents' case that the presidential election was conducted in accordance with the

Constitution, the IEBC Act, the Elections Act, the Regulations thereunder, and all other relevant provisions of the law. The respondents claimed that, contrary to the allegations of the petitioners, the process of relay and transmission of results from the polling stations to the Constituency Tallying Center (CTC) and to the National Tallying Center (NTC), and from the CTC to the NTC was simple, accurate, verifiable, secure, accountable, transparent, open and prompt as required by article 81 (e) (iv) and (v) of the Constitution.

The respondents submitted that the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results. They urged the court to find that the petitioners had not substantiated the claim that the said irregularities affected at least 7 million votes.

According to the 1st and 2nd respondents, the rejected votes did not account for 2.6% of the total votes cast as contended by the petitioners. They submitted instead that the total number of rejected ballots was 81,685 as declared in Form 34C, a percentage of 0.54% of the votes cast. They thus urged that the rejected ballots were properly excluded from valid votes in accordance with the law.

The 3rd respondent urged that a party seeking the nullification of a presidential election bore the burden of proving that not only was there non-compliance with the election law but that the non-compliance also affected the results of the election. He thus submitted that the only way the petitioners could impugn the results reflected in Forms 34A and 34B was through demonstrating either that legal votes were rejected or that illegal votes were allowed and that that had an effect on the election.

Following the petitioner's application at the pre-trial stage, the court granted an order for scrutiny and access on terms that the petitioners and the 3rd respondent were to attain read only access to the certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by presiding officers and used to generate the final tally of the presidential election; to the Forms 34A, 34B and 34C from all 40,800 polling stations; and to the scanned and transmitted copies of all Forms 34A and 34B. The scrutiny process was conducted under the supervision of the Registrar of the Court and a report filed. The Registrar made the following observations:

1. Certain forms 34As appeared to have been duplicated.
2. Certain forms 34As and 34Bs appeared to be carbon copies.
3. Certain forms 34As and 34Bs appeared to be photocopies.
4. Some of the forms had no evidence of being stamped or signed.

It was recorded that out of the 291 Forms 34B scrutinized; 56 forms bore no watermark, 5 forms had not been signed by the returning officer, 31 forms had no serial numbers, 32 forms had not been signed by the respective party agents, the "hand over" section of 189 forms had not been filled and the "take over" section of 287 forms had not been filled. Further, a random scrutiny of 4,299 Forms 34A across 5 counties was undertaken to check and confirm; whether the forms bore the watermarks and the serial numbers; whether the forms had been signed and stamped by the presiding officers; whether there was involvement of the party agents.

Some of the issues emanating from the scrutiny of Forms 34A were that:

1. some forms were carbon copies;
2. others were the original Forms 34As but did not bear the IEBC stamp;
3. other forms were stamped & scanned while others were photocopies;
4. others had not been signed.

The report further indicated that out of the 4,299 Forms 34As, 481 were carbon copies, but signed, 157 were carbon copies and were not signed; 269 were original copies that were not signed; 26 of the Forms were stamped and scanned. 1 form was scanned and not stamped; 15 had not been signed by agents, 58 were photo copies of which 46 had not been signed; and 11 had no watermark security feature.

The petitioners contended that the report had proved beyond reasonable doubt, that the election process was shambolic. They contended that the Form 34C which was used to announce the presidential results had no security features and hence the authenticity of the results as announced in Form 34C could not be guaranteed.

On September 1, 2017, the Supreme Court issued a determination of the petition without reasons pursuant to rule 23 (1) of the Supreme Court Presidential Election Rules 2017.

Issues

i. What amounted to and who bore the burden of proof in a presidential election petition?
ii. What were the circumstances under which the evidential burden of proof shifted?
iii. What was the distinction between legal burden and the evidentiary burden of proof in election petitions?
iv. What was the standard of proof in election petitions?
v. What was the distinction between "votes", "cast" and "ballot papers?"
vi. What was the place of valid versus rejected votes in a presidential election.
vii. What was the meaning of "votes cast" to be taken into account in the computation to determine the threshold of 50% +1 under article 138(4) of the Constitution.
viii. What was the proper interpretation of section 83 of the Elections Act and whether the two limbs in the provision (compliance with the law on elections, and irregularities that may affect the result of the election) were conjunctive or disjunctive?
ix. What were the principles of free and fair elections?
x. Whether the Court of Appeals' decision in the *Maina Kiai* case provided a justification for declaring the results of the election of the president by the national returning officers without reference to Forms 34A.
xi. Whether the Court of Appeal's decision in the *Maina Kiai* case relieved the Independent Electoral and Boundaries Commission from its statutory responsibility of electronically transmitting 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.
xii. What was the meaning of undue influence in the context of an electoral malpractice?
xiii. Whether the Supreme Court could adjudicate issues which were still the subject of judicial determination at the High Court.
xiv. Whether election petitions were right centric or form centric.
xv. Whether technology was a mandatory component of Kenya's electoral transmission process.
xvi. What prevailed where there was a conflict between constitutional fundamental freedoms and the directive principles in the Constitution?
xvii. What was the proper test for verification of an electoral process?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 81- General principles for the electoral system

(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 that 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 safe keeping of election materials.

Article 138 - Procedure at presidential election

(3) In a presidential election—

(c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

Elections Act, Cap 7

Section 2 - Interpretation

"ballot paper" means a paper used to record the choice made by a voter and shallinclude an electronic version of a ballot paper or its equivalent for purposes of electronic voting."

Section 4 - Register of Voters

"*There shall be a register to be known as the Registerof Voters which shall comprise of–*

(a) a poll register in respect of every polling station;

(b) a ward register in respect of every ward;

(c) a constituency register in respect of every constituency;

(d) a county register in respect of every county; and

(e) a register of voters residing in Kenya.

Section 10 - Eligibility to vote

(1) A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station."

Section 6A - Verification of biometric data

(1) "The Commission shall, not later than sixty days before the date of a general election, open the Register for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

(2) The Commission shall, upon expiry of the period for verification specified under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

(3) The Commission shall, upon expiry of the period for verification specified under subsection(1) publish- ...the Register of Voters online and in such manner as may be prescribed by regulations.

Section 39 - 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) there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results."

(3) the Commission shall ensure that the technologyin use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent."

Section 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 the 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.

Elections (General) Regulations, 2012

Regulation 87

(1) The constituency returning officer shall, as soon as practicable

(a)...

(b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forms."

Election Offences Act, Cap 66

Section 10 - Undue Influence

(*1) A person who directly or indirectly in person undue influence or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of""*

(a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c)Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, Commits the offence of undue influence.

(2)...

(3) A person who directly or indirectly by duress or intimidation""

(a) Impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) In any manner influences the result of an election, commits an offence.

(4)...

Section 14 - Use of public resources.

(1) Except as authorized under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

(2) No government shall publish any advertisements of achievements of respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

(3) For the purposes of this section, the Commission shall, in writing require any candidate, who is a Member of Parliament, a county governor, a deputy governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

Leadership and Integrity Act, Cap 185C

Section 23 - Political neutrality

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

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

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

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

(3) Without prejudice to the generality of sub-section (2) a public officer shall not

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

(b) Publicly indicate support for or opposition against any political party or candidate participating in an election.

Held

Per Majority

1. The common law concept of burden of proof (*onus probandi)* was a question of law which could be described as the duty which lay on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. The law placed the common law principle of *onus probandi* on the person who asserted a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislated that principle.
2. An applicant who sought to annul an election bore the legal burden of proof throughout. Thus a petitioner who sought the nullification of an election on account of non-conformity with the law or on the basis of irregularities was required to adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. That was fixed at the onset of the trial and unless circumstances changed, it remained unchanged. Therefore, it was the petitioners who bore the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of the election, the 3rd respondent's election as President of Kenya should have been nullified.
3. Though the legal and evidential burden of establishing the facts and contentions which would support a party's case was static and remained constant throughout a trial with the plaintiff, however, depending on the effectiveness with which he or she discharged that, the evidential burden kept shifting and its position at any time was determined by answering the question as to who would lose if no further evidence was introduced.
4. Once the court was satisfied that the petitioner had adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifted to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground was one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bore an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifted and it behoved the respondent to adduce evidence to prove compliance with the law.
5. Besides the burden of proof, the law also imposed a degree of proof required to establish a fact. The extent of the proof required in each case was what, in legal parlance, was referred to as the standard of proof. Black's Law Dictionary defined it as the degree or level of proof demanded in a specific case in order for a party to succeed.
6. In electoral disputes, the standard of proof remained higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature were made; it was proof beyond reasonable doubt. Electoral disputes were not ordinary civil proceedings hence reference to them as *sui generis.* It must be ascertainable, based on the evidence on record, that the allegations made were more probable to have occurred than not.
7. No controversy arose as to the meaning of the word 'cast'. In elections, the term referred to the ballot papers inserted into ballot boxes. The problem which arose was the correct meaning that should be ascribed to the term "votes". Neither the Constitution nor the Elections Act defined the term "vote". The Elections Act, however, defined the term "voter" to mean a person whose name was included in a current register of voter*s*.
8. The distinction between a ballot paper and a vote was discernible. A ballot paper was the instrument in which a voter recorded his choice, while a vote was the actual choice made by a voter. A ballot paper did not become a vote by merely being inserted into the ballot box, as it could later turn out to be rejected.
9. A voter was said to have cast his or her vote when the procedure under regulations 69(2) and 70 of the Elections (General) Regulations, 2012 was followed. That meant that, upon receipt of the ballot paper, the voter proceeded to mark correctly, indicating his exact choice of the candidate he wished to vote for, and then inserted that marked ballot paper into the respective ballot box for the election concerned.

10. In the circumstances, a rejected vote, a vote which was void, a vote that accorded no advantage to any candidate, could not be used in the computation of determining the threshold of 50% + 1. A purposive interpretation of article 138(4) of the Constitution, in terms of article 259 of the Constitution, led to only one logical conclusion: that the phrase *votes cast* in article 138(4) meant valid votes. Consequently, the court's view in the 2013 *Raila Odinga case* would be maintained.
11. The court in the 2013 *Raila Odinga* case, did not render an authoritative interpretation of section 83 of the Elections Act as read together with the relevant provisions of the Constitution. At best, the court only made a tangential reference to the section while addressing the applicable twin questions of burden and standard of proof in an election petition.
12. There were two limbs to various provisions from comparative jurisdictions that were similar to section 83 of the Kenyan Elections Act: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions was whether or not the two limbs were conjunctive or disjunctive. The use of the term 'and' in the cited English provisions rendered the two limbs conjunctive under the English law. Save for minor changes, the conjunctive norm in the two limbs of the provision as captured in the two English provisions appeared to have been borrowed lock, stock and barrel by many Commonwealth countries, notably Nigeria, Ghana, Zambia, Tanzania and Uganda. However, under both the repealed National Assembly and Presidential Elections Act (section 28) and the Elections Act (section 83) the term used was "or" instead of "and" appearing in the English Acts. The use of the word "or" clearly made the two limbs disjunctive under the Kenyan law. While interpreting section 83 of the Elections Act, that distinction should be borne in mind.
13. Section 83 of the Kenyan Elections Act was different from other countries in two other fundamental aspects.
    a. The Kenyan Act did not have the word 'substantially' which was in many of the provisions of other countries.
    b. In 2011, the Elections Act (No. 24 of 2011) was enacted and repealed the National Assembly and Presidential Elections Act. Section 83 of the Elections Act, to harmonize it with the Constitution of Kenya 2010, added that to be valid, the conduct of the elections in Kenya must comply with the principles laid down in the Constitution. That addition was purposive given that the repealed Constitution of Kenya did not contain any constitutional principles relating to elections. In interpreting the section therefore, the court had to first pay due regard to the meaning and import of the constitutional principles it envisaged.
14. Among the well-established cannons of statutory interpretation, was the requirement that in addition to reading the statutes as a whole, where the words were clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear. Kenya being a constitutional system, the interpretation of the statutes must also be harmonized with the values and principles in the Constitution. The wording of section 83 of the Elections Act was clear and unambiguous. The words of the section must therefore be given their natural and ordinary meaning.
15. Guided by the principles of statutory interpretation, and given the use of the word "or" in section 83 of the Elections Act as well as some of the Supreme Court's previous decisions, the court could not conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in the Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election. Such an approach would be tantamount to a misreading of the provision.
16. Annulling of presidential election results was a case by case analysis of the evidence adduced before the court. Although validity was not equivalent to perfection, if there was evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit

and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion were at liberty to annul the outcome of a sham election, for such was not in fact an election.

17. An election should be conducted substantially in accordance with the principles of the Constitution, as set out in article 81(e). Voting was to be conducted in accordance with the principles set out in article 86 of the Constitution. The Elections Act and the Regulations thereunder, constituted the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election was not to be invalidated only on ground of irregularities. Where however, it was shown that the irregularities were of such magnitude that they affected the election result, then such an election stood to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection were not enough, by and of themselves, to vitiate an election. Where an election was conducted in such a manner as demonstrably violated the principles of the Constitution and the law, such an election stood to be invalidated.

18. While the two limbs (compliance with the law on elections, and irregularities that may affect the result of the election) should be applied disjunctively, it would not take the route that even trivial breaches of the law should void an election. That was not realistic. It was a global truism that no conduct of any election could be perfect. Even though the word 'substantially' was not in section 83 of the Elections Act, it could be inferred in the words 'if it appears' in that section. That expression required that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be 'a sham or travesty of an election' or 'a spurious imitation of what elections should be'.

19. Section 83 of the Elections Act applied to the presidential election petitions as it did to all other election disputes. The two limbs in section 83 could not be given a conjunctive interpretation. The two limbs of section 83 should be applied disjunctively. In the circumstances, a petitioner who was able to satisfactorily prove either of the two limbs of the section could void an election.

20. A petitioner who was able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, would on that ground alone, void an election. He would also be able to void an election if he was able to prove that although the election was conducted substantially in accordance with the principles laid down in Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

21. An election such as the one at hand, had to be one that was both quantitatively and qualitatively in accordance with the Constitution. It was one where the winner of the presidential contest obtained more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties as stipulated in article 138(4) of the Constitution. In addition, the election which gave rise to that result must be held in accordance with the principles of a free and fair election, which were by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in article 81. Besides the principles in the Constitution that governed elections, section 83 of the Elections Act required that elections be conducted in accordance with the principles laid down in that written law. The most important written law on elections was the Elections Act itself.

22. Elections were not only about numbers. Even in numbers, to arrive at a mathematical solution, there was always a computational path one had to take, as proof that the process indeed gave rise to the stated solution. Elections were not events but processes. Elections were not isolated events, but were part of a holistic process of democratic transition and good governance. Incidentally, IEBC's own Election Manual (Source Book) recognized that an election was indeed a process. There were many

other authorities which spoke to the proposition that an election was a process. Therefore the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters was as important as the result of the election itself.

23. Following the 2007 post-election violence, the Government formed the Independent Review Commission (IREC), commonly known as the Kriegler Commission, to inquire into the conduct of the 2007 elections and the cause of that violence. One of the critical areas of that Commission's focus was the integrity of vote counting, tallying and announcement of presidential election results. Among the significant recommendations the Kriegler Commission made related to the use of technology in the electoral process. Pursuant to those recommendations, the process of integrating technology into the conduct of elections was undertaken starting with the use of biometric voter registration (BVR) equipment to register voters on a pilot basis in the run up to the 2010 referendum.

24. In the 2013 elections technology was applied for registration of voters, voter identification and results transmission. However, that did not work very well in the 2013 general election and it was one of the key issues that was raised in the 2013 presidential petition before the Supreme Court. Consequently, in 2016 the Joint Parliamentary Select Committee on matters relating to the bi-partisan IEBC was formed, discussed the use of technology in elections and made far-reaching recommendations which led, to amongst others, extensive amendments to the Elections Act to provide for use of technology and also technology dedicated regulations, the Elections (Technology) Regulations 2017.

25. The changes 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 those changes was the establishment of what was being 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 centers. Regarding the voter register, the court in the 2013 *Raila Odinga* decision had observed that there was no single voter register but an aggregation of several parts into one register. All those legislative enactments had one objective; to ensure that in conformity with the Constitution, the elections were free, fair, transparent and credible.

26. The terms 'simple, accurate, verifiable, secure, accountable and transparent' engrafted were the selfsame constitutional principles in articles 10, 38, 81 and 86. It was in that context that the court would determine whether, the 1st respondent, conducted the presidential election in accordance with the principles laid down in the Constitution and the law.

27. Regulation 87(3)(b) provided that: "upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the IEBC shall tally and complete Form 34C." However, the 1st respondent had to modify Form 34C to reflect the entry of Forms 34B, which was the form declared by the Court of Appeal to be the source document to determine the winner of a presidential election, instead of Forms 34A.

28. From a reading of the Court of Appeal decision in the *Maina Kiai case,* nowhere in that decision did that court suggest that by affirming the High Court's decision which had declared section 39(2) and (3) of the Elections Act unconstitutional, the Court of Appeal, somehow for unstated reasons, lent judicial *imprimatur* to the 1st and 2nd respondent to either circumvent, or simply ignore the provisions of section 39(1C) of the Elections Act. On the contrary, the appellate court's decision was an unstinting reaffirmation, if not a restatement of the letter and spirit of the constitutional principles embodied in articles 81, 86, and 138(3)(c), relating to the conduct of elections.

29. With section 39(1C) of the Elections Act in mind, the Court of Appeal in the *Maina Kiai* case was categorical that the elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, was a critical way of safeguarding the accuracy of the outcome of elections, and the appellant or any of its officers (1st respondent) could vary or even purport to verify those results. The appellant, as opposed to its chairperson, upon receipt of prescribed

forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, was required to tally and "verify" the result.

30. The polling station was the true *locus* for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Elections Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, meant, as it must, that the count was clothed with a finality not to be exposed to any risk of variation or subversion.

31. Neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the national tallying center (NTC) as required by section 39 (1C) of the Elections Act. What remained uncontroverted however was the admission that as of August 14, 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the 'final results' for the election of the President.

32. Pursuant to an application by the petitioners, the court issued an order requiring the 1st respondent to supply the petitioners and the 3rd respondent with all the scanned and transmitted Forms 34A and 34B from all the 40, 883 polling stations on a read only basis with the option to copy in soft version. Had the court's order been complied with, it would have unraveled the mysterious puzzle surrounding Forms 34A. Regrettably, according to the information made available to court, by its appointed experts, the 1st respondent only allowed read-only access to that information without the option to copy in soft version only two hours to the closure of court proceedings which never fully happened anyway. By that time however, the puzzle had been unraveled in the mind of the court.

33. Failure to access or catch 3G and/or 4G network was not a failure of technology. The IEBC's ICT officials must have known that there were some areas where network was weak or totally lacking and should have made provision for alternative transmission. It could not have dawned on IEBC's ICT officials, two days to the elections, that it could not access network in some areas. Under regulations 21, 22, and 23 of the Elections (Technology) Regulations 2017, IEBC was required to engage a consortium of telecommunication network service providers and publish the network coverage at least 45 days prior to the elections. In that regard, in one of its press briefings preceding the elections, IEBC assured the country that it had carefully considered every conceivable eventuality regarding the issue of the electronic transmission of the presidential election results, and categorically stated that technology was not going to fail them. IEBC indeed affirmed that it had engaged three internet service providers to deal with any network challenges. The IEBC's explanation of alleged failure of technology in the transmission of the presidential election results could not be therefore accepted. The so-called failure of transmission was a clear violation of the law.

34. Among the 11, 0000 polling stations that IEBC claimed were off the 3G and 4G range, most parts of the counties where the polling stations fell under had fairly good road network infrastructure. Even if all of them were off the 3G and/or 4G network range, it would take, at most, a few hours for the presiding officers to travel to vantage points from where they would electronically transmit the results. That they failed to do that, was an inexcusable contravention of section 39(1C) of the Elections Act.

35. The understanding of the process was that the figures keyed into the KIEMS corresponded with those on the scanned images of Forms 34A. In the circumstances, it could not be understood why those figures, which counsel referred to as mere "statistics" that did not go into the determination of the outcome of the results, differed. In the circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.

36. IEBC opposed the application for access to its servers, claiming that such access would compromise the security of the data in those servers. The objection was overruled and the application was partly allowed. Though the IEBC's claim of compromising the security of its servers was not accepted, considering the fact that having spent billions of taxpayers' money IEBC should have set a robust backup system, nevertheless to assuage those fears, a "read only access" was granted which included copying where the petitioners so wished. The report from the court appointed IT experts, holders of PhDs on IT and lecturers in Strathmore and Kabianga Universities respectively, showed clear reluctance on the part of IEBC to fully comply with the court's order of August 28, 2017 to provide the information requested.

37. In summary the following were the items that were not availed to the petitioners; the 3rd respondent and the court.

    a. Firewalls without disclosure of the software version. IBEC refused to provide information on internal firewall configuration contending that doing so would compromise and affect the vulnerability of their system. The court appointed ICT Experts disagreed with that contention and said it was difficult to ascertain whether or not there were any hacking activities.

    b. IEBC was also required to provide certified copies of the certificates of penetration tests conducted on the IEBC election technology system prior to and during the 2017 election pursuant to regulation 10 of the Elections (Technology) Regulations 2017. They were not provided. Instead IEBC issued uncertified documents and certificates by professionals which did not conform to that regulation.

    c. IEBC was also required to provide specific GPRS location of each KIEMS kit used during the presidential election for the period between August 5, 2017 and August 11, 2017. That was not provided. IEBC instead provided the GPS locations for the polling stations which was never ordered to be granted.

    d. Documents for allocated and non-allocated KIEMS kits procured were provided. However, the information on whether the kits were deployed or not were incomprehensive.

    e. The court ordered access to technical partnership agreements for IEBC election technology system including a list of technical partners, kind of access they had and list of APIs for exchange of data with partners. The documents were issued with the exception of the list of APIs. The court appointed ICT experts said full information on APIs would have enabled determination of what kind of activities may have taken place.

    f. The court had also ordered IEBC to provide the petitioners with the log in trail of users and equipment into the IEBC servers, the log in trails of users and equipment into the KIEMS database management systems and the administrative access log into the IEBC public portal between August 5, 2017 to date (being the date of the court order which was on August 28, 2017). They were also not provided. Instead, IEBC provided pre-downloaded logs in a hard disk whose source it refused to disclose. The IT experts agreed with the petitioners' contention that the 1st respondent should have demonstrated that the logs emanated from IEBC servers by allowing all parties to have read only access. Alternatively, the 1st respondent could have accessed the information in the presence of the petitioners' agents. Partial live access was also only purportedly provided on August 29, 2017 at about 3.50pm without ability to access the logs or even view them. The exercise was therefore a complete violation of the court order and the access was not useful to the parties or the court.

38. IEBC failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the petitioners' claim of hacking into the system and altering the presidential election results and its servers with Forms 34A and 34B electronically transmitted from polling stations and county tallying centers (CTCs). Those were the forms that section 39(1C) specifically required to be scanned and electronically transmitted to the CTCs and the NTC. In other words, the order of scrutiny was a golden opportunity for IEBC to place before court evidence to debunk the petitioners' said claims. If

IEBC had nothing to hide, even before the order was made, it would have itself readily provided access to its ICT logs and servers to disprove the petitioners' claims. However the IEBC contumaciously disobeyed the order in the critical areas.

39. Failure to comply with a lawful demand, leave alone a specific court order, left the court with no option but to draw an adverse inference against the party refusing to comply. In the case, IEBC's contumacious disobedience of the court's order of August 28, 2017 in critical areas left no option but to accept the petitioners' claims that either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data or simply refused to accept that it had bungled the whole transmission system and were unable to verify the data.

40. The petitioners claimed that while 15,558,038 people voted for the presidential candidates, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for Members of Parliament (MPs) raising questions as to the validity of the extra votes in the presidential election. No satisfactory answer was given and the 1st respondent was responsible for that unexplained yet important issue.

41. The transmission of results was done in a manner inconsistent with the expectations of section 39(1C) of the Elections Act. The principles in articles 81 and 86 of the Constitution had the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. Those terms should be understood to refer to:

    a. An accurate and competent conduct of elections where ballots were properly counted and tabulated to yield correct totals and mathematically precise results;
    b. an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;
    c. a secure election whose electoral processes and materials used in it were protected from manipulation, interference, loss and damage;
    d. an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it were capable of being audited; and
    e. a transparent election whose polling, counting and tallying processes as well as the announcement of results were open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms was made on the public portal.

42. Verifiability must have had strong significance in the August 8th election because the presiding officers were required to verify the polling station's results in the presence of polling agents before sending them to the CTC and NTC using the KIEMS KIT. The *Maina Kiai* decision, made it clear that Form 34A being the primary document, became the basis for all subsequent verifications.

43. The whole exercise of limited access to the 1st respondent's IT system was meant to conform and verify both the efficiency of the technology and also verify the authenticity of the transmissions allegedly made to the CTC and NTC. Non-compliance and failure, refusal or denial by IEBC to do as ordered, had to be held against it.

44. The critical element under article 138(3)(c) of the Constitution was the duty placed upon the IEBC to verify the results before declaring them. To ensure that the results declared were the ones recorded at the polling station. Not to vary, change or alter the results.

45. The duty to verify in article 138 of the Constitution was squarely placed upon the IEBC. That duty ran all the way, from the polling station to the constituency level and finally, to the NTC. There was no disjuncture in the performance of the duty to verify. It was exercised by the various agents or officers of the IEBC, that was to say that the presiding officer at a polling station, the returning officer at the constituency level, and the Chair at the NTC. The verification process at all those levels was elaborately provided for in the Elections Act and the Regulations thereunder.

46. The simultaneous electronic transmission of results from the polling station to the constituency and national tallying centre, was not only intended to facilitate that verification process, but also acted as

an insurance against, potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. That, the system did, by ensuring that there was no variance between, the declared results and the transmitted ones.

47. In the presidential election of August 8, 2017 however, the picture that emerged, was that things did not follow that elaborate, but clear constitutional and legislative road map. It had been established that at the time the 2nd respondent declared the final results for the election of the President on August 11, 2017, not all results as tabulated in Forms 34A, had been electronically and simultaneously transmitted from the polling stations, to the NTC. The 2nd respondent could not therefore be said to have verified the results before declaring them.

48. The verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with section 39(1C) of the Elections Act. Given the fact that all Forms 34 B were generated from the aggregates of Forms 34A, there could be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, the primary document (Form 34A), was completely disregarded.

49. Even if one were to argue, which at any at rate, was not the case in the instant matter, that the verification was done against the original Forms 34A from all the polling stations, which had been manually ferried to the tallying centre, that would beg the question as to where the scanned forms were, and why the manually transmitted ones, arrived faster than the electronic ones.

50. The failure by the IEBC to verify the results, in consultation with the 2nd respondent, before the latter declared them, therefore went against the expectation of article 138(3)(c) of the Constitution, just as the failure to electronically and simultaneously transmit the results from all the polling stations to the NTC violated the provisions of section 39(1C) of the Elections Act. Those violations of the Constitution and the law, called into serious doubt as to whether the election could be said to have been a free expression of the will of the people as contemplated by article 38 of the Constitution.

51. The *Maina Kiai case* did not restrain the IEBC from verifying the results before declaring them, or relieve the former from the statutory duty of electronically transmitting the results. What the 2nd respondent was barred from doing by the Court of Appeal and the High Court was to vary, alter, or change the results relayed to the NTC from the polling stations and CTCs under the guise of verifying.

52. Article 86 of the Constitution placed upon the IEBC the onerous responsibility of devising and deploying election systems that the voter could understand. The IEBC must further be expected to provide access to crucial information that could enable either a candidate or a voter to cross check the results declared by it with a view to determining, the integrity and accuracy thereof. In other words, the numbers must just add up even where Parliament found it necessary to make provision for a complementary system, it would not escape from the dictates of article 86 of the Constitution, hence section 44A of the Elections Act.

53. When called upon to explain why all the Forms 34A had not been scanned, transmitted and published on an online portal, in line with section 39 of the Elections Act, the IEBC, through counsel, alluded to some form of complementary mechanism. However, the description of such a mechanism did not appear to meet the yardsticks of verifiability inbuilt in the Constitution and section 44A of the Elections Act.

54. No election was perfect, even the law recognized that reality. It was however difficult to categorize the violations of the law as minor inadvertent errors. IEBC behaved as though the provisions of sections 39, 44 and 44A of the Elections Act and the provisions of article 88(5) of the Constitution requiring it to exercise its powers and perform its functions in accordance with the Constitution and the national legislation, did not exist. IEBC failed to observe the mandatory provisions of article 86 of the Constitution requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner. There was no transparency or verifiability when IEBC, contrary

to articles 35 and 47 of the Constitution, worse still, in contumacious disobedience of the court's order, refused to open its servers and logs for inspection.

55. The petitioners had discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the President, before the IEBC had received all the results from Forms 34A from all the 40,883 polling stations contrary to the Constitution and the applicable electoral law. The 2nd respondent, declared, the results solely, on the basis of Forms 34B, some of which were of dubious authenticity. The 1st respondent in disregard of the provisions of section 39(1C), of the Elections Act, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the NTC.

56. No evidence had been placed to suggest that, the processes of voter registration, voter identification, manual voting, and vote counting were not conducted in accordance with the law. As a matter of fact, nobody disputed the fact that on August 8, 2017, Kenyans turned out in large numbers, endured long hours on queues and peacefully cast their votes. However, the system thereafter went opaquely awry and whether or not the 3rd respondent received a large number of votes became irrelevant because, read together, sections 39(1C) and 83 of the Elections Act stated otherwise.

57. Whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before the court pointed to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports could not therefore be used to authenticate the transmission and eventual declaration of results.

58. The 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, *inter alia*, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation given to section 83 of the Elections Act, the presidential election had to be nullified.

59. While the impugned election was conducted in violation of relevant constitutional principles, the same was also alleged to have been fraught with illegalities and irregularities that rendered its result unverifiable and thus indeterminate. Illegalities referred to breach of the substance of specific law while irregularities denoted violation of specific regulations and administrative arrangements put in place.

60. On allegations of undue influence, bribery and voter intimidation, it was deposed that the 3rd respondent brazenly violated section 14 of the Elections Offences Act by advertising and publishing in the print and electronic as well as on billboards, achievements of his Government. Section 14 provided that no Government shall publish any advertisements of achievements of the respective Government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period. That prohibition was what article 81(e)(ii) of the Constitution referred to as improper influence. The rationale behind that prohibition, in the context of the case was that whatever achievements the current Government may have made, resulting from expenditure of public funds, should not be taken advantage of by the Government as a campaign tool. However in that regard, the 1st petitioner had not attached any material evidence to support his allegations of undue influence, bribery and voter intimidation. That being the case, no determination on that issue could be made for the lack of material particulars.

61. The 3rd respondent had submitted that the question whether he was allegedly sponsoring the advertisement of the Government's achievement in the print and electronic media was pending at the High Court and the petitioners did not contest that averment. The Supreme Court could not adjudicate on an issue which was the subject of judicial determination at the High Court.

62. The letter by the 2nd respondent to the EACC did not apply to the holder of the office of the presidency in which category the 3rd respondent fell. Furthermore, section 14(3) of the Election Offences Act which provided for the IEBC's enforcement powers, did not apply to persons holding the office of the

President. The interpretation of section 14 of the Election Offences Act was a live matter at the High Court; any allegation that touched on that section could not be addressed.

63. Undue influence in the context of election offences was defined under section 10 of the Election Offences Act. Though the wording of the Indian Penal Code section 171(C) was materially different from section 10 of the Election Offences Act, the meaning injected into the Indian Penal Code showed its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases explicitly stated that the test was whether there was interference or an attempted interference with the free exercise of any electoral right. Similarly, section 10 of the Election Offences Act, whose marginal note was 'undue influence', forbade any impediment of a person's exercise of the electoral right. In India, the electoral right of an elector, was defined under section 171A(b) of the Indian Penal Code, as the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. That was comparable to article 38(3) of the Constitution of Kenya, 2010 which conferred certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

64. The Indian courts laid down a distinction between mere canvassing for votes and acts of undue influence. In doing so, the Supreme Court pronounced itself that if the mere act of canvassing in favour of one candidate as against another were to amount to undue influence, the very process of a democratic election shall have been stifled because, the right to canvass support for a candidate was as much important as the right to vote for a candidate of one's choice. Therefore, in order that the offence of undue influence could be said to have been made out within the meaning of section 171C of the Indian Penal Code, something more than the mere act of canvassing for a candidate must be shown to have been done by the offender. The act alleged as constituting undue influence must be in the nature of a pressure or tyranny on the mind of the candidate or the voter. The mere act of canvassing for a candidate could not amount to undue influence within the meaning of section 171C of the Indian Penal Code.

65. The language used in the definition of undue influence implied that an offence of undue influence would be held to have been committed if the elector having made up his mind to cast a vote for a particular candidate did not do so because of the act of the offender, and that could only be if he was under the threat or fear of some adverse consequence. Whenever any threat of adverse consequences was given, it would tend to divert the elector from freely exercising his electoral right by voting for the candidate chosen by him for the purpose. But, in cases where the only act done was for the purpose of convincing the voter that a particular candidate was not the proper candidate to whom the vote should be given, that act could not be held to be one which interfered with the free exercise of the electoral, right.

66. The test of undue influence was whether the 3rd respondent's conduct, if satisfactorily proved, created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices. Words alone, without any other demonstrable evidence were not sufficient to enable the court make a conclusive finding on the issue. Further, the evidence of Dr. Kibicho, explaining the context within which the 3rd respondent uttered the words, remained undisputed. Consequently, the petitioners had not proved their case on the issue to the required standard.

67. It was alleged that the 3rd respondent improperly influenced voters by issuing cheques to internally displaced persons (IDPs) during campaign rallies. A perusal of the attached video transcript, which was in the form of an interview conducted by one of the local news reporting station showed that the transcript did not contain a satisfactory basis or convincing evidence to the effect that the 3rd respondent acted in any inappropriate manner with regard to the release of funds to IDPs.

68. The petitioners submitted that since Cabinet Secretaries were State Officers, they ought to be impartial, but that section 23 of the Leadership and Integrity Act gave them leeway for impartiality and hence sought to have the section declared unconstitutional. The Supreme Court may in exercise of its

jurisdiction interpret the Constitution and in doing so, where the need required, declare an offending provision of the law to be unconstitutional. Such was a natural consequence of any legal reasoning if the court were to maintain its fidelity to the law. However, the instant scenario was peculiar in the sense that, the petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare section 23 to be unconstitutional.

69. The rule of the thumb had always been that parties must be bound by their pleadings and especially in a case such as the instant one was where the petitioner was asking the court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, there was disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into that cause. In the circumstances, section 23 of the Leadership and Integrity Act could not be found unconstitutional. The matter should be addressed in the right proceedings in the right circumstances.

70. A number of conclusions/observations could be made from the scrutiny exercise ordered by the court: Firstly, the Form 34C, that was availed for scrutiny was not original. Whereas the copy availed for scrutiny was certified as a copy original, no explanation was forthcoming to account for the whereabouts of the original form. Regulation 87(3) obligated the 2nd respondent to tally and complete Form 34C and to sign and date the forms and make available a copy to any candidate or chief agent present. That regulation presupposed that the Chairman of IEBC retained the original. The 2nd respondent was required to avail the original Form 34C for purposes of access and to that extent the 2nd respondent did not.

71. From the report on Forms 34B, the Registrar outrightly made an observation that some of the forms were photocopies, carbon copies and not signed. Out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences were singled out since they were incidences where the accountability and transparency of the forms were in question.

72. The affidavit of a Director of the IEBC enumerated all the security features of statutory forms which differed completely with the abundance of caution submission by counsel for IEBC and the 'not in the law' argument by the IEBC. There was a reasonable expectation that all the forms ought to be in a standard form and format; and though there was no specific provision requiring the forms to have watermarks and serial numbers as security features, there was no plausible explanation for that discrepancy more so when it had been deponed that all forms had those features.

73. The schedule to the Elections Act provided for a sample of the format of the Form 34B. As was evident from the schedule, the 'Hand Over' section was filled when the Forms 34A were submitted to the constituency returning officer whereas the 'Taking Over' section was filled when the Chairperson received the Forms 34A. Indeed regulation 82(1) required the presiding officer to physically ferry the actual results to the constituency returning officer. Further, regulation 87(1)(b) required the constituency returning officer to deliver to the NTC all the Forms 34A from the respective polling stations and the summary collation forms. Regulation 87(3)(a) went on to provide that, upon the receipt of Form 34A from the constituency returning officer, the Chairperson of the IEBC would verify the results against Forms 34A and 34B received from the constituency returning officer. It could not be understood how the 1st and 2nd respondent could deny the receipt of the prescribed forms. In any case, during the hearing of the scrutiny application, counsel for the 1st respondent submitted that the IEBC was in possession of all the original Forms 34A and 34B and went ahead to suggest that, it was willing to release the same forms for inspection. During the scrutiny exercise that was subsequently carried out, the IEBC produced majority of those original forms.

74. The purpose of including the requirement for indicating the number of forms received by various officers was to ensure accountability and transparency. It was therefore unfortunate that, out of the

random sample of 4,299 Forms 34A examined, a total of 189 Forms had not been filled in the hand-over section, whereas 287 forms had not been filled in the take-over section. Such kind of scenario raised the question as to the kind of verification done, if at all, by the Chairperson of the IEBC.

75. As for Forms 34A, the sampled 4,299 forms revealed that 481 of them were carbon copies, 269 were not stamped while 257 of the carbon copies were not stamped. 11 forms had no water mark while 46 of the photocopies were not signed. 58 forms were not stamped. Considering the sample size, the discrepancies were widespread.

76. Elections were the surest way through which the people expressed their sovereignty. The Constitution was founded upon the immutable principle of the sovereign will of the people. The fact that, it was the people, and they alone, in whom all power resided; be it moral, political, or legal. They exercised such power, either directly, or through the representatives whom they democratically elected in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

77. Article 38 of the Constitution provided *inter alia,* that every citizen was free to make political choices, which included the right to free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors. That mother principle must be read and applied together with articles 81 and 86 of the Constitution, for to read article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, was to nurture a mirage, an illusion of free will, hence a still-born democracy. It was also against that background that the impact of the irregularities that characterized the presidential election would be considered.

78. Not every irregularity, not every infraction of the law was enough to nullify an election. Were it to be so, there would hardly be any election in the Kenya, if not the world, that would withstand judicial scrutiny. The correct approach therefore, was for a court of law, to not only determine whether the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

79. In view of the interpretation of section 83 of the Elections Act rendered, that inquiry about the effect of electoral irregularities and other malpractices, became only necessary where an election court had concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it was good judicial practice for the court to inquire into the potential effect of any irregularities that may have been noted upon an election. That helped to put the agencies charged with the responsibility of conducting elections on notice.

80. In the impugned presidential election, one of the most glaring irregularities that came to the fore was the deployment by the IEBC of prescribed forms that either lacked or had different security features.

81. Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. That Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and many more were photocopies. Five of the Forms 34B were not signed by the returning officers. It was not clear why a returning officer or a presiding officer could fail or neglect to append his signature to a document whose contents, he/she had generated. The appending of a signature to a form bearing the tabulated results was the last solemn act of assurance to the voter by such officer, that he stood by the numbers on that form.

82. Where the quantitative difference in numbers was negligible, the court should not disturb an election. The illegalities and irregularities committed by the IEBC were of such a substantial nature that no court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC could, in good conscience, declare that they did not matter, and that the will of the people was expressed nonetheless. The electoral law was amended to ensure that in substance and form, the electoral process and results were simple, yet accurate and verifiable. The presidential election of August 8, 2017, did not meet that simple test and could hence not be validated, the results notwithstanding.

83. The court had the mandate, to invalidate a presidential election under article 140(3) of the Constitution as read with section 83 of the Elections Act, *inter alia*, for reasons that there had been non-compliance with the principles in articles 10, 38, 81 and 86 of the Constitution as well as in the electoral laws. One of the clear reliefs in article 140(3) was that should a presidential election be invalidated, then a fresh election would be held within 60 days of the court's decision in that regard. Parties at the hearing of the petition did not address the court on the issue, however, and so it was not fit to delve into an interpretation of that term in the judgment. The term fresh election was addressed in the 2013 *Raila Odinga case* and was the subject of an application by the 1st interested party within the instant petition. The application had been fixed for hearing on September 21, 2017 and the court would deal with it on its merits.

84. IEBC did not conduct the August 8, 2017 presidential election in conformity with the Constitution and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be *inter alia* simple, verifiable, efficient, accurate and accountable. Although the petitioners claimed that various electoral offences were committed by the officials of the IEBC no evidence was placed before the court to prove that allegation. What was in evidence was a systemic institutional problem and there was no specific finger prints of individuals who may have played a role in commission of illegalities. It was therefore not possible to impute any criminal intent or culpability on either the 1st and 2nd respondent, or any other commissioner or member of the 1st respondent. There was also no evidence of misconduct on the part of the 3rd respondent.

85. Costs generally followed the event, but the instant petition had brought to the fore the need for IEBC to adhere strictly to its mandate and not to exhibit the casual attitude it did in the conduct of the impugned election and in defence of the petition. It was a heavily public funded constitutional organ and to burden Kenyans tax payers with litigation costs would be a grave matter which the court deemed unnecessary in the petition.

86. The constitutional mandate placed upon the IEBC was a heavy yet, noble one. In conducting the fresh election and indeed in conducting any future election, IEBC must do so in conformity with the Constitution and the law. In conducting the fresh election, IEBC must put in place a complementary system that accords with the provisions of section 44(A) of the Elections Act. Such a system only came into play when technology failed.

87. The petitioners had discharged the legal burden of proof as to squarely shift it to the 1st and 2nd respondent. Having so shifted, the burden had not in turn been discharged by the 1st and 2nd respondent as to raise substantial doubt with regard to the petitioners' case.

88. **[*Obiter*]** "The greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution."

89. **[*Obiter*]** "Have we in executing our mandate lowered the threshold for proof in presidential elections? Have we made it easy to overturn the popular will of the people? We do not think so. No election is

perfect and technology is not perfect either. However, where there is a context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in Section 39(1C) of the Elections Act, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this court close its eyes to an obvious near total negation of that transparent system?"

Dissenting opinion

Per JB Ojwang, SCJ

1. The objective merits of the case must be drawn from the foundation of fact. Fact was defined as something that actually existed; an aspect of reality. Therefore, fact was as reliable as the concrete foundations of a skyscraper; and it was to be counted upon as a basis of objectivity and truth. The practice of law and more particularly, the motions of the judicial process *via* the minds and hands of judges – society's trustees for justice – were invariably lodged upon the pillars of fact, this being proffered through evidence.
2. The petitioners did not seek an ascertainment of the true number of votes cast for the 1st petitioner and for the 3rd respondent. The petitioners had focused the burden of their case on apprehensions as to the perfect security of the transmission system. They claimed an improper tallying of votes from different polling stations, though that was denied, on the basis of specific evidence, and exhibits showing the contrary. They further alleged improper conduct during election, on the part of certain Government officials, said to have unduly benefited the 3rd respondent's electoral platform – but those attributions to the 3rd respondent of improper influence, intimidation and corruption, were not just unsubstantiated, but also failed to meet the high standards of proof required for criminal charges.
3. The petitioners asserted, in broad terms, that the 1st respondent, in the conduct of elections, did not abide by the terms of article 86 of the Constitution, which required elections to be conducted in a manner that was simple, accurate, verifiable, secure, accountable and transparent. Yet the use of the manual ballot paper would clearly meet such conditions: the voter had no difficulty in marking it; its reality and visibility was not in doubt; it was verifiable, as a check so readily revealed the voter's exercise of his or her right of choice; it was secure; it was transparent; it was accountable.
4. The votes cast had been announced at the polling stations, where they were tabulated and results announced. From that initial ascertainment of the voting situation, the results were collated at the CTC and announced at that level. The IEBC thereafter provided the Forms 34A from all polling stations; Forms 34B from CTCs; and Forms 34C at the NTC– which was signed by all the presidential election agents, save for the petitioners' agent. Thus, from the evidence on record, the claim of non-compliance with the terms of article 86 of the Constitution could not stand.
5. Judges entertaining the competing claims of parties, constantly had to form an opinion, and, from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth. That had to be done in the instant case. More substantial and persuasive evidence had emanated from the respondents' side. The respondents' factual accounts were firm and gripping. They were credible, and represented the substantial truth. However, no account of equal strength was beckoning from the petitioners.
6. On facts conveyed through evidence, in support of the petitioners' case, they were on weak grounds, as compared to the respondents. In establishing the merits of their case, the petitioners had both the ultimate legal burden of proof, and the shifting evidential burdens falling upon them. They did not discharge even the early evidential burden – the effect being, in the end, that they made no valid case against the respondents.
7. The petitioners' claims as to the conduct and management of the presidential elections by the 1st respondent invoked the question as to the 1st respondent's compliance with the law in every detail, though without necessarily adverting to the objective facts, as borne by the evidence. The court had

to consider whether such contentions should be a basis for annulling the outcome of the presidential election held on August 8, 2017.

8. The Constitution which represented the people's much laboured initiatives to find a pacific, rational and humane regulatory structure for governance, bore certain principles, and it safeguarded certain rights and values in unambiguous terms. It safeguarded the rule of law, democracy, participation of the people and political rights, in detailed terms which included the provision that every adult citizen had the right, without unreasonable restrictions, to vote by secret ballot in any election; and to be a candidate for public office, and, if elected, to hold office. Such sacrosanct safeguards had to be so interpreted as to accord them true operational meaning. The same Constitution entrusted the interpretive mandate to the courts, to which, for the faithful discharge of the task, the voters had entrusted their adjudicative sovereignty.

9. Under article 20(4)(a) of the Constitution, the Supreme Court, just like the other courts, was under obligation to promote the values that underlay an open and democratic society based on human dignity, equality, equity and freedom. The Supreme Court, just like the other courts, in the course of performing its safeguarded interpretive mandate, was under obligation to be guided by the principles; that justice should be administered without undue regard to procedural technicalities, and that the purpose and principles of the Constitution should be protected and promoted.

10. The Constitution enjoined all courts, in the exercise of their interpretive mandate, to adhere to certain well-defined paths:

    a. a manner that promoted the Constitution's purposes, values and principles;
    b. a manner that advanced the rule of law, the human rights and fundamental freedoms in the Bill of Rights;
    c. a manner that contributed to good governance.

11. The prescriptions, in the context of the exercise of the people's electoral rights as took place on August 8, 2017, were the firm foundation upon which the dissent opinion was founded from the majority opinion, in the critical election petition. The majority decision had not only done short shrift to the governing terms of the Constitution, but also failed to adhere to the clear path of the law which had evolved, including the court's precedents on electoral law.

12. Just as with the Constitution itself, so with the regulatory set of norms, including the statutes and regulations: they all fell to the interpretive mandate of the courts. That fact, on the plane of legal scholarship, ought to be apprehended as the inherent common law chain that ran through the motions of judicialism in Kenya, as in so many other countries of the common law world. The long-established rationales of the judicial method still remain, and they ordained the espousal of the doctrine of precedent – a universal concept which, was expressly replicated in the Constitution.

13. Case law, the law as interpreted and applied by judges, on the recorded merits of each matter, had forever been the cornerstone of the common law. It was precisely the common law's focused and authentic appraisal of the facts of each case, that made it ever so compelling, as a defining strand in the judicial contribution to progressive, modern governance in conditions of democracy.

14. The challenges of adjudication dictate that, the gains of the past, authoritative interpretation by a discerning and responsible court, be perceived as representing a precious juristic civilization; and those were for keeps, as a reference-point for the conscientious and effective resolution of later disputes.

15. The judicial approach in the sphere of electoral law was obviously inseparable from the Constitution's values and the principles of democracy. It thus behooved the court to pay due deference to the fundamentals of the sets of cases that had, in the last several years, been determined by the Supreme Court, on the subject of elections – including presidential elections. Such was, quite conclusively, the most dependable course of the law that Kenya's lawyers should engage, in the first place.

16. In the 2013 *Raila Odinga* case, the court took into account the nature of the governance mandate under the Constitution, and, in response to a challenge to the integrity of the presidential election,

laid down a set of guiding parameters. It observed that the office of the President was the focal point of political leadership in a democratic system, and was constituted strictly on the basis of majoritarian expression. The whole national population had a clear interest in the occupancy of that office which, they themselves renew from time to time through the popular vote. Flowing from the crucial majoritarian factor in the filling of the primary office of the Executive branch, the Supreme Court, in that case, defined its orientation as regards the resolution of an electoral dispute, such as the instant case before the court.

17. As a basic principle, it was not for the court to determine who occupied the presidential office; save that the court, as the ultimate judicial forum entrusted under the Supreme Court Act, 2011 with the obligation to assert the supremacy of the Constitution and the sovereignty of the people of Kenya, should safeguard the electoral process and ensure that individuals acceded to power in the presidential office, only in compliance with the law regarding elections. The foregoing principle, in the Supreme Court's perception, dictated that even though the court must uphold the clear popular, electoral choice, it would hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of the Presidential office, in case there was any major breach of the electoral law. Such guiding principles were clear enough, were attended with special merit and they represented the vital backdrop to Kenya's electoral law.

18. The precedent-setting decision (the 2013 *Raila Odinga* case) was distinctly endorsed by subsequent electoral dispute cases: and it must be regarded as the pillar of the scheme of electoral law in Kenya – founded upon a beneficent interpretation of the Constitution, and of the whole body of electoral law. The point was consistent with the comparative adjudicatory experience in election matters.

19. The Supreme Court clearly defined the operative electoral law, on the basis of the *Raila Odinga* petition of 2013, in the subsequent petitions. The court was scrupulously affirming the synchrony of two express edicts of the Constitution: the first defining the sovereignty of the people, and the second delimiting the judicial authority. By article 1(3) of the Constitution, the people's sovereign power was partly delegated to the Judiciary and independent tribunals; while article 159(1) of the Constitution, which constituted the judicial authority was derived from the people and vested in, and should be exercised by the courts and tribunals established by or under the Constitution.

20. The general guiding path for the disposal of electoral disputes, such as the instant one, was by the design of the general principles of the electoral system, and of voting, in articles 81 and 86 of the Constitution, it was envisaged that no electoral malpractice or impropriety would occur that impaired the conduct of elections. That was the basis for the public expectation that elections were valid until the contrary was shown.

21. A consideration of the merits of an electoral petition such as the instant one, took one straight back to the evidence tendered. There was an inseparable link between constitutional principle, and the pillars of evidence. Since, the petition herein failed on the pillars of evidence, it was clear that the majority decision lacked validity from the standpoint of governing principles.

22. Evidence was the bearer of tell-tale signs of electoral victory, or of electoral defeat. The physical form of the ballot was directly visible, and was readily subjected to the test of simplicity, accuracy, verifiability, security, accountability and transparency. The physical evidence was the natural starting point in ascertaining who had won an election: and hence the majority judgment would have been expected to begin from a foundation of numerical assessment, before invoking any other parameters. For such other elements were essentially subjective and were inherently destined to compromise the sovereign will of the voters which the Constitution expressly safeguarded.

23. Only from such a foundation of the physical vote-count, did one secure a proper viewpoint for the other dimensions of the electoral process, including the credibility of the entire operation. Indeed, in view of the relative strength of the evidence emanating from the two sides, the only objective

conclusion would have been that, within the measure of the possible, the conduct of the election by the IEBC was entirely credible.

24. The emerging principle regarding the initiation of claims by way of election petitions was that all proof should commence from the foundation of the physical ascertainment of voting records. All other claims then, must revolve around that pillar and must establish that some gross impropriety had affected the electoral process, and should lead to its annulment. The court (minority) was constrained to propose that scheme as a proper agenda for the reform of Kenya's electoral law. Such legal reform would need to institute all appropriate security back-ups around the physical records, and would ensure the establishment of safety-nets around the votes cast.

25. The Constitution, while safeguarding the Judiciary's adjudicatory space, entrusted certain governance-spaces to other agencies – primarily the Legislature and the Executive: and that was the basis for the constitutional principle, separation of powers – a principle the validity of which, in the Kenyan constitutional order, had not ever been seriously contested. The Judiciary was the trustee of the people's sovereign power with regard to the interpretation and application of all the terms of the Constitution and of all other law. A substantial initiative in the motions of the entire sphere of law, legality and jurisprudence had been reserved to the courts.

26. Unlike the Judiciary, the work-orbit of which was lined up with laws, principles and jurisprudential yardsticks, both the Legislature and the Executive in view of their electoral and policy foundations, may quite properly be described as political agencies. They related to the largest number of Kenyan people, in a close and direct proximity; they influenced and were influenced by the momentary concerns which, therefore, justified the conception and espousal of policy and politics conceived and executed within short time-frames. That was in stark contrast with the relationship between the ordinary citizen, and the courts of law: and if the courts overlooked that reality, it would constitute a groundswell for failure of judicial responses in line with the professional, juristic remit.

27. The prolonged history of judicialism, in all democratic countries, demonstrated that the proper role of the courts had been professional, judicial, and founded upon cardinal principles which drew lines of correctness and propriety in situations of dispute, so as to secure a certain optimum level of safeguards for the rights of the citizen. Beyond that level of safeguard and fulfilment, it fell to the political agencies to pursue constantly, such policy stands as would satisfy, and give fulfilment to the national populace.

28. On the principles of institutional disposition, it followed that it fell not to the court to make undue haste in assuming the policy mantle; a stampede was destined not only to disrupt the delicate institutional balances, but to weaken the reliable jurisprudential bedrock which assured the citizens of ultimate governance safety-net.

29. The majority on the instant petition had made a precarious move that was destined to prove detrimental to the dependable setting of relations among essential governance entities – to the detriment of the rights and legitimate expectations of the citizen. Such a determination was in clear departure from the state of the evidence. The petitioners' case rested on just one dimension of the electoral process – electronic transmission of results. Moreover, the bulk of the assertions made as regards transmission, were just that, contentions, with only limited testimonial ingredient: it was hardly evidence.

30. Evidence in the true sense, a set of probative facts, was what came forth from the respondents: and its tenor and effect was that, there were only limited instances of failure of results-transmission; only limited cases of irregularity in vote-addition and tabulation, not affecting the ultimate compilation and summation; the lawful complementary device was put in service, in cases of failure in the transmission process; all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry and could have been re-counted, to confirm that the 3rd respondent had been properly declared as the President-elect. Thus, on basic elements of trial, the essence of the burden of

proof was undischarged and it was in effect a reversal of the conventional process of judicial inquiry and determination – making a finding in favour of the petitioners.

31. The majority would appear to have taken leave of the juristic obligation to interpret the terms of the articles of the Constitution invoked by the petitioners; the obligation to break them down, so as to ascertain the discrete demands of the law; the obligation to consider the pertinence of the specific statements of evidence from the petitioners, such as would answer to the constitutional and legal principles invoked.

32. The majority departed, as it would seem, from the placid frame of the juridical setting and assumed direct responsibility for the immediate calls of policy or politics – by altering the design of momentary, popular inclinations which were, by the terms of the Constitution, legitimate in all respects. The damage such as may flow from such a deportment was not yet plain to all as was quite clear from common perceptions recorded in the media ever since the delivery of the majority judgment.

33. The general perception associated the majority judgment with an overtly political inclination. That was the judgment's obvious departure from the professional plane of jurisprudence as the proper platform of the judicial arm of the State. By the magic jolt of September 1, 2017, general political history would have been made, even though that represented a departure from the jurisprudence of democratic systems, which so much cherished the separation of powers, and which so studiously committed the Judiciary to the professional task of line-drawing to ensure the sustenance of regular safeguards of the Constitution and the law, for all.

34. In future inquiries, it may be established that the law, as advanced by its interpreters and scholars, had its anchorage on the adjectival plane, from which it addressed the primary motions of social, economic and political activity. The law stood to be formulated, molded, interpreted and applied, not for its own sake and in its own cause, but in relation to the primary motions which preoccupied citizens and communities. Thus, in the instant case, the electoral process had taken place and its motions had to be matched to the law as interpreted. By the interpretive scheme of the law, it did not stand the test of rationality or efficacy to merely allege some unspecified impropriety in the electoral process.

35. The relevant clause of the Constitution must be taken through an analytical process and subjected to definite categorizations which crystalized the specific concepts and elements said to have been violated. By that criterion, most of the contentions of the petitioners in the instant case, on account of their broad generality, would not stand. The interpretive task as it related to the adjectival essence of the law was inherently professional – and was reflected in the concept of jurisprudence, which dealt with thought about law.

36. The court, in the normal performance of its role under the Constitution, was engaged in the specialized process of jurisprudence. It followed that the more immediate, urgent and primary motions of basic policy-making, inherently devolved to the political arms of the State, rather than the more specialized entity which was the Judiciary.

37. [***Obiter***] "The judgment, apart from the occasion it proffers for a reflection on the law relating to elections, is a basis for a rethink on law as a concept, and as a professional engagement, defined in a regulatory framework applicable to the citizens' primary undertakings. From such a platform, it emerges that the law's design in the hands of the judge, the lawyer and the scholar, rests in unity with the fundamentals of constitutional governance – an important element of which is the independence of the Judiciary. On the basis of this principle, it is to be recognized that the judge's proper mandate lies several removes from the citizen's momentary policy and political desires and expectations – which generally devolves to the state's political agencies. By this perception, the judge's proper remit has its focus upon professional engagement, founded upon objective scenarios, or criteria...Such a perception of law and legal process, in retrospect, will be found to be in conformity with the analytical schemes that mark the dedicated works of great jurists of the past."

38. [***Obiter***] "The special contribution of these judges and law scholars is to light up the orbit of jurisprudence, as a dedicated sphere of thought, learning and preoccupation, that secures the requisite motions of the different spheres of human activity, while affirming the perceptions of integrity and propriety...Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state."

39. The petition would have been dismissed with costs.

Per SN Ndungu, SCJ

1. The Supreme Court had the first original, exclusive and final resort for any party challenging the election of any person to the Office of the President. It determined presidential election petitions to the exclusion of all other courts. That jurisdiction was also limited in time. The Constitution required one to petition quickly and particularly. That restriction, on extent and time was not without basis. The parties had to present a clear, concise case supported by cogent evidence. The jurisdiction even though limited in time and scope, revolved around critical constitutional questions. The requirement for particularity was therefore important to ensure that the case presented before the court was properly of.
2. The Supreme Court when discharging its mandate as an election court, remained the precedent-setting forum in Kenya and its decisions had to be carefully analysed to ensure that a jurisprudential crisis or confusion did not ensue. Were that to happen, the court would have failed the Constitution and the people.
3. The Constitution was Kenya's guiding order. It had organized Kenya's governance character and infused accountable governance, public service and responsible citizenship. The Judiciary had the enviable, but extremely difficult and rewarding duty of giving the Constitution comprehensible interpretation that was stable, consistent, predictable, certain and true to the sovereignty of the people. Undergirding that sovereignty was the ability of every Kenyan to enjoy his/her full human-character guaranteed by an elaborate charter on rights. A determination of a dispute akin to the one that was presented before the Supreme Court could not therefore be mechanically disposed of without paying due regard not just to the letter or spirit but also the conception of the Constitution itself. At the core of the Constitution was sovereign will, at the soul of sovereign will were the people and central to the people were their rights.
4. An election cause was a right-centric cause. At the heart of a petition challenging the results of a presidential election was the right to vote in free and fair elections. That right was at the epicenter of Kenya's democratic character as a republican state. Interpretation and application of the constitutional provisions touching on elections had to therefore be read holistically with each provision reinforcing the other. That approach had been consistently applied by other courts in the region and embedded in the theory of constitutional interpretation in Kenya's own jurisdiction.
5. Evidence was the epicenter of any trial. The nature of a presidential election petition did not displace the basis of the law of evidence outlined in the Law of Evidence Act, section 80 of the Elections Act, 2011 expressed that among the powers of an election court in exercise of its jurisdiction was: summoning and swearing in witnesses in the same manner, or as nearly as circumstance admitted, as in a trial by a court in exercise of its civil jurisdiction. As per article 163(3)(a) of the Constitution, the proceedings before the Supreme Court, although regulated by the Supreme Court Act, 2012 and the attendant Presidential Election Petition Rules, 2017 allowed reliance on affidavit evidence. In order for that evidence to bear cogent value, it had to meet the demands of proof.

6. The Supreme Court's role in exercise of its exclusive original jurisdiction ought to be thorough in fact-finding and interpretation of the Constitution and the law. In cases of factual prerequisite such as the petition, interpretation of the law devoid of complete and exhaustive factual examination was by itself, an insufficient basis upon which to make the final determination contemplated under article 140(2) of the Constitution. The evidence adduced had to be clear to show that what was declared was not the result.
7. Electoral processes had assumed a fair presumption of correctness. To rebut the presumption required proof to a high degree that the resulting declaration was not trustworthy. That was drawn from the democratic legitimacy accorded to elections by the Constitution. The test of invalidating an election had to be a clear one. A new election ought to be conducted only when voters had been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome. A determination to hold a fresh election in terms of article 140(3) of the Constitution should only be made if the following questions were considered, analysed and determined conclusively:
    a. Was the final outcome of the election the result of fraud, mistake or omission which precluded the certified vote total from correctly aggregating all voters independent, non-coerced and non-procured preferences?
    b. Is the outcome incapable of being trusted to reflect the will of the people?
    c. Can a reliable outcome be determined in a manner other than holding a fresh election?
8. The right to vote in free and fair elections was violated when a court, without comprehensive understanding and analyzing of the evidence displaced the electorate by halting an election and deciding the outcome itself. An election, unless clearly proven to have been conducted in gross violation of the Constitution and the law, affecting the ultimate outcome, must never be taken away from the voters. The electorate, by dint of article 1 of the Constitution were entitled to be represented by men and women of their choice. In resolving electoral disputes, the Judiciary must set upon that duty as a judicial and not a political actor. In so doing, its guiding force must be proper exercise of judicial authority granted under article 159 of the Constitution. It must consider rights not form.
9. The majority based their decision on an interpretation of section 83 of the Elections Act and in doing so they read-in the provisions of articles 81 and 86 of the Constitution. They stated that the electoral process had not met the requirements as listed in those articles. That was a narrow and restrictive interpretation of the law. The majority in doing so, limited itself to operational and aspirational constitutional principles but failed to address the substratum of the issue at hand, the *grund* norm of the Constitution, the sovereignty of the people and the centrality of the people in the entire architecture of the Constitution of Kenya, 2010, but secondly used a restrictive test in assessing whether a claim that the right to vote had been violated in any way had been made.
10. In interpreting and applying any provision of the Constitution, the Elections Act and Regulations, the Supreme Court must adopt an interpretation that promoted the *grund* norm in article 1 and the right to vote in article 38 of the Constitution.
11. Articles 81 and 86 of the Constitution reinforced the right to vote elaborated under article 38 of the Constitution. Those constitutional provisions had to therefore be applied to the core right and not vice versa. Articles 81 and 86 were to be facilitative of the fundamental rights under article 38, in addition to other provisions of the Constitution. In fact, there were many other articles of the Constitution, legislation and regulations whose purpose was intended to give effect to, facilitate and support the right to vote as provided for under article 38. In the application and implementation of those provisions, the centrality of article 38 as the primary purpose for their existence must never be lost.
12. A reading of the majority decision appeared to presume that the only test for ascertaining the credibility of the election process, or more correctly for assessing any violation of the rights under article 38 of the Constitution, lay in articles 81 and 86 of the Constitution. That was not the case. Articles 82 and 83 of the Constitution also went to the specifics of the electoral process that supported the right under article

38. Article 82 and 83 addressed the registration of voters and article 83 underlined the requirements of the voting exercise itself as simple, accurate, and taking into account those with special needs.

13. Article 83(3) of the Constitution provided that administrative arrangements for the registration of voters and the conduct of elections had to be designed to facilitate and would not deny, an eligible citizen the rights to vote or stand for election. The upshot being that the test for assessing a violation claim under article 38 of the Constitution had to be more comprehensive than the aspirational guidelines set under articles 81 and 86 of the Constitution. Cherry-picking constitutional provisions to determine a right-centric cause on the basis of formal considerations the choice of form over rights undermined a purposive approach to the interpretation and application of the Constitution.

14. The Constitution in article 259(1) displayed the framework of applicable principles while interpreting the Constitution. Further the Constitution provided under article 20(3)(a) and (b) that in applying a provision of the Bill of Rights, a court had to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favored the enforcement of a right or fundamental freedom. The majority in the petition had not given effect to the people's right to franchise and had not interpreted the Constitution broadly and in a manner that most favored its enforcement. The case for the advancement of the Bill of Rights had to therefore be at the forefront of any judicial determination under the Constitution.

15. Even if there could have been a perception that a competing rights situation existed between articles 38, 81 and 86 of the Constitution there had to be a balancing and an application of proportionality to effect a judicial outcome that served the dictates of the Constitution. One had to recognize that not all claims would be equal before the law. Some claims were afforded a higher legal status and greater protection than others.

16. While there were many situations in which rights, principles and values could seem to conflict or compete when evaluating situations of competing rights, human rights, especially those provided in the Bill of Rights would usually hold a higher status than principles and values. That rationale was underlined by the architecture of the Constitution, which actually ring-fenced the Bill of Rights from amendment which could be made only through referendum by the people of Kenya unlike the principles in article 81 and 86 of the Constitution which could be amended by elected leaders in Parliament. That plebiscite protection in itself placed the Bill of Rights higher in the pecking order of competing provisions in the Constitution. The principle therefore should complement the right not vice versa.

17. The principles in article 81 and 86 of the Constitution could not trump the fundamental rights as provided for under article 38 of the Constitution and certainly they could not undermine the provisions of article 1 of the Constitution on the sovereignty of the people. Further, they ought not compete with all international treaties that provided and protected the right to vote and to which Kenya was a signatory and which were part and parcel of Kenya's constitutional order under article 2.

18. Fundamental rights constituted the foundation of any Constitution and any accompanying values and principles were to be complementary and not to detract from the Constitution. The rights in article 38 of the Constitution remained central to any election cause and it was a claim of the violation of those rights that ought to take center-stage in such a cause and not the form that accompanied it in the periphery.

19. The collectivity and interlocking nature of constitutional provisions in the scheme of rights, values, principles and administrative directives were infused into the Elections Act and Regulations and in determining claims of commission or omission in electoral disputes, a court had to consider:
    a. The nature of the commission or omission, in general.
    b. The source of such omission or commission.
    c. Foreseeability and mitigation, that was, whether the commission or omission could be foretold were there to be steps to avert it.
    d. The effect of the commission or omission on a right, a duty or the consequence of a duty thereof such as effect upon the result of an election.
    e. The effect of the commission or omission on the individual and the collective.
    f. Possible remedies and directions.
20. Article 86 of the Constitution provided a strict quantitative language regulating voting at an election. The article required the voting method employed to be simple, accurate, verifiable, secure, accountable and transparent. The petitioners' claim was that the results from the polling stations, the CTCs could not be verified by their agents at the NTC. The process of verification was not a two-step process. Verification in a presidential election was a continuous process traceable from the date of registration of voters to the determination of a presidential election petition in an election court. In other words, the plurality of persons engaged in the conduct of an election, including the ultimate determination of that election's validity, were all agents of verification in ascertaining the credibility of an election. To examine the integrity of the election, the election court was obliged to consider all the relevant steps of the verification process.
21. Section 6 of the Elections Act mandated the IEBC to avail the register of voters to be inspected by the public at all times for purposes of rectifying the particulars therein. Verification of one's registration details, including biometric data, was therefore a critical part of verification essential to the conduct of an election and enjoyment of the right to vote. The IEBC was also mandated to open the register for inspection by the public, ninety days from the date of the notice of a general election. That assured the public of the correctness of the registration details entered into the register and guaranteed certain key components of the right to vote under article 38. That process was undertaken in the months of May and June, 2017.
22. Kenya's electoral system was instituted on the basis of multi-party democracy founded on the national values and principles outlined under article 10 of the Constitution. The general principles of the electoral system and the interlocking constitutional provisions, including article 81 were engaged in an exercise of sovereign guardianship. Therefore, the Supreme Court by dint of its jurisdiction was the final verifying agency, if called upon to do so, in a presidential election petition. That duty was enabled by the Supreme Court's inherent powers as an election court to order; -
    a. scrutiny;
    b. recount;
    c. re-tally;
    d. discovery of documents;
    e. inspection of ballots; and
    f. orders that facilitated the court to establish the people's sovereign will.
23. The court had to give full weight to the constitutional commitment to free and fair elections and the safeguard it provided of the right and ability of all who so wished to offer themselves for election to public office. It was essential to hold the IEBC to the high standards that its constitutional duties imposed upon it. It was insufficient for the court to say that it had doubted, or had a feeling of disquiet, or was uncomfortable about the freedom and fairness of the election. It had to be satisfied on all the evidence placed before it that there were real not speculative or imaginary grounds for concluding that the elections were not free and fair.

24. The preservation of election material for a period of three years was also an enabler of the verification process. In cases where a court was in grave doubt as to the outcome of the election, as the majority in the case decided they were, the ballots existed to enable a final inspection/verification process by an election court. The people spoke through the ballot and the ballots, once marked and cast, in turn, spoke for themselves anonymous of the voter, preserving the principle of secrecy under article 38 (3) (b) of the Constitution.

25. Verification was an exercise that comprised the entire electoral process commencing from registration of voters, inspection of the voters register, verification of registration, verification of an elector's details where the electronic identification failed, audit of the register, identification of voters, presence of candidates, agents, accredited observers and media, the process of counting and the limited right of recount, signing the declaration forms and the entitlement of candidates or agents to a copy, displaying the declaration of results for access by the public, sealing of ballot boxes and handing over of election materials, the tallying process and the right to challenge the declaration of results in an election court. All those processes activated several inbuilt principles of the electoral system under article 81 of the Constitution. They also provided an opportunity for electoral quality assurance. The hierarchy was that any shortfalls in the preceding process could be detected in a consequent process forming a basis for a pre-election or post-election dispute.

26. A proper test for verification of an electoral process must always prioritize the primary instrument for declaration of the result or outcome of the voters' choice. The voter was identified at the polling station, he voted at the polling station, ballots were counted at the polling station. The agents, candidates, observers were allowed access into the polling stations to verify the inner sanctum of the voice of the electorate, the altar of the voter's choice. What happened there was what determined the parameters of verification. Any doubt as to the credibility or integrity of the election had to be tested against the various layers of verification, including the election material in the custody of the returning officer. A single want of form in the elaborate scheme of verification could not be a basis for nullifying a presidential election.

27. The electoral process was conducted in accordance with the directions of the Court of Appeal in the *Maina Kiai* case. Processes that had been put in place before the determination by the Court of Appeal declaring section 39(2) and (3) of the Elections Act, 2011 and regulation 87(2)(c) of the Elections (General) Regulations, 2012 unconstitutional were adjusted to; -

    a. eliminate provisional results; and
    b. adjust Form 34C to reflect a collation of Forms 34B from the constituency returning officers who had verified and tabulated the final results from the polling stations in Forms 34A.

28. The declaration by the 2nd respondent of the results of the election per county was in keeping with the constitutional requirement that the candidate declared elected as President received at least twenty-five per cent of the votes cast in each of more than half of the counties.

29. The *Maina Kiai* decision, delivered on June 23, 2017, 35 days prior to the conduct of the presidential election in August, 2017, was definitive of the status of the law at that time. As such, the 1st and 2nd respondent's adherence to those guidelines was an answer to the duty in article 10 of the Constitution, binding all State organs and State officers to the national values and principles, in the case, the rule of law, whenever any of them such as the 1st and 2nd respondents applied or interpreted the Constitution, enacted, applied or interpreted any law; or made or implemented public policy decisions. The only challenge was that the system of data transmission from the polling station to the NTC had already been set up.

30. The case of *Maina Kiai*, though in many respects was similar to *Hassan Ali Joho & another v Suleiman Said Shahbal and others* [2013] eKLR, Supreme Court Petition No 10 of 2013; the (*Joho* case), was a play of different legal and constitutional provisions. While the *Joho* case interrogated the plurality of declaration processes for a gubernatorial election, a three-tier election with no requirement of a county

or national threshold, the *Maina Kiai* case addressed itself to the declaration processes in a presidential election; a two-tier election process under article 138(3)(c) of the Constitution with a mandatory national and county threshold under article 138(4)(a) and (b), and a defined mode of declaration under article 138(10)(a). The two cases were in different electoral law amendment periods. The foregoing aspects therefore signaled an imperative to distinguish *Joho* from the *Maina Kiai* case.

31. The polling station was the true *locus* for the free exercise of the voter's will and once the counting of votes as elaborated in the Elections Act, 2011 and Regulations thereunder, with its open, transparent and participatory character using the ballot as the primary material meant, as it had to, that the count there was clothed with finality not to be exposed to any risk of variation or subversion. Consequently, the concept of provisional results did not exist in Kenya's constitutional electoral practice. As such, the Supreme Court upheld the determination by the Court of Appeal in the *Maina Kiai* case that sections 39(2) and (3) of the Elections Act, 2011 were inconsistent with the Constitution and to that extent, null and void. However, the judge departed from the decision by the appellate court to the extent that; -
    a. it endorsed another layer of tallying and verification of the result of the presidential vote in the form of the CTC; and
    b. incapacitated the chairperson of the IEBC, an integral part of the declaration process in a presidential election, from verifying the polling results.
32. The word "declared" in article 180(4) of the Constitution (in the petition, article 138), had been used to depict the finality culminating in the declaration of the winner of an election. Article 138(3)(c) of the Constitution was the pace setter of the declaration process. It called on the IEBC to tally and verify the count before declaring the result. That formula was in terms of article 86(a) of the Constitution, simple, verifiable, transparent and accountable. Article 138(3)(c) eliminated the need for the polling results in a presidential election to be tallied at the CTC before being declared. Presidential election results were declared at the NTC by the chairperson of the IEBC. Before that declaration could be made, several things had to be done; -
    a. the polling results had to be tallied - article 138(3)(c);
    b. the count had to be verified - article 138(3)(c);
    c. the national threshold had to be met - article 138(4)(a); and
    d. the county threshold had to be met - article 138(2)(c).
33. The prerequisites could only be done at the NTC by the chairperson of the IEBC who was also the person who was to return the results of the presidential election in accordance with the Constitution.
34. Whilst it was the case that the role of the returning officer was indispensable to the election process, it was the case that he/she, in fulfilling that role, was a creature of statute and was bound by the terms of the express legislative provisions. Accordingly, in the performance of his/her duties and functions he/she had to be guided by the principles laid down in such legislation, within which was set out the framework where those whose names were validly on the register of electors could give effect to the franchise vested in them.
35. The returning officer must not exceed the limits of the competence so conferred on him, he was therefore confined to what could legitimately be extracted from the provisions in issue, either by way of express conferment or necessary intendment. He could not operate in excess of those limitations. He could not, for example, justify any act or action, however desirable his intentions could be, based on any form of inherent power for the simple reason that his office was not amenable to attract competence in that way. When an occasion arose it would therefore become a matter of statutory interpretation as to whether or not the act or omission complained of was within the competence of his office to perform.
36. Ordinarily a question regarding the interpretation or application of the Constitution could arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values

embodied in it. Therefore article 138 of the Constitution had to be interpreted liberally and in a manner that none of its sub-articles would strike down the other.

37. Although the petitioners' expert witness on cyber security outlined the six principles which the transmission systems and database ought to have been tested against, the source of that opinion was not provided. Sufficient evidence to prove the link between those principles, the imperatives of electoral conduct and elaborate omission by the 1st respondent, supported by any evidence, was not provided. Experts, when admitted before the court in person or by deposition, would have a primary function to educate the court in the technology they would come as teachers, as makers of the mantle for the court to don. Further, as a practical matter a well-constructed expert report containing opinion evidence would set out the opinion and the reasons for it. If the reasons stood up the opinion did, if not, then the opinion would not.

38. Article 86 of the Constitution lay down the parameters of voting in furtherance of the right to vote in free and fair elections pursuant to article 38 of the Constitution. The system of voting ought to be simple, accurate, verifiable, secure, accountable and transparent. It was peculiar that with regard to voting, article 86 did not make any direct reference to transmission of the election results. However, transmission was an integral part of the electoral process. It was the mode through which the results left the polling station to the CTC and the NTC. In order to enable voting and give full effect to the right to vote, appropriate structures had to be set up. According to article 86(d), those structures and mechanisms ought to eliminate electoral malpractice. The KIEMS system was one such mechanism.

39. Upon signing Form 34A and ensuring the same was signed by the agents of the candidates present in the polling station, the presiding officer manually input the results and the scanned form in the designated electronic kit and electronically transmitted the results to the constituency, county and national tallying centres. The KIEMS kit applied for that purpose required 3G or 4G network in order to transmit the results. In the areas where that nature of network was not available, the presiding officer would have been required to move to an area where that network was available in order to electronically transmit the results. A copy of the form containing the declared results was also to be pinned on the door of the polling station.

40. The counting of the votes and the declaration of the results at the polling station was manual but the transmission was electronic. Nonetheless, by dint of section 44A of the Elections Act, 2011, if the electronic transmission of the results failed then the presiding officer was to revert back to the manual system of transmission in which case he would have to physically deliver the Form 34A to the constituency returning officer.

41. Kenya's electoral process could not be said to be purely electronic. It comprised of both manual and electronic components. It was a rather ugly grouchy and reluctant mongrel of two very distinct processes. In fact, it was a largely manual system. It was therefore very distinct from electronic electoral processes exhibited in foreign jurisdictions such as India, Australia, the United States of America, Canada, and Brazil among others.

42. In Kenya, the system of voting was partly manual and partly electronic with the option of reverting to the manual processes should the electronic processes fail. However, the counting of votes, tallying, collation and verification of the results was entirely manual. An interpretation of section 44A of the Elections Act was incomplete without due consideration to article 38 and 86(d) of the Constitution and section 39 and 44 of the Elections Act. The High Court considered it only in light of section 44 advancing an incomplete conclusion.

43. Section 39(1)(C) of the Elections Act had mandated that for purposes of a presidential election, the IEBC would electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the CTC. Technology, however, per section 44 of the Elections Act was used subject to the provisions of the entire section, meaning that there were prerequisites to be

met before technology could be employed. Parliament was keen to introduce conditions preceding the use of technology in elections. The conditions were in-built in the provision as follows:

a. A policy for progressive use of technology in the electoral process (section 44(2)).
b. The technology would be simple, accurate, verifiable, secure, accountable and transparent (section 44(3) which was in terms of article 86(a) of the Constitution)
c. In an open and transparent manner, procure the technology at least 120 days before such elections.
d. Deploy the technology at least sixty days before a general election.
e. Enact regulations in consultation with relevant agencies, institutions, stakeholders, including political parties for the aspects listed under section 44 (5) (a-j).
f. Technology shall be restricted to voter registration, identification and results transmission
g. Establish a technical committee to oversee the adoption of technology and its implementation for the conduct of the general elections.

44. The use of technology was progressive. Electronic technology had not provided perfect solutions. Such technology had been inherently undependable and its adoption and application had been only incremental over time. It was not surprising that the applicable law had entrusted discretion to IEBC on the application of such technology as could be found appropriate. Since such technology had not yet achieved a level of reliability, it could not as yet have been considered a permanent or irreversible foundation for the conduct of the electoral process. It negated the petitioner's contention that, in the instant case, injustice or illegality in the conduct of election would result if IEBC did not consistently employ electronic technology. The petitioner's case, insofar as it attributed nullity to the presidential election on grounds of failed technological devices, was not sustainable.

45. The Constitution and the entire electoral code enliven the mechanism, the manual identification of voters and manual transmission of results in the prescribed instruments of transmission, verifiable by various agents including an election court using election material expressly referenced under article 86(d) of the Constitution and defined under section 2 of the Elections Act. The essence of the section was to save the sovereign will of the people from the unpredictable nature of technology and to introduce a layer of verifiability to the electoral process. Parliament was clear, by the terms of section 44A of the Elections Act that the complementary mechanism which existed as the manual system of result transmission in the prescribed instruments of declaration and whose finality was only questionable before an election court was sufficient to deliver a presidential election, as happened in areas where there was no 3G or 4G network coverage.

46. The public nature of elections required that all essential steps in the elections were subject to examinability, unless other constitutional interests justified an exception. The examination ought to be possible, by the voter/public, without special expert knowledge. Therefore, the voter in Kenya understood the function of the ballot and the critical importance of entries in the statutory Forms 34A, 34B and 34C. Election results were displayed in the relevant forms after the close of polling for all to see and scrutinize. Any mechanism that purported to complicate the simplicity was at variance with the Constitution. Technology reinforced the efficient and fast translation of the will of the people into an ascertainable return. It however did not supplant the critical primary instrument-form 34A generated at the primary *locus* of the election and challengeable only in a court of law.

47. The claim of a consistent variance of 11% between the results for the 3rd respondent and the 1st petitioner was not proved. Having determined that failure of technology could not supplant the will of the people recorded in verifiable ballots and other election material and the results declared in available, ascertainable, unchallenged and proper statutory instruments of declaration, the petitioners' case to have excluded results from 11,000 polling stations which were out of 3G and 4G network would be an affront to the Constitution and the right to franchise.

48. In accordance with article 138(4) of the Constitution, a candidate would be declared elected as President if the candidate had received more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties. That meant that in order for a candidate to be declared President-elect, he/she ought to receive more than fifty (50) per cent of the votes cast in the election, or what had been commonly referred to as the threshold of 50 plus 1. If no candidate met the threshold, then fresh elections ought to be held at which only the two candidates with the highest number of votes in the first round would participate. In the second round, it was the candidate who received the largest number of votes or a simple majority, who would be declared President-elect. Therefore, percentage point played a critical role in determining the winner of a presidential election in the first round and whether there would be a second round of elections. Consequently, any factor that would affect the percentage of votes attained by a candidate needed to be addressed.

49. A non-compliant ballot paper yielded a rejected vote which was invalid and therefore conferred no advantage upon any candidate. Due to its numerical inconsequence on any candidate's final tally, it should not be considered while computing the final percentage outcomes in a presidential election.

50. Although the Constitution did not define the term cast, the Black's Law dictionary defined "cast 'as "to formally deposit (a ballot) or signal one's choice. Therefore, the act of a voter secretly marking his/her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom the voter wished to vote, constituted, a vote. However, that vote only counted to the final computation and was deemed cast, if the elector complied with the applicable standards elaborated under the Constitution and the electoral law and regulations.

51. In certain instances, at the time the voter placed his/her marked ballot paper in the ballot box, it remained a ballot that could be rejected unless the voter had satisfied the requirements necessary to render their intention, a vote cast. The ballot paper however bore a mark against the name and symbol of the person whom the voter wished to vote. The process of marking the ballot paper was therefore an expression of the voter's wish/will to elect a particular candidate. That act, alongside other enabling electoral processes such as voter registration comprised the voter's exercise of his/her political rights in line with article 38(2) of the Constitution.

52. In order for a ballot to translate into a verifiable vote (a vote cast), it had to be clear in whose favour the vote was cast without identifying the voter. Meaning, that a vote was cast only when a presiding officer, during counting, declared that the intention of the voter was clear and that the vote was made in favour of a particular candidate. The intention of the voter in a voting process that was by secret ballot was a core component of an individual's political right pursuant to article 38 of the Constitution. Therefore, spoilt ballots did not constitute votes eligible to be included in the tally of the final results in a presidential election.

53. Rejected ballots in accordance with regulations 77 and 78 of the Elections (General) Regulations, 2012 were void and were not counted unless in terms of regulation 77(2). Viewed purposively it could be concluded that regulations 2,69,70,71,77 and 78 of the Elections (General) Regulations, 2012 excluded rejected ballots from the total votes cast which were considered for purposes of computing the final results in a presidential election

54. The petitioners' logic collectivizing all votes as cast and therefore applicable in computing the final results of a presidential election did not distinguish the presidential election from other elections held on the same day. That reasoning accepted that stray ballots also ought to form part of the votes considered in computing the final percentages. A stray ballot paper meant a ballot paper cast in the wrong ballot box.

55. If any ballot for another election, for instance, Senate or Gubernatorial was placed in the presidential ballot box, then that vote was not cast in the presidential election. It was for all intents and purposes, a

foreign object that could not be considered a vote cast in that election. Consequently, it could not be taken into account when considering the total number of votes cast in that election. Rejected ballots belonged to no candidate. That however, was not to understate the statistical need to record rejected ballots. Such statistics could be helpful in assessing voter turnout and also acting as a barometer for evaluating civic education programs for voters.

56. In an election petition, the burden of proof at the very onset lay on the petitioner to prove the facts that he alleged. Once the petitioner discharged that, burden it shifted to the respondent(s) to rebut the claims made.

57. The court elaborated on the distinction between the legal burden and the evidentiary burden, noting that the legal burden was the initial burden on the petitioner to prove the facts pleaded in the petition. Once the petitioner discharged that legal burden to the standard required, then the burden shifted to the respondent to disprove those claims; that being the evidentiary burden.

58. The petitioner had to discharge the initial legal burden for the 1st respondent to be under the evidentiary burden with respect to the register and the declared results. The evidential burden regarding the contents of the register and declared results lay on the IEBC; save that, that burden was activated, in an election petition only when the initial legal burden had been discharged.

59. The petitioner must discharge the burden of proof in order to succeed in their pursuit to invalidate the declared results. The petitioner was not only required to prove that the irregularity was committed but also that the irregularity materially affected the election result. Section 83 of the Elections Act, 2011, specifically required that no election would be declared void by reason of non-compliance with written law if it appeared that the election was conducted in accordance with the Constitution and with written law or that the non-compliance did not affect the result of the election.

60. Where a claim of electoral malpractice was made, the standard of proof was one above a balance of probabilities but below beyond reasonable doubt. Where a claim of commission of an election offence was made, the standard of proof was similar to that in a criminal matter, which was beyond reasonable doubt. Where the claim related to data-specific electoral requirements, the standard of proof was also beyond reasonable doubt.

61. Where the petitioner assailed the declared results on the allegation that the returned candidate committed election offences it was imperative for the petitioner to prove beyond reasonable doubt that the returned candidate or his agents working under his instructions committed the alleged offence. Where an election offence was alleged in an election petition, the standard of proof was beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the cause.

62. With regard to the allegation that the Cabinet Secretaries committed the alleged electoral offences, the petitioners were required to show firstly that the offences were committed and that secondly, they were acting under the instructions of the 3rd respondent. They had to show the nexus between the person who was alleged to have committed the offence and the returned candidate and they should have shown the full particulars of the allegation.

63. Where a petitioner imputed electoral offences on the part of the returned candidate, the burden of proof lay on the petitioner to prove the commission of the electoral offences by the returned candidate or by his agents or by other persons with his consent, which claim had to be supported by cogent evidence, bare allegations, without more, that the offence was committed would not suffice. If the evidence supplied failed to meet the set standard the petition had to fail.

64. The law was clear that cabinet secretaries were exempt from the prohibition that public officers should not engage in the activities of a political nature and for good reason. Cabinet secretaries and county executives' members served at the pleasure of either the President or Governor. They were political appointees with the express purpose of delivering the manifesto of their appointing authority or political party. That was an essential part of a political Government in any democracy. A change in the presidency signaled the immediate resignation or replacement of the political appointees not so with

the rest of the civil service whose tenure was protected against the vagaries of politics. That was why civil servants did not and should not participate in active politics as they should remain apolitical.

65. There was need by major stakeholders, in a process such as the one forming the subject matter of the instant petition (the presidential election), to gain access to all the relevant documents containing all the material facts relating to the process. Therefore, the need for the petitioners to get all the relevant forms from the 1st respondent was completely justifiable. However, the 1st respondents had been tasked with an immense constitutional mandate to conduct six elections on the same day which ran concurrently. Though that was humanly possible it was a daunting task to count, tally and verify the results of all the six elections and more specifically the presidential election within the constitutional timeline of seven (7) days from the date of the election.

66. One could not lose sight of the fact that the IEBC's officials had been working round the clock during the election period, therefore the reduced efficiency that ordinarily came with long working hours and lethargy was inevitable irrespective of a person's will power to efficiently accomplish such a sacrosanct process that normally came once in every five years. The performance by the IEBC and availing all the Forms 34B to the public and to the petitioners within 4 days of the declaration was commendable in view of the fact that the KIEMS system was being used by the 1st respondent for the first time. The delay by the IEBC of about four days to supply the petitioners with the Forms 34A could not be construed to be completely unwarranted under the circumstances.

67. If after the presidential election results had been declared, a person was desirous of accessing the prescribed declaration forms relating to the presidential election which the law did not expressly stipulate were to be availed to a party, such a party should seek access to such forms through the court.

68. The petitioner in most of the allegations made did not discharge the onus of proof on them. In that regard the burden did not shift to the respondent to counter the allegations since they bore reinforcement by cogent evidence. In the instances in which the petitioners did discharge the burden, the respondents sufficiently supplied cogent evidence in rebuttal. On the other hand where the respondents admitted the allegations such as those of administrative errors credible evidence was supplied to prove that the errors did not materially affect the results and they were not in favour of any particular candidate.

69. The terms of the court's orders were met to the best extent possible. Although the parties differed on the interpretation of the orders, they were very clear and free from misconstruction. The orders were of access to information and read-only access which included copying if necessary. The court's orders were very clear, they were also very distinct from the prayers originally sought in the application. The court took the concerns of all the parties into consideration before making a determination on the application. Any inference into the intent or assumed order of the court could not therefore be left to flourish.

70. The basic principles applicable to construing documents, applied to the construction of a court's judgment or order. The court's intention was to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. As in the case of a document, the judgment or order and the court's reasons for giving it, must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order was clear and unambiguous, no extrinsic fact or evidence was admissible to contradict, vary, qualify, or supplement it.

71. The IEBC was an independent constitutional body with the powers to regulate vital procedures such as the deployment of technology in elections. Although the petitioners prayed for unfettered access into the servers, the court, in consideration of the security concerns and in line with principles of justice and equity did not grant that but granted only specific limited orders to information, which were met. The Supreme Court did not give orders for the petitioner to access the servers of the 1st respondent, what was given was access to particular read only information. The location of servers, the entry and penetration into the servers, were not part of the orders given. It would have been dangerous to expose

the IEBC to any administrative incapacity in the future. The court had a responsibility to preserve the working systems of the IEBC for future elections.

72. The 1st and 2nd respondents were not in contempt of the Supreme Court's orders and there was no basis to nullify the presidential election on the basis of any information revealed or otherwise in the Report. The allegations of inconsistency in Forms 34A and 34B was verifiable using the existing paper-trail which was also in the possession of the petitioner having requested the court vide a letter dated August 23, 2017 and the entire set of primary records provided in scanned form on August 24, 2017. As such an order for nullification based on that exercise that was merely based on controvertible and speculative grounds, and was well below the standards set for nullifying an election, especially, where other remedies, such as inspection of ballots, existed.

73. The majority did not address themselves to any other evidence in arriving at their determination, had they systematically analysed the evidence, they would not have determined the election on a tangential issue whose determination could easily have been settled through reference, by the court itself, to the evidence deposited by the 1st respondent 48 hours after filing the petition.

74. The Supreme Court consistently applied the test in section 83 with the result of the election in mind. The qualitative component (the result of an election) was an integral element of election causes. In a Presidential election petition, the petitioner challenges the election of the President-elect under article 140(1). The result of the election of the President by constitutional requirement could only be ascertained when the formula under article 138(4) of the Constitution has been met. Anyone challenging an election had to therefore challenge both the quantitative and qualitative aspects of the election.

75. The constitutional threshold in a presidential election was anchored on the numbers and the formula. The drafters of the Constitution were very clear that Kenyans ought to elect, as President, a person who was acceptable to more than half of the voters in Kenya and one supported by at least 25% of the votes cast in each of more than half the counties. It was only such a person who had garnered that percentage threshold in terms of popular support that was to be declared elected as President. That was one of the irreducible minimums for a transformative change in Kenya's electoral architecture. There was a purpose to that formula, the need for national cohesion, a unifying personality and a nationally popular individual. In a petition relating to such an election, an election court had to therefore ascertain that any question as to the quality of the election had affected the constitutional quantitative threshold.

76. The legal position was that election results would be upheld unless it had been proved in court that the irregularities or illegalities changed the result of an election or made it impossible to determine the will of the electorate. The upshot was that the alleged illegalities or irregularities ought to have had a nexus with the declared result.

77. The decisions of the Supreme Court triggered various processes in legal reform or the constitutional performance of institutional mandate. Therefore, a critical aspect of precedent was to preserve the certainty and predictability of the law. Although the doctrine of precedent did not stand in the way of progressive interpretation of the law, that power must be used in a sparing and cautious manner to guarantee continuity, certainty and adaptability. Those three aspects had to however be balanced with the requirement that justice be done. Judicial guidance was an integral part of directing people's relations. That critical aspect was wasted if it became impossible to direct actions appropriately when similar facts and circumstances were subjected to different standards of the law.

78. Section 3 of the Supreme Court Act and the body of jurisprudence from the Supreme Court was central on the preservation, protection and affirmation of the Constitution. The framers of the Constitution were fully aware that the Supreme Court was the only court that could reverse itself as it was not bound by its own decisions. However, considerations for reversal or departure had to be carefully weighed against various considerations. Departure from electoral jurisprudence was inviting of an even firmer and higher restraint from departure of well-settled principles. The Judiciary was one

of several critical institutions that acted as anchors to the Constitution. The others were the people, the Executive, the Legislature, independent commissions, State offices and officers. All those institutions interacted with the law and with each other in a manner that was clear, certain, stable and predictable. A different approach would threaten the fabric of institutional legal interaction. The law was a primary limb of the body politic.

79. A judge stood before a dilemma to follow precedent previously determined by his court, or deviate from it. The judge must use his discretion reasonably. The reasonableness test required the judge to consider on the one hand all considerations supporting the honoring and following of the precedent. On the other hand the judge must consider the full scope of considerations pointing toward deviation from precedent and choosing new law. The judge must assign each one of those systems of considerations its proper weight. Having done that, the judge must place both on the scale. The judge must choose the prevailing ruling, the judge must choose the ruling whose utility was greater than the damage caused by it. The guiding principle should be that: it was appropriate to deviate from a previous precedent if the new precedent's contribution to the bridging of the gap between law and society and to the protection of the Constitution and its values after setting off the damage caused by the change was greater than the contribution of the previous precedent to the realisation of those goals. Deviation from precedent, particularly precedent of the highest court was a serious matter, great sensitivity was needed to weigh all the considerations.

80. Although the Supreme Court was not bound by its decisions and could review or depart from them, such considerations only ought to be in the clearest of cases, and distinguishable in fact, circumstances and relevance. The majority had failed that critical test. The value of their deviation from precedent damaged more than it offered utility. It would cause damage to the legal system because it turned the entire electoral jurisprudence on its head.

81. Every arm of Government had the unique role of defending the Constitution, the Bill or Rights and the sovereignty of the people. The essence of a system of checks and balances was to ensure that when one constitutional branch threatened the entire schematic ordering of the Constitution and the State, the other was ready to check those actions. Having been part of the inaugural Supreme Court and having steadily and consistently settled the law on elections, the interpretation of section 83 of the Elections Act by the majority would unleash jurisprudential confusion never before witnessed. Unfortunately, Kenya was part of the common law system, encumbered by rules requiring lower courts to pay due deference to the courts above. Parliament must therefore untie the hands of courts below by clarifying the meaning of section 83. That was the only way that Kenya could avert a crisis of jurisprudence in such a sensitive area of law as elections.

82. The Supreme Court could not roll over the defined range of the electoral process like a colossus. The court must take care not to usurp the jurisdiction of the lower courts in electoral disputes. The annulment of a presidential election would not necessarily vitiate the entire general election and the annulment of a presidential election needed not occasion a constitutional crisis, as the authority to declare a presidential election invalid was granted by the Constitution itself.

83. The petition contained numerous allegations of irregularity, illegality and electoral offences, enough, if proved to the required burden and standard, and if it affected the result to void the presidential election. The allegations were however not proved and where evidence was adduced, there was sufficient evidence to rebut the allegations.

84. The Supreme Court should never abdicate its duty as an election court exercising exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140 of the Constitution. As an election court, the court must not narrow the scope of its remedies nor delegate its powers to the parties. The zeal of the voter to participate in elections and the overwhelming responsibility of every State organ and stakeholders to conduct free, fair and peaceful elections must be matched by equal zeal from the court.

85. The majority nullified the conduct of the presidential elections solely on the basis that some Forms 34A and 34B lacked security features which were elected by the IEBC and spread in different versions across most forms. The majority, in the aftermath of the Registrar's report did not even attempt to peruse the enormous evidence deposited by the 1st and 2nd respondents bearing certified copies of Forms 34A and 34B of the Constitution and against which they ought to have checked the alleged irregularities. By subjecting the integrity of the election to considerations of design, that were neither statutory nor regulatory, the majority had not only threatened the people's belief in the electoral system, it had overburdened and in fact, negated the electorate's right to franchise.

86. In election causes, the majority ought to have disengaged the mechanical gear of appellate jurisdiction and fully considered the evidence against the dictates of the burden and standard of proof. The absence of time was not a sufficient excuse. The court had a competent institution of research and was well facilitated to be able to perform the role of an election court as a final verifying agent in cases of monumental importance such as the instant petition.

87. Just as Parliament was expected to operate within its constitutional powers as an arm of Government so must the Judiciary. The system of checks and balances that prevented autocracy, restrained institutional excesses and prevented abuse of power, applied equally to the Executive, the Legislature and the Judiciary. No one arm of Government was infallible and all were equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature were regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected judicial arm of Government was largely self-regulatory. The parameters of encroachment on the powers of other arms of government had to be therefore clearly delineated, limits acknowledged and restraint fully exercised. It was only through practice of such cautionary measures that the remotest possibility of judicial tyranny could be avoided.

88. Had the majority been engaged in the mode of a court of exclusive original jurisdiction, it would have found that each and every allegation in the petition was addressed to a satisfactory standard and where and if, the burden of proof shifted, the IEBC discharged it satisfactorily.

89. Petition would have been dismissed with costs.

Petition allowed.

Orders

a. *A declaration was 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.*

b. *A declaration was issued that the irregularities and illegalities in the presidential election of August 8, 2017 were substantial and significant that they affected the integrity of the election, the results not-withstanding.*

c. *A declaration was issued that the 3rd respondent was not validly declared as the President elect and that the declaration was invalid, null and void.*

d. *An order was issued directing the IEBC to organize and conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination of September 1, 2017 under article 140(3) of the Constitution.*

e. *Each party to bear its own costs.*

Citations

Cases

Kenya

1. *Adam, Nathif Jama v Abdikhaim Osman Mohamed & 3 others* Petition 13 of 2014; [2014] eKLR - (Applied)

2. *Albeity, Hassan Abdalla v Abu Mohamrd Abu Chiaba & another* Election Petition 9 of 2013; [2013] KEHC 2132 (KLR) - (Explained)
3. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Petition 5 of 2014; [2014] eKLR - (Explained)
4. *CMAWM v PAWM* Civil Appeal 2 of 2014; [2015] KECA 673 (KLR) - (Mentioned)
5. *Gitau, William Kabogo v George Thuo & 2 others* Civil Appeal 126 of 2008; [2009] eKLR - (Mentioned)
6. *Githinji, Dickson Mwenda v Gatirau Peter Munya & 2 others* Civil Appeal 38 of 2013; [2014] eKLR - (Applied)
7. *Imanyara, Mugambi & another v Attorney General & 5 others* Constitutional Petition 399 of 2016; [2017] KEHC 7955 (KLR) - (Explained)
8. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 32 - (Followed)
9. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 20 (KLR) - (Explained)
10. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] eKLR; [2012] 3 KLR 718 - (Mentioned)
11. *In the Matter of the Speaker of the Senate & another* Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
12. *Independent Electoral & Boundaries Commission v Kiai & 4 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR); [2017] 2 KLR 1136 - (Explained)
13. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
14. *Joho, Hassan Ali v Hotham Nyange & another* Election Petition 1 of 2005; [2005] KEHC 1291 (KLR); [2008] 3 KLR (EP) 500 - (Explained)
15. *Kabage, Karanja v Joseph Kiuna Kariambegu Nganga & 2 others* Election Petition 12 of 2013; [2013] KEHC 2345 (KLR) - (Explained)
16. *Kai, Sarah Mwangudza v Mustafa Idd (Sued in Capacity as the County Returning Officer (IEBC) Kilifi & Independent Electoral & Boundaries Commission* Election Petition 8 of 2013; [2013] KEHC 2116 (KLR) - (Explained)
17. *Kariuki, Steven v George Mike Wanjohi & 2 others* Election Petition 2 of 2013; [2013] KEHC 2191 (KLR) - (Applied)
18. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014; [2014] KESC 11 (KLR) - (Explained)
19. *Kingara, Peter Gichuki v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 31 of 2013; [2014] eKLR - (Applied)
20. *Lisamula v Independent Electoral and Boundaries Commission & 2 others* Petition 9 of 2014; [2014] eKLR; [2014] 4 KLR 316 - (Explained)
21. *Lukoye, Moses Wanjala v Bernard Alfred Wekesa Sambu & 3 others* Election Petition 2 of 2013; [2013] KEHC 2152 (KLR) - (Explained)
22. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
23. *Magara, James Omingo v Manson Onyongo Nyamweya & 2 others* Civil Appeal 8 of 2010; [2010] eKLR - (Explained)
24. *Masaka, Benard Shinali v Boni Khalwale & 2 others* Election Petition 2 of 2008; [2011] eKLR - (Mentioned)
25. *Mathenge,Thuo & another v Nderitu Gachagua & 2 others* Civil Appeal 29 of 2013; [2013] KECA 84 (KLR) - (Applied)
26. *Mboya, Apollo v Attorney General & 15 others* Petition 162 of 2017; [2017] KEHC 2725 (KLR) - (Explained)

27. *Miriti, M'nkiria Petkay Shen v Ragwa Samuel Mbae & 2 others* Civil Appeal 47 of 2013; [2014] KECA 698 (KLR) - (Explained)
28. *Mohammed, Abdikhaim Osman & another v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 293 of 2013; [2014] KECA 637 (KLR) - (Explained)
29. *Munialo, Jack Mukhongo & 12 others v Attorney General & 2 others* Petition 162 of 2017; [2017] eKLR - (Explained)
30. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Explained)
31. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
32. *Muruli, Mable v Wycliffe Ambetsa Oparanya & 3 others* Petition 11 of 2014; [2016] eKLR - (Applied)
33. *Mwashetani, Khatib Abdalla v Gideon Mwangangi Wambua & 3 others* Civil Appeal 39 of 2013; [2014] KECA 848 (KLR) - (Explained)
34. *National Super Alliance (NASA) Kenya v Independent Electoral & Boundaries Commission, & 2 others* Petition 328 of 2017; [2017] KEHC 4466 (KLR) - (Explained)
35. *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 258 of 2017; [2017] KECA 342 (KLR) - (Explained)
36. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] eKLR; [2012] 2 KLR 419 - (Applied)
37. *Njenga, Peter Kariuki v Gabriel P Muchira & another* Civil Appeal 188 of 2010; [2017] KEHC 7829 (KLR) - (Explained)
38. *Obado, Zacharia Okoth v Edward Akong'o Oyugi & 2 others* Petition 4 of 2014; [2014] eKLR - (Mentioned)
39. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013; [2013] KESC 6 (KLR) (Consolidated) - (Explained)
40. *Otieno, Kenneth v Attorney General & Independent Electoral & Boundaries Commission (IEBC)* Petition 127 of 2017; [2017] KEHC 4811 (KLR) - (Explained)
41. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
42. *Republic v Independent Electoral and Boundaries Commission ex-parte Gladwell Otieno & another* Judicial Review Miscellaneous Application 447 of 2017; [2017] eKLR - (Explained)
43. *Royal Media Services Ltd v Attorney General* Petition 346 of 2012; [2012] KEHC 2053 (KLR) - (Explained)
44. *Tallam, Collins Kipchumba v Attorney General* Petition 415 of 2016; [2016] eKLR - (Applied)
45. *Wanjohi, George Mike v Steven Kariuki & 2 others* Petition 2A of 2014; [2014] eKLR - (Explained)
46. *Waweru, John Kiarie v Beth Wambui Mugo & 2 others* Election Petition 13 of 2008; [2008] KEHC 826 (KLR) - (Mentioned)
47. *Wetang'ula, Moses Masika v Musikari Nazi Kombo & 2 others* Civil Appeal 43 of 2013; [2014] KECA 734 (KLR) - (Cited in Dissenting Opinion)
48. *Wetangula, Moses Masika v Musikari Nazi Kombo & 2 others* Petition 12 of 2014; [2015] KESC 12 (KLR) - (Explained)

Tanzania

Madundo v Mweshemi & A-G Mwanza HCMC No 10 of 1970 - (Explained)

Uganda

1. *Amama Mbabazi v Museveni & others* Presidential Election Petition No 1 of 2016; [2016] UGSC 3 - (Explained)
2. *Kizza Besigye v Attorney General* (Constitutional Petition No 13 of 2009); [2016] UGCC 1 (29 January 2016) - (Explained)
3. *Kizza Besigye v Electoral commission,Yoweri Kaguta Museveni* (Election Petition No 1 of 2006); [2007] UGSC 24 - (Applied)

4. *Olum & another v Attorney General* (Constitutional Petition No 6 of 1999) [2000] UGCC 3; [2002] EA 508 - (Explained)
5. *Winnie Babihunga v Masiko Winnie Komuhamhia & others* HTC-OO-CV-EP-004-2001 - (Explained)

South Africa

1. *August & another v Electoral Commission & others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 - (Explained)
2. *Electoral Commission v Mhlope & others* (CCT55/16) [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) (14 June 2016) - (Explained)
3. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) - (Explained)
4. *Kham & others v Electoral Commission & another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) - (Explained)
5. *New National Party v Government of the Republic of South Africa & others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 - (Explained)
6. *Richter v Minister for Home Affairs and others (with the Democratic Alliance and others Intervening, and with Afriforum and another as Amici Curiae)* (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC) ; 2009 (5) BCLR 448 (CC) - (Explained)

Nigeria

1. *Abubakar v Yar'adua* (2009) All FWLR (Petition 457) 1SC - (Explained)
2. *Buhari v Obasanjo* (2003) 17 NWLR (PT 850) 587; (2003) 11 SC 74 - (Explained)
3. *Olusola Adeyeye v Simeon Oduoye & others* (2010) LPELR_CA/I/EPT/NA/67/08 - (Mentioned)

Botswana

Pilane v Molomo & another (1990) BLR 214 (HC) - (Mentioned)

Zambia

Akashambatwa Lewanika & others v Fredrick Chiluba (SCZ Judgment No 14 of 1998) [1998] ZMSC 11; (1999) 1 LRC 138 - (Explained)

Ghana

Akufo-addo & others v Mahama & another (J8 31 of 2013) [2013] GHASC 137 - (Explained)

United Kingdom

1. *In Re B (Children)* [2008] Fam Law 619; [2008] 3 WLR 1; [2008] 4 All ER 1; Re [2008] UKHL 35 - (Explained)
2. *Jugnauth v Ringadoo and others* [2008] UKPC 50 - (Explained)
3. *Mölnlycke AB v Procter & Gamble Ltd* [1991] EWCA Civ J0627-10; [1994] RPC 49 - (Explained)
4. *Morgan v Simpson* [1974] 3 All ER 722; [1975] 1 QB 151 - (Explained)
5. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, HL(E) - (Explained)
6. *Rockwater Ltd v Technip France SA & Anor* [2004] EWCA Civ 381 - (Explained)
7. *Simmons v Khan* [2008] EWHC B4 (QB) - (Explained)
8. *Woodward v Sarsons* (1875) LR 10 - (Explained)

India

1. *Charan Lal Sahu & others v Giani Zail Singh & another* 1984 AIR 309, 1984 SCR (2) 6 - (Explained)
2. *Golak Nath v The State of Punjab* AIR 1643, 1967 SCR (2) 762 (1967) - (Explained)
3. *Jagdev Smgli v Pratap Singh Daulla* (1965) AIR SC 18 - (Explained)
4. *Jeet Mohinder Singh v Harmoniser Singh Jassi* 1999 Supp (4) SCr 33; AIR 2000 256 - (Explained)
5. *Jitendra Bahadur Singh v Krishna Behari and others* [1969] INSC 176; AIR 1970 SC 276 - (Explained)
6. *Joshna Gouda v Brundaban Gouda & another* SC Civil Appeal No 15174 of 2011; (2012) 5 SCC 634 - (Explained)

7. *Kanhiyalal Omar v RK Trivedi & others* 1986 AIR 111, 1985 SCR Supl. (3) 1. - (Explained)
8. *Narendra Madivalapa Kheni v Manikarao Patil and Others* AIR 1977 SC 2171; 1977 (2) KarLJ 355; [1978] 1 SCR 193 - (Explained)
9. *Ponnala Lakshmaiah v Kommuri Pratap Reddy & others* Civil Appeal 4993 of 2012; 2012 DGLS (SC) 323 : AIR 2012 (SC) 2638 - (Explained)
10. *Rahim Khan v Khurshid Ahmed & Ors* 1975 AIR 290, 1975 SCR (1) 643 - (Explained)
11. *Shiv Kirpal Singh v Shri VV Giri* 1971 SCR (2) 197 - (Explained)
12. *State of Madras v Champakam Dorairajan* AIR 1951 SC 226 - (Explained)
13. *Union of India v Association for Democratic Reforms & another* Appeal (Civil) 7178 of 2001; [2002] AIR 2112 - (Explained)
14. *Vashist Narain Sharma v Dev Chandra & others* 1954 AIR 513; 1955 SCR 509 - (Explained)

United States

1. *Brown v Carr* 47 SE 2d 401, 130 W Va 455 - (Explained)
2. *Bush v Gore* 531 US 98 (2000) - (Explained)
3. *State of South Dokota v State of North Carolina* 192, U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448) - (Explained)

Canada

1. *FH v McDougall* [2008] 3 SCR 41 - (Mentioned)
2. *Opitz v Wrzesnewskj* (2012) SCC 55-2012-10-256 - (Explained)
3. *R v Big M Drug Mart Ltd* 1 SCR 295, 18 DLR (4th) 321; [1985] 1 SCR 295 - (Explained)

Australia

Kean v Kerby [1920] HCA 35; 27 CLR 449; [1920] 27 CLR 449 - (Explained)

Ireland

Kiely v Kerry County Council (Rev 1) [2015] IESC 97 - (Explained)

Seychelles

1. *Popular Democratic Movement v Electoral Commission & Anor* (SCA 16 of 2011) [2011] SCCA 25; (2011) SLR 385 - (Explained)
2. *Wavel John Charles Ramkalawan v The Electoral Commission* [2016] SCCC 11 - (Explained)

Texts

1. Abuya, PE., (2010), *Can African States Conduct Free and Fair Elections?* Spring: Northwestern Journal of International Human Rights, Vol 8 Issued p 123
2. Abuya, PE., (Ed) (2009), *Consequences of a Flawed Presidential Election* Oxford: Blackwell Publishing Vol 29, Issue 1, pp 127-158.
3. Auburn, J., et al (Eds) (2010), *Phipson on Evidence* London: Sweet & Maxwell Ltd, 17th Edition, pp 149-151
4. Barak, A., (Ed) (2006), *The Judge in a Democracy* Princeton: Princeton University Press p 200
5. Black, HC., (Ed) (1995), *Black's Law Dictionary* Clark, New Jersey: The Lawbook Exchange, Ltd.; 2nd edition
6. Cardozo, BN., (Ed) (1921), *The Nature of the Judicial Process* New Haven: Yale University Press, pp 28-31
7. Chagema, A., (Ed) (2017), *A Little Shock Therapy from the Supreme Court* Nairobi: The Standard p 15
8. Chamberlayne, CF., Howard, C., (Ed) (1911), *A Treatise On The Modern Law of Evidence* Michigan, United States: M. Bender & Heinoline; Vol II Para 937
9. Communications Authority of Kenya (2016), *Communications Authority of Kenya Access Gap Study Report 2016* Nairobi: Communications Authority of Kenya
10. Craies, WF., & Edgar, SGG., (Eds) (1963), *Caries on Statute Law* London: Sweet & Maxwell p 66
11. Dahl, R., (Ed) (1998), *On Democracy* New Haven CT and London: Yale University Press
12. Denning, A., (Ed) (1982), *What Next in the Law* Oxford: Oxford University Press

13. Derya, NK., (Ed) (2016), *How to Resolve Conflicts Between Fundamental Constitutional Rights* Saar Blueprints: 10.17176/20160216-140832.
14. De Smith, SA., (Ed) (1977), *Constitutional and Administrative Law* Harmondsworth: Penguin Books, 3rd Edition, p 252
15. Dias, RWM., (Ed) (1976), *Jurisprudence* London: Butterworths, 4th Edn p 17
16. European Union (2016), *Compendium of International Standards for Elections* Brussels and Luxembourg: Publication Office of the European Union, 2016; 4th Edition, pp 22-23.
17. Farber, DA., & Sherry, S., (eDS) (2009), *Judgment Calls: Principle and Politics on Constitutional Law* London: Oxford University Press
18. Garner, BA., (Ed) (1995), *A Dictionary of Modern Legal Usage* London: Oxford University Press; 2nd Edn
19. Garner, BA., (Ed) (2004), *Black's Law Dictionary* St Paul Minnesota: Thomson West; 8th edition
20. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 1535
21. Goodman, A., (Ed) (2009), *How Judges Decide Cases: Reading, Writing and Analysing Judgments* New Delhi: Universal Law Publishing Co Pvt Ltd, 2nd Indian Reprint, p 44
22. Hatchard, J., (ed) (2015), *Election Pettitions and the Stanard of Proof* Denning Law Journal Vol 27 p 291
23. Herrnson, PS., et al (2012), *The Impact of the Ballot Type on Voter Errors' in American Journal of Political Science* American Journal of Political Science, Vol 56 No 3 (July, 2012) pp 716-730
24. Heward, E., (2011), *Lord Mansfield* New Delhi: Universal Law Publishing Co Pvt Ltd, 2nd Indian Reprint
25. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 para 13
26. Holdsworth, WS., (Ed) (1937), *Lord Mansfield* The Law Quarterly Review, Vol 53 pp 221-234;
27. Holmes, OW., (ed) (1907), *In Memoriam: Frederic William Maitland* The Law Quarterly Review, Vol 23 (1907), pp 137-138
28. Holmes, OW., (Ed) (1881), *The Common Law* Boston: Little, Brown and Company
29. Independent Electoral and Boundaries Commission (2017), *Election Manual (Source Book)* Nairobi: Independent Electoral and Boundaries Commission, chapter III, pp 9, 32, 138
30. Independent Review Commission on the General Elections (IREC) (2008), *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December , 2007 (The Kriegler Report)* Independent Review Commission on the General Elections (IREC), pp 9, 138
31. Kleefeld, JC., et al (Eds) (1932), *Law as an Educational Subject* Fredericton: Journal of the Society of Public Teachers of Law, pp 30-58
32. Kumar, A., (2014), *Election Laws and Corrupt Practice in India* International Journal of Multidisciplinary Approach and Studies, Volume 01, No.5, Sep - Oct 2014
33. Lewis, G., (2008), *Lord Atkin* New Delhi: Universal Law Publishing Co Pvt Ltd, 2nd Indian Reprint
34. Likoti, JF., (2009), *Electoral Managment Bodies as Institutions of Good Giovernance: Focus on Lesotho Independent Electoral Commission* New Haven CT and London: Yale University Press; Review of South African Studies Vol 13 (1) pp 123-142 at p 126
35. Lumumba, PLO., (2015), *From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013* Nairobi: The Law Society of Kenya Journal, Vol II 2015 No 1, Law Africa.
36. Mackay, JPH., (Lord of Clashfern) (Ed) (1964), *Halsbury's Laws of England* London: Butterworths 3rd Edn para 52
37. Malik, H., (ed) (2010), *Phipson on Evidence* London: Sweet and Maxwell, London, 17th Edn, pp 149-151
38. Martin, R., (1985), *Rawls and Rights* Lawrence, Kansas: University Press of Kansas, Illustrated edition

39. Milacic, S., (ed) (2010), *"Justice Coming face to face with electoral norms" in The Cancellation of Election results The Science and Technique of Democracy* Council of Europe , Venice Commission, No 46; (2010), pp 25-67
40. Morris, HF., (1968), *Evidence in East Africa* London: Sweet & Maxwell, p 134
41. Muga, W., (2017), *The Most Complex and Expensive Political Situations* The Star, September 7, 2017, p 20
42. Odote, C., & Musumba L., (Eds) (2016), *A Critigue of the Raila Odinga v IEBC Decision in light of the Legal Standards for Presidential Elections in Kenya* Nairobi: International Development Law Organization
43. Ogot, BA., (Ed) (2005), *History as Destiny and History as Knowledge: Being Reflections on the Problems of Historicity and Historiography* Kisumu: Anyange Press p 8
44. Omukoba, D., (Ed) (2017), *Supreme Shift Like No Other in President's Election Petition* Nairobi: The Standard p 14
45. Organization for Security and Co-operation in Europe (Office for Democratic Institutions and Human Rights (ODIHR)) (2013), *Guidelines for Reviewing a Legal Framework for Elections* Warsaw, Poland: Organization for Security and Co-operation in Europe (Office for Democratic Institutions and Human Rights (ODIHR)) 2nd Edition p 70
46. Otieno-Odek, (Ed) (2017), *Election Technology Law and the Concept of "Did the irregularity affect the Results of the Election?* Nairobi: Judiciary Training Institute
47. Parliament of Kenya (2016), *Report of the Joint Parliamentary Select Committee on matters of the Independent Electoral and Boundaries Commission* Nairobi, Kenya ; Parliament of Kenya, Volume 1
48. Salevao, L., (Ed) (2005), *Rule of Law, Legitimate Givernance and Development in the Pacific* Canberra, Australia: ANU Press & Asia Pacific Press, p 2
49. Schuyler, RL., (Ed) (1960), *Frederic William Maitland Historian: Selections from His Writings* Berkeley: University of California Press
50. Sorabjee, SJ., (Ed) (2010), *Rule of Law: A Moral Imperative For South Asia and the World* South St, Waltham: Brandeis University Massachusetts p 2
51. Vickery, C., (Ed) (2011), *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections (GUARDE)* Washington DC: International Foundation for Electoral Systems, p 8
52. Weinberg, BH., (Ed) (2008), *The Resolution of Election Disputes: Legal Principles that Control Election Challenges* Virginia: International Foundation for Electoral Systems, 2nd Edition, p 103

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) section 4- (Interpreted)
2. Appellate Jurisdiction Act (cap 9) In general - (Cited)
3. Constitution of Kenya (Repealed) sections 5 (3)(f)(5)(e) - (Interpreted)
4. Constitution of Kenya, 2010 articles 1(3)(a)(c); 2; 4; 10(2)(a); 19; 20(3)(4)(a); 27(8); 35(2); 38,(2),(3)(b)(c); 47; 50(4); 54; 56; 81,(e)(ii)(iv)(v); 82,(1)(d); 83,(3); 86,(b),(c); 87(3); 88; 90; 91; 94; 100; 101; 129(1); 136; 138,(3)(a)(c),(4)(10); 140,(2),(3); 159(2)(d)(e); 160(1); 163,(3) (a),(7); 165(3)(a); 166(2); 232; 248; 249(1); 259(1)(a)(b)(d); Chapter 7, 8, 9; Preamble ; Chapter 6- (Interpreted)
5. Election Campaign Financing Act, 2013 (Act No 42 of 2013) In general - (Cited)
6. Election Offences Act, 2016 (Act No 37 of 2016) sections 10, 14, 15- (Interpreted)
7. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 2, 3, 5(1A); 6; 7(1)(c); 62, (1)(g), (3); 68; 69; 70; 73; 74, (4)(f); 76; 77; 78; 79(2)(a), (c), (3-7); 80; 81; 82; 83; 85; 87(1)(a)(3); 94(6); 95 - (Interpreted)
8. Elections (Registration of Voters) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulation 12 - (Interpreted)

9. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) regulations 10, 15(4), 20, 21, 22, 23- (Interpreted)
10. Elections Act, 2011 (Act No 24 of 2011) sections 2; 4; 5 (1); 6; 6A; 10 (1); 17 (1); 30; 39 (1C); 44; 44A; 44B; 83; 109- (Interpreted)
11. Electoral Code of Conduct (Act No 24 of 2011 Sub Leg) regulations 3, 6- (Interpreted)
12. Evidence Act (cap 80) sections 48, 50, 80, 83, 106, 107, 108, 109, 110- (Interpreted)
13. Independent Electoral And Boundaries Commission Act, 2011 (Act No 9 of 2011) sections 4 (m); 8A; 23; 25- (Interpreted)
14. Interpretation And General Provisions Act (cap 2) section 72- (Interpreted)
15. Leadership And Integrity Act, 2012 (Act No 19 of 2012) section 23- (Interpreted)
16. National Assembly and Presidential Elections Act (Repealed) (cap 2) section 28- (Interpreted)
17. Political Parties Act, 2011 (Act No 11 of 2011) In general - (Cited)
18. Prevention, Protection And Assistance To Internally Displaced Persons And Affected Communities Act, 2012 (Act No 56 of 2012) In general - (Cited)
19. Public Officer Ethics Act, 2003 (Act No 4 of 2003) In general - (Cited)
20. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) In general - (Cited)
21. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3, 12, 14, 83- (Interpreted)

South Africa

1. Election Regulations, 2004 (Act No 202 of 1993 Sub Leg) regulation 25
2. Electoral Act ,1993 (Act No 202 of 1993) section 47(3)- (Interpreted)

United Kingdom

1. Ballot Act, 1872 In general - (Cited)
2. Representation of the People's Act, 1983 (cap 2) sections 47, 48, 50, 123 - (Interpreted)

India

Penal Code sections 171A (b); 171 (C) - (Interpreted)

New Zealand

Electoral Act, 1993 sections 178, 179- (Interpreted)

Advocates

Mr James Orengo, Mr Otiende Amollo, Mr Pheroze Nowrojee, Mr Paul Mwangi, Dr Mutakha Kangu, Prof Ben Sihanya and *Mr Jackson Awele* for the 1st & 2nd petitioners
Mr Paul Muite and *Mr Kamau Karori* for the 1st respondent
Prof PLO Lumumba and *Mr Peter Wanyama* for the 2nd respondent
Mr Fred Ngatia and *Mr Ahmednassir Abdullahi* for the 3rd respondent
Mr Harrison Kinyanjui for the 2nd interested party
Prof Githu Muigai, Attorney General for the 1st amicus curiae
Mr Steve Mwenesi for the 2nd amicus curiae
Mr Omwanza Ombati for the 2nd amicus curiae

JUDGMENT

A. Introduction

1. Kenya is a sovereign Republic and a constitutional democracy founded on national values and principles of governance in article 10 of her *Constitution*. All sovereign power in the Republic is reserved to her people but delegated to

> " Parliament and legislative assemblies in the County Governments; the national executive and the executive structures in the County Governments; and the Judiciary and the independent tribunals.[1]"

In the election of her representatives, Kenya holds general elections on the second Tuesday of August in every fifth year.[2]

2. On August 8, 2017, Kenya held her second general election under the *Constitution, 2010* and Kenyans from all walks of life trooped to 40,883 polling stations across the country to exercise their rights to free, fair and regular elections under article 38(2) of the *Constitution*. That date is significant because it was the first time that a general election was being held pursuant to article 101(1) of the *Constitution* which decrees the holding of general elections every five years on the second Tuesday of August in the fifth year.

3. The general election was also held for the first time under an elaborate regime of electoral laws including amendments to the *Elections Act* made to introduce the Kenya Integrated Electoral Management System (KIEMS) which was a new devise intended to be used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC). The membership of the 1st respondent, the Independent Electoral and Boundaries Commission (IEBC), had also been changed barely seven months to the general election.

4. The number of registered votes in the country was 19, 646, 673 and on August 11, 2017, the 2nd respondent, exercising his mandate under article 138(10) of the *Constitution*, as the Returning Officer of the Presidential election, declared the 3rd respondent, Uhuru Muigai Kenyatta, the winner of the election with 8,203,290 votes and the 1st petitioner, Raila Amollo Odinga, the runner's up with 6,762,224 votes.

5. On August 18, 2017, Raila Amolo Odinga and Stephen Kalonzo Musyoka, who were the presidential and deputy presidential candidates respectively of the National Super Alliance (NASA) Coalition of parties, running on an Orange Democratic Movement (ODM) party ticket and Wiper Democratic Movement ticket respectively, filed this petition challenging the declared result of that Presidential election (the election).

6. The petitioners in the petition aver that the Independent Electoral and Boundaries Commission (IEBC), conducted the election so badly that it failed to comply with the governing principles established under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution of Kenya* and the *Elections Act* (No 24 of 2011).

1 *Constitution of Kenya, 2010*, article 1.

2 *Constitution of Kenya, 2010*, Articles 101 (1), 136(2)(a), 177(1)(a) and 180(1).

B. The Parties

7. The IEBC, the 1st respondent, is an independent Commission established under article 88 as read together with articles 248 and 249 of the *Constitution of Kenya* and the *IEBC Act* No 9 of 2011. It is constitutionally charged with the mandate and responsibility of conducting and/or supervising referenda and elections to any elective body or office established by the *Constitution*, as well as any other elections as prescribed by the *Elections Act*.

8. The 2nd respondent, the Chairperson of IEBC, who is also the Returning Officer for the Presidential election, is constitutionally mandated under article 138(10) of the *Constitution of Kenya* to declare the result of the presidential election and deliver a written notification of the result to the Chief Justice and the incumbent President.

9. The 3rd respondent is the President of the Republic of Kenya and was the presidential candidate of the Jubilee Party in the August 2017 presidential elections and was declared the winner of the said elections by the 1st respondent on August 11, 2017.

C. Interlocutory Applications

10. Prior to the hearing of the petition, a number of applications were filed by persons/entities seeking either to be enjoined as amici curiae or as interested parties. On August 27, 2017, the court rendered rulings in those applications with the consequence that:

    (i) The Attorney General and the Law Society of Kenya were enjoined as amici curiae while;

    (ii) Dr Ekuru Aukot and Prof Michael Wainaina were enjoined as interested parties.

11. The applications by Mr Charles Kanjama, Advocate and the Information Communication Technology Association for joinder as amici curiae were disallowed as were those of Mr Benjamin Wafula Barasa and Isaac Aluoch Aluochier to be enjoined as interested parties.

12. Applications by the petitioners to strike out all the respondents‘ responses to the petition were also disallowed as were the respondents‘ applications to strike out some of the petitioners‘ affidavits and annextures in support of the petition.

13. The petitioners‘ application dated August 25, 2017 seeking orders of access to and scrutiny of forms 34A, 34B and 34C used in the presidential election, as well as access to certain information relating to the 1st respondent‘s electoral technology system, was allowed. The exercise of access was conducted under the direction of the Registrar of this court, two ICT experts appointed by this court with each of the principal parties being represented by initially two and later, five agents. The reports from that exercise will be addressed later in this Judgment.

D. Petitioners‘ and the 1st Interested Party‘s Case

14. This petition is anchored on the grounds that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the *Constitution*, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process.

i. Violation of the Principles Set out in the *Constitution*, Electoral Laws and Regulations

15. On violation of the principles set out in the *Constitution* as well as the electoral laws and regulations, the petitioners' case as contained in the affidavits in support of the petition and the written and oral submissions of their counsel was that in relation to elections, the citizenry's fundamental political rights under article 38 are encapsulated in the principles of free and fair elections in article 81(e) and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as stated in article 86 of the *Constitution*. The petitioners also argue that IEBC, like all other state organs and persons, is bound by the principle of constitutional supremacy under article 2(1) of the *Constitution*. It follows then that, in the conduct of any election, any of its acts that violates those principles, shall by dint of article 2(4) of the *Constitution*, be *ipso facto* invalid and any election conducted contrary to those principles shall be nothing but a usurpation of the people's sovereignty under article 4 and shall produce masqueraders who do not represent the people's will and are not accountable to them.

16. It was further submitted that instead of protecting and safeguarding the sovereign will of the people of Kenya, IEBC so badly conducted, administered and managed the presidential election, giving rise to this petition and that it flouted the governing principles set out in articles 1, 2, 4, 10, 35(2), 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution*, the *Elections Act* and the *Regulations*. The petitioners thus contended that in the conduct of the August 8th Presidential Election, IEBC flagrantly flouted the principles of a free and fair election under article 81(e) of the *Constitution* as read together with the *Elections Act*, the *Election Regulations*, and section 25 of the *IEBC Act*.

17. Furthermore, according to the petitioners, IEBC's was under obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as required by article 86 of the *Constitution*. The petitioners further aver that instead of complying with the above imperatives, contrary to article 88(5) of the *Constitution* which requires IEBC to

> "... exercise its powers and perform its functions in accordance with the *Constitution* and national legislation",

in the conduct and management of the election, IEBC became a law and Institution unto itself and instead of giving effect to the sovereign will of the Kenyan people, it delivered preconceived and predetermined computer generated leaders thereby subverting the will of the people. It thus did not administer election in an impartial, neutral, efficient, accurate and accountable manner.

18. They also argue that the IEBC committed massive systemic, and systematic irregularities which go to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya and thus undermined the foundation of the Kenyan system as a Sovereign Republic where the people are sovereign and the very rubric and framework of Kenya as a nation state.

ii. Improper Influence, Corruption, Misconduct and Undue Influence

19. It was the petitioners' case that the election was marred and significantly compromised by intimidation and improper influence or corruption. They submitted in that regard that with impunity, the 3rd respondent contravened the rule of law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters. Relying on the averments in the affidavit of Raila Odinga, the petitioners argued that on August 2, 2017, the 3rd respondent directly threatened Chiefs in Makueni County for not supporting him.

20. The petitioners also accused the 3rd respondent of sponsoring or causing sponsorship during the election period of publications and advertisements in the print and electronic media as well as on billboards contrary to section 14 of the *Election Offences Act*, No 37 of 2016. Under the guise of launching official state projects and paying reparations to victims of 2007 post-election violence, it was further argued that the 3rd respondent, improperly influenced voters by issuing cheques to Internally Displaced Persons (IDPs) during campaign rallies.

21. The petitioners also imputed improper conduct on several Cabinet Secretaries for allegedly campaigning for the 3rd respondent. They argued that, Cabinet Secretaries being Public Officers, are prohibited by the *Constitution*, the *Political Parties Act* (No 11 of 2011), the *Public Officer Ethics Act* (No 4 of 2003) and the *Election Offences Act* from participating in political activities. They thus demanded that the Cabinet Secretaries who campaigned for the 3rd respondent should be prosecuted.

22. The petitioners in addition urged the court to declare section 23 of the *Leadership and Integrity Act*, cap 182 of the Laws of Kenya, as unconstitutional for exempting Cabinet Secretaries from the requirement of impartiality contrary to article 232 of the *Constitution*.

iii. Failure in the Process of Relaying and Transmitting Results

23. In his affidavit in support of the petition, Raila Odinga, deposed that following the history of electoral malpractices in this country, the law was amended to require the IEBC to obtain and operationalise the Kenya Integrated Electoral Management System (KIEMS) to be used in voter registration, voter identification and the transmission of results. The said system was thus intended to ensure that no malpractices in those activities are committed.

24. To avoid manipulation and to make the Presidential Election results secure, accurate, verifiable, accountable and transparent as required by article 86 of the *Constitution*, Raila Odinga further deposed that the *Elections Act* was amended to add section 39(1C) which provided for simultaneous electronic transmission of results from the polling stations to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC) immediately after the counting process at the polling station. Contrary to this mandatory provision, after polling stations were closed on August 8, 2017, IEBC inordinately delayed in the transmission of the results. As a matter of fact, on August 17, 2017, (9 days after the elections) the IEBC's CEO, Ezra Chiloba, allegedly admitted that IEBC had not received all Forms 34A and 34B. That delay, coupled with the fact that IEBC had ignored advice from the Communication Authority of Kenya (CAK) to host in Kenya its primary and disaster recovery sites but had gone ahead and contracted OP Morpho SAS of France to host it, compromised the security of KIEMS exposing it to unlawful interference and manipulation of results by third parties rendering the 2017 Presidential Election a sham.

25. Raila Odinga further deposed that contrary to the provisions of section 44 of the *Elections Act* which required the technology to be used in the election to be procured and put in place at least 8 months and be tested and deployed at least 60 days before the election, IEBC tested it only 2 days to the elections. That together with the disbandment of the Elections Technology Advisory Committee (ETAC) and IEBC's unsuccessful attempt to declare section 39(1C) of the *Elections Act* unconstitutional through the case of *Collins Kipchumba Tallam v the AG*[3], is clear testimony that IEBC was not keen to electronically transmit election results.

26. Basing their submissions on those averments, counsel for the petitioners argued that the delay and/or failure to electronically transmit the results in the prescribed forms meant that IEBC's conduct of

3 *Collins Kipchumba Tallam v the Attorney General*, Petition No 415 of 2016.

elections was not simple, accurate, verifiable, secure, accountable, and transparent contrary to article 81(e)(iv) and (v) of the *Constitution*. Moreover, counsel further argued, the data on Forms 34A, the primary election results documents, was inconsistent with the one on Forms 34B as well as the numbers IEBC kept beaming on TV screens hence unverifiable. As a matter of fact, counsel argued, 10,056 polling stations had results submitted without Forms 34A.

27. The petitioners further urged that contrary to the Court of Appeal decision in *Independent and Electoral Boundaries Commission v Maina Kiai & 5 others*[4] [Maina Kiai case] the IEBC failed to electronically collate, tally and transmit the results accurately, and declared results per county thus failing to recognize the finality of the results at the polling stations.

28. Relying on the averments in the affidavits of Ole Kina Koitamet, Godfrey Osotsi and Olga Karani, counsel for the petitioners also contended that at the time of declaration of the results, IEBC did not have results from 10,000 polling stations representing approximately 5 million voters and 187 Forms 34B hence the declaration was invalid and illegal.

29. The petitioners also submitted that given the unprecedented case of varying results in the IEBC's portal and Form 34B provided; inconsistencies between the results displayed and those in the Forms 34A and 34B, the electronic system of transmission was compromised by third parties who manipulated it and generated numbers for transmission to the NTC.

30. Counsel for the petitioners cited the cases of *William Kabogo Gitau v George Thuo & 2 others*[5] and *Benard Shinali Masaka v Boni Khalwale & 2 others*[6] and urged the court to look at the entire electoral processes rather than results alone as contended by their counterparts.

31. In the petitioners' view, all these violations of the law fundamentally compromised the credibility of the presidential election and this court has no choice but to annul it.

iv Substantive Non-compliance, Irregularities and Improprieties that Affected Results

32. It was the petitioners' case that the election was so badly conducted and marred with irregularities that it does not matter who won or was declared winner. The irregularities committed significantly affected the results to the extent that IEBC cannot accurately and verifiably determine what results any of the candidates got, so the petitioners contended.

v Errors in the Voting, Counting and Tabulation of Results

33. Relying on the affidavit of George Kegoro of 'Kura Yangu Sauti Yangu initiative', counsel for the petitioners submitted on the above issues that the results announced by the Returning Officers were not openly and accurately collated. They contended that the results tabulated in Forms 34A differed significantly from those captured in Forms 34B and also those displayed in the IEBC maintained public portal.

34. Counsel contended that in numerous instances, IEBC deliberately inflated votes cast in favour of the 3rd respondent. As a consequence, they further argued, it is impossible to determine who actually won the presidential election and/or whether the threshold for winning the election under the *Constitution* was met.

[4] *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017

[5] *William Kabogo Gitau v George Thuo & 2 others*; Civil Appeal No 126 of 2008; [2009] eKLR.

[6] *Benard Shinali Masaka v Boni Khalwale & 2 others*, Election Petition 2 of 2008; [2011] eKLR.

35. On the averments in the affidavits of Mohamud Noor Bare and Ibrahim Mohamed Ibrahim, it was contended that IEBC illegally and fraudulently established un-gazetted polling stations in Mandera County which were manned by un-gazetted and undesignated returning and presiding officers.

36. Based on the averments in the affidavits of Dr Nyangasi Oduwo and Godfrey Osotsi, the petitioners contended that on the August 8, 2017, at around 5.07 pm, barely 10 minutes after closure of the polling stations, IEBC started streaming in purported results of the presidential vote through the IEBC web portal and the media with constant percentages of 54% and 44% being maintained in favour of the 3rd respondent and the 1st petitioner respectively.

37. The petitioners also argued that a whooping 14,078 Forms supplied by IEBC had fatal and irredeemable irregularities and that some Forms 34A and 34B lacked the names of Returning Officers; some lacked the IEBC authentication stamp; some were not signed by the candidates' agents and no reasons were given for that failure; different polling stations bore the name of the same person as the presiding officer; several Forms 34A were altered and tampered with; the number of Forms 34A handed over was not clear; several Forms 34As were signed by un-gazetted presiding officers; some forms were illegible; the handwriting and signatures on Forms 34A appeared made up; some Forms 34A were filled in the same handwriting; and some Forms 34A did not relate to any of the existing gazetted polling stations/tallying centres; and contrary to regulations 79(2)(a) and 87(1)(a), IEBC used different Forms 34A and 34B at some polling stations and constituency tallying centres.

38. On the further averments of Dr Nyangasi Oduwo, the petitioners also contended that upon examining about 5000 Forms 34A, serious discrepancies were noted between the figures on Forms 34A given to the petitioners' agents at various polling stations and those posted on IEBC's website and a number of Forms 34B uploaded on to the IEBC's website were incomplete. Dr Nyangasi also deposed that from the records he examined, while 15,558,038 people voted for the presidential candidate, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for MPs raising questions as to the validity of the extra votes in the presidential election.

39. The petitioners submitted that at the time of declaration of results, IEBC publicly admitted that it had not received results from 11,883 polling stations and 17 constituency tallying centres. In its letter of August 15, 2017, IEBC also admitted that it had not received authentic Forms 34A from 5,015 polling stations representing 3.5 million votes. Lastly, the petitioners claimed they had knowledge that more than 10, 000 Forms 34A were not available at the time of declaration of the results and that they were being scanned at Bomas and Anniversary Towers even during the pendency of this petition.

vi. Unprecedented and Contradictory Quantity of Rejected Votes

40. The petitioners took issue with the large number of rejected votes accounting for at least 2.6% of the total votes cast arguing that that has an effect on the final results and the outcome of the presidential election. In this regard, the petitioners urged the court to reconsider its finding on rejected votes in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*[7] and hold that rejected votes should be taken into account in the computation to determine the threshold under article 138(4) of the *Constitution*.

41. The First interested party, Dr Ekuru Aukot, buttressed the petitioners' case. He submitted that the massive non-compliance with the law by IEBC's officials constitute grounds for nullifying the presidential election. He produced a report compiled by his party's Chairman, Mr Miruru Waweru on the irregularities committed by IEBC. Some of the alleged irregularities contained in the report

7 *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Petition No 5 of 2013; [2013] eKLR.

included different Forms 34B originating from the same constituency like Bahati in Nakuru County and Kuresoi South; Forms 34A issued but not used; and several of them having differing serial numbers.

42. Dr Aukot also raised issue with the declaration of the presidential results without all Forms 34A, which he stated was non-compliant with section 39 of *Elections Act* as directed in the *Maina Kiai* decision. He echoed the petitioners' case that the whole process of counting, tallying and transmission of results from polling stations to the CTC and finally to the NTC lacked fairness and transparency.

43. In addition, the petitioners faulted the late publication of the public notice on polling stations lacking network coverage for being unlawful, arbitrary and non-verifiable and contrary to the requirement of 45 days publication before the general elections which was in breach of regulation 21, 22 and 23 of the *Elections (Technology) Regulations 2017*. They urged that the 1st respondent's averments were misleading and contradicted the publicly available *Communications Authority of Kenya Access Gap Study Report 2016* which shows that only 164 sub-locations are not network covered and that 94% of the population is covered by at least 2G network services.

vii. Interpretation and Application of section 83 of the *Elections Act*

44. On the law, the petitioners argued that by the use of the term 'or" in section 83 of the *Elections Act* unlike the term "and" in the English equivalent *Act*, the two limbs of that provision are disjunctive and not conjunctive. They therefore urged the court to depart from its interpretation of section 83 of the *Elections Act* in the 2013 *Raila Odinga* case. They argued that despite the conjunctive nature of the English section, the same was given a disjunctive interpretation in the famous case of *Morgan v Simpson*.[8]

45. The first interested party supported the petitioners' case on the interpretation of section 83 of the *Elections Act* and urged that the provision should not be used to sanctify all manner of illegalities and irregularities which may occur during the electoral process so as to render them immaterial.

46. On the standard of proof to be applied, the petitioners submitted that this court erred in the 2013 *Raila Odinga* case in holding that save where criminal allegations are made in a petition, the standard of proof in election cases is the intermediate one, above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.

47. Appreciating that the court had reviewed several positions held by various jurisdictions in setting the standard of proof in the 2013 *Raila Odinga* case, the petitioners submitted that the emerging jurisprudence set out by the House of Lords in England is that in law, there exists only two standards of proof, the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities. They cited the case of *Re B (Children)*[9] in support of that proposition.

48. It was further urged that besides Canada, the position held by the House of Lords has recently been emulated by the Constitutional Court of Seychelles in *Wavel John Charles Ramkalawan v The Electoral Commission*.[10]

49. Citing the decision of the Canadian Supreme Court in the case of *FH v McDougall*[11], the petitioners contended that the elevation of the civil standard of proof in respect of matters which are not criminal

8 Morgan v Simpson [1974] 3 All ER 722

9 *Re B (Children)* 2008 UKHL 35

10 *Wavel John Charles Ramkalawan v The Electoral Commission* (2016) SCCC 11.

11 *FH v McDougall* (2008) 3 SCR 41

in nature on the basis that they are deemed as serious matters' is improper. In the circumstances, they urged the court to find that the applicable standard of proof in the presidential election petition is on a balance of probabilities.

50. The petitioners concluded by submitting that their petition is merited and should be allowed in the following terms:

a. Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours.

b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the Presidential Election within 48 hours.

c. A specific order for scrutiny of the rejected and spoilt votes.

d. A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election.

e. An Order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C.

f. An Order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/ portal.

g. A declaration that the non-compliance, irregularities and improprieties in the Presidential Election were substantial and significant that they affected the result thereof.

h. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the Presidential Election.

i. A declaration 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.

j. A declaration that the 3rdrespondent was not validly declared as the President elect and that the declaration is invalid, null and void.

k. An order directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the *Constitution* and the *Elections Act*.

l. A declaration that each and all of the respondents jointly and severally committed election irregularities.

m. Costs of the petition.

n. Any other orders that the honourable court may deem just and fit to grant.

E. Respondents And 2nd Interested Party's Case

51. On August 24, 2017, the 1st and 2nd respondents filed a joint response, while the 3rdrespondent filed a separate response to the petition. They all opposed the petition and urged the court to find that IEBC conducted a free, fair and credible election in which the 1st petitioner garnered 6,762,224 votes, being 44.74% of the votes case, while the 3rdrespondent garnered 8,203,290 votes being 54.27% of the votes

cast. In addition, the 1st petitioner and the 3rdrespondent also garnered at least 25% of the total votes cast in 29 and 35 counties, respectively. These are the results that the 2nd respondent declared on August 8, 2017, as deponed in his supporting affidavit.

i. Violation of the Principles Set Out in the *Constitution*, Electoral Laws and Regulations

52. It is the respondents' case that the presidential election was conducted in accordance with the *Constitution*, the *IEBC Act*, the *Elections Act*, the regulations thereunder, and all other relevant provisions of the law. Further, that the presidential election process was backed by an elaborate electoral management system supported by various electoral laws, which included several layers of safeguards to ensure an open, transparent, participatory and accountable system so as to guarantee free and fair elections pursuant to articles 81 and 86 of the *Constitution*.

53. In addition, the 1st respondent submitted that it had put in place a strategic plan (2015- 2020) setting out key priorities for strengthening electoral systems and processes in Kenya. It also had a two year election operation plan, 2015-2017 as a roadmap towards free, fair and credible 2017 election. In execution of this plan, Mr Muite, learned counsel for IEBC, submitted that the presidential election was conducted in accordance with the *Constitution* and the people's sovereign will in article 1 thereof was duly realized. Learned counsel urged that even observers during the period found no fault in the conduct of the election and it would be a wrong interpretation of article 1 of the *Constitution* if this court nullified the election.

54. Citing the advisory opinion *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[12], the 1st and 2nd respondents submitted that the election of a president is a process, involving a plurality of stages, beginning from party primaries elections to the final election leading to the identification of a president elect. These processes were adhered to, according to them.

55. On his part, the 3rdrespondent agreed with the 1st and 2nd respondents ' contention that the petitioners had not demonstrated, orally or by documentary evidence, how the conduct of the election failed to comply with the governing law. In that context, he cited the case of *Bush v Gore*[13] and urged that the court in determining the petition before it, should keep in mind the role of the court in presidential election petitions. The Supreme Court of the United States of America in that case had held:

> ... None are more conscious of the vital limits on judicial authority than are the members of this court, and none stand more in admiration of the *Constitution*'s design to leave the selection of the President to the people, through their legislatures, and to the political sphere...

56. Consequently, all the respondents dismissed the petitioners' contention that IEBC abdicated its role and duty and averred that IEBC discharged its mandate in accordance with the *Constitution* and applicable body of electoral laws and the sovereign power of the people was exercised through the presidential election held on August 8, 2017. It was their case therefore that the results were accurately tallied, collated and declared in accordance with article 138(10) of the *Constitution*.

ii. Failure in the process of relay and transmission of results

57. The respondents submitted that, contrary to the allegations of the petitioners, the process of relay and transmission of results from the polling stations to the CTC and to the NTC, and from the CTC to the

12 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Reference No 2 of 2012; [2012] eKLR

13 *Bush v Gore* 531 US 98 (2000)

NTC was simple, accurate, verifiable, secure, accountable, transparent, open and prompt as required by article 81 (e) (iv) and (v) of the *Constitution*. They also urged that the transmission of results was in strict accord with section 39(1C) of the *Elections Act* and in conformity with the *Maina Kiai* case.

58. It was also submitted that the completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. Hence, in respect of areas lacking 3G or 4G network coverage, there were established alternative mechanisms to ensure completion in transmission of the image of the Form 34A.

59. The 1st respondent relied on the affidavit of James Muhati who averred that following a mapping exercise carried out by the Commission and analysis by Mobile Network Operators (MNOs) it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G network and this communication was sent out to the public vide a notice dated August 6, 2017. He stated that it thus became necessary to instruct presiding officers to ensure that they move to points where there was network coverage or in the alternative to constituency tallying centres in order to transmit results. He further stated that the Commission was nevertheless able to avail all Forms 34A in the public portal by the date of declaration of results.

60. On the basis of the averments in the affidavit of Winnie Guchu, therefore, it was contended for the 3rdrespondent that there was no legal obligation that the data entered into the KIEMS kits must be sent simultaneously with images of the Forms 34A. Consequently, no legal sanction ought to attach where there is a failure to simultaneously transmit the result data and the scanned image of the Form 34A. Accordingly, the 3rdrespondent dismissed the petitioners‘ contention that there was a legitimate expectation that the data and the Forms would be transmitted concurrently. In this regard, Ms Guchu deponed that under section 44A of the *Elections Act*, IEBC has a statutory discretion to use a complementary mechanism where technology either fails to work or is unable to meet the constitutional threshold of what a free and fair election should constitute.

61. Mr Nyamondi, counsel for the 1st respondent outlined to the court the mode of the transmission process of the results and submitted that after the manual filling in of the Form 34A, the Presiding Officers then keyed in the results into the KIEMS kit, took the image of the Form 34A and then simultaneously transmitted the same to the constituency and national tallying centres. In his view however, the figures in the KIEMS kit had no legal status, and they did not go into the determination of the outcome of the result which could only be authenticated by Forms 34A and 34C.

62. The respondents denied the petitioners‘ allegation that the results entered into the KIEMS kits varied from the results on Forms 34A in respect of more than 10,000 polling stations and further urged that the statistics‘ entered into the KIEMS kits was not the result and is therefore not comparable with the results recorded in Forms 34A. And that if there were any discrepancies in the statistics entered in the KIEMS kits, the same would be as a result of inadvertent human errors during the transfer of figures from Forms 34A to the KIEMS kits; and if there were, they did not materially affect the outcome of the presidential elections.

63. Upon transmission, it was submitted by the 1st and 2nd respondents that in accordance with section 39(1C) of the *Elections Act*, IEBC published the images of Forms 34A and 34B on its public portal. They contended in that regard that the petitioners confused the public portal where the Forms 34A and 34B were published with the statistics‘ that were displayed by the media and instead they should have understood that all polling stations transmitted the statistics of the results through KIEMS kits accompanied by the electronic image of Forms 34A, and that at the time of declaration of the results, the 1st and 2nd respondents had in their possession all the requisite forMs Mr Nyamodi said that what he called statistics were variously called data in the respondents‘ submissions.

64. The 1st and 2nd respondents further relied on the affidavits of Wafula Chebukati and Immaculate Kassait to make the point that the declaration of results was based on the results contained in Forms 34B from each of the 290 constituencies and the diaspora as Form 34B is an aggregation of Forms 34A in each constituency. That therefore the results declared by IEBC were not affected by any variances or errors that may have occurred at the point of data entry into KIEMS kits.

65. It was also the respondents' case that the role of the constituency returning officer as set out in regulation 83 (1) of the *Elections (General) Regulations* is limited to tallying and verifying the count of the votes as contained in Forms 34A from the polling stations and collating them in Form 34B. Thereafter he declares the results and delivers to IEBC such results at the NTC. On the other hand, the 2nd respondent's role is to tally and collate the results received at the NTC in Form 34C pursuant to Regulation 83 (2). In that context, in his supporting affidavit, the 2nd respondent deposed that between 8th and August 11, 2017, he was present at the NTC where he tallied and validated the Forms 34B that were being electronically transmitted by the constituency returning officers and upon receipt of these Forms 34B, he proceeded to execute his mandate as by law provided.

66. Mr Ezra Chiloba on his part deposed that IEBC unsuccessfully defended the case of *Kenneth Otieno v Attorney-General & another*[14], which declared section 44(8) of the *Elections Act* unconstitutional for establishing a technical committee to oversee the adoption of technology and implement use of that technology in the conduct of elections. The court held that, the composition of the committee and the functions given to it threatened the structural independence of IEBC and hence was in conflict with article 88 and 249(2) of the *Constitution*. The 1st respondent further asserts that it is unfair and malicious to accuse IEBC of filing *Collins Kipchumba Tallam v the Attorney-General*[15], to which it was not a party.

67. In his affidavit, Mr James Muhati refuted the petitioners' claim that IEBC did not verify the KIEMS system and instead deposed that the Commission undertook the verification exercise between May 10th and June 10th 2017. It was his further testimony therefore that IEBC fully and successfully deployed the use of ICT in the following manner: First, the Commission developed and implemented a policy to regulate the progressive use of technology in the process as required by section 44(2) of the *Elections Act*. Secondly, prior to deployment of KIEMS, the Commission undertook a series of tests including a public test carried out on June 9, 2017, (60 days before the elections) and a simulation done on August 2, 2017. Lastly, as part of preparations for the deployment and use of ICT in the elections, the Commission developed a robust training manual and schedule aimed at building capacity and competence of all its staff members which included training of candidates' agents on the KIEMS systeMs

68. Replying to the petitioners' allegations, which she termed mischievous that the results started streaming in at 5.07 pm, very soon after the closure of polling stations, Immaculate Kassait deposed that in polling stations such as Boyani Primary School, Tsimba Golini Ward, Matuga Constituency, Arabrow, Benanre Ward, Wajir South Constituency, Ya Algana Dukana Ward, North Horr Constituency and Lowangina Primary School, Muthara Ward, Tigania East Constituency among others, with between 1-10 registered voters, it was possible to count and tally votes within a short period of time after closure of polling.

69. Equally the 3rdrespondent, through the affidavit of Davis Chirchir, submitted that the posting of results as above was not irregular and gave the example of polling stations within Narok Main Prison where

14 *Kenneth Otieno v Attorney-General & another*, Petition 127 of 2017; [2017] eKLR

15 *Collins Kipchumba Tallam v the Attorney-General*, Petition 415 of 2016;

results were transmitted between the hours of 5.08pm, 5.09pm, 5.12pm and 5.14pm. Counsel for the 3rdRespondent, Mr Ngatia contended in that regard that rather than be castigated, IEBC should be commended for such promptness and efficiency of transmission of results.

iii. Intimidation and Improper Influence or Corruption

70. With regard to the allegation that the Commission failed to take steps against the 3rdrespondent for alleged breach of the provisions of section 14 of the *Election Offences Act*, Mr Chiloba deposed that on June 21, 2017, he wrote a letter to the Director of Public Prosecutions (DPP) informing him of the alleged breaches for his action. The DPP in turn directed the Director of Criminal investigations to take action and therefore IEBC cannot be accused of not having taken appropriate action when the complaint was made to it.

71. The 3rdrespondent also sought to disabuse the petitioners' allegations of intimidation of voters and in that regard Mr Ngatia submitted that the 3rdrespondent, on receiving intelligence information reports from among others, Dr Karanja Kibicho, Principal Secretary, simply warned Chiefs against campaigning for any politician as they were public servants of whom impartiality was expected. Counsel thus argued that a warning to people not to engage in politics is not an act of intimidation as alleged. Mr Ngatia also wondered how the voters could have been intimidated when the petitioner garnered over 130,000 votes against the 3rdrespondent's 27, 000 votes in Makueni County and in any case, there is no evidence of action having been taken against any of those Chiefs for taking sides in politics

72. As regards the payments made to IDPs in Kisii County, Mr Ngatia, referring to the affidavit of Dr Kibicho submitted that the settlement of IDPs is a continuous process being undertaken by a body known as the National Consultative Coordination Committee on IDPs (NCCC) established under the *Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012* and the funds alluded to were approved for disbursement by Parliament and not the 3rdrespondent. Counsel further argued that there is no evidence that any of the beneficiaries were influenced by that payment to vote for the 3rdrespondent.

73. In her affidavit, Winnie Guchu also refuted the claim that the 3rdrespondent advertised Government projects. She instead stated that there is no provision in the *Constitution* that requires ongoing government programs to be suspended during the election period. And that because article 35 of the *Constitution* guarantees the right to information, what is called advertisement is actually information made available to members of the public through the various available channels. In any case, that there are two pending cases in the High Court namely; *Apollo Mboya v Attorney General & 3 others*[16] and *Jack Munialo & 12 others v Attorney General and Independent Electoral and Boundaries Commission*,[17] challenging the constitutionality of section 14 of the *Election Offences Act* and that therefore therein is the right forum for the petitioners to raise their complaints.

iv Substantial Non-compliance, Irregularities and Improprieties that Affected the Results

74. The respondents submitted that the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results. They thus urged the court to find that the petitioners have not substantiated the claim that the said irregularities affected at least 7 million votes.

16 *Apollo Mboya v Attorney General & 3 others*, Petition 162 of 2017.

17 *Jack Munialo & 12 others v Attorney General and Independent Electoral and Boundaries Commission*, Petition 182 of 2017.

75. The respondents' case in this regard was supported by the 2nd interested party, Prof Wainaina who, through his counsel, Mr Kinyanjui, submitted that the alleged irregularities were not proved and did not affect the results in any event.

v. Voting, Counting and Tabulation of Results

76. It was urged by the respondents on the above issue that the results from the polling stations and the constituency tallying centres were counted, tabulated and accurately collated in compliance with article 86 (b) and (c) of the *Constitution* as read together with the *Elections Act*. The respondents argued therefore that there were no inconsistencies in the votes cast as captured in Form 34A and Form 34B and averred that the results in Forms 34B included all polling stations within constituencies.

77. The 3rd respondent, through the affidavit of Winnie Guchu also contended that upon the conclusion of voting, the counting exercise commenced in the presence of all agents present, observers, police officers and all other authorized persons. She further stated that according to the Elections Observation Group (ELOG), a local observer group, which deployed one of the largest observer delegates, the petitioners had very good representation of agents, and even where agents failed to sign the prescribed Forms, that does not on itself invalidate the results as provided for under regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*.

vi. Unprecedented and contradictory quantity of rejected votes

78. According to the 1st and 2nd respondents , the rejected votes did not account for 2.6% of the total votes cast as contended by the petitioners. They submitted instead that the total number of rejected ballots was 81,685 as declared in Form34C, a percentage of 0.54% of the votes cast. They thus urged that the rejected ballots were properly excluded from valid votes in accordance with the law and this court's decision in the 2013 Raila Odinga case. They therefore reiterated that the figures on the public portal and media were not results but statistics hence cannot be taken as proof of rejected votes. Mr Chiloba further deposed that any variance between the actual number of rejected votes on Form 34C and the public portal were as a result of human error and did not affect significantly the outcome of the election.

79. In response to the petitioners' contention that the Supreme Court ought to re-visit its decision in the 2013 *Raila Odinga* case on rejected votes, the 1st and 2nd respondents submitted that in arriving at that decision, the court considered the relevant provisions of the *Constitution*, the *Elections Act* and *Regulations*, hence that decision was a correct interpretation of the law. All respondents thus urged the court not to depart from it.

80. In her affidavit, Winnie Guchu further stated that in a few polling stations, presiding officers inserted the number of registered voters in the column reserved for rejected votes but the correct numbers of votes each candidate garnered were not affected. However, she also contended that since the final results were declared on the basis of the 290 Forms 34B which had been compiled from the physical Forms 34A, any error of transmission did not occur and/or affect the results.

vii. Interpretation and Application of section 83 of the *Elections Act*

81. The 1st and 2nd respondents submitted that preponderance of legal authorities shows that, the non-compliance with the law alone, without evidence that the electoral process or the results had been materially or fundamentally affected is not a basis for invalidating an electoral outcome. Some of the cases cited were the 2013 *Raila Odinga* case, *Hassan Ali Joho v Nyange & another*[18], and *John Kiarie*

[18] *Hassan Ali Joho v Nyange & another* [2008] 3 KLR (EP) 500

Waweru v Beth Wambui Mugo & 2 others[19]. Comparatively, they cited the Botswana case of *Pilane v Molomo & another*[20], and the Nigerian cases of *Buhari v Obasanjo*[21] and *Olusola Adeyeye v Simeon Oduoye & others*[22].

82. It was further urged by the respondents that this court should not render section 83 of the *Act* unconstitutional since such an interpretation as advanced by the petitioners would derogate from the well laid down and solid foundation of law and jurisprudence of this court in the 2013 *Raila Odinga* case. Through counsel Mr Wekesa, it was submitted for the 1st respondent that the 2013 *Raila Odinga* case is good law as was subsequently adopted and applied by this court in the *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others,*[23] and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others.*[24]

83. The 3rdrespondent in addition to the above urged that a party seeking the nullification of a presidential election, bears the burden of proving that not only was there non-compliance with the election law but that the non-compliance also affected the results of the election. He thus submitted that the only way the petitioners can impugn the results reflected in Forms 34A and 34B is through demonstrating either that legal votes were rejected or that illegal votes were allowed and that this had an effect on the election. In support of his proposition, the 2013 *Raila Odinga* case and other comparative cases from the Supreme Court of Uganda, in the case of *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*,[25] the Canadian case of *Opitz v Wrzesnewskj*[26] and the Nigerian case of *Abubakar v Yar'adua*.[27]

84. Through Mr, Ahmednassir SC, it was submitted for the 3rdrespondent that the 2013 *Raila Odinga* case is a bedrock of precedent and should not be departed from. He also urged that the Supreme Court was created to develop jurisprudence that was coherent and sound and that the 2013 *Raila Odinga* case has settled the law as regards elections in Kenya on various aspects such as of burden and standard of proof and interpretation of section 83 aforesaid. Further, that before the establishment of the Supreme Court, the electoral legal regime in the country was in disarray and therefore this court should strictly adhere to the doctrine of stare decisis for consistency of its jurisprudence.

85. It was also the 3rdrespondent's submission that as a consequence of the many court cases filed by NASA (some of which are set out in the affidavit of Davis Chirchir) the courts made pronouncements on various specific aspects of elections, thereby checking the manner in which IEBC was to conduct the 2017 election.

86. Mr Kinyanjui, for the 2nd interested party, supported the respondents' position and urged that no sufficient evidence had been tendered to oust the prevailing interpretation of section 83 of the *Elections Act*. Counsel also argued that any non-compliance with the law ought not to invalidate the election

19 *John Kiarie Waweru v Beth Wambui Mugo & 2 others,* Petition 13 of 2008; [2008] eKLR

20 *Pilane v Molomo & another* (1990) BLR 214 (HC)

21 *Buhari v Obasanjo* (2003) 17 NWLR (PT 850) 587; (2003) 11 SC 74

22 *Olusola Adeyeye v Simeon Oduoye & other* (2010) LPELR_CA/I/EPT/NA/67/08

23 *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*, Supreme Court Petition 4 of 2014; [2014] eKLR

24 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition 2B of 2014; [2014] eKLR.

25 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*, Petition 1 of 2016; [2016] UGSC 3

26 *Opitz v Wrzesnewskj* (2012) SCC 55-2012-10-256

27 *Abubakar v Yar'adua* (2009) All FWLR (Petition 457) 1SC

if the court is satisfied that the election was substantially conducted in accordance with the principles laid down in the *Constitution*.

viii. Alleged Specific Irregularities

87. IEBC refuted the petitioners' claim that it established secret and un-gazetted polling stations. It contended in that regard that pursuant to regulation 7 (1)(c) of the *Election (General) Regulations 2012*, it published in Gazette Notice Number 6396 of June 26, 2017 specifying the polling stations established in each constituency. The claim that results from any un-gazetted polling station were included in the final tally are therefore baseless, it submitted.

88. IEBC also stated that all Forms 34B were executed by duly gazetted and accredited constituency returning officers in accordance with the applicable Regulations. It contended in that context that it complied with the requirements of regulation 5 of the *Election (General) Regulations, 2012* and provided a list of persons proposed for appointment as presiding officers to political parties through the office of the Registrar of Political Parties. It is therefore not correct that a significant number of returns were signed by strangers, so it submitted.

89. It is furthermore the respondents' case that all Forms 34A and 34B were signed and/or stamped as required under the law. They thus denied that a number of Forms 34B did not indicate the names of the returning officers and a number did not bear IEBC's stamp or authentication stamp as alleged by the petitioners. They also denied the allegation that a substantial number of Forms 34A and Forms 34B do not bear the signatures of the candidates' agents or the reason for their refusal to sign the forms as is the law. In any event, it was further urged, the refusal by the agents to sign the said forms did not invalidate the results announced. In that regard, they cited the Ghanaian Supreme Court Case of *Nana Addo Dankwa Akufo- Addo & 3 others v John Dramani Mahama & 2 others*[28].

90. IEBC also dismissed as unfounded the allegation that in some instances one person was the presiding officer in a considerable number of polling stations. It submitted in that regard that it appointed presiding officers in respect of each of the polling stations in the country as by law prescribed.

91. As regards lack of handing over notes in the forms, the respondents contended that there is no obligation under Regulation 87 *Election (General) Regulations, 2012* for the constituency returning officers to indicate the number of Forms 34A handed over to them and that based on the *Maina Kiai* decision, the returning officers were exempted from physically availing the statutory forms at the NTC. Further, it was urged that the integrity of Forms 34A and Forms 34B was not compromised and the results contained therein are valid. IEBC also denied that it manufactured any results or that 14,078 Forms 34A have fatal and irredeemable irregularities. It asserted instead that the results of the presidential election were declared on the basis of the aggregate of Forms 34B which reflected the will of the people.

92. As regards the contention by the petitioners on lack of security features on the statutory forms, it was IEBC's submission that all Forms 34A and 34B issued to presiding and returning officers had serial numbers, barcodes and the IEBC watermarks. In addition that Forms 34A were carbonated to ensure that only one Form was filled by the presiding officer to generate 6 copies. These security features were meant to help authenticate the results at the polling centres before transmission.

93. In her affidavit, Ms Immaculate Kassait added that IEBC developed standards for its electoral materials prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to

[28] *Nana Addo Dankwa Akufo- Addo & 3 others v John Dramani Mahama & 2 others*, Writ No J 1/6/2013

improve controls. She explained that all the ballot papers and statutory forms used in the August 8, 2017 election contained certain and specific security features. These features included: guilloche patterns against which all background colours on the declaration forms had been printed, anti-copy patterns, watermarks, micro text, tapered serialization, invisible UV printing, polling station data personalization, self- carbonating element and barcodes. In addition, each ballot paper included different colour coding of the background.

94. Mr Muite SC submitting on behalf of IEBC, urged that in any case, though there was no legal requirement for the Forms to have security features and IEBC only introduced them suo motu out of abundant caution. That therefore no breach of any law was committed where the same features were found missing. Counsel further questioned why agents of both petitioners and 3rd respondent proceeded to sign on the Forms if the security features were a legal prerequisite yet in some instances they were missing. He argued in that context that one cannot execute a document and turn back and say it did not have security features.

95. On the allegation that legitimate petitioners' agents were thrown out of some polling stations, it was the respondents' case that none of these claims are substantiated and no particulars whatsoever were provided as required by law. It was submitted specifically that the allegations made by one Mr Wamuru, in his affidavit in support of the petition which were, at any rate not reported to the police, were of a general nature, false and mischievous. That the petitioners in any event neither identified the agents who were allegedly ejected nor the presiding officer(s) who allegedly ejected them. To the contrary, Immaculate Kassait and Marykaren Kigen deposed in their affidavits that the petitioners' agents duly executed Forms 34A in the identified polling stations signifying the fact that there were no anomalies detected.

96. Regarding the petitioners' alleged constant 11% difference between the 1st petitioner and the 3rd respondent's election results, Immaculate Kassait deposed that the percentage ranged between a low of 9.095 to a high of 25.573. Hence there was no pre-conceived percentage that was constant.

97. On his part, the 3rd respondent, through counsel Mr Ngatia, submitted that there was no pre-convinced formula used in the computation of the results, but that the results were streaming in, in a manner peculiar to the respective polling stations. He urged therefore that if at all there was any problem in the transmission, the fall back was available and includes a physical examination of all Forms 34A.

98. In summation, the 1st and 2nd respondents contended that if indeed there were any irregularities as alleged, the same were administrative, human, clerical, transcription, transposition, computation, data input, mathematical and erroneous recording errors which would not in any way affect the results. In this regard, they relied on the affidavits sworn by Rebeccah Abwaku, Samson Ojiem, Manco Mark Gikaro, David Kipkemoi, Julius Meja Okeyo, Moses Nyongesa Simiyu and Gilbert Kipchirchir. These were presiding and returning officers who deponed to having committed these minor administrative irregularities due to fatigue and inadvertence. They urged that the said irregularities were not pre-meditated and should be excused.

99. In reply to the depositions made by Ms Olga Karani in her affidavit, Winnie Guchu deposed that they are of such a generalized nature that it is impossible to respond to them with any specificity. She stated for example that the IEBC Commissioners alleged to have committed improprieties and illegalities are not identified and neither are the presiding officers named said to have done the same nor their polling stations identified. Furthermore, she stated that Ms Karani did not state what occurrences and events happened in Migori, Homabay and Kisumu County that would have affected the integrity of the impugned election. Moreover, she did not state the names of persons missing from the voters register. Further, she disputed Ms Karani's testimony that as at August 10, 2017, very few Forms 34A were

available. On the contrary, the deponent stated that as at midnight on August 9, 2017, the information availed to political parties through the IEBC Application Program Interface showed that 39,426 Forms 34A results had been received.

100. In a nutshell, the respondents submitted that the petition is devoid of merit and should be dismissed with costs.

F. Amici Submissions

i. Attorney-General

101. The Attorney General was enjoined in this petition as the 1st *amicus curiae*. In his amicus brief he delineated the following questions for submission:

> "i. What is the proper constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both articles 81 and 86 of the *Constitution*.
>
> ii. What were the changes to the elections infrastructure post 2013 and their effect on the conduct of presidential elections: to wit, the Elections Laws (Amendment) Act No 36 of 2016 and Elections Laws (Amendment) Law No 1 of 2017.
>
> iii. How should the court treat rejected/spoilt votes in respect to votes cast in terms of article 138(4) of the *Constitution*.
>
> iv What is the proper constitutional and legal threshold for invalidating a presidential election under article 140 of the *Constitution*.
>
> (iv) What remedies can the court grant in determining a presidential election petition under article 140 of the *Constitution*."

102. On the first issue, the Attorney-General submitted that the determination of the Presidential election dispute should be made within the context of articles 81 and 86 of the *Constitution* which sets out both the qualitative and quantitative principles applicable to their conduct, where the qualitative context under articles 81(e) is as good as the process leading to those results, while quantitatively, the court is called upon to deal with numbers and figures regarding the threshold for declaration of Presidential results envisaged under article 138(4) of the *Constitution*.

103. Citing the scholarly text of Hon Justice (Prof) Otieno-Odek[29] of the Court of Appeal, he submitted that the qualitative requirements appraise the entire electoral process prior to and during voting, evaluating whether the environment was free and fair within the meaning of article 81 (e). He thus urged that substantial non- compliance with this requirement renders the entire electoral results void. For that proposition, he cited the case of *Winnie Babihunga v Masiko Winnie Komuhamhia & others*[30] where it was stated;

> The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitablewhere the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair.

104. He further urged that determining whether an election was free and fair taking into account principles of impartiality, neutrality, efficiency, accuracy and accountability involves the interpretation of articles

[29] Paper by Hon Justice (Prof) Otieno-Odek titled *Election Technology Law and the Concept of "Did the irregularity affect the Results of the Election?"*

[30] *Winnie Babihunga v Masiko Winnie Komuhamhia & others*, HTC-OO

81 (e) (v) and 86 of the *Constitution*. Ideally this means, he urged, that the principles listed under article 81 are meant to safeguard and promote the centrality of the voter as captured under article 38 of the *Constitution* which principles, he submitted, are universal and articulated in various international instruments.

105. The Attorney General further cited the decision of the constitutional Court of South Africa in *Richter v Minister for Home Affairs & others*[31] where it was pointed out that the right to vote is symbolic to citizenship and has constitutional importance, the exercise of which is a crucial working part of democracy. Accordingly, the court stated that we should approach any case concerning the right to vote mindful of the symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civil responsibilities and willing to take the trouble of exercising the right.

106. He also adopted the decision of the Supreme Court of Uganda in the case of *Rtd Col Dr Kiza Besigye v Yoweri Kaguta Museveni And Electoral Commission*[32], where the Court defined free and fair elections to be where, *inter alia*, the electoral process is free from intimidation, bribery, violence, coercion, and results are announced in good time.

107. Secondly, as regards the changes to the electoral law, he submitted that following the recommendation of a Bi-Partisan Joint Parliamentary Committee, the various amendments to election law, geared towards enhancing the conduct of free and fair elections, were made. They included Sections 39 and 44 of the *Elections Act* which were amended to provide for the manner in which Presidential election results would be declared and published after close of polling and the introduction of the use of technology in transmission of results. That regulation 79 of the *Elections (General) Regulations* as amended by L/N No 72/2017 also introduced Forms 34A, B, and C for the purposes of declaration of Presidential election results while Regulation 83 was amended to introduce regulation 83(2) which provides that the Chairperson of the Commission shall tally and verify the results at the NTC. The KIEMS system to be introduced under section 44 further had a complementary manual system (which was upheld by the Court of Appeal in the case of N*ational Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*.[33]

108. It was his submission that the above reforms were made in an effort to ensure that the technology, restricted to biometric voter registration, biometric voter identification and electric result transmission system, would pave way for free and fair elections administered in an efficient, simple, accurate, verifiable, secure accountable and transparent manner.

109. Thirdly, in regard to rejected/spoilt votes cast, the Attorney General submitted that in terms of article 138 (4) of the *Constitution*, the phenomena' of rejected votes is still a continuing concern in developing jurisprudence in Kenya but nonetheless he urged that the court's decision in the 2013 Raila Odinga case on the subject case remains good law and should not be departed from.

110. Comparatively, he referred to sections 47-50 of the *Representation of the People's Act 1983* of the United Kingdom, in urging that a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated; in New Zealand, sections 178- 179 of the *Electoral Act 1993* makes a distinction between a vote and an informal vote where informal votes are rejected and not included in the vote; and finally in South Africa where section 47(3) of the *Electoral Act 1993* provides

[31] *Richter v Minister for Home Affairs & others* CCT 09/09 [2009] ZACC 3; 2009 (3) Sa 615 (CC)

[32] *Rtd Col Dr Kiza Besigye v Yoweri Kaguta Museveni And Electoral Commission*, Preseidential Petition 1 of 2001.

[33] *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*, Civil Appeal 258 of 2017.

for the procedure for the rejection of votes and regulation 25 of the *Election Regulation 2004*, which indicates that rejected ballots are not counted as part of the votes.

111. Alluding to the views of Hon Justice (Prof) Otieno-Odek, he postulated that the rationale for excluding a rejected or spoilt ballot is exemplified as being where the will of the voter is not expressed and as such the vote holds no weight. He thus urged that the will of the voter is ring-fenced by the provisions of article 38 (2) of the *Constitution* which gives every citizen the right to free, fair and regular elections, based on universal suffrage and the free expression of the will of the electors.

112. The fourth issue the Attorney General submitted on was the proper constitutional and legal threshold for invalidating a presidential election under article 140 of the *Constitution*. He submitted on that issue that this should be considered within the context of the applicable legal and evidential burden of proof, the standard of proof and the irregularity in issue.

113. It was his further submission that there exists a rebuttable presumption in law as to the validity of election results by returning officers and the legal and evidentiary burden lies with he who seeks to upset it. In that regard,he cited the Supreme court of India in *Jeet Mohinder Singh v Harmoniser Singh Jassi*[34], where the Court upheld the presumption of validity of election results. He also cited the 2013 Raila Odinga case in urging that he who alleges non – conformity with electoral law must not only prove non-compliance, but must also show that such non - compliance affected the validity of the elections. This burden of proof, he submitted, is captured in section 107 as read together with section 109 of the *Evidence Act* and must be discharged to the required standard.

114. As regards standard of proof, he submitted that presidential elections, being sui generis in character, the standard of proof varies between the balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non – compliance with the electoral laws in issue. He cited the case of *Simmons v Khan*[35] in support of that proposition.

115. The Attorney General in addition urged that section 83 of the *Elections Act* captured the general standard in our jurisdiction. In his view, and citing the 2013 *Raila Odinga* case, the threshold required to disturb an election is one where evidence discloses profound irregularities in the management of the electoral process, and non-compliance that affected the validity of the election.

116. Comparatively, the Attorney General cited the Supreme Court of Ghana in *Nana Addo Dankwa Akufo Addo & Others v John Dramani Mahma & 2 Others*,[36] where the position of that court was that elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the court is satisfied that the election was, notwithstanding those transgressions, a real election and in substance was conducted under the existing election law. Also cited was *Woodward v Sarsons*[37] where the court was of the opinion that an election is declared void by the common law applicable, where the tribunal asked to void it is satisfied that there was no real election at all or that the election was not really conducted under the subsisting election law and that there were mishaps that prevented a majority from electing a preferred candidate.

117. Lastly on remedies, the Hon Attorney General submitted that while article 140 requires the court to declare the election valid or invalid, no other reliefs are provided for. however, he urged that article

34 *Jeet Mohinder Singh v Harmoniser Singh Jassi*, 1999 Supp (4) Scr 33; AIR 2000 256

35 *Simmons v Khan* EWHC B4 (QB) 2008.

36 *Nana Addo Dankwa Akufo Addo & Others v John Dramani Mahma & 2 others*, writ No J 1/6/2013

37 *Woodward v Sarsons* (1875) LR 10

163(8) mandates the Supreme Court to make rules to exercise its jurisdiction. In this regard, he submitted that the *Supreme Court (Presidential Election Petition) Rules, 2017* set out the powers of the court i.e dismissing the petition; declaring the election of the president-elect to be valid or invalid; or invalidating the declaration made by IEBC.

118. He submitted further that considering that article 140(3) of the *Constitution* provides for only two reliefs, declaration of validity or invalidity of presidential election results, the court has to issue reliefs/ remedies within the confines of article 140. The reliefs must be confined within the parameters of the law. He cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*[38] and the 2013 *Raila Odinga* case in urging the Court to be cautious of its jurisdictional limits. And thus submitted that the Court's final remedy is restricted to a declaration of validity or invalidity, which they can only affirm or annul.

119. Finally he urged that incidental to the final order, the court has inherent power to order for scrutiny of votes in order to determine the integrity and credibility of an electoral process as it *suo motu* invoked and ordered for the scrutiny of all Forms 34 and 36 in the 2013 *Raila Odinga* case.

ii. The Law Society of Kenya

120. The Law Society of Kenya (LSK) was admitted as the 2nd *amicus curiae* and limited by the court to make submissions in regard to the interpretation of section 83 of the *Elections Act*. Teaming up with Mr Ombati, Mr Mwenesi, learned counsel for the LSK, emphasized the centrality of a voter in a democratic form of government and urged that in interpreting the meaning and scope of section 83, this court should consider its history and constitutionality as well as its interpretation in the 2013 *Raila Odinga* case. The history of section 83 was thus traced to section 28 of the *National Assembly and Presidential Elections Act* (repealed) all the way to the English *Ballot Act 1872*. Reference was also made to the decision in *Morgan v Simpson*[39] where the court stated that an election conducted substantially in accordance with the law will not be invalidated by a breach of the rules or a mistake at the polls which did not affect the result.

121. The Society urged that section 83 was not straightforward and had posed difficulties in judicial interpretation as to what constitutes an administrative irregularity which can invalidate an election. It was submitted that in interpreting section 83 of the *Elections Act* in the 2013 *Raila Odinga* case, this court laid out a broad test: whether an alleged breach of law negates or distorts the expression of the people's electoral intent. It was contended in that regard that, from the court's interpretation, breach of the law, however grave, is not by itself sufficient to invalidate an election, where it is not shown that the breach negated the voters' intent.

122. Counsel for LSK argued that the application of section 83 is limited in content and scope and only applies where the validity of an election is restricted to irregularities. He thus sought to distinguish between an illegality and an irregularity by contending that the former constitutes a violation of the *Constitution* or a substantive statutory or common law provision. Accordingly, it was urged that section 83 has no application where there is a violation of the *Constitution* or a substantive provision of election laws and Regulations. That it was only applicable where the validity of an election does not concern a violation of the *Constitution* or substantive statutory provision, but is applicable where there are minor irregularities which do not affect the overall outcome of the election. Counsel urged that giving the provision a different meaning leads to an absurdity that it is acceptable to violate the *Constitution*

38 *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.

39 *Morgan v Simpson* (1974) 3 All ER 722

or substantive statutory law provided that it cannot be established how those violations affected the results.

123. Further, it was submitted on behalf of the Society that the repealed Constitution did not have the equivalent of articles 81 and 86 of the *Constitution* 2010 and therefore any interpretation of section 83 cannot make sense in that context because the said section was enacted before 2010. That fact alone would mean that the regulation of what the nature and quality of election was, should be left to statute without any reference to the *Constitution*. However, the Society urged that in constitutionalizing what constitutes a free and fair election, the 2010 Constitution created minimum and non-negotiable thresholds which the process and substance of an election must adhere to. In this regard, counsel cited the case of *Speaker of the Senate & another v Attorney-General & 4 others*[40], where the court was emphatic that procedures prescribed in the *Constitution* must be adhered to. Hence, it was urged in the alternative that if section 83 is to be applied to post 2010 circumstances, it cannot be read to oust a constitutional imperative or to regulate any aspect of the *Constitution*. Consequently, it was the Society's submission that a narrow reading of section 83 which confines the provision to determination of validity premised on an irregularity or technicality is good law.

124. Counsel further submitted that while article 140(3) of the *Constitution* requires this court to determine whether a presidential election is valid, section 83 of the *Elections Act* instead relates to voiding an election. Counsel contended that invalid connotes the existence of something that can be revived, while void has the essence of nothingness. It was therefore the submission of the Law Society of Kenya that section 83 is not applicable to the resolution of a presidential election dispute in that context. That the test of invalidating an election is provided for under article 81 of the *Constitution* and not section 83 of the *Elections Act*, which ignores fundamental constitutional principles.

G. Issues for Determination

125. The main issues for determination as crystallized from the petition, the responses thereto and the written as well as oral submissions by counsel, are as follows:

> " 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"

126. Before addressing the specific issues highlighted above, we shall first discuss some of the identifiable legal principles emanating in this case, with the aim of setting the foundation for the ultimate determination of this matter.

[40] *Speaker of the Senate & another v Attorney-General & 4 others*, Petition 2 of 2013; [2013] eKLR.

H. Interrogating The Emerging Legal Principles

i. Burden of Proof

127. Counsel for the petitioners, and the 1st and 2nd respondents did not make substantive submissions on the burden of proof. It was, however, contended on behalf of the 3rdrespondent, that in election matters there is a presumption that the results declared by the electoral body are correct until the contrary is proved. In support of that proposition, reference was made to the decision of this court in *George Mike Wanjohi v Steven Kariuki & 2 others*[41] and that of the Supreme Court of Ghana in *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahama & 2 others*.[42]

128. Senior counsel Mr Ahmednassir emphasized that the party, in this case, the petitioners, seeking the nullification of the presidential election, bears the burden of proving that not only was there non-compliance with the election law but also that the non-compliance affected the results of the election. In buttressing this line of argument, senior counsel cited section 83 of the *Elections Act*, the decision of this court in the 2013 *Raila Odinga* case, the decision of the Supreme Court of Uganda in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*[43], (Amama Mbabazi case) majority decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[44] and the Supreme Court of Nigeria in *Abubakar v Yar'adua*[45].

129. The common law concept of burden of proof (*onus probandi*) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue.[46] *Black's Law Dictionary*[47] defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof"

130. The law places the common law principle of onus probandi on the person who asserts a fact to prove it. section 107 of the *Evidence Act*, cap 80 of the Laws of Kenya, legislates this principle in the words: Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v Wrzesnewskyj*[48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This court reiterated that position in the 2013 *Raila Odinga* case, thus:

> (195) There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....

41 *George Mike Wanjohi v Steven Kariuki & 2 others*, Petition 2A of 2014; [2014] eKLR

42 *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahama & 2 others*, Writ No J 1/6/2013

43 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*, Petition No 01/2016; [2016] UGSE 3.

44 *Opitz v Wrzesnewskyj* 2012 SCC 55; [2012] 3 SCR 76

45 *Abubakar v Yar'adua* [2009] ALL FWLR (PT. 457) 1 SC.

46 Auburn J, '*Burden of Proof*' in Malik H (ed) '*Phipson on Evidence*, 17th (ed) Sweet and Maxwell, London, 2010 pp 149-151.

47 *Black's Law Dictionary* 8th ed (Bryan A Garner) (St Paul, MN: West Publishing Co, 2004), p 209.

48 *Opitz v Wrzesnewskyj* (2012) SC 55.

(196) This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

131. Thus a petitioner who seeks the nullification of an election on account of non- conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds[49] to the satisfaction of the court.[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.[51] In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified.

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial[52] with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting"[53] and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."[54]

133. It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.

ii. Standard of Proof

134. The standard of proof is the one which raised controversy in this petition. On the applicable standard of proof, the petitioners submitted that this court erred in the 2013 *Raila Odinga* case in holding that save where criminal allegations are made in a petition, the standard of proof in election cases is the intermediate one: above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.

135. Appreciating that the court had reviewed several positions held by various jurisdictions in setting the standard of proof in the 2013 *Raila Odinga* case, the petitioners submitted that the emerging jurisprudence set out by the House of Lords in England is that in law, there exists only two standards

49 *Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another*, petition 9 of 2013; [2013] eKLR.

50 *Col Dr Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission*, Election Petition No 1 of 2001.

51 Auburn J, '*Burden of Proof*' in Malik H (ed) '*Phipson on Evidence*, 17th (ed) Sweet and Maxwell, London, 2010 pp 149-151.

52 *Halsbury's Laws of England*, 4th Edition, Volume 17, para 13.

53 *Raila Odinga & others v Ahmed Issaack Hassan & others*, Petition 5 of 2013, para 195.

54 Charles Frederic, Joyce Chamberlayne, Howard C: '*The Modern Law of Evidence*' (1911-1916 V II Para 937 (Heinoline))

of proof, the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities. They cited the case of *Re B (Children)*[55] in support of that proposition.

136. It was further urged that besides Canada, the position held by the House of Lords has recently been emulated by the Constitutional Court of Seychelles in *Wavel John Charles Ramkalawan v The Electoral Commission*.[56]

137. Citing the decision of the Canadian Supreme Court in the case of *FH v Ian Hugh McDougall*[57], the petitioners contended that the elevation of the civil standard of proof in respect of matters which are not criminal in nature on the basis that they are deemed as serious matters' is improper. In the circumstances, they urged the court to find that the applicable standard of proof in the presidential election petitions is on a balance of probabilities.

138. In contrast, the 1st and 2nd respondents argued that the 2013 Raila Odinga case is good law. It was submitted that the burden of proof lies with the petitioners while the standard of proof is higher than that in civil cases where election malpractice is imputed. In that regard, the respondents relied on the Zambian case of *Akashambatwa Lewanika & others v Fredrick Chiluba*[58], the decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[59] and the Nigerian Supreme Court's decision in *Buhari v Obasanjo*[60].

139. For the 3rdrespondent, relying on this court's decision in the 2013 *Raila Odinga* case and *Amama Mbabazi* case, it was submitted that save where allegation of commission of election offences are made in respect of which the standard of proof is beyond reasonable doubt, the standard of proof in all other allegations is above the balance of probabilities but not beyond reasonable doubt. Counsel for the 3rd respondent dismissed the petitioners' call for a review of this court's decision in the 2013 *Raila Odinga* case, arguing that the law as set out in that case, which this court and other have applied in several subsequent cases, is still good law.

140. Although this court has jurisdiction to depart from its earlier decisions, counsel cited the decision of this court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*[61] and argued that to ensure predictability, certainty, uniformity and stability in the application of the law and on the doctrine of *stare decisis*, this court should be slow in reversing its decisions.

141. Counsel further submitted that under article 163(7) of the *Constitution*, it is the duty of the Supreme Court to create law, order and solidity where there is conflict in decisions over similar matters in the lower courts. To do otherwise, the court would give rise to anarchy. Referring to the article by Daniel A Farber & Suzanna Sherry[62], he maintained that once the court renders itself in interpretation of the *Constitution* it can't depart from such an interpretation.

55 *Re B (Children)* [2008] UKHL 35.

56 *Wavel John Charles Ramkalawan v The Electoral Commission* (2016) SCC 11

57 *FH v Ian Hugh McDougall* (2008) 3 SCR 41.

58 *Akashambatwa Lewanika & others v Fredrick Chiluba* (1999) 1 LRC 138.

59 *Opitz v Wrzesnewskyj* 2012 SCC 55; (2012) 3 SCr 76.

60 *Buhari v Obasanjo* (2005) CLR 7K (SC)

61 *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Petition 4 of 2012; [2013] eKLR.

62 Daniel A Farber & Suzanna Sherry, '*Judgment Calls: Principle and Politics on Constitutional Law*, (2009) 10 (2) Engage 135.

142. On his part, the Attorney General submitted that presidential elections, being sui generis in character, the standard of proof varies between the balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non – compliance with the electoral laws in issue. He cited the case of *Simmons v Khan*[63] in support of that proposition.

143. Besides the burden of proof, the law also imposes a degree of proof required to establish a fact. The extent of the proof required in each case is what, in legal parlance, is referred to as the standard of proof. *Black's Law Dictionary* defines it as [t]he degree or level of proof demanded in a specific case[64] in order for a party to succeed.[65]

144. Various jurisdictions across the globe have adopted different approaches on the question of the requisite standard of proof in relation to election petitions. From many decisions, three main categories of the standard of proof emerge: the application of the criminal standard of proof of beyond reasonable doubt; the application of the civil case standard of balance of probabilities'; and the application of an intermediate standard of proof.[66]

145. The application of the criminal standard of proof of beyond reasonable doubt' arises when the commission of criminal or quasi criminal acts are made in a petition. This is the standard the Supreme Court of India employed in the case of *Shiv Kirpal Singh v Shri V V Giri*[67] where it stated:

> " Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice."

146. Kenya adopts this standard of proof. In the 2013 *Raila Odinga* case, this court stated that where [there] are criminal charges linked to an election, ... the party bearing the legal burden of proof must discharge it beyond any reasonable doubt. Following this decision in *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others*[68], the Court of Appeal stated that:

> " Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.

147. In England, however, no such distinction is made. Whether or not allegations of a criminal or quasi-criminal nature are made in a petition, the ordinary civil litigation standard of proof on a balance of probabilities' applies. This came out clearly in the decision of the Judicial Committee of the Privy

63 *Simmons v Khan* EWHC B4 (QB) 2008.

64 *Black's Law Dictionary* (9th Edition, 2009) 1535.

65 *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sumbu & 3 others*, Petition 2 of 2013; [2013] eKLR.

66 John Hatchard, '*Election Pettitions and the Stanard of Proof*,' (2015) Vol 27 Denning Law Journal 291.

67 *Shiv Kirpal Singh v Shri VV Giri* 1971 SCR (2) 197

68 *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others*, Civil Appeal 39 of 2013; [2014] eKLR.

Council in *Jugnauth v Ringadoo and others*[69] where there was an allegation of bribery. Affirming the decision of the Supreme Court of Mauritius, the Privy Council stated that:

> [17] ...there is no question of the court applying any kind of intermediate standard...
>
> [19] It follows that the issue for the election court is whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition."

148. In many other jurisdictions including ours, where no allegations of a criminal or quasi- criminal nature are made in an election petition, an intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a balance of probabilities', but below the criminal standard of beyond reasonable doubt', is applied. In such cases, this court stated in the 2013 *Raila Odinga* case that [t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt....

149. This is the standard of proof that has been applied in literally all election petitions in this country. For instance, in the case of M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others[70] the Court of Appeal observed that [f]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.

150. The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. As the Tanzanian High Court stated in the old case of *Madundo v Mweshemi & A-G Mwanza*[71]:

> " An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes ie their decision without satisfactory reasons.

151. In Kenya, Githua, J succinctly stated the rationale for this higher standard of proof in the case of *Sarah Mwangudza Kai v Mustafa Idd & 2 others*[72]–

> [29] ...it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under article 38 of the *Constitution*. This means that electoral disputes involve not only the parties to the petition but also the electorate in the electoral area concerned.
>
> It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election

69 *Jugnauth v Ringadoo and others* [2008] UKPC 50

70 *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others*, Civil Appeal 47 of 2013; [2014] eKLR

71 Madundo v Mweshemi & A-G Mwanza, HCMC No 10 of 1970.

72 *Sarah Mwangudza Kai v Mustafa Idd & 2 others*, Election Petition 8 of 2013; [2013] eKLR

petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.

152. We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

153. We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

iii. Valid Versus Rejected Votes in a Presidential Election in Kenya

154. As in the 2013 *Raila Odinga* case, an issue of rejected votes has also arisen in this petition. Besides urging this court to find that the high number of rejected votes in this matter is unrealistic, the petitioners also urged this court to depart from its decision in the 2013 *Raila Odinga* case and take rejected votes into account in ascertaining if a candidate had met the constitutional threshold.

155. On their part, the 1st and 2nd respondents submitted that rejected votes were properly excluded from valid votes and in accordance to the law and in line with the court's sound finding in the 2013 *Raila Odinga* case. For the 3rdrespondent, it was submitted that the court in the 2013 *Raila Odinga* case had made a well-reasoned decision on whether spoilt, disputed and rejected votes should count as part of the votes cast in the computation of the constitutional requisite numerical threshold. They noted that while the Supreme Court is not bound by its own decisions, and no reasonable ground having been advanced for this court to reverse its decision in the 2013 *Raila Odinga* case, to ensure predictability, certainty, uniformity and stability in the application of the law, the petitioners' plea in this regard should be dismissed. It was further urged that the institutionalization of the play of the law gives scope for regularity in spheres of social and economic relations.

156. The Attorney-General as amicus, submitted that although in terms of article 138 (4) of the *Constitution*, the phenomena' of rejected votes is still a continuing concern in developing jurisprudence in Kenya, he referred to comparative jurisprudence and urged that the court's decision in the 2013 *Raila Odinga* case on the matter remains good law and should not be departed from.

157. In presidential elections in Kenya, a candidate is elected president if he or she attains the threshold set out in article 138(4) of the *Constitution*. The article provides that [a] candidate shall be declared elected as President if the candidate receives more than half of all the votes cast in the election and at least 25% of the votes cast in each of more than half of the counties.

158. In the 2013 *Raila Odinga* case, in considering whether the President elect had attained the threshold of 50% + 1, the Supreme Court was faced with the question of what the phrase votes cast means. In answering this question, the court, in paragraph 285 of its judgment, interpreted the phrase votes cast, in article 138(4) of the *Constitution* as referring to only valid votes cast and not including ballot papers or votes inserted into presidential ballot boxes but which were later rejected for non-compliance with the law.

159. Varied opinions have since been expressed on the propriety of that decision. While some agree with that decision, others are of the view that the phrase votes cast should be understood to refer to all

ballot papers inserted into the presidential ballot box. For instance, Francis Ang'ila Aywa[73] criticized this court's reliance on the Seychellois Court of Appeal decision in *Popular Democratic Movement v Electoral Commission*[74] and particularly for equating spoilt' with rejected' votes. He contended that [t]he two are different and spoilt votes' are never included in the tabulation of any election results. While conceding that it is a truism in the study and scientific analysis of elections that votes cast eventually get separated during the counting process into valid and rejected votes; he nevertheless takes the view that votes cast include selfsame rejected votes. He posits that [i]n determining whether rejected votes should be included in the computation, regard should only have been made on the law. And in this regard, in his view, article 138(4) of the *Constitution* leaves little to interpretation, especially when looked at against the context that it was drafted to replace the repealed *Constitution*'s section 5(3)(f). He does not address what informed the change.

160. Although he does not delve into the overall tallying for purposes of determining the threshold of 50% + 1, PLO Lumumba, in his article: "*From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013*"[75], shares Aywa's position that a ballot paper that is inserted into a ballot box amounts to a vote. However, only a properly marked ballot paper, or vote, counts in favour of the intended candidate and this is the valid vote. The non-compliant ballot paper, or vote, on the other hand will not count in the tally of any candidate""it is not only rejected, but is invalid and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void.

161. With respect, this court's decision in the 2013 *Raila Odinga* case was not based on the distinction between spoilt votes and/or rejected votes as Mr Aywa argues. This court's decision in that case was based on the reasoning that if rejected votes are not counted and/or assigned to any candidate, it would be illogical to take them into account for purposes of determining the threshold of 50% +1 in article 138(4) of the *Constitution*. In its analysis at paragraph 281 of its judgment in the 2013 *Raila Odinga* case, this court observed that even though both the *Elections Act* and its Regulations have used the terms vote and ballot paper interchangeably, in Kenya, no law or regulation brings out any distinction between them. The court thus noted that a ballot paper marked and inserted into the ballot box will be either a valid vote or a rejected vote.

162. Viewed from the prism of these observations, it is imperative that the meaning of the phrase votes cast in article 138(4) is clearly understood. In our view, no controversy arises as to the meaning of the word cast. In elections, the term refers to the ballot papers inserted into ballot boxes. The problem which arises is the correct meaning that should be ascribed to the term votes. Some, like Aywa[76] and Lumumba[77], take the view that all marked ballot papers and inserted into the presidential ballot box are votes, whether or not some are determined as valid and others as rejected votes at the time of counting. Others, for instance, this court in the 2013 *Raila Odinga* case and the Seychellois Court of Appeal decision in the *Popular Democratic Movement v Electoral Commission*[78], hold the view that only validly marked ballot papers amount to votes. In the circumstances, to determine the issue before us of what

73 In the Chapter "*A Critigue of the Raila Odinga v IEBC Decision in light of the Legal Standards for Presidential Elections in Kenya*" in Collins Odote & Dr Linda Musumba (eds) "*Balancing the Scales of Electoral Justice; Resolving Disputes From the 2013 Elections in Kenya and the Emerging Jurisprudence*" IDLO and JTI 2016.

74 *Popular Democratic Movement v Electoral Commission* (2011) SLR 385.

75 The Law Society of Kenya Journal Vol II 2015 No 1 Law Africa.

76 Supra.

77 Supra.

78 Supra.

is meant by the votes cast to be taken into account in the computation to determine the threshold of 50% +1 under article 138(4), resort has to be had to the meaning of the words votes, cast and even ballot papers.

163. Section 2 of our *Elections Act* defines the phrase ballot paper to mean a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting. In their article From Intent to Outcome: Balloting and Tabulation Around the World, Birkenstock Joseph M & Sanderson Matthew T, define the term ballot in more or less the same way:

> " We use ballot' in the broadest sense of the word... [to mean] any instrument used in the act of voting, including paper ballots, optical scan sheets, punch cards, direct recording electronic voting machines.

164. Herrnson Paul S (*et al*) defines the ballot paper as the means through which voters register their intentions....[79] Echoing the same words, Isaacs J, sitting as a Court of Disputed Returns, in *Kean v Kerby*[80] observed that [t]he essential point to bear in mind in this connection is that the ballot itself is only a means to an end, and not the end itself.

165. Neither the Kenyan *Constitution* nor the *Elections Act* define the term vote. The *Elections Act*, however, defines the term voter to mean a person whose name is included in a current register of voters. *Black's Law Dictionary* defines a vote' as the expression of one's preference or option in a meeting or election by ballot, show of hands or other type of communication. The *Dictionary of Modern Legal Usage*[81] defines the term as an [o]pinion expressed, resolution or decision carried, by voting.

166. From these definitions, particularly the one in the *Black's Law Dictionary* referring to a vote as the expression of one's preference or option, the distinction between a ballot paper and a vote is clearly discernible. A ballot paper is the instrument in which a voter records his choice, while a vote is the actual choice made by a voter. A ballot paper does not become a vote by merely being inserted into the ballot box, as it may later turn out to be rejected. Such an interpretation can also be deduced from the wording of regulations 69(2) and 70 of the *Elections (General) Regulations, 2012* which provides:

> " 69(2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers""
>
> (a) Cast his or her votes in accordance with regulation 70 without undue delay."

On the other hand, regulation 70 provides:

> " (1) A voter shall, upon receiving a ballot paper under regulation 69(2)-
>
> a. Go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote; and

79 '*The Impact of the Ballot Type on Voter Errors' in American Journal of Political Science*, Vol 56 No 3 (July, 2012) pp 716-730.

80 *Kean v Kerby*, (1920) 27 CLR 449

81 2nd Edition, by Garner Bryan A.

b. Fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.

(2) The voter shall after following the procedure specified in sub regulation (1) put each ballot paper into the ballot box provided for the election concerned.

(3) ...

167. A voter therefore is said to have cast his or her vote when the procedure under regulation 70 is followed. This means that, upon receipt of the ballot paper, the voter proceeds to mark correctly, indicating his exact choice of the candidate he wishes to vote for, and then inserts that marked ballot paper into the respective ballot box for the election concerned.

168. Comparative jurisprudence from other jurisdictions, notably Australia; New Zealand; Canada; the United Kingdom; Ireland; the Netherlands; India and South Africa, also makes a clear distinction between a ballot paper and a vote. For instance, section 123 of the Australian Electoral Act of 1992, formally distinguishes between a valid and an invalid vote. It states in subsection (4) thereof that [i]f a ballot paper has effect to indicate a vote, it is a formal ballot paper. And in subsection (5) it adds that [i]f a ballot paper does not have effect to indicate a vote, it is an informal ballot paper. That Act then goes on to provide that an informal ballot paper does not count. A ballot paper is therefore counted as a vote if it is filled in accordance with the set down procedure.

169. In the US, the criterion for making the distinction between a ballot paper and a vote is the clear and discernible intention of the voter. This is manifest from the case of *Brown v Carr*[82], cited with approval by the US Supreme Court in *Bush v Gore*[83], in which the Supreme Court of Western Virginia stated that:

> " It is equally well settled that, in determining whether a ballot shall be counted, and, if so, for whom, depends on the intent of the voter, if his intention can be gleaned from the ballot being considered, or, in some special instances, from facts and circumstances surrounding the election. Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter, and in respect thereto follow a liberal policy, to the end that voters be not deprived of the exercise of their constitutional right of suffrage.

Adding that the investigation of the intent of the voter should be confined to the ballot itself, the court added:

> " Where the uncertainty as to the voter's intention is such as to cause a reasonable and unprejudiced mind to doubt what the voter intended, the ballot should not be counted.

170. We can find nothing in the Constitutional Review Commission's Report or in the Parliamentary Hansard Report giving the basis for the change from valid votes cast in section 5(3)(f) of the old Constitution to votes cast in article 138(4) of the current *Constitution*. As we have stated, comparative jurisprudence from New Zealand; Canada; the United Kingdom; Ireland; the Netherlands; India and South Africa shows that rejected votes count for nothing. In the circumstances, we cannot see how a rejected vote, a vote which is void, a vote that accords no advantage to any candidate, can be used in the computation of determining the threshold of 50% + 1. In our view, a purposive interpretation of

82 *Brown v Carr* 47 S.E. 2d 401, 130 W. Va. 455

83 *Bush v Gore* 531 US 98 (2000).

article 138(4) of the *Constitution*, in terms of article 259 of the *Constitution*, leads to only one logical conclusion: that the phrase votes cast in article 138(4) means valid votes. Consequently, we maintain this Court's view in the 2013 *Raila Odinga* case and accordingly reject the petitioners' invitation to reverse it.

iv The Meaning of section 83 of the *Elections Act*

171. If we understand it well, and we think we do, section 83 of the *Elections Act* is the fulcrum of this petition. Paragraph 17 0f the petition states that where an election is not conducted in accordance with the *Constitution* and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even though that is the petitioners' position, they further aver that IEBC conducted the presidential election with such serious irregularities which, standing alone would also invalidate the election. Section 83 provides that:

> " 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."

172. Both Messrs. Mutakha Kangu and Paul Mwangi, counsel for the petitioners, urged this Court to depart from its interpretation of section 83 of the *Elections Act*, in the 2013 *Raila Odinga* case. Counsel urged that by following the Nigerian case of *Buhari v Obasanjo*[84], the Court had devalued the effect of this section . In that case, the Supreme Court of Nigeria in interpreting the statutory version of section 83 stated thus:

> " The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result....There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election."

173. It was counsel's submission that the approach taken by the Supreme Court of Nigeria meant that for a court to void an election, a petitioner would have to prove both limbs of the provision. Not only would one have to prove that the impugned election was not conducted in accordance with the principles of a written law relating to the election; the petitioner would also have to prove that such non-compliance affected the result of the election. Such an approach, argued counsel, was not only onerous to a petitioner, but made it almost impossible for an election to be successfully challenged in a court of law.

174. It was submitted for the petitioners that the conjunctive and narrow interpretation of section 83 of the *Elections Act* that this court gave the section in the 2013 *Raila Odinga* case undermines the supremacy of the *Constitution* under article 2 of the *Constitution* and suggests that an act can remain valid despite its transgression of the *Constitution* so long as it does not affect the result. It was submitted that the correct interpretation of the section is the disjunctive one, the English Court of Appeal gave the English equivalent in *Morgan v Simpson*[85] which has been followed in many cases in this country including *Hassan Ali Joho v Hotham Nyange & another*[86], *Moses Masika Wetangula v Musikari Nazi Kombo*[87] and *Abdikhaim Osman Mohammed v Independent Electoral and Boundaries Commission*[88].

84 *Buhari v Obasanjo* (2005) cLR 7(k) (SC).

85 *Morgan v Simpson* [1974] 3 All ER 722 at p 728.

86 *Hassan Ali Joho v Hotham Nyange & another* [2008] 3 KLR (EP) 500.

175. The petitioners further urged the court to adopt a purposive and progressive interpretation of section 83 to give effect to the spirit and letter of the law. It was submitted that the essence of section 83 was that for elections to be valid, they must comply with the principles laid down in the *Constitution*', written law and regulations. the constitutional principles are established in articles 38, 81 and 86 of the *Constitution*. article 81(e) has established principles of free and fair elections, which principles have been elevated to the status of fundamental rights under article 38 of the *Constitution*. article 86 focuses on system of election, and that most importantly, the *Constitution* imposes an obligation on the 1st respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. This is meant to avoid the possibility of manipulation of the system.

176. The petitioners urged that an election that does not comply with the constitutional principles results is a usurpation of the peoples' sovereignty by false representatives who do not represent the people's will and who are not accountable to them. This goes contrary to the essence of article 4 of the *Constitution*, which establishes Kenya as a sovereign Republic. They urged that Kenya being a Republic, it must conduct itself and its elections as a true Republic anchored on constitutional democracy.

177. Supporting the petitioners view, counsel for the 1st interested party submitted that section 83 should not be used to white wash all manner of sins and irregularities which may occur during the electoral process so as to render them immaterial.

178. For the 1st and 2nd respondents , it was submitted that non-compliance with the law alone without evidence that the electoral process or the result had been materially and fundamentally affected was not a basis for invalidating the electoral outcome. In the 1st and 2nd respondents ' view, the correct interpretation of section 83 is the one this court gave it in the 2013 *Raila Odinga* case.

179. Learned counsel for the 1st and 2nd respondents urged that to give the section the interpretation advanced by the petitioners would derogate from the well settled and solid foundation of law and jurisprudence as laid down by this court in the 2013 *Raila Odinga* case and render the section unconstitutional in as far as article 140 of the *Constitution* is concerned.

180. The 3rdrespondent through his advocate, Senior Counsel, Mr Ahmednassir, contended that a party seeking the nullification of the presidential election, bears the burden of proving that not only was there non- compliance with the election law but also that the non- compliance affected the results of the election. In support of this submission, counsel referred to the decision of this court in the 2013 *Raila Odinga* case, the decision of the Supreme Court of Uganda in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*[89] majority decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[90] and the Supreme Court of Nigeria decision in *Abubakar v Yar'adua*.[91]

181. Mr Kinyanjui learned Counsel for Prof Wainaina, the 2nd interested party, submitted that the 2017 Presidential Elections were free and fair. He argued that no sufficient evidence had been tendered to oust section 83 of the *Act*. Counsel argued that non-compliance with the law during the election ought not to invalidate the election if the court is satisfied that the election was substantially conducted in accordance with the principles laid down in the *Constitution*.

87 *Moses Masika Wetangula v Musikari Nazi Kombo*, Civil Appeal 43 of 2013; [2014] eKLR.

88 *Abdikhaim Osman Mohammed v Independent Electoral and Boundaries Commission* [2014] eKLR.

89 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*, PT No 01/2016.

90 *Opitz v Wrzesnewskyj*, 2012 SCC 55; [2012] 3 SCR 76.

91 *Abubakar v Yar'adua* [2009] ALL FWLR (PT 457) 1 SC.

182. The Law Society of Kenya (LSK) as amicus curiae emphasized the centrality of a voter in a democratic government and urged that in interpreting the meaning and scope of section 83, this court should consider its history and meaning, its interpretation in the 2013 *Raila Odinga* case as well as its constitutionality.

183. Mr Mwenesi, learned Counsel for LSK urged that section 83 was not straightforward and posed difficulties in judicial interpretation as to what an administrative irregularity which can invalidate an election constitutes. Further, that in interpreting that section in the 2013 *Raila Odinga* case, this court laid out a broad test which is whether an alleged breach of law negates or distorts the expression of the people's electoral intent. Counsel contended that from the court's interpretation, breach of the law however grave is not by itself sufficient to invalidate an election, where it is not shown that the breach negated the voters' intent.

184. The LSK argued that the application of section 83 is limited in content and scope and only applies where the validity of an election is restricted to irregularities. According to LSK, section 83 has no application where there is violation of the *Constitution* or substantive provision of elections laws and Regulations. It was urged, that section 83 is only applicable where there are minor irregularities which do not affect the overall outcome of the election. It is the submission of LSK that giving the provision a different meaning leads to an absurdity.

185. The Attorney General submitted that the threshold required to disturb an election is one where evidence discloses profound irregularities in the management of the electoral process, and where the non-compliance affected the validity of the election. He concurred with the decision of the Supreme Court in the 2013 *Raila Odinga* case where this court laid out the guiding criteria for disturbing an election result.

186. The Attorney General pointed out comparative judicial decisions which affirm the above position. He cited the Supreme Court in Ghana in *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahma & 2 others*[92], where the position was that elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the court is satisfied that notwithstanding the transgressions, an election was in substance conducted under the existing election law. He also relied on the case of *Woodward v Sarsons*[93] where the court was of the opinion that an election is declared void by the common law applicable, where the tribunal asked to void it is satisfied that there was no real election at all.

187. It is instructive to note that this court in the 2013 *Raila Odinga* case, did not render an authoritative interpretation of section 83 of the *Elections Act* as read together with the relevant provisions of the *Constitution*. At best, the court only made a tangential reference to this section while addressing the applicable twin questions of Burden and Standard of Proof in an election petition. We therefore think that now is the time this Court should pronounce itself on the meaning of section 83 of the *Elections Act*.

188. The forerunner to section 83 of our *Elections Act* is section 13 of the *English Ballot Act of 1872*, which provided:

> " No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 of this Act, or any mistake in the use of the forms in Schedule 2 of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted

92 *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahma & 2 others*, Writ No J 1/6/2013.

93 *Woodward v Sarson* [1875] LR 10 CP 733.

in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.

189. The post-1872 versions of this provision in British Election Statutes (1949) and (1983), use slightly different phraseology. Instead of the words conducted in accordance with the principles laid down in the body of this Act the modern statutes use the phrase so conducted as to be substantially in accordance with the law as to elections. Judicial fora when called upon to interpret similar provisions have tended to assign the same meaning to the two phrases.

190. The celebrated case of *Morgan v Simpson*[94], set the tempo on how courts in the Commonwealth would interpret versions of the *Representation of People Act*. At issue in *Morgan v Simpson*, was the interpretation and application of section 37 of the Representation of People Act (1949), which provided thus:

> "No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the elections or otherwise of the local election rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect the result."

191. Before the current Kenyan *Elections Act*, this provision was imported into the *National Assembly and Presidential Elections Act, 1992* (now repealed) section 28 of which provided as follows:

> "No election shall be declared to be void by reason of a 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 that written law, or that the noncompliance did not affect the result of the election.

192. There are clearly two limbs to all the above quoted provisions: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive.

193. It is unequivocally clear to us that, the use of the term and in the above cited English provisions renders the two limbs conjunctive under the English law. Save for minor changes, the conjunctive norm in the two limbs of this provision as captured in the two English provisions appears to have been borrowed lock, stock and barrel by many Commonwealth countries, notably Nigeria, Ghana, Zambia, Tanzania and Uganda to mention but a few.

However, under both the repealed *National Assembly and Presidential Elections Act* (section 28) and the current *Elections Act* (section 83) the term used is or instead of and appearing in the English Acts. The use of the word or clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting section 83 of our *Elections Act*, this distinction is borne in mind. In the circumstances, authorities from many Commonwealth countries, such as Nigeria, Ghana, Zambia, Tanzania and Uganda whose provisions are not in sync or exact *parri materia* with ours may not be useful.

194. That is not all. Our present provision is different from that in other countries in two other fundamental aspects. First, the Kenyan Act does not have the word substantially, which is in many of the provisions of other countries. Secondly, and fundamentally, in 2011, the *Elections Act* (No 24 of 2011) was enacted and repealed the *National Assembly and Presidential Elections Act*. Section 83 of the new *Elections Act*,

[94] *Morgan v Simpson* [1974] 3 All ER 722.

obviously to harmonize it with our *Constitution*, added that to be valid, the conduct of our elections in our country must comply with the principles laid down in the *Constitution*. This addition was purposive given that the retired *Constitution* did not contain any constitutional principles relating to elections. In interpreting the section therefore, this court must first pay due regard to the meaning and import of the constitutional principles it envisages.

195. Among the well-established cannons of constitutional interpretation is the basic one that the *Constitution* must be read as an integrated whole. Mr Justice White, in his dissent (Fuller CJ, McKenna & Day concurring) captured this principle in the case of *State of South Dokota v State of North Carolina*[95] where he stated:

> "I take it to be an elementary rule of constitutional construction that no one provision of the *Constitution* is to be segregated from all the others and considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.

196. Whereas the petitioners listed a host of articles of the *Constitution* which they alleged to have been violated, we would like to zero in on article 10 which obliges all State organs, State Officers, public officers and all persons to observe national values (*inter alia*, good governance, integrity, transparency and accountability) whenever they apply and/or interpret the *Constitution* or other law or implement public policy decisions; article 38 which sets out the political rights including the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors; article 81 which sets out the principles to be observed in the conduct of free and fair elections; article 86 which sets out the manner of conducting referenda and elections; article 88 which establishes the IEBC and enumerates its functions the paramount one being conducting and supervising referenda and elections; and article 138 which sets out the procedure for conducting presidential elections. These articles have to be read together to effectuate the purpose of electoral processes in our country.

197. Particularly, under article 38, besides the right to be registered as a voter and to vote in any referenda or election as well as the right to contest in any public elective position, every citizen of this country is entitled to the right to free, fair, and regular elections based on universal suffrage. article 81(e) requires, in mandatory terms, that our electoral system shall comply, *inter alia* with ... the principles ... of 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.

198. In addition to these principles, article 86 of the *Constitution* demands that [a]t every election, the Independent Electoral and Boundaries Commission shall ensure that—

a. whatever voting method that 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;

[95] *State of South Dokota v State of North Carolina* 192, U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448).

(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 safe keeping of election materials. [Emphasis supplied]

199. Article 138 (3) (c) basically reiterates the provisions of article 86 and directs that after the counting of votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

200. The principles cutting across all these articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.

201. As we have stated, section 83 of the *Elections Act* was not in direct focus in the 2013 *Raila Odinga* case. That notwithstanding, critics of that decision assert that had this court disjunctively considered the two limbs of that section arguing that if it had, it would perhaps have reached a different conclusion. Those who support the court's observation in that case argue that a holistic interpretation of the section required the conjunctive application and, according to them, that is the interpretation this court gave the section. What do we now make of these divergent contentions in the light of the pleadings in this petition"

202. Among the well-established cannons of statutory interpretation, is the requirement that in addition to reading the statutes as a whole[96], where the words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear.[97] Ours being a Constitutional System, the interpretation of our statutes must also be harmonized with the values and principles in our *Constitution*. The wording of section 83 of the *Elections Act* is clear and unambiguous. The words of the section must therefore be given their natural and ordinary meaning.

203. Guided by these principles, and given the use of the word or in section 83 of the *Elections Act* as well as some of our previous decisions[98], we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.

204. Even in the English Court of Appeal decision in *Morgan v Simpson*[99], which has extensively been cited and applied in many cases in this country, both Lords Denning and Stephenson were of the clear view that notwithstanding the use of the word and instead of the word or in their provision, the two limbs of the section should be applied disjunctively. In his words, Lord Denning asserted:

96 *Royal Media Services v AG*, Petition 346 of 2012; [2012] eKLR following Olum & another v AG of Uganda, (2002) 2 EA 508.

97 *Halsbury Laws of England* (3rd Ed) para 52; *Caries on Statute Law* (6th Edn), Sweet & Maxwell (1963) p 66.

98 See decision of Maraga, J (as he then was) *Hassan Ali Joho v Hotham Nyange & another* [2008] 3 KLR (EP) 500 at page 512.

99 *Morgan v Simpson* [1974] All ER 722.

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.

205. On his part, Lord Stephenson went even a step further and held that even trivial breaches of the election law should alone vitiate an election. This is how he put it:

> " Any breach of the local election rules which affects the result of the election is by itself enough to compel the tribunal to declare the election void. It is not also necessary that the election should be conducted not substantially in accordance with the law as to local elections...If substantial breaches of the law are, as I think enough to invalidate an election though they do not affect its result, it follows that, contrary to the opinion of the Divisional Court, trivial breaches which affect the result must also be enough. I cannot hold that both substantial breach and an effect on the result must be found in conjunction before the court can declare an election void.

206. Nearer home, we adopt the concurring opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued in the case of *Col DR Kizza Besigye v Attorney-General*[100] where, notwithstanding the conjunctive nature of the Ugandan provision, she opined:

> " Annulling of Presidential election results is a case by case analysis of the evidence adduced before the court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election."

207. Be that as it may, the issue as to how section 83 of the *Elections Act* ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this court in *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others* (2014) eKLR.

208. We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This court, was never in any doubt as to the disjunctive character of section 83. The 7-judge bench was categorical, when stating thus:

> It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves,

[100] *Col DR Kizza Besigye v Attorney-General*, Petition Number 13 of 2009.

> to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of the *Constitution* and the law, such an election stands to be invalidated.[Emphasis added.]

209. Therefore, while we agree with the two Lord Justices in the *Morgan v Simpson* case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word substantially is not in our section, we would infer it in the words if it appears in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the *Constitution*, the *Elections Act* and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called "a sham or travesty of an election" or what Prof Ekirikubinza refers to as "a spurious imitation of what elections should be".

210. Contrary to the submissions for the Law Society of Kenya, we entertain no doubt whatsoever that section 83 of the *Elections Act* applies to the presidential election petitions as it does to all other election disputes. As stated, guided by the principles in articles 10, 38, 81 and 86 as well as the authorities referred to above, we therefore disagree with the respondents, the 2nd interested party as well as the Attorney General that the two limbs in section 83 of the *Elections Act* have to be given a conjunctive interpretation.

211. In our respectful view, the two limbs of section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our *Constitution* as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our *Constitution* as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

212. Having analyzed the wording of section 83 of the *Elections Act*, bearing in mind its legislative history in Kenya and genesis from the *Ballot Act* and also in light of the need to keep in tune with Kenya's transformative *Constitution*, it is clear to us that the correct interpretation of the section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the *Constitution*. It is one where the winner of the presidential contest obtains more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties as stipulated in article 138(4) of the *Constitution*. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in article 81. Besides the principles in the *Constitution* which we have enumerated that govern elections, section 83 of the *Elections Act* requires that elections be conducted in accordance with the principles laid down in that written law. The most important written law on elections is of course the *Elections Act* itself. That is not all. Under article 86 of the *Constitution*, IEBC is obliged to ensure, *inter alia*, that:

> Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results

announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

I. Analysis of Issues for Determination

213. With the above imperative constitutional and legal principles in mind, we would now like to turn to the facts of this case, starting with the first limb of section 83 and in this we shall be analyzing the violations of the principles in the *Constitution* and the electoral law that the petitioners are complaining of.

i. Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the written law relating to elections

214. In paragraphs 12 and 13 of the petition, the petitioners allege that in the conduct of the presidential election, IEBC became a law and institution unto itself‘ and so flagrantly flouted the *Constitution* and the written election law on elections that in the end it completely subverted the will of the electorate. In particular, the petitioners urge that the 1st respondent violated the constitutional principles set out in articles 81 and 86 by failing to ensure that the conduct of the elections was simple, accurate, transparent, verifiable, secure and accountable.

215. In support of their case, the petitioners filed several affidavits setting out what, in their view, were egregious irregularities and illegalities, which, taken together, establish an impregnable case on both limbs of the section to wit: non-compliance with constitutional principles and the written law on election, as well as commission of irregularities which affected the results of the elections. We shall address other illegalities and irregularities later but for now we shall limit ourselves to the question of transmission of results and transmission of unverified results.

216. The petitioners‘ major complaint in this matter relates to the transmission of the election results. Ole Kina, Godfrey Osotsi and Olga Karani, who were NASA‘s agents at the National Tallying Centre at Bomas of Kenya, deposed that hardly 10 minutes after polling closed at 5.00 pm on August 8, 2017, the presidential results started streaming in and were beamed on TV screens at the Centre without any indication of where they were coming from. On enquiry, IEBC kept fumbling around, alleging that because of network challenges, images of Forms 34A were not coming in as fast as would be expected and that some might not come in at all. Ole Kina deposed that by the end of 10th August, IEBC had supplied them with only 23,000 Forms 34A and 50 Forms 34B. By the time the results were declared on August 11, 2017, results from over 10,000 polling stations had not been received. In the circumstances, he wondered how the final results declared could be relied upon to validate the election.

217. The petitioners‘ further case is that the results that were streaming in from August 8, 2017 to 1August 1, 2017 showed a consistent difference of 11% between the results of Uhuru Kenyatta and Raila Odinga. According to the petitioners, such a pattern indicated that the results were not being streamed in randomly from the different polling stations but that they were being held somewhere and adjusted using an error adjustment formula to bring in a pre-determined outcome of results.

218. In a nutshell, the petitioners‘ claim in this regard is that, on the consideration of the evidence contained in all the affidavits sworn in support of the petition and the submissions made by their counsel, IEBC‘s conduct of the presidential election was fundamentally flawed and/or incompatible with the electoral values and principles of the *Constitution* including transparency, accountability, accuracy, security, verifiability, and efficiency. They further argue that contrary to sections 39, 44 and 44A of the *Elections Act*, IEBC failed to transmit or to promptly and simultaneously electronically transmit presidential

election results from polling stations to the Constituency Tallying Centres (CTC) and National Tallying Center (NTC). According to them, this failure was deliberate, systemic and systematic.

219. The petitioners add that IEBC's Secretary and CEO, Ezra Chiloba, is on record as admitting that as at August 17, 2017 (over 9 days after close of polling) the IEBC was yet to provide all Forms 34A and Forms 34B to the petitioners. And that bearing in mind the mischief sought to be cured by the prompt electronic transmission of results and the constitutional obligation of secure, accurate, verifiable, accountable and efficient elections, the unreasonable delay in the electronic transmission of the results, if at all, as required by section 39(1C) of the *Elections Act*, grossly affected the integrity, credibility and validity of the results purportedly declared by the IEBC, so the petitioners contended.

220. In response, the 1st and 2nd respondents submitted that upon completion of counting of votes, the presiding officers would, using the KIEMS, take an image of Form 34A, manually enter into the KIEMS the results of each candidate and then simultaneously transmit the image and the results directly to the NTC and the CTC.

221. The 1st and 2nd respondents ' case as contained in James Muhati's affidavit is also that, the transmission of results required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs), Safaricom, Airtel and Telkom Orange. That following a mapping exercise carried out by the 1st respondent and analysis by the MNOs (he does not say when this was done), it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G network. In that regard, it was their case that the presiding officers in such affected polling stations would then be required to move to points with network coverage or in the alternative, to Constituency Tallying Centres, in order to transmit the results.

222. The 1st and 2nd respondents further urged that even if the electronic transmission of results was not effective as pleaded, the Forms 34A were still physically delivered to the CTC in accordance with the law. They also maintained that the system was not compromised and the results were not in any way manipulated.

223. In conclusion, the respondents urged that the flaws in election transmission of results, if any, cannot be the basis of voiding a presidential election with such a large margin of difference of numbers between the two leading contestants. Counsel for the respondents, the 2nd interested party as well as the 1st amicus curiae, the Attorney-General, submitted that in an election petition, the paramount consideration is to ensure that the will of the majority of the voters carry the day. In their view, flaws in election results transmission cannot be the basis of voiding a presidential election with such a large margin in votes as the one in this case.

224. On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti, JF opines [e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance....[101] Incidentally, IEBC's own Election Manual (Source Book)[102] recognizes that an election is indeed a process.

[101] Likoti, JF., "*Electoral Managment Bodies as Institutions of Good Giovernance: Focus on Lesotho Independent Electoral Commission*" Vol 13 (1) Review of South African Studies 123-142 (2009) at page 126 (Dahl, R) (1998) *On Democracy*. New Haven CT and London": Yale University Press.)

[102] *Election Manual (Source Book)*, 1st Edition, 2017.

225. There are many other authorities which speak to this proposition. In *Kanhiyalal Omar v RK Trivedi & others*[103] and *Union of India v Association for Democratic Reforms & another*[104], the Supreme Court of India, for example, stated that the word election' is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[105] Lady Justice Georgina Wood, the former Chief Justice of Ghana, made the same point and added other stages when she stated:

> " The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on[106]
>
> And according to the European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal.[107]

226. Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others*[108] where the High Court observed that:

> " an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.

227. This case was cited with approval by the Supreme Court in *In the matter of the Gender Representation in the National Assembly and Senate*.[109] Therefore the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters is as important as the result of the election itself.

228. It is also fact of common notoriety that there were serious protests following the declaration of the 2007 presidential election results. The violence arising from those protests not only claimed over 1000 lives and led to the destruction of and looting of property worth hundreds of millions of shillings, but also drove the entire country to the precipice of destruction. It is also common knowledge that following

103 Supreme Court of India on September 24, 1985; 1986 AIR 111, 1985 SCR Supl. (3) 1.

104 Appeal (Civil) 7178 of 2001.

105 OSCE/ODIHR 2013; '*Guidelines for Reviewing a Legal Framework for Elections* Second Edition at page 70

106 Lady Justice Georgina Wood, "International Standards in Electoral Dispute Resolution" in the Book "*Guidelines for Understanding Adjudicating and Resolving Disputes in Elections,*" Guarde, Edited by Chard Vickery (2011) at page 8.

107 See European Union, "*Compendium of International Standards for Elections*" (4th Edition), Brussels, 2016 Pg 22- 23.

108 *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*, Election Petition 12 of 2013; [2013] eKLR.

109 *In the matter of the Gender Representation in the National Assembly and Senate*, Advisory Opinion 2 of 2012; [2012] eKLR.

that violence, the Government formed the Independent Review Commission (IREC), commonly known as the Kriegler Commission, to inquire into the conduct of the 2007 elections and the cause of that violence. One of the critical areas of that Commission's focus was the integrity of vote counting, tallying and announcement of presidential election results. Let the Kriegler Report speak for itself:

> The acceptability of an election depends very considerably on the extent to which the public feel the officially announced election results accurately reflect the votes cast for candidates and the parties. It depends, too, on factors such as the character of the electoral campaign and the quality of the voter register, but reliable counting and tallying is a *sine qua non* if an election is to be considered legitimate by its key assessors-the voters[110]....The system of tallying, recording, transcribing, transmitting and announcing results was so conceptually defective and executed (sic)...[111] Counting and tallying during the 27-30 December 2007 (and even hereafter) and the announcement of individual results were so confused- and so confusing- that many Kenyans lost whatever confidence they might have had in the results as announced. While integrity is necessary at all stages in the electoral process, nowhere is it more important than in counting and tallying [Emphasis added.]

229. Among the significant recommendations the Kriegler Commission made related to the use of technology in the electoral process. It recommended that:

> ... without delay [the Electoral Commission of Kenya] ECK starts ... [developing] an integrated and secure tallying and data transmission system, which would allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.[112]

230. Pursuant to those recommendations, the process of integrating technology into the conduct of elections was undertaken starting with the use of Biometric Voter Registration (BVR) equipment to register voters on a pilot basis in the run up to the 2010 referendum. In the 2013 elections technology was applied for registration of voters, voter identification and results transmission. However, that did not work very well in the 2013 general election and it was one of the key issues that was raised in the 2013 presidential petition before this court. Consequently, in 2016 the Joint Parliamentary Select Committee on matters relating to the bi- partisan Independent Electoral and Boundaries Commission(IEBC) was formed, discussed the use of technology in elections and made far-reaching recommendations which led, to amongst others, extensive amendments to the *Elections Act* to provide for use of technology and also technology dedicated regulations, the *Elections (Technology) Regulations 2017*.

231. 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.

110 *Report of the Independence Review Commission on the General Elections Held in Kenya on December 27, 2007*, page 9 (Kriegler Report).

111 *Kriegler Report*, page 9.

112 *Kriegler Report*, page 138.

232. Towards this end, Parliament enacted section 44 of the *Elections Act*; subsection (1) of which provides that:

> " there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results."

Subsection (3) thereof provides that:

> " the Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

233. Section 39(1C) of the *Elections Act* then squarely addresses the results transmission aspects of these changes in the law. It provides that:

> 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.

234. Regarding the voter register, this court in the 2013 *Raila Odinga* decision had observed that there was no single voter register but an aggregation of several parts into one register.

235. To cure this anomaly, Parliament amended section 4 of the *Elections Act* to provide that:

> " There shall be a register to be known as the Register of Voters which shall comprise of–
>
> a. a poll register in respect of every polling station;
>
> b. a ward register in respect of every ward;
>
> c. a constituency register in respect of every constituency;
>
> d. a county register in respect of every county; and
>
> e. a register of voters residing in Kenya."

Section 10 (1) of the *Elections Act* provides that:

> " A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station."

Parliament also, introduced a new section 6A to provide inter alia; that:

1. The Commission shall, not later than sixty days before the date of a general election, open the Register for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

2. The Commission shall, upon expiry of the period for verification specified under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

3. The Commission shall, upon expiry of the period for verification specified under subsection(1) publish- ...the Register of Voters online and in such manner as may be prescribed by regulations.

236. All these legislative enactments have one objective; to ensure that in conformity with the *Constitution*, the elections are free, fair, transparent and credible.

257. It is important to note that the terms simple, accurate, verifiable, secure, accountable and transparent engrafted into these provisions, are the selfsame constitutional principles in articles 10, 38, 81 and 86. We must in that context now proceed, to determine whether, the 1st respondent, conducted the presidential election in accordance with the principles laid down in the *Constitution* and the law.

The Mystery of Forms 34A and the conundrum of electronic transmission

238. By far, the most critical and persistently claimed non-compliance with the law, was that the 1st respondent announced results on the basis of Forms 34B before receiving all Forms 34A. It was also alleged that the results announced in Forms 34B were different from those displayed on the 1st respondents' Public Web Portal. This was contrary to section 39 (1C) of the *Elections Act*. The petitioners also argued that the non-compliance was in violation of Articles 81(e) and 86 of the *Constitution*. The non-compliance also went contrary to the Court of Appeal's decision in *Maina Kiai*. The petitioners also claimed that many results were transmitted from the polling stations unaccompanied by the scanned image of Form 34A, contrary to section 39 (1C) of the *Elections Act* as read together with sections 44, and 44 (A) of the *Act*.

239. In response, the 1st respondent submitted that the difference in the results announced on the Forms and the Public Web Portal did not offend any law or regulation in view of the fact that the results in the forms were final, while the results on the Public Web Portal were mere statistics. Mr Nyamodi, counsel for the 1st respondent also submitted that in view of the Court of Appeal's decision in *Maina Kiai*, the system of transmission had to be reconfigured to allow for manual transmission. Counsel explained that the source document that the 1st respondent relied on to do so was no longer Form 34A but Form 34B.

240. Likewise, counsel submitted, a similar fate had befallen the Form 34C in terms of format and structure. Towards this end, counsel informed the court that the original Form 34C which had contained a Form 34A tally was reconfigured by the first respondent to exclude that tally so as to conform to the decision of the appellate court in *Maina Kiai*.

241. As for the controversy surrounding the electronic transmission of results, counsel submitted that such transmission, was a mere conveyance belt and nothing more. To this, Mr Ngatia, counsel for the 3rdrespondent would later add that, the electronic transmission with which the petitioner was obsessed was like a matatu and no more. What was important, counsel urged, was what was conveyed (meaning, the results) as opposed to the manner in which it was conveyed (meaning the electronic transmission).

242. The 1st respondent also submitted that the security feature of the Kenya Integrated Electoral Management System (KIEMS) was programmed to capture and transmit only one image. In some instances, Text Data was transmitted instead of the filled and scanned Forms 34A. At any rate, argued the 1st respondent, the omission of un-transmitted forms, was cured by uploading the said forms, onto

the Public Portal. According to the IEBC, the transmission of the wrong images did not affect or invalidate the result contained in the statutory Forms 34A. Later, it was argued, access to the scanned forms was granted to the public through Website.

243. Still on transmission of results, the petitioners highlighted various discrepancies, for instance that there was transmission of results from slightly more than 11,000 polling stations other than gazetted polling stations contrary to Regulation 7. It was also alleged that the streaming of results commenced a few minutes after 5.00 pm. being the official closing time for all polling stations. In addition, the petitioners questioned the streaming of results in constant percentages of 54% and 44% in favour of the 3rdrespondent and the 1st petitioner, respectively.

244. The petitioners further claimed that there were numerous discrepancies between the results declared in Forms 34A and those in Forms 34B from various polling stations across the Country, contrary to section 39 of the *Elections Act*, as read with regulation 82 thus compromising the integrity of the election.

245. In response, the 1st and 2nd respondents, countered the accuracy in some of the allegations by providing contrary figures through a number of deponents. However, the said respondents also admitted that indeed there were discrepancies in the results in Forms 34A and Forms 34B spread across the Country but attributed them to human errors and fatigue of election officials. They further contended that the discrepancies in question did not affect the result of the election.

246. The 1st and 2nd respondents added in further response, that the 11, 155 polling stations from which the impugned results were streamed were in areas which were not served by 3G and 4G network coverage.

247. The petitioners‘ case, and the responses thereto by the respondents, have conjured in our minds, a puzzle of labyrinthine proportions regarding Forms 34A. In the face of a very clear and unambiguous section 39(1C) of the *Elections Act*, what went wrong with this critical document" The case for the petitioners is that the 2nd respondent, in exercise of his responsibility as the returning officer of the presidential election, declared the results for the election of president before receiving all the Forms 34A from the 40,883 polling stations from across the country. Incomplete results, argued Mr Otiende Amollo for the petitioners, could not be a basis for a valid declaration. The respondents‘ answer to that assertion is that the results were declared on the basis of Forms 34B all of which had been received by the time the declaration was made.

248. In an affidavit sworn by Koitamet Ole Kina, in support of the petition, there is telling correspondence which we had referred to earlier but which we reproduce in the present context. On the 10th of August 2017, the deponent, acting on behalf of the petitioners, wrote to the 2nd respondent in the following words:

> “ Your brief on the above subject at Bomas on August 10, 2017 at around 9:00 pm refers. You informed Kenyans and the world at large that IEBC had received over 40000, Forms 34 A and about 170 Forms 34B. We have requested IEBC for all these forms for purposes of verification. Members of your secretariat have informed us that they can only avail 29000 Forms 34A as at 11pm of August 10, 2017. We kindly request the Commission expedite (sic) release of the remaining Forms 34A &B to enable us complete the verification exercise."

249. Again on August 14, 2017, the deponent wrote:

> “ This is a follow up on our letter dated August 10, 2017. Until now, IEBC has only furnished NASA with 29000 forms 34 A and 108 forms 34B. We urgently require the unsupplied ten thousand (10000) forms 34A and one hundred and eighty seven (187) forms 34 B to

complete the list of documents the Commission was supposed to release to all the candidates in the just concluded general elections. Attached please find a list of the outstanding 187 constituencies for your immediate action.

250. On August 14, 2017, the Secretary and CEO of the 1st respondent wrote;

> " Reference is made to your letter dated August 14, 2017 requesting to be supplied with the remaining forms that were not supplied earlier. The Commission is in a position to provide all the required form 34Bs immediately. We are however not able to supply form 34As at the moment but the same shall be availed to you as soon as possible."

251. It is a fact that the correspondence quoted above did take place, and the contents of the said correspondence were never controverted. On this basis, a number of questions arise:

> " a. Why was the 1st respondent not able to immediately supply the petitioners' agents with all the Forms 34 B upon declaration of results if as it was submitted, the said results were based on the same, and all of which were said to have been available"
>
> b. Why was the 1st respondent not able to supply all the Forms 34 A (said to be around 11,000) to the petitioners as at August 14, 2017; (4) days after the declaration of results"
>
> c. Were all the scanned copies of Forms 34A electronically transmitted to the National Tallying Centre simultaneously with those transmitted to the Constituency Tallying Centre in accordance with section 39(1C) of the *Elections Act*" If so, why would it have been impossible for the 1st respondent to avail those copies to the petitioners" If not, why were they not transmitted in the manner required by the law"

252. We sought answers to these questions as we listened to the submissions of counsel on the emerging conundrum. The submissions of Mr Nyamodi, on behalf of the 1st respondent, made disturbing if not startling revelations. According to counsel, the 1st respondent used Forms 34B as opposed to Forms 34A to declare the final results of the presidential election. He emphasized that at the time the final results of the presidential election were declared, all Forms 34B had been collated. It was counsel's submission that, the declaration of sections 39 (2) and (3) of the *Elections Act, 2011* by the Court of Appeal as being inconsistent with the *Constitution*, curtailed the 1st respondent's ability to change, amend or alter the results transmitted from the Constituency. According to him therefore, the decision of the Court of Appeal in the *Maina Kiai* case extinguished the concept of provisional results.

253. Consequently, the numbers manually entered into the KIEMS kit at the close of polling, and transmitted simultaneous to the CTC and the NTC, bore no status in law. They were mere statistics, although, as Mr Muhati stated in his affidavit, the presiding officer had to show the agents present the entries made for confirmation before transmission.

254. Mr Nyamodi further explained that the completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. In respect of areas lacking 3G or 4G network coverage, the respondents established alternative mechanisms to ensure completion in transmission of the image of the Form 34A. The procedure adopted in the transmission and tallying of results of the presidential election was in conformity with the decision of the Court of Appeal in the Maina Kiai case.

255. On the basis of this process, Counsel submitted that the petitioners' allegation that the 1st respondent deliberately pre-determined and set itself on a path of subverting the law by being a law unto itself, was unfounded. In addition, Counsel submitted that the determination by the Court of Appeal on the finality of presidential election results declared by the constituency returning officer also changed the structure of Form 34C. Regulation 87(3)(b) for avoidance of doubt provides that: upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall tally and complete Form 34C. However, the 1st respondent had to allegedly modify Form 34C to reflect the entry of Forms 34B, which was the Form declared by the Court of Appeal to be the source document to determine the winner of a Presidential election, instead of Forms 34A.

256. Mr Nyamodi concluded by reaffirming that the way the 1st respondent structured its transmission system, was largely based on the Court of Appeal's decision in the *Maina Kiai* case which did not interfere with or negate the will of the people resident in Form 34A.

257. What was Mr Nyamodi saying

> " We were left to ask. Was counsel admitting that the 2nd respondent indeed as claimed by the petitioners, had declared the presidential results without having received all Forms 34A" Was he in the same vein also admitting that not all Forms 34A had been electronically transmitted to the National Tallying Centre from the polling centres as required by law" Where did the language of statistics as opposed to results emerge from" Was counsel disclosing the fact that fundamental changes had been made to the KIEMS system at the sole discretion of the 1st respondent without reference to all the players in the presidential election contest"

258. Be that as it may, Mr Nyamodi persistently argued that the conduct by the 1st and 2nd respondents, to wit; of declaring results solely based on Forms 34B without reference to Forms 34A; of not scanning all Forms 34A and simultaneously transmitting them to the NTC; of reconfiguring Form 34C to exclude the Form 34A tally and only include the Forms 34B tally; of introducing the language of statistics as opposed to results; that all these actions, were necessitated, nay, required by the decision of the Court of Appeal in the *Maina Kiai* decision.

259. We were at pains to understand how the Court of Appeal decision in that case, could have provided a judicial justification for the conduct of the 1st and 2nd respondents. The Attorney General, appearing as amicus curiae, having been so admitted, and despite having been clearly restrained from submitting on the so called impact of the *Maina Kiai* decision, also appeared to suggest, in his closing remarks that somehow, the Appellate Court's decision in that case, had changed the landscape of the conduct of elections in the Country.

260. In the above context, we reiterate that the main questions that this Court has to grapple with at this stage are:

a. Whether the 2nd respondent declared the results of the presidential election before he had received all the results tabulated on Forms 34A from all the polling stations.

b. Whether all the Forms 34A had been electronically transmitted from the polling stations to the National Tallying Centre.

261. We have read the extensively reasoned and powerfully rendered decision by the Court of Appeal in *Maina Kiai*. We find nowhere in that decision where, the learned judges of appeal suggested, or even appeared to suggest that by affirming the High Court's decision which had declared section 39 (2) and (3) of the *Elections Act*, unconstitutional, the Court of Appeal, somehow for unstated reasons, lent

judicial imprimatur to the 1st and 2nd respondent to either circumvent, or simply ignore the provisions of section 39(1C) of the *Elections Act*. On the contrary, the appellate court's decision was an unstinting reaffirmation, if not a restatement of the letter and spirit of the constitutional principles embodied in articles 81, 86, and 138 (3) (c), relating to the conduct of elections. And we have shown why that is so.

262. Section 39(1C) of the *Elections Act* for avoidance of doubt provides that:

> " 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.

263. Clearly, with this provision in mind, the Court of Appeal in *Maina Kiai* decision, was categorical as it rendered itself thus:

> " We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers (read 1st respondent) can vary or even purport to verify those results..."

Further, the Court of Appeal stated thus:

> " The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of president electronically transmitted to it from the near 40,000 polling stations, is required to tally and verify the results..."

265. The appellate court had earlier made a pronouncement with which we are in total agreement, to the effect that:

> " It is clear ...that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."

266. Given this very clear elucidation of the law regarding the imperative for electronic transmission of results from the polling station to the NTC, how could the Court of Appeals' decision in Maina Kiai have provided a justification for declaring the results of the election of the president without reference to Forms 34A" How was it a basis for the reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the results" But most critically, how did the Court of Appeal's decision relieve the 1st respondent from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the president from a polling station to the CTC and to the NTC in accordance with section 39(1C) of the *Elections Act*"

267. At the end of the day, neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the NTC as required by

section 39 (1C) of the *Elections Act*. What remained uncontroverted however, was the admission by Ezra Chiloba, that as of August 14, 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the final results for the election of the president.

268. In addition to the above and relevant to this aspect of the petition, pursuant to an application by the petitioners, the court issued an order requiring the 1st respondent to supply the petitioners and the 3rdrespondent with all the scanned and transmitted Forms 34A and 34B from all the 40, 883 polling stations on a read only basis with the option to copy in soft version. Had the court's order been complied with, it would have unraveled the mysterious puzzle surrounding Forms 34A. Regrettably, according to the information made available to court, by its appointed experts, the 1st respondent only allowed read-only access to this information without the option to copy in soft version only two hours to the closure of court proceedings which never fully happened anyway. By this time however, the puzzle had been unraveled in the mind of the court and we shall shortly explain why.

268. In any event, it is claimed in the petition, and IEBC in its response conceded, that two days to the election date, IEBC announced that it was going to be unable to electronically transmit results from 11,000 polling centres because they were off the range of 3G and 4G network. Consequently, its officers would have to move to spots where they could get network to be able to transmit. Come the election date on August 8, 2017, IEBC claimed it was unable to transmit results from those stations. According to submissions by counsel for IEBC, such inhibition set in place the use of a complementary system of transmission of results envisaged under section 44A of the *Elections Act*, which is in essence the physical delivery of Forms 34A to the CTC and hence the delay in the declaration of results from those polling stations.

269. With tremendous respect, we cannot accept IEBC's said explanation. Failure to access or catch 3G and/or 4G network, in our humble view, is not a failure of technology. Surely IEBC's ICT officials must have known that there are some areas where network is weak or totally lacking and should have made provision for alternative transmission. It cannot have dawned on IEBC's ICT officials, two days to the elections, that it could not access network in some areas.

270. In stating so, we note that under regulations 21, 22, and 23 of the *Elections (Technology) Regulations 2017*, IEBC was required to engage a consortium of telecommunication network service providers and publish the network coverage at least 45 days prior to the elections. In that regard, we take judicial notice of the fact that, in one of its press briefings preceding the elections, IEBC assured the country that it had carefully considered every conceivable eventuality regarding the issue of the electronic transmission of the presidential election results, and categorically stated that technology was not going to fail them. IEBC indeed affirmed that it had engaged three internet service providers to deal with any network challenges. We cannot therefore accept IEBC's explanation of alleged failure of technology in the transmission of the presidential election results. The so-called failure of transmission was in our view a clear violation of the law.

271. In any case, in his affidavit, Mr Muhati, IEBC's ICT director, as stated, averred that in polling stations off the range of 3G and 4G network coverage, Presiding Officers (POs) were instructed to move to points with network coverage or to the Constituency Tallying Centres in order to electronically transmit results. It is important to note that once the POs, who were off the network range, scanned the results into Forms 34A and typed the text messages of the same into the KIEMS and pressed the submit key, a process IEBC told the country was irreversible, all that remained was for the POs to move

to vantage points where 3G or 4G network would be picked and the details could automatically be transmitted in seconds.

272. As is also clear from the information posted in IEBC's website, among the 11,0000 polling stations IEBC claimed were off the 3G and 4G range are in Bomet; Bungoma; Busia; Homa Bay; Kajiado; Kericho; Kiambu; Kisumu; Kisii; Kirinyaga; Nyeri; Siaya; and Vihiga Counties. It is common knowledge that most parts of those Counties have fairly good road network infrastructure. Even if we were to accept that all of them are off the 3G and/or 4G network range, it would take, at most, a few hours for the POs to travel to vantage points from where they would electronically transmit the results. That they failed to do that is in our view, an inexcusable contravention of section 39(1C) of the *Elections Act*.

273. We further note that at the time of declaration of results, IEBC publicly admitted that it had not received results from 11,883 polling stations and 17 constituency tallying centres; that in its letter of August 15, 2017, IEBC also admitted that it had not received authentic Forms 34A from 5,015 polling stations representing upto 3.5 million votes.

274. Dr Aukot, the 1st interested party, in the above context echoed the petitioners' case that the whole process of counting, tallying and transmission of results from polling stations to the CTC and finally to the NTC lacked fairness and transparency. That IEBC itself admitted that it had network problems which hindered its prompt transmission of results but by the time of announcement of results, transmission had been completed.

275. What was IEBC's answer to the above contention" In his submissions before us, Mr Nyamodi, learned counsel for IEBC outlined to the court the mode of the transmission process of the results and submitted that after the manual filling in of the Form 34A, the POs then keyed in the results into the KIEMS kit, took the image of the Form 34A and then simultaneously transmitted the same to the Constituency and National Tallying Centres. Our understanding of this process is that the figures keyed into the KIEMS corresponded with those on the scanned images of Forms 34A. In the circumstances, we do not understand why those figures, which learned counsel referred to as mere statistics that did not go into the determination of the outcome of the results, differed.

276. In these circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.

277. Of further note is that IEBC strenuously opposed the petitioners' application for access to its servers, claiming that such access would compromise the security of the data in those servers. After considering the application, we overruled that objection and partly allowed the application. Though we did not therefore accept IEBC's said claim of compromising the security of its servers, considering the fact that having spent billions of taxpayers' money IEBC should have set a robust backup system, nevertheless to assuage those fears, we granted the petitioners a read only access which included copying where the petitioners so wished. The report from the court appointed IT experts, Professor Joseph Sevilla and Professor Elijah Omwenga, holders of PhDs on IT and lecturers in Strathmore and Kabianga Universities respectively, shows clear reluctance on the part of IEBC to fully comply with this court's order of August 28, 2017 to provide the information requested.

278. In summary the following are the items that were not availed to the petitioners; the 3rdrespondent and the court.

a. Firewalls without disclosure of the software version. IBEC refused to provide information on internal firewall configuration contending that doing so would compromise and affect the vulnerability of their system. The court appointed ICT Experts disagreed with that contention and said it was difficult to ascertain whether or not there were any hacking activities;

b. IEBC was also required to provide Certified copies of the certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 election pursuant to Regulation 10 of the *Elections (Technology) Regulations 2017*. These were not provided. Instead IEBC issued uncertified documents and certificates by professionals which did not conform to that Regulation;

c. IEBC was also required to provide Specific GPRS location of each KIEMS kit used during the presidential election for the period between August 5, 2017 and August 11, 2017. This was not provided. IEBC instead provided the GPS locations for the polling stations which was never ordered to be granted;

d. Documents for allocated and non-allocated KIEMS kits procured was provided. However, the information on whether the kits were deployed or not was incomprehensive;

e. The court ordered access to Technical Partnership Agreements for IEBC Election Technology System including a list of technical partners, kind of access they had and list of APIs for exchange of data with partners. The documents were issued with the exception of the list of APIs. The court appointed ICT Experts said full information on APIs would have enabled determination of what kind of activities may have taken place;

f. The court had also ordered IEBC to provide the petitioners with the log in trail of users and equipment into the IEBC servers, the log in trails of users and equipment into the KIEMS database Management systems and the administrative access log into the IEBC public portal between August 5, 2017 to date (being the date of the court order which was on August 28, 2017). These were also not provided. Instead, IEBC provided pre-downloaded logs in a hard disk whose source it refused to disclose. The IT experts agreed with the petitioners‘ contention that the 1st respondent should have demonstrated that the logs emanated from IEBC servers by allowing all parties to have Read Only Access. Alternatively, the 1st respondent could have accessed the information in the presence of the petitioners‘ agents. Partial live access was also only purportedly provided on August 29, 2017 at about 3.50pm without ability to access the logs or even view them. The exercise was therefore a complete violation of the court order and the access was not useful to the parties or the court.

279. It is clear from the above that IEBC in particular failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the petitioners‘ claim of hacking into the system and altering the presidential election results and its servers with Forms 34A and 34B electronically transmitted from polling stations and CTCs. It should never be lost sight of the fact that these are the Forms that section 39(1C) specifically required to be scanned and electronically transmitted to the CTCs and the NTC. In other words, our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the petitioners‘ said claims if IEBC had nothing to hide, even before the Order was made, it would have itself readily provided access to its ICT logs and servers to disprove the petitioners‘ claiMs But what did IEBC do with it" It contumaciously disobeyed the Order in the critical areas.

280. Where does this leave us" It is trite law that failure to comply with a lawful demand, leave alone a specific court order, leaves the court with no option but to draw an adverse inference against the party

refusing to comply.[113] In this case, IEBC's contumacious disobedience of this court's order of August 28, 2017 in critical areas leaves us with no option but to accept the petitioners' claims that either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data or simply refused to accept that it had bungled the whole transmission system and were unable to verify the data.

281. The petitioners also made claims that some Forms 34A supplied to them did not relate to any of the existing gazetted polling station/tallying centres; that while 15,558,038 people voted for the presidential candidates, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for Members of Parliament (MPs) raising questions as to the validity of the extra votes in the presidential election. No satisfactory answer was given to the latter issue and we must also hold the 1st respondent responsible for that unexplained yet important issue.

282. Having therefore shown that the transmission of results was done in a manner inconsistent with the expectations of section 39(1C) of the *Elections Act*, we must of necessity return to the principles in articles 81 and 86 of the *Constitution* which we have already reproduced. Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:

a. an accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;

b. an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;

c. a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage;

d. an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited; and

e. a transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms is made on the public portal.

283. Verifiability must have had strong significance in the 8th August election, because the presiding officers were required to verify the polling station's results in the presence of polling agents before sending them to the CTC and NTC using the KIEMS KIT. The Maina Kiai decision, made it clear that Form 34A being the primary document, becomes the basis for all subsequent verifications.

284. We have already addressed the import of the refusal to obey a court order and we further note that the whole exercise of limited access to the 1st respondent's IT system was meant to conform and verify both the efficiency of the technology and also verify the authenticity of the transmissions allegedly made to the CTC and NTC. Non-compliance and failure, refusal or denial by IEBC to do as ordered, must be held against it.

285. What of article 138 (3) (c) of the *Constitution*" It provides that:

> " in a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result."

[113] *CMAWM v PAWM*, Civil Appeal 2 of 2014; [2014] eKLR (CA).

287. The critical element here is the duty placed upon the Commission to verify the results before declaring them. To ensure that the results declared are the ones recorded at the polling station. Not to vary, change or alter the results.

288. The duty to verify in article 138 is squarely placed upon the Independent Electoral and Boundaries Commission (the 1st respondent herein). This duty runs all the way, from the polling station to the constituency level and finally, to the National Tallying Centre. There is no disjuncture in the performance of the duty to verify. It is exercised by the various agents or officers of the 1st respondent, that is to say, the presiding officer at a polling station, the returning officer at the constituency level, and the Chair at the National Tallying Centre.

289. The verification process at all these levels is elaborately provided for in the *Elections Act* and the regulations thereunder. The simultaneous electronic transmission of results from the polling station to the Constituency and National Tallying Centre, is not only intended to facilitate this verification process, but also acts as an insurance against, potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. This, the system does, by ensuring that there is no variance between, the declared results and the transmitted ones.

290. In the presidential election of August 8, 2017 however, the picture that emerges, is that things did not follow this elaborate, but clear constitutional and legislative road map. It has been established that at the time the 2nd respondent declared the final results for the election of the President on August 11, 2017, not all results as tabulated in Forms 34A, had been electronically and simultaneously transmitted from the polling stations, to the National Tallying Centres. The 2nd respondent cannot therefore be said to have verified the results before declaring them.

291. The said verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with section 39 (1C) of the *Elections Act*. Given the fact that all Forms 34 B were generated from the aggregates of Forms 34A, there can be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, this primary document (Form 34A), was completely disregarded.

292. Even if one were to argue, which at any at rate, is not the case here, that the verification was done against the original Forms 34A from all the polling stations, which had been manually ferried to the tallying centre, this would still beg the question as to where the scanned forms were, and why the manually transmitted ones, arrived faster than the electronic ones.

293. The failure by the 1st respondent to verify the results, in consultation with the 2nd respondent, before the latter declared them, therefore went against the expectation of article 138(3)(c) of the *Constitution*, just as the failure to electronically and simultaneously transmit the results from all the polling stations to the National Tallying Centre, violated the provisions of section 39 (1C) of the *Elections Act*. These violations of the *Constitution* and the law, call into serious doubt as to whether the said election can be said to have been a free expression of the will of the people as contemplated by article 38 of the *Constitution*.

294. It was further urged in court by a number of counsel for the 1st and 2nd respondent, that by disregarding Forms 34A, and exclusively relying on Forms 34B (many of whose authenticity would later be called into question), in the tallying process, the said respondents were simply complying with the Court of Appeal's decision in *Maina Kiai*. We have already held, that we find little or nothing in this decision, to suggest that, by deciding the way it did, the appellate court restrained or barred the 1st respondent from verifying the results before declaring them, or that it was relieving the former from the statutory duty of electronically transmitting the results. What the 2nd respondent was barred from

doing by the Court of Appeal and the High Court, was to vary, alter, or change the results relayed to the National Tallying Centre from the polling stations and Constituency Tallying Centres, under the guise of verifying.

295. But be that as it may, how spectacularly re-assuring to the Kenyan people would it have been if the 2nd respondent, on that night of August 11 2017, had commenced the declaration of the results, with these words:

> Fellow Kenyans, the results I am about to declare, are exclusively based on Forms 34B which I have received from all the 290 constituency tallying centres country-wide. I have not verified these results against those tabulated on Forms 34A from all the 40,800 polling stations countrywide. This may sound strange, but I am simply doing this in compliance with the Court of Appeal's decision in *Maina Kiai*. This decision by the appellate court requires me to treat the results as tabulated by the various returning officers, as final and not to attempt, to verify them against the electronically transmitted Forms 34A. You will therefore, have to bear with me, as court orders must at all times, be obeyed. However, all hope is not lost, since I have availed all the Forms 34A on our Public Portal. Any candidate, election observer, or member of the public, is free to download these forms and compare the results thereon against the ones I am about to declare. If such an exercise should reveal serious discrepancies, then one can petition the Supreme Court to scrutinize them, and even annul them, since the Supreme Court has original and exclusive jurisdiction over such disputes...

295. He failed to do the above and apart from the duty to verify, the 1st respondent also has the responsibility to ensure that the system of voting, counting and tallying of results is verifiable. This is in conformity with article 86 of the *Constitution* which requires that:

> 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 elections materials.

296. This provision places upon the 1st respondent the onerous responsibility of devising and deploying election systems that the voter can understand. The 1st respondent must further be expected to provide access to crucial information that can enable, either a candidate, or a voter to cross check the results declared by it with a view to determining, the integrity and accuracy thereof. In other words, the numbers must just add up.

297. We note in the above regard, that even where Parliament found it necessary to make provision for a complementary system, it would not escape from the dictates of article 86 of the *Constitution*. Hence, section 44A of the *Elections Act* provides:

> Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for the 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*.

298. When called upon to explain why all the Forms 34A had not been scanned, transmitted and published on an online portal, in line with article 39 of the *Elections Act*, the 1st respondent, through counsel, alluded to some form of complementary mechanism. However, the description of such a mechanism did not appear to us to meet the yardsticks of verifiability inbuilt in the *Constitution* and section 44A of the *Elections Act*.

299. In their submissions, counsel for the respondents and the 2nd interested party urged us not to annul the election on the basis of minor inadvertent errors. We entirely agree. We have already categorically acknowledged the fact that no election is perfect. Even the law recognizes this reality. But we find it difficult to categorize these violations of the law as minor inadvertent errors. IEBC behaved as though the provisions of sections 39, 44 and 44A did not exist. IEBC behaved as though the provisions of article 88 (5) of the *Constitution* requiring it to ...exercise its powers and perform its functions in accordance with the *Constitution* and the national legislation did not exist. IEBC failed to observe the mandatory provisions of article 86 of the *Constitution* requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner. Where is transparency or verifiability when IEBC, contrary to articles 35 and 47 of the *Constitution*, worse still, in contumacious disobedience of this court's order, refuses to open its servers and logs for inspection"

300. Having therefore carefully considered all the affidavit evidence, and submissions of counsel for all the parties, we find and hold, that, the petitioners herein have discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the president, before the 1st respondent had received all the results from Forms 34A from all the 40,883 polling stations contrary to the *Constitution* and the applicable electoral law. We also find and hold that, the 2nd respondent, declared, the said results solely, on the basis of Forms 34B, some of which were of dubious authenticity. We further find that the 1st respondent in disregard of the provisions of section 39 (1C), of the *Elections Act*, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the National Tallying Centre.

301. At this juncture, we must restate that, no evidence has been placed before us to suggest that, the processes of voter registration, voter identification, manual voting, and vote counting were not conducted in accordance with the law. As a matter of fact, nobody disputes the fact that on August 8, 2017, Kenyans turned out in large numbers, endured long hours on queues and peacefully cast their votes. However, the system thereafter went opaquely awry and whether or not the 3rdrespondent received a large number of votes becomes irrelevant because, read together, sections 39(1C) and 83 of the *Elections Act* say otherwise.

302. In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.

303. For the above reasons, we find that the 2017 presidential election was not conducted in accordance with the principles laid down in the *Constitution* and the written law on elections in that it was, inter alia, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to section 83 of the *Elections Act*, we have no choice but to nullify it.

ii. 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"

304. While the impugned election was conducted in violation of relevant constitutional principles, the same was also alleged to have been fraught with illegalities and irregularities that rendered its result unverifiable and thus indeterminate. Illegalities refer to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place.

305. The petitioners in that context claim that the August 8, 2017 presidential election, was conducted in an environment characterized by many systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election, contrary to the principles laid down in the *Constitution*. The alleged illegalities and irregularities, ranged from blatant non-compliance with the law, to infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the 1st respondent, for the management of the elections.

(a) Illegalities Allegations of Undue Influence, Bribery and voter intimidation

306. In addressing the above issue, at paragraph 37 of his supporting affidavit, Raila Odinga deposed that the 3rdrespondent, Uhuru Kenyatta, brazenly violated section 14 of the *Elections Act* (he must have meant section 14 of the *Election Offences Act*) by advertising and publishing in the print and electronic as well as on billboards, achievements of his government. Section 14 of the *Election Offences Act* provides that:

> No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

307. This prohibition is clearly what article 81(e)(ii) refers to as improper influence. In our view, the rationale behind this prohibition, in the context of this case is that whatever achievements the current government may have made, resulting from expenditure of public funds, should not be taken advantage of by the government as a campaign tool.

308. Further, section 14(1) and (2) of the *Election Offences Act* provides:

1. Except as authorized under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

2. No government shall publish any advertisements of achievements of respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

309. In response to the allegations of improper influence‘ and misuse of public resources, the 3rdrespondent submitted that the petitioners had not adduced evidence showing the particulars of such sponsorship and that in any case, it is the mandate of the Presidential Delivery Unit to enhance the accountability of a government to its citizens by availing any information relating to ongoing projects.

310. We note in the above regard that the 1st petitioner has not attached any material evidence to support his proposition. That being the case, we are unable to make any determination on this issue for lack of material particulars. Furthermore, the 3rdrespondent submitted that the question whether he was allegedly sponsoring the advertisement of the government‘s achievement in the print and electronic

media is pending at the High Court in the case of *Apollo Mboya v the Attorney-General and 3 others*[114] and *Jack Munialo & 12 others v the Attorney-General & the Independent Electoral and Boundaries Commission*[115]. The petitioners did not contest this averment and in this regard as we have previously held, we cannot adjudicate on an issue which is still the subject of judicial determination at the High Court. Our advisory opinion in the matter of *In Re The Matter of the Interim Independent Electoral Commission*[116], succinctly speaks to this point:

> The two cases seek the interpretation of the *Constitution*, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this court must protect the jurisdiction entrusted to the High Court.

311. Further to the above finding, we also note the petitioners' further contention that the 1st respondent failed to act on the 3rdrespondent's alleged violation of the law by his misuse of public resources. In response, the 2nd respondent stated that he wrote a letter dated June 21, 2017, informing the Director of Public Prosecutions (DPP) about the alleged misconduct of the 3rdrespondent. The said letter is attached to the Affidavit sworn by Wafula Chebukati, and it reads as follows:

> "...In accordance with section 14 of the Election Offences Act, 2016, the Commission published a notice in the press advising candidates against the use of public resources in campaigns. The demised notice required all candidates who are current members of Parliament, county governors, deputy governors and members of the county assembly to declare the facilities attached to them, or any equipment normally in the custody of the candidate by virtue of such office.
>
> Following that publication, the Commission has received declaration from only twelve candidates...in that regard, any other person using the state resources other than those registered with the Commission are committing offences to which, upon sufficient evidence being gathered, should be prosecuted swiftly. This applies to Governors, Senators, Members of the National Assembly, Members of the County Assembly and Women Members of the National Assembly. [Emphasis added.]

312. We note further that upon considering the contents of the above letter, and contrary to submissions by the 1st and 2nd respondents, the above letter did not apply to the holder of the office of the presidency in which category the 3rdrespondent falls. Furthermore, we note that section 14(3) of the *Election Offences Act* which provides for the Commission's enforcement powers, does not apply to persons holding the office of the President. For clarity section 14(3) provides:

> For the purposes of this section, the Commission shall, in writing require any candidate, who is a Member of Parliament, a county governor, a deputy governor or a member of a

[114] *Apollo Mboya v the Attorney-General and 3 others*, Petition 162 of 2017.

[115] *Jack Munialo & 12 Others v the Attorney-General & the Independent Electoral and Boundaries Commission*, Petition 182 of 2017.

[116] *In Re The Matter of the Interim Independent Electoral Commission*, Reference 2 of 2011; [2011] eKLR.

county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

313. Having that in mind and fortified by our observation that the interpretation of section 14 of the *Election Offences Act* is a live matter at the High Court, we are unable to address our minds into any allegation that touches on this section. That is the end of that matter.

314. We further note, in paragraph 34 of his said affidavit, Raila also claimed that while campaigning in Makueni County on August 2, 2017, President Uhuru Kenyatta threatened Chiefs in the area with dire consequences if he won for failure to campaign for him. That such an action also goes against article 81(e)(ii) of the *Constitution* which outlaws intimidation in the electioneering process. In proof of this assertion, the petitioners have attached transcripts of video evidence in the supplementary affidavit sworn by Ms Ogla Karani, detailing the allegedly offending words spoken by the 3rd respondent. The said words reads as follows:

> "*...Naona walipewa kazi na wale wengine wajue pikipiki wanatumia allowances wanaopata wajue ni za Jubilee. Wenzenu walikuwa wanawafukuza. Tutaonana na nyinyi baada ya uchaguzi tunaelewana wazee tutakuwa na nyinyi, usione sisi hatujui nini inaendelea dunia hii, tunaelewa kabisa.*"

315. In response, the 3rd respondent relies on an affidavit sworn by Dr Karanja Kibicho, who avers that as the Principal Secretary, Ministry of Interior & Co-ordination of National Government, he received information to the effect that, some Chiefs in Makueni County, whose names are provided in the said affidavit, were unlawfully using their positions and government issued motor cycles to campaign for the petitioners. He thereafter reported the same to the 3rd respondent who warned the Chiefs in that area not to take any political position nor use public resources to campaign for anyone. According to the said Dr Kibicho, it is against that background that the 3rd respondent uttered the remarks now impugned by the petitioners.

316. In the above context, section 10 of the *Election Offences Act* provides:

> Undue Influence
>
> (1) A person who directly or indirectly in person undue influence or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of""
>
> a. Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;
>
> b. Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or
>
> c. Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, Commits the offence of undue influence.
>
> (2) ...
>
> (3) A person who directly or indirectly by duress or intimidation""

a. Impedes, prevents or threatens to impede or prevent a voter from voting; or

b. In any manner influences the result of an election, commits an offence.

(4) ...

317. What then is the meaning of the term undue influence in the context of an electoral malpractice and particularly as used under section 10 above" In India, the meaning of the term undue influence' is found in section 171(C) of the *Penal Code* which defines the offence of undue influence at an election as:

" Undue influence at elections

171C.

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

2. Without prejudice to the generality of the provisions of sub-section (1), whoever–

a. threatens any candidate or voter, or any other person in whom a candidate or voter is interested, with injury of any kind, or

b. induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

3. A declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

318. Though the wording of the Indian *Penal Code* quoted above is materially different from section 10 of the *Election Offences Act*, the meaning injected into the above legal provisions, shows its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases of *Charan Lal Sahu & others v Giani Zail Singh and another; Nem Chandra Jain v Giani Zail Singh; Charan Singh and others v Giani Zall Singh*[117] thus explicitly stated that the test was whether there was an interference or an attempted interference with the free exercise of any electoral right. Similarly, section 10 above, whose marginal note is undue influence' forbids any impediment of a person's exercise of the electoral right. In India, the electoral right of an elector, is defined under section 171A(b) of the *Indian Penal Code*, as "the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election." This is comparable to article 38(3) of our Constitution which

[117] *Charan Lal Sahu & others v Giani Zail Singh and another; Nem Chandra Jain v Giani Zail Singh; Charan Singh and athers v Giani Zall Singh* 1984 AIR 309; 1984 SCR (2) 6.

confers certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

319. The above case of India laid down a distinction between mere canvassing for votes and acts of undue influence. In doing so, the Supreme Court pronounced itself as follows in the above case:

> If the mere act of canvassing in favour of one candidate as against another were to amount to undue influence, the very process of a democratic election shall have been stifled because, the right to canvass support for a candidate is as much important as the right to vote for a candidate of one's choice. Therefore, in order that the offence of undue influence can be said to have been made out within the meaning of section 171C of the *Penal Code*, something more than the mere act of canvassing for a candidate must be shown to have been done by the offender. That something more may, for example, be in the nature of a threat of an injury to a candidate or a voter as stated in sub-section 2(a) of section 171C of the *Penal Code* or, it may consist of inducing a belief of divine displeasure in the mind of a candidate or a voter as stated in sub-section 2(b). The act alleged as constituting undue influence must be in the nature of a pressure or tyranny on the mind of the candidate or the voter. It is not possible to enumerate exhaustively the diverse categories of acts which fall within the definition of undue influence. It is enough for our purpose to say, that of one thing there can be no doubt: the mere act of canvassing for a candidate cannot amount to undue influence within the meaning of section 171C of the *Penal Code*.

320. The Supreme Court of India had also held in an earlier case of *Shiv Kirpal v Shri VV Giri*[118] that:

> The language used in the definition of "undue influence" implies that an offence of undue influence will be held to have been committed if the elector having made up his mind to cast a vote for a particular candidate does not do so because of the act of the offender, and this can only be if he is under the threat or fear of some adverse consequence. Whenever any threat of adverse consequences is given, it will tend to divert the elector from freely exercising his electoral right by voting for the candidate chosen by him for the purpose.... But, in cases where the only act done is for the purpose of convincing the voter that a particular candidate is not the proper candidate to whom the vote should be given, that act cannot be held to be one which interferes with the free exercise of the electoral, right.

321. The test of undue influence is therefore, whether the 3rd respondent's conduct, if satisfactorily proved, created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices. In applying that test we cannot however ignore the deposition of Dr Kibicho who impugned the alleged non- impartiality on the part of two Chiefs who are public officers. Thus the 3rd respondent's statement above, must also be tested against the testimony of Dr Kibicho which evidence has not been controverted.

322. In the above context therefore, has a case been made against the 3rd respondent, for the commission of the offence of undue influence within the required standard of proof" Have the petitioners dispelled the 3rd respondent's position that he was merely giving a directive that it was against the law for a public officer to openly take political positions in support of one candidate against the other" In this context, words alone, without any other demonstrable evidence are not sufficient to enable this court make a conclusive finding on this issue. Further, we note that the evidence of Dr Kibicho, explaining the context within which the 3rd respondent uttered the said words, remains undisputed. Consequently,

[118] *Shiv Kirpal v Shri VV Giri* 1971 SCR (2) 197.

after carefully considering the evidence before us, we hold that the petitioners have not proved their case on this issue to the required standard.

323. The petitioners further alleged that the 3rd respondent and the Deputy President being contestants in the presidential elections are guilty of corruptly influencing voters in the lead up to the August 8, 2017 general election by paying reparations to victims of 2007 Post-election violence (PEV) in various parts of the country and used the platforms to canvass for votes for personal political gain in the said electoral areas contrary to the Election Offences Act. In proof of this assertion, the petitioners rely on the affidavit of Ms Olga Karani who attaches a transcription of the 3rd respondent's speech during his tour of Kisii and Nyamira Counties during the campaign period.

324. In response, the 3rd respondent relies on the affidavit sworn by Dr Kibicho aforesaid who stated that there is a National Consultative Coordination Committee (Committee) which is tasked with the obligation to manage the Internally Displaced Persons (IDP) affairs on behalf of the Government. That any such funds are approved by Parliament and released by the Committee into the beneficiaries' accounts and the 3rd respondent is not involved in the matter at all.

325. We have perused the attached video transcript, which is in the form of an interview conducted by one of the local news reporting station. We note that the transcript does not contain a satisfactory basis or convincing evidence to the effect that the 3rd respondent acted in any inappropriate manner with regard to the release of funds to IDPs.

326. The 1st petitioner's further complaint on illegalities is that President Uhuru Kenyatta engaged Cabinet Secretaries who openly abused their position and used State resources in actively soliciting votes for him. Referring to article 152(4)(a) of the *Constitution*, the petitioners submitted that every Cabinet Secretary swears or affirms to have obedience to the *Constitution of Kenya* and ought therefore to be impartial in political contests as is required under the *Constitution*.

327. In a supplementary affidavit sworn by Olga Karani, the petitioners list various incidences in which, they claim that Cabinet Secretaries campaigned for the 3rd respondent. At paragraph 10 of the said affidavit, the deponent avers that, Mr Joe Mucheru, the Cabinet Secretary in charge of Information, Communication and Technology, at an interview conducted by a local television station, stated that he was at liberty to campaign for the 3rd respondent because no law barred him from doing so. Other Cabinet Secretaries also mentioned in Ms Karani's affidavit includes; Eugene Wamalwa, Mwangi Kiunjuri and Najib Balala.

328. The petitioners in their submission on these issues, brought to the attention of the court what they consider to be an inconsistency in the law and in this respect, they urged the court to declare section 23 of the *Leadership and Integrity Act* to be unconstitutional. In that regard, section 23 provides:

> 1. An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties""
>
> a. Act as an agent for, of further the interests of a political party or candidate in an election; or
>
> b. Manifest support for or opposition to any political party or candidate in an election.
>
> 2. An appointed State Officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
>
> 3. Without prejudice to the generality of sub-section (2) a public officer shall not ""

a. Engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

b. Publicly indicate support for or opposition against any political party or candidate participating in an election [Emphasis added.]

329. The Petitioners submitted that since Cabinet Secretaries are State Officers, they ought to be impartial, but that section 23 above gives them leeway for impartiality. The 3rdrespondent contests that submission and urges the court to disregard it since the issue of unconstitutionality was not pleaded in the petition but was only introduced as an argument in the petitioners' oral submissions. The 3rdrespondent also urges that the Supreme Court in exercise of its exclusive original jurisdiction cannot adjudicate on the unconstitutionality of an Act of Parliament since that is a matter within the domain of the High Court in exercise of its jurisdiction under article 165 (3) (d) of the *Constitution*.

330. In addressing the above issue, we note that in rendering an advisory opinion *In Re The Matter of the Interim Independent Electoral Commission*[119], this Supreme Court noted [paragraph 43]:

> "Quite clearly, the High Court has been entrusted with the mandate to interpret the *Constitution*. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the *Constitution*, certainly in respect of matters resolved at first instance by the High Court. And while the Advisory-Opinion jurisdiction is exclusively entrusted to the Supreme Court, the *Constitution* does not provide that this Court while rendering an opinion, may not interpret the *Constitution*. Indeed, interpretation of the *Constitution* stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the *Constitution* as may be necessary; and the several independent Commissions under the *Constitution* are similarly entitled to interpret the *Constitution* as part of the performance of their respective mandates. The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the *Constitution*. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the *Constitution* by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages.

331. It is not in doubt therefore that the Supreme Court may in exercise of its jurisdiction such as this, interpret the *Constitution* and in doing so, where the need requires, declare an offending provision of the law to be unconstitutional. Such is a natural consequence of any legal reasoning if the court were to maintain its fidelity to the law. Indeed in *SK Macharia and Anor v KCB*[120], the Court declared section 14 of the *Supreme Court Act* to be unconstitutional. However, the present scenario is peculiar in the sense that, the petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare section 23 to be unconstitutional.

332. The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, we cannot afford to lock our eyes to the

119 *In Re The Matter of the Interim Independent Electoral Commission*, Reference 2 of 2011; [2011] eKLR.

120 *SK Macharia and Anor v KCB*, Sup ct Application 2 of 2011; [2012] eKLR.

disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause.

333. In the circumstances, we are unable to find that section 23 is unconstitutional. Let the matter be addressed in the right proceedings in the right circumstances.

Irregularities

334. Apart from outright non-compliance with electoral law, the petitioners also claimed that the presidential election was marred by many irregularities the cumulative effect of which fundamentally and negatively impacted the integrity of the election.

Security Features: Now You see them, Now you see them not:

335. The most serious of the irregularities alleged by the petitioners was that many of the prescribed Forms 34A, 34B and 34C that were used in the election had no security features. Other such forms had different layouts and security features. Some forms were said to have had no serial numbers, bar codes, official stamps, water marks, anti-copying, among others. In response thereto, the 2nd respondent contended that the forms were protected by enhanced security features. Mr Mansur for the 1st respondent submitted that the reason the petitioners could not see the security features, was that the latter had been relying on the wrong bar-code readers which could not detect the embedded security features.

336. The other irregularity alleged by the petitioners was that many Forms 34A and 34B did not contain handover notes in the prescribed manner. This irregularity allegedly offended regulation 87(1) (b) of the *Election Regulations*. The petitioners also contended that many other forms bore no official stamp of the 1st respondent, while the stamps used on other forms were not official. The respondents however contended that hand over notes and official stamps were not a legal requirement.

337. The petitioners also alleged that many Forms 34A and 34B were signed by unknown persons, while many others were signed by the same presiding or returning officers. Some Forms 34A originated from un-gazzeted polling stations. Finally, the petitioners alleged that not all pages in some Forms 34B were signed.

338. In response thereto, the 1st respondent argued that regulation 83 only provides for signing of the forms and that there is no obligation flowing from this regulation that requires a returning officer to indicate his/her name while signing. Similarly, the 1st respondent argued, that the law does not require that all pages should be signed. Regarding the claim that many forms were signed by the same person in similar handwriting, contrary to regulation 5 (1A)(a), the respondent contended that the said claim had not been backed by evidence from a hand-writing expert. As for some Forms 34A having originated from un-gazetted polling stations, the respondent dismissed such a claim on grounds that there were no such polling stations.

339. The petitioners further claimed that there were numerous discrepancies between the results declared in Forms 34A and 34B from various polling stations across the Country, contrary to section 39 of the *Elections Act*, as read with regulation 82 of the Regulations thus compromising the integrity of the election. In response, the respondents, countered the accuracy in some of the allegations by providing contrary figures through a number of deponents. However, the 1st respondent also admitted that indeed there were discrepancies in the results in Forms 34A and 34B spread across the Country but attributed the discrepancies to human errors and fatigue of officials. The respondent contended that the discrepancies in question did not in any event affect the result of the election.

340. We reiterate in the above context that the petitioners applied for an order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C. This application was premised upon the petitioners' assertion that the elections were conducted so badly and marred with such grave irregularities that it did not matter who won or was declared the winner. As such, this court granted an order for scrutiny and access in the following relevant terms:

(72) ....the petitioners, as well as the 3rd respondent shall be granted a read only access, which includes copying (if necessary) to–

q. Certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production, leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. Forms 34A, 34B and 34C from all 40,800 polling stations.

s. Scanned and transmitted copies of all Forms 34A and 34B.

341. It be must be understood for avoidance of doubt, that the petitioners had laid a firm foundation for the grant of those orders because in the petition they had sought the following orders:

a. Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours.

b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the Presidential Election within 48 hours.

c. A specific order for scrutiny of the rejected and spoilt votes.

d. ...

e. An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C.

f. An order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/ portal.

g. ...

h. ...

i. ...

n. ...

342. The scrutiny process was conducted under the supervision of the Registrar of this court and a report filed. The report was endorsed by the petitioners and all the respondents as being a fairly accurate reflection of what the partial scrutiny had unearthed.

343. According to the report, the process started with the Registrar counting to ascertain the number of Forms delivered by the 1st respondent. We note as per the Registrar's count, that the 1st respondent

availed to her the following: 1 Form 34C, 291 Forms 34B, and 41,451 Forms 34As. The Registrar also made the following observations:

a. Certain forms 34As appeared to have been duplicated;

b. Certain forms 34As and 34Bs appeared to be carbon copies; (c) Certain forms 34As and 34Bs appeared to be photocopies;

(d) Some of the forms had no evidence of being stamped or signed.

344. The report nonetheless states that the petitioners chose to focus on distinguishing the genuine from the fake forms by checking whether the forms contained the following security features namely: the presence of a watermark using the UV reader; colour of the forms; serialization; Microtext; X10 magnification; Column for comments on the form; Format of the forms; and Anti-copy. The petitioners resorted to the use of a UV light reader (DoCash model) to ascertain the presence of or otherwise of the watermark on the forMs

345. Based on that process, the Registrar's report can be summarized as follows; On Form 34C, the petitioners noted that the Form 34C presented did not have a watermark and serial number and it looked like a photocopy. On the other hand, the 3rd respondent observed that the form was a copy of the original duly certified by an advocate of the High Court. Clearly, therefore the IEBC did not avail to parties and the Court the original Form 34C but a copy certified by an advocate.

346. With regard to Forms 34B, the petitioners were availed with a total of 291 ForMs These were to represent the 290 Constituencies as provided for under article 97(1) (a) of the *Constitution*. The extra one form represented the diaspora vote. It is noted that in scrutinizing those forms, the parties formulated a checklist which included confirming whether the forms had been signed and stamped by the returning officer and agents, and whether the hand over and take over' section had either been filled or not.

347. From the above exercise, the following were the findings; it was recorded that out of the 291 Forms 34B scrutinized 56 forms bore no watermark, 5 forms had not been signed by the returning officer, 31 forms had no serial numbers, 32 forms had not been signed by the respective party agents, the hand over section of 189 forms had not been filled and the take over section of 287 forms had not been filled.

348. Further, a random scrutiny of 4,299 Forms 34A across 5 Counties was undertaken to check and confirm; whether the forms bore the watermarks and the serial numbers; whether the forms had been signed and stamped by the presiding officers; whether there was involvement of the party agents.

349. Some of the issues emanating from the scrutiny of Forms 34A were that:

a. some forms were carbon copies;

b. others were the original Forms 34As but did not bear the IEBC stamp;

c. other forms were stamped & scanned while others were photocopies;

d. others had not been signed.

350. The report further indicates that out of the 4,299 Forms 34As, 481 were carbon copies, but signed, 157 were carbon copies and were not signed; 269 were original copies that were not signed; 26 of the Forms were stamped and scanned. 1 form was scanned and not stamped; 15 had not been signed by agents, 58 were photo copies of which 46 had not been signed; and 11 had no watermark security feature. All these issues correspond with the Registrar's observation stated above.

351. Submitting on the findings, SC Orengo for the petitioners contended that the report had proved beyond reasonable doubt, that the election process was shambolic. According to Counsel, the Form 34C which was used to announce the presidential results had no security features and hence the authenticity of the results as announced in Form 34C could not be guaranteed.

352. Counsel further contended that in totality, the number of votes affected in more than 90 Constituencies as a consequence of these irregularities could be as high as five million. Counsel submitted that the random sampling of the Forms 34A depicts numerous irregularities. He argued that some of the forms used were not standardized forms and were not prepared in accordance with the agreement between the 1st and 2nd respondents and the printer. Counsel thus urged the court to find that the forms did not comply with the statutory forms as required by law.

353. In response, the respondents were categorical that most of the forms met all the standard required features. They stated that the petitioners had failed to demonstrate that any of the figures in the forms were inconsistent with what was announced. Further, that the format of the forms was undisturbed.

354. Mr Muite, SC for the 1st respondent further contended that the only requirement under regulations 79 (2) (a) and 83 (a) is for the signing of the forms and that there was no requirement for security features. Asked by the court to explain why some forms bore security features if it was not a requirement of the law, Mr Muite responded that it was out of abundance of caution' on the part of the 1st respondent that it did so. Counsel could however not explain why some forms bore security features while others didn't if indeed they were printed by the same entity.

355. Counsel also argued that there were only 5 Forms 34B that had not been signed by the returning officers but that the 5 had serial numbers as well as watermarks. Counsel further argued that the petitioner did not challenge the numbers of the votes and had not alleged that any of the figures contained in the forms was incorrect. Counsel thus submitted that the results as announced captured and represented the will of the Kenyan people and urged the court to dismiss this petition.

356. A number of conclusions/observations may be made from this exercise: Firstly, the Form 34C, that was availed for scrutiny was not original. Whereas the copy availed for scrutiny was certified as a copy original, no explanation was forthcoming to account for the whereabouts of the original Form.

357. Regulation 87(3) obligates the 2nd respondent to tally and complete Form 34C and to sign and date the forms and make available a copy to any candidate or chief agent present. This regulation presupposes that the Chairman retains the original. The court is mindful that the 2nd respondent was required to avail the original Form 34C for purposes of access and to this extent the 2nd respondent did not.

358. Secondly, turning to the Forms 34B, the court notes that whereas the registrar received 291 forms representing 290 Constituencies and the diaspora, it was explained that the results relating to prisons were collated alongside those of their respective Counties as the prisons fall within Constituencies where they are located. This was also noted by the Registrar of this court in her report.

359. The court notes further that from the report on Forms 34B, the Registrar outrightly made an observation that some of the forms were photocopies, carbon copies and not signed. And out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences are singled out since they are incidences where the accountability and transparency of the forms are in question.

360. The Court also notes that in her affidavit, Immaculate Kassait, a Director of the 1st respondent deponed as follows:

> Security Features Of Statutory Forms
>
> 214. That I am aware that the Commission developed standards for its electoral goods prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls. All the ballot papers and statutory forms used in the August 8, 2017 election contained these security features.
>
> 215. That some of the security features employed on the result declaration Forms 34A and 34B used in the August 8, 2017 election include:
>
> a. Guilloche patterns against which all background colors on the various results declaration forms have been printed. These patterns are non – reproducible geometric patterns generated by a special security software used for currency designs and are generated as lines in vector format and cannot be scanned and reproduced.
>
> b. Anti – copy patterns; when the results declaration forms are photocopied, hidden texts appear on the copy produced thus distinguishing the original from the reproduced copy. Thus, a photocopy would be distinguishable from an original form.
>
> c. Watermarks; when the results declaration forms are viewed against normal light or at an angle, a pattern or text incorporated in the form can be seen.
>
> d. Micro text; the results declaration forms have text characters printed in very small font size which appear like a line to the naked eye and are verifiable only under a magnified glass.
>
> e. Tapered serialization; this means serial numbering. Each of the result declaration forms has a unique serial number to ensure monitoring and control of the distribution of forMs Furthermore, this serialization cannot be done by regular mechanical impact devices.
>
> f. Invisible UV printing; each result declaration form bears invisible logos which may only be seen under a UV light. This feature renders the forms almost impossible to counterfeit.
>
> g. Polling station data personalization; In addition to having the candidates‘ names, the forms 34A are personalized with the details of the polling station‘s name and code, ward name and code, constituency name and code and the county name and code. This curbs the misuse of forms at different stations and minimizes manual entry of information by officials at the polling stations.

h. Self – carbonating element; Forms 34A bear this aspect thereby restricting manual entry of data on the form 34A to only once and consequently enhancing accuracy and verifiability of the results.

i. Barcodes; The Forms 34B and Form 34C are printed with barcodes which identify the tallying center by showing the county codes and constituency codes, therefore ensuring quick identification and verification of results.

216. That security features were also incorporated in the ballot papers used in the 8th August 2017 election all in an effort to ensure that the elections were free and fair. For example, each ballot paper included different colour coding of the background of each ballot paper for the six (6) elections. Each ballot paper when examined visually contained a different colour. Specifically the commission used different background colors for each election to wit:-

a. Presidential-Plain white.

b. Member of National Assembly-Green colour.

c. Senator ballot paper-Yellow colour.

d. Member of County Assembly-Brown colour.

e. County woman member of national assembly-Purple colour.

f. Governor-Sky Blue Colour.

217. That in addition to the colour coding, similarly as in the statutory declaration forms, each ballot paper incorporated a guilloche pattern, generic watermark, anti – copy feature, embossment, UV sensitive security, tapered serialization and tapered UV serialization to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls.

218. That the security features incorporated on the results declaration forms and the ballot papers would enable the commission detect a counterfeit statutory form or ballot paper and discharge its constitutional mandate of conducting secure and verifiable elections.

219. That in addition to incorporating the security features, the Commission went a step further to instruct that all ballot papers need be stamped before they are issued to a registered voter to cast his/her vote. This was an extra measure initiated by the Commission with a view to ensure that the electoral process was secure. However, the absence of a stamp does not by itself speak to the authenticity of or invalidate the ballot paper.

220. That I confirm that all the Form 34A's received by the Commission at the National Tally Center had all the above mentioned security features.

361. The above categorical statement differs completely with the abundance of caution submission by Mr Muite SC and the not in the law' argument by the IEBC.

362. In the above context, we now turn to examine the applicable statutory provisions in this regard. As pointed out by the petitioners, there is a reasonable expectation that all the forms ought to be in a standard form and format; and though there is no specific provision requiring the forms to have watermarks and serial numbers as security features, there is no plausible explanation for this discrepancy more so when Immaculate Kassait deponed that all forms had those features.

363. There is another set of discrepancies relating to 32 Forms not being signed by agents, 103 forms where the hand over' section had not been filled and 287 where the take over' section had not been filled.

364. Regulation 87(1)(b) of *Elections (General) Regulations, 2012* as read with section 39(1A)(i) of the *Elections Act* deals with Forms 34B in the following terms:

> 87(1) The constituency returning officer shall, as soon as practicable-
>
> (a) ...
>
> (b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forMs

365. The schedule provides for a sample of the format of the Form 34B. As is evident from the schedule, the Hand Over' section is filled when the Forms 34A are submitted to the Constituency returning officer whereas the Taking Over' section is filled when the Chairperson receives the Forms 34A. Indeed Regulation 82(1) requires the presiding officer to physically ferry the actual results to the Constituency returning officer. Further, Regulation 87(1)(b) requires the Constituency returning officer to deliver to the National Tallying Centre all the Forms 34A from the respective polling stations and the summary collation forMs Regulation 87(3)(a) goes on to provide that, upon the receipt of Form 34A from the Constituency returning officer, the Chairperson of the Commission shall verify the results against Forms 34A and 34B received from the Constituency returning officer.

366. How then can the 1st and 2nd respondent deny the receipt of these prescribed forms" In any case, during the hearing of the scrutiny application, Counsel for the 1st respondent submitted that the Commission was in possession of all the original Forms 34A and 34B and went ahead to suggest that, it was willing to release the same forms for inspection. We note that, during the scrutiny exercise that was subsequently carried out, the Commission produced majority of those original forMs

367. It is clear that the purpose of including the requirement for indicating the number of forms received by various officers was to ensure accountability and transparency. It is therefore unfortunate that, out of the random sample of 4,299 Forms 34A examined, a total of 189 Forms had not been filled in the hand-over section, whereas 287 forms had not been filled in the take-over section. Such kind of scenario raises the question as to the kind of verification done, if at all, by the Chairperson of the Commission.

368. As for Forms 34A, the sampled 4,299 forms reveal that 481 of them were carbon copies, 269 were not stamped while 257 of the carbon copies were not stamped. 11 forms had no water mark while 46 of the photocopies were not signed. 58 forms were not stamped. Considering the sample size, it is apparent that the discrepancies were widespread. Did these discrepancies affect the integrity of the elections"

ii. The impact of the irregularities on the integrity of the election

369. Counsel for the respondents urged the court to dismiss the petition, as this would preserve the will of the people who turned out in large numbers to vote for their preferred candidates. Our attention in that regard was drawn to the provisions of article 38 of the *Constitution*, which is the embodiment of the political rights of the citizen. It was variously submitted that elections are about numbers and that they are about who gets the largest number of votes. Such irregularities as complained of by

the petitioners, counsel submitted, could not in themselves overturn the sovereign will of the people. Further, if the quantitative discrepancies are so negligible (in this case, allegedly slightly over 20,000 votes), they should not affect the election; for in the words of one of the Prof PLO Lumumba, counsel for the 2nd respondent, of small things, the law has no remedy.

370. On the other hand, counsel for the petitioners urged the court to look at the elections as a whole, as a process rather than an event. To look at, not just the numbers, but the entire conduct of the election. Mr Mwangi, counsel for the petitioners, went as far as to submit that elections are not a political process, but a legal one. That the court should concentrate on examining the legal process in the conduct of elections, as opposed to the political process.

371. It is our view however, that elections, are all these things. None of the factors highlighted by the parties can be viewed in isolation. For by doing so, we run the risk of cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our *Constitution* is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the *Constitution*, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

372. It is in this spirit, that one must read article 38 of the *Constitution*, for it provides inter alia, that every citizen is free to make political choices, which include the right to free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors.... This mother principle must be read and applied together with articles 81 and 86 of the *Constitution*, for to read article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of free will, hence a still-born democracy. Of such an enterprise, this court must be wary.

373. It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

374. In view of the interpretation of section 83 of the *Elections Act* that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the *Constitution* or in that law. But even where a court has concluded that the election was not conducted in accordance with the principles laid down in the *Constitution* and the applicable electoral laws, it is good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.

375. In the impugned presidential election, one of the most glaring irregularities that came to the fore was the deployment by the 1st respondent, of prescribed forms that either lacked or had different security features. The 1st respondent had submitted by way of affidavit and in open court that out of abundant caution, it had embedded into the prescribed Forms, such impenetrable security features that it was

nigh impossible for anyone to tamper with them. The court was also reminded that this was done, despite it being not a requirement by the law.

376. However, the scrutiny ordered and conducted by the court, brought to the fore, momentous disclosures. What is this court for example, to make of the fact that of the 290 Forms 34B that were used to declare the final results, 56 of them had no security features" Where had the security features, touted by the 1st respondent, disappeared to" Could these critical documents be still considered genuine" If not, then could they have been forgeries introduced into the vote tabulation process" If so, with what impact to the numbers" If they were forgeries, who introduced them into the system" If they were genuine, why were they different from the others" We were disturbed by the fact that after an investment of tax payers money running into billions of shillings for the printing of election materials, the court would be left to ask itself basic fundamental questions regarding the security of voter tabulation forms.

377. Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated" Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the numbers on that form"

378. Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election" It is true that where the quantitative difference in numbers is negligible, the court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced" In such a critical process as the election of the President, isn't quality just as important as quantity" In the face of all these troubling questions, would this court, even in the absence of a finding of violations of the *Constitution* and the law, have confidence to lend legitimacy to this election" Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables" It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the *Constitution*, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.

379. In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of August 8, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.

iv What Consequential Declarations, Orders and Reliefs Should this Court Grant, if Any"

380. In the petition, the petitioners sought the following Orders;

(a) Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the presidential election within 48 hours;

b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the presidential election within 48 hours;

c. A specific order for scrutiny of the rejected and spoilt votes;

d. A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election;

e. An order for scrutiny and audit of all the returns of the presidential election including but not limited to Forms 34A, 34B and 34C;

f. An order for scrutiny and audit of the system and technology used by the 1st respondent in the presidential election including but not limited to the KIEMS Kits, the Server(s); website/ portal;

g. A declaration that the non-compliance, irregularities and improprieties in the presidential election were substantial and significant that they affected the result thereof;

h. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off the from the final tally and computation of the presidential election;

i. A declaration 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;

j. A declaration that the 3rd respondent was not validly declared as the president elect and that the declaration is invalid, null and void;

k. An order directing the 1st respondent to organize and conduct a fresh presidential election in strict conformity with the *Constitution* and the *Elections Act*;

l. A declaration that each and all of the respondents jointly and severally committed election irregularities;

m. Costs of the petition; and

n. Any other orders that the honourable court may deem just and fit to grant;

381. Noting the prayers sought in this petition, this court has the mandate, to invalidate a presidential election under article 140(3) of the *Constitution* as read with section 83 of the *Elections Act*, *inter alia*, for reasons that there has been non-compliance with the principles in articles 10, 38, 81 and 86 of the *Constitution* as well as in the electoral laws. One of the clear reliefs in article 140(3) is that should a presidential election be invalidated, then a fresh election' shall be held within 60 days of this court's decision in that regard. Parties at the hearing of the petition did not address us on the issue, however, and so we do not deem it fit in this Judgment to delve into an interpretation of that term. We also note that the term fresh election' was addressed in the 2013 *Raila Odinga* case and is the subject of an application by the 1st interested party within this petition. The application has been fixed for hearing on September 21, 2017 and the court will deal with it on its merits. We now return to the specific prayers in the petition.

382. Without belabouring the point, prayers (a), (b) (c) (e) and (f) have been spent by fact of the ruling of this court delivered on August 28, 2017. And whereas a scrutiny of rejected and spoilt votes as was sought in prayer (c) was not specifically done, we have elsewhere above substantively addressed the legal regime on that issue and we do not need to repeat ourselves. However for clarity, and in addressing prayer (d), as we have already stated, it is our firm finding that the decision in the 2013 *Raila Odinga* case on rejected and spoilt votes remains good law and we see no reason to depart from it. Prayer (d) is therefore disallowed.

383. Prayer (g) has been addressed in the analysis and determination of Issues Nos (ii) and (iii) and it is our finding therefore that non-compliance with the constitutional and legal principles in *inter alia* Articles 10, 38, 81 and 86 of the *Constitution* and the *Elections Act* coupled with the irregularities and illegalities cited above, affected the process leading to the declaration of the 3rd respondent as President elect in a very substantial and significant manner that whatever the eventual results in terms of votes, the said declaration was null and void and the election was rendered invalid. Prayer (g) is therefore allowed.

384. Regarding prayer (h), the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities and illegalities and it is our position that a concise reading of section 83 of the *Elections Act* would show that the results of the election need not be an issue where the principles of the *Constitution* and electoral law have been violated in the manner that we have shown above. Prayer (h) to the extent that it refers to votes to be struck off cannot therefore be allowed.

385. Regarding prayer (i), we have shown beyond peradventure 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. In the circumstances, prayer (i) is allowed as prayed. Prayers (j) and (k) are a consequence of the declaration in prayer (i) and are also allowed.

386. Regarding prayer (l), we have shown that IEBC did not conduct the August 8, 2017 presidential election in conformity with the *Constitution* and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be inter alia simple, verifiable, efficient, accurate and accountable. Although the petitioners claimed that various electoral offences were committed by the officials of the 1st respondent (IEBC) no evidence was placed before us to prove this allegation. What we saw in evidence, was a systemic institutional problem and we were unable to find specific finger prints of individuals who may have played a role in commission of illegalities. We are therefore unable to impute any criminal intent or culpability on either the 1st and 2nd respondent, or any other commissioner or member of the 1st respondent. We are similarly unable to find any evidence of misconduct on the part of the 3rd respondent. The prayer is therefore disallowed.

387. On costs, we are aware that costs generally follow the event, but the present petition has brought to the fore the need for IEBC to adhere strictly to its mandate and not to exhibit the casual attitude it did in the conduct of the impugned election and in defence of this petition. It is a heavily public funded constitutional organ and to burden Kenyans tax payers with litigation costs would be a grave matter which we deem unnecessary in this petition. Let each party therefore bear its own costs.

J. Conclusion

389. In this judgment, we have settled the law as regards section 83 of the *Elections Act*, and its applicability to a presidential election. We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the *Constitution* and the applicable electoral law. Never has the word 'or' been given such a powerful meaning. Why did we do that?

390. We did so because as Judges we have taken an oath (as advocates first and as Judges later). In the two oaths, the fundamental words are fidelity to the *Constitution* without fear or favour. the constitutional principles that we have upheld in this judgment were embedded and became a critical part of our electoral law. The Legislature in its wisdom chose the words in section 83 of the *Elections Act* and in keeping to our oath, we cannot, to placate any side of the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that section.

391. As for the IEBC, all we are saying is that, the constitutional mandate placed upon it is a heavy yet, noble one. In conducting the fresh election consequent upon our orders, and indeed in conducting any future election, IEBC must do so in conformity with the *Constitution*, and the law. For, what is the need of having a *Constitution*, if it is not respected?

392. Having taken note of Mr Nyamodi's submissions, which appeared to suggest that IEBC had put in place a complimentary system for the transmission of results; a system that was neither simple nor known to the petitioners, we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of section 44(A) of the *Elections Act*. It goes without saying that such a system as held by the High Court, in the case of the *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*,[121] only comes into play when technology fails.

393. In the 2013 *Raila Odinga* case, this court stated that

> " it should not be for the court to determine who comes to occupy the Presidential office; save that this court, as the ultimate judicial forum, entrusted under the *Supreme Court Act, 2011* (Act No 7 of 2011) with the obligation to assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya [S 3(a)] must safeguard the electoral process and ensure that individuals accede to power in the presidential office, only in compliance with the law regarding elections.
>
> We reiterate those words in this petition and for as long as the *Constitution of Kenya* has the provisions granting this court the mandate to overturn a presidential election in appropriate circumstances, it will do so because the people of Kenya in the preamble to the *Constitution* adopted, enacted and gave unto themselves the *Constitution* for themselves and future generations.

394. It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the *Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the *Constitution*.

395. And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law

> " is the heritage of all mankind"

[121] *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*, Petition 328 of 2017; [2017] eKLR.

and

> " a salutary reminder that wherever law ends, tyranny begins."[122]

Cast the rule of law to the dogs, Lutisone Salevao once observed and government becomes a euphemistic government of men... He adds:

> " History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith."[123]

The moment we ignore our *Constitution* the Kenyans fought for decades, we lose it.

396. We further note that elections world over are competitive features.[124] Presidents in many parts of the world, and especially in Africa, wield a lot of power.[125] The influence that comes with the office makes its very attractive.'[126] That influence cascades down through all elective positions to the lowest. Candidates and political parties often do anything to be elected. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally agitated.[127] All these factors make elections at every level extremely high-pressure events.'[128]

397. If they are mismanaged or candidates do not respect the rule of law; if the average citizen, political parties and even candidates themselves do not perceive them as free and fair, elections can, and have led to instability in some countries. Examples of such an eventuality abound. However, we do not need to look far for examples. As we have stated, the flawed presidential elections in Kenya in December 2007 led to post-election skirmishes that left over 1,000 people dead, about 50,000 others displaced and drove the country to the brink of precipice not to mention the economic crisis that was thereby wrought.

398. In the circumstances, and in answer to the respondents' harp on numbers, we can do no better than quote the words of Justice Thakar of the Indian Court of Appeal in the case of *Ponnala Lakshmaiah v Kommuri Pratap Reddy & others*,[129] in which he observed:

> " There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the courts. The courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be

122 Soli J Sorabjee,'*Rule of Law; A Moral Imperative For South Asia and the World*,' Soli Sorabjee Lecture, Brandeis University Massachusetts, April 14, 2010 at page 2. Available at www.brandeis.edu/programs/southasianstudies/pdfs/rule_of_law_full_text.pdf.

123 Lutisone Salevao, '*Rule of Law, Legitimate Givernance and Development in the Pacific*'(ANU Press, 2005)page 2.

124 *Independent Review Commission Report on the General Elections Held in Kneya on December 2007*, Chapater III (Kriegler Report) at 32.

125 Edwin Odhiambo Apuya, '*Can African States Conduct Free and Fair Elections?*' Vol 8 Issued (Spring, 2010) Northwestern Journal of International Human Rights, p 123.

126 Ibid

127 Edwin Odhiambo Apuya, '*Consequences of a Flawed Presidential Election*', Legal Studies Vol 29, Issue 1, (March 2009) pp 127-158.

128 Above Note 1.

129 Ponnala Lakshmaiah v Kommuri Pratap Reddy & others, Civil Appeal 4993 of 2012 arising out of SLP (C) No 20013 of 2010.

unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process.

An election which is vitiated by reason of corrupt practices, illegalities and irregularities..... cannot obviously be recognized and respected as the decision of the majority of the electorate. The courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute.

399. What of the argument that this court should not subvert the will of the people" This court is one of those to whom that sovereign power has been delegated under article 1(3)(c) of the same *Constitution*. All its powers including that of invalidating a presidential election is not, self-given nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the *Constitution* reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant.

400. Have we in executing our mandate lowered the threshold for proof in presidential elections" Have we made it easy to overturn the popular will of the people" We do not think so. No election is perfect and technology is not perfect either. However, where there is a context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in section 39(1C) of the *Elections Act*, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this court close its eyes to an obvious near total negation of that transparent system"

401. In keeping with our pronouncement regarding the burden and standard of proof in election petitions, we are therefore satisfied that the petitioners have discharged the legal burden of proof as to squarely shift it to the 1st and 2nd respondent. We are also of the firm view that having so shifted, the burden has not in turn been discharged by the 1st and 2nd respondent as to raise substantial doubt with regard to the petitioners‘ case.

402. For the above reasons, let this Judgment then be read in its proper context; the electoral system in Kenya today was designed to be simple and verifiable. Between August 8, 2017 and August 11, 2017, it cannot be said to have been so. The petition before us was however simple and to the point. It was obvious to us, that IEBC misunderstood it, hence its jumbled- up responses and submissions. Our judgment is also simple, and in our view clear and understandable. It ought to lead IEBC to a soul-searching and to go back to the drawing board. If not, this court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the *Constitution* is a non-wavering commitment this court makes.

403. One other peripheral but important matter requires our attention; the timeframe for hearing and determining a presidential election petition in Kenya. The court is able to bear all manner of criticisms but one would be extremely unfair; alleged inability to deliver on time. Where is that time" Between the decision in the 2013 *Raila Odinga* case and the present petition, it was a matter of agreement across

Kenya that 14 days is not enough for parties and the court to fully deliver on their respective mandates not because they cannot (in fact they all have) but because there may be the need to conduct exercises such as a recount of votes or scrutiny which require substantial amounts of time. Yet the Legislature ignored pleas to rethink the timeframe. It is time they did so. The reasons for doing so are obvious and need no extrapolation here.

404. In concluding, we must express our profound gratitude to all counsel who appeared before us, for their submissions that assisted us in reaching the present decision.

K. Final Orders

405. By a majority of four (with JB Ojwang and N Ndungu, SCJJ dissenting), we make the following final orders:

a. 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;

b. A declaration is hereby issued that the irregularities and illegalities in the Presidential election of August 8, 2017 were substantial and significant that they affected the integrity of the election, the results not- withstanding.

c. 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;

d. 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 the determination of September 1, 2017 under article 140(3) of the *Constitution*.

e. Regarding costs, each party shall bear its own costs.

The Dissenting Judgment of Justice JB Ojwang, SCJ

A. Background

1. So proximate to the moment of delivery of the Supreme Court's decision in this pivotal case, did I learn that I fell on the minority side. By the *Constitution*, the timeline for hearing and determination was below a fortnight, and so, full versions of the Judgment had to come later. My summarized dissent, thus, grasped only the compelling elements of the case. Today, I have the opportunity to set out my opinion in detail.

2. The question before the court was whether the Presidential election, conducted under one and the same electoral process with five other sets of election (for Senate; National Assembly; County Governors; Women's Representatives; and County Assemblies), had been so compromised by operational irregularity and illegality, as to compellingly attract Orders of annulment.

3. I learnt that the majority on the Bench had come to the unreserved resolution that the Presidential election was a nullity, and that the electorate must return to the polls. Such a position was thus summarized:

(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.

4. Having taken such standpoints, the majority proceeded to strike down the Presidential- election outcome, ordering as follows:

(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*.

5. Thus, vital issues turning upon the democratic principle, issues of the terms and essence of the *Constitution*, of the statute law, and of the judicial mandate in the interpretation and crystallization of functional dimensions of the legal process, had been so cursorily dispatched – maybe in answer to policy objects, or to political persuasions, or to other general, social calls. For me, as an experienced lawyer and Judge, but more particularly, as a dedicated legal scholar, such an approach to contentious matters did short shrift to the firm and principled, normative configuration of the law and the legal process – elements which alone, would temper the motions of the social and political order, and ensure that the mechanisms of governance remain attuned to the ideals of civilized process.

6. I will, in this Judgment, examine the foregoing dimensions of law with greater focus, after adverting to the pertinent issues and evidence in the whole case.

B. Main Cause and Prelude

a. Prelude

7. The petitioners were the Presidential and Deputy-Presidential candidates of the National Super Alliance [NASA] coalition of parties, and were running on the Orange Democratic Movement Party [ODM] and the Wiper Democratic Movement Party tickets, respectively.

8. The 1st respondent is the Independent Electoral and Boundaries Commission [IEBC], an independent agency established under article 88, as read with articles 248 and 249 of the *Constitution of Kenya*, and the *Independent Electoral and Boundaries Commission Act, 2011* (Act No 9 of 2011) [the IEBC Act]. The 1st respondent bears the mandate of conducting and/or supervising referenda and elections for

any elective body or office established under the *Constitution*, as well as any other elections provided for under the *Elections Act, 2011* (Act No 24 of 2011).

9. The 2nd respondent is the chairperson of the 1st respondent – and bears the mandate under article 138(10) of the *Constitution*, to declare the outcome of the Presidential election, and to deliver written notification of the same to the Chief Justice and to the incumbent President.

   The 3rd respondent is the incumbent President, who was the candidate of the Jubilee Party, and who was declared the winner in the elections, on August 11, 2017.

10. The petitioners are aggrieved with the mode of conduct of the Presidential election of August 8, 2017. They contend that the said election was conducted, administered and managed improperly by the 1st respondent, and that such mismanagement was deliberate and systematic, and having the effect that there was failure of compliance with the governing principles prescribed under articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution*; with the *Elections Act*; with the Regulations made thereunder; with the *Electoral Code of Conduct*; and with other relevant provisions of the law. The petitioners call for the invalidation of the 2nd respondent's declaration of the 3rdrespondent as the duly elected candidate.

11. The prelude to the main cause is marked by a set of preliminary applications. These, and the court's determinations, may be enumerated in summary form:

    i. an application by the petitioners dated August 25, 2017 – seeking an order for the 1st respondent to give the petitioners direct access to data and information; this elicited the order that the 1st respondent do grant the petitioners, as well as the 3rd respondent, a read-only access', with copying if necessary, for certain items of data; the court also ordered its Registrar to give supervised access to certified copies of original voting-record Forms 34A and 34B, to the petitioners and 3rd respondent; the Registrar being required to file a report on the exercise by August 29, 2017 at 5.00 pm.; parties to make submissions thereupon; the court also designated an information and communication technology (ICT) officer from its staff, as well as independent ICT experts – to oversee the required access to the dissemination technology applied during the election;

    ii. an application by the 3rd respondent, dated August 25, 2017 and seeking to strike out from court record such documents as were not served out timeously; this was refused by the court, on the premise that, in the interests of justice to all parties, its inherent jurisdiction favoured retaining the documents and annexures in question; and, to safeguard the applicant's right to fair hearing, the court directed that the documents and annexures in question be served upon the 3rd respondent;

    iii. an application by the petitioners, dated August 26, 2017, seeking to strike out documents filed by the 1st, 2nd and 3rd respondents, which had not been served upon counsel for the petitioners: this was dismissed, on grounds that if granted, it would terminate the entire case for the 1st, 2nd and 3rd respondents at this preliminary stage – and this would derogate from the interests of justice;

    iv an application by 1st respondent, dated August 26, 2017 and seeking orders to expunge from the record documents filed out of time, which had the effect of raising a fresh cause of action, apart from carrying additional evidence: this was disallowed, on the basis that the question related to an application already before the court;

v an application dated August 21, 2017 by Information Communication Technology Association of Kenya for joinder as amicus curiae: this was dismissed, on the basis that it fell short of the applicable standard for admission;

vi. an application dated 21st August, 2017 by Mr Ekuru Aukot, one of the Presidential election candidates, seeking joinder as interested party: this was allowed, on the basis that the applicant had a personal stake in the outcome of the petition;

vii. an application dated August 23, 2017 by Mr Michael Wainaina Mwaura, who had been a Presidential election candidate, seeking joinder in some capacity – respondent, amicus curiae, or interested party: this being allowed (for interested party), on the basis that he had a personal stake in the outcome of the petition;

viii. an application by Mr Aluoch Polo Aluochier, dated August 23, 2017, seeking joinder as interested party: this being disallowed, on the ground that the applicant failed to meet the requisite legal threshold;

ix. an application by Mr Benjamin Barasa Wafula dated August 24, 2017 seeking joinder as interested party: this being disallowed, for failure to meet threshold requirements;

x. an application by learned counsel, Mr Charles Kanjama, dated August 25, 2017 seeking joinder as amicus curiae: this being disallowed for failure to meet threshold standards;

xi. an application by the Law Society of Kenya dated August 25, 2017, seeking joinder as amicus curiae: this being allowed, on the basis that the legal threshold was satisfied;

xii. an application by the Attorney-General dated August 25, 2017 seeking joinder as amicus curiae: this was allowed.

b. Main Cause: Issues and Contentions

12. It was the petitioners‘ contention that, during the Presidential election, being part of the General Election of August 8, 2017, certain management improprieties came to pass, which affected the registration of voters, the votes cast, the vote count.

13. One of the allegations related to the category of votes described as rejected votes, said to have constituted 2.6% of the total votes cast. The issue being raised in this regard, came alongside a contention that an earlier decision of the Supreme Court, in *Raila Odinga v Independent Electoral and Boundaries Commission and others*, Sup Ct Petition No 5 of 2013, should be reversed: insofar the Court had in that case held that spoilt votes are not to be taken into account, in computing the 50% +1 vote-strength threshold for determining the winner in a Presidential election.

14. Such a claim is founded upon a desired legal yardstick, rather than on the prescribed, and operative law. The petitioners contended that the Supreme Court in the earlier case, had improperly arrived at its legal threshold, because it had been influenced by a dissenting opinion in a comparative case-citation noted by this Supreme Court – which by Kenya‘s *Constitution* (article 163(7)), is the ultimate judicial authority, and [a]ll courts, other than the Supreme Court, are bound by its decisions. The petitioners were invoking the case from Seychelles, *Popular Democratic Movement v Electoral Commission*, Constitutional Case No16 of 2011; they were urging that the majority stand in that case should determine this Supreme Court‘s position as regards spoilt votes in the electoral process: and that in that context, there was an impropriety in the Presidential-election vote-count, following the election of August 8, 2017.

15. The petitioners contended that the conduct of the Presidential election of August 8, 2017 had contravened the principle of free and fair election under article 81(e) of the *Constitution* as read with section 39 of the *Elections Act*, and the applicable regulations.

16. The burden of the petitioners' case lies on the process of relaying and transmitting voting records from polling stations to constituency tallying centres and the National Tallying Centre: they questioned this process as falling short of standards on simplicity, accuracy, verifiability, security, accountability, transparency, promptitude. They contended that such shortcomings had compromised the principle of free and fair elections in terms of article 81(e) (iv) and (v) of the *Constitution*. The petitioners attributed impropriety to the electoral process on a plurality of grounds, such as that:

    i. the data and information recorded in Forms 34A at the individual polling stations had not been accurately and transparently entered into the electronic KIEMS kits, at the individual polling stations;

    ii. there had been non-compliance with the requirement that KIEMS kits be accompanied by an electronic image of the prescribed forms, as these were transmitted to the National Tallying Centre; and this was in contravention of Regulation 87(3) of the *Elections (General) Regulations*;

    iii. the 1st respondent had pre-determined the results of the Presidential election, and was therefore not impartial, neutral and accountable as required by article 81(e) (v) of the *Constitution*;

    iv the declared results were not verified in more than 10,000 polling stations, and the data entered in the electronic kits was not consistent with the information in the Forms 34A;

    v the information in Forms 34A was not consistent with that in Forms 34B, and the figures were not accurate and verifiable;

    vi. the computation and tabulation of the results in a significant number of Forms 34B was not accurate, verifiable and internally consistent;

    vii. the results, recorded in the 1st respondent's Forms 34B were materially different from those relayed, and relayed again, as at the time of filing on its website;

    viii. the 1st respondent had espoused a false narrative and national psyche, as the stage for stealing the election on behalf of the 3rd respondent – by allowing the electronic media and the news channels to relay and continue relaying its results-data, which lacked a legal or factual basis; and

    ix. at the time of declaration of election result, the 1st respondent was not in possession of Forms 34B, and did not publicly display the same for verification.

17. The petitioners contended that the Presidential election was not impartial, neutral, efficient, accurate and accountable as required under article 81(e)(v) of the *Constitution*, as read with Sections 39, 44 and 44A of the *Elections Act* and Regulations made thereunder, and section 25 of the *IEBC Act*; and that there were instances in which vote-count had been distorted, manipulated, or inflated in favour of the 3rdrespondent. The petitioners asserted that it was impossible to determine who had won the Presidential election, or whether the threshold for winning the election was met.

18. The petitioners contended that there had been a deliberate failure in operational transparency, and that the respondent had disregarded the decision of the Court of Appeal in *Independent Electoral and Boundaries Commission v Maina Kiai*, Civ Appeal No 105 of 2017, by failing to electronically collate, tally and transmit accurate results, and by declaring results by county, rather than by polling stations.

19. The petitioners contended that the 1st respondent had allowed the transmission and display of unverified provisional results, contrary to law; that the 1st respondent had also posted contradictory results in Forms 34A and 34B; and that there were internal contradictions in Forms 34A. They contended that the 1st respondent had declared final results on August 11, 2017 even before receiving results from all polling stations, and had allowed more than 14,000 defective forms from polling stations – with the outcome of distorting more than 7 million votes. The petitioners contended that the 1st respondent had colluded with the 3rd respondent to eject their legitimate agents from various polling stations in Central and Rift Valley regions. On the basis of such allegations, the petitioners contended that the 1st respondent had abdicated its responsibility for ensuring a transparent and an impartial voting process, apart from corrupting the process of transmission of results.

20. The petitioners contended that the 1st respondent had failed to adhere to the *Constitution*, rule of law, court orders and decisions – and that such a condition rendered the processes of the Presidential election, the transmission of results, and the final outcome, a nullity, as it lacked integrity, fairness and transparency.

21. The petitioners contended that there had been a violation of article 86 of the *Constitution*, and that the votes cast in a significant number of polling stations were not counted, tabulated, and accurately collated as required under article 86(b) and (c) of the *Constitution*, as read with the *Elections Act*. They contended that the results recorded in Forms 34A differed from the results shown in the 1st respondent's Forms 34B and displayed in the 1st respondent's website; and they asserted that the 1st respondent's Forms 34B were inaccurate, bearing statistical manipulation to favour the 3rdrespondent.

22. The petitioners contended that the 1st respondent had acted contrary to the terms of articles 38, 81 and 86 of the *Constitution* as read with sections 39(1c) and 44 of the *Elections Act* and the regulations thereunder, as well as section 25 of the IEBC Act.

23. The petitioners contended that, contrary to regulation 7(1)(c) of the *Elections (General) Regulations*, the 1st respondent had fraudulently established secret and ungazetted polling stations, wherefrom vote-count results were added to the final tally, thereby undermining the integrity of the Presidential election.

24. The petitioners contended that a significant number of Forms 34B had been executed by persons not gazetted as Returning Officers, and not accredited as such by the 1st respondent – and that such election results as were carried in such forms were invalid. They contended that all returns submitted without IEBC's official stamp, or which did not bear the signatures and particulars of Returning Officers and agents, were invalid.

25. The petitioners averred that the returns used in a material number of polling stations were not in the prescribed Forms 34A and 34B, contrary to Regulations 79(2) (a) and 87(1)(a), and that the Forms 34B bore fatal irregularities affecting 14,078 polling stations out of the established 25,000. They contended that a number of the forms and returns were not signed; that some did not show the name of the Returning Officer; that some did not bear the IEBC stamp; that some Forms 34A and 34B did not bear the signatures of candidates' agents, nor the reason for lack of signature; that some were signed by the same presiding officer serving at different polling stations.

26. The petitioners contended that the 1st respondent had violated their rights under article 35(2) of the *Constitution*, by putting up inaccurate information which misled the general public. They also asserted that the Presidential election was compromised by intimidation and improper influence, or corruption, contrary to article 81(e)(ii) of the *Constitution* as read with the *Elections Act*, and regulations 3 and 6 of the *Electoral Code of Conduct*.

27. On the basis of the foregoing contentions, the petitioners formulated certain specific issues for the court's determination:

i. whether the Presidential election was conducted in accordance with the *Constitution*;

ii. whether the Presidential election was conducted in accordance with the written law;

iii. whether the 1st respondent's non-compliance with the *Constitution* and/or the law, affected the result of the Presidential election;

iv whether the 1st respondent's non-compliance with the *Constitution* and/or the law affected the validity of the result of the Presidential election;

v whether the non-compliance, irregularities and improprieties affected the validity of the results of the Presidential election;

vi. whether the non-compliance, irregularities and improprieties affected the result of the Presidential election;

vii. whether the exclusion of 2.6% of the total votes cast, as spoilt votes, substantially affects and/or invalidates the count and tally of the Presidential- election votes;

viii. whether the total number of verified, rejected votes should be considered in ascertaining the attainment by any candidate, of the constitutional threshold;

ix. whether the 3rd respondent was validly declared as President-elect;

x. whether the said 3rd respondent committed election irregularities;

xi. what are the appropriate orders to be issued by the court.

c. What is the Evidence?

28. The various contentions and averments, as a matter of vital judicial methodology, are to be lighted up by objective evidentiary account. I will now consider the scope of validation for the petitioners' cause, coming forth by way of their main body of factual testimony.

29. The 1st petitioner, Mr Raila Amolo Odinga, tendered evidence by his affidavit of August 18, 2017 which also represented the stand of the 2nd petitioner. He deponed that he had been a Presidential election candidate, duly nominated by the NASA coalition.

30. The 1st petitioner deposed that the 1st respondent, acting through presiding officers, undertook the vote-count which culminated in the declaration of the 3rdrespondent as President on August 11, 2017, with 8,203,290 votes, as against the deponent with 6,762,224 votes. The deponent was aggrieved with the declaration, as he believed the Presidential election to have entailed breaches of the *Constitution* and the applicable laws – such breaches arising before polling day, as well as during the processes of tallying and transmission of results.

31. The deponent stated his belief, that the Presidential election failed to meet the constitutionally-prescribed terms that require free, fair, transparent, accountable, credible and/or verifiable elections. He deposed that the IEBC had deliberately and/or negligently compromised the security of the integrated electoral management system (KIEMS), and thereby exposed it to unlawful interference by third parties. He deponed that the collation, tallying, verification and transmission of the Presidential-election results had been compromised by procedural flaws and illegalities, upon such a scale as substantially qualified the credibility of the declared result. He averred that the poll results as declared,

were substantially at variance with the actual results tallied and declared at the gazetted polling stations. He deponed that the 3rd respondent, in concert with Cabinet Secretaries and others serving under the charge of the 3rd respondent, had abused their positions, by bringing their influence and pressure to bear upon the potential voters.

32. The deponent averred that, while the 1st respondent had acted by virtue of section 44 of the *Elections Act*, and developed the *Elections (Technology) Regulations, 2017*, under which the KIEMS system had been set up for the management of elections, the failings in the conduct of the Presidential elections had now undermined the security of the electoral system, exposing it to third-party interference. He deponed that the said electronic system had been misapplied, with the effect that the Presidential election was substantially conducted by manual processes. As an instance in that regard, the deponent averred that the 1st respondent acted contrary to law by failing to transmit electronically the vote-count results from the polling stations and the constituencies – with the consequence that the transmission process was now exposed to unlawful manipulation. He averred, in that context, that the consequential delay in transmitting election results with the prescribed forms, gravely affected the credibility and validity of the results.

33. The deponent averred that a review of the election results, in relation to the available Forms 34A and 34B, had shown substantial qualitative anomalies, such as put into question the credibility of the Presidential election.

34. The deponent averred that the 3rdrespondent was guilty of undue influence, bribery, inducement and intimidation in relation to the free exercise of elective preference by the voters. In this regard the deponent averred that the 3rdrespondent had, on 2nd August at Makueni, issued threats to those chiefs who did not mount political campaigns in his favour; that Cabinet Secretaries had actively campaigned for the 3rdrespondent; that the 3rdrespondent had taken decisions involving public resource-deployment, in such a manner as to benefit his political campaign.

35. Another deponent, Ms Oichoe, averred that she was a cyber security expert, and had observed and followed the conduct of the August 8, 2017 General Election – in particular, the process of vote-count results transmission. The process, as she averred, entailed six primary scenarios in respect of which IEBC's operational systems and data base has to be tested. The first of these is confidentiality: this requires that information should only be accessed by authorized persons; the confidentiality of sensitive information is to be secured. Secondly, integrity: information used should be accurate, complete, protected from unauthorized modification – by authorized or unauthorized persons. Under this scenario, it was the deponent's averment that non-authenticated results had entered the IEBC's public portal – and so, this should raise questions as to the integrity of the data. The third element, availability, required that data systems be available when required by persons authorized to use them – and access thereto is to be in compliance with the terms of articles 35 and 47 of the *Constitution*, and section 44(b) of the *Elections Act* as read with section 4 of the *Access to Information Act*, and regulation 15(4) of the *Elections (Technology) Regulations, 2017*. She deponed that during the August 8, 2017 General Election, the voters' register had not been made available on request, until the last moment when an order of court had been made in aid of such access. The deponent averred that the next feature of the data-base system was non-repudiation: an audit trial is to be maintained on activities occurring. This ensures that should someone have access to the information or data-base, a footprint is left; and a log should be maintained to facilitate tracing-back to source. It was her averment that it was emerging from the petition, that entry had been made into the data-base, and a strange return made in place of the statutory Form 34. She deposed that a strange book had been posted on the IEBC website, and that such a situation calls for explanation. She averred that since the statutory form for transmitting results is Form 34, the book posted in the website was strange in law. The fifth website scenario, in the

deponent's averment, is authenticity: the information itself, as well as its source, is to be shown to be genuine – this being attributable to section 44B of the *Elections Act*. The deponent averred that, on the date of declaration of election results, only 29,000 Forms 34A were available, and the declaration was made on the basis of forms of questionable authenticity. Her last, essential data-base feature was privacy: section 55A as read with section 44B of the *Elections Act* contemplates privacy and security of data; and so, the deponent averred, if it is proved that IEBC failed to secure its data and its public portal, then it would be necessary to have an audit of all its systems.

36. Another deponent, Mr Koitamet Ole Kina, averred that he was a duly accredited agent of the NASA coalition, in the General Election of August 8, 2017. He deposed that he had arrived at the IEBC co-ordination base, the Bomas of Kenya, on the election date at 16.30 hrs, for the purpose of activating his access card. Following some delay in activating the card, the deponent joined the company of fellow agents, and they witnessed the streaming-in of election results, which commenced at 17.15 hrs. Thereafter, he averred, his team came to learn that it was not possible to verify the result-announcements, as they came unaccompanied with hard copies of Forms 34A, or the soft copies from the server. The NASA team, being concerned, approached IEBC Commissioners (Professor Guliye and Ms Roselyn Akombe) and the CEO, Mr Ezra Chiloba, calling for Forms 34B as a basis of verification. As this initiative proved ineffectual, the deponent averred, the NASA agents demanded a meeting with the Commission, and obtained yet another fruitless promise of access to Forms 34A: these being received, with Forms 34B, only in limited numbers, on August 11, 2017.

37. The deponent recorded his opinion, regarding the unreliability of the supply of Forms 34A and 34B by the IEBC, that this was evidence of a determination on the part of the Commission to declare results that could not be verified as required by law. The deponent drew on the content of another affidavit, by Dr Oduwo, and averred that dilatory responses to the demands for the said forms, showed the 1st respondent's announcements to have been misinformed, and/or based on information such as failed the test of verification, accuracy, transparency and credibility.

38. Mr Moses Wamuru, the NASA Presidential candidate's chief agent and co-coordinator for Embu County, deponed that he and his agent-colleagues had not only been harassed, but kept out of the polling station by IEBC officials and officers of the Provincial Administration, for most of the election day. He deponed that he had been forced by the Constituency Returning Officer, to sign the election declaration form, as a condition for being availed a copy of the election results.

39. Another deponent, Mr Godfrey Osotsi, for Amani National Congress (of the NASA coalition of parties), averred that he was an ICT expert who had been an observer of the August election vote-tallying. This deponent deposed not upon settled fact, but urged this Court to order a system-audit: to trace transmissions so as to reveal the code used by IEBC for the more-than 40,000 polling stations; for the purpose of identifying the IEBC officers who used such codes to transmit election results; to establish the time and place where such transmissions were originated; and to identify the person who applied the special identifier to effect results transmission.

40. The deponent also gave his opinion on matters of law: that under the *Elections Act*, election material' includes systems such as are contemplated under section 17(1), and include the Kenya Integrated Electoral Management System (KIEMS) – which incorporates voter registration, voter identification, and the results-transmission system.

41. The deponent proceeds on that same line of averment: a declaration of results has to come in the wake of a transmission in the right manner, as prescribed, before reaching the National Tallying Centre. He rested his affirmations upon other deponents' statements in support of the petition: as at the time of declaration of Presidential election results, only 29,000 Forms 34A had been received, and

their authenticity still stood to be ascertained; and, election results could only be declared when the Commission was already in possession of all the Forms 34A and 34B.

42. The deponent averred that IEBC either lacked full control of its system, or had ceded such control to some other authority.

43. Another affidavit was sworn by Mr George Kegoro, the executive director of the Kenya Human Rights Commission, a civil society agency committed to fostering and safeguarding human rights, democratic values, human dignity and social justice. He deponed that his organization serves as secretariat for an initiative known as Kura Yangu Sauti Yangu (KYSY), which is wholly devoted to the cause of fair elections during Kenya's 2017 election cycle. He averred that KYSY had deployed some 500 agents in all the 290 constituencies, to observe and monitor the electoral process: and KYSY had found contradictions and anomalies in the election data emanating from IEBC, especially in relation to the Presidential votes as reflected on the IEBC website.

44. An agent of the NASA coalition, Ms Olga Karani, deponed that, concerns had been expressed by members of the public, about anomalies and irregularities in the vote tallying process – such anxieties also coming from the election candidates, as well as NASA agents. She averred that the prescribed election forms were manually availed to the National Tallying Centre, though sometimes they were also displayed on the IEBC website. It was her belief that it was impossible to verify the authenticity of such forMs She deponed that, by the time of announcement of the election results, the Commission had neither collated, nor availed any of the Forms 34B, nor had it responded to outstanding issues regarding Forms 34A, or to the questions being raised about results posted on the website. She attributed lack of transparency to the actions taken by the 1st respondent.

45. Another deponent, upon whose averments several of the petitioners' witnesses relied, was Dr Nyangasi Oduwo. He deponed that on August 8, 2017 at 5.07 pm., some 10 minutes after the closure of the polling stations, the 1st respondent started streaming results for the Presidential election. He averred that such announcements of results had maintained a constant gap of 11% between the vote-count for the 1st petitioner and the 3rdrespondent – notwithstanding the random distribution of the constituency-locations. His averment expressed suspicion also on the basis that, as he perceived it, in numbers of polling stations within the central Kenya and Rift Valley regions, the petitioner's agents were chased away from the stations, and replaced by imposters, and thereafter presiding officers were caused to record fictitious results in favour of the 3rdrespondent.

46. Dr Oduwo averred that, upon being asked by the petitioner to examine 5000 Forms 34A, supplied by presiding officers to the 1st petitioner's agents across the country, and to compare these with Forms 34B supplied by the 1st respondent and Forms 34A posted on the 1st respondent's website, he found discrepancies.

47. Dr Oduwo made averments embodying opinion in clear terMs He asserted that the 3rdrespondent and the Deputy-President, who were candidates in the Presidential election, were guilty of corruptly influencing voters in the run-up to the General Election of August 8, 2017. He averred that the election was compromised by instances of undue influence, inducement, bribery and intimidation. The deponent, in a second affidavit, avers that certain anomalies had compromised the said election, instances being: forms marked with a rectangular, rather than an official, circular stamp; Returning Officers failing to sign Forms 34B, or recording their own names; lack of handing-over notes; discrepancies in numbers of valid votes; unstamped forms; corrected figures noted on forms; agents not signing statutory forms; discrepancies in vote-tally.

48. Discrepancy in vote-tally records was also the subject of averments by Mr Benson Wasonga, who deponed that the IEBC's summation of valid votes was 15,179,717 – with the 1st petitioner having 6,821,505; the 3rdrespondent having 8,222,862; and the total rejected votes being 477,195; as compared to the IEBC portal showing as total votes cast, 15,180,381, 1st petitioner's vote as 6,821,877, 3rdrespondent's vote as 8,223,163, and rejected votes as 403,495. These figures, it was deponed, varied from the specific figures (Form 34C), that were issued at the time of declaration of the 3rdrespondent as the leading candidate: total valid votes, as 15,114,622; 1st petitioner's votes, as 6,762,224; 3rdrespondent's votes, as 8,203,290; total rejected votes, as 81,685. The deponent deposed that the actual variation in the rejected votes, as between the IEBC's summation of the results, and the display on the portal, was 73,700 votes; and he averred that this differential amounted to violation of the electoral law, to the prejudice of Presidential candidates other than the declared winner.

49. The petitioners called two more witnesses, one of these being Mr Mohamed Noor Barre, from Mandera County in the north of the country. He deponed that while he had been trained, and sworn to serve as presiding officer in the elections, the local IEBC office had informed him on August 7, 2017 that he had been replaced by a different person. His averment was that the electoral process at his station had been conducted by strangers' as presiding officers.

50. It is the same with Mr Ibrahim Mohamud Ibrahim, also from Mandera, who deponed that although he had been appointed, training and sworn-in as presiding officer, he had been called to the local IEBC office on August 7, 2017 and informed that his place had been taken up by a different person. He deponed that the elections which took place on the following day, had been conducted by strangers, acting as presiding officers.

C. The Other Side: Respondents' Answer

a. Introduction

51. Judicialism, the established framework for relieving the all so-frequent grievances, conflicts, frays and tensions in the social order, has evolved as a civilized tradition of durable rules and methods of accommodation. Such methods have their objectivity and rationale, lodged within the discipline of law, which, as will become evident in this Judgment, is the domain not of the most open-textured manifestations, nor the most elementary political suasions – but of jurisprudence, as methodical reasoning, of a normative and professional category.

52. The established judicial method, which rests on the singular dependability of the fact- base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

53. As I express this introductory perception, so as to shed more light on the instant matter, I admit my debt to legal scholarship; with Andrew Goodman in his learned work, *How Judges Decide Cases: Reading, Writing and Analysing Judgments*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd, 2009), in which he observes (p 44):

> However rarefied and abstruse the legal argument before the [court], it must be anchored on the facts of the case: while the judges will feel free to expound upon the most general principles in order to provide guidance for the future, the actual decision...will turn on the facts, even if the detail of the argument is quite remote from them [emphases supplied].

54. Such is a fundamental principle, invariably observed in the practice and application of law in this country, as in other countries, the constitutional and judicial systems of which have benefited from the integrity of the common law tradition. And such an approach is certain to lead to a fair, dependable and plausible basis of judgment, as well as set a just and tenable reference-point for the future.

b. Issues and Contentions

55. It was the 1st and 2nd respondents' assertion that the 3rd respondent, in the Presidential election of August 8, 2017 had garnered the largest number of votes, and had satisfied the constitutional threshold prescribed in article 138(4) of the *Constitution*, apart from complying with the terms of the applicable statute law. They denied the petitioners' claims of non- compliance with the terms of articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution* as well as other applicable laws, asserting that all such claims of non- compliance were couched in bare generalities, and were devoid of any factual basis.

56. The 1st and 2nd respondents stated that the conduct of the Presidential election had been attended with an elaborate management system, guided by all relevant electoral laws, and safeguarded by definite safety measures for assuring transparency, accountability and verifiability, in terms of articles 81 and 86 of the *Constitution*.

57. The 1st and 2nd respondents stated that they had duly verified, and accurately tallied the election results for all candidates, before declaring the outcome, in accordance with article 138(10) of the *Constitution*, and duly taking into account the terms of the recent Court of Appeal decision in *IEBC v Maina Kiai and 4 others*, Civ App No 105 of 2017 [which relates to vote tallying]. They denied the petitioners' claims, that they had conducted the electoral process in a manner that prejudiced the sovereign will of the voters, and that they had only delivered preconceived and predetermined, computer-generated leaders.

58. The 1st and 2nd respondents denied the petitioners' allegation, that the number of rejected votes in the Presidential election had been as much as 2.6% of the total votes cast, stating that such votes, as declared in Form 34C, constituted only 0.54% of the votes cast.

59. The 1st and 2nd respondents contested the petitioners' claim that the right principle to guide this court, in respect of the treatment of rejected votes, should be that preferred by the Seychelles Supreme Court, in *Popular Democratic Movement v Electoral Commission*, Const Case No 16 of 2011, rather than this Court's established precedent in *Raila Odinga v Independent Electoral and Boundary Commission & others*, Pet No 5 of 2013. The respondents' stand was that rejected votes had been rightly excluded from the count of votes cast, by this court.

60. The respondents stated that the process of relay and transmission of results, from the polling stations to the constituency tallying centre and the National Tallying Centre, had been simple, accurate, verifiable, secure, accountable, transparent and prompt.

61. The 1st and 2nd respondents stated that the Presidential election had been conducted in a manner that was free, fair, and in accordance with the *Constitution*; a manner that gave fulfilment to the sovereign will of the voters. The respondents urged that in these proceedings, two basic questions fell for determination, namely:

    (i) whether the 3rd respondent was validly elected and declared as President- elect by the 2nd respondent;

    (ii) what consequential declarations, orders and reliefs the court should grant.

They asked the court to find, with regard to the two questions, that –

i. the respondents had not contravened the provisions of the *Constitution*, the *Elections Act*, or any other statute;

ii. the presidential election was conducted in accordance with the *Constitution* and the *Elections Act*, and all other relevant statutes, and a valid declaration of the outcome duly made;

iii. the 3rd respondent was validly elected as the President of the Republic of Kenya;

iv the people of Kenya exercised their sovereign power of the vote, and their decisions should be respected;

v the petition lacks merit, and should be dismissed;

vi. the petitioners should bear the costs of the petition.

c. Evidentiary Statements

62. The 2nd respondent, in his affidavit sworn on August 24, 2017 deponed that he had been the Returning Officer for the Presidential election of August 8, 2017. He averred that neither he nor the 1st respondent had any private stake in the election outcome, and that they had been neutral referees – their sole mandate being to provide the electoral structure for the voters to exercise their sovereign will, by electing leaders of their choice.

63. The deponent averred that, a tally of all the votes had shown Uhuru Kenyatta to have garnered 8,203,290 votes, followed by Raila Odinga, the 1st petitioner herein, who garnered 6,762,224 votes. The declared results were expressed in Form 34C, which was itself abstracted from forms 34B, forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote-tallies.

64. The deponent averred that, in view of the election-management infrastructure that was in place, the primary results-declaration forms (Forms 34A and 34B) were by no means compromised, in their accuracy and overall integrity. These forms had been transmitted through the KIEMS electronic system, in a scanned format, secured by non-replicable features. The security features, he averred, included anti-photocopy and self-carbonated elements, up to a span subsuming six copies.

65. He deposed that the presiding officers at the 40,883 polling stations were required to scan, and electronically transmit the original Forms 34A to both the constituency tallying centres and the National Tallying Centre. The constituency tallying centres for their part, were required to relay the Forms 34B to the National Tallying Centre, for the purpose of tallying: and so, for the Presidential election, the results could be verified by reconciling the figures in Forms 34A.

66. The deponent averred that, his dedicated task in the said electoral process was to provide policy leadership, and strategic direction, to ensure that the Commission's infrastructure for election-management, was accountable, efficient, systematic and methodical.

67. He deposed that, though afflicted by challenges occasioned by a multiplicity of suits against the Commission, it still ensured that the procurement of electoral materials, by the secretariat, was done in a transparent and timely manner; and that other electoral processes, including supportive technological systems, were deployed in a manner consistent with the constitutional and legal requirements of simplicity, accuracy, verifiability, security, transparency and accountability.

68. The deponent averred that, all due arrangements had been made by the Commission, in aid of the electoral process of August 8, 2017 – noting in particular the following aspects:

i. voter education had been conducted throughout the country;

ii. staff training, for the management of elections, had been duly carried out;

iii. all the polling stations had been duly gazetted;

iv the register of voters had been duly audited and uploaded in the Commission's website (https:www.iebc.or.ke/iebcreports), and hard copies printed and posted at conspicuous sites at each polling station;

v mechanisms were put in place to facilitate the observation, monitoring and evaluation of the elections, in compliance with the terms of article 88(4) of the *Constitution*;

vi. the procurement and distribution of strategic and non-strategic election materials was duly completed;

vii. as required by article 10 of the *Constitution*, the Commission had held many consultative meetings with key stakeholders, including – quite significantly – political parties: to update them on the progress made on all fronts, in relation to the August 8, 2017 elections;

viii. the Commission had duly complied with the recent decision of the Court of Appeal in the *Maina Kiai* Case, on the conditions attending the tasks of: vote-counting; tallying; verification; and declaration of Presidential-election results at the constituency level, and at the National Tallying Centre.

69. The deponent averred, in the light of the foregoing safeguard-measures taken, that, it was not true as alleged by the petitioners and their witnesses, that the Commission presided over a shambolic Presidential election, or that the entire electoral process was a failure, or that the election entailed breaches of the *Constitution* and the applicable laws relating to vote- tallying, and to the transmission of results.

70. The deponent averred that the Presidential election had met all the requirements of free and fair elections, having been conducted by way of secret ballot; being free from violence, improper influence or corruption; having been administered in a dedicated process conducted exclusively by the Commission; having been transparently conducted; and having been administered in an impartial neutral, efficient, accurate and accountable manner.

71. The deponent, on the course of action which he took following the elections, signalled his authority as emanating from article 138(10) of the *Constitution*: he is mandated, within seven days following the election, to declare the result as set out in Form 34C, and to deliver written notice of the same to both the Chief Justice and the Incumbent President. He averred that, throughout the electoral cycle, he had discharged his mandate in perfect accord with the *Constitution*, the electoral laws, and the applicable regulations. He averred that in the discharge of his obligations at election time, he had not been influenced by anyone, and had maintained the required standards of professionalism.

72. The deponent deposed that he had conducted and supervised the election in accordance with the terms of article 81(e) of the *Constitution*, and that in this respect, several elements in his discharge of duty stand out, namely:

i. every registered voter who participated in the General Election, had cast his or her vote by way of secret ballot;

ii. polling stations were adequately secured by the police, to ensure that the electoral process was free from violence, intimidation, improper influence, or corruption;

iii. the election was independently conducted by the Commission;

iv candidates and observers, were allowed to have their appointed agents at the various polling stations – to observe the voting process and to assure transparency;

v the said agents observed the closure of the voting process, and were involved in the counting of votes at the various polling stations, to bear witness to manifestations of transparency, impartiality, neutrality, efficiency, accuracy and accountability in the voting and vote-count; and

vi. the agents of the Presidential-election candidates were given access to the various vote-recording forms, including Forms 34A and 34B – a further element in the 1st respondent's transparency and accountability.

73. The deponent averred, as regards the transmission set-up during the electoral process, that the Commission's staff managing the KIEMS gadgets, had been trained in good time, and the said gadgets had been configured with the register of voters. He averred that the KIEMS system was designed to allow for integration of the biometric voter registration, biometric voter identification, the electronic transmission of election results, and the political party, and candidate registration systems. He deposed that the said system had been successfully deployed on August 8, 2017, and that it had significantly improved efficiency, effectiveness and accuracy in the operation of the electoral process.

74. The deponent averred that he was present at the National Tallying Centre between 8th and August 11, 2017, participating in the tallying and validation of Forms 34B that were being electronically transmitted by the constituency returning officers (and in this regard, he attached as evidence copies of Forms 34B, marked WWC-3). Upon receipt of these forms, he deposed, he had collated the same, and confirmed the consistency of the results, availing Forms 34B to the Presidential election candidates through their agents, for verification and confirmation. The deponent, thereafter, used the said results to tally and complete Form 34C, in compliance with section 39(3)(b) of the *Elections Act*.

75. The deponent makes specific averments on the vote tallies, as he received them on August 11, 2017; on this occasion he received 290 Forms 34B from the constituencies, as well as the tally of diaspora votes: and the Presidential election results were confirmed by the agents, the particulars thereof standing as follows:

Name of Candidate	Valid Votes	Percentage of Votes Cast	No of Counties wherein Candidate had at least 25% of the Votes Cast
John Ekuru Longoggy Aukot	27,311	0.18%	0
Mohamed Abduba Dida	38,093	0.25%	0
Shakhalaga Khwa Jirongo	11,705	0.08%	0
Japheth Kavinga Kaluyu	16,482	0.11%	0
Uhuru Kenyatta	8,203,290	54.27%	35
Michael Wainaina	13,257	0.09%	0
Joseph William Nthiga Nyaga	42,259	0.28%	0
Raila Odinga	6,762,224	44.74%	29

On the basis of these results, the deponent avers, he acted in compliance with article 138(4) and (10) of the *Constitution*, and publicly declared the Presidential election outcome on August 11, 2017.

76. The deponent averred that the Commission had found that, in a few of the results- declaration forms, there were certain errors – but that these were inadvertent, minor errors which had no effect on the vote-tally and outcome of the Presidential election. In support of the finding on the said errors, the deponent tendered in evidence a document marked WWC-5, attended with the detailed affidavit of Ms Immaculate Kassait (1st respondent's Director of Voter Registration and Electoral Operations).

77. Mr Chebukati had specific averments to make in relation to certain depositions made on behalf of the petitioners. He deponed, in relation to the statement by Mr Godfrey Osotsi, that, throughout the electoral process, the Commission had engaged the petitioners as well as the 3rdrespondent (in person, and through their representatives), the public, and interested stakeholders – for the purpose of adhering to best practices in electoral matters.

78. The deponent, in departure from the testimony of Mr Godfrey Osotsi, averred that the Commission was already in possession of all Forms 34B, at the time of declaration of the Presidential election results: and all the Forms 34B and 34C were availed to the candidates and their agents for verification, before the declaration of results; and all Presidential election candidates were allowed to visit the National Tallying Centre to verify the results, as from the commencement, up to the moment of declaration. He averred that he personally chaired many consultative meetings with the petitioners' agents, whenever

any issues of concern had been raised, even though for unexplained cause, the petitioners' agents had decided to depart from the National Tallying Centre, just prior to the declaration of results.

79. In response to the 1st petitioner's claim of procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of Presidential election results, the deponent averred that tallying as conducted by the Commission, was in compliance with articles 81(e) and 86 of the *Constitution* as read with section 39 of the *Elections Act*; and he deponed that at every forum of results-processing, the petitioners were allowed to have their agents, to confirm the tallying, the announcement and declaration of results. He averred as well, that the electronic system of transmission of results was secure, prompt, verifiable and efficient. He deponent that all the results-declaration forms had been subject to verification by the candidates' agents/representatives, and immediately thereafter, forwarded to the National Tallying Centre. The deponent further averred that the 1st petitioner had deposed that he had been given access to the Forms 34B through his agents: and thus the charge of lack of transparency and accountability in the tallying process, was short on veracity.

80. The deponent denied the 1st petitioner's assertion that IEBC had condoned voter intimidation, undue influence, bribery and/or flagrant electoral offences committed by the 3rdrespondent. He similarly denied the assertion by one of the 1st petitioner's witnesses, Dr Nyangasi Oduwo, that the 3rdrespondent had been declared to be the winner without a verification of all the requisite documents. He averred that all the Presidential election candidates and their agents, or representatives, had been invited to verify the results, before declaration. And he deponed that he did not announce the final results of the Presidential election until he had received and verified the Forms 34B from the constituency tallying centres.

81. The deponent averred that on August 10, 2017 the Commission received a letter of the same date from Mr Orengo, the petitioners' deputy chief agent, raising concerns about the Presidential election results; and the Commission internally considered the issues raised, before communicating its position by a letter of the same date (exh. WWC-6a and 6b). He averred that the declaration of Presidential election results on August 11, 2017 was done in full compliance with the terms of the *Constitution*, contrary to the averments of the 2nd petitioner.

82. The deponent averred that the petitioners' allegation that the Commission had failed to take steps against the 3rdrespondent for breach of the provisions of the Election Offences Act, section 14, was not true; for, on June 21, 2017 he had written to the Director of Public Prosecutions informing him of the alleged breach, and calling for his action. The Director of Public Prosecutions had responded by his letter of July 6, 2017 informing the deponent that he had directed the Director of Criminal Investigations to take action as appropriate (exh. WWC-7).

83. Another affidavit was sworn by the 1st respondent's Chief Executive Officer, Mr Ezra Chiloba (August 24, 2017), who averred that the Commission had conducted the Presidential election on August 8, 2017 in accordance with the terms of the *Constitution* (articles 81, 83 and 86), the *Elections Act*, and the applicable regulations.

84. Mr Chiloba testified that, despite the complex political and legal environment in the run-up to the General election of August 8, 2017, the 1st respondent had managed to put in place an effective infrastructure, with appropriate mechanisms, for the conduct of a free, fair and credible election. He averred that the election was conducted in a transparent, open and accountable manner, and that the process was peaceful and credible – just as was confirmed by both local and international observers. (In this regard, he annexed as evidence a copy of the various observer reports – exh. EC-12).

85. The deponent averred that the tallying and transmission of election results took place at the polling stations, where the vote-count was collated and declared at the constituency tallying centre, and at the National Tallying Centre. Results thus processed and accounted for, the deponent averred, were in every sense credible, and truly represented the will of the voters. He deposed that there had been no compromise to, nor interference with the system for the transmission of results – before, during, or after the declaration of the outcome of the Presidential election. He deponed that the collation, tallying and transmission of the results were in accordance with the terms of the *Constitution*, the *Elections Act*, and the appellate court's decision in the *Maina Kiai* case.

86. Referring to the documentary evidence on record, the deponent deposed that the election results as declared, were substantially consistent with, and were a true reflection of, the actual results tallied and declared at duly-gazetted polling stations.

87. Responding to the assertions in the 1st petitioner's affidavit, the deponent averred that the electoral law had been recently updated, with the enactment of the Election Laws (Amendment) Act, 2017, allowing a four-month period within which to procure and establish the Kenya Integrated Electoral Management System (KIEMS); and that there was no basis for the allegation that this new electronic system had been compromised through the practice of hacking, occasioning a distortion in the Presidential-election vote tallies. He denied the 1st petitioner's assertion that the 1st respondent had failed to put in place the requisite measures to assure the credibility of the KIEMS system, and averred that the said system had served well in the identification of voters, and for results transmission. He further deponed that the Commission's operations were not entirely dependent on KIEMS, as a complementary mechanism was provided for by law, in the event of any breakdown in the electronic mechanism.

88. The deponent denied the petitioner's assertion that the conduct of vote-tallying in the Presidential election had not been in accordance with the terms of article 86 of the *Constitution*. He deposed that the election results had been transmitted from polling stations and constituency tallying centres, as required by law. Denying the petitioners' statement that they were not supplied with Forms 34A and 34B, the deponent averred that the petitioners had indeed been supplied with all Forms 34A and 34B available on the public portal; and that by their own letter of August 14, 2017 the petitioners acknowledged being accorded access to all the requested forms. (The relevant correspondent in this regard is marked EC-15).

89. To the petitioners' assertions that the Forms 34A and 34B had certain anomalies, such as brought into question the credibility of the Presidential election, the deponent averred that the petitioners had not disputed the results as declared, but only alleged unsubstantiated qualitative anomalies.

90. The deponent averred that all presiding officers had been trained by the Commission to take the image of Forms 34A, for transmission through KIEMS, though there were a number of instances in which they chose to take images of other documents; and the consequence, in view of the fact that one of the security features was the capturing of only one image for the six sets of elections, was that, it was the test documents, rather than the Forms 34A, that ended up being transmitted. Upon noting this error, the 1st respondent uploaded the Form 34A for the affected polling stations, on the public portal. Such inadvertent transmission of wrong images, the deponent averred, did not affect the election results as contained in Forms 34A. (He annexed a typical example of such error, and its rectification, as exh. EC-18).

91. Responding to the petitioners' affidavit sworn by Ms Apprielle Oichoe, the deponent averred that the assertions made under the rubric, The Travesty that was the Electoral Process in Kenya 2017, did not give a true account. The report in question had not, in the first place, been dated or signed, nor was

its author or source indicated. The deponent averred that, quite to the contrary, the 1st respondent's tallying and transmission system were functional and credible in all respects.

92. In response to the affidavit of Mr Benson Wasonga, the deponent averred that the election results from each polling station were contained in Forms 34A; and the results- declaration for the Presidential election was made on the basis of results contained in Forms 34B from 290 constituencies and the diaspora. He averred that the total number of rejected ballots as declared in Forms 34C, was 81,685, and not 477,195 as alleged. He averred that Mr Wasonga had misconstrued the statistics published on the public-display mode of KIEMS – which was not the result within the terms of the law. He deponed that the cause of the variance between the actual number of rejected ballots and the figure shown on the public website, was but on account of human error.

93. In response to the statements made on behalf of the petitioners by Mr George Kegoro, the deponent, firstly, adopted the detail, tenor and effect of the 1st respondent's depositions by Ms Immaculate Kassait. Secondly, the deponent averred that the statistics electronically displayed did not, as such, constitute the results of the Presidential election: the final result of the Presidential election is verifiable from an inspection of Forms 34A and 34B.

94. The deponent denied Mr Kegoro's statement that the IEBC's portal showed varying levels of votes cast for the six different elective offices featuring in the General elections of August 8, 2017. He averred that Mr Kegoro's statement was unrelated to the fundamentals of the petition, as it lacked a foundation in the pleadings and the primary depositions of the petitioners – hence verging upon an attempt to litigate a substantial Presidential petition by the guise of supporting affidavit.

95. Responding to the affidavit of Ms Olga Karani, for the petitioners, the deponent adopted the averments made by Ms Immaculate Kassait and Mr James Muhati, and deposed that all agents at the National Tallying Centre had been given access to the Forms 34A and 34B, and an opportunity to verify the results, before declaration.

96. The deponent averred that the Presidential election of August 8, 2017 was conducted in accordance with the *Constitution* and the electoral laws, and that the process was free, fair and credible. Among the elements of credibility in the said election, he enumerated the following:

    i. a substantial increase was realized in the number of voters – from 14.4. million in 2013 to 19.6 million in 2017, being some 78% of the eligible voters;

    ii. an audit of the register had been conducted, before the date of voting;

    iii. the register had been opened for verification of biometric data, by members of the public (May 10, 2017 – June 9, 2017);

    iv a time-table had been published for political-party primaries – Gazette Notice of March 17, 2017;

    v resolving of disputes from the nomination process for candidates;

    vi. registering of over 14,500 candidates to participate in the 2017 General Election;

    vii. gazettement of 40,883 polling stations and 338 tallying centres across the country, including the prisons and the diaspora; and

    viii. gazettement of returning officers;

    ix. acquiring of an integrated electoral management system for voter registration, voter identification, candidates' registration, results transmission;

x. recruitment, training and deployment of over 360,000 election officials across the country;

xi. continuous voter education programmes undertaken across the country, using different strategies and platforms; and

xii. attracting over 15,000 individual observers; 105 international observer institutions; 254 local institutions; more than 7000 journalists from over 30 local and international media houses accredited to participate in the General Election.

97. The next deponent, James Muhati who holds the office of Director in charge of Information and Communication Technology at IEBC, made depositions bearing upon the statements by the 1st petitioner, and by Ms Apprielle Oichoe and Mr Godfrey Osotsi. He averred that the Commissions had taken up suggestions made in the *Kriegler Report* which was formulated in the wake of the violent General Election of 2007, and had deployed certain technological mechanisms to support the management of the electoral process – these being the Biometric Voter Registration (BVR); the Electronic Voter Identification Device (EVID); the Candidate Nomination System; and the Result Transmission System (RTS). When the ne electronic system was first utilized in 2013, the deponent averred, it was found to have certain imperfections; and it became necessary to amend section 44 of the *Elections Act*, mandating IEBC to establish an integrated electronic system: this would facilitate the conduct of biometric voter registration; electronic voter identification; and electronic results transmission - that is, the Kenya Integrated Electoral Management System (KIEMS). This new system, the deponent averred, was successfully employed during the August 8, 2017 General Election: and it enabled IEBC to properly verify the biometric data during the May 10, 2017 – June 9, 2017 verification exercise, as required by law; it also enabled the proper verification of voters on polling day; and it enabled the due transmission of election results from polling station to constituency, and to the National Tallying Centre.

98. The deponent averred that he was aware of the terms of the *Constitution* and the statutory and regulatory framework, within which the electoral process had been conducted: and in this context, he cited articles 81 and 86 of the *Constitution* as read with section 4(m) of the IEBC Act, which require the voting set-up to be simple, accurate, verifiable, secure, accountable and transparent. He deposed that the KIEMS had been established with the approval of the Elections Technology Advisory Committee (ETAC), under the terms of section 44(8) of the *Elections Act*, and with the participation of relevant agencies and institutions, including political parties. (He annexed the supporting minutes – exh. JM – 1).

99. On the role of ICT in the General Election of August 8, 2017, the deponent averred that a technological process had been used in voter identification, and the transmission of results; and that the transmission component in KIEMS had enabled the Commission to relay the Presidential election results and statistics from the polling stations to the constituency tallying centres and to the National Tallying Centre. During the transmission of election results through KIEMS, the presiding officer would complete Form 34A as required by law, and then input on the KIEMS the results-statistics captured on Form 34A; the presiding officer would then take the image of Form 34A, and, before sending the data, he or she would first show the entries made to the agents of the candidates and of the political parties, for confirmation. (He annexed as evidence, copies of the directions issued to the presiding officers, the training manual, and a transmission flow-chart (JM-5A; JM-5B and JM 5C, respectively)).

100. It was the deponent's evidence that the petitioners' allegations that the relay and transmission was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt, and that there had been a contravention of the terms of article 81 (e)(iv) and (v) of the *Constitution*, did not represent the truth – especially as no evidence had been adduced to support the claims.

101. On the question of the security and verifiability of the electronic system, and in relation to the allegation that there had been some compromise to the KIEMS system by unauthorized third parties, the deponent averred that such claims have no relation to the true position, noting also that they are not supported by evidence. He averred that the Commission had engaged a competent support-team of experts, who subsequently partnered with internationally recognized and accredited institutions to provide the best information-security system. (He annexed copies of certification and accreditation documents from the providers – exh. JM-8A; JM-8B; JM-8C; JM-8D).

102. The deponent gave testimony on the complementary system in the transmission of election results, for compliance with the terms of article 38 of the *Constitution*. He averred that Regulation 83 of the *Elections (General) Regulations, 2012* provided for the complementary system of transmission of election results, and that the complementary mechanism involves the physical delivery of Forms 34A by presiding officers to the Returning Officers, in the respective constituencies.

103. IEBC's Director of Voter Registration and Electoral Operations, Ms Immaculate Kassait, averred that, contrary to the negative impression given by some of the petitioners' witnesses on early transmissions of election results for some stations, such stations had only a few voters, sometimes numbering between one and 10 – and counting these would take only a short time; she gave examples in this regard: Boyani Primary School in Matuga Constituency; Arabrow in Wajir South Constituency; Ya Algana in North Horr Constituency; Lowangina Primary School in Tigania East Constituency.

104. The deponent denied the veracity of the claim by some of the petitioners' deponents, that there had been, in the transmission of election results, a constant 11% difference in vote-strength between the 1st petitioner and the 3rdrespondent. She displayed a table in her affidavit, based on a 30-minute interval analysis of transmitted election-results data; and this showed the vote difference to range in percentage between 9.095% to 25.573%.

105. The deponent denied the allegation in Dr Nyangasi's affidavit, that the 1st respondent had chased away from polling stations the agents of the 1st petitioner, in central Kenya and in the Rift Valley. She gave examples of polling stations in central Kenya in which, indeed, the petitioner's agents had duly executed Forms 34A.

106. The deponent admitted a case of an erroneous data entry in a station, where the petitioner had been credited with 2 votes instead of 561 votes, indicating that the circumstances in which such error occurred were explained in the 1st respondent's affidavit by Mr John Ole Taiswa; she deponed that a similar explanation of error was also set out in the affidavit of Ms Rebecca Abwaku.

107. The deponent took on specific instances in which the depositions made for the petitioner, and which attributed misrepresentation of vote-count, were based on untrue perceptions of fact: for instance, that a partial Form 34B was uploaded in respect of Karachuonyo Constituency; that in Kilome Constituency the original form 34B reflected 38,269 votes, while that uploaded in IEBC's portal showed 33,757 votes; that in Igembe South, the summation of total votes in Forms 34A for the 1st petitioner was 41,834, yet by Forms 34B in the Commission's portal, his total votes were 43,209; that the Forms 34A in respect of St. John's Primary School Polling Station indicated the total number of valid votes cast as 468, against the entry on Form 34B which showed 467; that there was a variance between the Forms 34B keyed-in on the KIEMS kit and that projected at the National Tallying Centre for Morrison Primary School Polling Station; that there were any discrepancies in Forms 34B for Embakasi South Constituency, and Forms 34A for Jobenpha Community School; that there were any discrepancies in Forms 34B and 34A in respect of Kiru Primary School Polling Station.

108. The deponent, while disagreeing with most of the claims made by the petitioners, admitted the occurrence of certain errors, for instance: there were discrepancies in Form 34B in Bomet Central Constituency – to the extent that at Bomet Primary School, the form did not show any rejected votes, while there was one rejected vote; in the case of Kapkoross Primary School in Turbo Constituency, there was a computation error – though the total vote cast in respect of each candidate was correctly tallied; there was a computation error in the case of Dagoretti North Constituency, with the total valid votes being shown as 104,789, rather than 105,840; in the case of Naivasha Constituency, there were arithmetic errors in the completion of the forms for several polling stations; in the case of Kiangai Primary School in Ndia Constituency, Form 34A indicated the 3rd respondent's votes as 461, while Form 34B showed these as 467; there was a data-entry error in the case of Gem Constituency – with a variance between the total votes tallied, and the total valid votes.

109. The 3rd respondent made depositions to the effect that he had at all material times been the President of the Republic of Kenya, as well as the nominated Presidential-election candidate for the Jubilee Party, following the earlier General Election of 4th March, 2013; and he had been declared as President-Elect by the 1st respondent, upon the conclusion of the General Election of August 8, 2017.

110. Regarding the integrity of the 1st respondent in its conduct of the 2017 General Election, the 3rd respondent deponed that the IEBC was a reconstituted team, drawing its origin from the endeavours of the NASA coalition's predecessor, CORD, which in May 2016, had held nationwide rallies culminating in the removal from office of the former Commissioners, and the amendment of the *Elections Act*. The said protests led to a bipartisan Parliamentary process, which crystallized a new legal framework, attended with the resignation from office of the then Commissioners, and the appointment of the current Commissioners, who managed the elections of August 8, 2017.

111. The deponent averred that the Presidential Election of August 8, 2017 had been preceded by considerable litigation on electoral matters, in the superior Courts, promoted by the CORD or NASA coalition – notable instances being: *IEBC v Maina Kiai and others* [2017] eKLR; *NASA v IEBC and others*, Civ Appeal No 258 of 2017; *Republic v IEBC ex parte Gladwell Otieno*, High Court Jud Rev No 447 of 2017.

112. It was the 3rd respondent's perception that the Commission had complied with the law, in the conduct of the General Election of August 8, 2017 – especially with directions issued by the Courts in the various election-related cases. This perception is founded upon a certain set of facts, as follows:

    i. election materials, including biometric voter verification kits, and ballot papers, were timeously conveyed to all polling stations in the country at large;

    ii. the biometric voter-verification kits were successfully applied in all polling stations – and where they malfunctioned, prompt action was taken to repair them, or to operationalize in their place the prescribed complementary identification mechanism;

    iii. the voting process came up against no impediment, throughout the country; and voting closed on time, in the vast majority of polling stations; where voting began late, voters were allowed commensurate additional time to vote, before closure;

    iv candidates and/or their agents, and political-party agents, were allowed in, at the polling stations, to monitor the process of voting, tallying, recording and transmission of results;

    v presiding officers at each polling station not only submitted Form 34A in electronic form in the presence of the candidates and/or their agents, but submitted also the scanned copy of Form 34A to the constituency tallying centre – before the hard copies were taken to the constituency

tallying centre; and wherever there was a failure to transmit simultaneously the results data and the scanned image of the Form 34A at a polling station, the same was not in violation of any law, there being no statutory obligation in that regard;

vi. other than minimal human errors, which are to be expected, the data entered in the KIEMS, particularly with regard to votes received by the individual Presidential-election candidates, was accurate;

vii. nonetheless, the results electronically transmitted through KIEMS were only provisional, and did not constitute the final figures which were announced by the 2nd respondent; it is notable in this regard that the 1st respondent had made it clear that in the event of any difference between the alpha-numeric results sent though KIEMS and the results reflected on the Forms 34A, the results on the Forms 34A would prevail;

viii. at each constituency tallying centre, the Forms 34A received from the polling stations were collated by the returning officer, and a declaration in the Form 34B, reflecting the same, was signed by the returning officer and the candidates or their agents, verifying that the Forms 34A received were a true reflection of the vote-count recorded by the presiding officers at the polling stations;

ix. the signed Forms 34B were thereafter scanned and transmitted to the National Tallying Centre electronically;

x. all transmitted Forms 34A were held accessible to all parties; and all Forms 34B were printed and availed to the Presidential-election agents at the National Tallying Centre;

xi. the Presidential election results were declared by the 2nd respondent on the basis of the results declared in forms 34A at the polling stations, and tallied in Forms 34B at the constituency tallying centres.

113. The 3rdrespondent deponed that the petitioners had failed to set out the particulars of the non-compliance with the *Constitution* and the law which they alleged, by the 1st respondent; hence their charge had rested merely upon conjecture and speculation.

114. As to the petitioners' contention that there were discrepancies between the Forms 34A and 34B bearing the election results, the 3rdrespondent averred that no instances of such variance had been shown; and in his perception, even assuming such allegations were true, the discrepancies would stand as no more than clerical errors, such as would affect the election result, in view of the large difference separating the 3rdrespondent and the 1st petitioner in vote-strength.

115. The deponent averred that it would not have been possible for the 1st respondent to manipulate or distort the votes cast and counted in favour of the 3rdrespondent, considering the rigorous statutory procedures observed by the 1st respondent; and moreover, the final results of the Presidential election had been duly verified by the political parties and the individual candidates, through their agents – the effect being that such election results were a true reflection of the will of the voters.

116. In the 3rdrespondent's perception, the 1st respondent, in the conduct of the General Election of August 8, 2017, had all along acted in a lawful and transparent manner, as it undertook the tasks of various stages of the election – including early preparations; voting process; vote counting at the polling stations; tallying at the constituency and the national tallying centres; and the transmission of results at all levels. The mode of conduct of the election, in the 3rdrespondent's perception, was efficient, accountable, accurate and credible.

117. The 3rd respondent averred that he had garnered, at the Presidential election of August 8, 2017, a substantial vote, represented in the figure of 1,401,286 above the number obtained by the 1st petitioner. Such a margin, in the deponent's view, emphatically demonstrated the sovereign will of the Kenyan people, which merits safeguard by the process of the law.

118. The 3rd respondent denied the petitioners' contention, that he had contravened the law and the declared principles for the conduct of free and fair election, through the medium of intimidation, coercion, or improper influence on voters. He averred that such allegations have been made without any evidentiary basis. He deponed that the Presidential election had been conducted peacefully, and in accordance with the law, as well as best international practice.

119. The 3rd respondent deponed that he had difficulty in responding to accusations emanating from the petitioners and their witnesses which were imprecise and lacked particulars. While he found Dr Nyangasi's depositions to be in the category of such generalized statements, he none-the-less went on to deny that he corruptly influenced voters in the run-up to the election of August 8, 2017; he denied that he had used threats to get the support of local chiefs in Makueni; he denied being aware of any Cabinet Secretaries who abused their offices and accorded him electoral support, and invoked several other affidavits in support of his averments – those by Dr Kibicho, Mr Wakahiu, Mr Chirchir, and Ms Guchu.

120. Mr Chirchir, who had been the chief Presidential agent during the 2017 elections, deponed that the said elections had been free, fair, accountable, credible and verifiable. He deponed that the majority-vote cast for the 3rd respondent was a natural reflection of the general national voting orientation, which gave the 3rd respondent's Jubilee Party the greatest number of votes for the five other categories of elective posts also filled through the same General Election of August 8, 2017.

121. Denying the averments in Mr Kegoro's affidavit for the petitioners, the deponent averred that the processes of voting, collating and tallying of votes, and declaration of results, had been conducted in compliance with the provisions of the *Constitution* and electoral laws, and that the Presidential election results announced by the 2nd respondent on August 11, 2017 were accurate, and in compliance with the prescribed standards.

122. The deponent averred that, at the time of declaration of the Presidential election outcome, the 1st respondent's online portal had not yet transmitted all the results; and these results were being retrieved from Forms 34A arriving from polling stations, which results had already been transmitted to the constituency level; and the inconsistency in the data displayed was on account of Forms 34A, 34B and 34C that had not yet been transmitted on the online portal. He deponed that, as at August 21, 2017 at 8.14 am, the transmission rate was 99.99%; and this meant that the reported valid votes in the figure of 15,180,381 at the portal, did not include all valid votes from all the 40,883 polling stations of the country.

123. It was Mr Chirchir's averment that the violence witnessed several days following the declaration of results by the 2nd respondent, was occasioned by the demands by the petitioners that they be declared President-elect and Deputy President-elect on the basis that the petitioners were already in possession of what they believed to be the genuine results, secured from the 1st respondent's servers. Such a crisis, the deponent averred, had been deepened by a press conference in which the petitioners urged their supporters to reject such vote-count results as would later be announced, on the basis of a collation of results in Form 34C.

124. Mr Bryan Gichana Omwenga, a technology advisor employed by the Jubilee Party, averred in his affidavit that it was not true as deposed by Mr Ole Kina, that Forms 34A had been used to declare the

Presidential election results; rather, he deponed, it is the Forms 34B that provide the basis for declaring such results.

125. Mr Omwenga deponed that the process of electronically transmitting Presidential election results had not, in all cases, functioned without a hitch: sometimes, the scanned image would fail to load, or would delay in loading, especially in those parts of the country that lacked the 3G or 4G network coverage. It was his testimony that such network challenges had been anticipated – and so, the 1st respondent had duly sounded necessary caution. However, the deponent averred, regardless of whether the electronic system duly functioned, the Forms 34A would still be physically delivered at the constituency tallying centre; and the Forms 34A would then be used to tally the constituency votes: and thereafter the results would be entered in Forms 34B. The Forms 34B would then be transmitted to the National Tallying Centre – where the Commission would sum-up in Form 34C, which would be the basis for declaring the results. Consequently, the deponent averred, it was not necessary to have Forms 34A in possession during the summation of Presidential election results. It followed, therefore, that the early voting results transmitted on television screens were only provisional, as the authoritative results would be based on the constituency tally in Forms 34B.

126. Dr Karanja Kibicho, in his affidavit sworn on August 24, 2017 carries depositions focussed upon the statements made on behalf of the petitioners by Dr Nyangasi Oduwo. He averred that, in his capacity as Principal Secretary in the Ministry of Interior and Co- ordination of Government, he had in July, 2017, received information that some chiefs in Makueni County were unlawfully using their positions, as well as government facilities, to participate in political campaigns – whereupon he duly informed the 3rdrespondent, who issued the necessary warning to halt such a practice.

127. Ms Marykaren Kigen-Sorobit, the Jubilee Party's deputy chief executive officer, made depositions in response to the statements of Mr Wamuru for the petitioners. She averred that Mr Wamuru had cited non-existent polling stations, and claimed that the NASA coalition agents had been excluded from certain polling stations. The deponent annexed evidence in the form of Form 34A, showing that one Ms Eunice Muthoni Ndwiga had been the NASA agent at the Karurumo Youth Polytechnic polling centre, and had duly signed the form, without any reservation.

128. The deponent averred that Mr Benson Wasonga for the petitioners, had stated that there were anomalies in the declaration of Presidential-election results, though without specifying the particulars of such anomalies. She deposed that the summation of the total valid votes in the portal is 15,180,381; and that by Form 34C, the 1st petitioner's votes were 6,762,244 while those for the 3rdrespondent were 8,203,290.

129. Ms Winifred Waceke Guchu swore an affidavit on August 24, 2017, in her capacity as the Executive Director of the Jubilee Party, and deputy chief Presidential agent for the 3rdrespondent. She averred that the difference of 1,441,066 votes that separated the vote tallies of the 3rdrespondent and the 1st petitioner, was a strong enough signal by the voters, who were expressing their free and sovereign will; and she perceived it as relevant to the orientation in political choice, that the Jubilee Party won the majority of elective positions for the office of County Governor; Senator; Member of the National Assembly; Women's Representative in the National Assembly; and Member of County Assembly, all from the same General Election.

130. The deponent averred that the petitioners had, on August 10, 2017 written a letter to the 1st respondent, claiming to have in their possession Presidential election results which differed from the results being shown on the IEBC portal at the time; and just before issuing this letter, the petitioners had made widely-publicised claims that the results transmission system had been corrupted through hacking.

131. The deponent averred that the *Constitution* imposes no duty on the 1st respondent to use electronic systems of results transmission exclusively: the only mandate of the 1st respondent being, to ensure that the electoral system is simple, accurate, verifiable, accountable and transparent. She averred that section 44A of the *Elections Act* entrusts to the 1st respondent a statutory discretion to apply a complementary mechanism, where technology fails, or cannot meet the constitutional threshold of a free and fair election.

132. The deponent averred that upon the conclusion of voting, the counting exercise had begun, in the presence of all agents present, observers, police officers, and all authorized persons. She deponed that according to ELOG, an observer group which deployed one of the largest observer-delegates, the petitioners had a good representation of agents. She believed that even where such agents failed to sign the prescribed forms, such failure would not invalidate the vote-count results, in the light of the terms of regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*. She deponed that once the counting process at the polling station was concluded, the results were simultaneously dispatched electronically to the constituency tallying centre and the National Tallying Centre, and these were the results which then streamed onto the public portal at the Bomas of Kenya.

133. The deponent averred that since the 1st respondent did not own telecommunication network facilities, it relied on licensed service providers. Such service providers were under obligation, under Regulation 20 of the *Elections (Technology) Regulations, 2017* to provide and deliver services as may be requested by the 1st respondent. The 1st respondent, in consultation with the service providers, was required under regulation 21 of the said regulations, to identify and communicate in a timely manner, to all stakeholders, about the network service available at different polling stations, and in areas where there was no telecommunication network. Thus, the deponent averred, Parliament introduced section 44A, to provide a complementary mechanism for the identification of voters and the transmission of results.

134. The deponent averred that after the Court of Appeal decision in the *Maina Kiai* case, it had been confirmed that regulation 83 would be the complementary system applicable in respect of the transmission of election results, in the event of failure of the technological mechanism. The complementary mechanisms would take the form of the physical delivery of Forms 34A from the polling stations to the returning officers at the constituency tallying centre, while constituency Returning Officers would deliver Forms 34B to the National Tallying Centre in Nairobi.

135. The deponent made averments regarding the claim of irregularity in the elections appearing in Dr Nyangasi Oduwo's affidavit. She averred that in the overwhelming majority of the cases cited by Dr Oduwo, the statement had not revealed the features typified as irregular. She deponed that neither the *Elections Act* nor the *Election (General) Regulations* requires that Forms 34A should bear the 1st respondent's stamp; and the failure of an agent to sign the forms at the counting hall did not invalidate the results.

136. In response to allegations of discrepancies in Forms 34A and 34B, the deponent averred that no significant variations existed. She produced a report (exh. WG 13) which showed that after reconciling the discrepancies in the forms attached to Dr Nyangasi Oduwo's affidavit, the effect was that the petitioner's vote-tally improved by 595, while that of the 3rdrespondent decreased by 1199 votes.

137. The deponent respondent to the deposition from the petitioners' side, that the final tally of Presidential-election votes had not included the results for Nyando Constituency, where the 1st petitioner had obtained 60,715 votes while the 3rdrespondent obtained 214 votes: she deponed that such an oversight was not fatal, as, by Regulation 87 of the *Election (General) Regulations*, the 2nd

respondent has authority to declare the Presidential election results where, in the opinion of the Commission, results not yet received would not make a difference in the final results.

138. Responding to the claim by the petitioners that there had been a suspicious disparity between the Presidential vote totals and the totals for other elective offices in the same constituencies, the deponent exhibited an analysis of results from 94 constituencies – showing that the votes cast in one or more of the five other sets of elections, were more than the votes cast at those levels, for the Presidential candidates.

139. The deponent denied the allegation made in affidavits sworn for the petitioners, that the voting results streamed by the Commission had shown a constant 11% margin between the vote-count for the 1st petitioner and for the 3rdrespondent: in line with other depositions for the respondents, she stated that such a gap in vote-count percentages had kept shifting constantly.

140. The deponent responded to the averment from the petitioners' side, that the 3d respondent's electoral strength had benefited from running governmental actions which showed him in positive light, and thus constituted censurable undue influence. She averred that there was no requirement in law that on-going government programmes be suspended during the election period; and that, as article 35 of the *Constitution* safeguards the right to information, the required openness made a case for current government projects and activities to be held accessible to all.

141. In further support of the respondents' stand, is the affidavit by Davis K. Chirchir, sworn on August 24, 2017. He avers that the collation of election results in Form 34C and the announcement thereof, was done after all Forms 34B, save as regards Nyando Constituency, had been electronically transmitted to the National Tallying Centre. He deponed, in line with the depositions of Ms Guchu, that the voting results for Nyando Constituency which had not been collated at the time of results declaration, had no effect on the outcome.

142. The deponent averred that, quite contrary to the reprobation of the vote-result transmission measures taken by the Commission, the actions taken had been based on the authority of the law. This transmission question had already featured in a High Court decision (*National Super Alliance v IEBC and others*, Petition No 328 of 2017) and a Court of Appeal decision (*National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission and 2 others*, Civ Appeal No 258 of 2017), where it was held that the 1st respondent had duly put in place a complementary mechanism in terms of section 44A of the *Elections Act, 2011* and that it had, with public participation, established regulations to operationalize the said statutory provision. In this context, the deponent averred that any failure of the technological devices would not impair the electoral process, or become the basis for invalidity of the electoral process.

143. The deponent averred that the petitioners' claim that the security of the integrated electoral management system (KIEMS) had been compromised, was not substantiated with any transcripts of video clips, or any other material reference.

144. The deponent averred that the 1st respondent had kept in full control of its electronic transmission system at all times, and that no evidence showed it to have ceded its management or authority in that regard, to any third party. He deponed that it was not true as alleged, that the transmission of results from 11,000 polling stations had been compromised – especially as none of the petitioners had contested the contents of Forms 34A from the relevant polling stations. He further averred that it would not be true, as alleged by the petitioners, that a total of 11,000 polling stations would represent as much as 7,700,000 voters, given that the number of registered voters per polling station varied from one to a maximum of 700.

145. The deponent deposed that it was not a factual statement coming from the petitioners, that the IEBC had the election results streamed on the website, represent a constant percentage of 54% and 44% respectively, for the 3rd respondent and the 1st petitioner: instead, the variation between the two had oscillated between 27.06% and 9.22% in favour of the 3rd respondent.

146. The deponent's perception, on the electoral process as a whole, was that, the 3rd respondent had been duly elected in a free, fair, credible and valid election conducted on August 8, 2017.

D. Does The Petitioners' Case Rest on Fact? Have They Discharged the Burden of Proof? Did the Respondents Discharge the Evidential Burden? Who is Favoured by the State of the Evidence?

147. The objective merits of this case must be drawn from the foundation of fact. I will subsequently revert to the vitality of fact, in the configuration of jurisprudence – the juristic and scholastic preoccupation with the essence of law, and its defining role in social, economic, political, religious or other crucial human engagements.

148. Fact is thus defined: Something that actually exists; an aspect of reality... (*Black's Law Dictionary*, 8th ed (Bryan A Garner, ed) (St Paul, MN: West Group, 2004), p628).

149. Fact, therefore, is as reliable as the concrete foundations of a skyscraper; and it is to be counted upon as a basis of objectivity and truth. The practice of law, and more particularly, the motions of the judicial process via the minds and hands of Judges – society's trustees for justice – are invariably lodged upon the pillars of fact, this being proffered through evidence.

150. The merits of the petitioners' case stand to be tested in the first place through evidence. What evidence did the petitioners adduce" And did they discharge their initial burden of proof, and complete it with an effective clearance of the constant legal burden resting upon them"

151. The evidence scenario speaks for itself, as may be summarized here:

i. the petitioners resort to broad assertions of alleged wrongs on the part of the 1st and 3rd respondents;

ii. such alleged failings are lined up against the *Constitution*'s prescription of certain values, principles and norms;

iii. the petitioners' statements are often plaintive, and inviting the Court to ascertain their true scope, in terms of legality and propriety in the measures taken by the respondents;

iv what the petitioners present as fact, relates primarily to the electronic transmission of election results, rather than the physical conduct of voting and enumeration of ballot;

v and what the petitioners present as fact, in relation to polling day, and to the count of votes, has been responded to in substantial detail in the consistent evidence emanating from the respondents;

vi. the deponents on the respondents' side have responded to the statements from the petitioners' side: they have given testimony describing their actions in the conduct of the General Election of August 8, 2017, as regards the tally and count of votes, and the recording, transmission and declaration of results. The respondents have in the process, explained the actions they took just before, in the course of, and in the aftermath of voting day – explaining such impediments as affected the electoral process, and invoking specific provisions of the *Constitution* and the law, by virtue of which they had acted.

152. Does one behold a clear evidence-scenario, such as ought to lead a duly- perceptive Court in some particular direction, of course, barring some weightier consideration of justice which compels a different course"

153. From the evidence, the petitioners do not seek an ascertainment of the true number of votes cast for the 1st petitioner and for the 3rdrespondent – even though these, as required by law, had been delivered to the Supreme Court, and are kept in the custody of the Registry. The petitioners have focussed the burden of their case on apprehensions as to the perfect security of the transmission system, whereby the election results had earlier been relayed, before the physical records were received, organized and kept by the 1st respondent. They have claimed an improper tallying of votes from different polling stations, though this has been denied, on the basis of specific evidence, and exhibits showing the contrary. They have spoken of improper conduct during election, on the part of certain government officials, said to have unduly benefited the 3rdrespondent's electoral platform – but these claims have been denied by witnesses for the respondents. The veracity of such averments have been brought to question by the detailed testimony of the respondents' witnesses, Dr Kibicho and Mr Wakahiu. The attributions to the 3rdrespondent of improper influence, intimidation and corruption, therefore, are not just unsubstantiated, but also fail to meet the high standards of proof required for criminal charges.

154. The petitioners assert, in broad terms, that the 1st respondent, in the conduct of elections, did not abide by the terms of article 86 of the *Constitution*, which requires elections to be conducted in a manner that is simple, accurate, verifiable, secure, accountable and transparent [article 86(a)]. Yet the use of the manual ballot paper would clearly meet such conditions: the voter has no difficulty in marking it; its reality and visibility is not in doubt; it is verifiable, as a check so readily reveals the voter's exercise of his or her right of choice; it is secure; it is transparent; it is accountable.

155. The votes cast had been announced at the polling stations, where they were tabulated, and results announced. From that initial ascertainment of the voting situation, the results were collated at the constituency tallying centre, and announced at that level. The 1st respondent thereafter provided the Forms 34A from all polling stations; Forms 34B from constituency tallying centres; and Forms 34C at the National Tallying Centre – which was signed by all the Presidential election agents, save for the petitioners' agent. Thus, from the evidence in this Court's record, the claim of non-compliance with the terms of article 86 of the *Constitution*, does not stand up.

156. More substantial and more persuasive evidence, in my perception, has emanated from the respondents side. Several examples of such evidence may be set out here:

    i. Mr Chebukati, who had been the Returning Officer for the Presidential Election, gave testimony that the verifiable, physical count of the votes cast showed that the 3rd respondent had garnered 8,203,290 votes, as against the 1st respondent who received 6,762,224 votes; and these results were duly recorded in Form 34C, which was itself abstracted from the Forms 34B forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote tallies.

    ii. Mr Chebukati deponed that the primary results-declaration Forms (Forms 34A and 34B) had in no way been compromised, as regards their accuracy and overall integrity. He deposed that the Forms 34B had been duly forwarded from the constituencies to the National Tallying Centre, for verification with Forms 34A and for tallying.

    iii. Mr Chebukati deponed that the Commission had taken all the necessary steps to ensure that the General Election in all its components, complied with the constitutional requirements of simplicity, accuracy, verifiability, security, transparency and accountability.

iv Mr Chebukati's averments are specific, matter-of-fact, and in line with vital evidence emanating from other deponents on the respondents' side. For instance, Mr Chiloba, the 1st respondent's Chief Executive Officer, confirms that the tallying and transmission of results took place at the polling stations, after which the vote-count was collated and declared at the constituency tallying centre and the National Tallying Centre. Mr Chiloba gave a clear account of the transmission system used by the 1st respondent, as well as of the context and modalities of the recently-introduced Kenya Integrated Electoral Management System (KIEMS).

v Mr Muhati in his affidavit, gave still more details on the working of the electronic transmission system – an account that was entirely consistent with the averments of both Mr Chebukati and Mr Chiloba.

vi Specific and credible evidence, in relation to the factual situation attending the conduct of the General Election of August 8, 2017, is recorded by other deponents, such as Ms Immaculate Kassait, the 3rd respondent, Mr Wakahiu, Ms Guchu, Mr Chirchir, Dr Kibicho, Mr Omwenga, and Ms Kigen-Sorobit.

157. Judges entertaining the competing claims of parties, constantly have to form an opinion, and, from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth. That has to be done in this instance. The factual accounts of the respondents are firm and gripping. They are credible, and represent the substantial truth. However, no account of equal strength is beckoning from the other side.

158. I cannot but conclude that, on facts conveyed through evidence, in support of the petitioners' case, they are on weak grounds, as compared to the respondents. In establishing the merits of their case, the petitioners had both the ultimate legal burden of proof, and the shifting evidential burdens falling upon them. They did not, in my appraisal, discharge even the early evidential burden – the effect being, in the end, that they made no valid case against the respondents.

159. The law of burden of proof, at the beginning and in the course of trial, has been the subject of scholarship. Dr HF Morris in his learned work, *Evidence in East Africa* (London: Sweet & Maxwell, 1968) [p 134], thus considered this issue:

> The distinction is commonly made by commentators on the law of evidence between the use of the term in the sense of the burden which lies throughout the trial of establishing a case – usually called the general burden of proof – and in the sense of the onus of producing evidence at any particular stage during the trial. There is a general burden of proof, which lies throughout the trial upon one of the parties and never shifts to the other, to establish the case....In a civil case this burden lies upon the party who would lose if no evidence at all were to be produced, that is to say, in order to win he must establish his case by a preponderance of evidence and, coupled with the onus of discharging this burden, is his right to begin.

160. Such a position is reflected in Kenya's *Evidence Act* (cap 80, Laws of Kenya), which thus provides [section 107]:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

E. The Petition: Any Other Basis of Claim?

161. How is the Court to be guided in relation to the petitioners' claims that

> " the Presidential election was so badly conducted, administered and managed...that it failed to comply with the governing principles established under articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163, and 249 of the *Constitution*...; the *Elections Act*... and the regulations made thereunder including the *Electoral Code of Conduct*....; and in relation to the assertion that [t]he massive, systemic, systematic and deliberate non-compliance with the *Constitution* and the Law goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya, Undermines the foundation of the Kenyan system as a sovereign republic where people are sovereign under article 4 of the *Constitution*, and severely undermines the very rubric [sic] and framework of Kenya as a nation State?"

162. How is the court to be guided in respect of the petitioners claims that:

> " [t]he Presidential Election contravened the principles of a free and fair election under article 81(e) of the *Constitution* as read with section 39 of the *Elections Act*...; that [t]he entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre...and from the constituency tallying centres to the NTC...was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt...[and] substantially compromised and affected the requirement of free and fair elections under article 81(e)(iv) and (v) of the *Constitution*; that [t]he data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS at the individual polling stations; that [t]he Presidential Election was not administered by the 1st respondent in an impartial, neutral and accountable manner as required under article 81(e)(v) of the *Constitution*; that the 1st respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results, which the 1st respondent was aware had no legal or factual basis, as well as other claims similarly couched"

163. Such claims invoke the question as to the 1st respondent's compliance with the law in every detail, though without necessarily adverting to the objective facts, as borne by the evidence. The Court has to consider whether such contentions should be a basis for annulling the outcome of the Presidential election of August 8, 2017. This takes us to the line of jurisprudence now established, in electoral matters.

F. Kenya's Jurisprudence in Election Matters

a. The terms of the *Constitution*

164. The *Constitution of Kenya, 2010*, which represents the people's much laboured initiatives to find a pacific, rational and humane regulatory structure for governance, bears certain principles, and it safeguards certain rights and values in unambiguous terms. It safeguards the rule of law, democracy and participation of the people [article 10(2)(a)]. It safeguards political rights, in detailed terms which include the provision [article 38(3)(b) and (c)] that every adult citizen has the right, without unreasonable restrictions, to vote by secret ballot in any election; and to be a candidate for public office...and, if elected, to hold office.

165. Such sacrosanct safeguards have to be so interpreted as to accord them true operational meaning. The same *Constitution* entrusts the interpretive mandate to the courts, to which, for the faithful discharge of the task, the voters have entrusted their adjudicative sovereignty [the *Constitution*, article 1(3)(c)].

166. How are the courts to interpret such rights and safeguards" The answer is provided in the *Constitution* itself. Article 20(3) thus stipulates:

> In applying a provision of the Bill of Rights, a court shall –
>
> ...
>
> b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

And if it is the Supreme Court that is undertaking such interpretation, then, just like the other Courts, it is under obligation [article 20(4)(a)] to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

167. The Supreme Court, just like the other courts, in the course of performing its safeguarded interpretive mandate, is under obligation, certainly in the straightforward case, to be guided by the principle that justice shall be administered without undue regard to procedural technicalities [article 159(2)(d)], and the principle that the purpose and principles of this *Constitution* shall be protected and promoted [article 159(2)(e)].

168. The *Constitution* enjoins all courts, in the exercise of their interpretive mandate, to adhere to certain well-defined paths, these being:

a. a manner that promotes [the *Constitution's*] purposes, values and principles [article 259(1)(a)];

b. a manner that advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights [article 259(1)(b)];

c. a manner that contributes to good governance [article 259(1)(d)].

169. The foregoing prescriptions, in the context of the exercise of the people's electoral rights as took place on August 8, 2017, are the firm foundation upon which I have founded my dissent from the majority opinion, in this critical election petition. The majority decision, in my considered opinion, has not only done short shrift to the governing terms of the *Constitution*, but also failed to adhere to the clear path of the law which has evolved, including this court's precedents on electoral law.

b. The Electoral Law

170. Just as with the *Constitution* itself, so with the regulatory set of norms, including the statutes and regulations: they all fall to the interpretive mandate of the Courts. This fact, on the plane of legal scholarship, ought to be apprehended as the inherent common law chain that runs through the motions of judicialism, in Kenya, as in so many other countries of the common law world. The long-established rationales of the judicial method remain with us today: and they ordain the espousal of the doctrine of precedent – a universal concept which, indeed, is expressly replicated in the *Constitution of Kenya, 2010*.

171. Thus, this *Constitution* stipulates:

> All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court [article 163(7)].

The *Constitution* prescribes competence in common law principles as prerequisite in the appointment of Judges, in the following terms [article 166(2)]:

> Each judge of a superior court shall be appointed from among persons who –
>
> (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.

172. The common law interpretive method, is the constant milieu within which the application of Kenya's electoral law, beginning from the *Constitution* to the subsidiary legislation, is to be apprehended.

173. Once the Judge accomplishes the task of interpreting the electoral law as provided in the *Constitution*, the Judge comes down to a whole set of statutes and regulations – the latter category comprising –

i. the *Supreme Court Act, 2011* (Act No 7 of 2011);

ii. the *Appellate Jurisdiction Act* (cap 9, Laws of Kenya);

iii. the *Elections Act, 2011* (Act No 24 of 2011);

iv the *Election Campaign Financing Act, 2013* (Act No 42 of 2013);

v the *Election Offences Act, 2016* (Act No 37 of 2016);

vi. the *Independent Electoral and Boundaries Commission Act, 2011* (Act No 9 of 2011);

vii. the *Political Parties Act, 2011* (Act No 11 of 2011).

174. How has the court interpreted such laws? Where is the Supreme Court's earlier work recorded, in that regard? And since the applicable law is the pertinent one for each electoral dispute, what is the current state of the law? How does such law apply in relation to a petition before the Supreme Court, in relation to the General Election of August 8, 2017? Does such law affect the Presidential election of that date, differently from the manner in which it affects the other five sets of elections of the same date?

c. The Rationale of the Case Law

175. Case law, the law as interpreted and applied by Judges, on the recorded merits of each matter, has for ever been the cornerstone of the common law. It is precisely the common law's focussed and authentic appraisal of the facts of each case, that made it ever so compelling, as a defining strand in the judicial contribution to progressive, modern governance in conditions of democracy.

176. Jurisprudential confirmation for the foregoing standpoint is found in the work of a distinguished Justice of the Supreme Court of the United States of America, Benjamin Nathan Cardozo (1870-1938) [*The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp 28-31]:

> [T]he problem which confronts the judge is...a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop....Cases do not unfold their principles for the asking. They yield their kernel slowly and painfully....
>
> The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the

community; this I will call the method of tradition; along the line of justice, morals, and social welfare, the mores of the day; and this I will call the method of sociology.

177. Such challenges of adjudication dictate that, the gains of the past, authoritative interpretation by a discerning and responsible court, be perceived as representing a precious juristic civilization; and these are for keeps, as a reference-point for the conscientious and effective resolution of later disputes.

178. Now the judicial approach in the sphere of electoral law is obviously inseparable from the *Constitution's* values and the principles of democracy. It thus behoves us to pay due deference to the fundamentals of the sets of cases that have, in the last several years, been determined by this Supreme Court, on the subject of elections – including Presidential elections. Such is, quite conclusively, the most dependable course of the law that this country's lawyers must engage, in the first place.

d. Case Law: Illustration

179. In *Raila Odinga and others v Ahmed Issack Hassan*, Sup Ct Petition No 5 of 2013, this court took into account the nature of the governance mandate under the *Constitution*, and, in response to a challenge to the integrity of the Presidential election, laid down a set of guiding parameters. The court thus remarked [para 298]:

> An alleged breach of an electoral law, which leads to a perceived loss by a candidate...takes different considerations. The office of President is the focal point of political leadership and, therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

180. Flowing from the crucial majoritarian factor in the filling of the primary office of the Executive branch, the court, in that case, defined its orientation as regards the resolution of an electoral dispute, such as the one which has come up before us [para 299]:

> As a basic principle, it should not be for the court to determine who comes to occupy the Presidential office; save that this court, as the ultimate judicial forum entrusted under the *Supreme Court Act*, 2011 (Act No 7 of 2011) with the obligation to assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya' [section 3(a), *Supreme Court Act 2011* (Act No 7 of 2011)], must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in the compliance with the law regarding elections.

181. The foregoing principle, in this Supreme Court's perception, dictated that even though the court must uphold the clear popular, electoral choice, it will hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of [the Presidential] office, [in case] there is any major breach of the electoral law... [para 300].

182. The foregoing point, regarding the Supreme Court's obligation of vigilance, is expressed still more clearly [para 301]:

> The Judiciary in general, and this Supreme Court in particular, has a central role in the protection of the *Constitution*, and the realization of its fruits, so these may inure to all within our borders; and in the exercise of that role, we choose to keep our latitude of judicial authority unclogged: so the Supreme Court may be trusted to have a watchful eye over the play of the *Constitution* in the fullest sense. Even as we think it right that this court should

> not be a limiting factor to the enjoyment of free political choices by the people, we hold ourselves ready to address and to resolve any grievances which flow from any breach of the *Constitution*, and the laws in force under its umbrella [emphasis supplied].

183. Such guiding principles were clear enough, and, in my perception, were attended with special merit. These principles, today, represent the vital backdrop to Kenya's electoral law.

184. In the foregoing case, this court, suo motu, undertook a sample re-tallying of votes, coming to the conclusion that,

> "by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office" [para 303].

The court, while being mindful of the several imperfections noted during the sample re- tallying, mainly directed its mind to the emerging majoritarian intent, asking itself the following question, before upholding the electoral outcome [para 304]:

> Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent" It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.

185. The precedent-setting decision was distinctly endorsed by subsequent electoral dispute cases: and it must now be regarded as the pillar of the scheme of electoral law in Kenya – founded upon a beneficent interpretation of the *Constitution*, and of the whole body of electoral law. This point, for good measure, is consistent with the comparative adjudicatory experience in election matters. As the retired Israeli Justice of the Supreme Court, Aharon Barak [*The Judge in a Democracy* (Princeton: Princeton University Press, 2006), p 200] observes:

> Comparative law can help judges determine the objective purpose of a constitution. Democratic countries have several fundamental principles in common. As such, legal institutions often fulfil similar functions across countries. From the purpose that one given democratic legal system attributes to a constitutional arrangement, one can learn about the purpose of that constitutional arrangement in another legal system. Indeed, comparative constitutional law is a good source of expanded horizons and cross-fertilization of ideas across legal systems.

186. On such a basis of principle, the law and practice in the United Kingdom of Great Britain may be cited, for its relevance in the instant case. An apt summary of that position was made by a distinguished scholar, Stanley A de Smith, who was Downing Professor of the Laws of England in the University of Cambridge [*Constitutional and Administrative Law*, 3rd ed (Harmondsworth: Penguin Books, 1977), p 252]:

> Petitions based on ...irregularities at...elections are now extremely rare; this is partly because very close contests are uncommon and even if the court finds that irregularities were present it may determine that the result ought to stand since they were unlikely to have affected the results [emphasis supplied].

187. Such a state of the law is reflected in yet another decision of this court, *Munya v Kithinji & 2 others*, Sup Ct Petition No 2B of 2014, in which it was thus held [paras 217, 218]:

> If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on the ground of irregularities.
>
> Where, however, it is shown that the irregularities were of such a magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.

188. On the same principle, the Supreme Court thus held, in *Kidero & 4 others v Waititu & 4 others*, Sup Ct Petition No 18 of 2014 [2014] KLR-SCK [para 341]:

> ...generally, an election can only be declared void if that election did not substantially comply with the written law... – in this regard, the *Constitution*, the *Elections Act*, and the Regulations made thereunder, and any other relevant law; and, where there is substantial compliance with the written law in an election, the irregularities must indeed have affected the result of the election for that election to be invalidated.

189. Yet another authoritative decision of this court is *Obado v Oyugi & 2 others*, Sup Ct Petition No 4 of 2014; [2014] KLR – SCK, in which it was thus held [para 139]:

> Although the Court of Appeal cited the decision of this court in the Raila Odinga Case, it did not apply the principle that a court should consider the effect of the irregularity in the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and the results of the election are unaffected [emphasis supplied].

190. The Supreme Court ever so clearly defined the operative electoral law, on the basis of the *Raila Odinga* petition of 2013, in the subsequent petitions. The Court was scrupulously affirming the synchrony of two express edicts of the *Constitution of Kenya, 2010* – in article 1(3) and article 159(1): the first defining the sovereignty of the people, and the second delimiting the judicial authority. By article 1(3), the people's sovereign power is partly delegated to the judiciary and independent tribunals [article 1(3)(c)]; while article 159(1), which constitutes the judicial authority, thus provides:

> Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this *Constitution*.

191. The foregoing principle was constantly reflected in the Supreme Court's decisions rendered in 2013 and after – as is exemplified in *George Mike Wanjohi v Steven Kariuki & 2 others*, Sup Ct Petition No 2A of 2014, [2014], eKLR. In that case the court thus pronounced itself [para 131]:

> This court should in principle, not substitute a sitting [elected representative] with another, without allowing the people to execute their political rights, as enshrined under the *Constitution*. To do otherwise would be to undermine the values and principles of democratic governance that bind us, in the execution of our judicial authority. It would also lead to an upset in the composition of the elected [office-holders] who bear the people's sovereignty, and would stand out as a clear disregard of the founding provisions of the *Constitution* [emphasis supplied].

192. In hindsight, the foregoing passage in the *Mike Wanjohi* case touches on the very nub of judicial responsibility, as it relates to the sovereignty of the people, who established the totality of the current governance system, through the *Constitution of Kenya, 2010*.

193. It hence follows that the general guiding path for the disposal of electoral disputes such as the instance one, could not have been stated more conscientiously and more effectively than it was in that case, thus [para.110]:

> By the design of the general principles of the electoral system, and of voting, in articles 81 and 86 of the *Constitution*, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid until the contrary is shown....

194. A consideration of the merits of an electoral petition such as the instant one, therefore, takes one straight back to the evidence tendered; and here there is an inseparable link between constitutional principle, and the pillars of evidence. Since, as I have already determined, the petition herein fails on the pillars of evidence, it becomes clear that the majority decision lacks validity from the standpoint of governing principles.

195. Evidence is the bearer of tell-tale signs of electoral victory, or of electoral defeat. The physical form of the ballot is directly visible, and is readily subjected to the test [*Constitution of Kenya, 2010*, article 86] of simplicity, accuracy, verifiability, security, accountability and transparency. This physical evidence, quite clearly, is the natural starting point in ascertaining who has won an election: and hence the majority Judgment would have been expected to begin from a foundation of numerical assessment, before invoking any other parameters. For such other elements are essentially subjective, and are inherently destined to compromise the sovereign will of the voters which the *Constitution* expressly safeguards.

196. Only from such a foundation of the physical vote-count, does one secure a proper viewpoint for the other dimensions of the electoral process, including the credibility of the entire operation. Indeed, in view of the relative strength of the evidence emanating from the two sides, the only objective conclusion would have been that, within the measure of the possible, the conduct of the election by the 1st respondent was entirely credible.

197. The emerging principle, regarding the initiation of claims by way of election petitions, is that all proof should commence from the foundation of the physical ascertainment of voting records. All other claims then, must revolve around that pillar, and must establish that some gross impropriety had affected the electoral process, and should lead to its annulment. I am constrained to propose this scheme as a proper agenda for the reform of Kenya‘s electoral law. Such legal reform would need to institute all appropriate security back-ups around the physical records, and would ensure the establishment of safety- nets around the votes cast.

G. Issues of Broad, and Frequent Policy-making, Politics, and Exigency: Jurisprudential Questions

198. The instant case has evoked intense national debate, involving professionals, politicians, observers, and others – the consequence being a justification, in this Judgment, for a clarification of the implications of judicial intervention in situations that entail the legitimate exercise of the citizen‘s momentary inclinations, on matters of politics and daily exigency. Falling squarely within such a category are the people‘s legitimate preferences. What is the proper stand for the Supreme Court, in such matters" How does the Judge‘s requisite approach relate to the majority decision, in the instant petition" My consideration of such issues confirms my position in this dissenting Judgment.

199. By article 160(1) of the *Constitution* –

> the Judiciary...shall be subject only to this *Constitution* and the law and shall not be subject to the control or direction of any person or authority.

200. The *Constitution*, while safeguarding the Judiciary's adjudicatory space, entrusts certain governance-spaces to other agencies – primarily the Legislature and the Executive: and this is the basis for the constitutional principle, the separation of powers – a principle the validity of which, in the Kenyan constitutional order, has not ever been seriously contested.

201. The Judiciary is the trustee of the people's sovereign power [article 1(3)] with regard to the interpretation and application of all the terms of the *Constitution*, and of all other law. Clearly, a substantial initiative in the motions of the entire sphere of law, legality and jurisprudence, has been reserved to the courts.

202. As the outer limits of such reserved competence has not been specified in express terms, it follows that the frontier areas of such power, at least potentially, admit of conflicting interpretive approaches. But, as already noted earlier, the proper trustee of the boundary- delimiting ethics must be the Judiciary – an arm of the state which is endowed with the special facility of juristic values; objective criteria of conflict resolution; a placid mien, such as facilitates professionalism, justice and fairness; and the benefit of access to relevant comparative lessons.

203. The Judiciary, in the exercise of such an exclusive mandate, ought to enter upon its task by taking into account the uncontestable reserved remits of the other agencies of the state. The people, in exercise of their sovereign power, have expressly delegated some of that power to Parliament and the legislative assemblies in county governments [article 1(3)(a)]; and they have exclusively entrusted some of their sovereign powers to the national executive and the executive structures in the county governments.

204. There is no basis for abridging Parliament's power and mandate; for the *Constitution* [article 94(1)] prescribes that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

205. Similarly there is no basis for detracting from the general character of executive power, article 129(1) prescribing that Executive authority derives from the people of Kenya and shall be exercised in accordance with this *Constitution*.

206. Unlike the Judiciary, the work-orbit of which is lined up with laws, principles and jurisprudential yardsticks, both the Legislature and the Executive, in view of their electoral and policy foundations, may quite properly be described as political agencies. They relate to the largest number of Kenyan people, in a close and direct proximity; they influence and are influenced by, the momentary concerns which, therefore, justify the conception and espousal of policy and politics conceived and executed within short time-frames.

207. This is in stark contrast with the relationship between the ordinary citizen, and the courts of law: and if the courts overlook this reality, it will constitute a groundswell for failure of judicial responses in line with the professional, juristic remit.

208. The prolonged history of judicialism, in all democratic countries, demonstrates that the proper role of the courts has been professional, judicial, and founded upon cardinal principles which draw lines of correctness and propriety in situations of dispute, so as to secure a certain optimum level of safeguards for the rights of the citizen. Beyond that level of safeguard and fulfilment, it falls to the political agencies to pursue constantly, such policy stands as will satisfy, and give fulfilment to the national populace.

209. On these principles of institutional disposition, it follows that it falls not to the court, to make undue haste in assuming the policy mantle; a stampede is destined not only to disrupt the delicate institutional balances, but to weaken the reliable jurisprudential bedrock, which assures the citizens of an ultimate governance safety-net.

210. In the context of the foregoing reasoning, it follows, in my view, that the majority on the instant petition, has made a precarious move, that is destined to prove detrimental to the dependable setting of relations among essential governance entities – to the detriment of the rights and legitimate expectations of the citizen.

211. The majority on the Bench thus pronounced itself:

(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), 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*....

(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 Judgement of the court...

(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.

212. From such findings, the majority went on to make orders nullifying the election results, as follows:

(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....

213. Such a determination is in clear departure, in the first place, from the state of the evidence. As already indicated herein, the petitioners' case rests on just one dimension of the electoral process – electronic transmission of results. Moreover, the bulk of the assertions made as regards transmission, is just that, contentions, with only limited testimonial ingredient: it is hardly evidence – what *Black's Law Dictionary*, 8th ed (Bryan A Garner) (St Paul, MN: West, 2004) (p 595) thus rightly depicts:

> Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact....
>
> On the other hand, evidence in the true sense, a set of probative facts, is what came forth from the respondents: and its tenor and effect was that, there were only limited instances of failure of results-transmission; only limited cases of irregularity in vote-

addition and tabulation, not affecting the ultimate compilation and summation; the lawful complementary device was put in service, in cases of failure in the transmission process; all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry, and could have been re-counted, to confirm that the 3rd respondent had been properly declared as the President-elect.

214. Thus, on basic elements of trial, the essence of burden of proof was undischarged; and it was, in effect, a reversal of the conventional process of judicial inquiry and determination – making a finding in favour of the petitioners.

215. Secondly, the majority would appear to have taken leave of the juristic obligation to interpret the terms of the articles of the *Constitution* invoked by the petitioners; the obligation to break these down, so as to ascertain the discrete demands of the law; the obligation to consider the pertinence of the specific statements of evidence from the petitioners, such as would answer to the constitutional and legal principles invoked.

216. Thirdly, the majority departed, as it would seem, from the placid frame of the juridical setting, and assumed direct responsibility for the immediate calls of policy or politics – by altering the design of momentary, popular inclinations which are, by the terms of the *Constitution*, legitimate in all respects.

217. The damage such as may flow from such a deportment, is not yet plain to all, as is quite clear from common perceptions recorded in the media, ever since the delivery of the majority Judgment. Alexander Chagema [The Standard, September 7, 2017, p 15] wrote of *A Little Shock Therapy from the Supreme Court*. *Wycliffe Muga* [The Star, September 7, 2017, p 20] thus wrote:

> [When] I listened to the Supreme Court ruling on the presidential petition [...] I knew very well that I was watching history being made.

The Nairobi Confidential of 4-10 September, 2017 [p 2] thus remarked:

> The Supreme Court ruling that nullified the election of [the 3rd Respondent] on Friday has thrown Kenya into one of the most complex and expensive political situations.

And *Decky Omukoba in The Standard*, September 11, 2017 [p 14] thus wrote:

> What we have experienced as a nation is definitely a shift! The recent ruling by the Supreme Court to nullify a presidential election has never happened before in the history of this nation, or even this continent but it is undoubtedly a political and judicial shift that has risen from years of tectonic plates of power pushing on each other within a constricted democratic space.

218. The general perception associates the majority Judgment with an overtly political inclination. This, precisely, is the Judgment's obvious departure from the professional plane of jurisprudence, as the proper platform of the judicial arm of the state. The majority position would, of course, make history, emanating from a basic principle aptly depicted by the distinguished historian, Professor Bethwell A Ogot [*History as Destiny and History as Knowledge: Being Reflections on the Problems of Historicity and Historiography* (Kisumu: Anyange Press, 2005), p 8]:

> To tell the story of a past so as to portray an inevitable destiny is for humankind, a need as universal as tool-making. To that extent, we may say that a human being is, by nature, historicus.

So, by the magic jolt of September 1, 2017, general political history would have been made, even though, as I maintain, this represents a departure from the jurisprudence of democratic systems, which so much cherishes the separation of powers, and which so studiously commits the Judiciary to the professional task of line-drawing, to ensure the sustenance of regular safeguards of the *Constitution* and the law, for all.

219. In future inquiries, it may be established that the law, as advanced by its interpreters and scholars, has its anchorage on the adjectival plane, from which it addresses the primary motions of social, economic and political activity – agriculture, architecture and engineering, land development, seafaring, sport, transport and communications, and others. The law stands to be formulated, moulded, interpreted and applied, not for its own sake and in its own cause, but in relation to the said primary motions, which preoccupy citizens and communities.

220. Thus, in the instant case, the electoral process had taken place, and now, its motions had to be matched to the law as interpreted. By the interpretive scheme of the law, it does not stand the test of rationality or efficacy, to merely allege some unspecified impropriety in the electoral process. The relevant clause of the *Constitution* must be taken through an analytical process, and subjected to definite categorizations which crystallise the specific concepts and elements said to have been violated. By this criterion, most of the contentions of the petitioners in the instant case, on account of their broad generality, would not stand up. The interpretive task, as it thus relates to the adjectival essence of the law, is inherently professional – and is reflected in the concept of jurisprudence, which deals with thought about law [RWM Dias, *Jurisprudence*, 4th ed (London: Butterworths, 1976), p 17].

221. The Court, in the normal performance of its role, under the *Constitution*, is engaged in the specialized process of jurisprudence. It follows that the more immediate, urgent and primary motions of basic policy-making, inherently devolve to the political arms of the State, rather than the more specialized entity which is the Judiciary.

222. This Judgment, apart from the occasion it proffers for a reflection on the law relating to elections, is a basis for a rethink on law as a concept, and as a professional engagement, defined in a regulatory framework applicable to the citizens' primary undertakings. From such a platform, it emerges that the law's design in the hands of the judge, the lawyer and the scholar, rests in unity with the fundamentals of constitutional governance – an important element of which is the independence of the judiciary. On the basis of this principle, it is to be recognized that the judge's proper mandate lies several removes from the citizen's momentary policy and political desires and expectations – which generally devolve to the state's political agencies. By this perception, the judge's proper remit has its focus upon professional engagement, founded upon objective scenarios, or criteria.

223. Such a perception of law and legal process, in retrospect, will be found to be in conformity with the analytical schemes that mark the dedicated works of great jurists of the past. Definite exemplars, in this regard, are the following jurists:

    i. Lord Mansfield (1705-1793) – see WS Holdsworth, *Lord Mansfield*, The Law Quarterly Review, Vol 53 (1937), pp 221-234; Edmund Heward, Lord Mansfield, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd., 2011);

    ii. Professor Frederic William Maitland (1850-1906) – see OW Holmes, *In Memoriam: Frederic William Maitland*, The Law Quarterly Review, Vol 23 (1907), pp137-138; Robert L Schuyler (ed), *Frederic William Maitland Historian: Selections from His writings* (Berkeley: University of California Press, 1960);

iii. Lord Atkin of Aberdovey (1867 – 1944) – Atkin, *Law as an Educational Subject,* Journal of the Society of Public Teachers of Law (1932), pp 30-58; Geoffrey Lewis, *Lord Atkin*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd, 2008);

iv Justice Oliver Wendell Holmes, Jr (1841 – 1935) – see Holmes, *The Common Law* (Boston: Little, Brown and Company, 1881);

v Justice Benjamin Nathan Cardozo (1870-1938) – see Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921);

vi. Professor Stanley Alexander de Smith (1922 – 1974) – see de Smith, *Constitutional and Administrative Law*, 3rd ed (Harmondsworth: Penguin Books, 1977);

vii. Lord Denning of Whitchurch (1899 – 1999) – see Denning, *What Next in the Law* (Oxford: Oxford University Press, 1982).

224. The special contribution of these judges and law scholars was to light up the orbit of jurisprudence, as a dedicated sphere of thought, learning and preoccupation, that secured the requisite motions of the different spheres of human activity, while affirming the perceptions of integrity and propriety.

225. Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state.

226. On these premises, I hold that the majority decision fails to resonate with the *Constitution* and the law, and with all relevant guiding principles. I would dismiss the petition with costs.

Dissenting Opinion of Njoki S. Ndungu, SCJ.

A. Introduction

1. By a petition dated August 18, 2017, and supported by evidence in the form of twelve affidavits, the petitioners alleged that the Presidential election was so badly conducted by the 1st respondent that it failed to comply with the governing principles laid in the *Constitution of Kenya*, the *Elections Act, 2011* and the Regulations made thereunder including the *Electoral code of conduct*. In summary, the Petitioners case was that the non-compliance fatally compromised the conduct of the election and consequently, the declaration of the 3rdRespondent by the 2nd Respondent as the President-elect.

2. After conclusion of the hearing and in strict conformity with the constitutional 14-day directive, the court in a summary by the majority (Maraga CJ & P, Mwilu DCJ & DP, Wanjala & Lenaola, SCJJ) delivered its decision nullifying the entire Presidential Election in the following terms:

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 3rdRespondent.

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. Having carefully evaluated the pleadings and the evidence, and having carefully dissected the submissions of the parties during the hearing, I was of a different conclusion summarized in the form reproduced below:

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 fulfill 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 3rdrespondent 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 2ndRespondents 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 2ndRespondents 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, which 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 voters 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 voters 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*, will issue my full dissenting Judgment within 21 days.

4. I now proceed to give the full rendition of my judgment, bearing the expounded reasons upon which this dissent is founded.

5. I also adopt the comprehensive pillars analyzing the Petition, Supporting evidence, the Responses, and the Parties submissions, including the opinion of amici curiae, contained in the dissenting Judgement of my brother, Justice J.B Ojwang, SCJ.

B. Outline

6. This dissenting Judgement commences with an introduction about the nature of the Petition culminating in my summarised dissenting Judgement delivered on September 1, 2014, exactly 14 days after the Petition challenging the results of the Presidential Petition was initially filed at the Supreme Court Registry.

7. The starting point of my dissent is:

(1) The proper context of the jurisdiction of this court sitting as an election court;

(2) A thorough analysis of the remit of this jurisdiction leads to the conclusion that election causes are right-centric in nature.

8. In totality, I analyse the petitioners case under the following additional considerations:

(3) Articles 81 and 86 of the *Constitution*

(4) The process of Transmission;

(5) Burden and Standard of proof;

(6) Weighing the Evidence adduced in Affidavits;

(7) Access to Information Orders by the Court;

(8) The Evidence Submitted to the court pursuant to section 12 of the *Supreme Court Act, 2011*;

(9) Section 83 of the *Supreme Court Act* and the question of Compliance;

(10) Preserving Kenyas electoral jurisprudence;

(11) Conclusion; and,

(12) Determination.

C. The Supreme CourtS Original Jurisdiction: Setting The Parameters

i. The Supreme Court as an election Court

9. The Jurisdiction of the Supreme Court to hear and determine questions as to the validity of a presidential election is set out in article 163 (3) (a) of the *Constitution* in the following terms:

163 (3) The Supreme Court shall have-

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140;

In this regard, the Supreme Court constituted in the terms of article 163(3)(a) discharges its mandate as an election Court. Section 2 of the *Elections Act, 2011* defines an "election court as follows:

> An "election Court means the Supreme Court in exercise of the jurisdiction conferred upon it by article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by article 165(3)(a) of the *Constitution* or the Resident Magistrates Court designated by the Chief Justice in accordance with section 75 of this Act;

10. According to the *Blacks Law Dictionary*, 8th ed (2004), "exclusive jurisdiction means:

> "A courts power to adjudicate an action or class of actions to the exclusion of all other courts....

11. In the *Raila Odinga* case, this Court clarified the bounds of its exclusive original jurisdiction as follows, at paragraph 208:

> [208] A Petitioner against the declaration of a candidate as President-elect, under Articles 163(3)(a) and 140 of the *Constitution* as read together with the provisions of the *Supreme Court Act, 2011* (Act No 7 of 2011) and the Supreme Court (Presidential Elections) Rules, 2013 (now 2017), is required to present a specific, concise and focused claim which does not purport to extend the Supreme Courts jurisdiction beyond the bounds set out in the *Constitution*. It follows that the Court will only grant orders specific to the Presidential election. [Emphasis added]

12. The Supreme Court is therefore, the first (original), only (exclusive) and final resort for any party challenging the election of any person to the Office of the President. It determines presidential election petitions to the exclusion of all other Courts. This jurisdiction is also limited in time. the *Constitution* requires one to petition quickly and particularly. This restriction, on extent and time, is not without basis. As decided in *Raila Odinga & others v Independent Electoral & Boundaries Commission*, Supreme Court Petition No 5 of 2013 (The *Raila 2013* case), the parties must present a clear, concise case supported by cogent evidence. This jurisdiction even though limited in time and scope, revolves around critical constitutional questions. The requirement for particularity is therefore important to ensure that the case presented before the Court is properly proved (in line with the set parameters of the burden and standard of proof).

ii. Election causes are right-centric and not form-centric

13. The peculiar nature of the Supreme Courts finality on interpretation of the *Constitution* and the law and the central theme in elections, ie, the right to vote in free and fair elections, presents an inescapable conclusion: the Supreme Court, as an election Court, is engaged by the parties in a right-centric cause driven by evidence and in the terms of its decision in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Civil Application No 5 of 2014 (the *Munya 1* case), in making its determination, the Court, must not disengage from the *Constitution*.

14. It is proper to emphasize that the Supreme Court in discharging its mandate as an election Court, remains the precedent-setting forum in the country and its decisions must be carefully analysed to ensure that a jurisprudential crisis or confusion does not ensue. Were that to happen, the Court would have failed the *Constitution* and the people. These considerations have been emphasized by this Court before. In the case of *Aramat v Lempaka & others*, Supreme Petition No 5 of 2014, (the Aramat case) at paragraphs 88, 101 and 102, the Court held (by a majority):

> (88) The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution of Kenya, 2010* (article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established. The exclusive, dedicated role of the Supreme Court under the *Constitution* takes several forms: for example, it has "original jurisdiction to hear and determine disputes relating to the elections to the office of President [article 163(3)(a)];
>
> (101) We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the *Constitution*. Besides, as the Supreme Court carries the overall responsibility [The *Constitution of Kenya, 2010*, article 163(7)] for providing guidance on matters of law for the States judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.
>
> (102) The Supreme Courts jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts. We note in this regard that while the Court of Appeals jurisdiction is based on section 85A of the *Elections Act*, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of article 163 of the *Constitution*, which confers an unlimited competence for the interpretation and application

of the *Constitution*; and this, read alongside the *Supreme Court Act, 2011* (Act No 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character. [Emphasis added]

15. The thrust of the foregoing paragraphs can be summed up as follows: the *Constitution* is Kenyas guiding Order. It has organized Kenyas governance character and infused accountable governance, public service and responsible citizenship. The Judiciary bears the enviable, but extremely difficult and rewarding duty of giving the *Constitution*, comprehensible interpretation that is stable, consistent, predictable, certain and true to the sovereignty of the people. Undergirding this sovereignty is the ability of every Kenyan to enjoy his/her full human-character guaranteed by an elaborate charter on rights. A determination of a dispute akin to the one before us cannot therefore be mechanically disposed of without paying due regard not just to the letter or spirit but also the conception of the *Constitution* itself. At the core of the *Constitution* is sovereign will, at the soul of sovereign will are the people, and central to the people are their rights.

16. What then is the complete description of an election cause within Kenyas constitutional system? An answer lies in the inaugural, elaborate jurisprudence laid by this Court and applied by lower Courts in a number of election cases.

In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*, Supreme Court Petition No 12 of 2014 (the *Wetangula* case), this Court held, at paragraphs 107 and 112:

> [107] The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.
>
> [112] The overriding objective of the *Elections Act* is to functionalize and promote the right to vote. This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process. The primary duty of the election Court is to give effect to the will of the electorate; and consequently, the Court is to investigate the nature and extent of any election offence alleged in an election petition. Accordingly, the happenings that touch on the due conduct of the election process, come as proper items of agenda in the tasks of an election Court. [Emphasis supplied]

In *George Mike Wanjohi v Steven Kariuki & 2 others*, Supreme Court Petition No 2A of 2014, (the Mike Wanjohi case) it was held, at paragraph 112:

> 112. [A]part from the priority attaching to the political and constitutional scheme for the election of representatives of governance agencies, the weight of the peoples franchise - interest is far too substantial to permit one official, or a couple of them, including the Returning officer, unilaterally to undo the voters verdict, without having the matter resolved according to law, by the judicial organ of State. It is manifest to this court that an error regarding the electors final choice, if indeed there is one, raises vital issues of justice such as can only be resolved before the courts of law. [Emphasis supplied]

17. An election cause is a right-centric cause. At the heart of a Petition challenging the results of a presidential election is the right to vote in free and fair elections. This right is at the epicenter of Kenyas democratic character as a Republican state. Interpretation and application of the constitutional provisions touching on elections must therefore be read holistically with each provision reinforcing

the other. This approach has been consistently applied by other Courts in the region and embedded in the theory of constitutional interpretation in our own jurisdiction. In *Olum v The Attorney-General of Uganda* [2002] EA 508, this principle was enunciated thus:

> "[T]he entire Constitution has to be read as an integrated whole and no particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.

In Re Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No 1 of 2012, this Court held as follows:

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

iii. Evidence in an election Court

18. What then is the law on evidence to be presented in an Election Court? Evidence is an imperative of the right to fair hearing. article 50 (4) of the *Constitution* cautions that:

> 50 (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

19. Evidence is the epicenter of any trial. The nature of a presidential election petition does not displace the basis of the law of evidence outlined in The Law of *Evidence Act*, Cap 80 of the laws of Kenya. Section 80 of the *Elections Act, 2011* expresses that among the powers of an election Court in exercise of its jurisdiction is: summoning and swearing in witnesses in the same manner, or as nearly as circumstance admit, as in a trial by a Court in exercise of its civil jurisdiction. article 163 (3)(a) proceedings before this Court although regulated by the *Supreme Court Act, 2011* and the attendant *Presidential Election Petition Rules, 2017*, allow reliance on Affidavit evidence. In order for that evidence to bear cogent value, it must meet the demands of proof.

20. This Courts role in exercise of its exclusive original jurisdiction ought to be thorough fact-finding and interpretation of the *Constitution* and the law in the terms set out in the foregoing paragraphs. In cases of factual prerequisite such as this one, interpretation of the law devoid of complete and exhaustive factual examination is by itself, an insufficient basis upon which to make the final determination contemplated under article 140(2) of the *Constitution*. The evidence adduced must be clear to show that what was declared was not the result. Electoral processes have assumed a fair presumption of correctness. To rebut this presumption requires proof to a high degree that the resulting declaration is not trustworthy. This is drawn from the democratic legitimacy accorded to elections by the *Constitution*. The test of invalidating an election must be a clear one. A new election should be conducted only when voters have been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome. A determination to hold a fresh election in terms of article 140(3) should only be made if the following questions are considered, analysed and determined conclusively:

i. Was the final outcome of the election the result of fraud, mistake or omission which precluded the certified vote total from correctly aggregating all voters independent, non-coerced and non-procured preferences?

ii. Is the outcome incapable of being trusted to reflect the will of the people?

iii. Can a reliable outcome be determined in a manner other than holding a fresh election?

21. An attempt to displace elections without proper recourse to the stated case and evidence amounts to an unfair dislocation of accrued rights under the *Constitution*- to the people and their elected representatives. The Court must protect the rights of the candidate(s) and by the same stroke, ensure that the rights of the electorate are not compromised. Only a clearly pleaded and proved case will warrant voiding of an election.

22. The right to vote in free and fair elections is violated when a Court, without comprehensive understanding and analysis of the evidence displaces the electorate by halting an election and deciding the outcome itself. An election, unless clearly proven to have been conducted in gross violation of the *Constitution* and the law, affecting the ultimate outcome, must never be taken away from the voters. The electorate, by dint of article 1 of the *Constitution* is entitled to be represented by men and women of their choice. In resolving electoral disputes, the Judiciary must set upon this duty as a judicial, not a political actor. In so doing, its guiding force must be proper exercise of judicial authority granted under article 159 of the *Constitution*. It must consider rights, not form.

23. On this basis, I now set upon the legal and factual analysis of my decision with close reference to the pillars set out in the Judgement of my brother, Justice J.B Ojwang, SCJ.

D. Right-Centric or Form-Centric? Interpreting and Applying article 38 of the *Constitution of Kenya, 2010*: Which Way for the Supreme Court Sitting as an Election Court?

24. It is not in doubt that the Majority base their decision on an interpretation of section 83 of the *Elections Act* and in doing so they have read-in the provisions of Articles 81 and 86 of the *Constitution*. They state that the electoral process has not met the requirements as listed in those Articles. In my opinion this is a narrow and restrictive interpretation of the law. I find that the Majority in doing so, limited itself to operational and aspirational constitutional principles but failed to firstly; address the substratum of the issue at hand- the grundnorm of *Constitution*- the sovereignty of the people and the centrality of the people in the entire architecture of the 2010 *Constitution*; but secondly used a restrictive test in assessing whether a claim that the right to vote had been violated in any way had been made.

25. Let me set out by reinforcing the essence of the voter, who bears the right of franchise. Justice Albie Sachs aptly captured this essence in the case of *August and Another v Electoral Commission and others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (August):

> "Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans (read, Kenyans) regardless of race, and for the accomplishment of an all embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. [Emphasis added]

26. The interpretation and application of the Bill of Rights must not be mechanical or limited by a Courts interpretation of legislation. To favor legislation over the *Constitution* would be an affront to the Supremacy of the *Constitution*, which reads:

> Article 2.
>
> 1. This *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
> 2. No person may claim or exercise State authority except as authorised under this *Constitution*.
> 3. The validity or legality of this *Constitution* is not subject to challenge by or before any court or other State organ.
> 4. Any law, including customary law that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid.
> 5. The general rules of international law shall form part of the law of Kenya.
> 6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this *Constitution*.

The correct approach ought to be that espoused in the Canadian case of *R v Big M Drug Mart Ltd* 1 S.C.R. 295, 18 D.L.R. (4th) 321

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.

27. The exercise of the sovereign power of the people in relation to the political processes of the State is to be found first in article 1 which provides that all sovereign power belongs to the people of Kenya who exercise their power directly or through their elected representatives and also delegate it to the three arms of government at both national and county level. The second reference to this sovereign power of the people is to be found in the Bill of Rights under article 38(2) and (3) of the *Constitution* where it is stated that:

> 38 (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.

28. There cannot be any doubt at all that in interpreting and applying any provision of this *Constitution*, the *Elections Act* and Regulations there-under, this Court must adopt an interpretation that promotes the grundnorm in article 1 and the right to vote in article 38.

29. Articles 81 and 86 of the *Constitution* reinforce the right to vote elaborated under article 38 of the *Constitution*. These constitutional provisions must therefore be applied to this core right and not vice versa. Articles 81 and 86 are to be facilitative of the fundamental rights under article 38, in addition to other provisions of the *Constitution*. In fact, there are many other Articles of the *Constitution*, Legislation and Regulations whose purpose is intended to give effect to, facilitate and support the right to vote as provided for under article 38. In the application and implementation of those provisions – the centrality of article 38 as the primary purpose for their existence must never be lost.

30. This was the position elaborated in the case of *Evans Kidero & others v Ferdinand Waititu & others*, Supreme Court Petition No 20 of 2014, (The *Kidero* case) this Court held, at paragraphs 137 and 138:

137. Chapter Seven of the *Constitution* is entitled "Representation of the People and bears the sub-title"Electoral System and Process, with further sub-title "General Principles of the Electoral System. Articles 81, 82, 83, 84, 85, 86 and 87 all fall under this Chapter. It is plain to us that most of the provisions in these Articles are rendered in the form of principles• some general, and others not so general. And, thus expressed, it is unavoidable that most of these principles are not self-executing: which fact moves the judicial forum to centre-stage, as regards interpretation and application.

138. These principles cannot crystallize into deliverables of public goods, such as those in the nature of governance and elections, without further legislative action.

Thus, article 82 (1) (d) provides as follows:

" Parliament shall enact legislation to provide for•

.....

a. the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections

2. Legislation required by clause (1) (d) shall ensure that voting at every election is•

a. simple;

b. transparent and;

c. takes into account the special needs of•

i. persons with disabilities and;

ii. other persons or groups with special needs. [Emphasis added]

31. A reading of the majority decision also appears to presume that the only test for ascertaining the credibility of the election process, or more correctly for assessing any violation of the rights under article 38, lie in Articles 81 and 86. This is not the case. Articles 82 and 83 also go to the specifics of the electoral process that support the right under article 38. Article 82 and 83 address the registration of voters and 83 underlines the requirements of the voting exercise itself – as simple, accurate, and taking into account those with special needs. article 83(3) states clearly that

> "administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate and shall not deny, an eligible citizen the rights to vote or stand for election."

The upshot being that the test for assessing a violation claim under article 38 must be more comprehensive than the aspirational guidelines set under Articles 81 and 86. Cherry-picking constitutional provisions to determine a right-centric cause on the basis of formal considerations - the choice of form over rights - undermines a purposive approach to the interpretation and application of the *Constitution*.

32. The *Constitution* in article 259(1) also clearly sets out the framework of applicable principles while interpreting the *Constitution*.

This article provides that;

259 (1) This *Constitution* shall be interpreted in a manner that—

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

(3). Every provision of this *Constitution* shall be construed according to the doctrine of interpretation that the law is always speaking.... [Emphasis added]

32A. Further the *Constitution* provides under article 20(3):

20(3) In applying a provision of the Bill of Rights, a Court shall-

a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and

b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom. [Emphasis]

In my opinion, the Majority has not given effect to the peoples right to franchise and have not interpreted it broadly and in a manner that most favours its enforcement.

33. The case for the advancement of the Bill of Rights clearly must therefore be at the forefront of any judicial determination under the *Constitution of Kenya, 2010*.

34. There is a more complex issue that must be addressed-article 19 of the Bill of Rights, Chapter IV of the *Constitution* states as follows:

> Part 1—General provisions relating to the Bill of Rights

Rights and fundamental freedoms

2. (1) The Bill of Rights is an integral part of Kenyas democratic state and is the framework for social, economic and cultural policies.

2. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

3. The rights and fundamental freedoms in the Bill of Rights—

a. belong to each individual and are not granted by the State;

b. do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

c. are subject only to the limitations contemplated in this *Constitution*. [Emphasis added]

35. If the rights under article 38 may not be limited other than by a specific provision of the *Constitution*, can an interpretation of Articles 81 and 86 purport to take the essence of those rights away from any Kenyan? Where a voter has made his choice known, having been registered in accordance with Articles 82 and 83, 138(3) (a), having voted in accordance with Articles 81, 83 and his vote counted at the polling station (Art 138(3) (c), and the result announced at the polling station in accordance with the *Constitution* and the law - and the outcome is known and uncontested – then can a general principle non-specific to any precise act – overturn that choice and undermine a fundamental right? Can an operational aspect of an election (read as forming part of Art 81) cancel a result/outcome (read Art 38) that is unchallenged? And further, where in fact the election is not challenged as to the aspect that the result/outcome (Art 38) has been violated? Can a claim that does not plead violation of a fundamental right, extinguish the enjoyment or exercise of that right? Can it be argued that there are two competing provisions of the *Constitution*: one provision guaranteeing the right and the other, burdening the enjoyment of that right? And if this is the case how would one balance to ensure an outcome that does not upset the will of the people?

36. We can draw lessons from the observations of Prof Rex Martin on the exposition of John Rawls Theory of Justice, in his book *Rawls and Rights*, where he states:

> " The weight of a right is a determination, sometimes explicit and sometimes not, sometimes quite exact and sometimes rather imprecise, of how it stands with respect to other normative considerations and whether it would give way to them or they to it, in cases of conflict .

37. Similarly, a scholar, Nur Kayacan, Derya in her paper, "*How to resolve Conflicts Between Fundamental Constitutional Rights*, (Saar Blueprints) puts across an interesting point, with which I fully agree with, that :

> " The discretion that the judges enjoy when applying the balancing method is a part of their duty as the guardians of law. One general rule, which embraces all of the situations in which a conflict occurs and gives a common technique to resolve them all, cannot possibly be formulated. Even if a single solution was to be formulated, it would not serve justice in each situation, since every case has its own specific circumstances. Also the discretion of the judges is not without any limits; they have to follow the principle of proportionality.

> The answer to the question, how to resolve conflicts between fundamental constitutional rights, is, at the end quite simple. Balancing ...

38. Thus even if there may appear to be a perception that a competing rights situation exists – that is between article 38 and 81 and 86 - there must be a balancing and an application of proportionality to effect a judicial outcome that serves the dictates of the *Constitution*. One must recognize that not all claims will be equal before the law: some claims have been afforded a higher legal status and greater protection than others. While there are many situations in which rights, principles, and values may seem to conflict or compete, when evaluating situations of competing rights, human rights, especially those provided in a Bill of Rights and will usually hold a higher status than principles and values. This rationale is further underlined by the architecture of our *Constitution*, which actually ring-fences the Bill of Rights from amendment which may be made only through referendum by the people of Kenya unlike the principles in article 81 and 86, which may be amended by elected leaders in Parliament. This plebiscite protection in itself - places the Bill of Rights - higher in the pecking order of competing provisions in the *Constitution*. The principle therefore should complement the right not vice versa. The principles in article 81 and 86 therefore cannot trump the fundamental rights as provided for under article 38; and certainly they cannot undermine the provisions of article 1 on the sovereignty of the people. Further they ought not compete with all international treaties that provide and protect the right to vote and to which Kenya is a signatory, and which are part and parcel of our constitutional order under article 2.

39. We can go further to draw from decisions of the Indian Supreme Court as relates to the conflict between the fundamental freedoms and the Directive principles in the India constitution. Harmony between aspiration, reinforcing or guiding provisions and rights is however critical. In India the *Constitution* provides for both fundamental rights and directive principles. The Indian Supreme Court has, in a number of judgments, called these principles the "conscience of the *Constitution* and also as the core of the *Constitution*. That Court has held that the courts can look at the Directive Principles for the purpose of interpretation of the fundamental rights and adopt that interpretation which makes the fundamental rights meaningful and efficacious. But more importantly the Indian Supreme Court has pronounced itself on the instances where a conflict between fundamental rights and directive principles should arise. In *State of Madras v Champakam Dorairajan* AIR 1951 SC 226, the Supreme Court held that the directive principles are not enforceable by court stating that the chapter on Fundamental rights in the *Constitution* is sacrosanct and the directive principles have to conform to and run subsidiary to the chapter on Fundamental Rights. Similarly in 1967, a bench of 11 judges of the Supreme Court in *Golak Nath v The State of Punjab* AIR 1643, 1967 SCR (2) 762 (1967), found that fundamental Rights cannot be abridged or diluted to implement the directive principles. This means that Fundamental Rights were given superiority over the Directive principles.

40. The conclusion may therefore be drawn that fundamental rights constitute the foundation of the any *Constitution* and any accompanying values and principles are to be complementary and not to detract from the *Constitution*. The rights in article 38 remain central to any election cause and it is claim of the violation of those rights that ought to take center-stage in such a cause and not the form that accompanies it in the periphery.

41. Having determined that election causes are right-centric in nature, and having discussed the centrality of every citizens right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the *Constitution*, I now evaluate the alleged violation of Articles 81 and 86 of the *Constitution of Kenya, 2010* and its effect upon the outcome of the presidential election.

E. The Alleged Violation of Articles 81 and 86 of the *Constitution of Kenya, 2010* and Its Effect Upon the Outcome of the Presidential Election.

i. The Case

42. The Petitioners averred that there were massive, systematic, systemic and deliberate non- compliance with the *Constitution* and the law which contravened the principles of a free and fair election under article 81(e) of the *Constitution* as read together with section 39, 44 and 44A of the *Elections Act, 2011* and the Regulations thereunder. The Petitioners asserted that the relay and transmission of results from Polling Stations to the Constituency and the National Tallying Centre was not simple, accurate, verifiable, secure, accountable, transparent and prompt contrary to the provisions of article 86 of the *Constitution*. The Petition elaborated that the non-compliance was:

> On Forms 34A and 34B:
>
> a. The data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS Kits.
>
> b. The data entered into the KIEMS Kits ought to have been accompanied by an electronic picture or image of the prescribed Form 34A.
>
> c. The Practice Manual verbally communicated and publicly demonstrated by the 1st Respondent to the parties, stakeholders and observers demonstrated that transmission of any data from the KIEMS kit was only possible if the data was simultaneously accompanied by the image of the Form 34A. That according to late ICT Manager of the 1st Respondent, Mr Chris Msando, the submit button was programmed to function only when the data was accompanied by the electronic image of Form 34A.
>
> d. The results from over 10,000 polling stations were not accompanied by an electronic image of Form 34A and that the results declared from these polling stations represented approximately 5 million voters.
>
> e. The data being publicly displayed by the 1st Respondent was not consistent with the information on Forms 34A.
>
> f. The 1st Respondent received in excess of 14,000 defective returns from polling stations affecting over 7 million votes.
>
> g. The information on Forms 34B did not correspond with that in the primary Forms 34A making them inaccurate, unverifiable and invalid.
>
> h. Inconsistencies in Forms 34B accounted for at least 7 million votes.
>
> i. At the time of declaring the result, the 1st Respondent did not have 187 Forms 34B.
>
> j. The computation and tabulation of results in a significant number of Forms 34B was not accurate, verifiable and internally consistent.
>
> k. The purported results in the 1st Respondents Forms 34B were materially different from what the 1st Respondent publicly relayed and continued to relay as at the time of filing in its website or portal

l. That the results in Forms 34B were inaccurate and had mathematical additions in favour of the 3rdRespondent.

m. That some returns in a material number of polling stations were not in the prescribed Forms 34A and 34B contrary to Regulations 79(2)(a) and 87(1)(a).

n. That Forms 34B bore fatal irregularities affecting 14,078 polling stations.

o. That a number of forms and returns were not signed, some forms did not indicate names of the Returning Officer, some did not bear the IEBC stamp, some Forms 34A and 34B did not bear the signatures of the candidates agents nor the reason for refusing to sign, some were signed by the same person presiding in different polling stations.

p. In more than half of the Constituencies, the Returning Officers failed to indicate the number of Form 34As handed over to them as required under the law and regulations. As such, it was impossible to authenticate and verify the results given as the integrity of the forms had been put into question and the forms were unknown to the law.

Alleged Fraud on the part of the 1st Respondent:

q. In numerous instances, the 1st Respondent selectively manipulated, engineered and deliberately distorted the votes cast and counted in favour of the Petitioners and inflated those in favour of the 3rdRespondent, thereby affecting the final results tallied.

r. That the Presidential Election was marred and significantly compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the *Constitution* as read together with the *Elections Act* and Regulations 3 and 6 of the *Electoral Code of Conduct*.

s. That the 3rdrespondent, with impunity, contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters

Vote counting

t. It was alleged that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act, 2011*.

The transmission process:

u. The respondents process of relaying and transmission of results from polling stations to the Constituency Tallying Centres and National Tallying Centre (NTC) was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. This substantially compromised and affected the requirement of free and fair elections under article 81(e) (iv) and (v) of the *Constitution*

v The IEBC deliberately and/or negligently compromised the security of the integrated electoral management system (KIEMS) and thereby exposed it to unlawful interference by third parties.

ii. The evidence

43. The Petitioners relied on evidence borne in twelve depositions all sworn on the August 18, 2017 by: (1) Raila A. Odinga, (2) Stephen Kalonzo Musyoka, (3) Dr Nyangasi Oduwo, (4) George Kegoro, (5) Benson Wasonga, (6) Godfrey Osotsi, (7) Ibrahim Mohamud, (8) Mohamed Noor Barre, (9) Moses Wamuru, (10) Olga Karani, (11) Aprielle Oichoe and (12) Koitamet Ole Kina and a certificate by Duncan Nunda certifying the authenticity of video and transcriptions attached to Dr Nyangasi Oduwos Affidavit. These depositions collectively support the case of the Petitioner and were filed on time, in line with the dictates of the *Constitution* and the *Supreme Court (Presidential Election) Rules, 2017*. This Evidence, together with a complete record of the responses is contained in the dissenting opinion of the Hon Justice JB Ojwang, SCJ.

iii. Analysis

44. The pertinent issues for consideration in this regard, in light of the pleadings, the evidence and submissions ought to evaluate the provisions of Articles 81 and 86 of the *Constitution* in the broad scheme of electoral prerequisites mandated by the *Constitution* and in light of article 38 of the *Constitution*. article 81 outlines the General Principles of the electoral system. Kenyas electoral system is instituted on the basis of multi-party democracy founded on the National Values and Principles outlined under article 10 of the *Constitution*. These values include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, equality, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalized, good governance, integrity, accountability, transparency and sustainable development. Most importantly, the *Constitution* provides a formula for the election of the President (more than half of all the votes cast and at least twenty- five percent of the votes cast in each of more than half of the Counties) [Art. 138(4)].

For the other five elective positions: Governor, Senator, Member of the National Assembly, Woman Representative to the National Assembly, and Member of the County Assembly, the applicable system is first-past-the post i.e. the person with the most number of votes in the election.

45. The approach that a Court, keen to develop all the parameter of social order ordained by the *Constitution* is the one taken by this court *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Re Gender), Supreme Court Application No 2 of 2012, at paragraphs. 26 and 54:

(26) The forthcoming general elections are not only the most important since independence, but are complex and novel in many ways. The elections come in the context of the first progressive, public-welfare-oriented, historic *Constitution* which embodies the peoples hopes and aspirations. Not only are these elections one of the vital processes instituted under the *Constitution*, but they constitute the first act of establishing a whole set of permanent governance organs. Clearly, any ambivalence or uncertainty in the path of such crucial elections must, as a matter of public interest, be resolved in time:

(54) Certain provisions of the *Constitution of Kenya* have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different

styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan *Constitution* fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.

46. The electoral system and process is therefore discernible from a holistic reading of the *Constitution*, particularly, Chapters Seven, [Representation of the People], Eight [The Legislature] and Nine [The Executive]. The General Principles under article 81, which in my view are qualitative, are infused in the entire fabric of these Chapters and their resulting Legislation are concretized by other provisions of the *Constitution* as follows.

    a. Freedom of citizens to exercise their political rights is provided under article 38 of the *Constitution*,

    b. Not more than two-thirds of the members of elective public bodies shall be of the same gender-article 10, 27(8), 38, 56 (a), 82, 90, 91, 100.

    c. Fair representation of persons with disabilities- article 54, 56, 82

    d. Universal Suffrage based on the aspiration for fair representation and equality of the vote-article 10 and 38

    e. Free and fair elections, which are

        i. By secret ballot-article 38

        ii. Conducted by an independent body-article 10 and 88

        iii. Free from violence, intimidation, improper influence or corruption-article 10,

        iv Transparent-article 10

        v Administered in an impartial, neutral, efficient, accurate and accountable manner-article 10, 82,83, 88

47. This collectivity and interlocking nature of constitutional provisions in the scheme of rights, values, principles and administrative directives are then infused into the *Elections Act* and Regulations thereunder and in determining claims of commission or omission in electoral disputes, a Court must consider:

    (a) The nature of the commission or omission, in general;

    (b) The source of such omission or commission;

    (c) Foreseeability and mitigation;i.e. could the commission or omission be foretold? Were there steps to avert it?;

(d) The effect of the commission or omission on a right, a duty or the consequence of a duty thereof (such as effect upon the result of an election);

(e) The effect of the commission or omission on the individual and the collective;

(f) Possible remedies and directions.

48. The rationale of these considerations may be drawn from the *Mike Wanjohi* case at paragraph 110:

> [110] By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the *Constitution*, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a recognized legal mechanism founded in law or the *Constitution*. Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than the Courts. The charge of commission of administrative error, fraud, deliberate misconduct, or some element of corrupt practice in elections, are questions that go to the root of the validity of elections and which, if apparent subsequent to the declaration of results, are expressly excluded from the scope of the dispute-resolution powers of the IEBC under article 88(4)(e). [Emphasis added]

49. Article 86 on the other hand bears a strict quantitative language regulating voting at an election. This article requires the voting method employed to be simple, accurate, verifiable, secure, accountable and transparent. The Petitioners claim is that the results from the polling stations, the Constituency Tallying Centres could not be verified by their agents at the National Tallying Centre. The process of verification is not a two-step process. Verification in a Presidential election is a continuous process traceable from the date of registration of voters to the determination of a Presidential election petition in an election court. In other words, the plurality of persons engaged in the conduct of an election, including the ultimate determination of that elections validity, are all agents of verification in ascertaining the credibility of an election. To examine the integrity of the election, the election Court is obliged to consider all the relevant steps of the verification process. We shall examine the role of each one.

The Agents of Verification

(i) The IEBC

50. The Commission is established under article 88 of the *Constitution* and mandated to conduct and supervise elections to any elective office established by the *Constitution*, including: the continuous registration of voters, the regular revision of the voters roll, and facilitation of the observation, monitoring and evaluation of the elections. Section 4 of the Independent Electoral and Boundaries Commission Act, No 9 of 2011 outlines the powers and functions of the Commission in the language of article 88, with the addition of deployment of appropriate technology and approaches in the performance of its functions [Sec 4(m)]. The Commission is bound by the principles of the electoral system as outlined under article 81 (Sec 25). The Commission is also mandated to subject the register of voters to an audit at least six months before a general election (Sec 8A of the *Elections Act*). It is also mandated to test, verify and deploy technology at least 60 days before a general election. [(Sec. 44(4)(b)]

(ii) The Public

51. Section 6 of the *Elections Act* mandates the Commission to avail the register of voters to be inspected by the public at all times for purposes of rectifying the particulars therein. Verification of ones registration details, including biometric data, is therefore a critical part of verification essential to the conduct of

an election and enjoyment of the right to vote. The Commission is also mandated to open the Register for inspection by the public, ninety days from the date of the notice of a general election. This assures the public of the correctness of the registration details entered into the register and guarantees certain key components of the right to vote under article 38. This process was undertaken in the months of May and June, 2017.

(iii) Candidates or Agents

52. Section 30 of the *Elections Act* empowers a political party, or a nominated agent, and an independent candidate to nominate one agent per polling station. Regulations 69, 70, 73,74,76, 77,79, 80, 83, 85 demonstrate that candidates and/or their agents are an integral part of the electoral process.

(iv) Political Parties

53. They are permitted under the regulations to observe the process of registration of voters under the registration of voters regulations

(v) Constituency Returning Officers

54. Section 39 of the *Elections Act* mandates the Commission to appoint Constituency Returning Officers to be responsible for collating and announcing the results from the polling stations in the constituency for the election of the President and submitting the collated results for the election to the national tallying center.

(vi) Presiding Officers

55. These officers are appointed subject to Regulation 5 (1A) of the Elections (General) Regulations, 2012. They are in charge of the entire process at the polling stations to ensure voting is done in accordance with the law and to ensure that counting of the votes at closure of polling, is done properly.

(vii) Representatives of electronic and print media accredited by the Commission

56. This accreditation is specifically provided for under regulation 95 to allow media access and cover to the electoral process. All accredited observers and media are permitted into the Polling stations on the basis of Regulation 62 (1)(g) of the Elections (General Regulations) 2012. They are allowed to attend the counting of votes pursuant to Regulation 74(4)(f) and the tallying venue (Reg. 83) and Reg. (85)

(viii). Observers: Local and international representatives accredited by the Commission.

56A. These persons or organizations are accredited to observe the election under section 42 of the *Elections Act* and more importantly are required to submit their official reports to the Commission under regulation 94 (6). The reports so filed therefore have a formal and official status.

57. All the international observers who observed the General elections termed it as free and fair. There are fundamental questions to be considered: What was the import of their reports regarding the fairness of the election? What is a free and fair election? What did the election observers consider? International election Observers are bound by Declaration of Principles for International Election Observation. Declaration 4 defines International election observation as:

> The systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral

processes based on the highest standards for accuracy of information and impartiality of analysis. International election observation should, when possible, offer recommendations for improving the integrity and effectiveness of electoral and related processes, while not interfering in and thus hindering such processes. International election observation missions are: organized efforts of intergovernmental and international nongovernmental organizations and associations to conduct international election observation.

58. Despite not having a universally acceptable definition of a free and fair election, there are certain common attributes to that description. They were aptly expressed by the constitutional Court of South Africa in the case of *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

> (34) There is no internationally accepted definition of the term"free and fair elections. Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgement. The following elements can be distilled as being of fundamental importance to the conduct of free and fair elections. First, every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third, insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote. Fourth, the *Constitution* protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.

In *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (New National Party) the Court held, at para 12.

> (25) There is even a shift among international observers towards abandoning the "free and fair standard and to ask instead whether the election is a legitimate expression of the will of the people or properly reflects the wishes of the people. In response to a question from the Swedish Ministry of Foreign Affairs regarding this shift in the public discourse over elections, the ACE Electoral Knowledge Network said:
>
> [A] shift has indeed taken place in the discourse of terms used to characterize the conduct of elections, and that consequently there are fewer references to elections as "free and fair. This shift was seen as a trend which began in the 1990s, when elections that were described as "free and fair at the same time could be seen by analysts to lack integrity, and it was also predicted to become a more widespread trend in the future. Moreover, one [Practitioners Network] member expected that the trend would go further as countries engage with new elections related technologies.
>
> Behind the shift in discourse lies a rising awareness among analysts that election observation should be less of a thumbs up/thumbs down judgement on an election- day event, and increasingly an effort to monitor and evaluate the process of an election, against international obligations voluntarily undertaken by countries.

ix. The Election Court

59. Let me reiterate that Kenyas electoral system is instituted on the basis of multi-party democracy founded on the National Values and Principles outlined under article 10 of the *Constitution*. The General principles of the Electoral System therefore and the interlocking constitutional provisions,

including article 81 are engaged in an exercise of sovereign guardianship. Therefore, the Supreme Court by dint of its Jurisdiction is the final verifying Agency, if called upon to do so, in a Presidential election petition. This duty is enabled by the Supreme Courts inherent powers, as an election court, to Order: (a) scrutiny (b) recount (c) re-tally (d) discovery of documents (e) inspection of ballots (f) Orders that facilitate the Court to establish the peoples sovereign will.

60. The Supreme Court as an Election court is empowered by article 138 (3)(c), 140 and 163 (3)(a) of the *Constitution* and also under Sections 2, 80, 82 and 85 of the *Elections Act, 2011*. This is critical to meet the constitutional imperatives set upon the Court and the Electoral body by the *Constitution*. An election Court must be sure that there is a solid, not imagined; a proved, not alleged; case for invalidating an election. The South African Constitutional Court, in Kham and Others v Electoral Commission and Another (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) remarked, and I am fully persuaded by their opinion:

> (91) It is undesirable to articulate a general test expressed in language different from that of the *Constitution*, as that may be misleading. The Court must give full weight to the constitutional commitment to free and fair elections and the safeguard it provides of the right and ability of all who so wish to offer themselves for election to public office. It is essential to hold the IEC to the high standards that its constitutional duties impose upon it. It is insufficient for the Court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real – not speculative or imaginary – grounds for concluding that they were not free and fair.

What are the stages in the Process of Verification?

61. Regulation 68 provides that ballot papers shall:

a. Contain the name and symbol of the candidate validly elected

b. Contain a photograph of the candidate where applicable

c. Be capable of being folded up

d. Have a serial number, or combination of letter and number, printed on the front and;

e. Have attached a counterfoil with the same number or combination printed thereon.

These features allow the candidates or agents present at the polling station to inspect the ballot papers provided for use at the polling station.

62. The voting procedure outlined under Regulation 69 contains core components of verification which are complemented by the requirements of inspection and verification of the voters register.

> Regulation 69. Voting Procedure
>
> 1) Before issuing a ballot paper to a voter, an election official shall—
>
> a. require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
>
> b. ascertain that the voter has not voted in that election;
>
> c. call out the number and name of the voter as stated in the polling station register;

d. require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;

e. in case the electronic voter identification device fails to identify a voter the presiding officer shall—

i. invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

ii. complete verification Form 32A in the presence of agents and candidates;

iii. identify the voter using the printed Register of voters; and

iv once identified proceed to issue the voter with the ballot paper to vote; (f) deleted by L.N. 72/2017, r. 31(c); (g) deleted by L.N. 72/2017, r. 31(c).

2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers—

a. cast his or her votes in accordance with regulation 70 without undue delay;

b. submit to having one finger as prescribed by the Commission immersed, dipped or marked in ink of a distinctive colour which, so far as is possible, is sufficiently indelible to leave a mark for the period of the election;

c. where a voter has no finger, make a mark on the next most suitable part of the body; and

d. upon collecting his or her identification documents, immediately leave the polling station.

3) A person who knowingly fails to place a ballot paper issued to him or her (not being a spoilt ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act.

4) An election officer who deliberately refuses to stamp any ballot paper commits an offence.

5) The presiding officer may, where a voter so requests, explain the voting procedure to such voter. [Emphasis added]

63. At the close of polling, a presiding office is supposed to indicate in a polling diary, a written statement of-

a. the number of ballot papers issued to him or her under regulation 61;

b. the number of ballot papers, other than spoilt ballot papers, issued to voters;

c. the number of spoilt ballot papers; and

d. the number of ballot papers remaining unused.

Then in the presence of the candidate or agents, seal, in separate tamper proof envelopes-

a. the spoilt ballot papers, if any;

b. the marked copy register, where necessary;

c. the counterfoils of the used ballot papers; and

d. the statement specified in sub-regulations

64. These items are then sealed by the presiding officer with the seal of the Commission and that of the candidate or agent (if they wish to do so) and then delivered together with the ballot boxes, to the returning officer. These items allow the examination of election materials at any stage of the election, permissible by law, for purposes of verification.

65. The Supreme Court of India has previously laid a basis upon which an election Court may lift the veil of secrecy in a ballot where a case has been made out by the Petitioner to do so. In *Jitendra Bahadur Singh v Krishna Behari and others* [1969] INSC 176; AIR 1970 SC 276 an elector challenged the validity of the election of the appellant to Lok Sabha. By the order dated May 21, 1968, the High Court permitted the Election Petitioner to inspect the packets of Ballot Papers containing the accepted as well as the rejected votes of the candidates. The said order passed by the High Court was impugned before the Supreme Court. The Supreme Court held, at paragraphs 7 and 8:

> 7. The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in Ram Sewak Yadav v Hussain Kamil Kidwai, 1964-6 SCR 238 [1964] INSC 6; (AIR 1964 SC 1249) and Dr Jagjit Singh v Giani Kartar Singh, AIR 1966 SC 773. These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are:
>
> (1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case and
>
> (2) the tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.
>
> 8. The trial court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as to afford a basis for the allegations made in the petition. ..... This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. Unfortunately, the trial court has mistaken the form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made. [Emphasis added]

66. The preservation of election material for a period of three years is also an enabler of the verification process. In cases where a Court is in grave doubt as to the outcome of the election, as the Majority in this case decided they were, the ballots exist to enable a final inspection/verification process by an election Court. The people speak through the ballot and the ballots, once marked and cast, in turn, speak for themselves anonymous of the voter, preserving the principle of secrecy under article 38 (3)(b) of the *Constitution*. Indias long constitutional tradition has given the Supreme Court an opportunity to reign in on the importance of ballots in verifying the result of the election when in doubt. In *Narendra Madivalapa Kheni v Manikarao Patil and Others*, Supreme Court Civil Appeal No 1114 of 1976 :

> The ballots are alive and available and speak best. Why, then, hazard a verdict on flimsy foundation of oral evidence rendered by interested parties? The vanquished candidate's ipse dixit or the victor's vague expectations of voters' loyalty – the grounds relied on – are shifting sands to build a firm finding upon, knowing how notorious is the cute art of double-crossing and defection in electoral politics and how undependable the testimonial lips of partisans can be unless authenticated by surer corroboration. Chancy credulity must be tempered by critical appraisal, especially when the return by the electoral process is to be overturned by unsafe forensic guesses. And where the ground for recount has been fairly laid by testimony, and the ballot papers, which bear clinching proof on their bosoms, are at hand, they are the best evidence to be looked into. No party can run away from their indelible truth and we wonder why the learned Judge avoided the obvious and resorted to the risky. May be, he thought reopening and recount of ballots may undo the secrecy of the poll. We are sure that the correct course in the circumstances of this case is to send for and scrutinize the 16 ballots for the limited purpose of discovering for whom, how many of the invalid sixteen have been cast. Secrecy of ballot shall be maintained when scrutiny is conducted and only that part which reveals the vote (not the persons who voted) shall be open for inspection. [Emphasis added]

67. The elaborate process of counting votes outlined under Regulation 76 guarantees several things:

(i) that vote counting is systematic, transparent (in the presence of candidates or agents),

(ii) verifiable-the presiding officer maintains a record of the count in a tallying sheet in Form 33.

68. After completing the count, Regulation 79 mandates the presiding officer, the candidates or agents to sign the declaration in respect of the elections. Pursuant to Regulation 79 (2A), the presiding officer shall-

> The presiding officer shall—
>
> a. immediately announce the results of the voting at the polling station before communicating the results to the returning officer;
>
> b. request each of the candidates or agents present to append his or her signature;
>
> c. provide each political party, candidate, or their agent with a copy of the declaration of the results; and
>
> d. affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station. [Emphasis Added]

This allows candidates or agents to verify the tally of these results at the Constituency Tallying Centre and to raise any objection to any manipulation or change of results. This is in line with the principle

in the *Joho* case that results at the polling station are final and any challenge to these results can only be before a Court of law. Signatures by the Candidates or agents are central to the declaration that where not provided, a record of the reasons for failure to sign shall be provided either by the candidate or agent [Reg. 79(3)], or by the presiding officer [Reg. 79 (4)]. Failure by a candidate or agent to sign the declaration, shall not, by itself, invalidate the results announced [Reg. 79(6)]. The presiding officer is also required to record the absence of any candidate or agent [Reg. 79(5)]. The absence of a candidate or agent at the signing of declaration shall also not of itself, invalidate the results announced [Reg 79 (7)].

69. An added layer of verification is provided under Regulation 80 where a candidate or agent after counting is completed may require the presiding officer to have the votes rechecked and recounted. The presiding officer may also, on their own initiative have the votes recounted. This regulation is couched as a limited right, to be enjoyed by the candidates or agents at most, twice.

70. The importance of these processes bear credence to a careful consideration of the history of electoral practice in Kenya as was highlighted by Mutunga CJ & P (as he then was) in his concurring opinion in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & Others, S.C. Petition No 2B of 2014; [2014] eKLR [Munya 2] at paragraph 235, 247, 248, 249 and 250:

> (235) The emphasis on free and fair elections, through an electoral system that is simple, accurate, verifiable, secure, accountable and transparent, in Articles 81(e) and 86 of the *Constitution*, has a rich Kenyan historical, economic, social, political, and cultural context. Article 86(b), for example, provides that the votes cast are to be counted, tabulated, and results announced promptly by the presiding officer at each polling station. This is because our electoral history is rife with malpractices that occur during the transportation of ballot boxes from polling stations to constituency counting-centres. It is therefore no coincidence that many of the petitions filed in the High Court, before the promulgation of the 2010 Constitution, gave lurid details of the stuffing of ballot boxes, or discarding of them en route to the constituency counting-centre. At the constituency counting- centre itself, votes disappeared when lights, either by design, negligence, or power- outage, went off. Our elections were therefore not free, fair and peaceful (see Charles Hornsby, Kenya: A History Since Independence (I.B. Tauris, 2013)). [Emphasis added]
>
> (247) Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote.
>
> Once the *Constitution* gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail ones party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay.
>
> (248) The election is first and foremost the citizens election. Every Kenyan must protect his or her right to vote the right to participate in the political affairs of the nation. It is upon exercising all the rights which the *Constitution* bestows upon the citizen, that she or he can claim the sovereign power that she or he donates to her or his representative.
>
> (249) It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling

station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybodys collective interest, and in everybodys collective and solemn duty, to safeguard it.

(250) Given the strict electoral timelines in our Constitution, it is clear elections, will result in cogent grounds upon which election results are challenged. We will start seeing candidates conceding defeat in elections because they have been free and fair. We will see electoral litigation that may be ended through consent of the parties because they agree that the grounds upon which the election results were based, are solid and not frivolous. It is not hard to imagine that one day it will be possible, because of the vigilance of the citizens and all electoral stakeholders, to have elections that will be free and fair, and Courts will no longer be involved in the settlement of electoral disputes. [Emphasis supplied]

71. The next stage of verification is the process of tallying outlined under Regulation 83. The Returning Officer at the Constituency is mandated to collate and publicly announce the results from each polling station in the presence of candidates, agents and observers if present.

72. Regulation 81 is important because it preserves the election material for reference by an election Court, where applicable and which in my opinion, is the final verification avenue.

Regulation 81. Sealing of ballot papers by presiding officer

1) Upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box—

   a. valid votes;

   b. rejected ballots sealed in a tamperproof envelope;

   c. unused ballot papers sealed in a tamperproof envelope; (d) counterfoils of used ballot papers sealed in a tamperproof envelope;

   e. copy of election results declaration forms; and

   e. stray ballot papers in a tamperproof envelope.

2) The presiding officer shall deliver, to the returning officer—

   a. the sealed ballot boxes;

   b. the statements made under regulations 78 and 79;

   c. copy of the Register of Voters; and

   d. Polling station diary. [Emphasis supplied]

73. Verification therefore is an exercise that comprises the entire electoral process commencing from registration of voters, inspection of the voters Register, verification of registration, verification of an electors details where the electronic identification fails, audit of the Register, identification of voters, presence of candidates, agents, accredited observers and media, the process of counting and the limited right of recount, signing the declaration forms and the entitlement of candidates or agents to a copy, displaying the declaration of results for access by the public, sealing of ballot boxes and handing-over of election materials, the tallying process and the right to challenge the declaration of results in an election

Court. All these processes activate several inbuilt principles of the electoral system under article 81 of the *Constitution*. They also provide an opportunity for electoral quality assurance, aptly described in the cited excerpt from the concurring opinion of Mutunga CJ & P (as he then was) in the Kidero case. The hierarchy is that any shortfalls in the preceding process can be detected in a consequent process forming a basis for a pre-election or post-election dispute.

74. It is however to be observed that a proper test for verification of an electoral process must always prioritize the primary instrument for Declaration of the result or outcome of the voters choice. The voter is identified at the Polling station; he votes at the polling station, ballots are counted at the polling station. The agents, candidates, observers are allowed access into the polling stations to verify the inner sanctum of the voice of the electorate - the altar of the voters choice. What happens there is what determines the parameters of verification. Any doubt as to the credibility or integrity of the election must be tested against the various layers of verification, including the election material in the custody of the Returning Officer. A single want of form in this elaborate scheme of verification cannot be a basis for nullifying a Presidential Election.

F. Transmission

75. At the heart of transmission was the application of the directions by the Court of Appeal in the Maina Kiai case. Before delving into the primary (Manual) and the complementary (electronic) modes of result transmission, I will revisit this decision and its bearing on the conduct of future elections.

The Case

i. The Petitioners Submissions

76. At paragraph 67 of the Petitioners written submissions, it was urged that the determination of the court of Appeal in the Maina Kiai case was that a polling station was the final point of declaration of Presidential Election results. The Petitioners contended that the 1st Respondent however, went contrary to this determination by: declaring the final results of the Presidential Election at the County; failing to electronically collate, tally and transmit the results accurately; allowing transmission and display of unverified results not provided for in law; posting contradictory and ever changing results in Forms 34A and 34B in the portal; and declaring final results of the Presidential elections on 11th August, 2017 before receiving results from all the polling stations.

77. According to the Petitioners, the only lawful, credible and secure way to conduct, tally and transmit the 2017 Presidential Election results was as provided under section 39(1C) of the *Elections Act, 2011* i.e. electronic transmission in the prescribed Forms and in a prompt and efficient manner. It was the Petitioners submission that the Court of Appeal in the Maina Kiai case affirmed the use of information technology to guarantee the accuracy and integrity of election results and at pages 70-71 of their judgment, determined thus:

> "We are satisfied that the electronic transmission of the already tabulated results from the polling station is a critical way of safeguarding the accuracy of the outcome of the elections The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop 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 result.

ii. The Responses

(a) The 1st and 2nd respondents

78. Counsel for the 1st and 2nd respondents made concurring arguments on this issue. The written submissions of the 1st Respondent, summarized the litigation logic of the Maina Kiai case as an appeal against the decision by the High Court in Constitutional Petition No 207 of 2016 seeking the following Orders:

    a. A declaratory Order that Sections 39 (2) & (3) of the *Elections Act, 2011*, are contrary to the provisions of Articles 86 and 138(2) of the *Constitution* and therefore, null and void;

    b. A declaratory Order that Regulations 83(2), 84(1) and 87(2) of the Elections (General) Regulations, 2012 are unconstitutional and contrary to Articles 86(b)(c) and 138(2) of the *Constitution* and therefore null and void;

    c. A declaration that respective constituency returning officers are the persons responsible for the conduct and declaration of constituency presidential election results;

    d. A declaration that constituency presidential elections results once declared and announced by respective constituency returning officers are final results for the purposes of that election;

    e. A declaration that constituency returning officers possess a fundamental and an inalienable mandate to announce and declare the final results of a presidential election at constituency level and that such declaration is final and is not subject to alteration, confirmation or adulteration by any person or authority, other than an election Court, pursuant to Articles 86 and 138(2) of the *Constitution of Kenya*.

79. The issue for determination was whether results announced by the Constituency Returning Officer in respect the Presidential election were provisional and subject to confirmation by the 1st Respondent. The Court of Appeal upheld the determination of the High Court that to the extent that section 39(2) and (3) of the *Elections Act, 2011* and Regulation 87(2)(c) provide that the results declared by the constituency returning officer are provisional, and to the extent that Regulation 83(2) provides that the results of the returning officer are subject to confirmation by the 1st Respondent, these provisions are inconsistent with the *Constitution* and therefore null and void.

80. In his oral submissions, counsel for the 1st Respondent Mr Nyamodi, submitted that the pathway to the final results was demarcated by the *Constitution*, the *Elections Act, 2011* and Regulations thereunder and by judicial directions rendered by Superior Courts in Kenya. To this extent, two critical decisions guided the 1st Respondents electoral returning role; the Maina Kiai case and National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & others [2017] eKLR Civil Appeal No 258 of 2017 (The NASA case).

81. Counsels submission was that in reliance to the *Constitution*, the law and judicial guidance, the 1st Respondent used Forms 34B as opposed to Forms 34A as argued by the Petitioners, to declare the final results of the presidential election. He emphasized that at the time the final results of the presidential election were declared, all Forms 34B had been collated. It was counsels submission that, by declaring Sections 39 (2) and (3) of the *Elections Act, 2011* inconsistent with the *Constitution*, the 1st Respondents ability to change, amend or alter the results transmitted from the Constituency, was entirely curtailed. According to counsel, the decision of the Court of Appeal in the Maina Kiai case extinguished the concept of provisional results. Consequently, the numbers manually entered into the KIEMS kit at the close of polling and transmitted simultaneous to the Constituency Returning Centre and the National

Tallying Centre, bore no status in law. They were mere statistics, although the Presiding officer had to show the Agents present the entries made for confirmation before transmission.

82. To buttress his argument, Mr Nyamodi traced the process of a vote as follows (with reference to paragraph 20 of the Response to the Petition):

a. Upon the close of polling, the votes cast were counted and the results recorded in Forms 34A.

b. An image of the Form 34A was captured by the Kenya Integrated Election Management System (KIEMS) kit and the statistics in the Form 34A were then entered into the KIEMS kits at all polling stations.

c. The presiding officer would then simultaneously relay the statistics and the image of the Form 34A to the relevant constituency returning officer and to the National Tallying Centre (NTC).

d. The completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. In respect of areas lacking 3G or 4G network coverage, the Respondents established alternative mechanisms to ensure completion of transmission of the image of the Form 34A. (It was however clarified, during oral submissions, that in such instances, the statistics could be sent without the accompanying image.)

e. In accordance with section 39 (1C) of the *Elections Act*, the 1st Respondent published the images of Forms 34A and 34B in respect of the presidential election on its public portal.

f. In all polling stations, the presiding officers transmitted the statistics of the results through KIEMS accompanied by the electronic image of Forms 34A.

g. At the time of the declaration of the results of the presidential election, the 1st and 2nd respondents had in their possession all the forms required in law for purposes of a declaration of the results of the presidential election.

h. The procedure adopted in the transmission and tallying of results of the presidential election was in conformity with the decision of the Court of Appeal in the Maina Kiai case. [Emphasis added]

83. On the basis of this process, Counsel submitted that the Petitioners allegation that the 1st Respondent deliberately pre-determined and set itself on a path of subverting the law by being a law unto itself, was unfounded. However, although section 44A of the *Elections Act, 2011* empowers the 1st Respondent to set up complementary mechanism for identification of voters and transmission of election results to ensure that it complies with article 38 of the *Constitution*, the Court of Appeal directed that the tabulated results electronically transmitted from the polling stations in the prescribed forms was a critical way of safeguarding the accuracy of the outcome of the elections and could not be varied. The rationale for this determination was that there was no need for 290 Constituency returning officers and 47 County returning officers to troop to the NTC with Forms 34B carrying the hard copies of the presidential results which they had announced in their respective tallying centres. It was counsels submission that despite this conclusion, the Court of Appeal did not declare section 44A of the *Elections Act, 2011* inconsistent with the *Constitution*.

84. In addition, counsel submitted that the determination by the Court of Appeal on the finality of presidential election results declared by the constituency returning officer also changed the structure of Form 34C. Regulation 87(3)(b) provides that:

> " upon receipt of Form 34A from the constituency returning officers under sub- regulation (1), the Chairperson of the Commission shall tally and complete Form 34C. However, the

1st Respondent had to modify Form 34C to reflect the entry of Forms 34B, which was the Form declared by the Court of Appeal to be the source document to determine the winner of a Presidential election, in place of Forms 34A.

85. Mr Nyamodi concluded by reaffirming that the way the 1st Respondent structured its transmission system, was largely based on the Court of Appeals decision in the Maina Kiai case which did not interfere with or negate the will of the people resident in Form 34A.

(b) The 3rdRespondent

86. Mr Ngatia, counsel for the 3rdRespondent submitted that the Forms 34B produced by the constituency returning officers upon tallying the results from the polling stations as contained in Forms 34A were binding upon the 2nd Respondent at the National Tallying Centre. As such, the duty of the 2nd Respondent at the National Tallying Centre was to tally the results contained in Forms 34B to produce Form 34C which contained the final results of the Presidential elections; a duty that was properly executed.

87. Counsel further rebutted the Petitioners argument that the declaration of results was made at the County. He urged that the declaration of results was done by presiding officers at every polling station, and by the returning officers at the Constituency Tallying Centre and that the role of the 2nd Respondent was simply to tally the results obtained from the returning officers in Forms 34B accompanied by Forms 34A before declaring the final results of the election. Due to the County threshold required by article 138(4)(b) of the *Constitution*, it was logical for the 2nd Respondent do announce the results County by County.

88. The Petitioners contention was that the 1st and 2nd respondents failed to adhere to the guidelines set by the Court of Appeal in the Maina Kiai case during the conduct of the 2017 Presidential elections. The Respondents on the other hand demonstrated that the presidential election was conducted in accordance with those guidelines. However, counsel for the 1st Respondent urged this Court to consider the place of the Maina Kiai decision rendered by the Court of Appeal, in the conduct of presidential elections in Kenya and to settle the law for future elections. According to the 1st Respondent, the role of the 2nd Respondent had been reduced by the Court of Appeal to tallying the results in Forms 34B to generate Form 34C.

89. Counsel for the 1st Respondent was of the view that this Court does not lose its status to interpret and apply the *Constitution* while sitting as a Court of original jurisdiction to hear disputes relating to a presidential election. Indeed, I agree with counsel for the 1st Respondent that while exercising original jurisdiction as conferred on this Court by article 163(3)(a) of the *Constitution*, this Court will resolve both issues of law and fact arising in the course of litigation, and settle any issues of constitutional controversy.

Analysis

90. While it may seem peculiar to delve into analysis of the jurisprudence laid by the Court of Appeal in the Maina Kiai case, in a case, other than one on appeal, it is my considered opinion that we can do so through a two-prong approach. Firstly, this is a court of original jurisdiction in presidential petitions under article 163, and therefore competent to adjudicate upon matters of both law and fact in such a matter, including the interpretation and application of the *Constitution*. Secondly, this Courts foreboding on circumstances such as present before us, manifests in the decisions of this Court in the cases of *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission and Two*

Others, Sup. Ct. Petition No 9 of 2014, (the Lisamula case) Rawal, DCJ, (as she then was), concurring [at paragraph 135]:

> " Therefore, the peculiar nature of the *Constitution of Kenya, 2010* informs the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. the *Constitution* progressively broadens the arena of litigation in this country, and the Supreme Court must remain steadfast in its duty to address itself to issues that may properly come [up] before it. The jurisprudence to be developed by the Supreme Court of Kenya may bear differences from that of other jurisdictions in the world, because of the special terms of this countrys charter, which expresses the peoples will, and embodies their mutual agreement. While most jurisdictions would command a Court to relieve itself of duty by making a prompt finding on jurisdiction, Kenyas Constitution directs the Supreme Court to take no rest, until all unsettled issues of its interpretation and application are resolved [Emphasis supplied].

In the Aramat case, [at paragraphs 101 and 111]:

> [101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the *Constitution*. Besides, as the Supreme Court carries the overall responsibility [The *Constitution of Kenya, 2010*, article 163(7)] for providing guidance on matters of law for the States judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.
>
> [111] From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions.
>
> Whatever option it takes, however, this Court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below. [Emphasis added]

In Re The Matter of the Interim Independent Electoral Commission, Sup. Ct. Civil Application No 2 of 2011; [2011] eKLR (Re IIEC) this Court has the jurisdiction to interpret any constitutional provisions in the course determining any matter. It held that:

> Indeed, interpretation of the *Constitution* stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the *Constitution* as may be necessary; and the several independent Commissions under the *Constitution* are similarly entitled to interpret the *Constitution* as part of the performance of their respective mandates. The Supreme Court too, may take its position as guided by its own interpretation of the *Constitution*. [Emphasis added]

91. At the centre of the instant case is the impact of the decision of the Court of Appeal in the Maina Kiai case to the constitutional status of section 39 (in its entirety) and section 44A of the *Elections Act, 2011*; the role of the Chairperson of the Independent Electoral and Boundaries Commission pursuant to article 138(10) (a) of the *Constitution*; and the overall mode of transmission of presidential election results from the polling station to the National Tallying Centre as elaborated in the *Constitution*, the

Elections Act, 2011 and Regulations thereunder. It is important to note that no intention of an Appeal from this decision was lodged in the Supreme Court Registry within the statutory 14 days. Bearing in mind the Supreme Courts constant call to interpret the *Constitution*, these issues still engage this Courts jurisdiction under article 163(3)(a).

92. This case therefore presents two apposite issues for determination:

(i) whether in conducting the 2017 presidential election, the 1st and 2nd respondents adhered to the guidelines set by the Court of Appeal in the *Maina Kiai* case; and

(ii) what is the place of this jurisprudence in the conduct of future presidential elections in Kenya?

93. The starting point is to place the *Maina Kiai* case in context. This was an appeal against the Judgement of the High Court delivered on April 7, 2017 in which the High Court made the following declarations:

a. that to the extent that section 39(2) and (3) of the *Elections Act* provides that the presidential election results declared by the constituency returning officer are provisional (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

b. that to the extent that regulation 87(2)(c) of the *Elections (General) Regulations 2012* provides that presidential election results declared by the constituency returning officer are provisional (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

c. that to the extent that regulation 83(2) of the *Elections (General) Regulations 2012* provides that presidential election results declared by the constituency returning officers are subject to confirmation by the Commission (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

d. that the presidential election results declared by the constituency returning officer are final in respect of the constituency, and can only be questioned by the election court;

e. that to the extent that the 1st respondent interprets section 39(2) and (3) of the *Elections Act* and regulations 83(2) and 87(2)(c) to mean that it can confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in the particular constituency (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void.

The Appellant (1st Respondent in this case) sought to have the Judgement of the High Court overturned. In arriving at its determination, the Court of Appeal considered the meaning of section 39(1C) of the *Elections Act, 2011* (as amended) and observed that:

> 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. [Emphasis added]

94. The Court of Appeal also found that the electoral system reforms which were emphasized in the 2016 and 2017 Amendments to the *Elections Act, 2011* was the use of information technology to guarantee

the accuracy and integrity of the election results. It noted that section 44(1) required the 1st Respondent in this matter to:

44.

(1) ...establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

...

(3) ...ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

...

(5) ...in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section...

...

44

A. 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*. [Emphasis added]

On the basis of these Sections, the Court of Appeal held:

> We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers can vary or even purport to verify those results, particularly when it is clear that, by article 86 (d), section 2 of the Act and regulation 93(1), all election materials, including ballot boxes, ballot papers, counterfoils, information technology equipment for voting, seals and other materials, are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared, unless required in proceedings in court.
>
> The information contained in Form 34, which has since been replaced following the promulgation of the Elections (General) (Amendment) Regulations, 2017, is primary information that is itself arrived at after an elaborate process at two levels of the electoral system to safeguard the integrity of the outcome before it is transmitted to the national tallying centre. Regulations 73 to 90 enumerate the process of counting of votes, declaration and transmission of results.
>
> Once the presiding officer closes the polling station at the end of voting, he is required, in the presence of the candidates or agents to open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose; cause to be counted, the votes received by each candidate by announcing the name of the candidate in whose favour the vote was cast; display to the candidates or agents and observers the ballot paper sufficiently for them to ascertain the vote; and put the ballot paper at the place on the counting table, or other facility provided for this purpose, designated for the candidate in whose favor it was

cast. The total number of votes cast in favour of each candidate is then recorded in a tallying sheet in Form 33. [Emphasis supplied]

The Court of Appeal, emphasizing on the centrality of the activities at the polling station on election day held:

> We bear in mind that presidential election, where two or more candidates are nominated, are held in each constituency and the foregoing process is undertaken at the constituency, the details of which are recorded at the end of the exercise in Form 34. It is inconceivable that those details, arrived at after such an elaborate process can be viewed as provisional, temporary or interim. The inescapable conclusion is that it is final and can only be disturbed by the election court.
>
> It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters will . The counting of the votes a s elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and an tithetical to inte g rity and accuracys hould fal l from the appellants mouth. [Emphasis supplied]

95. The Appellate Court expansively interrogated the process of voting as enunciated under article 86 of the *Constitution* and was of the view that it was an affront to constitutional values and principles to claim that the 2nd Respondent in this case, could alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process. The Court was of the view that article 138(3)(c) reinforces the values under article 86 by requiring the 1st Respondent to tally, verify the count and declare the result in a presidential election, after counting the votes in the polling stations. The Court interpreted this article to mean that the 1st Respondent could only declare the result of the presidential vote at the constituency tallying centre after the process of tallying and verification was complete. According to the Appellate Court, the 2nd Respondent has a significant constitutional role under article 138(10) as the authority with the ultimate mandate of making the declaration that brings finality to the presidential election process. The Court observed that the 2nd Respondent is required to tally all the results exactly as received from the 290 Returning Officers country-wide without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying centre and verification or confirmation related to establishing that the candidate to be declared President-elect had met the threshold set under article 138(4).

96. The Court of Appeal was of the view that the introduction of section 39 (2) and (3) of the *Elections Act, 2011* sowed discord, mischief and confusion in this elaborate process, making its retention in the *Elections Act, 2011*, unnecessary and in fact, unlawful. It remarked that the Amendment to section 39 was intended to align it with Articles 81, 82, 86, 101, 136 and 138 of the *Constitution* to provide for procedure at the general elections and that by dint of section 39(1) of the Act, required the 1st Respondent (through its Returning Officers) to tally, and verify the count and declare the results at the polling stations immediately after close of polling. It observed that:

> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in Sub article (3)(c) is not to be construed to mean the Chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms

containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and "verify the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how circumscribed and narrow the role of the chairperson of the appellant is.

97. The Court also focused on the Amendments to the *Elections (General) Regulations 2012* by the 1st Respondent through Gazette Supplement, Legal Notice No 72 of 21st April, 2017, replacing the Form titled "Declaration of Presidential Election Results at a Polling Station with two forms (Forms 34A and 34B) titled "Presidential Election Results at The Polling Station and "Collation of Presidential Election Results at the Constituency Tallying Centre, consecutively. It thus held:

> "It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability.
>
> ...
>
> The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.
>
> ... there is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the chairperson of the appellant.
>
> Ultimately we find no fault in the determination of the High Court that to the extent that section 39(2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the retuning officer are subject to confirmation by the appellant, these provisions are inconsistent with the *Constitution* and therefore null and void.

Did the 1st and 2nd respondents adhere to the guidelines set by the Court of Appeal in the Maina Kiai case?

98. In my view, the 1st and 2nd respondents satisfactorily demonstrated that the electoral process was conducted in accordance with the directions of the Court of Appeal in the *Maina Kiai* case. Processes that had been put in place before the determination by the Court of Appeal declaring section 39(2) and (3) of the *Elections Act, 2011* and Regulation 87 (2)(c) unconstitutional were adjusted to:

a. eliminate "provisional results" and

b. adjust Form 34C to reflect a collation of Forms 34B from the Constituency Returning Officers who had verified and tabulated the final results from the polling stations in Forms 34A.

99. The declaration by the 2nd Respondent of the results of the election per County was in keeping with the constitutional requirement that the candidate declared elected as President receives at least twenty-five per cent of the votes cast in each of more than half of the Counties (herein, the County threshold).

100. I am therefore satisfied with the adherence by the 1st and 2nd respondents , to the guidelines by the Court of Appeal in the Maina Kiai case. This decision, delivered on June 23, 2017, 35 days prior to the conduct of the Presidential election in August, 2017, was definitive of the status of the law at that time. As such, the 1st and 2nd respondents adherence to those guidelines was an answer to the duty in article 10 of the *Constitution*, binding all State Organs and State Officers to the national values and principles, in this case, the rule of law, whenever any of them (such as the 1st and 2nd respondents) applies or interprets the *Constitution*, enacts, applies or interprets any law; or makes or implements public policy decisions. The only challenge was that the system of data transmission system from the polling station to the National Tallying Centre had already been set up.

101. Having so determined, I must now prospectively interrogate, as invited by the Respondents to do, the place of the Maina Kiai case in the conduct of future presidential elections in Kenya.

102. This Court is not new to Kenyas complex electoral history as so aptly considered by the Court of Appeal in its analysis. In fact, one of the issues this Court had to deal with in its maiden election appeals litigation following the March, 2013 General Elections was the process of declaration of election results resulting in an outcome after which the parties to the election, or a voter, are at liberty to file an election petition at the High Court. An examination of *Hassan Ali Joho & another v Suleiman Said Shahbal and others*, (the Joho case), alongside that of *Maina Kiai* is necessary because *Joho* was extensively relied on by the parties during the hearing and determination of the appeal forming an integral part of the guiding precedent followed by the Appellate Court.

103. The *Maina Kiai* case, though in many respects similar to the case of the *Joho* case, Supreme Court Petition No 10 of 2013; [2013] eKLR was a play of different legal and constitutional provisions. while the *Joho* Case interrogated the plurality of declaration processes for a gubernatorial election, a three-tier election with no requirement of a County or national threshold, the Maina Kiai case addressed itself to the declaration processes in a Presidential election; a two-tier election process [article 138 (3)(c)] with a mandatory national and County threshold [article 138 (4)(a) and (b)], and a defined mode of declaration [article 138 (10)(a)]. Noteworthy is that these two cases were in different Electoral Law Amendment periods. The foregoing aspects therefore signal an imperative to distinguish *Joho* from the *Maina Kiai* case.

104. The Court of Appeal succinctly framed the controversy before it in the *Maina Kiai* case as follows:

> In the end, the learned Judges granted the petition by declaring that;
>
> > " .....to the extent that section 39(2) and (3) of the *Elections Act* provides that the results declared by the returning officer are provisional, that is contrary to Articles 86 and 138(2) of the *Constitution*. To the extent that regulation 83(2) of the Elections (General) Regulations 2012 provides that the results of the returning officer are subject to confirmation by the Commission, that is contrary to Articles 86 and 138(2) of the *Constitution*. To the extent that regulation 87(2)(c) of the Elections (General) Regulations 2012 provides that the results that the returning officer shall electronically to the Commission are provisional, that is contrary to Articles 86 and 138(2) of the *Constitution*." (Emphasis supplied)
>
> The highlighted phrase "subject to confirmation" and the word "provisional" were the main cause of discomfort prompting the 1st, 2nd and 3rdRespondents to Petition the High Court for relief. It is the construction of those very words by the three learned Judges that has now aggrieved the appellant to come to this Court. [Emphasis added]

105. The question before the Court of Appeal was whether the purpose for which section 39(2) and (3) of the *Elections Act* and Regulations 83(2) and 87(2)(c) (both Regulations now amended) were promulgated, or the effect of their implementation infringed any provision of the *Constitution*. In summary, the controversy was:

(a) the finality of the declaration (if any) of presidential election results at the polling station, the constituency tallying center and the national tallying centre and

(b) the process of transmission of election results from the polling station to the National Tallying Centre and the role of the Chairperson of the Commission in that process.

106. I agree with the determination of the Court of Appeal that

> "the polling station is the true locus for the free exercise of the voters will and that once the counting of votes as elaborated in the *Elections Act, 2011* and Regulations thereunder, with its open, transparent and participatory character using the ballot as the primary material means, as it must, that the count there is clothed with finality not to be exposed to any risk of variation or subversion."

Consequently, the concept of 'provisional results does not exist in our Constitutional electoral practice. As such, we uphold the determination by the Court of Appeal that Sections 39(2) and (3) of the *Elections Act, 2011* are inconsistent with the *Constitution* and to that extent, null and void.

107. However, I depart from the decision by the Appellate Court to the extent that:

i) it endorses another layer of tallying and verification of the result of the presidential vote in the form of the Constituency tallying centre and

ii) incapacitates the Chairperson of the Commission, an integral part of the declaration process in a presidential election, from verifying the polling results.

In particular, the determination that:

> Our interpretation of this article (138 (3)(c) is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the result of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification.
>
> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in sub article (3)(c) is not to be construed to mean the chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and "verify" the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how circumscribed and narrow the role of the chairperson of the appellant is.

108. It is conceded that the Chairperson of the Commission cannot supplant the entries of a presiding officer against any candidate with his own figures, however, an arithmetic verification of the correctness

of the summation in Form 34A and an examination of the authenticity of the instruments of declaration is permitted, nay, required by the *Constitution*. According to the *Constitution*, the Chairperson of the Commission is also the Returning Officer in a Presidential Election and therefore, ought to receive and preserve electoral material relating to that election in order to aid the election Court in its mandate as the final verifying Agency as elaborated in the foregoing section of this dissenting Judgement.

109. To place the role of the Chairperson of the Commission in the scheme of a presidential election, I am guided by the following interrogations:

(i) what is a declaration in a presidential election?

(ii) who makes that declaration and;

(iii) when is that declaration made?

110. The formula of locating a declaration of the result of a presidential election lies within the *Constitution* and can be derived by a reading of article 138 and 140 of the *Constitution*, together.

Article 138

(1) .....

(2) .....

(3) In a presidential election-

c. After counting the votes in the polling stations, the independent Electoral and Boundaries Commission shall tally and verify the count and declare the result. [Emphasis added]

(4) A candidate shall be declared elected as president if the candidate receives-

a) more than half of all the votes cast in the election; and

b) at least twenty-five percent of the votes cast in each of more than half of the Counties.

.....

(10) Within seven days after the presidential election, the Chairperson of the Independent Electoral and Boundaries Commission shall-

(a) declare the result of the election

Article 140

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

111. Adopting the decision of this Court in the *Joho* case, the word "declared in article 180 (4) of the *Constitution* (in this case, article 138), has been used to depict the finality culminating in the declaration of the winner of an election. Article 138 (3) (c) of the *Constitution* is the pace -setter of the declaration process. It calls on the Commission to tally and verify the count before declaring the result. This formula is in terms of article 86(a), simple, verifiable, transparent and accountable. Article 138(3)(c) eliminates need for the polling results in a presidential election to be tallied at the constituency tallying centre before being declared. Presidential election results are declared at the national tallying centre, by the Chairperson of the Commission. Before that declaration can be made; several things must be done:

i. the polling results must be tallied-Art. 138 (3)(c)

ii. the count must be verified-(Art. 138 (3)(c)

iii. the national threshold must be met-article 138(4)(a) and

iv the County threshold must be met-article 138(2)(c).

These prerequisites can only be done at the National Tallying Centre by the Chairperson of the Commission who is also the person who Returns the Results of the Presidential Election in accordance with the *Constitution*.

112. I am persuaded by the reasoning of the Irish Supreme Court in *Kiely v Kerry County Council (Rev 1)* [2015] IESC 97, where Mr Justice William M. McKechnie writing for the majority, elaborated the role of a returning officer as follows, at paragraph 45:

> Whilst it is undoubtedly the case that the role of the returning officer is indispensable to the election process, it is also evidently the case that he or she, in fulfilling that role, is a creature of statute and is bound by the terms of the express legislative provisions above referred to. Accordingly, in the performance of his (or her, as the case may be) duties and functions he must be guided by the principles so laid down in such legislation, within which is set out the framework where those whose names are validly on the register of electors can give effect to the franchise so vested in them. He must obviously not exceed the limits of the competence so conferred on him: he is therefore confined to what can legitimately be extracted from the provisions in issue, either by way of express conferment or necessary intendment. He cannot operate in excess of these limitations. He cannot, for example, justify any act or action, however desirable his intentions might be, based on any form of inherent power for the simple reason that his office is not amenable to attract competence in this way. When the occasion arises it therefore becomes a matter of statutory interpretation as to whether or not the act or omission complained of is within the competence of his office to perform. [Emphasis added]

113. The role of the Chairperson of the Commission as the Returning Officer of the result of the presidential election is confined within the four corners of articles 138 and 140 of the *Constitution*. The following determination by the Court of Appeal cannot therefore hold.

> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in sub article (3)(c) is not to be construed to mean the Chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result.

114. This is the only logical result following a holistic and purposive interpretation of the *Constitution*. We have previously explicated on the essence of a holistic and purposive interpretation of the *Constitution* In *Re Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Reference No 1 of 2012 as follows:

> "It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation

> does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

In the *Speaker of the Senate & another v Attorney-General & 4 others*, Sup Ct. Advisory Opinion No 2 of 2013; [2013] eKLR, held, with respect to interpretation of the *Constitution*, as follows-at paragraph 226:

> The Court, in the circumstances, should adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the *Constitution*.

In his concurring Opinion in the same matter, Mutunga, CJ & P, (as he then was) observed at paragraph 185 that a Constitution does not subvert itself. Therefore, no provision should be deemed to strike down another, but rather the provisions must be interpreted in a manner that each supports the other. the *Constitution* must be interpreted holistically and no provision should be read in isolation.

In the *Joho* case, this Court held that:

> Indeed, ordinarily, in our view, a question regarding the interpretation or application of the *Constitution* may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the *Constitution* should be interpreted broadly and liberally, so as to capture the principles and values embodied in it. [Emphasis added]

115. It is therefore my considered view that article 138 of the *Constitution* must be interpreted liberally and in a manner that none of its sub-Articles strikes down the other.

Electronic and Manual Electoral Processes

116. Having determined the place of the *Maina Kiai* case in the 2017 Presidential Elections, and having, by this dissent appealed to the Supreme Courts consideration of that decision in Kenyas electoral practice, noting the unnecessary burden upon the value of simplicity of the electoral process through an added layer of the Constituency, I now turn to the role of electronic results transmission as a complement to the manual transmission of election results (the classical ballot election). Once again, the pillars of this section have been elaborated in the dissenting opinion of my brother, Justice J.B Ojwang, SCJ and I shall restate only in part, where necessary.

117. The value of transparency underscores a critical component of elections: their public- nature. A voter must be able to verify whether the *Elections Act* has been conducted and recorded accurately-hence the participatory nature of vote counting and tallying expressed in the *Constitution*, the *Elections Act* and Regulations thereunder. The public is represented, at the counting stage by accredited members of the media and international observers. The process of voting and declaration is also public.

118. History is a great revealer of intent. Events inspire laws and public processes and at the heart of these laws and processes are shortcomings to be remedied, crises to be averted, needs to be met, and a nation to be efficiently and effectively governed. The disputed 2007 Presidential elections marked a turning point in electoral management in Kenya. Describing the political atmosphere during this period, the Committee of Experts on Constitutional Reform noted in their Preliminary Report dated November 17, 2009 that:

> These elections were heavily contested... The final results were delayed and then announced amidst public tension and accusations that the delay was a sign that the Presidents party was

attempting to rig the elections. Eventually, the results were announced on December 30, 2007 and the President hurriedly sworn in.

119. The *Report of the Joint Parliamentary Select Committee on matters of the Independent Electoral and Boundaries Commission* traces the historical use for deployment of Information Technology in elections. At paragraph 359, the report makes reference to the experience of voter registration and the ills thereof witnessed during the 2007 elections thus:

> 359. The Independent Review Commission on the General Elections found that the 2007 disputed General Elections were not credible due to names of deceased voters appearing in the electoral register, impersonation of absent voters and defective planning of voter registration system among other shortcomings in the electoral process. The Commission recommended that –
>
> > "Use of technology should also be implemented in order to enhance, not only integrity' and accuracy of results, but to increase speed of transmission, storage, and further analysis and audits by the ECK. If the law does not recognize results that are transmitted or tallied electronically, this technical solutions should, at least before the law is amended, be used as a parallel system for providing a backup system for ensuring accuracy of tallies and results, while still using the paper-based system of statutory forms" [Emphasis supplied]

120. Based on the lessons drawn from the 2007 General Elections, technology was introduced to address the dual problem of (a) voter identification and (b) vote transmission. Following this recommendation, the Commission employed technology in the 2013 General Elections in the terms elaborated by the Committees Report hereunder:

> 360. The Independent Electoral and Boundaries Commission employed technology in the 2013 General Elections in the following forms-
>
> 1) The Biometric Voter Registration System (BVR) was used for registering voters. It comprises a laptop, a finger print scanner and a camera. The Biometric Voter Registration System (BVR) captures a voters facial image, finger prints and civil data or Personally Identifiable Information (PII), that is, the name, gender, identity card or passport number, telephone number among other details.
>
> 2) The Electronic Voter Identification System (EVID) is an electronic poll book. There are two types of Electronic Voter Identification System (EVID) technology: the laptop with attached finger-print reader and the handheld device with in-built finger print reader. The Electronic Voter Identification System (EVID) verifies and confirms voters electronically as registered by the Biometric Voter Registration System (BVR). They are used to check-in voters at polling station on polling day and are helpful in Streamlining. Electronic Voter Identification System (EVID) curbs impersonation and ensures that only those who registered to vote are allowed to vote.
>
> 3) The Political Party Nominations System (PPNS) ensures that primary data on candidates nominated by political parties are entered in a format that makes it easy for the Independent Electoral and Boundaries Commission to verify the accuracy of the candidate details, compliance and generate ballot paper proofs. This is achieved by cross-matching the voters register and the political party register.
>
> 4) The Results Transmission System (RTS) is a system for transmitting provisional results electronically to an observation centre. At the end of voting and when votes have

been counted and tallied, the Presiding Officers enter the data on the signed results sheet (Form 35) into specially configured mobile phones and transmit the results simultaneously to the election results centres at the constituency, county and national level. The Results Transmission System (RTS) is meant to enhance transparency through electronic transmission of provisional results from polling stations and to also display and visualize provisional results at the tally centers and provide access to provisional elections data to media and other stakeholders in real time.

121. Several issues referenced in the Report and detailed in the decision of the Court in the *Raila* 2013 case emerged from the use of technology in elections. At paragraphs 233-235, the Court observed that:

> [233] We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television- monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.
>
> [234] In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ongondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the procurement process – squabbles which occasioned the failure to assess the integrity of the technologies in good time. It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: and we recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.
>
> [235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done.

122. A stakeholder recommendation of employing an integrated electoral technology was implemented birthing the Kenya Integrated Electoral Management System [KIEMS). The functioning of this system is what has been contested in the Petition and supporting Affidavits. In summary: [See foregoing paragraphs of this Judgement and the pillars in Justice Ojwangs dissenting Judgement for a full outline]

i) That there was system manipulation occasioning unfair advantage to the 3rd Respondent and unfair disadvantage to the Petitioners. In particular, that there was a consistent 11% variance between the 1st Petitioner and the 3rd Respondent in the transmission results displayed on the Commissions portal.

ii) That certain results were not transmitted in the form mandated by the Electoral law, fatally compromising the result of the election.

iii) That the results transmitted using the KIEMS system were materially different between Forms 34A and B

iv) That the election results were pre-determined by the Commission

123. The case on transmission is supported by the Affidavits of Raila Odinga, Aprielle Oichoe, Koitamet Ole-Kina and Godfrey Osotsi.

124. The 1st Petitioners evidence can be summarized as follows:

(i) That the IEBC deliberately and/or negligently comprised the security of the integrated electoral management system (KIEMS) and thereby exposed it to unlawful interference by third parties.

(ii) Collation, tallying, verification, verification and transmission of the presidential results was riddled with procedural flaws, illegalities of the nature and extent that compromised the credibility of final result.

(iii) That soon after procurement of KIEMS and establishment of ETAC, the IEBC conducted itself in a manner that weakened the security of integrated electronic system and exposed it to risks of interference from third parties that may have compromised the integrity of system. In particular:

a. That the Elections Technology Committee (ETAC) was declared unconstitutional in Petition No 127 of 2017 and the Commission failed to defend the Regulations or inform the stakeholders of the said suit.

b. That the Commission filed Petition No 415 of 2016 to declare section 39(1C) unconstitutional, which section is the basis of electronic transmission of results.

c. That the Commission failed to put in place several preparatory measures set up by law to assure the integrity and efficiency of KIEMS such as preparation, development, publication and implementation of a disaster recovery and operations continuity plan in the event KIEMS collapsed.

d. That two days to the presidential elections, IEBC announced that over 11,000 polling stations were purportedly out of 3G and 4G network range and results from these locations would therefore be transmitted manually.

e. That the Commission commenced the testing, verification and deployment of technology two days to the general elections contrary to requirement of at least 60 days to the election and therefore denied the public opportunity to verify the efficiency and the security of the same.

f. That despite clear advice from the Communication Authority of Kenya against hosting a private cloud to supplement the Commissions primary and disaster sites, it contracted OT Morpho SAS (France) thereby compromising the security of the cloud.

g. That the death of the Commissions ICT Manager in charge of the management of the integrated electronic system was a clear attempt to further weaken the electronic electoral system.

h. That failure to transmit results from polling stations and constituency electronically together with the prescribed forms exposed the collation and tallying process to manipulation.

i. That the unreasonable delay in electronically transmitting results together with the prescribed forms grossly affected the credibility and validity of the results. They averred that transmission of results without prescribed forms has no basis in law.

125. Aprielle Oichoe swore an Affidavit on the basis of expertise in cyber security. As such, her deposition was drawn on the basis that her observation of the transmission process, compounded by her expertise (although none was proven in terms of certifications) was useful in evaluating compliance with the

six main components or principles which the Commission systems and database ought to have been tested against. The deponent outlined the six principles as follows:

1) Confidentiality: that information ought to be accessed by authorized persons.

2) Integrity: Information used should be accurate, complete and protected from malicious modification either by authorised or unauthorized persons. In this regard, she swore that non-authenticated forms and non-prescribed results appeared on the 1st Respondents public portal. No evidence with particulars of these forms was however adduced to support this expert opinion.

3) Availability: it was her sworn evidence that systems required must be available as and when required by those authorized to use it in accordance with Articles 35 and 47 of the *Constitution* and section 44 of the *Elections Act* as read with section 4 of the *Access to Information Act* and Regulation 15 (4) of the *Elections (Technology) Regulations, 2017*. She swore that during the voting process, some persons could not find their names on the register and the explanation given by the Returning Officer in Upper Hill High School Polling station was that the affected persons either shard identity cards with other persons or their data has been lost by the 1st Respondent. Once again, no evidence was adduced, either in the form of affidavits from the affected persons or the Returning Officer in question to support this allegation.

4) Non-repudiation: An audit trail must be maintained on activities related to the information. Logs are therefore essential to trace actions performed on a computer system. That an entry was made into the system and a strange return made in the system in the form of an exercise book. The non- repudiation principle is supposed to ensure security by the unique identifier, in this case it was the QR code used by presiding officer to map the KIEMS device within the Results Transmission system

5) Authenticity: the information itself must be proven to be genuine and the source must also be proven to be genuine. In her expert opinion, at the time of declaration of results, there were only 29,000 Forms 34A available and the 1st Respondent declared the results with the authenticity of most Forms in dispute. Some of the forms used to declare the results differed with those returned by the Agents from the field. Once again, these forms were not produced as annexures to the Affidavit.

6) Privacy: IEBC failed to secure its data justifying the conduct of a systems audit.

An Assessment of the 'Expert Opinion' of Aprielle Oichoe

126. Although the deponent claimed cyber security expertise, no certifications were provided to prove the existing expertise to warrant the weight placed on expert opinions by the Court. Section 48 of the *Evidence Act*, Cap 80 of the Laws of Kenya is instructive on this point:

> 48. Opinions of experts
>
> (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

127. Although the deponent outlined the six principles which the transmission systems and database ought to have been tested against, the source of that opinion was not provided. Sufficient evidence to prove

the link between those principles, the imperatives of electoral conduct and elaborate omission by the 1st Respondent, supported by any evidence, was not provided. Experts, when admitted before the Court, in person or by deposition, in the words of Lord Justice Jacob in *Rockwater Ltd v Technip France SA (formerly Coflexip SA & Anor*, Case No A3/2003/107 have a primary function:

> " their primary function is to educate the court in the technology – they come as teachers, as makers of the mantle for the court to don."

Further, as elaborated by Sir Donald Nicholls V-C giving the judgment of the Court of Appeal in *Mölnlycke v Proctor & Gamble* [1994] RPC 49 at p. 113 (although determining a matter of patent):

> As a practical matter a well-constructed experts report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.
>
> [] In my view, this Affidavit does not meet the essential attributes of 'Expert opinion to guide the resolution of the question of transmission verification in issue.

128. Koitamet Ole Kina deponed that as a duly accredited agent of the Petitioners, he was at the National Tallying Centre and witnessed results Streaming into the online portal at 5:15pm, soon after the close of polling. They could not however verify the results of the elections because the same were not accompanied by hard copies of Forms 34A or the soft copies received by the 1st Respondent on their servers. They received 23,000 Form 34A on 10th August, 2017, and 50 Forms 34B. On 11th August, 2017, they were notified that only 29,000 Forms 34A were available with a shortfall of over 11,000 Forms 34A. Further, only 108 Forms 34B were available at the National Tallying Centre. Later that evening, the Commission confirmed that it was in possession of all Forms 34B and was ready to declare the result. In a letter dated August 15, 2017by the CEO of the 1st Respondent, it was indicated that all the Forms 34B had been availed by the Commission and handed to the deponent on August 14, 2017.

129. Godfrey Osotsi, the Secretary General of Amani National Congress Party and a duly accredited Agent nominated by NASA swore an affidavit as an IT expert with over 12 years experience. He swore that on the basis of information from Waqo Shuke, a member of the 1st Respondents ICT staff, the tallying process involved two sets of results, those with Forms 34A and those based on text messages only. The explanation obtained was that these results were coming from areas with no 3G or 4G network coverage. Despite a 10% variance (54 and 44%), the Petitioners' were denied access to the system back-end (servers) to ascertain the source of the variance.

130. He doubted whether each presiding officer used their unique QR code to transmit the results of the election from the various polling stations to the Constituency Tallying Centres and to the National Tallying Centre.

131. He joined Ole Kina in deposing that declaration of election results could only be done when the Commission was in possession of all Forms 34A and B, which was not the case during this election because at the time of declaration. He emphasized that the results could only be called or declared when the Commission was in possession of all the Form 34A and 34B and at the time of declaration; the Commission had only 29,000 Forms 34A. He asserted that the results transmitted from the 11,000 polling stations out of 3G and 4G network coverage could not be ascertained and compromised up to 7 million votes. In his evidence, vote transmission could only be manual, not both manual and electronic.

132. I must however point out that his evidence cannot be considered as that of an expert witness because he describes himself as part of the Petitioners party and in my view, supporting the averments in the Petition as opposed to advancing expert opinion to the Court. This evidence must therefore be

examined with that caution in mind. Ngaah J, in *Peter Kariuki Njenga v Gabriel P. Muchira & another* [2017] eKLR Civil Appeal, No 188 of 2010, referred to the following passage on expert evidence:

> In Cross on Evidence 5th Edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh Magistrates (1933) SC 34,40, is set out as stating the functions of expert witnesses:
>
> > "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."
>
> So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness. [Emphasis supplied]

In response

133. The 1st and 2nd respondents averred that:

(i) Transmission was completed in accordance with the electoral law and Regulations thereunder and in terms of the decision of the Court of Appeal in the Maina Kiai case

(ii) The completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage and where this was unavailable, alternative mechanisms to ensure completion in transmission of the image of the Form 34A in areas that lacked 3G or 4G network coverage, was established.

134. The 2nd Respondent swore that appropriate training had been completed before the KIEMS kits were deployed for elections.

135. The CEO of the Commission, Mr Ezra Chiloba reinforced this assertion by deposing that more than 360,000 election officials were recruited and trained across the country to conduct the elections.

a. It was the deponents testimony in response to the 1st petitioners Affidavit that that the law was amended vide the Election Laws (Amendment) Act, 2017 to provide for a period of four (4) months within which to procure and put in place the KIEMs He averred that the 1st Petitioners allegation in his affidavit evidence that electronic electoral system may have been exposed to risk of interference was speculative and untrue.

b. The cases referenced by the Petitioners were both filed by other parties and the Commission was enjoined to these causes on the basis of its role in electoral preparations. [See: *Collins Kipchumba Tallam v The Attorney General*, Petition No 415 of 2016 and *Dr Kenneth Otieno v The AG & IEBC*, Petition No 127 of 2017].

136. James Muhati, the 1st Respondents ICT Director referred to the History of Electronic Transmission in Kenya and swore that section 44 of the *Elections Act* was amended (by inserting section 44A to address the concerns raised by failure of technology in the 2013 General Elections.

137. Mr Muhati deposed that the Commission and ETAC ensured that mechanisms to satisfy the constitutional and Statutory while using the KIEMS were put in place by the Commission. He also averred that the Commission, pursuant to section 44(5) of the *Elections Act* published the Elections (Technology) Regulations 2017 on 21st April, 2017, 3 months before the general elections. He deponed that the 1st respondent developed and implemented a policy to regulate the progressive use of technology in the electoral process.

138. He swore that the transmission required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs) i.e. Safaricom Limited, Airtel Kenya Limited and Telkom Kenya Limited. These providers were assigned zones of covered out of the thirteen zones established around the country. Each zone was powered by two providers, one as a primary service provider and the other as back-up. This was done to ensure consistency and accountability in operation and availability of service. It was his testimony that in a zone where an MNO was neither a primary nor secondary service provider, it was not expected to provide any results transmission system since KIEMS could only accommodate two SIM cards. Accordingly, the Commission gave such provider the coordinates of polling stations within the zones to enable the service provider prepare itself for the provision of results transmission services. The zoning was to ensure effective data segmentation into manageable parts.

139. He averred that following a mapping exercise carried out by the Commission and analysis by the service providers, it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G Network and this communication was sent out to the public vide a Notice dated August 6, 2017. As a result, it was averred that presiding officers in these areas were instructed to move to points where there was network coverage or in the alternative go physically to the Constituency Tallying Centres in order to transmit the results. He further swore that the Commission had made all the necessary arrangements to avail all Forms 34A in a public portal.

140. Regarding the security guarantees inbuilt within the KIEMS system, it was Mr Muhatis evidence that there was:

    i) configuration of only pre-determined and authorized tablets for transmission which was under constant round the clock automated monitoring,

    ii) secured network spectrum with a twin high-level perimeter firewall which filtered unauthorized transmission,

    iii) robust database management solution with recommended security options such as pre-encryption or results;

    iv) secure Virtual Private Network (VPN) and a granular role-based access control and user management for the entire Result Transmission System (RTS) and the SIM cards used during the exercise were disabled for voice and text messaging and had unique security features to conduct the exercise. Any attempts to relay data from a SIM card other than those provided by the service providers was easily detectible.

141. He further averred that the KIEMS kit was configured in such a way that it could not transmit data which bore more registered voters than those specific to a particular polling station.

142. Brian Gichana Omwenga swore an Affidavit in Response to the allegations in his capacity as the 3rdRespondents Party Technical Advisor and a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT) on the issue of transmission. It was his evidence he elaborated that although the results keyed-into the KIEMS kit would be accompanied by an image of Form 34A, in areas without 3G or 4G network coverage, transmission of the scanned image of Form 34A would either delay or not be sent at all, prompting the presiding officer to deliver Form 34A physically to the Constituency Tallying Centre. These Forms would thereafter be used to tally the results in Forms 34B.

143. Having laid out critical elements of the petitioners issue with the transmission of the results of the Presidential election, I now turn to the analysis. The allegations, although in most part, bare of any evidence (eg, the blanket allegation of 11000 polling stations without proper particulars, and the link of tangential events such as publicly available law suits to the functioning of the system) present certain critical areas for examination:

(i) What is the import of Sections 39, 44 and 44A as far as transmission of election results is concerned?

(ii) Is technology a mandatory component of Kenyas electoral transmission process?

(iii) Is the Petitioners averment that technology was the only acceptable mode of election results transmission accurate and that lack of 3G and 4G coverage in 11,000 polling stations compromised over 7 million votes?

What is the complementary mechanism provided under section 44A of the *Elections Act*?

144. The High Court (upheld by the Court of Appeal) has had a chance to consider the use of technology in elections in Kenya and particularly, interpretation of Sections 39, 44 and 44A of the *Elections Act* in a decision wwhose final determination I concur with. In National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others, Constitutional Petition No 328 of 2017 (The NASA case), the High Court held that:

80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.

81. In the The Concise Oxford English Dictionary, Oxford University Press, 12th Edition 2011, the word complementary means forming a complement or addition, ... combining in such a way as to form a complete whole or enhance each other while complement means a thing that contributes extra features to something else so as to enhance or improve it.... That being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will complement, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under article 38 of

the *Constitution*. This complementary mechanism only sets in when the integrated electronic system fails.

145. While I find the decision of the High Court quite compelling, I would, with respect, reinforce it by applying the terms of the *Constitution*. The Honourable Justices only partially interpreted section 44A and restricted themselves to the *Elections Act* without due regard to Articles 38 and 86 of the *Constitution*. Having referenced the decision of this Court in Raila 2013 case, the High Court rightly observed at paragraph 54:

> 54. It is clear from this judgment that when the electronic system fails there should be a fall-back system to avoid the entire election falling into shambles

A situation not envisaged by Articles 38 and 86 (d) of the *Constitution*.

146. Article 86 of the *Constitution* lays down the parameters of voting in furtherance of the right to vote in free and fair elections pursuant to article 38 of the *Constitution*. The system of voting ought to be simple, accurate, verifiable, secure, accountable and transparent. It is peculiar that with regard to voting, article 86 does not make any direct reference to transmission of the election results. However, transmission, as discussed in the foregoing paragraphs is an integral part of the electoral process. It is the mode through which the results leave the polling station to the Constituency Tallying Centre and the National Tallying Centre. In order to enable voting and give full effect to the right to vote, appropriate structures must be set up. According to article 86(d) of the *Constitution*, these structures and mechanisms ought to eliminate electoral malpractice. The KIEMS system was one such mechanism. the *Constitution* goes further and mandates that included in those appropriate structures and mechanisms is the safe-keeping of election materials. This requirement completes the dictates of accuracy, verifiability, security, accountability and transparency of the election process. But why does the *Constitution* emphasise on the safe-keeping of election materials as part of the appropriate structures and mechanisms to eliminate electoral malpractice and what then ought to be the interpretation of Sections 39(1)(C), 44 and 44A with reference to this provision?

146A. These provisions provide as follows:

> 39. Determination and declaration of results
>
> (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.
>
> (1A) The Commission shall appoint constituency returning officers to be responsible for—
>
> i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;
>
> ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and
>
> iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.
>
> (1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from

constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(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.

(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with article 138(10) of the *Constitution*.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

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 sub section (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.

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*. [Emphasis added]

147. The High Court kept a consistent eye on the essence of the *Elections Act* in general and section 44 and 44A in particular with regard to engaging and protecting the right to vote. Technology is a means to an end (a verifiable election result) not an end in itself. In fact, the Court was aware of the enduring need to always consider article 38 and its reinforcing provisions while construing provisions in the *Elections Act* when it referenced the German Federal Constitutional Courts Judgement of the Second Senate in part:

bb) in a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.

cc) The Public nature of the elections is also anchored in the principle of the rule of law. The public nature of the states exercise of power, which is based on the rule of laws, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the state bodies. This also applies as to the activities of the election bodies.

b. The principle of the public nature of elections requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the *Elections Act* and to the ascertainment of the election result. An election procedure in which the voter cannot reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements.

c. Despite the considerable value attaching to the constitutional principle of the public nature of elections, it does not ensue from this principle that all acts in connection with the ascertainment of the election result must take place with the involvement of the public so that a well-founded trust in the correctness of the elections can be created.....

It is certainly ensured in these cases that the voters are in charge of their ballot and that the result of the election can be reliably checked by the election authorities or by interested citizens without any special prior technical knowledge..... b) Restrictions on possibilities for citizens to monitor the election events cannot be compensated for by sample devices in the context of the type approval procedure or in the selection of the voting machines specifically used in the elections prior to their deployment being subjected to verification by an official institution as to their technical performance. The monitoring of the essential steps in the election promotes well-founded trust in the correctness of the election certainly in the necessary manner that the citizen himself or herself can reliably verify the election event.

For this reason, a comprehensive bundle of other technical and organizational security measures (eg, monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and local organization of the elections) is also not suited by itself to compensate for a lack of controllability of the essential steps in the election procedure by the citizen. Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verification of the election events.

Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists, relate to a stage in the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is hence likely to require other additional precautions. [Emphasis Added]

148. However, a sharp deviation from this consistence is marked by the Courts opinion at paragraph 72, in part:

72. Under sections 39 and 44 of the Act, the use of technology in our electoral system is entrenched. Registration of voters, their identification at the point of voting and the transmission of election results is purely electronic. However, the actual voting, tallying and collating of votes is wholly manual.

I disagree with the High Courts conclusion that transmission of election results is purely electronic. To maintain that standard would be to negate the purport of section 44A of the *Elections Act*. A clear understanding ought to be made of the components of our electoral system – whether electronic or manual.

What constitutes the electoral system in Kenya?

[] Article 83 of the *Constitution* provides that:

(1) ...

(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

[] Section 4 of the *Elections Act, 2011* provides that the Independent Electoral and Boundaries Commission (Commission) shall compile and maintain the Register of Voters. Section 5 of the *Elections Act, 2011* provides that:

(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times ...

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters.

[] Section 44 of the *Elections Act, 2011* provides that:

(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.

[] These provisions are the basis of registration of voters by the Commission. Registration of voters in Kenya is conducted when the voter physically goes to the registration centre and his details are manually inputted into an electronic system and his biometrics are taken as part of his identification mechanism pursuant to Regulation 8 of the *Elections (Registration of Voters) Regulations*, 2012. This Regulation provides that:

> A register of voters shall contain biometric data and the particulars set out in Form A in the Schedule.

Further Regulation 13A provides the process to be followed during the registration of a voter, in the following terms:

Registration procedure

(1) A person who applies to be registered as a voter shall present his or her identification document to the registration officer stationed at a Registration Centre of his or her choice. (2) The registration officer shall, where the applicant is qualified to be registered as a voter, issue the applicant with Form A as set out in the Schedule.

(3) The applicant shall return the duly completed Form A to the registration officer and the registration officer shall confirm the details in the form and enter them in the biometric voter registration system and the Voters Record Book. (note the filling of the form is manual)

(4) The applicant shall be issued with an acknowledgement slip upon registration.

[] The details of the voter are thereafter transmitted by the Registration officer to the Commission for compilation, pursuant to the Regulation 12. This Regulation provides as follows:

12. Certification of Register of Voters

1. Where as a result of operation of section 5 of the Act, the registration of voters has been ceased, the Registration officer shall compile the list of registered persons.

2. The registration officer shall after effecting compilation of the register of voters relating to the constituency submit his or her component for compilation by the Commission.

3. The Commission shall compile the register of voters comprising of components under section 4 of the Act. (4) ...

149. Therefore the registration is electronic, but it can only be done manually by the Registration Officer or another officer designated to do the registration, hence a voter must physically present himself at registration centre.

The voters details and biometrics are then manually inputted into the Register of Voters which by law includes an electronic register. The definition section of the *Elections Act, 2011* describes the Register of Voters as:

> " [A] current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."

150. During the elections the voter goes to the polling station and uses his National Identification Card as one means of identification and then undergoes a biometric voter identification process which is electronic. If for any reason the system is not able to identify the voter using the biometrics then a complementary manual system shall be applied in the identification of the voter, pursuant to section 44A of the *Elections Act, 2011*.

152. Therefore there is a twin scheme of manual and electronic voter identification at the polling station during the elections. Voting is also manual not electronic as voters mark their ballots and cast them into the ballot boxes. Once the voting process ends at the polling station, the votes are manually counted and the presidential election results recorded manually in the Form 34A by the Presiding Officer.

153. Regulation 5 of the *Elections (General) Regulations, 2012* unequivocally sets out the functions of the presiding officer in the following terms:

(1A) The functions of a presiding officer shall be—

a. presiding over elections at an assigned polling station;

b. tallying, counting and announcement of results at the Polling station;

c. submitting polling station results to the Constituency returning officer; and

d. electronically transmitting presidential results to the constituency, counties and national tallying centers.

154. Therefore upon signing Form 34A and ensuring the same is signed by the agents of the candidates present in the polling station, the presiding officer manually inputs the results and the scanned Form in the designated electronic kit and electronically transmits the results to the Constituency, County and National Tallying Centres. The Kenya Integrated Election Management System (KIEMS) kit applied for that purpose requires 3G or 4G network, as indicated by Learned counsel for the 1st respondent in order to transmit the results. In the areas where that nature of network is not available, the presiding officer will be required to move to an area where that network is available in order to electronically

transmit the results. A copy of the Form containing the declared results is also pinned on the door of the polling station.

155. It is clear that the counting of the votes and the declaration of the results at the polling station is manual but the transmission is electronic. Nonetheless, by dint of section 44A of the *Elections Act, 2011* if the electronic transmission of the results fails then the presiding officer will revert back to the manual system of transmission in which case he will have to physically deliver the Form 34A to the Constituency Returning officer.

156. In like manner, the Constituency Returning Officer upon receipt of the Forms 34A from the polling stations in the constituency, will manually tally, collate and verify the results and complete the Form 34B. He will then send those results electronically to the County and National Tallying Centres. If that fails, he will deliver them manually. Similarly, at the National Tallying Center the results are tallied, collated and verified manually and the declaration of the winning presidential candidate is done. The Certificate of Declaration of Results is then manually handed to the President-elect.

157. Kenyas electoral process cannot therefore be said to be purely electronic. It comprises of both manual and electronic components. It is a rather ugly grouchy and reluctant mongrel of two very distinct processes. In fact it is a largely manual system. It is therefore very distinct from electronic electoral processes exhibited in foreign jurisdictions such as India, Australia, the United States of America, Canada, and Brazil among others.

158. In India, for instance, the process of voter registration is now electronic since a voter is able to register as a voter online by completing a form online and submitting it to the electoral body for registration. The process of voting is done by use of Electoral Voting Machines and the votes are counted and tallied electronically. There are no paper ballots.

158. In Australia the Parliamentary elections are conducted by an electronic voting system which uses standard personal computers as voting terminals. Voters use a barcode to authenticate their votes. The voting terminals are linked to a server in each polling location using a secure local area network. However no votes are transmitted over a public network such as the internet. The votes are then electronically counted and tallied. Again, there are no paper ballots.

159. In the United States of America voting is by way of optical-scan ballots or by direct- recording electronic devices that record votes electronically. The votes are counted and tallied electronically. Dominant in these jurisdictions where the electoral process is electronic is the electronic counting and tallying of the votes -an element which we do not have in our electoral process.

160. The upshot is that in Kenya, the system of voting is partly manual and partly electronic with the option of reverting to the manual processes should the electronic processes fail. However, the counting of votes, tallying, collation and verification of the results is entirely manual.

161. An interpretation of section 44A of the *Elections Act* is incomplete without due consideration to article 38 and 86(d) of the *Constitution* and section 39 and 44 of the *Elections Act*. With respect, the High Court considered it only in light of section 44 advancing an incomplete conclusion. At paragraphs 80-87, parts which I would construe differently, the High Court held:

> 80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.

81. In the The Concise Oxford English Dictionary, Oxford University Press, 12th Edition 2011, the word complementary means forming a complement or addition, ... combining in such a way as to form a complete whole or enhance each other while complement means a thing that contributes extra features to something else so as to enhance or improve it.... That being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will complement, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under article 38 of the *Constitution*. This complementary mechanism only sets in when the integrated electronic system fails.

83. It was the petitioners contention that the mechanism envisaged under section 44A is akin to the one in section 44 of the Act; that the debate in Parliament did not indicate that the complementary mechanism was to be manual. With greatest respect, we do not think that there is any ambiguity in the language used in section 44A to resort to the Hansard of Parliament in order to decipher the true intention of the legislature in this case. The language and meaning in that section is plain and clear. To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.

84. One other thing that buttresses our position that the mechanism contemplated in section 44A of the Act is independent of the one set out in section 44 of the Act, is the use of the words Notwithstanding the provisions of section 39 and section 44, ... The use of the term 'notwithstanding makes the mechanism in section 44A independent of what is contained in sections 39 and 44. The authors of Strouds Judicial Dictionary of Words and Phrases 6th Edition, London, Sweet and Maxwell 2000 at page 1732 have defined notwithstanding as follows:

> Notwithstanding: Anything in this Act to the contrary notwithstanding is equivalent to saying that the Act shall not be an impediment to the measure, ...

85. On the other hand, the Blacks Law Dictionary, 9th edition, Bryan and Garner, 2009, defines the word notwithstanding to mean despite, inspite of. In this regard, the use of the term notwithstanding in section 44A means that inspite of what the provisions of section 39 and 44 stipulate as to the mechanism in our electoral system, the respondent is to put in place a mechanism to complement sections 39 and 44 of the Act. All that is required is that the said mechanism be simple, accurate, verifiable, secure, accountable and transparent; and, one which will not disenfranchise the citizens.

86. We are fortified in our finding by the decision of the Supreme Court of India in Chandavakar Rao v Ashalata Guram [1986] 4SCC 447. It was held-

> -A clause beginning with the expression notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law

for the time being in force, or in any contract is more often than not appended to a section at the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment.

87. Accordingly, our determination on what constitutes the components of the complementary mechanism to be established under section 44A of the Act is: that the mechanism should be separate but which is meant to improve or augment the mechanism already set out in section 44. That mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It must also comply with article 38 of the Constitution, that is, it must ensure that every citizens right to register as a voter, vote at an election or vie for political office is safeguarded.

161. Article 39(1)(C) mandates that for purposes of a presidential election, the Commission shall electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre. Technology however, per section 44, is used subject to the provisions of the entire section, meaning, that there are prerequisites to be met, before technology can be employed. Parliament was keen to introduce conditions preceding the use of technology in elections. These conditions are in-built in the provision as follows:

i. A policy for progressive use of technology in the electoral process (S. 44(2)

ii. The technology shall be simple, accurate, verifiable, secure, accountable and transparent (S. 44(3) which is in terms of Art. 86(a) of the *Constitution*)

iii. In an open and transparent manner, procure the technology at least 120 days before such elections

iv Deploy the technology at least sixty days before a general election

v Enact Regulations in consultation with relevant agencies, institutions, stakeholders, including political parties for the aspects listed under section 44 (5) (a-j)

vi. Technology shall be restricted to voter registration, identification and results transmission

vii. Establish a technical committee to oversee the adoption of technology and its implementation for the conduct of the General elections.

162. It is imperative at this juncture to highlight that the use of technology is progressive. Kenyas electoral system is a vivid recollection of progressive improvement. Emerging from the mlolongo (queing) system that made no use of paper ballots, to the introduction of paper ballots, the development of statutory transmission Forms and several layers of verification, to the maiden introduction of technology during the 2013 General Elections whose partial failure inspired the introduction of the KIEMS system which returned proper voter registration, identification and sufficient vote transmission with verifiable paper trail. I reiterate the finding of this case in the Raila 2013 case, at paragraph 237:

(237) From case law, and from Kenyas electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the

applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioners contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioners case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

163. The Petitioners and other interested parties sought guidance from the Courts on a significant aspect of these prerequisites, which were all settled in time for the elections.

164. In light of the provisions relating to the use of technology in elections and in transmission of the results in a presidential election, Parliament introduced a non-obstante clause in the terms of section 44A mandating the Commission to put in place a complementary mechanism for identification of voters and transmission of election results. According to Blacks Law Dictionary, 9th Edition, page 1155, a non-obstante clause is one which gives effect despite any laws to the contrary or which precludes interpretation contrary to the stated object or purpose.

165. The *Constitution* and the entire electoral code enliven this mechanism: the manual identification of voters and manual transmission of results in the prescribed instruments of transmission, verifiable by various agents including an election Court using election material expressly referenced under article 86 (d) and defined under section 2 of the *Elections Act*. The essence of this section was to save the Sovereign will of the people from the unpredictable nature of technology and to introduce a layer of verifiability to the electoral process. Parliament was clear, by the terms of section 44A that the complementary mechanism (which exists as the manual system of result transmission in the prescribed instruments of declaration and whose finality is only questionable before an election Court) was sufficient to deliver a presidential election, as happened in areas where there was no 3G or 4G network coverage.

166. I have already laid out the provisions of article 86(d) of the *Constitution* which provides for the security of electoral materials. Section 2 of the *Elections Act* defines Election material to mean ballot boxes, ballot papers, counterfoils, envelopes, packet statements and other documents used in connection with voting and includes information technology equipment used for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election. These items exist. Their non-utility, compromise, interference or unavailability for purposes of inspection was not challenged. Notwithstanding the shortcomings of technology in terms of article 44A, these materials stood as a testament of the *Elections Act*s exercised by millions of Kenyans-an exercise which the majority has termed, irrelevant.

167. The *Constitution of Kenya* is one drawn for efficiency. It communicates purpose with timelines. In the Mary Wambui case, this Court held that:

> (75) The electoral history of Kenya is replete with cases of delay in finalizing matters, thereby denying the voters the opportunity to have their chosen representatives in the organs of democratic governance. It is clear that the sovereign power belongs to the people, and is exercised either directly or through their democratically elected representatives in the State Organs, which include Parliament and the Legislative Assemblies in County Governments. The voters rights in this regard are quite clear, from the terms of the *Constitution* (article 1).

168. Article 138 of the *Constitution* is replete with these directives of time: Art. 138 (5); Art. 138(9); and Art 138 (10). the *Constitution* gives the Chairperson of the Commission a maximum period of seven days within which to declare the result of the election and deliver a written notification of the result to the Chief Justice and the incumbent President. This imperative allows enough time for the Commission

to tally, verify the count of the results from the polling station, and declare the result pursuant to article 138(4)(b) of the *Constitution*.

169. The complementary mechanism referenced in section 44A of the *Elections Act* is a function of verification. I am persuaded by the determination of the German Federal Constitutional Court in the Judgement of the Second Senate that, the public nature of elections requires that all essential steps in the elections are subject examinability, unless other constitutional interests justify an exception. This examination must be possible, by the voter/public, without special expert knowledge. Therefore, the voter in Kenya understands the function of the ballot and the critical importance of entries in the statutory Forms 34A, 34B and 34C. Election results are displayed in the relevant forms after the close of polling for all to see and scrutinize. Any mechanism that purports to complicate this simplicity is at variance with the *Constitution*. Technology reinforces the efficient and fast translation of the will of the people into an ascertainable return. It however does not supplant the critical primary instrument-Form 34A generated at the primary locus of the election and challengeable only in a Court of law.

170. There was lingering doubt, throughout the proceedings on the figures that were being Streamed on television. Counsel for the 1st Respondent submitted, to my satisfaction, that those figures (he referred to them as statistics) bore no status in law following the decision of the Court in the Maina Kiai case. I also note that the decision to Stream these statistics was proper to manage public expectation owing to the history of elections in Kenya. The following recommendations from the Krieglar Report are instructive:

> RecommendationsIREC recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK in the drivers seat in relation to providing the media with fast and reliable data.IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non- frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked.

171. In my view, the claim of a consistent 11% variance between the results for the 3rd Respondent and the 1st Petitioner in my view was not proved (reference to hacking is analysed in the part on Orders of Access to Information).

172. Having determined that failure of technology could not supplant the will of the people, recorded in verifiable ballots and other election material and the results declared in (a) available (b) ascertainable (c) unchallenged (d) proper statutory instruments of declaration, it is my opinion that the Petitioners case to exclude results from 11,000 polling stations which were out of 3G and 4G network would be an affront to the *Constitution* and the right to franchise.

Presidential Election Vote Tally: Are Rejected Votes Relevant In Computing Percentages?

The Legal Importance of Percentages in the presidential vote tally

173. The controversy surrounding the Presidential Election 2007 was based on a number of factors including the perception of what constitutes a popular winning candidate. the constitutional framework adopted in August 2010 sought to address this concern by introducing a possible two tier election for the position of President.

In accordance with article 138(4) of the *Constitution*, a candidate shall be declared elected as President if the candidate receives more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties. This means that in order for a candidate to be declared President-elect, he/she must receive more than fifty (50) per cent of the votes cast in the election, or what has been commonly referred to as the threshold of 50 plus 1.

174. If no candidate meets this threshold, then fresh elections must be held at which only the two candidates with the highest number of votes in the first round will participate. In this second round, it is the candidate who receives the largest number of votes or a simple majority, who will be declared President-elect.

175. Therefore percentage points play a critical role in determining the winner of a presidential election in the first round and whether there will be a second round of elections. Consequently, any factor that would affect the percentage of votes attained by a candidate needs to be addressed.

The Petitioners Case

176. According to the Petitioners, the number of rejected votes accounted for at least 2.6% of the total votes cast and affected the final result of the Presidential election. It was the Petitioners averment that the exclusion of spoilt votes from the final percentage computation of the Presidential election results, rendered voting by a number of voters, irrelevant.

In that respect, the Petitioners sought the following reliefs:

a. A specific order for scrutiny of the rejected and spoilt votes;

b. A declaration that the rejected and spoilt votes count towards the total votes cast and in the computation of the final tally of the Presidential election.

The Law

177. In their written pleadings the Petitioners refer to the following applicable sections of the law and the *Constitution*:

a. Article 1-Sovereignty of the Kenyan people;

b. Article 2-The Supremacy of the *Constitution*;

c. Article 4-Establishment of the Kenyan Republic as a multi-party State founded on the national values and principles of governance referred to in article 10 of the *Constitution*;

d. Article 10-National values and principles of governance

e. Article 38 guaranteeing every citizen the right to exercise their political rights.

f. Article 81 (e)(v) read together with section 39 of the *Elections Act* and Regulations thereunder which undergird the conduct of free and fair elections administered in an impartial, neutral, efficient, accurate and accountable manner.

g. Article 86 which requires that at every election, the Independent Electoral and Boundaries Commission shall ensure that—the voting method is simple, accurate, verifiable, secure, accountable and transparent; votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including safekeeping of election materials.

h. Article 88 establishing the Independent Electoral and Boundaries Commission;

i. Article 138 outlining the procedure at an election petition.

j. Article 140-Questions as to the validity of presidential election

k. Article 163-The Supreme Court

l. Article 249-The objects, authority and funding of commissions and independent offices.

Issues for determination

178. The Petition outlines the following issues for determination:

(i) whether the colossal 2.6% of the total votes cast (constituting the number of rejected votes) substantially affects and/or invalidates the count and tally of the Presidential election; and

(ii) whether the total number of rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold.

Analysis

179. A similar question of rejected votes arose in Supreme Court Petition No 5 of 2013 (See paragraphs 258 to 285). This Court considered the meaning of all votes cast and whether these included rejected votes? or were limited to the properly marked ballots which figured in the vote-tally for the individual candidates. The Court considered the provisions of the *Constitution of Kenya*, 1969 and the *Constitution of Kenya, 2010* specifically, reference to valid votes cast in determining the winner of an election in the previous constitutional dispensation (section 5 (5)(e) and all votes cast in article 138(4) of the *Constitution of Kenya, 2010*.

180. The Petitioners case is that all votes cast include rejected and spoilt votes (sic).

The ratio in the Raila 2013 caseOdinga v IEBC & 3 Others Supreme Court Petition No 5 of 2013

181. Analysis of this issue ought to commence with the question posed at paragraph 262 of Supreme Court Petition No 5 of 2013:

> Is it intended, in the *Constitution of Kenya, 2010* that the expression more than half of all the votes cast should mean, literally, all the ballot papers that were marked and cast into the ballot box Or should it mean only all the valid votes that were cast, and were counted in favour of one candidate or another?

This Court held that:

> The Elections (General) Regulations 2012 make no provision for rejected votes, though they provide for rejected ballot papers:absenting a distinction between a vote and a ballot paper. A ballot paper marked and inserted into the ballot-box is perceived as a vote, and becomes either valid or rejected, depending on the electors compliance with the applicable standards (see paragraph 281).

182. A non-compliant ballot paper yields a rejected vote which is invalid and therefore confers no advantage upon any candidate. Due to its numerical inconsequence on any candidates final tally, it should not be considered while computing the final percentage outcomes in a Presidential election.

Further analysis on the basis of the current Petition

183. The *Elections (General) Regulations 2012* defines a rejected ballot paper as a ballot paper rejected in accordance with regulation 78. Regulation 78-Rejected ballot papers-provides that:

(1) Every rejected ballot paper shall be marked with the word rejected by the presiding officer, and, if an objection is made by a candidate or an agent to the rejection, the presiding officer shall add the wordsrejection objected to and shall be treated as rejected for the purpose of the declaration of election results at the polling station.

(2) The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word disputed but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station.

(2A) The presiding officer shall make a decision on the validity of the disputed ballot paper under sub regulation (2) and award it to a candidate and such decision shall be final.

(3) After the counting of votes is concluded, the presiding officer shall draw up a statement in Form 41 set out in the Schedule showing the number of rejected ballot papers under such of the following heads of rejection as may be applicable—

a. want of security feature;

b. voting for more than one candidate;

c. writing or mark by which the voter might be identified; or

d. unmarked or void for uncertainty, and any candidate, counting agent or observer shall, if he or she so desires, be allowed to copy that statement.

When/how is a ballot rejected?

Regulation 77 provides guidance on the rejection of ballot papers. It provides that:

1. At the counting of votes at an election, any ballot paper:

a. which does not bear the security features determined by the commission;

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

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

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

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

When is a vote cast?

184. As determined in Supreme Court Petition No 5 of 2013, the Regulations make no provision for rejected votes. However, they do provide for rejected ballot papers, spoilt ballot papers, stray ballot papers, and disputed ballot papers. This classification is consistent on the use of the term ballot paper and outlines the manner in which these ballots are treated by the presiding officers.

Section 2 of the *Elections Act*;

> ballot paper means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;
>
> Ballot papers constitute election material and are required for the purpose of conducting an election while election results means the declared outcome of the casting of votes by voters at an election. (section 2 of the *Elections Act*). Casting of votes is an integral part of generating election results. In terms of article 138 (2)(c): In a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

185. In line with the decision of this Court in Supreme Court Petition No 5 of 2013 spoilt ballots are those which are not placed in the ballot box but in fact are cancelled and replaced where necessary by the Presiding Officer in a polling station. This is unlike rejected and disputed ballots, which although placed in the ballot box, are declared disputed or invalid by the Presiding Officer for a range of reasons as enumerated in Regulations 77 and 78.

186. Regulation 69 (2) provides that: A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers— (a) cast his or her votes in accordance with regulation 70 without undue delay.

Regulation 70 outlines the method of voting:

1. A voter shall, upon receiving a ballot paper under regulation 69(2)—

    a. go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote; and

    b. fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.

2. The voter shall after following the procedure specified in sub-regulation (1) put each ballot paper into the ballot box provided for the election concerned.

What is a vote?

While the term vote is neither defined in the *Constitution* nor the *Elections Act*, Blacks law dictionary defines it as the expression of ones preference or opinion by ballot, show of hands or other type of communication.

What is to cast?

Similarly, although the *Constitution* does not define the term cast, Blacks law dictionary defines cast as to formally deposit (a ballot) or signal ones choice.

Therefore, the act of a voter secretly marking his/her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom the voter wishes to vote, constitutes, a vote. However, that vote only counts to the final computation and is deemed cast, if the elector complies with the applicable standards elaborated under the *Constitution*, and the electoral law and regulations.

187. In certain instances, at the time the voter places his/her marked ballot paper in the ballot box, it remains a ballot, that can be rejected, unless, the voter has satisfied the requirements necessary to render their intention, a vote cast. This ballot paper however bears a mark against the name and symbol of the person whom the voter wishes to vote. The process of marking the ballot paper is therefore an expression of the voters wish/will to elect a particular candidate. This act, alongside other enabling electoral processes such as voter registration comprise the voters exercise of his/her political rights in line with article 38 (2) of the *Constitution*.

188. Regulation 76 clarifies is position more succinctly:

Regulation 76-Counting of votes:

1. The presiding officer shall, in the presence of the candidates or agents—
    a. open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose and, shall cause to be counted the votes received by each candidate; and
    b. record the total number of votes cast in favour of each candidate.
2. Each ballot paper shall be counted as follows—
    a. the presiding officer shall in respect of every ballot paper, announce the candidate in whose favor the vote was cast;
    b. display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote; and
    c. put the ballot paper at the place on the counting table, or other facility provided for this purpose, set for the candidate in whose favor it was cast.
3. The presiding officer shall record the count of the vote in a tallying sheet in Form 33 set out in the Schedule.
4. A candidate or an agent shall have a right to—
    a. dispute the inclusion in the count, of a ballot paper; or

b. object to the rejection of a ballot paper, where upon the presiding officer may decide to uphold or reject the complaint and act as provided under regulation 80.

In order for a ballot to translate into a verifiable vote (a vote cast), it must be clear in whose favour the vote was cast without identifying the voter.

Meaning, that a vote is cast only when a presiding officer, during counting, declares that the intention of the voter is clear and that the vote is made in favour of a particular candidate. The intention of the voter in a voting process that is by secret ballot is a core component of an individuals political right pursuant to article 38 of the *Constitution*.

Therefore:

(i) Spoilt ballots do not constitute votes eligible to be included in the tally of the final results in a presidential election. Regulation 71 which provides for spoilt ballot papers is clear on this position:

A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and providing to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt ballot paper shall be immediately cancelled and the counterfoil thereof marked accordingly.

(i) Rejected ballots in accordance with Regulations 77 and 78 and are void and not counted unless; in terms of Regulation 77 (2):

-a ballot paper on which a vote is marked—

a. elsewhere than in the proper place;

b. by more than one mark; or

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

189. Viewed purposively, it can be concluded that Regulations 2, 69, 70, 71, 77 and 78 exclude rejected ballots from the total votes cast; which are considered for purposes of computing the final results in a presidential election.

Do the Regulations conform to the provisions of the *Constitution* as set out in article 86(b) and 138(4) of the *Constitution*?

190. Article 86 (b) of the *Constitution* provides that;

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

a. ...

b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.

Article 138(4) of the *Constitution* further provides that;

A candidate shall be declared elected as President if the candidate receives

a. more than half all the votes cast in the election; and

b. at least twenty-five percent of the votes cast in each of more than half of the counties.

191. The Petitioners' logic collectivizing all votes as cast and therefore applicable in computing the final results of a presidential election, does not distinguish the Presidential election from other elections held on the same day. This reasoning accepts that stray ballots also ought to form part of the votes considered in computing the final percentages. A stray ballot paper means ballot a paper cast in the wrong ballot box (Regulation 2)

192. If any ballot for another election, for instance, Senate or Gubernatorial is placed in the Presidential ballot box, then that vote is not cast in the Presidential election. It is for all intents and purposes, a foreign object that cannot be considered a vote cast in that election. Consequently, it cannot be taken into account when considering the total number of votes cast in that election. Rejected ballots belong to no candidate. This however, is not to understate the statistical need to record rejected ballots. Such statistics may be helpful in assessing voter turnout and also acting as a barometer for evaluating civic education programmes for voters.

G. Burden of Proof

193. It is trite law that whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya stipulates this in the following terms:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Further section 109 in narrowing down to proof of particular facts, stipulates:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

194. Section 110 further provides that:

> The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

195. Regarding the incidence of burden, section 108 provides that:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

196. This Court had the opportunity of pronouncing itself on the issue of burden of proof in a Presidential election petition in Raila 2013. It held [paragraph 195]:

> " There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting.

Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."

197. The Court further held [paragraph 203] that a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The Court cited with affirmation the Canadian case, *Opitz v Wrzesnewskyj* 2012 SCC 55-2012-10-256 where it was thus stated in the majority opinion:

> " An applicant who seeks to annul an election bears the legal burden of proof throughout.....

However, the Court qualified this position by finding that the burden of proof once discharged by the petitioner, shifts to the respondents to disprove the claims made. It proceeded to specify what exactly the petitioner would be required to do to discharge that legal burden holding [at paragraph 196 & 197]:

> " Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long- standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authoritys departures from the prescriptions of the law.
>
> [198] IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the peoples political rights [article 38 of the *Constitution*]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behooves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.

198. It is therefore clear that in an election petition the burden of proof at the very onset lies on the petitioner to prove the facts that he alleges. Once the petitioner discharges that burden it shifts to the respondent(s) to rebut the claims made. This decision was cited with affirmation in Munya 2 when the Court stated:

> 178. One of the grounds for impugning the judgment of the Court of Appeal was that the Court shifted the burden of proof from the petitioner to the 2ndand 3rdrespondents, contrary to the holding by this Court in Raila Odinga and Another v IEBC. Regarding the burden of proof, this Court held that:
>
> > " ...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the

elections. It is on that basis that the respondents bear the burden of proving the contrary.

179. We affirm that this statement represents the legal position regarding the question of burden of proof in election petitions.

199. This Court elaborated on the distinction between the legal burden and the evidentiary burden, noting that the legal burden is the initial burden on the petitioner to prove the facts pleaded in the petition. Once the petitioner discharges that legal burden to the standard required, then the burden shifts to the respondent to disprove those claims; that being the evidentiary burden. The Court held [paragraph 182]:

> " The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process. The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue [Cross and Tapper on Evidence, (Oxford University Press, 12thed, 2010, page 124)]. In the Raila case, this Court echoed this trite principle (paragraph 195 of its judgment) when it remarked:
>
> > " ...an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made [emphasis supplied].

200. The petitioner must discharge the initial legal burden for the 1st Respondent to be under the evidentiary burden with respect to the register and the declared results. In that regard, this Court, in Munya held that [paragraph 188]:

> " [T]he evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged. [Emphasis supplied]

201. In *Vashist Narain Sharma v Dev Chandra & others*, 1954 AIR 513; 1955 SCR 509 (Vashist Narain) the Supreme Court of India, with regard to the burden of proofing an election should be annulled on the ground that it did not conform with written law, held that – the volume of opinion preponderates in favour of the view that the burden lies upon the [petitioner].

202. In instances in which the respondent admits certain facts alleged by the petitioner, the burden of proof is deemed to have been discharged by the petitioner but only with respect to the specific facts admitted.

The Supreme Court of India has had the opportunity to pronounce itself of this aspect in *Joshna Gouda v Brundaban Gouda & another*, SC Civil Appeal No 15174 of 2011. It held [paragraph 18]:

> " An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted."

In the same matter the Court held that since the petitioner at the trial Court had failed to discharge the burden cast upon him the election petition had to fail.

203. In *Vashist Narain* (above) the Court in emphasizing the grave need for the petitioner to discharge the burden of proof before an election is upset, held:

> " If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election .... but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the Legislature to consider. The English Act to which we have referred presents no such conundrum and lays down a perfectly sensible criterion upon which the Tribunal can proceed to declare its opinion. It directs the Tribunal not to set aside the election if it is of opinion that the irregularity has not materially affected the result."

204. The Supreme Court of India shed light on the sacred nature of an election by virtue of the fact that it is the expression of the will of the people which the Court is enjoined to guard jealously and void the declared results only upon proof illegal practices supported by cogent evidence. These principles were thus enunciated in *Rahim Khan vs Khurshid Ahmed & Ors*, 1975 AIR 290, 1975 SCR (1) 643 in which the Supreme Court of India held:

> " We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor. An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."

205. Therefore the petitioner must discharge the burden of proof in order to succeed in their pursuit to invalidate the declared results. The petitioner is not only required to prove that the irregularity was committed but also that the irregularity materially affected the election result. section 83 of the Evidence Act, 2011 specifically requires that no election shall be declared void by reason of non-compliance with written law if it appears that the election was conducted in accordance with the *Constitution* and with written law or that the non- compliance did not

affect the result of the election. The implications of this provision are addressed in detail later on in this opinion.

H. Standard of Proof

206. In electoral offences the standard of proof was held by this Court in Raila 2013 to be higher than balance of probabilities by below beyond reasonable doubt.

The Court citing with approval various authorities held [paragraph 203]:

> " The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the *Constitution*, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to thenational values and principles of governance declared in the *Constitution* [article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable- doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.

207. More specifically, where a claim of electoral malpractice is made the standard of proof is one above a balance of probabilities but below beyond reasonable doubt. Where a claim of commission of an election offence is made the standard of proof is similar to that in a criminal matter – it is beyond reasonable doubt. Where the claim relates to data-specific electoral requirements the standard of proof is also beyond reasonable doubt.

208. Where the petitioner assails the declared results on the allegation that the returned candidate committed election offences it is imperative for the petitioner to prove beyond reasonable doubt that the returned candidate or his agents working under his instructions committed the alleged offence. This Court in the Wetangula case was categorical that where an election offence is alleged in an election petition the standard of proof is beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the cause. It held that [paragraph 120]:

> " [120] Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved beyond any reasonable doubt. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged. We may draw analogy with the Supreme Court of India decision in M. Narayana Rao v G. Venkata Reddy & Others, 1977 AIR S.C 208, in which it was thus held:
>
> > " . . . The charge of commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge, but not exactly in the manner of establishment of guilt in the manner of a criminal prosecution giving liberty to the

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

209. The petitioners alleged that contrary to section 2 of the *Elections Act*, S 14 and 15 of the *Election Offences Act*, the 3rd respondent, Cabinet secretaries and other public officers blatantly misused state resources in favour of specific candidates and the Jubilee party as a whole which as a result unfairly skewed the playing field in favour of the 3rdrespondent and as such the presidential elections could not be termed as free or fair. These they contended, amounted to gross violations of Articles 81(e), 232 and 73(2) the remedy of which could only be nullification of the said results.

210. Applying the principles espoused above it is clear that the onus is on the petitioners to prove beyond reasonable doubt that the 3rdrespondent committed the said electoral offences with detailed specificity by way of cogent evidence; bare allegation of commission of the alleged offences would evidently fall short of that standard.

211. In respect of the allegation that the Cabinet Secretaries committed the alleged electoral offences, the petitioners must show firstly that offences were committed and that secondly, they were acting under the instructions of the 3rdrespondent – they must show the nexus between the person who is alleged to have committed the offence and the returned candidate and they must have shown the full particulars of the allegation. The Supreme Court of India in making a determination in *Jagdev Smgli v Pratap Singh Daulla*, (A.I.R. 1965. S.C. 18), an election petition, in which it was alleged that the agents of the returned candidate had committed corrupt practices the Court held that it must be proven not only that the offence was committed but that it was committed by the returned candidate or his agents or with the consent of the returned candidate – and the standard applicable is beyond reasonable doubt. It observed:

> " It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches, i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful-candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

212. A digest of the Election Law Reports Vols. XI to XXII 1955-60 underscores the requirement to furnish full particulars of the alleged offences in the petition noting that where full particulars are not supplied the Court should strike out those alleged offences whose full particulars have not been provided. That has been set out in the following terms:

> " The requirement of full particulars is one that has got to be complied with, with sufficient fullness and clarification so as to enable the opposite party fairly to meet them - and they must be such as not to turn the enquiry before the Tribunal into a rambling and roving inquisition.
>
> ...
>
> Where the petitioner had ample opportunity to get his petition amended for supplying full particulars of a corrupt practice alleged in the petition and has not taken advantage of that

opportunity, the Tribunal would be justified in striking off the allegations relating to such corrupt practice.

213. Section 2(c) of the *Representation of People Act, 1951* of the Laws of India, defines corrupt practices as any of the practices specified in section 123 of the Act. The elaborate definition of various corrupt practices under section 123 are —bribery, undue influence, appeal on the ground of religion, race, caste, community or language and the use of appeal to religions or national symbols, promotion of enmity or hatred between different classes of citizens on the ground of religion, race, caste, community or language, propagation of sati, publication of false statements, hiring of vehicles or vessels, incurring excessive expenditure, procuring the assistance of government servants, and booth capturing.

214. Where a petitioner imputes electoral offences on the part of the returned candidate the burden of proof lies on the petitioner to prove the commission of the electoral offences by the returned candidate or by his agents or by other persons with his consent, which claim must be supported by cogent evidence – bare allegations, without more, that the offence was committed will not suffice. If the evidence supplied fails to meet the set standard the petition must fail. In *Jagdev Smgli v Pratap Singh Daulla*, (1965) AIR 183, 1964 SCR (6) 750 the Supreme Court of India in dealing with the issue of burden of proof and standard of proof where it was alleged that the winning candidate had committed corrupt practices during the election, held as follows:

> "It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

215. Akhil Kumar (an Assistant Professor in the University of Rajasthan, Jaipur) in his journal article, *Election Laws and Corrupt Practice in India*, International Journal of Multidisplinary Approach and Studies observes that electoral offences are akin to criminal offences and therefore must be proved strictly. He states:

> "[An] election may be avoided if corrupt practices have been committed. Attempts to influence may not be unlawful and not restrained unless corrupt intent or abuses of influence is established against the candidate or his election agent. Therefore, an allegation of undue influence must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practice of undue influence envisaged by the Act. It is settled view that a charge of corrupt practice under the Act of 1951 has to be proved beyond reasonable doubt, because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election.

216. I am persuaded that the petitioners failed to provide full particulars of the electoral offences that they allege had been committed by the 3rd respondent. I would therefore have at that instance struck out all the allegations of illegality from their petition for want of full particulars as required by law.

Alleged Electoral Offences

217. The petitioners alleged that various electoral offences were committed by the 3rd respondent in during the electoral process. These are:

i. Bribery

ii. Intimidation

iii. Undue influence

218. I have already addressed these allegations earlier in this opinion however I would like to pay particular attention to the allegation that the Cabinet Secretaries breached the constitutional requirement not to be involved in any political activities as enshrined in Chapter Six of the *Constitution* relating to Leadership and Integrity, hence the declared results were vitiated.

219. The Leadership and Integrity Chapter of the *Constitution* provides for the conduct of State Officers. Article 80 of the *Constitution* mandates Parliament to enact legislation to provide to operationalize that Chapter. It provides:

> " 80. Parliament shall enact legislation—
>
> a. establishing procedures and mechanisms for the effective administration of this Chapter;
>
> b. prescribing the penalties, in addition to the penalties referred to in article 75, that may be imposed for a contravention of this Chapter;
>
> c. providing for the application of this Chapter, with the necessary modifications, to public officers; and
>
> d. making any other provision necessary for ensuring the promotion of the principles of leadership and integrity mentioned in this Chapter, and the enforcement of this Chapter.

220. In exercise of this mandate Parliament has enacted the *Leadership and Integrity Act*, which provides in section 23 as follows:

> "(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—
>
> a. act as an agent for, or further the interests of a political party or candidate in an election; or
>
> b. manifest support for or opposition to any political party or candidate in an election.
>
> (2) An appointed State Officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
>
> (3) Without prejudice to the generality of subsection (2) a public officer shall not —

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

b. publicly indicate support for or opposition against any political party or candidate participating in an election.

221. The law therefore is clear that Cabinet Secretaries are exempt from the prohibition that public officers should not engage in the activities of a political nature, and for good reason. It is to be observed that Cabinet secretaries and County Executives members do serve at the pleasure of either the President or Governor. They are political appointees with the express purpose of delivering the manifesto of their appointing authority or his or her political party. This is an essential part of a political government in any democracy. A change in the Presidency signals the immediate resignation or replacement of these political appointees; not so with the rest of the civil service whose tenure is protected against the vagaries of politics. This is also the reason why civil servants do not and should not participate in active politics, as they should remain apolitical.

222. It was also alleged that the 3rd respondent and the Cabinet Secretaries gave donations to the Internally Displaced Persons with a view to influence them to vote for the 3rd respondent. These allegations were full rebutted by the affidavit of Engineer Karanja Kibicho who produced documents to prove that the assistance given to the Internally Displaced Persons was in line with a work plan of the government with a budget approval by Parliament in the previous financial year and which was no prompted by the aim to influence the voters in favour of the 3rd respondent.

223. In the foregoing, I therefore find that the Petitioners allegations on bribery, intimidation and undue influence are not proven.

I. Affidavit Evidence: An Analysis.

224. The petition sets out the following as the alleged illegalities that were committed by the 1st and 2nd respondent in conducting the electoral process:

a. Non-compliance with Articles 1, 2, 4, 10, 38, 81, 82, 86, 138, 140, 163, and 249 of the *Constitution*.

b. Non-compliance with the *Elections Act*.

c. Non-compliance with the Regulations made under the *Elections Act*.

d. Non-compliance with the *Electoral Code of Conduct*.

225. In summary the particulars of the petitioners claims are that:

1. The 1st respondent by failing or neglecting to act in accordance with the *Constitution* subverted the sovereign will of the people.

2. The Presidential Election was so badly done and marred with irregularities that it does not matter who won.

3. The nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1st respondent cannot accurately and verifiably determine the election results.

4. section 83 of the *Elections Act* contemplates that where an election is not conducted in accordance with the *Constitution* and the written law, then that election must be invalidated

notwithstanding the fact that the result may not be affected. The non- compliance with the *Constitution* and the written law is by itself sufficient to invalidate the Presidential Election.

5. Number of factors including the registration of voters and the rejected votes which accounted for 2.6% of the total votes cast affected the Presidential Election results.

6. This Court in Raila 2013 in determining that spoilt votes cannot be counted in computing the 50% plus 1, relied on the opinion of the minority yet the majority in that decision held that the total number of votes cast in an election refers to all votes cast whether valid or not.

7. The petitioners call upon this Court to reconsider its decision in *Raila* 2013 and correct itself.

8. The transmission of results from polling stations to the Constituency and National Tallying Centre and from the Constituency to the National Tallying Centre was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt which compromised and affected the requirement of free and fair elections under Articles 81 of the *Constitution*.

9. By an internal circular dated 2July 5, 2017, the 1st Respondent adopted a procedure that was contrary to and did not comply with the law as set out under regulation 87(3) of the *Elections (General) Regulations* made pursuant to Sections 39 and 109 of the *Elections Act* and article 82 of the *Constitution*.

10. The 1st Respondent declared the result without verification of the results from over 10,000 polling station representing approximately 5 million voters.

11. The information in Forms 34A is not consistent with the information recorded in Forms 34B as required and legitimately expected.

12. Forms 34B were not accurate and verifiable and consequently invalid.

13. The additions and figures do not add up.

14. The nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

15. The inaccuracies and inconsistencies affect and account for at least 7 million votes.

16. At the time of declaration of the result, the 1st Respondent did not have 187 Forms 34B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

17. In numerous instances the 1st Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3rd Respondent thereby affecting the final results tallied.

18. the 1st Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

19. There was massive and deliberate failure in operational transparency.

20. The 1st Respondent deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of I*ndependent and Electoral Boundaries Commission v Maina Kiai*, Court of Appeal Civil No 105 of 2017 by:

    a. failing to electronically collate, tally and transmit the results accurately as per the Court decision;

b. failing to make the results at the polling stations final as per the decision;

c. failing to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in its portal even at the time of filing this Petition; that without verifiability the purported results are unconstitutional and therefore invalid.

d. failing to ensure accurate, verifiable and accountable final result by declaring final results on August 11, 2017 before receiving all the results from all polling stations;

e. by colluding with the 3rd Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions, the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results;

f. By allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes, the 1st Respondent abdicated its responsibility of delivering verifiable results;

21. The votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act*.

22. The results as displayed in the 1st Respondents Forms 34B variously exclude substantial numbers of polling stations within the constituencies and are incorrigibly inaccurate in mathematical additions in favour of the 3rdRespondent.

23. The results contained in Forms 34B in respect of the Presidential Election are not the results required under article 86 and are therefore a nullity.

24. The Petitioners aver that contrary to regulation 7(1)(c) of the *Elections (General) Regulations* the 1st Respondent illegally and fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election.

25. A significant number of Forms 34B were executed by persons not gazetted as Returning Officers and not accredited as such by the 1st Respondent thereby rendering those results invalid.

26. The results from over 10,000 polling stations transmitted to the National Tallying Centre did not comply with the mandatory requirement set since they were not accompanied by the electronic image of Forms 34A.

27. Forms 34B are contradictory, defective and bear fatal irregularities affecting 14,078 polling stations out of 25,000 ForMs

28. The use of inconsistent and different forms and returns demonstrates lack of consistency, uniformity, neutrality, impartiality and indicates and intention to manipulate the results and the returns.

29. The 1st respondent is still in the process of altering and tampering with the Forms 34A and is summoning its officers to sign Forms 34A.

30. Some of the forms and returns are not signed as required by law and Regulations.

31. Some of the Forms 34B do not indicate the names of the Returning Officer.

32. A substantial number of Forms 34A and 34B do not bear the IEBC stamp others do not bear the signatures of the candidates agents nor the reason for refusing to sign.

33. A number of polling stations in different areas show the same person as presiding in those stations.

34. In more than half of the 290 constituencies the returning officers failed to indicate the number of Forms 34A handed over to them as required by the law and the Regulations.

226. The petitioners in their petition made various further allegations upon which certain reliefs were sought which included the nullification of the results declared for the Presidential Election. The following is a summary of the assertions made:

1. By an internal circular dated July 25, 2017, the 1st Respondent adopted a procedure that was contrary to and did not comply with the law as set out under regulation 87(3) of the *Elections (General) Regulations* made pursuant to Sections 39 and 109 of the *Elections Act* and article 82 of the *Constitution*.

2. The 1st Respondent declared the result without verification of the results from over 10,000 polling station representing approximately 5 million voters.

3. The information in Forms 34A is not consistent with the information recorded in Forms 34B as required and legitimately expected.

4. Forms 34B were not accurate and verifiable and consequently invalid.

5. The additions and figures do not add up.

6. The nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

7. The inaccuracies and inconsistencies affect and account for at least 7 million votes.

8. At the time of declaration of the result, the 1st Respondent did not have 187 Forms 34B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

9. In numerous instances the 1st Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3rdRespondent thereby affecting the final results tallied.

10. The 1st Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

11. There was massive and deliberate failure in operational transparency.

12. The 1st Respondent deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of *Independent and Electoral Boundaries Commission v Maina Kiai*, Court of Appeal Civil No 105 of 2017 by:

    a. failing to electronically collate, tally and transmit the results accurately as per the Court decision;

        i. to make the results at the polling stations final as per the decision;

ii. to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in its portal even at the time of filing this Petition; that without verifiability the purported results are unconstitutional and therefore invalid.

iii. to ensure accurate, verifiable and accountable final result by declaring final results on August 11, 2017 before receiving all the results from all polling stations;

b. By colluding with the 3rd Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions, the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results;

c. By allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes, the 1st Respondent abdicated its responsibility of delivering verifiable results;

227. The votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act*.

13 It was averred that the results as displayed in the 1st Respondents Forms 34B variously exclude substantial numbers of polling stations within the constituencies and are incorrigibly inaccurate in mathematical additions in favour of the 3rd Respondent.

14 It was also asserted that the results contained in Forms 34B in respect of the Presidential Election are not the results required under article 86 and are therefore a nullity.

15 The Petitioners aver that contrary to regulation 7(1)(c) of the *Elections (General) Regulations* the 1st Respondent illegally and 16 fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election.

16 It was his assertion that a significant number of Forms 34B were executed by persons not gazetted as Returning Officers and not accredited as such by the 1st Respondent thereby rendering those results invalid.

228. The petitioners in support of their petition have filed various affidavits and in some of those affidavits are an array of documents and video clips annexed as evidence.

1.The affidavit of the 1st Petitioner

229. The Affidavit of the 1st petitioner makes averments on the same claims contained in the petition and an additional deposition that the Presidential Election was compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the *Constitution* as read together with the *Elections Act* and Regulations 3 and 6 of the *Electoral Code of Conduct*. Further, that the 3rdrespondent, with impunity, contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters.

230. To that affidavit was one document annexed as evidence; a document indicating the areas that were outside the 3G and 4G network coverage. The affidavit indicates that further evidence in other affidavits serves as evidence in support of the matters deposed therein.

2. The affidavit of the 2nd Petitioner

231. The affidavit of the 2nd petitioner briefly reiterates some of the claims contained in the petition. However, it does not adduce any evidence in support of the claims made. The deponent states that he relies fully on the evidence in the affidavit of the 1st petitioner and in the affidavit of Dr Nyangasi Oduwo.

3. The affidavit of Benson Wasonga

232. The deponent averred that there were irregularities in the declaration of the Presidential results by the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) vis-a-vis the Forms 34C. He asserted that the actual summation of the total valid votes from the IEBC portal was 15,179,717, with Raila Odinga having 6,821,505 votes while Uhuru Kenyatta had 8,222,861 votes, and the total rejected votes being 477,195 votes. However, the IEBC portal displayed the results as follows; the total valid votes were 15,180,381, Raila Odingas votes amounted to 6,821,877 while Uhuru Kenyattas votes were 8,223,163 and the total number of rejected votes was 403,495. He attached an analysis of the number of rejected votes.

233. He deposed that the declaration of results for the election of the President at the National Tallying Centre as per the Form 34C indicated the results as follows; the total valid votes are 15, 114,622, Raila Odinga 6,762,224, Uhuru Kenyatta 8,203,290 and the total rejected votes were 81,685. His assertion was that the actual variation of rejected votes between the actual results and those displayed at the IEBC portal was 73,700 votes. His averment was that this was a violation of clear provisions of electoral laws to the disadvantage of the other presidential candidates.

4. The affidavit of Mohamed Noor Barre

234. Mohamed Noor Barre who is a resident of Mandera North Constituency, Mandera County swore that he had been appointed as Presiding Officer at Kalicha Primary School in Mandera North Constituency. He averred that on August 7, 2017 at around 5.00 pm, he convened with 70 other people, at the Independent Electoral and Boundaries Commissions Office in Mandera North Constituency. He deposed that they were all informed that their names had been replaced by others for unexplained reasons.

235. It was his testimony that elections proceeded the following day at Kalicha primary school polling station. He averred that the said elections were conducted by strangers who were acting as presiding officers who were untrained and had not taken an oath of secrecy. He asserted that as a consequence, Kalicha Primary School, polling station 2 of 2 polling stations, had a 100% voter turnout as all registered voters numbering 594 voted.

236. Further, he asserted that, these figures were filled in at a tallying Centre at the Sub County Commissioners Block contrary to a Court Order which had directed that the tallying centre should be at Rhamu Arid Zone Primary School. It was his assertion that this kind of rigging happened throughout Mandera County. He gave as evidence, documents to support his averments.

237. I am of the opinion that the evidence in Mr Mohamed Noor Barre did not meet the standard of proof required since it comprised of bare allegations without any substantiation of the averrments made with regard to the fact that he was the appointed presiding officer, that the person who acted as presiding officer was not the one appointed initially, that there was rigging at the polling station and that persons who were not supposed to vote were allowed to vote. This affidavit evidence was rebutted by the affidavit of MaryKaren Kigen Sorobit.

5. The affidavit of Ibrahim Mohamud Ibrahim

238. Ibrahim Mohamud Ibrahim a resident of Mandera North Constituency, Mandera County deposed that he was appointed, trained and took oath to serve as a Presiding Officer at Guticha Primary School in Mandera North Constituency. He asserted that on August 7, 2017 at around 5.00 pm, he as well as 70 other people were summoned to the Independent Electoral and Boundaries Commissions Office in Mandera North and informed that their names had been replaced by others for unexplained reasons. A protest arose and they reported the matter to Rhamu police station.

239. Further he averred that the elections took place on the following day at various polling stations conducted by strangers who were acting as presiding officers. It was his testimony that these strangers had neither been trained nor taken oath of secrecy. It was his testimony that this opened voter numbers to alteration at the Constituency Tallying Centre which was in the Sub County Commissioners office boardroom. He averred the *Constitution* of the tallying centre was against a court order which had directed that the tallying centre should be at Rhamu Arid Zone. He took the stance that this kind of rigging happened throughout Mandera County.

6. The affidavit of Moses Wamuru

240. The deponent avers that on the August 8, 2017 he arrived at Thigingi Primary School in Kagaari North Ward, Runyenjes Constituency where he found all the NASA agents locked out of the polling station. He asserts that his effort to persuade the Presiding Officer to allow the said agents back into the polling station were unsuccessful. He avers that the NASA agents did not gain access into the polling station until the voters in the queue protested. He further deposes that the said agents were later evicted from the polling station at the time of counting. These averments are incredible given the fact that the Form 34A on record of Thigingi Primary School, polling station 01 bears the signature of an agent of the Orange Democratic Movement affiliated to the NASA coalition. The authenticity of that Form 34A has not been challenged by the petitioners.

241. Similar, averments have been made with respect to the NASA agents at Gichera Primary School polling station, Kagaari South Ward, Runyenjes Constituency, Embu County. Likewise, it is evident from the Form 34A on record that the NASA agents signed the Forms 34A for both polling stations at Gichera Primary School, as required by law. The authenticity of those forms was not challenged. In respect of Siakago Girls Secondary School which was the Talling Centre for Mbeere North Constituency Mr Wamuru averred that tallying was conducted in the absence of the NASA agents and that he was coerced into signing the Form 34A in order to get a copy. These averments are not supported by any evidence.

242. Further the deponent states that in Mbeere South Tallying Centre at Nyangwa Secondary School the Chief Agent, one Mr Donald Muchembi registered several complaints that included harassment by Jubilee and Provincial Administration Officers. It is also averred that the County Commissioner was acting as the Jubilee Chief Agent. It is unfortunate, that the deponent did not in any way attempt to support these claims with any form of evidence. The statement that Mr Muchembi was harassed is hearsay and therefore inadmissible in its entirety.

243. It was further asserted that at Mbeere South Tallying Centre the Returning Officer informed the persons present in the hall that she would wait for the County Commissioner to return before concluding the tallying process. It was also averred that in Gichera Primary, Runyenjes Central, Ngurweri: the indelible ink was not used and voters confessed to have voted more than once; the agents were sitted too far from where identification of voters was taking place hence they could not ascertain whether identification had happened; the presiding officers and the Polling Clerks were assisting

those who were unable to vote; the Presiding Officers were counting rejected ballots in favour of the 3rdRespondent without any explanation; there were reports that NASA agents were compromised by the County Commissioner and the Head of Police; and, the conduct of the IEBC officials and the County Commissioner were repeated in all areas in Embu County. These statements are unsupported by any evidence and remain as bare allegations.

244. Other averments in this affidavit were with regard to the following:

a. Late commencement of the voting process at Karago Primary School in Kieni North Constituency.

b. The use of the manual identification of voters and abandonment of the electronic system of identification without justification, at Kathungu Primary School in Kagaari South.

c. The assertion that one of the NASA agents witnessed voters issued with two presidential ballot papers in the same polling station.

245. No evidence was adduced in support of these allegations. The allegation that some voters were issued with two presidential ballot papers is unsupported by any evidence. It would be expected that the deponent would have adduced more credible evidence in support of that claim. The mere statement of an account supposedly witnessed by some other persons in this case some NASA agents – is hearsay evidence which is inadmissible.

246. The affidavit of Moses Wamuru in support of the petition makes bare averments which have not been supported by cogent evidence.

7.The Affidavit of Godfrey Osotsi in support of the Petition

247. Mr. Godfrey Osotsi deposed that he is the Secretary Generay of the Amani National Congress Party and was accredited as the Chief agent nominated by the ANC Party affiliated to the NASA coalition. In respect of the time of streaming of the results, he averred at 1715hrs the presidential results had started streaming in. He explained that upon enquiry with one official of the 1st respondent by the name Waqo Shuke, he was informed that there were two sets of results; those with Forms 34A and those without Forms 34A which were based on the text messages only. He asserts that the 1st respondent had all along represented to them that all text results would be accompanied by scanned Forms 34A simultaneously. In evidence he annexed a transcript of video clips of the officers of the 1st respondents making statements on that issue.

248. It was his assertion that upon consultation the 1st respondent‘s Information Technology consultants from Saffron (which supplied the KIEMS gadgets) they confirmed that they were receiving results without Forms 34A for the reason that some areas lacked 3G and 4G network and could not, therefore, transmit the images. It is to be noted that this assertion is a bare allegation without supporting documents for the same rendering the statement as hearsay.

249. He admits that the 1st respondent availed 29,000 Forms 34A on the deponent‘s external drives. He however, emphasized that they did not get over 11,000 forms. He added that by the time the results were being announced, there were 10,480 Forms 34A outstanding and that upon request to get the outstanding forms Mr. Waqo an official of the 1st respondent sent him an email with the results from 10056 Polling Stations. He avers that out of those Polling Stations 100 of them had more than 700 registered voters. He annexes a copy of the said email and what is stated to be the accompanying data file containing the text only results.

250. It should be noted here that the said accompanying document contains data on the number of Polling Stations that were out indicated to be outside network coverage. Indeed, that document bears the title Analysis of network coverage in relation to IEBC Public Notice. That document is of no probative in respect of the claim that there were text-only results of 10,056 Polling stations or in respect of the allegation that there were polling stations with more than 700 registered voters.

251. Annexed to the same affidavit is another document that is lacking in clarity. It bears some data categorized in three columns indicating the county name and the number of Polling Stations. However, since its contents are vague and it is not possible to decipher the details contained in the document. It is therefore of no evidentiary value. Even if the contents of the document were clear it would only serve as evidence of the number of Polling Stations in specific Counties that is assuming that

8. The Affidavit of Olga Karani

252. Olga Karani deposed that she was one of the duly accredited agents nominated by the National Super Alliance (NASA) for the August 8, 2017 general elections as the Deputy Chief Agent. She asserted that there were irregularities and anomalies in the tallying process at the tallying center which were expressed by the members of public, NASA agents and candidates in several media platforms; details of which were set out in the affidavit of Dr. Nyangasi Oduwo.

253. She averred that the prescribed forms which were manually transmitted to the National Tallying Center or otherwise deposited in the IEBC website were impossible to verify as the same forms filled in by the presiding officers and the Returning Officers in the presence of the agents as prescribed by law. She asserted that she made a request for the 1st respondent to clarify why the forms were not processed in accordance with KIEMs procedure provided but it declined to disclose the source of the forms or make clarifications on the same. It was her assertion that by the time the results were announced by the Chairperson of the 1st Respondent, the Commission had neither collated or availed any Forms 34B and had not addressed any issues relating to the Forms 34A or the results published in its website which evidenced a lack of transparency on the part of the 1st Respondent. The affidavit has no documentary evidence annexed which are relevant in support of the averments made.

9. Dr. Nyangasi Oduwo's Affidavits

254. Dr. Oduwo deposed that he is a medical doctor with a Post-Graduate Diploma in Research Methods, a Masters in Project Management and Planning, a Second Masters in Economic Policy and Analysis and is the economic advisor to the current Governor of Mombasa County Government. He asserted that on August 8, 2017 at around 5.07 pm, barely 10 minutes after the closure of the polling stations, the Commission started streaming in results of the presidential vote in the media. He averred that from the very start of the results broadcast to the end, a constant percentage difference of about 11% was maintained between the 1st petitioner and the 3rdrespondent despite the fact that the results were coming in a random manner.

255. He averred that the Chairperson of the Commission addressed the media and indicated that the 1st Respondent was yet to receive all the statutory Forms 34As in respect of the Presidential results it was streaming through the 1st Respondent's online web Portal and that the said results were provisional.

256. In line with the grounds in the petition he reiterated that in many polling stations within Kenya and the Rift Valley region, agents of the petitioner were chased away from the stations and replaced by imposters who were caused to create fictitious names and sign blank Form 34As. It was his averment that the Presiding Officers were caused to fill in such fictitious results as they desired in favour of the 3rdrespondent, and that they were filled by one person on the particulars of all 7 agents. In

evidence he annexed a copy of a blank Form 34 A for Ruai Girls Secondary School polling in Kasarani Constituency.

257. I have found that that blank Form 34A has no probative value in respect of the assertions made in the Petition (in fact I have checked this allegation alongside the certified copy of the particular polling station and found it not to be correct), and those deposed to in the affidavit of Dr. Nyangasi. He makes a further assertion that upon analyzing the turn out in the presidential results vis-a-vis the gubernatorial results and the Parliamentary results vis-a-vis the registered voters and the votes cast he discovered that the total votes cast for the President are 15,588,038 while those cast for the Governors are 15,098,646 demonstrating that of 482,202 voted for the President and not for the Governor. Further, the same examination discloses that 15,008,818 people voted for MPs only demonstrating that 567,517 voted only for the President and not MPs. He posits that the foregoing disclosure is a factual and legal impossibility and shows that the presidential votes were inflated by these number of votes. He attached his analysis in support of that claim.

258. It is also averred that Forms 34A submitted by the petitioner's agent in respect of Igembe South, URA Tea Buying Centre Polling Station number 2 of 2, Amwamba Primary School Polling Station in Igembe South, Meru County, Tonye Primary Polling Station, North Kamagambo and Memba Primary School Polling Station Number 1, West Asembo Ward indicated results that differed from those in the respective Forms 34B.

10. Affidavit of George Kegoro in support of the Petition

259. Mr. George Kegoro the Executive Director of Kenya Human Rights Commission deposed that Kura Yangu Sauti Yangu which is a coalition of like-minded civil society organisations deployed 500 monitors in all the constituencies to monitor and observe the elections. He averred that Kura Yangu Sauti Yangu revealed contradictions and anomalies in the final presidential results announced by the 2nd respondent and those displayed on the 1st respondent's website portal. He asserts that in Kisumu the verbal announcement was 60,000 votes less than what is in the portal. To the affidavit a report of Kura Yangu Sauti Yangu is annexed in evidence. That report comprises of an analysis that juxtaposes the number of valid votes in Nyanza on 11th August, 2017 against those in the portal on August 18, 2017 and it indicates the variance as 63,368 votes less.

260. It is worthy of note that the report was prepared by Kura Yangu Sauti Yangu which is a project of Kenya Human Rights Commission where the deponent is the Executive Director. Therefore, its veracity without additional corroboration from an independent third party is questionable.

11. The affidavit of Apprielle Oichoe

261. Apprielle Oichoe deposes that she is a cyber-security expert. She avers that she is a PhD candidate on cyber security and is a consultant on cyber-security matters.

262. She avers that the 1st respondent's systems and database ought to have been tested on the following components and principles:

(i) Confidentiality – the information should only be accessed by authorized persons only.

(ii) Integrity – the information used should be accurate and complete and protected from malicious modification.

(iii) Availability – the information and systems required must be available as and when require,

(iv) Non-repudiation – the audit trail must be maintained; and,

(v) Authenticity – the information and the source must be proven to be genuine.

(vi) Privacy – where the deponent avers that, on the basis of advice by her advocates on record section 55A of the *Elections Act* read with section 44 B (5) contemplates privacy and security of data.

263. It was her testimony that if it is proven as alleged in the petition that the 1st respondent failed to secure its data and public maintained portal there would be need and justification for an audit of all its systems.

12. The affidavit of Koitamet Ole Kina

264. Mr. Ole Kina who averred that he was a duly accredited agent nominated by the National Super Alliance (NASA) for the 8th of August 2017 general elections swore that he arrived at Bomas of Kenya August 8, 2017 at 1630hrs to activate his access card which took him about one hour. He asserts that he converged with fellow agents and at about 5.15pm the results started streaming in at the IEBC portal.

265. It was his testimony that his team realized that there was no way to verify the results as they were not accompanied by the hard copies of Forms 34A or the soft copies that IEBC was receiving from their server. They approached Commissioners Professor Guliye, Roselyn Akombe and the CEO Ezra Chiloba and requested them to avail the Forms 34B for purposes of verification of the results.

266. He avers that they waited for the response which was not forthcoming. As a result they requested for a meeting with the Commission. At the meeting, they raised their issues regarding the results. He averred that Professor Guliye asked Saffron consultants to access the document which they stated they could not. He asserted that Prof. Guliye explained that while the data had arrived, it was unaccompanied by the required image. Therefore, the deponent asserted, they had to wait to upload as soon as the KIEMS kit was taken to a physical location with either 3G or 4G. He averred that the consultant stated that there was a possibility that the data would not come at all.

267. He asserted that they pressed on for a solution to the problem, and agreed that an access point in form of an email would be created. Further, he added that the link provided was not working and the IT team took the whole night trying to access it but was only able to access one Form 34A on the morning of 9th of August 2017 but eventually, the credentials granting them access was revoked.

268. It was his testimony that on the 9th of August 2017, they approached the issue of verification and challenges in accessing forms again with the Chief Executive Officer of the 1st Respondent and were promised that they would be able to have access to 11,000 Forms 34A by the Commissions Director of ICT Mr. Muhati. They were asked to provide a two-terabyte external hard disk for the copies to be availed which they did but they only received 6,000 of the anticipated 11,000 soft copies.

269. He asserted further, that on the 10th of August 2017, the Commission continued to transmit unverifiable results implying that the same was verified. He indicated that this was pointed out to them, and they arranged for a meeting the next morning. It was his testimony that by the end of that day, the Commission was only able to supply 23,000 Forms 34A and about 50 Forms 34B.

270. In respect of the same, he averred, that his team officially wrote to the Commission highlighting their issues but no response was received. Further, he asserts that they agreed to an informal meeting, in which the NASA deputy Chief Agent Ms. Ogla Karani outlined discrepancies and inconsistencies in the results that were live streaming as well as those in the Forms received, and it was agreed that the Commission would respond immediately. It was further agreed that only those results with verifiable Forms 34A and 34B would be declared.

271. It was his testimony that on the 11th of August 2017, when all indications were that the Commission was ready to declare the results, he approached the Commission on request for the remaining 34As and was told that as at that moment there were only 29,000 available forms putting those pending at over 11,000. They were assured that the declaration could not be made without the remaining forms.

272. He swore that the Petitioners and the Chief Agent approached the Commission on the same issues and were reassured that results would not be transmitted until they were verified; that the commission would follow the law.

273. He deposed that his team was approached by Commissioner Lucy Ndung'u the Registrar of Political Parties to sign the Forms 34As, implying that despite assertion by the Chairman that he would not announce unverifiable results there was a possibility that he would do so. It was his assertion that the Registrar could not deny or confirm this. It was also averred that the Commission was not able to supply the remaining Form 34As and that although the chairman had at that time claimed that 288 Forms 34B had arrived, there were only 108 available at the tallying center.

274. It was his testimony that at 8:00 p.m. the Commission summoned them to a meeting where they were informed that they had received all the requisite Forms 34B and verified them and that the chairman was going to make a declaration. He deposed that the NASA team was asked if they were ready to sign the results which it declined to do on the basis that their request to be supplied with the forms had gone unheeded.

275. It was asserted further that on the 14th of August 2017 Ms. Ogla Karani formally wrote to the Commission requesting for the remaining forms and the 1st respondent replied indicating that the Forms 34B were available immediately but the Forms 34A were not available but would be availed as soon as it was possible to do so.

276. He averred that on 15th of August at around 1630hrs he received a phone call from a Mr Abednego Ominde, Ezra Chiloba's personal assistant requesting him to go and collect 5,150 scanned copies of Form 34A that were now available. In addition he stated that Ezra Chiloba did so in response to pressure from the public and the Petitioners on the non-availability of Forms 34A therefore questioning the authenticity of the results; especially seeing that the results were announced without 10,000 Forms 34A and 187 Forms 34B. He stated that there was still a balance of more 5,000 forms to be supplied by the Commission. Mr. Ole Kina also attached Mr. Chiloba's letter dated August 15, 2017, addressed to Ms. Ogla Karani and reads as follows:

> -Reference is made to your letter dated 10th August, 2017 and August 14, 2017.....On 11th August 2017, the Commission supplied you with 29,000 Form 34As and 103 Form 34Bs as stated in your letter dated August 14, 2017. On August 14, 2017, you were supplied with the balance of 187 Form 34Bs which were collected by one Mr. Ole Kina. The CEO advised Mr. Ole Kina to visit our offices today, Tuesday August 15, 2017to collect additional Forms. Enclosed herein are 5,015 Form 34As part of those that had not been scanned. Please note that all the 40,883 Form 34As shall be made available at www.forms.iebc.or.ke So far, up to 35,314 Forms 34As can be found on the public portal....

277. Mr. Ole Kina averred that the chronology of the events pointed to the fact that the determination on the part of the 1st respondent to declare results that could not be verified as required by law. It was his evidence that 1st respondent is on record confirming the nonavailability of a substantial number of Forms 34A and 34B hence calling into question the authenticity of the results that were declared on the 11th of August 2017.

278. In conclusion he averred that the massive irregularities, discrepancies and anomalies contained in the Affidavit of Dr. Nyagasi Oduwo show that the 1st respondent's decisions were misinformed and are based on information incapable of verification as to their accuracy, transparency and credibility.

279. The letters annexed in evidence indicate that there was a delay in availing copies of the prescribed forms to the petitioners. However, it is evident from the letter by the 1st respondent to Ms. Olga Karani dated August 15, 2017that 29,000 Forms 34A had already been availed to the petitioners on August 11, 2017 together with 103 Forms 34B. On August 15, 2017, additional Forms 34A which were 5,015 in number were supplied enclosed with the said letter. It is also clear that the petitioners were informed that 35,314 Forms 34A were already available on the public portal and that all the 40,833 Forms 34A would be available on the said portal.

280. Mr. Ezra Chiloba in his affidavit controverts the allegation that the said forms were not supplied to the petitioners. He avers that the forms were supplied and attaches the said letters in evidence.

281. The allegation made by the petitioners is that since the Forms were not availed to them promptly then the 1st and 2nd respondents ' decisions were misinformed and were based on information that was incapable of verification. This is intended to advance the claim of the petitioners that the election did not comply with article 81 and 86 of the Constitution.

282. I am conscious of the need by major stakeholders, in a process such as the one forming the subject matter of the present petition (the Presidential election), to gain access to all the relevant documents containing all the material facts relating to the process. Therefore the need for the petitioners to get all the relevant forms from the 1st respondent was completely justifiable. However, I am alive to the fact that the 1st respondents have been tasked with an immense constitutional mandate to conduct six elections on the same day which run concurrently. Though that is humanly possible it is a daunting task to count, tally and verify the results of all the six elections and more specifically the Presidential election within the Constitutional timeline of seven (7) days from the date of the election.

283. One cannot lose sight of the fact that the 1st respondent's officials had been working round the clock during the election period, therefore the reduced efficiency that ordinarily comes with long working hours and lethargy are inevitable irrespective of a person's will power to efficiently accomplish such a sacrosanct process that normally comes once in every five years. In my opinion the performance by the 1st respondent and availing all the Forms 34B to the public and to the petitioners within 4 days of the declaration is commendable in view of the fact that the KIEMS system was being used by the 1st respondent for the first time. The delay by the 1st respondent of about four days to supply the petitioners with the Forms 34A cannot be construed to be completely unwarranted under the circumstances.

284. It is imperative to state that after the Commission has declared the election results it becomes *functus officio* and it has nothing more to do with the concluded election. It was so held by this Court in *Joho* that [paragraph 65]:

> "-The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus

shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer.

285. This was reinforced by the Court in *George Mike Wanjohi* in which this Court held that once a declaration of results is made by the returning officer the Commission becomes functus officio and any alteration of the declared result has to be by an Order of the Court. The Court held that [paragraph 111]:

> "-The Returning Officer having declared the 1st respondent as the winning candidate, and duly issued the Form 38, became functus officio. There is neither scope for the Returning Officer to withdraw a declaration of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the Form 38. Once the votes are polled, counted and results declared, it would be perilous to allow the Returning Officer to nullify the result, purportedly in rectification of some error. This would not only affect the very sanctity of the election process, but also encroach on the powers of theElection Court.

286. Having said that, it is necessary to state that going forward, if after the Presidential election results have been declared, a person is desirous of accessing the prescribed declaration forms relating to the Presidential election which the law does not expressly stipulate are to be availed to a party, such a party should seek access to such forms through the Court.

13. The Replying Affidavit of Immaculate Kassait

287. Ms. Immaculate Kassait deposed that she is the Director Voter Registration and Electoral Operations of the 1st Respondent. She averred that her duties included the management of electoral processes, voter registration processes (voter registration strategies and inspection of voters' register), electoral operations among others.

288. In response to Dr. Nyangasi's supporting affidavit she deposed that in most polling stations voting commenced at 6.00am and ended at 5.00pm after which the counting of votes began. Further, she averred that there were a number of polling stations in which voting process was delayed for some reasons and cited Turkana County as one of the Counties affected by floods and the voting materials had to be airlifted which in turn delayed the voting process.

289. She asserted that it was erroneous to state that Forms 34A from the polling station were the final results. She deposed that the Court of Appeal in the Maina Kiai case ruled that the electronically transmitted image of Form 34B is the final result for the Presidential Election with respect to each Constituency.

290. In response to the aspersions cast on the practicality of streaming results shortly after close of polling stations she averred that it was possible to count and tally votes in polling stations which had between 1-10 registered voters. She pin-pointed polling stations such as Boyani Primary School in Matuga Constituency, Arabrow in Wajir South Constituency, Ya algana in North Horr Constituency which all had 3 registered voters, and Lowangina Primary School, in Tigania East Constituency which had one registered voter.

291. In respect of the constant 11% difference as alleged in the affidavits in support of the petition the deponent denied the same. She displayed a table in her affidavit based on thirty-minute interval analysis of the data which showed that the percentage ranged from 9.095 to 25.573.

292. She averred that the 2nd Respondent clarified that the statistics not backed by Forms 34A or 34B, including the statistics that were being projected on the National Tallying Centre's Television screens were not the final result.

293. She deposed that the 1st respondent did not chase away the agents of the petitioner in central Kenya and Rift Valley asserting that there was no evidence to substantiate that claim. Further, she averred that contrary to the claims in Dr. Nyangasi's affidavit, Ruai Girls Secondary School was a polling centre in Kasarani Constituency of Nairobi County with 13 polling stations and not a polling station. In addition, she deposed that in the said polling centre, the petitioners' agents duly executed Forms 34A in all polling stations.

294. She averred that the tallied votes for the 1st petitioner that were transmitted from the KIEMS kit in terms of text and image of the Form 34A URA Tea buying polling station 2 of 2 was 56 votes and not 66 votes as alleged in the supporting affidavit.

295. She denied Dr. Nyangasi's assertion that in Amwamba Primary School Polling Station in Igembe South, Meru County, the total tally for Odinga Raila was 323, while Form 34B in respect of the same polling station indicated 325 votes. She averred that Amwamba Primary School had two polling stations; in polling station 01, the 1st petitioner had an agent. She deposed that the total tally for the 1st petitioner in polling station number 1 was 51 votes. Further, she asserted that neither the 1st petitioner nor the 3rdrespondent had agents in polling station 02. She added that the 1st petitioner's tally in polling station 02 was 32 votes. In support of those assertions is a copy of the Form 34B annexed as evidence.

296. She admitted there was a data entry error leading to the 1st Petitioner who garnered 561 votes being shown as having received only 2 votes. She cited in support of these assertions the affidavit of John Ole Taiswa which set out the particulars of the circumstances under which the error occurred. It was also admitted that there was a data entry error leading to the 1st petitioner who garnered 437 votes being shown as having received only 4 votes. She deposed that the full circumstances as to how those errors occurred were set out in the affidavit of Rebecca Abwaku.

297. She denied the allegation that a partial form 34B was uploaded in respect of Karachuonyo Constituency. Instead, she asserted that the whole Form 34B was uploaded and was available online and she annexed a copy of the said Form 34B.

298. She denied the allegation that in Kilome Constituency, Makueni County, the original IEBC Form 34B reflected 38,269 votes while that uploaded in Commission's portal showed 33,757 thereby creating a variance of 4,512 votes. It was here assertion that the Form 34B as uploaded onto the online portal and the original Form 34B indicated a figure of 38,285 as valid votes cast. Further, she deposed that the reference to 33,757 votes in the said Form referred to the votes cast for the 1st petitioner.

299. The deponent refuted the allegations that in Igembe South, Meru County, the total number of votes in Forms 34As for the 1st petitioner was 41,834 yet according to Form 34B in the Commission's portal his total votes were 43, 209. She deposed that the accurate figure which was reflected in the uploaded Form 34B was 50,931 votes as opposed to the figures alleged.

300. She admitted that there was a clerical error in Form 34A submitted by the Petitioner's agent in respect of Mungoye Pimary School Polling Station Number 1, West Bunyore, Emuhaya Constituency, Vihiga County where a variation of -10 votes against the entry made on Form 34B.

301. She denied the allegation that the Form 34A in respect of St. John's Primary School Polling Station, Makongeni Ward, Makadara Constituency, Nairobi County, indicated the total number of valid votes casts as 468 against the entry on Form 34B which was stated to be 467.

302. Likewise, she denied the allegation that there was a variance in the Form 34B keyed in the KIEMS kit and that projected at the National Tallying Centre in of Morrison Primary School Polling Station Number 6 of 9 as alleged. She admitted that there was a clerical error which created a discrepancy in Form 34A of 6 votes.

303. It was admitted that there was a discrepancy in Forms 34A and 34B in respect of Rabai Road Primary School Polling Station Number 1 of 4, Harambee Ward, Makadara Constituency, Nairobi County due to a transcription error. She deposed that this had no material effect on the results, adding that the circumstances were explained in the affidavit of Moses Nyongesa Simiyu.

304. The deponent admitted that the Form 34A submitted by the Petitioner's agent in respect of Kaloleni Primary School Polling Station Number 8 of 10, Makongeni Ward, Makadara Constituency, Nairobi County, which indicated that the total number of rejected votes to be 4 while Form 34B in the portal did not indicate any rejected votes, had a transposition error.

305. The deponent averred that there were no discrepancies between Form 34B for Embakasi South Constituency and Form 34A for Jobenpha Community School Polling Station Number 17 of 21, Kware Ward, polling station.

306. She admitted that there was a discrepancy between Form 34 A and Form 34B regarding the votes for the 3rd respondent in respect of Kewi – South C Polling Station Number 3 of 8, South C Ward, Langata Constituency, Nairobi County. However, she denied that there was a discrepancy between Form 34A and Form 34B in respect of both Nyandiwa Primary School Polling Station Number 2 of 2, Bogetenya Ward, South Mugirango Constituency, Kisii County and Omgogwa Primary School Polling Station Number 1 of 1, Bosetenya Ward, South Mugirango, Constituency, Kisii County.

307. It was admitted that there was an arithmetic error in Form 34A and Form 34B in respect of Manywand A' Primary School Polling Station Number 2 of 2, Boikanya Ward, South Mugirango Constituency, Kisii County. However, she deposed that the aggregate votes cast for each candidate in Form 34A showed that there were 300 valid votes cast which was reflected in Form 34B. She annexed as evidence the relevant Forms 34A and Form 34B.

308. It was denied that there were any discrepancies in Forms 34B and 34A in respect of Kiru Primary School Polling Station Number 1 of 2, Bokimonye Ward, Bomachoge, Borabu Kisii County. She asserted that Form 34B and the result keyed in the KEIMS kit and projected at the National Tallying Centre tally all matched showing 338 total votes. She however admitted that there was a computation error in Form 34A.

309. The deponent denied that there was a variance in Form 34B that indicated 4 rejected votes and Form 34A that did not indicate any rejected votes in respect of Nyanturago Tea Buying Centre Polling Station Number 2 of 2, Beno Ward, Nyaribare Chache, Kisii County. She however admitted that there was a clerical error in that Form 34A indicated 4 rejected votes, while Form 34B indicated 5 rejected votes.

310. It was denied that in Kiogoro Tea Buying Centre Polling Station Number 2 of 3, Kiogoro Ward, Nyaribari Chache-Kisii County, the Form 34As had a total of 516 votes compared to Form 34B which indicated 561 votes, thereby having an increased variation of 45 votes. She however indicated that Form 34A of this polling station indicated no rejected votes, while Form 34B indicated 2 rejected votes revealing a variance of 1 rejected vote.

311. She admitted that the Form 34A submitted by the Petitioner's agent in respect of Keoke Primary School Polling Station Number 1 of 2, Bironyo Ward, Nyaribari Chache, Kisii County, indicated 4

rejected votes while the IEBC Form 34B did not indicate any rejected votes which according to her was a transposition error.

312. In respect of the allegation that the Form 34A submitted by the petitioners' agent in Irondi Primary School Polling Station Number 1 of 1, Birongo Ward, Nyaribari Chache, Kisii County, indicated 3 rejected votes while Form 34B of the IEBC had no rejected votes and the allegation that there was a discrepancy as the total number of votes in Form 34A was 410 and Form 34B recorded 413, she averred that the valid votes cast in respect to the candidates when tabulated was 410. She deposed that the minor variance between the Form 34A and Form 34B was occasioned by a clerical error.

313. The deponent admitted that the Form 34A submitted by the petitioners' agent on Amabiria Primary Polling Station Number 1 of 1, Keumbu Ward, Nyaribari Chache Constituency, Kisii County indicated the total votes at 273 against 377 votes in Form 34B in the uploaded Commission's portal. She also admitted that the 3rd respondent's votes recorded in Form 34A were 138 while those recorded in Form 34B were 238, thus creating 100 extra votes in his favour. She deposed that the circumstances leading to the variance were set out in the affidavit of Julius Meja Okeyo.

314. It was admitted that the Form 34A submitted by the petitioners' agent in respect of Sosera Primary School Polling Station Number 1 of 2, Nyamasibi Ward, Nyaribari Masaba Constituency, Kisii County, recorded 386 total votes while those in the IEBC's Form 34B were 383. She deposed that it was a transposition error.

315. In response to the allegation that there was a discrepancy in the recorded votes in the Form 34A submitted by the petitioner's agent which recorded 273 votes in respect of Ibacho Tea Buying Centre Polling Station Number 2 of 2, in Kiamokama Ward, Nyaribari Masaba Constituency, Kisii County, while the Form 34B indicated 272 votes, it was deposed that the correct number was 272 votes and 273 votes was an erroneous record.

316. She denied that there were any discrepancies in Form 34B, which was alleged to record 340 votes, and Form 34A, which was alleged to indicate 343 votes, in respect of Ekemuga Primary School Polling Station Number 1 of 1, Ichuni Ward, Nyaribari Masaba Constituency, Kisii County. She asserted that the valid votes cast were 340 and the 3 extra votes were rejected votes.

317. The allegation that the Form 34B, recorded 260 votes, and Form 34A, indicated 261 votes, in respect of Kiamokama Township Primary School Polling Station Number 1 of 2, Gesusu Ward, Nyaribari Masaba, Kisii County, was denied. She swore that the total number of votes recorded and transmitted were 260. The deponent admitted that there was a variance in the Forms 34A and 34B as alleged with regards to Kiomiti Primary School Polling Station Number 2 of 2, Gesusu Ward, Nyaribari Masaba Constituency, Kisii County. She deposed that while it was alleged that Form 34A recorded 356 votes, the correct number of votes was 354 and the variance occurred due to a transposition error.

318. The deponent admitted that there was a variance in the Forms 34A and 34B as alleged with regards to Kiomiti Primary School Polling Station Number 2 of 2, Gesusu Ward, Nyaribari Masaba Constituency, Kisii County. She deposed that while it was alleged that Form 34A recorded 356 votes, the correct number of votes was 354 and the variance occurred due to a transposition error.

319. The deponent averred that in respect of Riasongoro Tea Buying Centre Polling Station Number 1 of 1, Kiamokama Ward, Nyaribari Masaba Constituency, Kisii County there were only data entry errors. She asserted that Kaluyu Japheth Kavinga was recorded as having 1 vote in Form 34B while Form 34A indicated that he received 2 votes.

320. She denied the allegation that the Form 34B was missing in respect to Getare Tea Buying Centre Polling Station Number 1o 2, Ichuni Ward, Nyari Bari Masaba, Kisii County. It was her assertion that both Forms 34A and 34B indicated a similar record of votes.

321. Ms. Kassait also denied the allegations that there was a variance in Forms 34A and 34B in respect of Suguta Primary School Polling Station Number 1 of 1, Baasi Central Ward, Bobas Constituency. She swore that contrary to the allegations in the supporting affidavit of Dr. Nyangusi, the recorded votes in both forms were 508.

322. Similarly, she disputed the assertion that there was a discrepancy in the recorded votes in both Forms 34A and 34B in Bokinibanto Primary School Polling Station Number 1 of 1, Masige East Ward, Boasi Constituency, Kisii County. She deposed that both forms indicated 483 votes.

323. She refuted the allegation that there was a variance in Forms 34A and 34B in respect of Rusinga Primary Polling Station Number 1 of 2, Bobasi Constituency adding that the alleged votes received were false.

324. It was admitted that the Form 34A submitted by the petitioner's agent with respect to Nyabieyo Primary School Polling Station Number 1 of 1, Bomariba Ward, Bonchari Constituency, Kisii County, recorded the 1st petitioner as having 228 votes as compared to Form 34B where he was recorded to have 0 votes. She referred to the affidavit of David Kipkemoi Cherop to provide the relevant explanations.

325. The deponent admitted to a clerical error in Forms 34A and 34B in respect to Nyamiobo S.D.A. Primary School Polling Station Number 1 of 1 Majoye Ward, Bomache Chache Constituency, Kisii County. She swore that that the correct number of votes cast was 405 as opposed to the 407 that was recorded in error.

326. It was admitted that there were arithmetic errors in Musunji primary School Polling Station Number 2 of 2, Shiru Ward, Hamisi Constituency, Vihiga County in the statutory Forms in respect of the 1st petitioner's votes. Form 34A indicated that he had 357 and 34B indicated 356 votes. She similarly admitted to such error in Nyalendaa Community Hall Policing Station Number 5 of 6, Kisumu County where she deposed that the 3rdrespondent was denied 12 votes. Similarly, she admitted to a variance of 1 vote in Wandiege Primary School polling stations where Form 34A indicated 503 against Form 34B' 504.

327. She refuted that there was any variance in the total number of votes recorded in the statutory forms in respect of both Angira Primary School Polling Station Number 2 of 2, Kajuu Ward, Kisumu East Constituency, Kisumu County and Nyanchenge Primary polling station number 1 of 2 in Bobasi Constituency in Kisii County.

328. She admitted to minor variances the Statutory Forms in Rusinga Primary polling station number 1of 2 within Bobasi Constituency in Kisii County due to a mathematical error and in respect of Amabiria Polling Primary number 1 of 1, Nyaribari Chache Constituency Kisii where the votes for 3rdrespondent were increased by 100 votes. She deposed that the variance was explained in Julius Meja Okeyo's affidavit.

329. She refuted that the petitioners' votes in Nyabieyo Primary Polling Station 1 of 1 Nyaribari Chache Constituency Kisii were deducted by 228 votes.

330. Dr. Nyangasi's allegation that there was any variance in the number of votes recorded in the statutory forms in respect of: Maturu Primary Polling station 2 of 2 in Lugari Constituency Kakamega; Cheptoroi Polling station 2 of 3 in Njoro Constituency Nakuru and Kapkures Health Polling Station number 7 of 7 Nakuru county, was denied.

331. The deponent admitted that there was data entry error in Form 34A in respect of Kiptembwo Primary Polling number 4 of 8, Nakuru Town West Constituency where the votes for petitioner were deducted by 229, while 288 votes were added to the 3rd respondent. She averred that the circumstances leading to the variance were explained in the affidavit of Gilbert Serem.

332. The deponent denied that the 3rd respondent's votes in Ilomotioo Primary Polling Station number 1 of 1 in Kajiado Central Constituency were increased by 10 votes. She confirmed that the 3rd respondent garnered 234 votes from the said station as reflected in both Form 34A and 34B and not 224 votes as alleged Dr Nyangasi.

333. She refuted Dr. Nyangasi's allegations that there was any variance in the number of votes recorded in the statutory forms in respect of: URA Tea Polling Station number 2 of 2 Igembe South Constituency; Kiyanka Primary polling station number 2 of 2 Igembe South Constituency in Meru County; Kiegoi Primary polling station 2 of 2 in Igembe South Constituency and Nkiriana polling station number 1 of 2 in Igembe South Constituency in Meru.

334. The deponent admitted that there was a clerical error in Dandora III City Council Hall polling station number 9 of 9 in Embakasi North Constituency Nairobi where 2 votes were deducted from the petitioner's tally from 214 votes to 212.

335. The deponent admitted that there was a clerical error of wrong entry in Migori Main Prison polling station 1 of 1, Suna Central Ward, Suna East Constituency where the 1st petitioner's 12 votes were wrongly entered as votes for Nyagah Joseph.

336. Also admitted was the fact that there was a clerical error of wrong entry in Waitharaga Primary School polling station number 1 of 1 Suna Central, Suna East Migori county where petitioners 359 votes were wrongly entered as votes for Nyagah Joseph.

337. The deponent denied Dr. Nyangasi's allegation that the 1st petitioner garnered 663 votes from Nyarongi Primary School polling station number 1 of 2 Kakrao Ward, Suna East, Migori County and that his votes were reduced by 331 to 332 votes. She averred that registered voters in that station were 382 and thus it was impossible to for the petitioner to garner 663 which was more than the registered voters.

338. Ms. Kassait denied Dr. Nyangasi's allegations that there were instances of different presiding officer signing for another or voting presided over by ungazetted presiding officers.

339. It was denied that the 3rd respondent's votes from Isiolo North Constituency were inflated by 5,422 votes or that there were inconsistencies between forms 34As and 34Bs. She added that there was no evidence of such variance, noting that Form 34B was duly filled. She deposed that handover section could not be filled because the Forms had to be sent to NTC electronically and not physically by returning officers. In support of her claim she attached the Form 34B.

340. The deponent denied that the 3rd respondent's votes from Loima Constituency Turkana County were inflated by 7,934. She refuted the allegation that the Form 34B was blank asserting that it was filled, signed and stamped by the returning officer and agents as required by the law.

341. She refuted the allegation that there was a polling station named Nyakwara Primary School in Funyula Constituency which had 339 votes cast therefrom or that the candidates were only apportioned 13 votes. She was emphatic that polling station non-existent, hence no results could originate from a non-existent polling station.

342. The deponent refuted that in Busijo Primary School in Funyula Constituency total rejected votes exceeded the registered votes or that the hand over section of Form 34B was not filled as required by law. It was her testimony that the handover notes were not a legal requirement. She was emphatic that the Court of Appeal had held that the Forms 34B were to be sent electronically to the NTC. Further she deposed that it was not conceivable that the Returning Officer could have physically handed over and signed the section to the 2nd respondent at the NTC.

343. The deponent denied the allegations that the 3rdrespondent's results from Rabai Constituency, Kilifi were inflated by 83 votes and there was lack of handover notes. Similarly, she denied the allegations that in Maara Constituency, Tharaka Nithi, that the Statutory Forms were signed by a stranger and not the presiding office and that there were no handover notes. She deposed that Obadiah Kariuki Gacoki who signed form 34B was a duly gazetted returning officer. However, she deposes that the statistics projected in the online portal at the NTC were not a representation of the results.

344. The deponent denied that results posted in the online portal from Kipipiri Constituency, Nyandarua County were different from those in Form 34As, or that there was inflation of rejected votes from 92 to 1087, with lack of handover notes. In response she stated that the results projected in the online portal was not representation of the results.

345. The deponent denied the allegations that there were inflated votes in Ndaragwa Constituency, Nyandarua County by 153 in the online portal, inflation of rejected votes in the portal from 477 in Form 34B to 1,031 or that results for the 2nd respondent in Form 34B were 45,197. She deposed that 2nd respondent was not a candidate so results could not be allocated to him in form 34B, but that in any event the figure in the Form 34B was 44,595 votes not as alleged.

346. The deponent admitted that the rejected votes in respect to Ol-jorok Constituency, Nyandarua County were 121 and that the 1st petitioner garnered 515 votes. However, she denied that there were discrepancies of the rejected votes as reflected in the portal at 1, 233 and that announced at 121. She further denied that the 1st Petitioner was denied 2 votes as alleged.

347. She refuted the allegations in Doctor Nyangasi's Supporting Affidavit that there was variance in respect to total rejected votes in Tarbaj Constituency, Wajir County where the portal indicated total of 475 rejected votes whilst Form 34B indicate a mere 31 rejected vote. It was further alleged that the said Form 34B lacked evidence of hand over notes. She deposed that the total rejected votes indicated in Form 34B were 31 as was tallied from Form 34S. She deposed that handing over notes are not a requirement in law and were not applicable to the 2017 presidential election.

348. She denied allegations in the Supporting Affidavit that Form 34B in respect to Uriri Constituency, Homabay County did not indicate the final tally of the presidential candidate and that the results in the Commission portal indicated 1078 rejected votes whilst the Form 34B indicated 125 rejected votes. She averred that the correct results are the ones indicated in Form 34B at a total of 125 as the total rejected votes.

349. The deponent rejected the allegations that there were discrepancies in rejected votes as indicated in the portal as 860 as against the Form 34B which indicated 114 rejected votes in respect of Baringo Central Constituency, Baringo County. On the contrary, she averred that the correct number of total rejected votes was 121 as reflected in Form 34B and that the said figure matched the ones reflected in Form 34A.

350. The deponent denied that Forms 34A and 34B in respect to Kathiani Constituency, Machakos County; Chepalungu Constituency, Bomet County; Marakwet Constituency, Elgeyo/Marakwet; Sigowet/Soin Constituency, Kericho County; Changamwe Constituency, Mombasa County; Wajir

North Constituency, Wajir County; Dagoretti Constituency, Nairobi County; Kericho County Yatta Constituency, Machakos County; Mwatate Constituency, Taita Taveta County; Voi Constituency, Taita Taveta County; Lamu East Constituency, Lamu County; Malindi Constituency, Kilifi County; Yatta Consituency, Machakos County; Eldas Constituency, Wajir County, Kuresoi Constituency, Nakuru County; Likoni Constituency, Mombasa County; Sigor Constituency, West Pokot County; Ndhiwa Constituency Homabay County; Kieni Constituency, Nyeri County; Kajiado Central Constituency Kajiado County; Belgut Constituency lacked handing over notes and bore no indication of date and time for handing over of the forms contrary to law. She deposed that the handing over notes are not a requirement in law and were not applicable in the 2017 presidential election as Form 34B was sent electronically and not physically taken to the National Tallying Centre physically.

351. In response to unstamped Form 34B's such as that alleged in Changamwe Constituency, Mombasa County, and Form 34As in Sigowet/Soin Constituency, Kericho County; Wajir North Constituency, Wajir County; Mukarara and Waithaka polling stations in Dagoretti South Constituency; Malindi Constituency, Kilifi County; Likoni Constituency, Mombasa County; Ms. Kassait deposed that while it was procedural to stamp an unstamped form could not be a basis for disenfranchising voters.

352. The deponent denied the allegations in the Supporting Affidavit that in Mwala Constituency Machakos County that there was a variance in the total rejected votes indicated in the portal and the Statutory Form 34B. She annexed the Form 34B marked as evidence.

353. She refuted the allegation that in Bureti Constituency, Kericho County, the summation of votes for the 3rd Respondent in the portal were 65,284 whilst those for the 1st petitioners were 3,106 yet in the Form 34B the 3rdrespondent was indicated to have garnered 56, 259 votes and the petitioner 3,106 votes. It was her assertion that the correct results were the ones indicated in Form 34B. She attached as evidence the Form 34B marked.

354. She denied that the 3rdrespondent's votes were inflated in: Marakwet Constituency, Elgeyo/Marakwet by 93 and Sigowet/Soin Constituency, Kericho County by 100 votes.

355. It was denied that in Wajir North Constituency, Wajir County the 3rdRespondent's votes were inflated by 282 votes. She disputed the allegation that there was a variance in the rejected votes in the portal and those Form 34B. She deposed that the correct number of the rejected votes were those found in Form 34B.

356. She also denied the allegation that there were discrepancies in the number of rejected votes in Voi Constituency, Taita Taveta County as recorded in the portal against the Form 34B. She deposed that the corrected number of rejected votes was 260 as indicated in Form 34B.

357. In respect of the allegations that in Mavoko Constituency, Machakos County, Jetview polling station, there was a variance in the number of votes recorded in the Statutory forms favouring the 3rdRespondent to the detriment of the 1st petitioner she denied the allegation and refuted that no Form 34A was submitted in respect of Githunguri polling station.

358. The deponent denied the allegations that the stamp used in Eldas Constituency, Wajir County was not the official IEBC Returning Officer's stamp and that the Returning Officer did not indicate his/her name on the Form. She deposed that an authentic stamp was utilized and there was no basis for invalidating Form 34 for Eldas Constituency.

359. The deponent rejected the allegation in the Supporting Affidavit that in Embakasi Central Constituency, Nairobi County there was a discrepancy in the columns of valid votes and valid votes tally in the following polling stations: Kayole North, Imara Primary, Bondeni Primary, Thwabu

Primary and Mwangaza Primary. She deposed that the total votes with respect to Mwangaza Primary for each candidate were captured correctly as they were indicated in Forms 34A and 34B. She also denied the allegation that the official IEBC stamp was not used.

360. The deponent admitted that there was a variance in votes in Gem Constituency, Siaya County. She averred that there was a variance between the total votes tallied and the total valid votes that led to 461 unaccounted votes. She stated that this was a data entry error. She deponed that this did not mean the votes were deducted from the 1st Petitioner. She stated that the 1st petitioner's votes were correctly reflected and remain unaltered and it was the other candidates whose votes were affected.

361. She denied the allegations in the supporting affidavit that in Sigor Constituency, West Pokot County, that Form 34B was signed by unknown persons whose name was not stated. It was her evidence that the form was signed by the gazetted Returning Officer for Sigor Constituency.

362. The deponent refuted the allegation that in Starehe Constituency, Parkroad Primary School, there was 1 rejected vote not captured in Form 34B and that the stamp used in the Form did not match the IEBC Returning Officer's stamp. She also denied allegations that the Form was unsigned and gave no reasons for absence of signatures. She averred that the Form 34B indicated the number of rejected votes as 24, and that the stamp used on the form was that of the Returning Officer issued by the 1st Respondent. She swore that the agent duly appended his signature to the form including his name, ID number and Contact.

363. With regards to the allegations made in Turbo Constituency, Uasin Gishu County that there were discrepancies in the votes cast and tallied, she admitted that there was a computation error in respect to the votes cast. She deposed however, that the valid votes for each of the Presidential candidates was accurate. She attached as evidence the Form 34B for Turbo Constituency marked as EC.10. The deponent further denied that unsinged and undated Forms in that Constituency were not handed over in the prescribed manner, had discrepancies in the tally of votes, and that the handover was done by an ungazetted person.

364. She denied the allegation that in Turkana Central Constituency, Turkana County, the Forms did not indicate a date or time and was not handed over in the prescribed manner. She further denied that the portal indicated 1,393 rejected votes while the petitioner's votes were reduced by 7 votes. She asserted that the rejected votes were 156 and not 1,393 as alleged and tendered in as evidence the relevant Form 34B as an annexure marked-EC.11.

365. She refuted the allegation that in Kipkelion West Constituency, Kericho County, Kipkelion Primary School polling station had discrepancies in Form 34A and 34B decreasing the Petitioners votes. It was her evidence that Kipkelion Primary School had two polling station where Raila Odinga had 61 votes and the same is reflected in 34B while the 3rdRespondent garnered 269 votes as indicated on Form 34A properly reflected in Form 34B.

366. She denied the allegation that in Kipsigei Primary School, Simotwet Pry School, Kaula Nursery School, Kimologit Pry School, Lelechwet Primary School, Siret Pry. School, Kapkese Pry School, Kaplelit Pry School, Murgut Pry. School, Chilchila Pry School, Bararget Cooperative, Tunnel Pry. School, Boror Nursery School, Koisagat Pry School, Smolel Pry School, Magire Pry School, Cheborus Nursery School, the requisite Forms were unstamped.

367. The deponent refuted allegations that in Emurua Dikir Constituency, Narok County that Forms were not handed over in the prescribed manner and that Form 34B indicated the 3rdrespondent garnered 22,213 votes while the portal indicated 21,910 votes. She averred that the total number of votes garnered by the 3rdRespondent was 22,313 and the same was confirmed by both Form 34A and 34B.

368. The deponent denied the allegations that in both Bahati Constituency Nakuru County at Dundori Primary School and Dundori Youth Polytechnic there were discrepancies in Forms 34A and 34B in the votes for the 3rdRespondent.

369. The deponent admitted that in Ndia Constituency, Kiangai Primary School Form 34A indicated that the 3rdRespondent got 461 votes while Form 34B indicated he got 467. She attributed this to data entry error. She denied the allegations that the Forms were not handed over in the prescribed manner and that they were not stamped.

370. She denied the allegation that in Othaya Constituency, Nyeri County the Forms lacked handing over notes and that Form 34B indicated the 3rdRespondent garnered 51,186 votes while the portal indicated he had 51,184 votes. It was further alleged that the rejected votes were at 72 while the portal indicated 124. It was her evidence that the 3rdRespondent garnered 51,186 votes and that the rejected votes are 74 and not 124 as alleged.

371. The deponent admitted that in Naivasha Constituency, Nakuru County, there were some arithmetic errors in completing Forms in Bishop Ndingi Sec School, Unity Farm Nursery, Manera Pry School, Lakeview Pry School, Kihoto Trading Centre, Ngeya Pry School, Shermoi Pry School, Sher Social Hall, Rev. Jeremiah Primary School and Mununga Primary School. She denied all other allegations alluding to lack of signed forms and lack of handover notes. She averred that the number of votes cast in favor of each candidate was clearly indicated and that the forms were signed by the Presiding Officer and Party agent.

372. The deponent denied allegations that in Wajir South Constituency, in Wajir County the Form 34B lacked a bar code, and that in Serif Dispensary Polling Station the total valid votes indicated 113 votes but the vote tally was more than the total valid votes.

373. She denied allegations that in Mandera East Constituency the IEBC stamp used was rectangular and different from the circular stamp used on other forms, and that only two agents signed the forms while one did not indicate the date, as well as his/her name.

374. The deponent refuted the allegation that in Lamu West Constituency not all pages and sheets were signed. It was her evidence that there was no requirement in law for signing all pages.

375. The deponent rejected the allegations that in Turkana South Constituency there were discrepancies in the number of valid votes and the summation of votes. She also denied that some Forms were neither stamped or signed in this constituency.

376. She disputed the allegation that Trans Nzoia Constituency had a table format in its Form 34B that included a column reading rejected‘, objected to‘ and disputed‘ not the norm in any other form. She averred that Trans Nzoia is a County and not a constituency therefore there cannot have been a Form 34B in respect to it.

377. The deponent rejected the allegation that in Malava Constituency in Bulupi Pry School, Imbiakalo Pry School, Mukhone Pry School, Chimoroni Pry School, Isanjiro Pry School, Machemo Pry School, Lwanda Kabras Pry School, Shianda Pry School and Ikoli Pry School; the handing over sections on the forms were not signed and that not all sheets/pages of form 34B were stamped.

378. She admitted that there were discrepancies in Form 34B in Bomet Central Constituency but only to the extent that in Bomet Primary School, the Form did not show any rejected votes although there was 1 rejected vote. She attributed this to a transposition error. All other allegations of use of excessive whiteout and corrected figures as well as those of missing data from 63 polling stations were denied.

She also denied that there were discrepancies in the votes recorded in the Statutory Forms in Kabusare Primary School.

379. She denied the allegations that in Kitui South Constituency there were unstamped pages in the Forms, the number of Forms 34As submitted were not indicated, the Returning officer signed the form but did not indicate his name and that no agent of the Petitioner signed the Forms.

380. The deponent denied the allegations that in Elda Constituency the stamp used was not the official IEBC Returning Officer Stamp and the Returning Officer neither indicated his name nor signed the form. It was her evidence that the stamp used was the official IEBC stamp.

381. The deponent disputed the allegation that in Kuresoi North Constituency, no agents signed Form 34B, and that the Form had no indication of receipt/submission of Form 34A and did not have an aggregate. She deposed that the Returning Officer signed, dated and stamped the form and the total number of votes for each candidate were clearly indicated on the Form. She averred that only agents who are present sign forms and that there was no evidence that the Petitioners agents were present.

382. She denied the allegation that there was a discrepancy in the vote tallies in Garsen Constituency in Wardei Primary School. She averred that the actual vote tally was 159 and not 169 as alleged. It was her testimony that the votes garnered by each candidate were entered correctly in Form 34B.

383. It was deposed that there was a variance of 40 votes in Wajir South Constituency (IEBC NTC/080) in terms of the total valid votes. It was averred that this variance was due to a computation error. The deponent denied the allegation that the stamp was not authentic.

384. The deponent admitted that although there was a computation error in both Turbo constituency (IEBC NTC/190) Kapkoross Primary school and Turbo Constituency (IEBC NTC/190) Kapsaos Primary school the total votes cast in respect to every candidate was accurately tallied.

385. She rejected the allegation that in Likoni Constituency (IEBC/NTC/208), Form 34A of Mirima Primary school did not bear any official stamp; an unstamped Form 34A was transferred to Form 34B; Ushindi Baptist primary school results did not have an official stamp and data of unstamped Form 34A was transferred to Form 34B. She deposed that the Forms 34A of Mirima Primary School and Ushindi Baptist Primary School were duly stamped before the results were transferred to Form 34B.

386. The deponent denied the allegation that in Embakasi Central (IEBC/NTC/176) there were discrepancies in the number of valid votes and valid votes tallyin: Kayole North (18), Imara Primary (18), Bondeni (1), Thwatu (19) and Mwangaza (19). She deposed that the total votes for each respective candidate was captured correctly as they were indicated in Forms 34 A and 34B.

387. The deponent denied the allegations that in Gem constituency, no agent signed Forms 34B; the stamp on the Form 34B was inconsistent with the Returning Officer‘s official stamp; the final tally was inconsistent with the stated constituency tally of 65,128 valid votes, thus 461 votes not accounted for. She also denied that in Makadara Constituency (IEBC/NTC/186) there was no proper identification of the Petitioners‘ agent and that not all sheet/pages were stamped with the official IEBC Returning Officers stamp.

388. She admitted there was a computation error in Dagoreti North Constituency where the total valid votes were indicated as 104,789 while a summation indicated 105,840. She agreed with the petitioner that the total number of valid votes received by the candidates was 105,840. She further responded that the Returning Officer‘s Stamp was authentic and the allegations that the Form did not have a bar code was denied.

389. She rejected the allegation that in Sigor Constituency (IEBC/NTC/044) the name of the Returning Officer was not indicated in the statutory form. She further disputed the allegations that in Starehe Constituency (IEBC/NTC/195) in Park Road primary school, there were vote discrepancies in the Statutory Forms, not all the pages were signed; the stamp used was suspect and only Petitioners' agents appended her signature. She deposed that Park road was polling centre with three polling stations and these allegations were not specific to allow for a response.

390. She averred that on the 5th August 2017 the Chief Executive of the 1st Respondent issued a directive invalidating any ballot paper that was not stamped and directing that the same to be marked as rejected. She stated that the said directive was limited to ballot papers and did not extend to Forms 34A. She deposed that if the intention was for the directive to extend to Forms 34A as alleged in the supporting affidavit, then the directive would have specifically provided so.

391. She rejected in toto the allegation that in the following polling stations, the Form 34A as uploaded in the Commission's portal, were not clear/illegible: Chaani primary school; Miritini World Bank; Jomvuu Kuu primary school 2; Taratibu Social Hall 3; Miririni primary school 4; Aldinnah nursery 5; Jomvuu nursery 6; Swaleh Khalid Social Hall 7; Nuru CBR 001 8; Nuru Community based Rehabilitation 8; Abu-Ubaida primary 9; Miritim primary school 10; Miritim primary school 11; Railways Station hall 12; Mwamlai primary school 13; Ministry of Water Tanks 14; Mikindani Social Hall 15; Owino Uhuru nursery 16; Kiembeni Baptist primary 21; Mtopanga primary 22; Concordia primary 23; St Joseph Herman primary 25; Kiranzoini primary, Mwamanga; Jogoo; Football Ground; Mbuwani primary; Emgwen primary; Kamkunji Market; Chemalal primary school; Chepkemel primary school; Maraba primary school; Maraba primary school; Union primary school, Railways Dispensary; St Andrews primary school; Railways Dispensary; Radar Station; Lelboinet primary school; Tarus primary school; and Kiptaruso primary. She deposed that all these forms were clear and legible.

392. It was denied that in Kiptendon primary school, Form 34As had not been signed by the Petitioner's agent and the Returning Officer had not indicated the reason for the failure. She deposed that the 1st Respondent did not gazette any polling station or centre known as Kiptendon primary school as alleged. Further, only agents present could sign the relevant forms and no evidence was provided that the petitioners' agent was present and was denied the opportunity to sign the form or refused to sign the same for a valid reason.

393. It was denied that the allegation that in the following polling stations, Forms 34A had been filed by the same person as evidenced in handwriting: Kipkongen primary 48; Bemja primary; Chepsioch 57; Kabusagawat 87; Timbilil primary school 13; Kitum nursery; Cheptabach primary; Siwo Health Centre Taboinyat primary 60; Tartar nursery 62; President 63; Chepngetuni primary 65; Keben primary; Koilot primary school; Kepkechui primary school; Kapsabet Boys primary school; AIC Kosira estate; AIC Baraton; Nandi primary school; Kamurguywo primary; Chenare primary; Kaptildil primary; Kamonjil primary; Kapkimbimbir; Segut primary; Chepterit primary; and Belekenya 001. She deposed that no report by a handwriting expert was produced to substantiate the allegation that the same person filled or completed Forms 34A.

394. She countered the allegation that in Tikiyo primary school, the name of the Deputy Presiding Officer was not given to aid verification. She also refuted the allegation that Form 34A in Kilingile and Kataingo primary school had not been signed by the presiding officer or the deputy presiding officer. She further denied that in Njoguini primary school 6 Form 34As were unclear and unreadable. The allegation that in Shimo La Tewa Forms 34As as uploaded in the portal had been severally repeated was denied by the deponent.

395. She rejected the allegation that in Wareng High School, Kapsaret constituency, Ngesia Ward, Kiambaa primary school the Forms had been crossed and did not indicate the candidates' results. She asserted that the Forms from the referenced centre had not been crossed as alleged and they indicated the votes the candidates garnered.

396. Further, she rejected the allegation that in Chebirir primary school only one agent signed form 34A and that no reason was given as to why the others did not sign. In addition, she denied the allegation that in Chepsioch primary no NASA agent signed Form 34A and no reason was given for this. She asserted no evidence had been provided to show that there was any agent who was denied an opportunity to sign the forms or that they refused to sign and provided reasons.

397. She denied the allegation that the Forms 34As were illegible and the photos incomplete in the following polling stations: Lakole North Centre; Waso girls; Matho Dam; Kanjara Centre Dandu primary school; Huruma primary school. She deposed that the referenced places were not polling stations. She also denied the allegation that Form 34A was not signed by any agent in Bargugue Dam and Mathah Boqay. She deponed that there was no mandatory legal requirement for agents to sign Form 34A and that only agents who were present could sign. Further, there was no allegation that the Petitioners' agents were present or were refused the opportunity to sign.

398. The existence of a polling station by the name Habasein Boys primary school was denied along with the allegation that only one party agent signed form 34A in that polling station and no reason was given as to why the other agents did not sign. She further noted that there was no polling station by the name Kisina primary school and contested the allegation that the stream had been changed from 1 of 2 to 2 of 2 using a pen.

399. She refuted the allegation that in Nunguni primary school the Form 34A was signed by one person and was similar to that of Nunguni primary school in Kitui East. She however admitted that Form 34A belonging to Maluma primary school was erroneously uploaded as being for Kalivu primary school.

400. She refuted the allegations that in Mitalani primary the handwriting in the form 34A was altered; that in Makueni primary school the handwriting and signatures on the Form 34A appeared made up. She deposed that other than the relevant forms having been signed and witnessed by agents, no evidence had been provided to prove the allegation on the alteration of handwriting and further that the forms referenced to were not annexed to the supporting affidavit.

401. The deponent refuted the allegation that in Kanziko Cotton Stores the Forms were unclear and illegible; in Tetu primary school; Mugumo primary school; Kivumbuni primary school; Kisayani primary school; Kunguluni primary the tallying is incorrect. She averred that the specific form that is alleged to be unclear was not identified and the tallying alleged to be incorrect was not specified.

402. She refuted the assertion that: the statutory form of YKivuti primary school was unclear, Kalima Kio primary school had no code and the stream was indicated in the uploaded picture. Further that in Molemuni primary school, the Form did not indicate the total results and was incomplete and that Form 34As were not clear in Ta Farmer and Kitoroch 135. She averred that there were no polling stations known as Ykivuti primary school, Molemuni primary school and Ta Farmers School.

403. She countered the allegation that in respect of; Mikimbi Full Gospel Grounds; Full Gospel Church Ground Njukikiri; Teachers Advisory Centre Hall; Nembure polytechnic; ACK Muchonoke Church Grounds; Faithful Church of Christ Makumbiri; Kwa Douglas Bus Stage; Full Gospel Churches Grounds Ndunduri; Full Gospel Churches Grounds-Gitururu; Ngurueri Coffee factory; Nguire primary school; Muchangor primary school; Kavutiri primary school; Gatura Tea Buyng Centre; Gichera primary school; Kangondi primary school; Kanduri primary school; Ugweri primary school;

Kithunguthia primary school; Gikuuri primary school; Ndamunge Tea Buying Centre; Kirimiri Coffee Factory; Thigingi primary school; Magara Tea school; Mugaari Tea Buying Centre; Kanyaueri Tea Buying Centre; Kiameceru Tea Buying Centre; Kiandongó Tea Buying Centre; Kathari primary school; Kathageri Youth Polytechnic; Muhanda primary school; Ramula primary school; Burlwolo primary school; Nyangunda primary school; Tambach prison; Kapsabet prison; Eldama Ravine prison; Nanyuki prison; Nanyuk prison; Vihiga prison; Kanoth primary school Kiritiri primary school; Kauraciri market; Kanduku primary school; Marimari primary school; Ndithini primary school; Raciina primary school and Kariari primary school the respective Form 34As had been filed with the same handwriting. She averred that no evidence had been provided to support the allegation.

404. She further contended, in relation to the allegation that there were no agents in Taveta prison; Moyale prison; Embu Women prison; Kitui Women Prison; Kitui Prison; Machakos Main prison; Machakos prison; Makueni prison; Nyeri Medium prison; Mwea prison; Kerugoya prison; Muranga prison; Muranga Women prison; Maranjau prison; Kiambu prison; Kapenguria prison; Kitale medium; Kitale women prison; Kitale main prison; Eldoret prison; Tambach prison; Kapsabet prison; Kabarnet prison; Eldama Ravine prison; Rumuruti prison; Naivasha medium; Nakuru women prison; Kericho main; Sotik prison; Bomet prison; Shikusa Farm prison; Busia women prison; Busia prison; Kisumu women prison; Kibos main prison; Kibos medium; Homa Bay prison; Kehancha prison; Kisii women prison; Nairobi Remand and Kilgoris prison, she was aware that the 1st respondent did not receive and therefore did not reject any application from a candidate seeking to appoint agents in the abovementioned polling stations or centres. She further stated that it had not been demonstrated how the absence of agents had affected voting or tallying in the said places and/or how it had affected the petitioners.

405. Ms Kassait denied the allegation that in Kinyaga primary school; Nyambori primary school; SDA Mariari primary school; Kwa-Andu-Ambogo primary school; Mwondu primary school; Siakago Hall; Itiira primary school; Ndutori primary school; Gangara primary school; Gatakari primary school; Kathigagaceru primary school and Karauri primary school, the Form 34As had been filed with the same handwriting. She stated that no evidence had been provided to support the claim.

406. The deponent, in response to the claim that in Uruku Primary School the number of registered voters was not indicated, stated that the number of registered voters in that station was 12, which number was gazetted.

407. She deposed that: the 1st respondent did not gazette any polling station known as Gatinja primary school and therefore could not comment on the claim that the Form 34A in respect of that station was only signed by the 3rdrespondent‘s agents and that no reason had been given as to why other agents did not sign. In response to the claim that the form 34A was not clear in Runyenjes Municipal Hall, she averred that all the forms for the three (3) polling stations were legible and that copies of the said forms had been provided to the Court.

408. In response to the assertion that in Nduuri primary school the total number of registered voters and total number of votes cast was not indicated and that the polling station was not legible, Ms. Kassait averred that the said forms were legible. She further remarked that the total number of registered voters and total numbers of votes cast was clear as were the polling station names. She stated that copies of the said forms had been provided to the Court.

409. In response to the assertion that the form 34A in Kathungu Primary indicated the party agent to be the petitioner and the 3rdrespondent being shown as the candidate, she deposed that she noted that instead of indicating their names, the agents for the respective parties simply indicated the names of their principals. She further stated that this did not affect the results and that the petitioners did

not demonstrate how the indication of the principals' names materially affected the result of the presidential election.

410. She denied the assertion that in Kithangari Tea Buying Centre the Presiding Officer and the Deputy Presiding Officer had the same handwriting.She also denied Dr. Nyangasi's allegation that in Kithagutari primary school the same handwriting had been used to fill and sign the form 34A and that the form was a photocopy. She averred that the 1st respondent did not gazette any polling station by the name Kithagutari primary school.

411. The deponent denied the allegation that the form 34A was not clear for Ciangera primary school. She swore that the respective forms 34As for both polling stations at Ciangera primary school polling station centre were clear and legible and that copies of the said forms had been provided to the Court. She contested the allegation that the Form 34As for Kiathambu primary school, Kamwaa primary school and Gwakathi primary school were not stamped.

412. She countered the deposition that in Gwakathi primary school the tally results had been cut off and that the agent signed off as a NASA agent. She also denied the allegation the Presiding Officer in Qvaaine also signedGwakathi primary school's Form 34A. She stated that the 1st respondent did not have a polling station under the name Qvaaine. She further denied the assertion that in St. Peters primary school and Itururi primary school were not stamped.

413. She denied the allegation that in Mugwanjogu primary school and Mbaci primary school the handwriting in the two forms was similar and that the form 34A for Kamarindo primary school was illegible. It was her testimony that no expert evidence had been provided to demonstrate the similarity of handwriting and that such similarity did not mean that the same person signed the forms in the 2 polling centres.

414. Ms Kassait denied the allegation that in Muruaki secondary school; Kahuru primary school; Matundura primary school; Muthoni primary school; Munyaka primary school; Kaimba primary nursery school; Kanyungi primary school Vijiweni Grounds; Likoni Muslim primary school; Consolata nursery school; Mirima primary school Ngurubani primary school; Kamuchege primary school; Karuangi primary school; Defathas; Karoti girls and Ciagini the same handwriting had been used for all the Form 34As. She further denied the assertion that in Likoni primary school the Form 34A did not indicate the name of the Presiding Officer.

415. She also denied the assertion that the Forms 34A were not stamped in Thome primary school; Gakuo primary school; Kutus primary school; Karoti girls; Murinouko; Musinduko; Ichangi; Tongoye; Karuangi primary school; Kamuchege primary school; Murubara Social Hall; Wanguru County Counsil; Ngurubani primary; Wanguru secondary school; Samburu primary school; Mwambani primary school; Chituoni nursery; Matumbi primary school; Mivirivirini primary school; Mlola nursery; Vikolani primary school and Kipni.

416. The deponent denied the averments that the Deputy Presiding Officer did not sign the Form 34A in Mwambani primary school and that an evidently fake IEBC stamp was used in Chituoni nursery and in Mugamba Ciura primary school. It was her testimony that the 1st respondent's stamp was authentic.

417. She further denied the assertion that both the Deputy Presiding Officer and the Presiding Officer did not sign the Form 34A in Kafuduni primary school while in Mazerus primary the Deputy Presiding Officer did not sign the Form 34A.

418. Further she rebutted the following allegations:

(i) In Tarasaa Secondary the Form 34A had been filed using the same handwriting and signatures.

(ii) In Ngao Social Hall the Deputy Presiding Officer did not sign the Form 34A.

(iii) In Onwadei primary school and Tanan nursery the same handwriting had been used but there were no signatures in the Form 34A.

(iv) In Imani Primary, Mswakini primary and Maua primary the same handwriting had been used to fill the Form 34As.

(v) In Walkon, the Deputy Presiding Officer did not sign and in Maua Primary the Form 34A was not signed at all.

(vi) In Konkon the same handwriting had been used but no signatures had been appended, in Gatuto primary, Kirinyaga Tech the Deputy Presiding Officer did not sign and the Form was not stamped.

(vii) In Kaitheri primary, Kaitheri youth polytechnic, Kiabarikire primary, Kianderi primary, Karitha, Kirugoya coffee factory, Kirigo primary, Valley road primary, Gakararu; Amani gardens; Kiamuruga primary; Karaini primary; Holly Rosery primary and Karuri primary the Form 34As were not stamped.

(viii) In Iego primary the same handwriting had been used to write and sign for agents.

(ix) In Mukarara primary and Kiawambogo primary the Forms had been filed suing the same handwriting.

(x) In Laciathuriu primary the Form had been signed by three Jubilee candidates and no reason was given as to why the other candidates did not sign.

(xi) In Kisorngot primary the signatures were similar for all the agents.

419. Her averment was that in Pangani Girls Secondary there was no number of total votes cast or registered voters indicated in the Form 34A. In addition she averred that Pangani Secondary polling centre had several polling stations, all of which had the total number of votes cast and registered voters indicated on the respective Form 34A and that copies of the said forms had been provided.

420. In respect of the allegation that the code was unclear or illegible in Kuni Primary, she swore that there was no polling station with the name Kuni Primary.

421. In her deposition she denied the following allegations:

(i) In Empaash primary the Form had been signed by the same person and no record of the registered voters was recorded.

(ii) In Kimulot primary the agents‘ signatures were similar.

(iii) In Murguiwet primary the agents‘ signatures were similar.

(iv) In Mugenyi primary two jubilee agents signed the Form and it was not indicated why other agents had not signed.

(v) In Kapkweni primary school the agents had similar handwritings.

(vi) In Meru primary school all agents signed using one handwriting and no results were given.

(vii) In Mosque Road Hall and Nteere Park all agents had a similar handwriting.

(viii) In Kokoin Constituency, polling stations number Kimulot primary school, Murgiwet primary school, the agents had a similar signature and handwriting.

422. She based her averment on the fact that no evidence had been provided to back up the claims nor had it been demonstrated how similarity of signatures, if any, affected the results.

423. The deponent, in response to the allegation that in Pimbiniet primary there was no agent's signature in the posted Form 34A, stated that only agents who were present signed the relevant Form 34A and that no evidence had been provided to show that there were agents who were present but failed or refused to sign the relevant forms.

424. She refuted the assertions that the information in the uploaded form had been cut out in Ololchurra Centre and that in Nkosuash nursery, there was no entry for all the Presidential candidates in the uploaded Form 34A. it was her testimony that the relevant forms for the abovementioned centres were clear and legible and copies of the same had been supplied to the Court.

425. In denying the assertion that in Teldet primary school the Form 34A was illegible and unverifiable and that in Kiplegut primary school, the number of valid votes as well as the rejected votes were not specified. Ms. Kassait swore that there were no polling stations known as Teldet primary school and Kiplegut primary that were used in the 2017 Presidential Election.

426. The allegation that in Kapkilaibei primary school only independent candidates' agents signed the form and no reasons were given as to why the other agents did not sign. She asserted that only agents who were present signed the relevant forms and that no evidence had been provided to show that the petitioners' agents were present but failed or refused to sign the relevant forms. It was also denied that whiteout had been used to alter Form 34A in 'Masset', stating that 'Masset' was a non-existent polling station.

427. The allegation that there were discrepancies in figures in Makutano Market was denied on the basis that the allegation had neither been substantiated nor particulars of the same provided. She also rejected the assertion in respect to Miriga, that Form 34A had not been stamped or signed.

428. She refuted the averments that the Forms 34A in Njukinjiru, Tinderet, Kalyet Primary School and Gakoromone Market were illegible and unverified. She also denied that the form in Kathurini Coffee was only signed by the 3rd respondent agent and that in Keses, the picture form was incomplete and in Kilelgut. She rejected the allegation that valid votes and rejected votes had not been specified. She averred that there were no polling stations with the names Njikinjiru, Kathurini Cofee, Keses,Kilelgut, Kalyet Primary School or Gakoromone Market used in the 2017 Presidential election.

429. While denying the allegation that there was a discrepancy in figures on form 34A in Makutano Market polling station, North Imenti, the deponent contended that the allegation was not substantiated and that no particulars had been furnished. Further, she denied that Form 34A in Masste Pry. polling station, Bomet Central Constituency, had been erased using a white out and averred that the allegation had not been proved and further, but most importantly, there was no polling station with the name Masste Pry.

430. She refuted the allegations that Form 34A had no signature of agents in St Patrick Primary in Gilgil Constituency. Further, she denied that form 34As in Ole Sultan Pry, Muricucuria ECD Primary, Ndibai Primary and St Barnabas Trading had only been signed by the 3rd Petitioner's agents. Discrepancies in the addition of figures in Munanda Primary, Gitare Primary and Nyondia Primary were also denied.

431. In addition, she refuted that form 34A for Kahuho Primary, Kamathat Primary, Echacharia Primary and Loldia Primary polling stations were illegible. The deponent also denied that Forms 34A in Ndogo Primary, Itherero Primary and Kiunguria Primary were filled by the same person. Allegations that no summations were made in Nuthu Primary and that the Deputy Presiding Officer did not sign the form for Komothat Primary were contested.

432. It was the deponent's averment that there were no polling stations with the names St. Patrick Pry, Ole Sultan Pry, Muricucuria ECD Pry, Ndibai Pry School, St Barnabas Trading, Munanda Primary, Gitare Primary and Nyondia Primary. Further, she refuted the allegation that form 34A were illegible for Kahuho Primary, Kamathat, Echacharia Primary, Loldia Primary, Itherero Primary,Kiunguria and Komothat Primary.

433. The deponent asserted that allegations of discrepancies in Bishop Ndungi Primary were not substantiated. Further, she denied that only the 3rdrespondent's agents signed in Milimani Primary, Naivasha Constituency and averred that no evidence had been furnished to show that the petitioners agents were present and denied the opportunity to sign the relevant form or that they refused to sign the form for valid reasons.

434. She denied the allegations that the presiding officers: Isaac M Omari Jeremiah Kumutai, Judy Doreen Chelegat and Deputy Presiding Officer sDerrick Ngetich and signed Form 34A in more than one polling station.

435. Further she rejected the allegations that in the following polling stations the result did not tally mathematically N. Chebelyon Pry; Murunga; Kapkagogoron Pry; Chepsumei; Kapkatoi; Madaraka School; Rise And Shine; Birongo Pri; Ibeno Sec School; Matieko Dok Pry; Muramati Pry; Westlands Pry; Hospital Hill; North Highridge Pry; Karura Forest Pry; Cheleta Pry; Mji Wa Huruma Pry; Kttc ; Hospital Hill High; Kianjagi Pry; Seretut Pry; Bishop Ndingi School; Nyakinyua Pry; Rev Jeremiah; Chekeliek Nursery; Cheplelakbei Pry; Muruguyu Woo Pry; Kwangoly Pry; Athi River; Sirimon; Kithithi Pry; Kombe Pry. She averred that no evidence was provided to show or substantiate the claim that the result in the mentioned places did not tally mathematically moreover, she deposed some of the places mentioned were not polling stations.

436. She denied the allegations that the defects and irregularities outlined in Dr. Nyangasi's affidavits render the Statutory Forms invalid, null and void. She contested the allegations as unverified and incapable of being relied upon as the basis upon which to nullify the declared results. It was her evidence that the Presidential Election was conducted in accordance with the requirements of the Constitution, the *Elections Act* and regulations thereunder as well as all relevant applicable laws and regulations as demonstrated in the 1st and 2nd respondents response to the Petition.

437. The deponent denied the allegation that there were persons other than the gazetted County Returning Officers, Constituency Returning Officers and Returning Officer for citizen residing outside the country who signed statutory forms.

438. She deposed that that no elections were conducted in ungazetted polling stations/tallying Centres and further that the alleged ungazetted polling stations/tallying Centres do not exist.

439. In relation to the variance in the total number of votes cast been the Presidential and county level elections, she deposed that the said variance was not of 482,202 votes as alleged and is in any event within acceptable statistical limits. She tendered in as evidence of this a document marked Ec.12.

440. In reply to the further affidavit, Ms. Kassait deposed that the annexures marked as DNO-2A and DNO-2-2A to the said further affidavit were not supplied to the 1st and 2nd respondents .

441. On the security features of the Statutory Forms, the deponent averred that the Commission developed standards for its electoral goods prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls. She deposed that all the ballot papers and statutory forms used in the August 8, 2017 election contained these security features.

442. Some of the features employed on the result declaration forms 34A and 34B were averred to include: guilloche patterns against which all background colours on the declaration forms were printed, anti-copy patterns, watermarks, micro text, tapered serialization, invisible UV printing, polling station data personalization, self-carbonating element, barcodes.

443. It was her testimony that each ballot paper included different colour coding of the background. She averred that the security measures were to ensure that the Commission detects counterfeit statutory forms or ballot papers and discharge its constitutional mandate of conducting secure and verifiable elections. In addition, she asserted that all ballot papers were to be stamped before issuance to a registered voter to cast the vote. She deposed that this was an extra measure initiated by the 1st respondent to ensure that the electoral process was secure. She added that lack of the stamp did not invalidate or by itself speak to the authenticity of the ballot paper.

444. She concluded by confirming that all the Form 34A's received by the Commission at the National Tally Center had all the above-mentioned security features.

445. I am convinced that, apart from the specific admissions made, the affidavit of Immaculate Kassait rebutted all the allegations made in the affidavits of Dr. Nyangasi, in support of the Petition and supplied evidence in support of the averments made by the deponent and where the evidence was contained in the affidavit of another deponent reference was made to that other affidavit. I have taken into consideration the effect, on the declared results, of the admitted administrative errors appearing on the Forms 34A and 34B, and I have arrived at the conclusion that the said administrative errors do not taint the declared results.

14. The affidavit of the 2nd respondent - Wanyonyi Wafula Chebukati

446. The 2nd respondent filed a replying affidavit sworn and dated August 24, 2017. He deponed to being the returning officer for the August 8, 2017 presidential election.

447. He averred that both he and the 1st respondent had no stake in the outcome of the August 8, 2017 elections and that throughout the election cycle, they were neutral referees; their resolute mandate being to provide the electoral infrastructure for the people of Kenya to exercise their sovereign will to elect leaders of their choice.

448. He averred that after tallying all the votes, the presidential candidate who emerged the winner was Uhuru Kenyatta, having garnered 8,203,290 votes; followed by Raila Odinga, who garnered 6,762,224 votes. He swore that this declaration was based on the contents of the Form 34C prepared from forms 34B forwarded to the NTC from the constituency tallying centres plus the tally of the diaspora votes.

449. It was his assertion that given the election management infrastructure that was deployed, the primary results declaration forms (Forms 34A and Forms 34B) could not possibly have been interfered with at all. He added that the forms were transmitted through the KIEMS system in the scanned format and they had special security features that could not be replicated. Further that the security features included anti-photocopy and self-carbonated copies upto a depth of six (copies).

450. He averred that the presiding officers at the 40,883 polling stations were required to scan and electronically transmit the original Forms 34A to both the constituency and NTC. In turn, the constituency returning officers were required to electronically submit to the NTC the Forms 34B for purposes of tallying and declaring the results of the presidential election and therefore, the outcome of the election could easily be verified by reconciling the figures in Forms 34A.

451. He swore that upon his assumption to office, on 20th January, 2017, together with fellow commissioners, they embarked on a process of managing the remaining part of the election cycle to ensure that the August 8, 2017 election met all the constitutional and statutory ingredients of a free and fair election. Specifically, his task as the Chairperson was to provide policy leadership and strategic direction to the Commission to ensure that the entire electoral infrastructure for elections management was accountable, efficient, systematic and methodical.

452. He deposed that despite the numerous challenges arising from litigation against the Commission; the commissioners ensured that the procurement of strategic electoral materials by the Commission's secretariat was done in a transparent and timely manner; that the other electoral cycle processes including the supporting technology were deployed in a manner that was congruent with the constitutional and legal requirements of simplicity, accuracy, verifiability, security, accountability, and transparency.

453. He deposed that in compliance with the law, all the required steps and processes were firmly in place for a free and fair election. He precedes to enumerate the steps that were taken to ensure compliance with the Constitutional principles.

454. He deposed that it is neither true that the Commission presided over a shambolic presidential election nor that the entire electoral processes had failed before and during the August 8, 2017 elections or that they were riddled with grave breaches of the Constitution and applicable laws during the tallying and transmission of results.

455. He averred that the presidential election met all the requirements of free and fair elections: they were conducted through secret ballot; they were free from violence, improper influence or corruption; the entire electoral cycle was exclusively administered by the Commission; they were transparently conducted; and they were administered in an impartial, neutral, efficient, accurate and accountable manner.

456. Invoking article 138(10) of the Constitution, he deponed that he is mandated, within seven (7) days after the presidential election, to declare the result of the election as set out in Form 34C and deliver a written notification of the result to the Chief Justice and the incumbent President which he did. It was his testimony that throughout the electoral cycle, he discharged his mandate in full compliance with the Constitution, electoral laws and the applicable regulations and oversaw the conduct of the election in compliance with article 81(e) of the Constitution. He deposed that he was not influenced by anyone at all and maintained high levels of professionalism.

457. As regards the Commission as a body, he swore that it conducted and supervised the election in accordance with article 81(e) of the Constitution. Particularly, that:

(a) every registered voter who participated in the General Election cast their vote by way of secret ballot;

(b) polling stations were adequately secured by the police to ensure the electoral process was free from violence, intimidation, improper influence and corruption;

(c) the election was independently conducted by the Commission;

(d) candidates and various observers were allowed to have their appointed agents present at the various polling stations to observe the voting process to ensure transparency;

(e) the said agents observed the closure of the voting process and were involved in counting of the votes at the various polling stations to ensure that the administration of the electoral process was done in a transparent, impartial, neutral, efficient, accurate, and accountable manner; and

(f) the presidential candidates' agents/representatives were given access to the various Forms including Forms 34A and 34B thereby increasing the 1st Respondent's transparency and accountability during the electoral process.

458. It was the 2nd respondents deposition that the Commission staff that operated the KIEMS gadgets was trained in good time, and the gadgets were configured with the register of voters. He deposed that the KIEMS sought to ensure a transparent, secure, verifiable, reliable and accurate framework for elections management. It was his testimony that the system allowed for integration of the biometric voter registration, biometric voter identification, electronic results transmission and the political party and candidate registration systeMs He averred that it was successfully deployed on August 8, 2017 and significantly helped to increase efficiency, effectiveness and accuracy of the electoral process. He deposed that the system never failed.

459. He avers that the relaying and transmission of the results was done in compliance with section 39 of the *Elections Act* regulation 87 of the *Elections (General) Regulations 2012*, and the Court of Appeals decision in the Maina Kiai case.

460. The deponent states that he was present at the NTC between 8th and August 11, 2017, tallying and validating Forms 34B that were being electronically transmitted by the constituency returning officers. He attached as evidence copies of the Form 34Bs marked WWC-3. He averred that upon receipt of these Forms 34B, he proceeded to collate and confirm the consistency of the results and availed the Forms 34B to the presidential candidates through their agents for confirmation and verification. He thereafter used the same results to tally and complete Form 34C in compliance with section 39(3)(b) of the *Elections Act*. He tendered in as evidence a copy of the Form 34C marked WWC-4.

461. He avers that on August 11, 2017, upon receipt of the 290 Forms 34B from the constituencies and also the tally of the diaspora, the presidential election results were confirmed by the presidential candidates through their agents present as follows:

462. On the basis of these results, he avers that in compliance with Articles 138(4)and 138(10) of the *Constitution*, he publicly declared the presidential results on August 11, 2017.

463. He testified that there were inadvertent and/or arithmetic human errors in a few of the Forms, which errors were minor and did not have any effect on the outcome of the presidential election. In this regard he tendered in as evidence a document marked WWC-5 and also referred to the affidavit of Immaculate Kassait, the 1st respondents Director Voter Registration and Electoral Operations.

463. Responding to the affidavit sworn by Godfrey Osotsi in support of the petition, he deponed that throughout the electoral cycle, the Commission variously engaged the petitioners (in person and through their representatives), the 3rd respondent through his agents, the public and other interested stakeholders in conformity to best electoral practices including the reform of electoral laws. He deposed that there was no engagement in any partisan drive howsoever for the reform of electoral laws or at all.

464. He swore that the Commission fully complied with the law guiding the transmission of presidential results, including through its website, which access was granted to the general public to download Forms 34A, 34B and 34C.

465. In response to Godfrey Osotsis allegation that the commission did not have all the Form 34Bs at the time of declaration of results, he deposed that the Commission had received all Forms 34B. It was his testimony that to ensure the transparency of the process, all the Forms 34B and 34C were availed to all presidential candidates and their agents for verification before declaration of the results. They were all allowed to attend to the NTC at BOMAS to verify the said tally of the presidential votes, from commencement to declaration.

466. In response to Godfrey Osotsis evidence that the petitioners were sidelined during the tallying process, he deposed that no one was side-lined during the tallying process. He averred that he personally chaired numerous consultative meetings with the petitioners agents to consider their concerns. He testified that prior to thedeclaration of the final result the petitioners' agents decided to leave the NTC for unexplained reasons.

467. In response to the 2nd petitioners affidavit sworn on August 18, 2017 disparaging the credibility of the final outcome of the presidential election, he deposed that the declaration and announcement of the Presidential Election results on August 11, 2017 was done strictly and fully in compliance with the *Constitution of Kenya* and electoral laws.

468. In response to the 1st petitioners affidavit sworn on August 18, 2017, he stated that the commission notified the public throughout the electoral cycle of the anticipated challenges and demonstrated the alternative mitigation measures which included the confirmation of the petitioners agents in verification of voters in the polling stations, tallying of results and transmission of the results.

469. In further response to the 1st petitioners affidavit allegation that there were procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of presidential election results, the deponent stated that the tallying process carried out by the Commission was in compliance with article 81(e) and 86 of the *Constitution* as read together with section 39 of the *Elections Act*. He also deposed that at every result management level, the petitioners were allowed to have their agents present to confirm the tallying, announcement and declaration of the results. He emphasized that the electronic transmission of the results by the Commission was secure, prompt, accurate, verifiable, accountable and efficient. Further that all the results declaration Forms were subject to verification by the candidates agents/representative and immediately thereafter forwarded to the National Tallying Centre.

470. In further response to the 1st petitioners affidavit evidence that there was avariance between the declared result and the actual results as tallied by the petitioners the deponent averred that the Court should take cognizance that the 1st petitioner deposed that they were given access to the Forms 34B through their agents thus the issue of lack of transparency and accountability in the tallying process did not arise at all.

471. The deponent denied the 1st petitioners allegation that the 1st respondent condoned voter intimidation, undue influence, bribery and/or flagrant commission of Electoral offences by the 3rd respondent. He denied Dr Nyangasis allegation thatthe 3rd respondent was declared winner without verification of all the requisite documents. He deposed that all presidential candidates and their agents or representatives were invited to verify the results before the declaration. He averred that he did not announce the final results of the presidential election until he received and validated the Forms 34B from the constituency tallying centers.

472. He deposed that on August 10, 2017 the Commission received a letter dated August 10, 2017 from the Petitioners Deputy Chief Agent, James Orengo raising concerns over the presidential election results. It was his testimony that upon receipt of the letter, the Commission internally considered all the issues and communicated its response via a letter dated August 10, 2017. He tendered as evidence copies of this communication marked.

473. He swore that the declaration and announcement of the presidential election results on August 11, 2017 was done strictly and fully in compliance with the *Constitution of Kenya* and electoral laws, contrary to the averments of the 2nd petitioner.

474. In conclusion, he deponed that the allegation in the petition that the Commission failed to take steps against the 3rd respondent for alleged breach of the provisions of section 14 of the *Election Offenses Act* was untrue. He stated that on June 21, 2017, he wrote a letter to the Director of Public Prosecutions (DPP) informing him of the alleged breach for his action. The DPP responded via a letter dated July 6, 2017 informing him that he had directed the Director of Criminal investigations to take action. He tendered in as evidence, copies of the communication.

15. Replying affidavit by Ezra Chiloba

475. The 1st respondents replying affidavit was sworn by Ezra Chiloba, its Chief Executive Officer on August 24, 2017. He averred that the 1st respondent conducted the presidential election on August 8, 2017 in accordance with the provisions of Articles 81, 83 and 86 of the *Constitution*, the *Elections Act* and the Regulations thereunder.

476. It was his deposition that there were key milestones achieved in the lead up to the presidential election. He annexed the Elections Operations Plan (EOP) as the roadmap towards free, fair and credible 2017 General Election. He asserted that the EOP was formally and publicly launched in January 2016.

Also annexed to the affidavit as evidence was a copy of the audit report of the registered voters. Copies of Gazette Notices were annexed to prove:

i. Closing the registration of voters pursuant to section 5(1) of the *Elections Act* as read together with regulation 12 of the *Elections (Registration of Voters) Regulations* on March 7, 2017.

ii. Opening the register of voters for verification of biometric data by members of the public between 10th May and June 9, 2017.

iii. Certification of the register of voters in accordance with section 6A (3) (a) of the *Elections Act*.

iv Publication of the timetable and roadmap for the party primaries and General Election.

v Gazettement of 40,883 polling stations and 338 tallying centres across the country including the prisons and for the Diaspora. Annexed was a copy of the relevant Gazette Notice.

vi. Gazettement of County Returning Officers, Deputy County Returning Officers, Constituency Returning Officers and Deputy Constituency Returning Officers through various Gazette Notices, Addenda and Corrigenda, copies of which were annexed and marked EC-11.

477. Among other milestones deposed to were that the Commission acquired and deployed an integrated electoral management system for voter registration, voter identification, candidates registration and results transmission. Further, there was recruitment, training and deployment of over 360,000 election

officials across the country; and continuous voter education programmes undertaken across the country using different strategies and platforMs

478. In addition it was deposed that there were over 15,000 individual observers, 105 international observer institutions, 254 local institutions and more than 7,000 journalists from over 30 local and international media houses were accredited to participate in the general election.

479. It was his testimony that despite the complex political and legal environment in the lead up to the 2017 General Election, the 1st respondent put in place mechanisms and infrastructure towards what has been lauded as the most free, fair and credible election in Kenyas history.

480. Responding to the affidavit by the 1st petitioner, the deponent stated that the general election was conducted in a transparent, open and accountable manner. He averred that the process was peaceful and credible, a fact confirmed by both local and international observers. He attached as evidence a copy of various observer reports.

481. He deposed that the tallying and transmission of results was undertaken at the polling stations, collated and declared at the constituency tallying centers and at the NTC, hence the results declared were credible and represent the will of the Kenyan people. It was his testimony that the system used was credible, transparent and accountable. Further, that there was no compromise or interference with the system for results transmission before, during or after the declaration of the outcome of the presidential outcome. He reiterated that the collation, tallying and transmission of the results were in accordance with the *Constitution*, the *Elections Act* and the Court of Appeal decision and the *Maina Kiai* decision.

482. Referring to the documentary evidence on record, he deposed that the results declared were substantially consistent with and a true reflection of the actual results tallied and declared at the gazetted polling stations with the consequence that the finality of the results declared by the 1st Respondent could be faulted.

483. It was the deponents testimony in response to the 1st petitioners affidavit that that the law was amended vide the Election Laws (Amendment) Act, 2017 to provide for a period of four (4) months within which to procure and put in place the KIEMs He averred that the 1st petitioners allegation in his affidavit evidence that electronic lectoral system may have been exposed to risk of interference was speculative and untrue.

484. He deposed that the 1st petitioners allegation in his affidavit that Petition No 127 of 2017, *Dr Kenneth Otieno v The AG & IEBC*, that sought and got orders declaring the Elections Technology Advisory Committee (ETAC) unconstitutional, was not defended by the 1st respondent was true. He averred that the Commission filed a defense and advanced arguments in the matter. He stated that the fact that the Court ruled against it does not mean that it did not oppose the petition.

485. He further averred that the 1st petitioners allegation in his affidavit falsely accused the 1st respondent of filing Petition No 415 of 2016, Collins Kipchumba Tallam v The AG. This petition sought to declare section 39(1C) of the *Elections Act* unconstitutional. The deponent denied this allegation and stated that it was unfair and malicious to accuse the 1st respondent of filing the case as it was not a party to it.

486. He denied the 1st Petitioners allegation that the 1st Respondent failed to put in place several preparatory measures to assure the credibility of the KIEMS system. He deponed that the KIEMS system performed exceptionally well in identification of voters and results transmission. He averred that where there were anticipated challenges in voter identification and transmission, the legal complementary mechanism was invoked. He termed the allegation of failure in transmission and that of breach of security as unfounded and untrue.

487. He denied the petitioners allegation that they were ambushed two days to the election date when they were informed by the 1st respondent that over 11000 polling stations were out of range for the 3G and 4G network and were expected to transmit election results from locations other than gazetted polling stations and/or manually is false.

488. He averred that the petitioners were not ambushed as alleged since in a workshop held on May 22, 2017, representatives of the petitioners were informed of the mapping of network coverage and how the same had been shared by the mobile network operators. He deposed that the Communication Authority of Kenya (CAK) at no time advised the 1st respondent against hosting a private cloud to supplement the 1st respondents primary as it was satisfied with the Commissions arrangements.

489. The deponent denied the petitioners allegation that the 1st respondent delayed in carrying out testing verification and deployment of technology. He deposed that the 1st respondent tested the KIEMS system on June 9, 2017 as required by law. He averred that the 1st respondent also conducted other tests, verified and deployed the KIEMS system.

490. It was the deponents testimony that the 1st petitioner made reference to an affidavit of one Professor Kaloki, which affidavit was not served on the 1st and 2nd respondents. The 1st respondent reserved its right in respect of what it termed a false allegation that Professor Kaloki had sworn an affidavit in support of the petition. He deposed, without prejudice to the preceding averment, that the allegation that the CAK advised the 1st respondent against hosting a private cloud to supplement the 1st respondents primary and disaster recovery sites was untrue. He deposed that on the contrary, the CAK was satisfied with the arrangements put in place by the 1st Respondent.

491. He attached a copy of a letter dated July 31, 2017 from the CAK marked EC- 14 as evidence. Accordingly, he averred that the allegation, by the 1st petitioner in his affidavit that the KIEMS system was compromised and that the presidential election was substantially conducted using manual processes, lacked merit.

492. He disputed the petitioners allegation that the voting process was not conducted in accordance with article 86 of the *Constitution*. He deposed that the results were transmitted from polling stations and constituency tallying centres as by law required. He denied the petitioners allegation they had not been supplied with all Forms 34B and all Forms 34A. He deposed that they were supplied with all the Forms 34B all the Forms 34As were available on the public portal. He averred that by their own letter dated 14th August 2017 the petitioners acknowledged having been provided with access to all the requested forMs He attached copies of the relevant correspondence marked EC-15.

493. The deponent denied petitioners allegations that the Form 34As and 34Bs had substantial, systemic, glaring, qualitative anomalies that put to question the credibility of the presidential election. It was his testimony that the petitioners did not dispute the presidential election results as declared but only alleged unsubstantiated qualitative anomalies.

494. Mr Chiloba averred that the petitioners deposition that they had compared Formsn34A and 34B supplied by the 1st Respondent was a tacit admission that the Petitioners had received Forms 34A and 34B from the 1st Respondent. He deposed that there were no massive numerical discrepancies as alleged by the petitioners that affected the results declared by the 2nd respondent.

495. The deponent denied any partiality on the part of the 1st respondent as alleged by the petitioners. He deposed that he was aware that the 1st Respondent wrote to the Director of Public Prosecutions to discharge his constitutional mandate. He attached, as evidence, a copy of the said letter marked EC-16. It was further deposed that voting was conducted only in gazetted polling stations and only results

for the gazetted polling stations were tallied and ultimately declared. He adopted the averments in the affidavit of Immaculate Kassait on these allegations.

496. Responding to the affidavit of Apprielle Oichoe, he reiterated and adopted the responses in the replying affidavit sworn by James Muhati. In addition, he deponed that it was not true that the 1st respondent replaced Forms 34A and entered results in Forms not provided for. He deposed that results in all polling stations were entered in the statutory Forms 34A.

497. He further deponed that although all presiding officers had been trained and instructed to take an image of the Forms 34A for transmission through the KIEMS, in some instances, they decided to take images of other documents for purposes of testing the kits. Consequently, given that one of the security features of the system was for the system to capture and transmit one image only for each of the six (6) elections and thereafter lock itself, the test documents were transmitted instead of the Forms 34A.

498. He averred that upon noting this error, the 1st respondent uploaded the Form 34A for the said polling stations on the public portal. He deposed that this inadvertent transmission of wrong images did not affect the results as contained in Forms 34A. As example, he annexed a letter dated 16th August 2017 from the Presiding Officer Bulla Dadacha Stream 02 polling station explaining the erroneous uploading of an exercise book page marked EC-17. He deposed that upon noting this error, the 1st respondent uploaded the Form 34A for the said polling stations on the public portal. He annexed said Form 34A marked EC-18 as evidence.

499. He termed the report in Aprielles affidavit titled The Travesty that was the electoral process Kenya 2017 as untrue. He deposed that the alleged report was not dated or signed and neither was the source or author indicated. He averred that it was a document with no probative or evidentiary value. He reiterated that the system deployed by the 1st respondent was not compromised and that the allegations contained in the said report were without basis.

500. In response to the affidavit of Mohamed Noor Barre and Ibrahim Mohamud Ibrahim, he reiterated and adopted the responses contained in the Replying Affidavit of Abdibashir Alinoor. In response to the affidavit of Benson Wasonga, Mr Chiloba averred that the result of the election from each polling station was contained in Forms 34A, the declaration of the results of the presidential election was on the basis of the results contained in Forms 34B from the 290 constituencies and the diaspora. He also swore that the total number of rejected ballots as declared in Form 34C was 81,685 and not 477,195 as alleged. He stated that Mr Wasonga had misconstrued the statistics published on the public display mode of KIEMS which was not a result within the meaning of the law. He deponed that the cause of the variance between the actual number of rejected ballots and the public website were as a result of human error.

501. In response to affidavits of Moses Wamuru, Koitamet Ole Kina and supporting affidavit and 2nd affidavit of Godfrey Osotsi, he reiterated and adopted the responses contained in the Replying Affidavits of Amina Shaku and James Muhati respectively.

502. In response to affidavit of George Kegoro, he reiterated and adopted the averments in the affidavit sworn by Immaculate Kassait. He responded that the statistics displayed electronically did not constitute and were not the results of the presidential election. He deposed that the final result of the presidential election is verifiable and certifiable from an inspection of Forms 34A and 34B.

503. He denied Mr Kegoros allegation that IEBCs portal showed varying levels of votes cast for the different elective offices. It was his testimony that upon closer inspection of the subject Supporting Affidavit of George Kegoro, it was evident that it was not underpinned in the petition. He deposed that it lacked foundation in the pleadings and or primary affidavits of the petitioners and could only be described

as an attempt to litigate a substantive presidential petition under the guise of presenting a Supporting Affidavit to the Petition herein. He averred that since it was filed out of time, the affidavit suffered the fatal defect for being time barred and in blatant defiance and abuse of this Honourable Courts process and the law and ought to accordingly be struck out.

504. In response to the affidavit of Olga Karani, he reiterated and adopted the averments in the affidavits sworn by Immaculate Kassait and James Muhati. In addition, he stated that the allegations in Ms Karanis affidavit lacked proper specifics and were untrue. He deposed that in instances where a voter could not be identified biometrically, the said voter would still be identified by keying in the KIEMS system their alpha numeric details. Contrary to her allegations, he averred that agents at the National Tallying Centre were provided with access to the Forms 34A and 34B and given an opportunity to verify the results before declaration.

505. He emphasized that the presidential election held on August 8, 2017 was conducted in accordance with the *Constitution* and the Electoral laws and that the same was free, fair and credible.

16. James Muhati's affidavit evidence sworn on August 24, 2017

506. He swore that he was the Director in charge of Information Communication and Technology (ICT) for 1st respondent. His deposition was in response to matters touching on ICT in the petition and affidavits of Raila Odinga, Apprielle Oichoe and Godfrey Osotsi.

507. He deponed that consequent to the 2007 General elections, a number of concerns were raised relating to human intervention and how it affected the credibility and integrity of the results. He deposed that the concerns were addressed in the Independent Review Commission also known as the Kriegler report. It was his testimony that the 1st respondent took on board the recommendations of the Kriegler Report to utilize ICT in future elections to improve their accuracy, transparency and verifiability. In this regard, the 1st respondent deployed use of ICT in the following: Biometric Voter Registration (BVR), Electronic Voter Identification Device (EVD), Candidate Nomination System and Result Transmission System (RTS).

508. It was his testimony that when the 1st respondent utilized ICT as forestated in the 2013 General Election, the system experienced technical challenges. He deponed that these were addressed by amending section 44 of the *Elections Act*. The amendment mandated the Commission to establish an integrated electronic electoral system which would enable biometric voter registration, electronic voter identification and electronic results transmission and thus the Kenya Integrated Elections Management System (KIEMS) was born.

509. He swore that the system was put in place and successfully deployed in the 2017 elections. He deponed that it enabled the 1st respondent to successfully verify the biometric data by the public during the May 10th – June 9th verification exercise as required by law, successfully verify voters on polling day and successfully transmit the results of the election results from polling station to constituency and to the National Tallying Centre.

510. He deponed that he was aware that the legislative framework was the *Constitution*, Statutory Provisions and Regulations. He cited Articles 81 and 86 of the *Constitution* as read with section 4(m) of the IEBC Act which obligates the voting system used to be simple, accurate, verifiable, secure, accountable and transparent. He averred that the KIEMS was established with the approval of the Elections Technology Advisory Committee (ETAC) established under section 44(8) of the *Elections Act* and comprising relevant agencies and institutions including political parties. He annexed minutes marked JM-1 of ETC to this effect.

511. He deposed that the Commission and ETAC ensured that the ICT put in place satisfied the constitutional and Statutory threshold required under section 44(1) of the *Elections Act*, and had capabilities pursuant to section 44 of the *Elections Act*. He also averred that the Commission, pursuant to section 44(5) of the *Elections Act* published the *Elections (Technology) Regulations 2017* on April 21, 2017, 3 months before the general elections. He deponed that the 1st respondent developed and implemented a policy to regulate the progressive use of technology in the electoral process as required and annexed as evidence a copy of the said policy marked JM-2.

He also annexed copies of the public notices on the testing of the technology to be deployed and the minutes of the simulation carried out at Bomas of Kenya marked JM-3A and JM-3B.

512. On statutory compliance and implementation, he averred that at the time of carrying out the general election, the Commission had fully and successfully deployed the use of ICT in the following manner: First, the Commission had developed and implemented a policy to regulate the progressive use of technology in the process as required under section 44(2) of the *Elections Act*. Secondly, prior to deployment of KIEMS, the commission undertook a series of tests on the KIEMS including public test carried out on June 9, 2017, (60 days before the elections) and a simulation done on August 2, 2017. Lastly, as part of preparations for the deployment and use of ICT in the elections the Commission developed a robust training manual and schedule aimed at building the capacity and competence of all its staff members and included training of candidate agents on the KIEMS systeMs

513. On the implementation of ICT in the 8th August general election, he averred that the use of technology comprised voter identification and result transmission system. The transmission component in KIEMS enabled the Commission to relay the presidential election results and the statistics from the said results from the polling stations to the constituency tallying centre and the NTC in respect of the presidential election.

514. He deposed that during the transmission of election results through KIEMS the Presiding Officer would complete Form 34A as required by law then input into the KIEMS the statistics of the results as captured on Form 34A. The Presiding Officer would then take the image of Form 34A. Before sending the data, the Presiding Officer would first show the entries made to agents of the candidates and political parties for confirmation. He annexed as evidence, copies of the directions that were issued to the Presiding Officers, the Training Manual and a transmission flow chat marked JM-5A, JM-5B and JM-5C respectively.

515. He averred that the allegations in the petition that the relay and transmission was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt and that article 81 e(iv) and (v) of the *Constitution* were contravened was inaccurate and misleading and no evidence had been adduced to buttress the allegation.

516. On transmission, he swore that the transmission required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs) being Safaricom Limited, Airtel Kenya Limited and Telkom Kenya Limited for whom the Commission entered into contracts with MNOs for a secured transmission of the results. He referred to a meeting held on the 22nd day of May 2017, minutes (marked JM-6) of which he annexed, between the Commission and MNOs who had been identified by the Commission.

517. He deponed that for purposes of offering election results transmission services, the country was zoned into thirteen (13) Zones with two (2) MNOs providing election results transmission services for each zone. He averred that, of the two MNOs in every zone, one MNO was the primary service provider

and the other MNO was the secondary service provider. The MNOS were assigned zones to ensure consistency and accountability in operation and availability of service.

518. It was his testimony that in a zone where an MNO was neither a primary nor secondary service provider, it was not expected to provide any results transmission system since KIEMS could only accommodate two SIM cards. Accordingly, the Commission gave such provider the coordinates of polling stations within the zones to enable the service provider prepare itself for the provision of results transmission services. The zoning was to ensure effective data segmentation into manageable parts.

519. He averred that following a mapping exercise carried out by the Commission and analysis by MNOs, it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G Network and this communication was sent out to the public vide a notice dated August 6, 2017. He annexed a copy marked JM-7 of the said notice. He averred that it became apparent to instruct presiding officers to ensure that they move to points where there was network coverage or in the alternative to constituency tallying centres in order to transmit results. He further states that the Commission was nevertheless able to avail all form 34As in a public portal through https:formsiebc.or.ke

520. On security and verifiability and in response to allegations on the compromise of KIEMS and access by unauthorized third parties, the deponent averred that the allegations are misleading and unsupported by evidence or explanation. He deposed that the Commission engaged a highly qualified team and eventually partnered with internationally recognized and accredited institutions to provide top of the range government-grade information security system. He annexed copie of certification and accreditation documents from the providers with a guaranteed 99.99% security service to the whole system.

521. It was his testimony that the architecture of the KIEMS has in-built as well as process related features aimed at guaranteeing the integrity and security of the system. He annexed as evidence the architecture index and flow chart marked JM-9. He also averred that the Communication Authority granted approval contrary to the allegation that the Commission disregarded the advise of the Communication Authority as evidenced by the letter dated 31st July 2017 a copy of which was annexed as evidence.

522. The deponent listed some of the security parameters entailed in the KIEMS system and information management environment. These include configuration of only pre-determined and authorized tablets for transmission of which transmission was under constant round the clock automated monitoring, secured network spectrum with a twin high-level perimeter firewall which filters unauthorized transmission, robust database management solution with recommended security options such as pre-encryption or results and secure Virtual Private Network (VPN) and fourth tier security measure, a granular role-based access control and user management for the entire RTS.

523. It was his testimony that this fourth-tier security measure meant that:

(i) only authorised users could access the system through randomly issued credentials none of which was biometric

(ii) the permitted users had distinct but interdependent roles at different levels, such that not a single person could perform an end to end operation in the system

(iii) no password was issued to any of these users of the system until the eve of the election.

524. He averred that technical safeguards were introduced as the Commission had outsourced the network provision services from the MNos These safeguards included use of unique specialized SIM cards configured on secured APN for result transmission from KIEMS devices; Static Internet Protocol

addresses for use in specific gadgets where the SIM Cards could only be used within the Commissions Access Point Network (APN); the use of specialized SIM Cards MSISDN which should not allow any duplication and was disabled for any SIM Card cloning; the SIM Cards were disabled for voice or text messaging; and a unique internet mobile subscriber identity (IMSI) a unique identifying number within the network which is the primary identifier of the subscriber.

525. He deponed that all the SIM cards used for transmission were placed under monitoring and periodic reports generated confirming that the cards were transmitting data. It was his testimony that that no intrusion or compromisewas noted in the system.

526. He averred that the electronic result transmission system was configured in a way that enabled it to detect any SIM card which was not in the list of those assigned by the MNos The SIM cards transmitted the results in the form of Hyper Text Transfer Protocol (HTTP) packets encrypted with Secure Socket Layer (SSL) technology. He deposed that this is a concealed protocol used by the internet to define how messages are formatted and transmitted. The link was meant to secure all the data by securing it with a code which was not availed to any of the MNos He averred that the sole duty and obligation of the MNOs was to transmit the data and monitor the continuous flow of such data.

527. He swore that the election results data were all transmitted wirelessly across the 3G & 4G network installed and secured by the Commission with controlled access with a clear trail and event logs that capture log-on and log-off data according to time and user name.

528. It was his testimony that as a monitoring and control tool, the MNOs generated and provided Call Data Records commonly referred to as CDRs which were forwarded to the Commission at intervals. He averred that studied and ascertained that the CDRs showed no stoppage in transmission of data or intrusion by any strange unidentified number. He deposed that the cyber security procedures and safeguards protected against any possibility of intrusion by an unauthorized third party and no evidence had been adduced to demonstrate any compromise, intrusion or unauthorized access/ entry by any party

529. He confirmed the position set out by the 2nd affidavit of Godfrey Osotsi sworn on 18th August that the Presiding Officer was required to input the QR code into the KIEMS upon which the machine became polling station specific in terms of data and usage. He deposed that the KIEMS cannot allow more voters that those provided for in the polling station and cannot therefore transmit results where there are more votes cast that the number of registered voters at the particular polling station. As such, he disputed the allegation that in some stations more voters than those registered were recorded.

530. On the implementation of the complementary system, the deponent reiterated the need to comply with article 38 of the *Constitution*. He deposed that where a voter cannot be identified by the device the Presiding Officer shall invite the agents in the station to witness that the voter cannot be identified using the device, complete verification Form 32A in the presence of the agents and candidates, identify the voter using the printed Register of voters, and once identified proceed to issue the voter with the ballot paper to vote.

531. The deponent referred to regulation 83 of the Elections (General) Regulations 2012 as the complementary system of result transmission envisaged by law. He averred that the complementary mechanism for failure to transmit results involves physical delivery of forms 34A by the Presiding Officers to the Returning Officers in the respective constituencies. The deponent referred to the Court of Appeal decision Civil Appeal No258 of 2017 which involved the petitioners, where the Appellate Court directed the Commission to comply with its internal memorandum issued on July 27, 2017.

532. With respect to issue of access to the back end of the system, the deponent alleged that it was erroneous for the Petitioners to claim that they demanded that access. On the contrary, he averred that the petitioners had demanded that since the Forms 34A were not being displayed on the screen, the entire system should be switched off. He deposed that as a way of enhancing transparency, the Commission volunteered to provide secure dedicated links to agents of the presidential candidates to have access to the forms 34A being transmitted from polling stations. He asserted that the petitioners claim that facilitating the access took more than eight (8) hours and that the same access was not available outside the auditorium underscores the fact that the Petitioners did not appreciate the importance of guaranteeing security of the system.

533. Based on the totality of the foregoing responses, the deponent averred that the Commission conducted the election in accordance with the *Constitution* the applicable law and regulations in relation to the use of technology.

17. Affidavit by Davis Kimutai Chirchir in response to the Petitioners Affidavit

534. Mr Chirchir deponed that he was the Chief Presidential Agent of JP for the 2017 General Elections. He averred that he was conversant with the conduct of elections including voting, counting, tallying and transmission of results from the training given by IEBC to party agents and others, his own knowledge and from his role as the Chief Presidential Agent.

535. He denied Petitioners allegations that the elections were not free, fair, transparent, accountable, credible or verifiable. He deponed the on the contrary, they were conducted in accordance with the *Constitution* and the *Elections Act*. It was his testimony that a comparison of Form 34A and the actual results announced together with the text transmitted results confirms that there was no interference.

536. He deposed that on or about May 2016 the Coalition for Reforms and Democracy (CORD), the predecessor of the National Super Alliance (NASA), held a series of nationwide protest rallies to agitate for electoral reforms which included: use of technology in elections, legal framework for verification of the principal register of voters and removal of the IEBC Commissioners.

537. He deposed that as a result, a joint parliamentary select committee was established to inter alia agree on electoral reforms that had to be undertaken before the general election of August 2017. He averred that the Election Laws (Amendment) Act, 2016 (the Amendment Act) made provision for inter alia: the resignation from office of the Chairperson and Commissioners of the IEBC; the Audit of the Register of Voters by a reputable professional firm; the establishment of an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results; and opening of the Register of Voters for verification of biometric data by members of the public.

538. It was deposed that the current IEBC was reconstituted in January 2017 following a bipartisan process where the candidates were vetted through a special sitting of Parliament. The deponent also averred that at least 41 cases were filed challenging the implementation of the amended Act by the IEBC within the past twelve months, majority of which were filed by NASA or persons affiliated to NASA.

539. The subject matter of the cases included inter alia, the procurement processes of the technology and voting materials that were used in the 2017 general elections, the complementary mechanism set up by IEBC for identification of voters and transmission of election results and the finality of results declared at the constituency level by the Constituency Returning Officer.

540. He stated that all this litigation demonstrates NASAs habit of constantly filing cases challenging the decision of the IEBC and revealed their intention to ensure that IEBC conducted the 2017 elections on

NASAs terms He deposed that from his observation and the communications from IEBC to all parties, the 2017 general elections were conducted in compliance with the various decisions of the Courts with regard to the various aspects of the elections.

541. On the conduct of elections, Mr Chirchir averred that election materials and ballot papers were received in all polling stations across the country. He deposed that there was no incident of lack of ballot papers and only insignificant cases of malfunctioning of the electronic voter identification devices were reported. It was his testimony that the conduct of 2017 elections was an improvement from the 2013 elections in that the Commission had deployed the use of technology to enhance transparent, accountable, and credible and verifiable elections. To buttress this assertion, he annexed observer reports.

542. It was Mr Chirchirs testimony that the voting process was a marriage of electronic and manual processes. He deposed that the elections process was neither wholly and exclusively manual nor electronic. He averred that it was a hybrid complementary process in that technology was incorporated into a manual process to enhance accountability and transparency

543. He swore that the 1st respondent informed all the agents and representatives of political parties at the National Tallying Centre that the final results would be ultimately declared based on Form 34B. As such, it was his testimony that the results that were being transmitted were provisional based on the text message transmissions (the alpha numeric). In addition, the screened results were provisional subject to confirmation of the Form 34B from the respective constituencies. He deposed that in the event of any discrepancy between the televised data (based on the alpha-numeric data) and Form 34B, the latter would prevail.

544. Mr Chirchir deponed that candidates or their agents were allowed to be present when the votes for each polling station were being counted and tallied. He averred that the election process complied with the provisions of regulation 79(1) of the *Elections (General) Regulations, 2012* which requires a presiding officer of every polling station, the candidates or their agents to sign Form 34A which contains the presidential election results. He deposed that in the event that the candidate or agent fails to sign Form 34A, the candidate or agent is required to record the reasons for refusal or failure to sign.

545. He averred that the IEBC acted in a transparent manner during the entire vote counting, tallying and transmission exercise. He stated that all Forms 34A were made accessible to all parties at the polling stations while all Forms 34B were given to candidates or their agents at the constituency tallying centres and a print copy was availed at the National Tallying Centre. He further deposed that the IEBC was in constant communication with agents of the candidates at the National Tallying Centre updating them when Forms 34As and Forms 34B were received from the presiding and returning officers. He denies the averments that the petitioners agents were ejected from polling stations in central and rift valley regions or elsewhere.

546. It was his averment that the petitioners were making sensational statements without providing any evidence to support their claiMs These statements include that there were 14,000 fatally defective results that affected over 7 million votes; that in more than half of the 290 constituencies the Returning Officers failed to indicate the number of Forms 34A; that the IEBC is yet to receive 5,015 Form 34As which represent in excess of 3.5 million votes; that the Form 34As the Petitioners have received from IEBC showed fatal and irredeemable irregularities; that the votes cast as captured in Forms 34A differ from results as captured in Forms 34B and that the rejected votes/ballots were unlawfully deducted from the petitioners and added to the 3rdrespondent.

547. As part of his evidence, he relied on an analysis marked DKC6 showing that the total voters in areas gazetted by IEBC as not having the 3G or 4G network was 4,433,652 and not the 7,700,000 as stated

by the petitioners. Out of these 4,433,652 voters, a sum of 3,506,558 voters representing 79 % of the registered number of voters turned up to vote and their votes were tallied. It was his testimony that election observers monitoring the gave the process a general clean bill of health save for a few isolated incidents. He relied on reports from the African Electoral Observation Group, the Elections Observation Group (ELOG), EAC Observer Mission, ICGLR Observer Mission, AU Mission, and Commonwealth Mission. He also tendered them in as evidence as well as an audio/video recording by John Kerry.

548. Mr Chirchir deposed that JP won a majority of the seats in all other elective positions, retaining their popularity and it to new frontiers. He averred that this was an indication that the Jubilee Party was the preferred party across the country. He tendered in as evidence graphical representations of the deposed numeric strength.

549. He denied the allegation that the 1st respondent illegally Streamed results not verified by Forms 34A to create an impression that the 3rdrespondent was winning. He deposed that: the Streaming of the results by the IEBC was intended to ensure that the tallying process was open and transparent; the IEBC was not prohibited from Streaming the electronically transmitted results provided the same was verified using the forms before the declaration of the results; the Streaming of results electronically could not, in any event, have affected the results finally declared. The final results were based on Forms 34B obtained from the constituency tallying centres.

550. The deponent averred the petitioners approached the Court in a deprecatory and contemptuous manner aimed at bullying and intimidating the Court to find in their favour. As evidence, he cited various statements made by the petitioners or their representatives.

551. He deposed that the petitioners unfortunate rhetoric about the death of Mr Musando, the Deputy ICT director was reckless, irresponsible and sensational and was aimed at distracting from the real issues in the instant dispute in that: the said death was under investigations and the petitioners were free to avail the investigative agencies whatever evidence in their possession; the KIEMS was not handed over to IEBC but remained in the hands and management of the contracted consultant, a French firm, Safran; and, the IEBC had well-established structures including sufficient well-trained ICT personnel capable of handling the electoral process.

552. Mr Chirchir denied petitioners allegation that the presidential election results were computer generated. He deponed that that the electronically submitted data, with timestamps, had been analyzed against the results of accumulated votes for the 3rd respondent and the 1st petitioner accumulated for the span of transmission so as to plot a graph of the 3rd respondents votes minus the 1st petitioners votes as a percentage against the timestamps of submission.

553. He deposed that from what was observed from the graphs, the data showed that the lead oscillated between the two at the start of transmission. Splitting the transmission times into time sections, the first hour showed oscillations between the two ranging between 42.6% and 3.2% percentage difference which were observed to be very random. In support of this averment Mr Chirchir, relied on copies of data from IEBC showing timings at which results arrived and an analysis of the matrix showing how the computer maintained the data with percentages. He also tendered in these as evidence showed the time stamp sheet for the first presidential results which Streamed in and this were from Narok Women Prison received at 17:07hrs indicating that 10 out of the 20 registered voters had voted.

554. In response to the petitioners allegations that the rejected votes were substantial, Mr Chirchir averred that none of the candidates were in any way deprived of their legitimate votes in the postings of the rejected votes. He deponed that the rejected votes were erroneously entered on the text transmissions of

votes that were provisional. In the end they did not count as the rejected votes were properly captured in Forms 34A and Form 34B. He averred that correct rejected votes eventually went into Form 34C and informed the final declaration of the results. He deposed that the rejected votes did not exceed 90,000 votes.

17. Affidavit by Davis Kimutai Chirchir in response to the Affidavits of George Kegoro

555. The deponent, in his sworn testimony averred that Mr Kegoro had exaggerated facts, peddled outright falsehood and supressed material facts in a bid to mislead this Court and obtain an unjust advantage in favour of the petitioners. He asserted that Mr Kegoro's averments were vague and unspecific.

556. He added that the process of voting, collating, tallying and declaration of results was conducted and done in full or substantial compliance with the provisions of the *Constitution* and all electoral laws; that the presidential results announced by the 2nd respondent on August 11, 2017, were accurate and verifiable in accordance with the standards established by law and were announced in a transparent and lawful manner as contemplated by article 86 of the *Constitution* and the *Elections (General) Regulations, 2012*; that most local and international observers accredited by the 1st respondent have issued preliminary reports terming the election substantially free, fair and credible notwithstanding the minor transmission problems experienced during the election process and lastly, that the 1st respondent has posted on its website scanned copies of each and every Form 34B received in its servers, which upon collation and tallying into Form 34C, demonstrates that the election results announced on August 11, 2017 were accurate, verifiable, transparent and lawful.

557. It was his testimony that as at the time the 2nd respondent announced the presidential results, the 1st respondents online portal had not yet transmitted all the presidential results. These results were being retrieved from the Form 34As received from the polling stations, which results had already been transmitted to the constituency level. He explained that the contradiction in the data displayed was as a result of Forms 34A, 34B and 34c that had not been transmitted to the online portal. He stated that as at August 21, 2017, at approximately 8:14am (10 days after the general election), the transmission rate was at 99.99% meaning that the reported valid votes of 15,180,381 at the portal did not include valid votes from all the 40883 polling stations.

558. He further stated that the presidential results were based on Form 34C which form, did not contain results from Nyando Constituency which is made up of 60,370 valid votes as captured in Nyando Constituencys Form 34B, as such there is no significant differences in the number of valid votes reported in Forms 34Bs and Form 34C.

559. While responding to the averment that there is evidence of turnout in excess of 100 per cent, Mr Chirchir stated that no prison station had a voter turnout in excess of 100%. He noted that the total number of registered voters in Moyale prison, Kitale Medium prison and Manyani Prison were erroneously entered as rejected votes in the KIEMS kit. He also stated that the rejected votes as seen in the 1st respondents online portal is due to erroneously keying in the value of the valid votes in the rejected votes column of the KIEMS kit which explains why the rejected votes equals the valid votes. In giving an explanation to the averments that the valid votes in different elective position in Igembe Central Constituency Mr Chirchir stated that the figures are close to one another making them even more reliable.

560. Mr Chirchir averred that the violence that was witnessed a few days after declaration was occasioned by the demands by of the 1st and 2nd petitioners who sought to be declared the President and Deputy President elect respectively even before collation of results in Form 34C on the basis that the petitioners were in possession of what they termed actual results as contained in the 1st respondents servers. He

deposed that the situation was worsened by the Petitioners holding a press conference at Caramel Restaurant in Nairobi at which the Petitioners urged their supporters not to accept the results that were about to be announced and ominously to await further instructions. He observed that as the Kreigler report noted, the use of such coded and/or ambiguous language in highly charged and polarised political environment more often than not lead to violence.

561. My opinion is that this affidavit fully rebutted the averments in the affidavit of Mr Kegoro notwithstanding that the burden of proof had not shifted to the respondent in respect of the allegations made in the affidavit and the fact that the affidavit introduced new issues which were not pleaded in the petititon.

18. Affidavit of Brian Gichana Omwenga in reply to Koitamet Ole Kina

562. The deponent swore his affidavit in the capacity of Technology Advisor employed by Jubilee Party. He deposed that he is a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT). He averred that Mr Ole Kina erroneously stated that Form 34As were used to declare the presidential results, yet it is the Forms 34B that forms the basis for declaring the presidential results. He deposed that in some cases, at the time of electronically transmitting the results, the scanned image would either fail to load or delay especially in areas lacking 3G or 4G network coverage.

563. He clarified that such network challenges had been anticipated and the 1st respondent had issued a prior communication to that effect. However, regardless of whether or not the electronic transmission effectively worked, Form 34A would still be physically delivered at the Constituency tallying centre. Accordingly, the Form 34As would then be used to tally the constituency votes and thereafter results would be entered in Form 34B. The Form 34B would then be transmitted to the National Tallying Centre, wherein the Commission would sum them up in a Form 34C which would then be the basis for declaring the results. Consequently, he averred that it was not necessary to have in possession Form 34A during summation of the presidential results.

564. Accordingly, he deposed that the results transmitted on the television screens were only provisional since the final results were to be based on the constituency tally in Form 34B. This affidavit controverts all the allegations made in the affidavit of Mr Koitamet Ole kina. Therefore the allegations that there was deliberate non-compliance with constitutional principles cannot stand.

19. Affidavit of Dr Karanja Kibicho sworn on August 24, 2017 in reply to the affidavit of Dr Nyangasi Oduwo

565. In his sworn affidavit, Mr Kibicho averred that he is the Principal Secretary, Ministry of Interior & Co-ordination of National Government. He swore his affidavit in response to the averments made concerning the payments made to the Internally Displaced Persons (IDP).

566. He stated that following the post-election violence in 2007, several persons were displaced from their homes and thereafter the Government embarked on a settlement programme. Soon after, it was realized that due to the complexity and the magnitude of the IDP problem, there was need to formulate an appropriate legal framework to strengthen the Governments effort. He averred that, it was against that background that Parliament enacted the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012.

567. He stated that the IDP Act established a National Consultative Coordination Committee (Committee) which is tasked with the obligation to manage the IDP affairs on behalf of the Government. In his sworn testimony, the deponent averred that in the 2016/2017 Development

Budget for the State Department of Interior, there was an allocation of kshs. 6 Billion. On the basis of the said budgetary provision, the Committee prepared a detailed work plan which they submitted to the Accounting Officer for approval to enable them undertake the necessary processes towards achieving the resettlement of the IDPs. The said funds were however reduced by the National Treasury to Kshs. 2 Billion which was the amount disbursed to the Integrated IDPs across the 17 counties.

568. Mr Kibicho further averred that the said funds were disbursed through the beneficiaries Bank accounts and it is upon that background that the 3rd respondent witnessed the announcement regarding the said disbursements being made in Kisii and Nyamira counties. Consequently, the deponent denied that the 3rd respondent made any payments to the IDPs as stated by the petitioners.

569. He further averred that as the Principal Secretary of Ministry of Interior & Coordination of National Government, it is within his docket to oversee all field National Government Administrative Officers that include Regional Commissioners, County Commissioners, Deputy County Commissioners among others. In line with his scope of work, he averred that in the month of July, he received information that some chiefs in Makueni County were unlawfully using their positions and government motor cycles to campaign for the petitioners. In his sworn testimony, he provided the names of the chiefs whom he avers that were implicated in the said allegation of misuse of office.

570. He depose that, upon receipt of the said intelligence report on the conduct of the chiefs, he reported the same to the 3rd respondent and it is against that background that the 3rdrespondent made the impugned remarks during a campaign rally at Makueni. According to him, the 3rd respondents statement was meant to ensure that no Chief takes any political side or use public resource to campaign for anyone.

571. I find that this is a complete rebuttal of the allegation and the video transcripts adduced to prove that the 3rd respondent had committed election offences and that the principles in article 81 and 86 of the *Constitution* were violated since the Cabinet Secretaries expended government funds in campaigning for the 3rd respondent.

20. Affidavit by Marykaren Kigen-Sorobit in response to Moses Wamuru

572. The deponent, Ms Kigen, averred that she is an advocate of over 20 years experience and is the Jubilee Party, Deputy Chief Executive Officer and Director of Legal affairs & Compliance. It was her averments that it was her responsibility to oversee and supervise all party agents retained at various counties, sub-counties, wards and polling stations. In addition to this, she trained the party agents on their expected roles in consultations with the Chief Party Agents.

573. She stated that the 3rd respondent had agents deployed in all the polling stations across the country and such agents were assigned their respective stations at each county, constituency and wards with a chief agent to report to. She averred that the roles of the chief party agents includes _acting as the chief agent for the 3rd respondent in their respective stations; mobilizing the 3rd respondents agents; monitoring and advising the party agents on the progress of the elections; liaising with the 2nd respondents officials conducting the election and reporting any incidences likely to negatively affect the interests of the 3rd respondent.

574. In her sworn testimony, Ms Kigen averred that, contrary to the position taken by the petitioners witness, Mr Wamuru, there was a NASA agent at Gichera primary school, Thigingi primary school, Karurumo primary school and Kiangongi primary school by the names of Josphat Nyaga, Martin Thati Njeru, Eunice Muthoni Ndwiga and Eliud Gitari respectively.

575. Furthermore, she stated that Mr Wamuru has misled the Court as to the existence of polling stations called Ngurweri primary school and Kiangongi primary school when in fact no such polling stations

exist. She also stated that there was no NASA agent called Donald Muchemi at the Nyangwa secondary school which was the tallying centre for Mbeere South Constituency. In addition, she attached Form 34A of Gichera primary school which shows that, unlike what has been averred by Mr Wamuru, a person by the name of Josphat Nyaga, being a NASA agent signed Form 34A belonging to that polling station.

576. Further, she impugned the deposition by Mr Wamuru that as at 12.30 am, voting was still on-going at Thigingi primary school. In doing so, she attached a copy of Form 34A and the transmission report for that polling station which indicates that the transmission was done at 23.31 hours. She also stated that the 3rd respondents agent, by the name of Martin Thati Njeru was present all through yet he signed Form 34A without any reservations or adverse comments.

577. With regard to allegations that voting began at 2.00 pm at Karago primary school, the deponent averred that she has sought information from the 3rd respondents agent at the polling station who stated that voting begun at 8.00am. Ms Kigen, also questioned why the NASA agent, by the name of Juliet Wamburu, who indeed signed the Form 34A, did not mention that there was delay in opening the polling station.

578. With regard to allegations that NASA agents were kicked out of Karurumo youth polytechnic polling centre, the deponent attached Form 34A which showed that a person by the name of Eunice Muthoni Ndwiga, a NASA agent signed Form 34A without any reservations. She stated that even Kyeni Girls secondary school polling station, NASA agents signed Form 34A hence they could not have been kicked out as alleged. Further Ms Kigen stated that according to the information received from the 3rdrespondents agent deployed at New Farmers Hall polling station, there was no NASA agent present at that polling station hence the allegations that the agents were threatened are untrue.

579. The deponents concluded by stating that no County Commissioner acted as the 3rdrespondents agent as alleged.

I wish to state that the allegations made in the affidavit of Mr Moses Wamuru and the evidence adduce in support of those claims did not shift the burden of proof to the respondents. More specifically the claim that the NASA agents were kicked out of the polling stations during the counting of the votes and that the County Commissioner was the chief agent of Jubilee Party. No evidence was adduced in support of this claim hence the respondents were under no evidentiary burden to disproof the allegations since they had not been proven in the first instance. Nonetheless, the affidavit of Ms Marykaren Kigen-Sorobit sufficiently counters those allegations.

21. Affidavit by Marykaren Kigen- Sorobit in response to the affidavit of Benson Wasonga

580. The deponent, Ms Kigen stated that no proof has been availed of the alleged anomalies with regard to the declaration of the presidential results by the 2nd respondent, thus the averments contained in the affidavit of Benson Wasonga are unsubstantiated and do not raise any factual issues.

581. She asserted that the actual summation of the total valid votes under the portal is 15,180,381. Further, that according to Form 34C, the 1st petitioners votes were 6,762,244 and the 3rdrespondents votes were 8,203,290 and hence the assertion that the 1st petitioners votes were 6,821,505 while the 3rdrespondent votes were 8,223,163 is false.

582. It was her assertion that the Form 34C, upon which the results were declared by the 2nd respondent pursuant to the provisions of regulation 87(3)(e) of Elections (General) Regulations, 2012 does not include the results for Nyando constituency where the Petitioner had 60,715 votes against the 3rd Respondents 214 votes. She stated that those votes would not have made any material difference within

the contemplation of the proviso to regulation 87(3). I find that the issue as to the results of Nyando constituency being left out in the declaration of the presidential election results is fully supported by the proviso to regulation 87 (3) of the Elections (General) Regulations, 2012. In the constituency the petitioner had 60,715 votes while the 3rdrespondent had 214 votes. The justification for the results being declared without those from Nyando is that the results from the constituency could not have materially affected the result.

22. Affidavit by Marykaren Kigen - Sorobit in response to the affidavit of Ibrahim Muhamud Ibrahim

583. In her sworn statement, Ms Kigen averred that the 1st respondent vide an email dated July 21, 2017, forwarded to all Political Parties and Independent Candidates a list of presiding officers for Mandera North Constituency which indicates the presiding officer at Guticha primary school as Isaak Alasow Abdi.

584. She asserted that Guticha primary school has only one polling station and the registered number of voters is 660. In that polling station the total number of valid votes cast were 581 representing a percentage of 88% voter turnout. She compared the voter turnout at Kiatine primary school in Mbooni Constituency, Makueni County wherein the registered number of voters was 2 and the voter turnout was 100% same as Kwataruk Water Point polling station in Loima Constituency, Turkana County where the registered number of voters was 5 and the number of valid votes was 5 which indicates 100% voter turnout. Accordingly, she averred that it is not unusual to have record of 100% voters turnout.

585. In response to the averment that figures were filled in at the tallying centre which was done at the Sub County Commissioners Block, against a court order which had directed that the tallying centre be at Rhamu Arid Zone Primary School, she explained that the Decree attached was served in Mandera North Constituency on August 3, 2017 which was a Thursday and four days to the elections hence, the practicability of the execution of the Decree became impossible.

I find that the this affidavit controverted all the allegations contained in the affidavit of Ibrahim Muhamud Ibrahim.

23 Affidavit by Marykaren Kigen-Sorobit in response to the affidavit of Mohamed Noor Barre

586. In response to the averments made on Mr Barres affidavit, Ms Kigen stated that the 1st respondent vided an email dated 21st July, 2017 forwarded to all Political Parties and Independent Candidates a list of all presiding officers for Mandera North Constituency which indicated that the presiding officer at Kalicha Primary School was Mohamed Abass.

587. She averred that Kalicha Primary School has two polling station and the registered number of voters at polling station 2 is 594; and the voter turnout was 100%. She avers that there is nothing unusual in having a voter turn -out of 100%. I find that the allegations of rigging and replacement of presiding officers with untrained officers has not been proved at all. These were bare allegations in the affidavit of Mohamud Noor Barre in respect of which the petitioners did not discharge their burden of proof. Nonetheless, the respondents adduced evidence to controvert those allegations which evidence I find was a complete rebuttal of the claims made in the said affidavit.

24. Affidavit by Andrew Wakahiu in response to the affidavit of Dr Nyangasi Oduwo & Olga Karani

588. Andrew Wakahui, swore his affidavit dated August 23, 2016, in his capacity as the Secretary of Delivery and Head of the Presidential Delivery Unit (PDU) which is a functional office in the Executive Office of the President.

589. He averred that the 3rd respondent did not violate the provision of section 14 of the *Election Offences Act* by sponsoring or causing sponsorship of advertisement in printed electronic media, business and billboards of the government achievements during the election period. He stated that the work of the Presidential Delivery Unit is to enhance the accountability of a government to its citizens through making information relating to ongoing projects available. He went on to explain the roles and function of the PDU which includes accountability.

590. He deposed further, that the web portal is one of the tools the PDU uses to enhance accountability as it is the easiest ways of making information on government projects available. According to his averments, it was necessary to sensitize Kenyans on its existence by way of *inter alia* advertisements through the electronic and print media.

591. It was his deposition that this was necessitated by the numerous efforts by the general public inquiring information from the various state departments of the Government of Kenya especially on all ongoing projects undertaken from April, 2013 onwards and especially after the launch of the Jubilee Coalition and shared manifesto which outlined the coalition's vision, pledges and agenda from 2013 to 2017.

592. Mr Wakahui stated that the purpose of setting up the president's delivery unit and specifically the delivery portal was to ensure that the members of the general public are informed and are able to track projects undertaken by the government and which is an obligation under article 35 and article 201 of the *Constitution* which requires that there be openness, accountability and public participation in financial matters. Further that since the web portal was set up there have been over 6 million impressions (visits) which shows it is a very useful tool for monitoring government projects and the feedback from the members of the public.

593. In addition he stated that there is pending litigation before the High Court which seeks to determine inter alia the constitutionality of section 14 of the *Elections Act*. The cases are Constitutional Petition 162 of 2017 *Apollo Mboya vs Attorney General and 3 others* and Constitutional Petition 182 of 2017 *Jack Munialo & 12 others -vs- Attorney General*. Moreover, there was a bill which was introduced to the National Assembly seeking to repeal section 14 of the *Election Offences Act* in order to ensure that it confirms to article 35 of the *Constitution*, unfortunately the National Assembly was adjourned sine die before the bill was passed.

594. This affidavit offered a full explanation as to the functions of the Presidents Delivery Unit which was set up to ensure that the members of the general public are informed and are able to track projects undertaken by the government and which is an obligation under article 35 and article 201 of the *Constitution*. I find that this fully rebuts the imputations of electoral offences on the part of the 3rdrespondent.

595. On the issue of the pending Constitutional matters pending in other Court it is imperative to note that this Court will respect the hierarchy of Courts and will not usurp the jurisdiction reposed in another Court. This Court will allow other Court below it to exercise their jurisdiction in accordance with the law and will allow a matter to come before it in the ordinary course of appeal. *In Re the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Civil Application No 2 of 2011 this Court held [paragraph 45]:

> " In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High

> Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.

Similarly with respect to allowing other Courts to exercise their jurisdiction, this court held, in *Peter Ngoge v Hon Ole Kaparo* that [paragraph 30]:

> " In the interpretation of any law touching on the Supreme Courts appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

It is my considered view that this Court should not delve into any matter pending before another Court; instead this Court will give room to the High Court to hear and determine any matter or matters pending before it including that relating to the constitutionality of any provisions in the Election Offences Act.

25. Winifred Waceke Guchu Affidavit sworn on August 24, 2017, in Reply to Dr Nyangasi Oduwo

596. The deponent, Ms Guchu averred that she is the Executive Director of Jubilee Party and was the Deputy Chief Presidential Agent for the 3rd respondent during general elections held on August 8, 2017.

597. She averred that the difference of 1,441, 066/- between the votes cast in favour of the 3rd respondent and the 1st petitioner was very significant and demonstrated the resolve of the people of Kenya to exercise their free and sovereign will. In addition, the Jubilee Party had won a majority of positions in the other five elections of Governor, Senate, National Assembly, Women Representative and Members of County Assembly conducted on the same day.

598. Ms Guchu averred that, the petitioners wrote a letter to the 1st respondent on August 10, 2017, claiming to have in their possession presidential results which were different from the results being displayed in the IEBC portal at the time. Before the issuance of the said letter, Ms Guchu averred that the petitioners had made widely publicized claims stating that the results transmission system of the 2nd respondent had been hacked.

599. It was therefore, surprising that the petitioners had now abandoned that argument in favour of other averments which according to her, were never an issue when the results were being tallied, collated and verified. She further stated that she was aware of the 1st petitioners attempt to coerce candidates nominated by NASA affiliate parties to reject their positions in order to strengthen the petitioners position.

600. Ms Guchu further averred that the *Constitution* does not impose any duty on the 1st respondent to exclusively use electronic systems to transmit the results. She deponed that the only mandate imposed on the 1st respondent was to ensure that the system used is simple, accurate, verifiable, accountable and transparent. It was her testimony that section 44A of the *Elections Act* grants the 1st respondent a statutory discretion to use a complementary mechanism where technology either fails or is unable to meet the constitutional threshold of a free and fair election. She further deposed that the Streamed results were not the basis on which the winner of the election was declared. She swore that there was no

legal requirement obliging the 1st Respondent to avail Form 34A to any of the presidential candidates for verification.

601. Ms Guchu asserted that upon the conclusion of voting, the counting exercise commenced in the presence of all agents present, observers, police officers and all other authorized persons. She averred that according to ELOG, an observer group which deployed one of the largest observer delegates, the petitioners had very good representation of agents and even where the agents failed to sign the prescribed forms, such failure does not of itself invalidate the results as provided for under Regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*. Furthermore, in accordance with regulation 79(2)(A)(a), a copy of Form 34A was affixed at the polling station.

602. She averred that once the process of counting at the polling station was concluded, the results were simultaneously sent electronically to the constituency tallying centre and the national tallying centre. She deposed that those were the results that were thereafter Streamed into the public portal at the Bomas of Kenya.

603. It was her testimony that since the 1st respondent did not own telecommunication network facilities, it relied on duly licensed service providers to provide the service. She deposed that by virtue of regulation 20 of the *Elections (Technology) Regulations, 2017*, the said service providers are under an obligation to provide and deliver services as may be requested by the 1st respondent. She averred that the 1st respondent in consultation with the service providers, was required by virtue of regulation 21 of the Technology Regulations, to identify and communicate, in a timely manner, to all stakeholders about the network service available at different polling stations and in areas where there was no telecommunication network. Aware of such complexities, MsGuchu avers that Parliament introduced section 44A in order to provide a complementary mechanism for the identification of voters and transmission of results.

604. It was her testimony that the petitioners, through their umbrella political movement had written a letter to the 1st respondent enquiring on how the IEBC intended to implement section 44A of the *Elections Act*. In response, by a letter dated 28th February, 2017, the 2nd respondent informed the Petitioners that the complementary system envisaged under section 44A of the *Elections Act* would be effected through inter alia an amendment to Regulation 69 of the draft Elections (General) Regulations that the 1st respondent was developing in consultation with stakeholders including NASA.

605. She indicated that following the Court of Appeal decision in the *Maina Kiai* case, it was confirmed that Regulation 83 would be the complementary system applicable in respect of transmission of results in the event that the technology failed. Such complementary mechanism would be effected through the physical delivery of Form 34As from the polling stations to the returning officers at the constituency tallying centre while constituency returning officers would deliver Forms 34B to the National Tallying Centre in Nairobi

606. She further averred that on August 6, 2017, the 1st respondent, by virtue of Regulation 21 of the Technology Regulationspublished a list of approximately 11,000 polling stations that lacked 3G network coverage. Consequently, the electronic transmission of results would be generally poor in those stations.

607. Regarding the irregularities set out in Dr Nyangasis affidavit, Ms Guchu responded that in an overwhelming number of cases cited therein, the evidence produced did not reveal the said irregularities as alleged. In particular she deposed that neither the *Elections Act* nor the *Election (General) Regulations*

require that Form 34A bears the 1st respondents stamp. Further, the failure of an agent to sign the Forms or attend his/her duties at the counting hall did not invalidate the results.

608. In addition, she averred that Dr Nyangasi had made an expert' opinion on handwriting even though he is not a forensic document examiner. She referred to section 50 of the *Evidence Act* which provides circumstances under which the court can admit an opinion about a persons handwriting. She deposed that Dr Nyangasis opinion is of no probative value for lack of legal basis.

609. In response to allegations on discrepancies of returns in forms 34A and 34Bs, Ms Guchu stated that there were no significant discrepancies between Form 34A and Form 34B. She has produced a report, marked as Exhibit WG 13, which demonstrated that after reconciling the discrepancies in the Forms attached to Dr Nyangasis affidavit, the net effect is that the petitioners tally improves by 595 votes while that of the 3rdrespondent decreases by 1199 votes. She observed that it is incomprehensible for the petitioners to allege that the IEBC systems had been hacked and at the same time persist the argument that electronic transmission of results was the only acceptable mode of transmitting results.

610. She further deposed that contrary to Dr Nyangasis assertions, an analysis of all the 290 Form 34Bs reveals that NASA agents signed the vast majority of the said ForMs In addition, she stated that an overwhelming majority of the allegations set out in Dr Nyangasis affidavit are false, erroneous, predicated on fictitious documents and that he lacks competence to give an opinion on some of the claiMs

611. Ms Guchu acknowledged that according to Form 34C downloaded from the 1st respondents website, the rejected votes were 81,685 while the public portal on which the electronic results were posted showed that the rejected votes were 403,495.She explained that, she undertook an analysis which revealed that in 688 polling stations accounting for 229,869 out of 294,271 registered voters, the number of reported rejected votes was equal to the number of registered voters in those affected polling stations.

612. According to the MsGuchu, the presiding officers in the affected stations inserted the registered number of voters in the field reserved for rejected voters in the KIEMS kits since the slot for registered voters was already pre-filled. She averred that such an error or mistake was quite easy to make since in the physical Form 34A, the number of registered voters in a polling station was the first slot that an electoral officer fills. She deposed that this explained the discrepancy between the number of rejected votes displayed in the portal and the ones indicated in Form 34C. It was her testimony that in any case, since the official results were declared on the basis of the 290 Form 34B which had been compiled from the physical Form 34A, the said transmission error did not occur

613. In response to the allegation of failure to include results of Nyando Constituency in the final tally, Ms Guchu averred that such failure was not fatal for the reason that even if the results declared did not include the results from Nyando constituency wherein the 1st petitioner had 60,715 votes as compared to the 3rdrespondent who had 214 votes, under Regulation 87 of the General Regulations, the 2nd respondent can declare results of the presidential election, where in the opinion of the Commission the results that have not yet been received would not make a difference in the final results.

614. Responding to the alleged disparity between presidential votes and results of the other elective posts, Ms Guchu attaches an analysis of results from 94 constituencies showing that that votes cast in one or more of the other 5 elections, were more than the votes cast for the presidential candidates. She denied the allegation that the Streamed results showed a static 11% margin between the 1st petitioner and the 3rd respondent, noting that the gap in percentage between votes cast with respect to the petitioner and the 3rdrespondent kept on shifting throughout.

615. On the allegation of undue influence and intimidation, she states that there is no provision in the *Constitution* that requires ongoing government programs to be suspended during the election period. Furthermore, article 35 guarantees the right to information hence in openness and transparency such information was made available to the members of public, through the various available channels. In addition, she stated that there are two pending cases in the High Court namely; Apollo Mboya v Attorney General & 3 Others Petition No 162 of 2017 and Jack Munialo & 12 Others v Attorney General, Petition 182 of 2017 which challenges the constitutionality of section 14 of the Election Offences Act which prohibits advertisements on government achievements during the election period. She deposed that a Bill had been introduced in the National Assembly with a view to repealing this provision to ensure conformity with article 35 of the *Constitution*.

616. In conclusion, she averred that the petitioners had consistently undermined the electoral process by way of their public utterances in various foruMs Specifically, she deponed that the 1st petitioner stated that the 3rdrespondent is a 'computer generated leader and that it does not matter who won the election. She further states that the petitioners had, by their conduct and actions, shown their resolve to compromise the fair adjudication of this petition.

617. I do not hesitate to find that this affidavit offers a complete rebuttal to the allegations made in the affidavit of Dr Nyangasi which now stands controverted.

26. Winifred Waceke Guchu Affidavit sworn on August 24, 2017, in Reply to Olga Karani

618. The deponent stated that the averments made by Ms Karani in her Affidavit were of such generalized nature that it is impossible to respond to them with any specificity. She averred that the IEBC Commissioners referred to were not identified and neither were the presiding officers named nor their polling stations identified. She swore that Ms Karani did not specify occurrences and events that allegedly happened in Migori, Homabay and Kisumu County. Moreover, she did not state the names of persons missing from the voters register. Further, she disputed Ms Karanis testimony that as at 10th August, 2017, very few Form 34As were available. On the contrary, the deponent stated that as at midnight of August 9, 2017, the information availed to political parties through IEBC Application Program Interface showed that 39,426 Forms 34As results had been received.

619. Ms Guchu concluded by testifying that she was not aware of any law that requires presidential agents to be given any roles at the National Tallying Centre.

This affidavit rebutted the affidavit evidence of Olga Karani with the effect that the claim that the petitioners were not given the Forms 34A.

27. Affidavit of Brian Gichana Omwenga in reply to the affidavit sworn by Apprielle Oichoe

620. The deponent, Mr Omwenga, in his affidavit sworn on August 24, 2017, averred that the opinion of Ms Oichoe on how the IEBCs system should have been, is purely subjective and lacked scientific basis. He stated that Ms Oichoe made generalized allegations without producing any evidence to support her assertions failed to show how, when and by whom the IEBC website was compromised as alleged. He deposed that she also failed to support with any evidence the assertion that non-authenticated and non-prescribed results through use of unknown form and format found their way into the IEBC portal.

621. On the questions raised on the voters register, Mr Omwenga testified that the IEBC complied with the *Elections Act* and the *Elections (Registration of Voters) Regulations, 2012*. With regard to allegations of non-availability of the register, Mr Omwenga responded that the IEBC issued a press statement on May 18, 2017, urging all Kenyans to inspect the voters register and confirm their biometric details.

622. It was his deposition that on June 9, 2017, 60 days before the general elections, the IEBC informed the public that it would be revising the register as guided by the findings of the verification exercise. Further that on this date, the IEBC also issued a media releasing on the audit report on the register of voters. Subsequently, the IEBC established a portal on their website which enabled voters to access and inspect the voters register at their convenience He added that the 1st respondent posted into the portal further information including an audit report, the 2017 register of voters which included statistics per polling station, statistics per county assembly ward, statistics per constituency, diaspora statistics and prison statistics and informed members of the public to verify their registration details online or by sending an SMS to 70000 with their Identity Card Number or Passport number.

623. Mr Omwenga questioned the authenticity of the averments made by Ms Oichoe to the effect that voters at Upper Hill Primary polling station were turned away since their names were missing from the register. It was his testimony that Ms Oichoe has no capacity to make such an averment because she was neither the allegedly affected voter nor the presiding officer and hence the veracity of the said allegation cannot be validated.

624. He deposed that if indeed she was an observer in that station, she ought to have been accredited by the 1st respondent in accordance with Regulations 62 and 94 of the *Elections (General) Regulations, 2012*. Furthermore, the particulars of the voters allegedly affected were not provided by Ms Oichoe. The deponent further states that Regulation 69 of the Elections (General) Regulations stipulates how the complementary mechanism should be applied in instances where the electronic voter identification device fails to identify a voter.

625. Responding to the assertion that results were transmitted by use of a document that was not prescribed by law, Mr Omwenga stated that under Regulation 82, *Elections (General) Regulations, 2012* the Commission may direct any other manner in which the results could be transmitted. Relying on section 72 of the *Interpretation and General Provision Act*, Cap 2 Laws of Kenya, which provides,

> "...whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead. he averred that the Commission was free to prescribe any other Form through which the results could be transmitted."

626. Mr Omwenga further stated that there is no legal requirement obliging the 1st respondent to avail Form 34A to any of the presidential candidates for verification and that the role of the 2nd respondent at the National Tallying Centre was limited to collating the results recorded in the 290 Form 34Bs and in the terms proscribed by the Court of Appeal decision in the Maina Kiai case He also pointed out that Ms Oichoi had relied on a non-existent section 44B of the *Elections Act*. The deponent also attached as evidence, a certificate of extraction of the video transcripts attached to Davis Chirchirs affidavit pursuant to section 106(4)(B) of the *Evidence Act*.

It is clear that there are no express statutory requirements imposing an obligation on the 1st respondent to avail the Forms 34A and 34B to the respondents. Therefore it cannot be a basis for making a claim of non-compliance with the constitutional principles or written law.

28. Affidavit by Davis Kimutai Chirchir in response to the 2nd affidavit of Godfrey Osotsi

627. Mr Davis Kimutai Chirchir, in his affidavit dated August 24, 2017 swore this affidavit in his capacity as the 3rd respondents chief agent in response to and in opposition of the supporting affidavit of Godfrey Osotsi.

628. It was his sworn statement that the affidavit of Mr Osotsi was exaggerated, peddled with outright falsehoods and has suppressed material facts in a bid to mislead this Court. He deposed that the process of voting, collating, tallying and declaration of results was conducted in full and or substantial compliance with the provisions of the *Constitution* and all electoral laws. Further that the presidential results announced by the 2nd respondent on August 11, 2017 were accurate, verifiable and in accordance with the standards established by law.

629. He emphasised that the results were announced in a transparent and lawful manner as contemplated by article 86 of the *Constitution* and the *Elections (General) Regulations, 2012*. In support of his averments he made reference to reports by local and international observers accredited by the 1st respondent terming the election as being substantially free, fair and credible.

630. In addition, he deposed that the collation of results to Form 34C and the announcement of the presidential results were done after all Forms 34B, with the exception of Nyando Constituency, had been electronically transmitted to the National Tallying Centre. He deponed that the results for Nyando Constituency which had not been collated at the time of declaration did not affect the outcome of the results. He testified that the petitioners have a culture of disputing an election outcome whenever they lose. He further denied that the IEBC failed to produce election materials in the 2013 presidential election petition, adding that the court had held that the petitioners then had not laid basis for the demand.

631. He averred that the issue of transmission of results was conclusively settled by the High Court in the Nasa case and later affirmed by the Court of Appeal in Civil Appeal No258 of 2017 where the Court held that the 1st respondent had put in place a complimentary mechanism in terms of section 44A of the *Elections Act* 2011 and that it had, with public participation, set up regulations to operationalize section 44A. He testified that any failure of technological devices should not invalidate the results.

632. Responding to the allegation that the security of the integrated electoral management system (KIEMS) was compromised, Mr Chirchir deposed that many allegations contained in the petition and supporting affidavits were unsubstantiated since no transcripts of the alleged video clips nor the MS Excel data has been provided.

633. Mr Chirchir deposed that the 1st respondent had full control of its system at all times and that there was no evidence of it having ceded its authority to third parties. It is therefore not true that the transmission of results from 11,000 polling stations was jeopardized as none of the petitioners agents challenged the contents of Forms 34A from these polling stations. Further, he stated that it was not accurate to state that 11,000 polling stations would represent 7, 700,000 voters since the number of registered voters per polling stations varied from 1 voter per polling station to a maximum of 700 voters per station.

634. He denied that the results continued Streaming in a constant percentage of 54% and 44% for the 3rd respondent and the 1st respondent respectively with a constant difference of 11% in favour of the 3rd respondent. According to Mr Chirchir, the difference between the petitioner and the 3rd respondent oscillated between 27.06% and 9.22% in favour of the 3rd respondent. He explained that as accumulative results retain high figures, it requires a high number to dilute its percentage i.e. if 700 represent 50%, an addition of another 700 to it, will increase the percentage by 16.7% making it 66.7%. However, if

3,000,000 represent 54% an addition of 700 to it, will increase the percentage by 0.00580066% making it 54.00580066%. It would therefore require a change of 130,000 in that number and no change at all in the corresponding number to attain a 1% increase.

635. Mr Chirchir concluded by stating that this Court should protect the constitutional democracy and find that the 3rd respondent was duly elected in a free, fair, credible and valid election conducted on August 8, 2017.

636. The petitioner failed to prove that the percentages between the votes garnered by the petitioners and those of the 3rd respondents had a constant difference of 11%. This Court held in Raila 2013 that for data-specific allegations the standard of proof is beyond reasonable doubt. This the petitioner was unable to discharge hence there burden did not shift to the respondents. That notwithstanding the all the respondents have adduced evidence in rebuttal showing an analysis of the various diffences in percentages at various intervals from the time the results started Streaming into the National Tallying Centre to the time of declaration of results indicating that the difference kept varying.

637. Consequently, I find that the petitioner in most of the allegations made did not discharge the onus of proof on them. In that regard the burden did not shift to the respondent to counter the allegations since they bore reinforcement by cogent evidence. In the instances in which the petitioners did discharge the burden, the respondents sufficiently supplied cogent evidence in rebuttal. On the other hand where the respondents admitted the allegations such as those of administrative errors credible evidence was supplied to prove that the said errors did not materially affect the results and they were not in favour of any particular candidate.

J. Orders on Access to Information

638. By a Ruling delivered on August 28, 2017, this Court considered a Notice of Motion Application dated August 25, 2017 seeking the following Orders:

1. This application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.

2. The application be heard and determined expeditiously and in priority to the petition but in any event before August 25, 2017.

3. This honourable court be pleased to order the 1st Respondent to give access to the petitioner/applicant to the following:

    a. Direct, unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system.

    b. Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/polling station location used to verify voters IP voters identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation ties and dates, device IDs MAC addresses, IP.

    c. Addresses, geographic and local communications mast information.

    d. Full and unfettered physical and remote access to any local server(s) connected to the electronic device(s) used to verify voters identification against the list of registered voters at each polling station, from which a forensic image will be taken.

e. Electronic device(s) used to capture Form 34As and Form 34Bs onto the KIEMS system and transmitted to a) the CTNs and b) the NTC.

f. Full and unfettered access to any form of scanning device which saved images onto access to any form of scanning device which saved images onto a access local server(s) for onward transmission.

g. Access to any scanning device which would serve to establish whether the Form 34A was captured, stored and forwarded in the expected timeframes.

h. Full and unfettered physical and remote access to any server(s) at the CTNs for storing and transmitting voting information.

i. Full and unfettered physical and remote access to any servers at the NTC for storing and transmitting voting information.

j. Addresses, source and destination IP Addresses, server details and user details.

k. Full and unfettered to access to all source codes, including all programming codes, pursuant to The Election Regulation Technology, 2017,

4. This honourable court be pleased to order the 1st Respondent to give access to all Parties, the following information and data that is in the exclusive possession;

a. The IEBC Election Technology System Network Architecture for the period of 30 days before the elections to the date of the Order of this Court comprising but not limited to:

i. All the servers used during the Elections;

ii. number of servers;

iii. location of servers;

iv firewalls;

v IP addresses;

vi. Operating systems;

vii. Software running applications

b. The IEBC Election Technology System Redundancy Plan comprising but not limited to:

i. Password policy;

ii. Password matrix;

iii. Owners of system administration password(s)

iv System users and levels of access

c. The IEBC Election Technology System Redundancy Plan comprising:

i. Business continuity plan

ii. Disaster recovery plan.

d. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

i. Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations, 2017; and

ii. Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation Presidential Petition No1 of 2017 -7- 10(2) of the Elections (Technology) Regulations, 2017.

e. In relation to KIEMS Kits:

i. Import testing certification in relation to all KIEMS Kits;

ii. Static IP addresses of each KIEMS Kit used during the Presidential Election;

iii. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 05th August 2017 and 11th August 2017;

iv Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

v Polling station allocation for each KIEMS Kit used during the Presidential Election;

vi. Audit log of what each KIEMS Kit used during the Presidential Election transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses Application Protocol Interface (API)(logs of media data update). Log must also show:

aa. Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

bb. Time of transmission from IEBC Result Transmission Database to the Media Houses API;

cc. Count of Identified Voters by each KIEMS Kit;

dd. Soft copy of Ids captured in each KIEMS Kit;

ee. Audit log of transmission of scanned Forms 34A from each of the KIEMS Kits.

f. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

i. List of the technical partners;

ii. Kind of access they had;

iii. List APIs for exchange of data with the partners.

g. Log in for the period of 30 days before the elections to the date of the order of this court of trails of showing the trail of users and equipments into all the IEBC Servers.

h. Log in for the period of 30 days before the elections to the date of the order of this court of trails of users and trails of users and equipments into the KIEMS Database Management SysteMs

i. Administrative access log into the IEBC public portal between 5th August 2017 to date.

5. The 1st Respondent be compelled to give access to and supply to the court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

6. The 1st Respondent be compelled to give the Petitioners access Form 34As 34Bs and 34 Cs from all 40,800 polling stations.

7. This honourable court be pleased to grant leave to the Petitioner/Applicants to:

(a) Rely on and or file further affidavits in support of the petition and or the affidavits of (i)Rt. Hon Raila Amolo Odinga, Omar Yusuf Mohamed, (ii)Omar Yusuf Mohamed, (iii) Dr Edga Ouko Otumbo, Nyangusi Oduwo and (iv) Norman Magaya dated 24/8/2017 be admitted on record and or be deemed to have been properly filed.

(b) File such other affidavits in response to or reply to any responses filed by the respondents

8. This Honourable Court be pleased to grant any other reliefs that become just and fit to grant.

639. The anchor of the Application was that the electronic system of transmission had been deliberately compromised in a manner not intended by law so as to interfere with and affect the result of the Presidential election. It was also contended that the election results from individual polling stations were not verifiable. Further, that 395,510 rejected/spoilt votes were unaccounted for and that the KIEMS system was designed to only transmit the results if the data entered was accompanied by an image of the prescribed form. This allegation was satisfactorily controverted by the 1st and 2nd respondents who explained that because of the size of the image, in certain polling stations out of 3G or 4G network range, the data was sent before the image of the prescribed Form could also be sent.

640. In the analysis the Court summarized the prayers sought by the Petitioner in the Application in the following three limbs:

i. Access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly, transmission of results;

ii. Access to and scrutiny of certified copied of Forms 34A, 34B and 34C

iii. Leave to file further Affidavits.

641. Regarding prayer (ii), having set out the law and jurisprudence regarding scrutiny, the Court determined that the Petitioners had signaled their intention to seek scrutiny of (a) all rejected and spoilt votes (sic), the returns of the Presidential Election Results including but not limited to Forms 34A, 34B and 34C and the KIEMS kit, the servers and website/portal.

642. The 1st and 2nd respondent, in response, particularly registered their concern regarding the practicality of some of the Orders being sought, such as access to the KIEMS kits, the security of the system

of transmission and the necessity to set up appropriate back up mechanism in case the Orders were granted, which process, they stated would take upto at least 3 weeks.

643. The Court was cognizant of the security system concerns raised by the 1st and 2nd respondents , particularly, the absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications, among others. Therefore none of the requests relating to these specifics were granted.

644. The Court disallowed prayer 3(a) in which the Petitioners were seeking direct, unfettered access to relevant persons and systems at Safran, being cognizant of the jurisdictional difficulties of granting access to an entity based in France that was also not party to these proceedings.

645. Having evaluated the evidence and analysed the arguments by counsel, the Court made the following orders, distinct and modified from the prayers originally sought by the Petitioners in the Application:

[72] Having so held, the final Orders we make are that the Petitioners as well as the 3rdRespondent shall be granted a read only access, which includes copying (if necessary) to –

a. Information relating to the number of servers in the exclusive possession of the 1st Respondent.

b. Firewalls without disclosure of the software version.

c. Operating systems without releasing the software version.

d. Password policy.

e. Password matrix.

f. System user types and levels of access.

g. The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.

h. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

(i) Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations , 2017; and

(ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017

i. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 5th August, 2017 and 11th August, 2017

j. Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

k. Polling station allocation for each KIEMS Kit used during the Presidential Election;

l. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

a. List of the technical partners;

b. Kind of access they had; and

c. List of APIs for exchange of data with the partners

m. Log in trail of users and equipments into the IEBC Servers.

n. Log in trails of users and equipments into the KIEMS Database Management SysteMs

o. Administrative access log into the IEBC public portal between 5th August 2017 to date.

p. The information listed in (m), (n) and (o) above shall be issued in soft copy to the petitioners and 3rdrespondent.

q. Certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. Forms 34A 34B and 34 C from all 40,800 polling stations.

s. Scanned and transmitted copies of all Forms 34A and 34B.

[73] Consequent upon the said Orders, we hereby make the following further Orders:

i. The Registrar of this court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rdRespondents at such a venue as she shall determine in consultation with the parties. A report on that exercise and related issues shall be filed by the Registrar by Tuesday, August 29, 2017 at 5.00 pm. and parties are at liberty to submit on it at the end of the hearing.

ii. In the exercise set out in (a) – (p) above, priority shall be given to the;

1. 292 Polling stations as deponed to at paragraph 12 of Norman Magaya Affidavit sworn on 23rdof August 2017;

2. 688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on 24th August 2017;

3. 14,078 polling stations as deponed at paragraph 70 of Dr Nyangasi Oduwos affidavit dated 18th August 2017

iii. An ICT officer designated by this court from among its ICT staff and two independent IT experts appointed by the court shall supervise access to the technology in paragraph 72 above at such a venue as they may determine in consultation with the parties. A report on that exercise and related issues shall be filed by the said officer and experts by 5.00 pm. on Tuesday, August 29, 2017 and parties are at liberty to submit on it at the end of the hearing.

iv. The parties to the petition are entitled to have a maximum of two agents/experts in each of the exercises above. The agents shall at all times comply with the directions of the Registrar and the ICT officer to ensure expeditious conclusion of the above exercise.

v. There shall be no order as to costs.

vi. It is so ordered.

646. The Court then set the parameters for the exercise and mandated the Registrar to supervise access to the certified copies of the Original Forms 34A and Forms 34B by the Petitioners and 3rdRespondent and due to the constraints of time, to file a Report on that exercise by Tuesday August 29, 2017 at 5.00pm. In addition, an ICT officer designated by the Court from among its ICT Officers and two independent IT experts appointed by the Court were tasked to supervise access to Orders on Technology and to file a report on that exercise at the same time as the Registrar. Each party to the Petition was allowed a maximum of two agents in each of the Forms and ICT exercises.

Submissions by the Parties

647. At the end of this exercise, the parties were each allowed to submit on the reports filed by the ICT experts and the Registrar.

648. Counsel for the Petitioner, Mr Orengo referred the Court to paragraph 13 of the Report where the number of Forms 34A, 34B and 34C availed by the 1st Respondent had been indicated. One (1) Form 34C, 292 Forms 34B and 41,451 Forms 34A. Counsel pointed out some of the remarks that had been made by the Registrar on the process:

(a) Forms 34A for Mandera West were not among the forms submitted

(b) There were illegible Forms

(c) Certain Forms 34A appeared to have been duplicates

(d) Certain Forms 34A and 34B appeared to have been carbon copies

(e) Certain Forms 34A and 34B appeared to have been photocopies

(f) Some of the Forms were neither stamped nor signed.

649. Counsel took issue with Forms that did not bear any security features or serialization. Counsel also cautioned that certain Forms 34B were neither signed by the Returning Officer nor by the Agents, 56 Forms did not have a watermark and 31 Forms did not have serial numbers, 32 Forms were not signed by the Agents and 189 where the handover notes had not been filled. Counsel also expressed dissatisfaction with non-compliance with a segment of the Orders of the Court on ICT access. He also contended that most of the Forms were not in the standardized format.

650. Mr Muite, Counsel for the 1st Respondent commenced by urging the Court to compare the contents of the Registrars Report using the Forms that were deposited in Court pursuant to section 12 of the *Supreme Court Act*. Counsel also urged that contrary to the allegations by counsel for the Petitioners, the statutory Forms matched with the format in the Regulations (Reg 79 and 83). He stated that although security features were not a legal requirement of the Forms, the Commission, out of abundance of caution, designed security features for the

651. ForMs Counsel also submitted that the 1st Respondent had complied with all the Orders of the Court, including availing soft-copy access of the logs to the Petitioners who declined to accept them. This is also indicated in the Experts Report. The Petitioners wanted to have the log in trails loaded from the servers as they observed. It was Counsels submission that with regard to some of the Orders, the limited time available to conduct the exercise precluded its completion because of the time difference between Europe and the United States where the Principal service Provider (Safron) and the company subcontracted by Saffron, resided.

652. Counsel revisited the entire issue of transmission and clarified the difference between the data that was being broadcast on screen and the results in the portal. He elaborated that following the decision of the Court of Appeal in the *Maina Kiai* case on the eve of the elections, the 1st Respondent had to reconfigure the way it displayed information being sent from the Constituency and Polling centres. He explained that sometimes, the data arrived without the accompanying image of the statutory Form, hence the discrepancy. Counsel however urged that the 1st Respondent took every measure to align its processes to the directions of the Court of Appeal which directions came literally, on the eve of the elections.

653. Justice Lenaola, SCJ, queried the lack of a serial number on the statutory Form 34B used to declare the results of Nyali Constituency, Mombasa County.

654. Mr Ngatia, counsel for the 3rdRespondent commenced his submissions with reference to Kisauni Constituency. He noted that although it had been indicated that the Form 34B was not signed by the Returning Officer, the Form in his possession, which was supplied by the 1st Respondent indicated that the same was indeed signed. Counsel also urged the Court to compare the Report on Nyali Constituency with the Form 34B deposited in Court.

655. Counsel indicated that in some areas, lapses were occasioned by difficulties such as broken down printers as was the case in Isiolo South. Overall, counsel submitted that the numbers in these Forms were not challenged and there was no discrepancy between the entry in Forms 34A and 34B.

656. After the bench retired to assess the evidence and make findings on this exercise supervised by the Registrar, I undertook a comparison of the complaints and allegations made by the Petitioner in both reports - with the Forms 34A, and 34Bs that had been submitted to this Court under section 12 of the *Supreme Court Act*. In doing so I have made a number of findings:

1. On the query raised by Justice Lenaola, SCJ, on the lack of a serial number on the statutory Form 34B used to declare the results of Nyali Constituency, Mombasa County, I pulled the Form out of the bundle of certified Forms provided to the Court by the 1st Respondent and noted the following:

    i) The Form has 4 pages that bears serial numbers - PR001004-5, PR001004-6, PR001004-7, PR001004-8

    ii) It is stamped;

    iii) The name and Identity number of the Constituency Returning Officer is indicated;

    iv) It is signed by the Returning Officer;

    v) It is also signed by Agents for Uhuru Kenyatta and Raila Odinga;

    vi) The Statutory Form was printed in landscape as opposed to portrait format as most of the forms are. The serial number therefore was at the bottom left corner of the paper.

2. As regards the complaint regarding Kisauni, once again, I took the liberty to retrieve this Form from the evidence deposited in Court by the 1st Respondent and note:

    i) The Form has 4 pages that bears serial numbers PR001003-7, PR001003-8, PR001003-9, PR001003-10.

    ii) The Form 34B is signed by the Returning Officer;It is stamped;

    iii) Signed by 6 agents;

vi) The handing over section has also been duly filled.

Regarding Likoni, which was also flagged by counsel as being marked as unsigned, I examined the certified copy of the Form 34B and noted:

1. It is signed by the Returning Officer whose name and ID number are indicated;
2. It bears a serial number;
3. It has an anti-copying feature;
4. It is stamped and was signed by 8 Agents;

Thus I was able as a Judge sitting on an election cause to verify the issue in question.

657. Regarding the ICT Report, counsel submitted that the 3rdRespondent accepted the pre- downloaded log trails as compliance with the Orders of the Court. It was submitted that according to the Conclusion in the ICT Report, the 3rdRespondent submitted that the 1st Respondent indicated that the read-only access would be available at 11am on August 29, 2017. However, the Petitioners asked for administrator rights which were beyond the purview of the Order of the Court.

In summary, and according to the ICT Report:

1. Information relating to the number of servers in possession of the 1st Respondent was provided;
2. Information regarding Firewalls without disclosure of software version was not fully provided because disclosing the internal and external firewall configurations would affect the security of the systeMs However, schematic diagram and hardware models were provided;
3. Operating systems without the software version was supplied;
4. Password policy was provided; 5.Password Matrix was provided;
6. System user types and levels of access was also provided;
7. The Disaster recovery plan was also provided;
8. Certified copies of Penetration Tests conducted on the IEBC Election Technology System prior to and during the elections were provided, together with the certificates;
8. GPS locations for the polling stations were provided. The Specific GPRS Locations for each KIEMS kit was not provided;
8. Certified list of all KIEMS kits procured, provided;
11. Polling Station allocation for each KIEMS kit provided;
12. Technical Partnership Agreement(s) for the IEBC Election Technology System provided;
13. Pre-downloaded Log-Trails provided, but rejected by the Petitioners;
14. In conclusion the Report indicated that the 1st Respondent faced a number of challenges in complying with the server Read only access order including:
    a. Set up of the VPN Tunnel to the server
    b. Connectivity challenges when accessing the cloud
    c. Security protection measures that need to be upheld for elections.

658. I am satisfied that the terms of the Courts Orders were met to the best extent possible. Although the parties seem to have differed on the interpretation of the Orders, I find that they were very clear and free from misconstruction. The Orders were of Access to Information and read-only access which included copying (if necessary). The Courts Orders were very clear. They were also very distinct from the prayers originally sought in the Application. The Court took the concerns of all the parties into consideration before making a determination on the Application. Any inference into the intent or assumed Order of the Court cannot therefore be left to flourish. For avoidance of doubt, I am in agreement with the constitutional Court of South Africa in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 304 D-F on the interpretation of Court Orders:

(33) On interpreting court orders, authority tells us:

> -The basic principles applicable to construing documents also apply to the construction of a courts judgment or order: the courts intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. [A]s in the case of a document, the judgment or order and the courts reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it.[Emphasis added]

659. On this, the 1st Respondent expressed real threats with regard to exposing the inner workings of their technology to external supervision or influence owing to numerous considerations of a public nature. We must acknowledge that the Commission is an independent Constitutional body with the powers to regulate vital procedures such as the deployment of technology in elections. Although the Petitioners prayed for unfettered access into the servers, the Court, in consideration of the security concerns and in line with principles of justice and equity did not grant this but granted only specific limited orders to information, which in my opinion were met. For the avoidance of doubt, this court did not give orders for the Petitioner to access the Servers of the 1st Respondent, what was given was access to particular read only information. The location of servers, the entry and penetration into the servers, were not part of the orders given. It would be dangerous to expose the Commission to any administrative incapacity in the future. The court has a responsibility to preserve the working systems of the IEBC for future elections. I acknowledge and approve the following reasoning by the constitutional Court of South Africa in *Electoral Commission v Mhlope and Others* (CCT55/16) [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC). In this case, the constitutional Electoral commission of South Africa approached the constitutional Court with prayers to condone certain shortcomings it had in the face of an approaching by-election. the constitutional Court considered the remedies available stating:

[84]. I have spelt out the difficult position in which the IEC finds itself. Ordinarily, it would be easy to dismiss its request on the basis that the situation in which it finds itself is of its own making. But the reality is that – unlike litigation between private individuals where a partys fault would affect it and it alone – here if something were to go wrong, the implications are serious and likely consequences dire. To put it bluntly, the IEC would not be able to certify the voters roll for want of the 12.2 million addresses. Without a certified voters roll, there can be no elections. In terms of section 159(2) of the *Constitution* it is obligatory that the elections must take place, and must do so not later than 16 August 2016. Indeed, the need for the regularity of elections in the *Constitution*s founding values underscores the importance of this obligation. Unsurprisingly, section 19(2) provides that -[e]very Citizen has the right to free, fair and regular elections for any legislative body established in terms of the *Constitution*.

[85]. A threat of a possibility of the elections not taking place is a threat to our democracy itself. An order that does not extricate the IEC from the impossible situation it is in may create a constitutional crisis affecting the rights to vote and stand for political office protected by section 19 of the Bill of Rights. As we are also bound by the Bill of Rights, we must be careful – as far as possible – to prevent that from happening. We cannot – in a Pilatian manner – throw our hands up in the air and say, If the crisis happens, so be it; the root cause is the IEC, not us. The reality is facing us. What may we do, if anything

660. Consequently, I do not find the 1st and 2nd respondents in contempt of this Courts Orders and also find no basis to nullify the presidential election on the basis of any information revealed or otherwise in the Report. I find that the allegations of inconsistency in Forms 34A and 34B is verifiable using the existing paper-trail which was also in the possession of the Petitioner having requested the Court vide a letter dated August 23, 2017 and the entire set of primary records provided in scanned form on August 24, 2017.

661. Regarding lack of security features on the Forms 34A and B, it is imperative to first contextualize the exercise that gave rise to these conclusions:

i. It was a party-led process not a court-led process

ii. It was a technical process that is usually the preserve of an election Court. As was elaborated by the Court in its Ruling on access to information, scrutiny encompasses an examination of the entire electoral material related to the election in a disputed polling station. This was not the case in this instance.

iii. Some of the findings are negated by reference to the statutory Forms deposited in Court pursuant to section 12 of the *Supreme Court Act*.

iv It was submitted that the presence of one security feature is sufficient to insulate the statutory Form from unauthorized reproduction. I find that this is a sufficient measure in the general scheme of other tools of verification guaranteed by the *Constitution* and electoral law, including ballots and other election materials.

v The presence of security features is neither statutory nor legal. It is administrative and therefore one of the components of verification in the electoral process. (I have earlier in this Judgment addressed the entire verification process in depth).

662. The Majority admits that security features are not provided for under any legal provision. The basis of their determination is that there was no plausible explanation when Immaculate Kassait had indicated that all Forms 34A and 34B bore these features. The Court however had the option to personally examine the original Forms deposited in the Registry; the majority did not do so.

663. As such an Order for nullification based on this exercise that was merely based on controvertible and speculative grounds, and is well below the standards set for nullifying an election, especially, where other remedies, such as inspection of ballots, exist. The Majority, did not address themselves to any other evidence in arriving at their determination. Had they systematically analysed the evidence, they would not have determined the election on a tangential issue whose determination could easily have been settled through reference, by the Court itself, to the evidence deposited by the 1st Respondent 48 hours after filing the Petition.

664. It is important to appreciate the circumstances under which the 1st Respondent was operating immediately before the elections where they were dogged with Court cases which slowed down their

operations and their normal cohesive preparedness to conduct the elections was hindered. Elections are public in nature. The actors and stakeholders involved in the electoral process ought to fully support the 1st Respondent in the execution of its mandate. In instances of lapse, how is the Court to apportion blame particularly in instances of active distraction from duty, by other actors and stakeholders

K. Evidence Submitted under section 12 of the *Supreme Court Act*

665. The material deposited by the Commission pursuant to section 12 (2) of the *Supreme Court Act, 2011* enable the essence of the Supreme Court to discharge its mandate as the final election verifying avenue. It is imperative to mention that the Commission fully complied with this imperative. At the time of determining this matter, all the material use to declare the results of the presidential election, including Forms 34A and 34B had been deposited at the Supreme Court Registry by the Commission. In furtherance of my duty as a Judge hearing a matter falling under the exclusive original jurisdiction of this Court, I have considered all the allegations in the pleadings and supported evidence and responses thereof, against this material.

666. Following the exercise Ordered by the Court on production of Forms 34A and 34B after which the parties undertook a partial scrutiny of the Forms, Counsel for the Respondents urged the Court to consider the Report in light of the Forms 34A and 34B that had been deposited in Court by the Respondents as part of the mandatory discovery under section 12 of the Supreme Court. I have already analysed the Report based on the contents provided by the Registrar and the ICT experts in a foregoing section. This section however follows the determination that an election Court, as the final verifying agency must employ the tools granted by the *Constitution* and Electoral law to enjoy that the ends of justice are met and that the right of the electorate to vote and the candidates to vie for any position is protected from illegal, or irregular practice, and electoral offence on the one hand or unfair exclusion of votes on the other.

667. In the Registrars Report, it was noted that five (5) Constituencies were in serious contention for want of Form. The report indicated:

i. That Forms 34B in Kisauni, Nyali, Likoni, Mandera South and Isiolo South Constituencies were not signed by the Returning Officer.

ii. That Nyali Constituency Form 34B lacked a water mark.

iii. That Form 34B in Isiolo South was not signed by the party agents.

668. The evidence deposited in Court by the 1st and 2nd respondents revealed that the disputed Forms were proper in Form and bore all the relevant features. The observations are summarized hereunder:

Constituency	No. of Pages	Serial No.	Signed by the Returning Officer	Official IEBC Stamp	Signed by the Party Agents
Kisauni	4	PR001003-7 PR001003-8 PR001003-9 PR001003-10	Signed	Stamped	Signed
Nyali	4	PR001004-5 PR001004-6 PR001004-7 PR001004-8	Signed	Stamped	Signed
Likoni	3	PR001005-8 PR001005-9 PR001005-10	Signed	Stamped	Signed
Mandera South	2	PR009042-3 Not legible	Signed	Stamped	Signed
Isiolo South	2	PR011050-8 PR011050-10	Signed	Stamped	Signed

669. The legality of Forms 34A and 34B was heavily contested by the Petitioners and evidence adduced on the same. In the interest of justice, I set out to examine each of the Forms that had been disputed (with particularity) in the detailed Affidavit of Dr Nyangasi Oduwo in support of the Petitionand examined whether the Forms met the test of verification set out on this Judgement.

Preliminary Observations;

i. 1640 Forms 34A and 34B in total were disputed with particularity ii.1349 Forms 34A were disputed, with particularity

iii. All 291 Forms 34B were also disputed

iii. Having looked at all the Forms 34A and 34B (290 constituencies, 1 diaspora), I am satisfied that all the Forms met the required threshold in Form and content. The findings are summarized below:

See Annexure 1 on the analysis of all Forms 34B

L. Compliance

670. section 83 of the *Elections Act, 2011* stipulates:

> -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.

671. Before this Court settled the meaning of section 83 of the *Elections Act* in 2014, the Court of Appeal had dealt with its interpretation in several cases:

i. *Dr Thuo Mathenge & another v Nderitu Gachagua & 2 others* Civil Appeal 29 of 2013; [2013] eKLR

> In this case, the irregularity was with regard to misprinting the name of the running mate to the 1st appellant. The name of the running mate was misprinted as Geoffrey Kamau Kibui instead of Geoffrey Gitonga Ndegwa. As a result of this, the Appellants alleged that the supporters of the 1st appellant voted against him because they felt that they had been misled. The Court of Appeal concurred with the trial Courts finding and declined to nullify the elections. The Court held that the elections were substantially in conformity with the law and the error on the ballot papers did not affect the gubernatorial election results. The Court of Appeal reiterated that the election could not be nullified as section 83 of the *Elections Act* prohibits an election from being declared a nullity on the grounds of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the law; or if there is non- compliance, the same did not affect the results.

ii. *James Omingo Magara v Manson Onyongo Nyamweya & 2 others*, Civil Appeal No 8 of 2010, (Omolo, Tunoi, Githinji JJA) the Court of Appeal reaffirmed that Courts can preserve an election conducted in accordance with the law. In this case, it was held:

> -The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, provided the results of the election was unaffected.
>
> In its conclusion, the Court of Appeal referred to the binding decision of the Supreme Court in the Raila 2013 case in which the Court held that since the election results reflected the electoral intent of the people, the Court had a duty to uphold the same.

iii. *Peter Gichuki Kingara v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal No 31 of 2013; [2014] eKLR-(Re-considered by the Supreme Court and proceedings set aside for breach of time)

The Court of Appeal analysed the evidence regarding errors that were admitted by the respondents in their pleadings and the 2nd respondents during cross-examination. Based on these reasons, the Court of Appeal held that the totality of these irregularities, which were unverifiable most probably affected the result and the ultimate will of the Othaya constituents. Consequently, the Court nullified the election.

iv. *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others* Civil Appeal No 38 of 2013; [2014] eKLR (Overturned by the Supreme Court for deviation from the materiality test (S. 83)

In this case, the vote margin between the appellant and the 1st respondent was 3,436 votes. This according to the Court of Appeal translated to a 0.819 per cent margin of the total votes cast (423, 247). The crux of this appeal was whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the Meru gubernatorial

election. Counsel for the appellant provided extensive arguments on the application of the principles in the case Morgan v Simpson. The Court of Appeal also held as follows [at paras. 91 and 92]:

> -.....The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes casts when set aside must exceed the margin between the winner and the runner up.

[92] ...If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected... (Emphasis added)

Additionally, the Court of Appeal analysed the qualitative and quantitative tests in order to determine whether the non-compliance affected the result. It referred to two cases in which the Court in Uganda and the Supreme Court in Kenya referred to the qualitative and quantitative tests. In the Ugandan case of Winnie Babihuga v Masiko Winnie Komuhangi & Others HCT-00-CV-EP.0004-2001, it was stated that the quantitative test is the most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.

This principle was reiterated here in the Supreme Court in the case of *Ali Hassan Joho & another v Suleiman Said Shahbal & 2 Others*, Supreme Court Petition No 10 of 2013, in which the Court held:

> -Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are.(Emphasis added)

672. From the foregoing, the Court of Appeal held that the trial Judge erred and misdirected himself in finding that a margin of 0.819 per cent which is less than 1 per cent could be described as wide. The Court of Appeal held that the margin of 3,436 votes between the winner and runner up was statistically small and that if the trial judge adjustment due to the proved errors and irregularities as disclosed in the evidence of DW 10, the margin between the returned candidate and the runner up would be significantly impacted and the election result materially affected.

In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* Civil Appeal 43 of 2013; [2014] eKLR

In this case the Appellant was declared the winner of the election after garnering 154, 469 votes whereas the runner up, the 1st respondent, garnered 125, 853 votes. The trial Court nullified the election on the ground that the irregularities allegedly committed in the conduct of the elections affected the results of the election. The Court of Appeal relied on the Raila 2013 case to the extent that a petition must prove that the non-compliance with the election law impugned the integrity of that election.

The Court of Appeal also cited the three principles of *Morgan v Simpson* and held that the principle that section 83 of the *Elections Act* did not protect any election not conducted substantially in accordance with the electoral law of that election and the same, would be null and void.

The finding of the Majority mirrors that of the Court of Appeal in this case. The conclusion is that, an election that is not conducted substantially in accordance with the law relating to that election is null and void regardless of the effect of that irregularity on the result of the election. The Court of Appeal held that according to section 83 of the *Elections Act, 2011* the term used to demarcate the governing principles in that provision was or not and which means that theviolation of either and not the two aspects, together, would void anelection.

673. Interpretation of section 83 of the *Elections Act* is not a new matter to this Court. In the Raila 2013 case, this Court engaged the import of this section in determining the principles of the Burden of proof. Four impetrative principles emerged:

i. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.

ii. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly-This finding is similar to that by Justice Kimondo in *Steven Kariuki v George Mike Wanjohi & others* Nairobi Election Petition No 2 of 2013, in which he held that: section 83 of the *Elections Act* is coached in the negative language introducing a rebuttable presumption in favour of the respondents, that the election was conducted properly and in accordance with the law.

iii. So, the petitioner must set out by raising firm and credible evidence of the public authoritys departures from the prescriptions of the law.

674. Consequently, following a successful Appeal by Hon Peter Munya [*Munya 2*], to reconsider the vitiation of his Gubernatorial election by the Appellate Court following the 2013 General elections, we considered the application of section 83 of the *Elections Act* in determining election causes. By a unanimous decision of the Court, we cited with approval Lord Dennings dictum in *Morgan v Simpson* (1975) 1 Q.B 151, and held as follows:

[210B] In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election

[211] In *Morgan v Simpson* (1975) 1 Q.B 151, Lord Denning evaluated cases that had been cited by counsel and that had impacted upon the duty of Courts in making declarations upon hearing election petitions. He summarized the law in three propositions:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. This proposition came out of a case where 2 out of 19 polling stations were closed all day thereby disenfranchising more than 5000 voters (re Hackney Election Petition, Gill v Reed (1874) 2 OM & H.77)

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.

3. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls-and it did affect the result-then the election is vitiated.

675. Although the Majority claims the maiden privilege of interpreting the provisions of section 83 of the *Elections Act*, this Court in the Munya case had already settled this issue in 2014. The ultimate decision of this Court in the *Peter Munya* (2B) Case was summarized in four paragraphs:

(213) The Court observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

(216) It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81 (e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

(217) If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities.

(218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.

676. This interpretation was upheld in subsequent consistent decisions of the Supreme Court thus:

In *Nathif Jama Adam v Abdikhan Osman Mohamed & 3 others*, Supreme Court Petition No 13 of 2014,

(85) Section 83 of the *Elections Act* is the definitive statement of the standard that an election Court must apply, in verifying the election results. That section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.

(87) As to the effect of irregularities, and the point at which a Court should overturn an election, we stated that Courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised.

677. In my concurring opinion in *Evans Odhiambo Kidero v Ferdinand Waititu & 4 others*, Pet. No 18 of 2014:

(348) Having examined the electoral code, and the emerging jurisprudence on elections, it is my considered opinion that when a court of law is faced with the question whether or not to annul an election the following are the fundamentals as can be deduced from Munya:

1. If it is demonstrated that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such an election is not to be invalidated only on ground of irregularities.

2. Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated.

3. Mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election. [Emphasis added]

678. The Supreme Court has consistently applied the test in section 83 with the result of the election in mind. The qualitative component (the result of an election) is an integral element of election causes. In a Presidential election Petition, the Petitioner challenges the election of the President-elect (Art. 140(1). The result of the election of the President by Constitutional requirement is only ascertained when the formula under Art. 138(4) of the *Constitution* has been met. Anyone challenging an election must therefore challenge both the quantitative and qualitative aspects of the election.

679. Unlike the situation in *Morgan v Simpson* (which was a municipal election) or a Gubernatorial election (as was the case in the *Peter Munya* (2B) case, the constitutional threshold in a Presidential election is anchored on the numbers, the formula. The drafters of the *Constitution* were very clear that Kenyans ought to elect, as President, a person who was acceptable to more than half of the voters in Kenya and one supported by at least 25% of the votes cast in each of more than half the Counties. It is only such a person who has garnered that percentage threshold in terms of popular support that is to be declared elected as President. This was one of the irreducible minimums for a transformative change in Kenyas electoral architecture. There was a purpose to this formula, the need for national cohesion, a unifying personality and a nationally popular individual. In a petition relating to such an election, an election Court must therefore ascertain that any question as to the quality of the election has affected the constitutional quantitative threshold.

680. Let us put this in context in a hypothetical situation: assuming there is a Constituency with 55,000 registered voters. On Election Day, two candidates supporters in that Constituency create a violent atmosphere where voters are intimidated, pulled out from stations, agents vehicles torched and election officials harassed. The situation is such that there can be no elections in that constituency. But in all other Constituencies nationwide, the election has proceeded properly, with the fore-running presidential candidate obtaining more than half of all the votes cast in the election and at least twenty-five of the votes cast in each of more than half of the Counties. The votes from that Constituency, even if cast, would not affect the constitutional threshold necessary to declare the results of the election. Can we nullify that entire election because there was violence, intimidation and voters in that Constituency did not vote That is the test the Court should apply and it would consider the following questions:

i. Did the irregularities or illegalities affect the result? Would the results of the election have reduced from more than half of the votes cast in the election? Would it have affected at least twenty five per cent of the votes cast in each of more than half of the Counties?

ii. Should the Court assess this test in the affirmative, then it should nullify the election. However, if the constitutional mathematical threshold is not affected, nullifying the entire election would have the effect of disenfranchising voters who did not vote in that constituency. What ought the court do?

681. According to Barry H. Weinberg in his book *The Resolution of Election Disputes: Legal Principles that Control Election Challenges*, 2nd Edition, pg. 103, the legal position is that election results will be

upheld unless it has been proved in Court that the irregularities or illegalities changed the result of an election or made it impossible to determine the will of the electorate. He observes:

> -Where the courts can determine which ballots were illegal but had been counted, those ballots are subtracted from the candidates totals. Where the courts can determine which ballots were legal but had not been counted, those ballots were added to the candidates totals. After the illegal votes have been subtracted from the candidates totals and the legal votes have been added, the candidates with the most votes will be the victor.

682. The upshot is that the alleged illegalities or irregularities ought to have a nexus with the declared result.

M. Preserving KenyaS Electoral Jurisprudence: Construing the Principle of Precedent in Electoral Matters

683. Having set out my reasons for dissenting with the decision of the Majority, and having espoused an interpretation of section 83 of the *Elections Act* in line with the standards laid out in the Raila 2013 case, with the conclusion that any deviation from written law must be evaluated in terms of the *Constitution* due to the sui generis and rights-centric nature of election causes, I note, with great concern the disregard by the Majority of clear-set and settled principles of electoral dispute resolution in the following terms:

a. The majority has reversed the interpretation of section 83 laid out in the Peter Munya (2B) case and affirmed by the Supreme Court in numerous cases by setting a standard for the conduct of elections that is impossible to meet and that completely exposes the rights of the voter to judicial trump. The will of the little man, walking to the little booth, marking his ballot with a little mark, in secret and in free and fair elections has now been burdened with a standard that does not take into account the existing environment within which elections are conducted globally. The practice has been to check any errors (which are to be expected) against their effect on the declared result of the elections.

   i. the *Constitution* itself makes it imperative for the quantitative and qualitative elements of declaration to be pleaded and proved to the required burden and standard before an election can be set aside. Article 138(4) of the elections provides the numerical consideration that must be satisfied before one can be declared to have been elected as president.

   ii. This numerical standard, ought to be checked against the terms of article 38-did every person have the freedom to vote article 81(e)-were the elections free and fair article 83- did every person have an opportunity to be registered as a voter article 86, was the voting method used simple, accurate, verifiable, secure, accountable and transparent Did the counting, tabulation and collation of votes announced promptly by the presiding and returning officers? Were there mechanisms to eliminate electoral malpractice and was the election material safely stored? Article 88, were the elections conducted by an independent electoral body and article 82, was the conduct of the election in line with legislation on elections-as read with the *Constitution*?

684. I now turn to examine the effect of reversing the electoral jurisprudence already settled by the Court and applied across the country at all levels of Kenyas Judicial system. I shall address the following questions in my analysis:

   i. When can or should this Court depart or reverse itself from any of its previous decisions?

ii. What is the effect of wholesale reversal of electoral jurisprudence by the Supreme Court?

iii. What avenues exist for lower Courts?

685. This Court can depart from its previous decisions. Article 163(7) of the *Constitution of Kenya, 2010* thus stipulates:

> -All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

686. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Supreme Court Petition No 4 of 2012, this Court had the occasion to consider instances when it can depart from its previous decisions. Several principles to guide this matter emerged. This Court can depart from its previous decisions:

i. In special circumstances

At Paragraph 40, the Court held:

> .....As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions.

ii. For good cause after taking into account legal considerations of significant weight:

At paragraph 43, the Court held:

> In principle therefore, it follows that this Court, an apex Court, can indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight.

iii. Where the impugned decision was obiter dictum (side-remark)

iv Where the impugned decision was given per incuriam

At paragraphs 50 and 51, the Court held:

> For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.
>
> "the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority."

[8] The consideration in this case in light of the Petitioners claim is: was the Judgement by this Court in the Peter Munya (2B) case obiter dictum or delivered per incuriam The issue of section 83 was settled as follows in that case, at paragraphs 216-218:

216. It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election

This determination proceeded on a full evaluation of pleadings, submissions and legal analysis. In essence, it was not a side-remark. The analysis by the Court took into account all the applicable laws, instruments and rules.

688. Have the circumstances in which the decision in Supreme Court Petition No 5 of 2013 changed so as to warrant departure on the basis of special circumstances? It is important to note that the decisions of this Court trigger various processes in legal reform or the constitutional performance of institutional mandate. Therefore, a critical aspect of precedent is to preserve the certainty and predictability of the law. In the *Practice Statement (Judicial Precedent)* [1966] 1WLR 1234 (HL) (Practice Statement) (cited in *George Mike Wanjohi v Steven Kariuki & 2 Others*, Supreme Court Petition No 2A of 2014 (The George Mike Wanjohi case), the Lord Chancellor extolled the virtues of precedent-law, thus:

> " Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."
>
> [10] The circumstances that triggered this question in the Peter Munya (2B) case were that the Court of Appeal had upset an election on the basis of extrapolation of possible numerical errors in the conduct of the Meru Gubernatorial elections. On Appeal, this Court reversed the Appellate Court on the following basis:
>
> [205] The appellate Court had been content to conclude that the statistically small margin would have been significantly impacted, but without taking into account the numerical alignment of votes. It would have been necessary for the appellate Court to demonstrate how a figure of 3,436 win-votes would have so diminished as to reverse the victory-outcome in favour of the petitioner. Without such a demonstration, the scenario is one in which an election was annulled on the ground of what might have been and not necessarily, what was. This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts.
>
> [205A] We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the *Constitution*, which

safeguards for citizens the freedom to make political choices [article 38 (1)].
[Emphasis Added]

689. This decision has guided the execution of the mandate entrusted by the *Constitution* onto the 1st and 2nd respondents .

Are the circumstances in this instance different?

690. Although the doctrine of precedent does not stand in the way of progressive interpretation of the law, this power must be used in a sparing and cautious manner to guarantee continuity, certainty and adaptability. These three aspects must however be balanced with the requirement that justice be done. Judicial guidance is an integral part of directing peoples relations. It follows that this critical aspect is wasted if it becomes impossible to direct actions appropriately when similar facts and circumstances are subjected to different standards of the law.

In the *Mike Wanjohi* case, this Court expounded on this question thus: At paragraph 83:

> Different sets of facts present themselves in the adjudication of disputes before the Courts. These varying facts fall for evaluation, interpretation and analysis, outcomes of which are then weighed, in a process of judicial reasoning, against some defined principles of law, so as to determine the respective rights of parties. Indubitably, the differing fact- situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion. Where facts are materially dissimilar, or the case is not analogous to the previous decision, this Court will always distinguish the rule and may, in the interest of justice, choose not to apply its previous decision. This is the guiding principle to be applied by this Court in distinguishing its decisions. [Emphasis Added]

It follows that:

i. The facts in this case are not materially dissimilar to those in the Peter Munya (2B) case, on this question save on the consideration of percentages in the declaration of presidential election results. This distinction, only on purport of the numerical threshold and not the effect of irregularities and illegalities in the conduct of an election and the effect of this on the final outcome of the result is evident at paragraphs 201 and 202 the Judgement thus:

> 201. It is clear that the *Constitution* requires that for one to be declared a winner in a gubernatorial election, he or she needs to garner a majority of the votes.
>
> This is the logical meaning to be attributed to the words greatest number of votes. It matters not how wide or small the margin of victory is. Indeed, this is the requirement in all the elections other than a Presidential election, where specific percentages are prescribed by the *Constitution*.
>
> 202. The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a

factor in the proper election-outcome. To nullify an election in such a context would fly in the face of article 180 (4) of the *Constitution*.

ii. Similar fact situations ought to be treated in a similar fashion.

iii. This Court cannot therefore reverse, or distinguish its decision in *Peter Munya (2B)* on material effect to the result of the election on the basis of special circumstances.

691. Recognizable political rights have vested in the parties concerned in this petition, and in the electorate. The Petitioners would have to show that new circumstances, so grave and critical now exist to warrant a departure from previous decisions of this Court displacing those political rights and public-interest expectations on the part of the electorate. (See *Mable Muruli v Wycliffe Oparanya*, Supreme Court Petition No 11 of 2014).

692. In the *Kidero* case, I held, in a concurring opinion, and in line with the consistent thread of authorities set by this Court, set several distinctive principles on the critical place of precedent in our jurisdiction: at paragraphs 236, 240 and 242:

(236) The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Courts vital essence and the decisions of this Court protect settled anticipations by ensuring that the *Constitution* is upheld and enforced and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized.....

(240) As already noted, the significance of article 163(7) is to regulate the development and settlement of our jurisprudence through the Supreme Court as the forum entrusted with the final mandate to interpret Kenyas transformative charter. This Court for instance bears the final responsibility of interpreting the constitutional propriety of Acts of Parliament as demonstrated in the *Joho* case. Constitutional interpretation allows the countrys constitutive charter to effectively guide the conduct of activities within the Republic This doctrine of precedent liberates Courts from considering every disputable issue as if it were being raised for the first time. This Court constantly examines its own previous decisions where similar facts abide as can be demonstrated in our consideration of election appeals. Under our mandate to develop the law, we endeavour to expand pre-set principles when the circumstances of the case permit.

(242) In applying case-law, one must consider the material conditions of the issue in question. One must then assign the question to its proper class or consideration and observe the right points of likeliness in the cases under consideration .....

(15) Have the Petitioners adduced legal reasons of significant weight as to persuade this Court to depart from its previous electoral jurisprudence?

693. Section 3 of the *Supreme Court Act* and the body of jurisprudence from this Court is central on the preservation, protection and affirmation of the *Constitution*. The framers of the *Constitution* were fully aware that this is the only Court that can reverse itself as it is not bound by its own decisions. However, considerations for reversal or departure must be carefully weighed against various considerations. Departure from electoral jurisprudence is in my view inviting of an even firmer and higher restraint from departure of well-settled principles. The Judiciary is one of several critical institutions that act as anchors to the *Constitution*. The others are: the People, the Executive, the Legislature, Independent Commissions, State Offices and Officers. All these institutions interact with the law and with each

other in a manner that is clear, certain, stable and predictable. A different approach would threaten the fabric of institutional legal interaction. The law is a primary limb of the body politic.

694. I am persuaded by the opinion of Justice Aharon Barak, Former Chief Justice and President of the Israeli Supreme Court in his book, The Judiciary in A Democracy, Princeton University Press, at page 158 that on the full scope of precedent and the need to balance the interests of justice by following precedent or by deviating from it :

> " A judge stands before a dilemma: to follow precedent previously determined by his Court, or deviate from it? The Judge must use his discretion reasonably. What should the Judge do? The reasonableness test requires the Judge to consider on the one hand all considerations supporting the honouring and following of the precedent. On the other hand, the judge must consider the full scope of considerations pointing toward deviation from precedent and choosing new law. The Judge must assign each one of these systems of considerations its proper weight. Having done that, the judge must place both on the scale. The Judge must choose the prevailing ruling; the judge must choose the Ruling whose utility is greater than the damage caused by it. The guiding principle should be this: it is appropriate to deviate from a previous precedent if the new precedents contribution to the bridging of the gap between law and society and to the protection of the *Constitution* and its values after setting off the damage caused by the change, is greater than the contribution of the previous precedent to the realisation of those goals.
>
> Deviation from precedent, particularly precedent of the highest Court is a serious matter, great sensitivity is needed to weigh all the considerations. [Emphasis added]

695. The doctrine of stare decisis is a critical element of our legal system, providing certainty and predictability in the law as consistently guided by this Court. Aptly put in the case of *Peter Gatirau Munya v IEBC & 2 Others*, Supreme Court Petition No2B of 2014. in a concurring opinion by Mutunga CJ (as he was then) at (paragraph 228):

> " Under article 163(7) of the *Constitution*, all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Thus, the adopted theory of interpretation of the *Constitution* will bind all Courts, other than the Supreme Court. It will also undergird various Streams and strands of our jurisprudence that represent the holistic interpretation of the *Constitution*."

696. Although this Court is not bound by its decisions and can review or depart from them, such considerations only ought to be in the clearest of cases, and distinguishable in fact, circumstances and relevance as elaborated in the foregoing paragraphs. The majority has failed this critical test. I must add that the value of their deviation from precedent damages more than it offers utility. It will cause damage to the legal system because it turns the entire electoral jurisprudence on its head.

697. Every arm of Government has the unique role of defending the *Constitution*, the Bill or Rights and the Sovereignty of the people. The essence of a system of checks and balances is to ensure that when one constitutional branch threatens the entire schematic ordering of the *Constitution* and the State, the other is ready to check these actions. Having been part of the inaugural Supreme Court and having steadily and consistently settled the law on elections, the interpretation of section 83 by the Majority will unleash jurisprudential confusion never before witnessed. Unfortunately, we are part of the common law system, encumbered by rules requiring lower Courts to pay due deference to the Courts above. Parliament must therefore untie the hands of Courts below by clarifying the meaning

of section 83 of the *Elections Act*. That is the only way that we can avert a crisis of jurisprudence in such a sensitive area of law, as elections.

697A. However, in the meantime, lower Courts are not without an option. The decision by the Majority is one given in a presidential election and which does not usurp the jurisdiction of the lower Courts in electoral disputes. At paragraph 207 of the *Raila* 2013 case, we held:

> [207] The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the *Constitution* itself. [Emphasis added]

N. Conclusion

698. Having now looked at the full reasons of the majority judgment, I briefly make the following initial observations:

I. The Petition contained numerous allegations of irregularity, illegality and electoral offences, enough, if proved to the required burden and standard, and if it affected the result, to void the Presidential election. The allegations were however not proved and where evidence was adduced, there was sufficient evidence to rebut the allegations. [Paragraph 42 of this dissenting judgment sets out those allegations]

II. According to the Majority, the determination of nullity turns only on one limb:

verification. The Majority espouses the following conclusions:

i. That the election declaration path set by the *Constitution* and the electoral law was not verifiable.

ii. There was lack of security features on the Statutory Forms 34A and 34B sampled by the parties during the Access to Information Exercise supervised by the Registrar of this Court.

iii. There was failure by the 1st Respondent to comply with the Orders of the Court as commanded in the Ruling dated August 28, 2017 on the Notice of Motion dated August 25, 2017. The Majority in fact acquiesces to the Petitioners allegations that the Information Technology system was infiltrated and compromised solely on a misplaced notion that the 1st Respondent withheld the information required. Reference to the ICT experts Report will however show that the information was provided in soft copy but rejected by the Petitioners who demanded physical witnessing of log-trail harvesting.

iv The Majority also makes an assumption, that the votes cast for the President were different (by a small margin I might add) from those cast in favour of Governors and Members of Parliament. They disregard the perfect choice of a voter to only cast preferred ballots and turn in unused ballots as spoilt (and which in turn are stored in tamper proof packets). It appears that the Majority expected that the voters were obliged to cast all six ballots provided.

vi. The Majority focused on a narrow inference of verification and placed this obligation solely at the door of the 1st Respondent ignoring the agents, candidates and other

agents of verification present, including the Court itself as the final verifying agency. Nothing would have been easier than to call for the election material, which is available and not tampered with, to ascertain the number of spoilt ballots to explain the discrepancy between the votes cast for the President and other candidates. Was this unknown and dangerous standard to be applied elsewhere, some of the candidates who garnered more votes than the President in their electoral units would suffer the same fate.

vi. The grave allegations made were not considered deeply or at all. The Majority went straight for the technical/formalistic issues and reversed the precedent in Munya 2 on section 83 to justify their conclusion.

699. Election causes ought to be determined in light of the highest consideration of the right of the electorate to vote in free and fair elections.

700. This Court must never abdicate its duty as an election Court exercising exclusive original jurisdiction to hear and determine disputes relating to the elections relating to the elections to the office of president arising under article 140 of the *Constitution*. As an election Court, the Court must not narrow the scope of its remedies nor delegate its powers to the parties. The zeal of the voter to participate in elections and the overwhelming responsibility of every State Organ and stakeholders to conduct free, fair and peaceful elections must be matched by equal zeal from the Court. The Majority nullified the conduct of the Presidential elections solely on the basis that some Forms 34A and 34B lacked security features which are elected by the Commission and spread in different versions across most ForMs The Majority, in the aftermath of the Registrars report did not even attempt to peruse the enormous evidence deposited by the 1st and 2nd respondents bearing certified copies of Forms 34A and 34B of the *Constitution* and against which they ought to have checked the alleged irregularities. By subjecting the integrity of the election to considerations of design, that are neither statutory nor regulatory, the Majority has not only threatened the peoples belief in the electoral system, it has overburdened and in fact, negated the electorates right to franchise.

701. Mr Slobodan Milacic a Professor Emeritus at Montesquieu University, in "Justice Coming face to face with electoral norms" a Chapter in the Book, *The Cancellation of Election results The Science and Technique of Democracy* No 46; (2010) Council of Europe pages 25-67, states that the will of the electorate is ultimately the core of any electoral process and it should be jealously guarded by the Courts in order to maintain public confidence in the electoral process. In that regard he makes the following remarks, which I cite with approval:

> "The importance, in a democracy, of a transparent and fair electoral process for both individual and collective rights to be respected immediately takes on real shape if one but thinks of electoral crises. The guiding principle in the exercise of a constitutional jurisdiction is that the function of the court is ultimately to ensure the prevalence of the will of the electorate. If this were not so, public confidence in the election process would be heavily compromised. It is important that the public perception remains throughout that it is the decision of the electorate that has prevailed." [Emphasis added]

702. In election causes, the Majority ought to have to disengaged the mechanical gear of Appellate Jurisdiction and fully considered the evidence against the dictates of burden and standard of proof. The absence of time is not a sufficient excuse. The Court has a competent institution of research and is well facilitated to be able to perform the role of an election Court as a final verifying agent in cases of monumental importance such as the present Petition.

703. I wish to make a short observation on the following paragraph in the conclusion in the decision of the Majority, where they said:

> " Let this Judgement then be read in its proper context; the electoral system in Kenya today was designed to be simple and verifiable. Between August 8, 2017 and August 11, 2017, it cannot be said to have been so. The petition before us was however simple and to the point. It was obvious to us, that IEBC misunderstood it, hence its jumbled-up responses and submissions. Our Judgement is also simple, and in our view clear and understandable. It ought to lead IEBC to a soul-searching and to go back to the drawing board. If not, this Court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the *Constitution* is a non- wavering commitment this Court makes.

704. This paragraph, to my mind is unfortunate – it is injudicious and imprudent. I reiterate, in the strongest terms, the following observation obtaining from my dissenting Judgement in *Speaker of the Senate & another v Attorney-General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR

> (249) Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of government is infallible and all are equally vulnerable to the dangers of acting ultra vires the *Constitution*. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of government must be therefore clearly delineated, limits acknowledged and restraint fully exercised. It is only through practice of such cautionary measures that the remotest possibility of judicial tyranny can be avoided.

705. Having evaluated the entire bundles of evidence submitted by the parties, and having checked the allegations made by the Petitioner against that evidence, it is clear to me that, had the Majority been engaged in the mode of a Court of exclusive original jurisdiction, it would have found that each and every allegation in the Petition was addressed to a satisfactory standard and where and if, the burden of proof shifted, the Commission discharged it satisfactorily.

706. In light of the foregoing, had I been in command of the Majority (and I am not), this would have been my determination:

O. Determination :

707. Having analysed the various sections laid out in the Rubric, having disagreed with the decision of the Majority and having consistently interpreted the *Constitution* to reflect the call in the *Constitutions* preambular paragraph: the people of Kenya, exercising their sovereign and inalienable right to determine the form of governance of our country, I hereby set down the Orders that flow from the ratio:

> 1. 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, I find it was so properly conducted and in particular with reference to Articles 1 and 38 of the *Constitution of Kenya*, and supported by Articles 2, 10, 81, 82, 83, 86 and 138.

2. As to whether there were illegalities committed in the conduct of the said election, I am satisfied that there was no instance of fraud or illegality found or proven.

3. As to whether there were irregularities committed in the conduct of the said election, I am satisfied that any irregularities that were found did not favour any particular candidate and could not have impacted in any way, on the result of the election.

4. As to whether the election was properly conducted by the 1st Respondent in accordance with the *Constitution* and the laws relating to elections, I am satisfied that with all the attendant challenges of conducing a national election, that it was so properly conducted.

5. As to whether the 2nd respondent properly declared the 3rdRespondent as President-elect in accordance with article 138(4) and 138(10) the *Constitution*, I am satisfied that indeed he did so.

6. As to whether the 3rdRespondent was validly and properly elected to the office of President of the Republic of Kenya, I am satisfied from all the evidence assessed that he indeed was.

7. Petition No 1 of 2017 is hereby dismissed.

8. Each party shall bear their own costs.

DATED AND ISSUED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2017.

.....

DK MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

PM MWILU

.....

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

....

JB OJWANG

.....

JUSTICE OF THE SUPREME COURT

SC WANJALA

.....

JUSTICE OF THE SUPREME COURT

NJOKI S NDUNGU

.....

JUSTICE OF THE SUPREME COURT

I LENAOLA

.....

JUSTICE OF THE SUPREME COURT

certify that this is a true copy of the original.

REGISTRAR,

SUPREME COURT OF KENYA