# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA AT NAIROBI

(*Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki and Lenaola, SCJJ*)

**PRESIDENTIAL PETITION NO. 1 OF 2017**

**BETWEEN**

1. **RAILA AMOLO ODINGA.....1ST PETITIONER**
2. **STEPHEN KALONZO MUSYOKA.....2ND PETITIONER**

**AND**

1. **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT**
2. **CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... 2ND RESPONDENT**
3. **H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT**

**AND**

1. **DR. EKURU AUKOT.....1ST INTERESTED PARTY**
2. **PROF. MICHAEL WAINAINA.....2ND INTERESTED PARTY**

**AND**

1. **THE ATTORNEY GENERAL.....*1ST AMICUS CURIAE***
2. **THE LAW SOCIETY OF KENYA.....*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 8th August, 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

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

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 11th August 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 18th August, 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).

## 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 11th August, 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 27th August, 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 25th August, 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 2nd August, 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 8th August, 2017, IEBC inordinately delayed in the transmission of the results. As a matter of fact, on 17th August, 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 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.

[3] Collins Kipchumba Tallam v. the Attorney-General, Petition No. 415 of 2016.
[4] Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017.

**[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.

[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 No. of 2008; [2011] eKLR.

### *(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.

**[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 8th August, 2017, at around 5.07 p.m, 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 15th August 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 included different Forms 34B

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

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.

[8] Morgan v. Simpson [1974] 3 All ER 722.
[9] Re B (Children) 2008 UKHL 35.

**[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 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.*

[10] Wavel John Charles Ramkalawan v. The Electoral Commission (2016) SCCC 11.
[11] FH v. McDougall (2008) 3 SCR 41.

(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 8th August 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.*

(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 24th August, 2017, 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 in which the 1st petitioner garnered 6,762,224 votes, being 44.74% of the votes case, while the 3rd respondent garnered 8,203,290 votes being 54.27% of the votes cast. In addition, the 1st petitioner and the 3rd respondent 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 8th August 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.

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

**[55]** On his part, the 3rd respondent 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 8th August, 2017. It was their case therefore that the results were accurately tallied, collated and declared in accordance with Article 138(10) of the Constitution.

[13] Bush v. Gore 531 US 98(2000).

### *(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 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 6th August, 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 3rd respondent 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 3rd respondent 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 11th August, 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

[14] Kenneth Otieno v. Attorney-General & Another, Petition No. 127 of 2017; [2017] eKLR.
[15] Collins Kipchumba Tallam v. the Attorney-General, Petition No. 415 of 2016;

Commission developed and implemented a policy to regulate the progressive use of technology in the process as required by Section 44(2) of the Election Act. Secondly, prior to deployment of KIEMS, the Commission undertook a series of tests including a public test carried out on 9th June 2017, (60 days before the elections) and a simulation done on 2nd August 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 3rd respondent, 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 results were transmitted between the hours of 5.08p.m, 5.09p.m, 5.12p.m and 5.14pm. Counsel for the 3rd Respondent, 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 3rd respondent for alleged breach of the provisions of Section 14 of the Election Offences Act, Mr. Chiloba deposed that on 21st June 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 3rd respondent also sought to disabuse the petitioners' allegations of intimidation of voters and in that regard Mr. Ngatia submitted that the 3rd respondent, 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 3rd respondent'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 3rd respondent. Counsel further argued that there is no evidence that any of the beneficiaries were influenced by that payment to vote for the 3rd respondent.

**[73]** In her affidavit, Winnie Guchu also refuted the claim that the 3rd respondent 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.

[16] Apollo Mboya v. Attorney General & 3 Others, Petition No. 162 of 2017.

[17] Jack Munialo & 12 Others v. Attorney-General and the Independent Electoral and Boundaries Commission, Petition 182 of 2017.

### *(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.

**[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 Election 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 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

[18] Hassan Ali Joho v. Nyange & another, (2008) 3KLR (EP) 500.
[19] John Kiarie Waweru v. Beth Wambui Mugo & 2 Others, Petition No. 13 of 2008; (2008) eKLR.
[20] Pilane v. Molomo & another, (1990) BLR 214 (HC).

***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 3rd respondent 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

[21] Buhari v. Obasanjo (2003) 17 NWLR (PT. 850) 587; (2003) 11 S.C.74
[22] Olusola Adeyeye v. Simeon Oduoye & Others (2010) LPELR_CA/I/EPT/NA/67/08.
[23] Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others, Supreme Court Petition No. 4 of 2014; [2014] eKLR
[24] Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others & 2 Others, Supreme Court Petition No.2B of 2014.
[25] Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Others, Petition No. 1 of 2016; [2016] UGSC 3.

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 3rd respondent 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 3rd respondent'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

[26] Opitz v. Wrzesnewskj , (2012) SCC 55-2012-10-256.
[27] Abubakar v. Yar'adua (2009) All FWLR (Petition 457) 1SC.

Act. Counsel also argued that any non-compliance with the law 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.

### *(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 26th June, 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

[28] Nana Addo Dankwa akufo-Addo & 3 others v JohnDramani Mahama & 2 Others, WRIT No. J 1/6/2013.

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 improve controls. She explained that ALL the ballot papers and statutory forms used in the 8th August 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 10th August, 2017, very few Forms 34A were available. On the contrary, the deponent stated that as at midnight on 9th August, 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?*

*(v) 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

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

***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 suitable where 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 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

[30] Winnie Babihunga v. Masiko Winnie Komuhamhia & Others, HTC-OO-CV-EP-004-2001.
[31] Richter v. Minister for Home Affairs & 2 Others, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC).

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 ***National Super Alliance (NASA)***

[32] Rtd. Col. Dr. Kiiza Besigye v. Yoweri Kaguta Museveni & Electoral Commission, Presidential Petition No. 1 of 2001.

***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 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.

[33] National Super Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission & 2 Others, Civil Appeal No 258 of 2017.

**[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.

[34] Jeet Mohinder Singh v. Harminder Singh Jassi, 1999 Supp(4) SCR 33; AIR 2000 SC 256

**[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

[35] Simmons v Khan EWHC B4 (QB) 2008.
[36] Nana Addo Dankwa Akufo Addo & 2 Others v. John Dramani Mahma & 2 Others, WRIT No. J 1/6/2013.
[37] Woodward v Sarsons (1875) LR 10 CP 733; [1874-80] ALL ER Rep 262.

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 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

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

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,

[39] Morgan v. Simpson (1974) 3 All ER 722.

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 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:

[40] Speaker of the Senate & another v. Attorney-General & 4 others, Reference No. 2 of 2013; (2013) eKLR.

(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.

## 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 3rd respondent, 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***

[41] George Mike Wanjohi v. Steven Kariuki & 2 others, Petition No. 2A of 2014; [2014] eKLR.

***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?

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[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 Presidential 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, Pg 149–151.
[47] *Black's Law Dictionary,* 8th ed. (Bryan A. Garner) (St. Paul, MN: West Publishing Co., 2004), p.209.

**[130]** The law places the common law principle of o*nus 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….***
>
> ***[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

[48] Opitz v Wrzesnewskyj (2012) SCC 55.
[49] Hassan Abdalla Albeity v. Abu Mohamrd Abu Chiaba & another, Petition No. 9 of 2013; [2013] eKLR.
[50] Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No.1 of 2001.

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

[51] Auburn J, 'Burden of Proof' in Malik H (ed), *Phipson on Evidence,* 17th (ed), Sweet and Maxwell, London, 2010, Pg 149–151.
[52] *Halsbury's Laws of England,* 4th Edition, Volume 17, paras 13.
[53] Raila Odinga and Others v. Ahmed Issack Hassan and Others, Petition No. 5 of 2013, par. [195].
[54] Charles Frederic, Joyce Chamberlayne, Howard C: 'The modern Law of Evidence' (1911-1916 V. II Para 937 (Heinoline).

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 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

[55] Re B (Children) (2008) UKHL 35.
[56] Wavel John Charles Ramkalawan v. The Electoral Commission (2016) SCCC 11.
[57] FH v. McDougall (2008) 3 SCR 41.

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 3rd respondent, 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.

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[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).

**[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.

**[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***

[61] Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, Petition No. 4 of 2012; [2013] eKLR.
[62] Daniel A. Farber & Suzanna Sherry, 'Judgment Calls: Principle and Politics on Constitutional Law, (2009 10(2) Engage 135.
[63] Simmons v Khan EWHC B4 (QB) 2008.

***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***

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[64] *Black's Law Dictionary* (9th Ed, 2009) 1535.
[65] Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu & 3 others, Petition No. 2 of 2013; [2013] eKLR.
[66] John Hatchard, 'Election Petitions and the Standard of Proof', (2015) Vol. 27 Denning Law Journal 291.
[67] Shiv Kirpal Singh v. Shri V. V. Giri 1971 SCR (2) 197.

***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 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

[68] Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua & 3 others, Civil Appeal No. 39 of 2013; [2014] eKLR.
[69] Jugnauth v. Ringadoo and Others [2008] UKPC 50.

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 i.e. their decision without satisfactory reasons."***

[70] M'nkiria Petkay Shen Miriti v. Ragwa Samuel Mbae & 2 Others, Civil Appeal No. 47 of 2013; [2014] eKLR.
[71] Madundo v. Mweshemi & A-G Mwanza HCMC No. 10 of 1970.

**[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 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

[72] Sarah Mwangudza Kai v. Mustafa Idd & 2 Others Election Petition. No. 8 of 2013; [2013] eKLR.

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 3rd respondent, 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

[73] In the chapter *"A critique of the Raila Odinga v. IEBC decision in light of the Legal Standards for Presidential Elections in Kenya"* in Dr. 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.

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

[76] Supra.
[77] Supra.

***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 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."*

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[78] Supra.
[79] 'The Impact of 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 C.L.R. 449.

**[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)—***

[81] 2nd Edition, by Garner Bryan A.

***(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.***

***(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:

[82] Brown v. Carr, 43 S.E. 2d 401, 130 W. Va 455.
[83] Bush v. Gore 531 US 98(2000).

> ***"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 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 of 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

[84] Buhari v. Obasanjo (2005) CLR 7(k) (SC).

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]**.**

**[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

[85] Morgan v Simpson [1974]3 All ER 722 at p. 728.
[86] Hassan Ali Joho v. Hotham Nyange & Another [2008] 3KLR (EP) 500.
[87] Moses Masika Wetangula v. Musikari Nazi Kombo, Civil Appeal No. 43 of 2013; [2014] eKLR.
[88] Abdikhaim Osman Mohammed v. Independent Electoral and Boundaries Commission [2014] eKLR.

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 3rd respondent 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.

[89] Amama Mbabazi v. Yoweri Kaguta Museveni & 2 others PT. No. 01/2016.
[90] Opitz v. Wrzesnewskyj 2012 SCC 55; [2012] 3SCR 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.

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[92] Nana Addo Dankwa Akufo Addo & Others v. John Dramani Mahma & 2 Others, WRIT No. J1/6/2013.
[93] Woodward v Sarsons (1875) LR 10 CP 733.

**[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 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***

[94] Morgan v. Simpson, [1974] 3 ALL ER 722.

> ***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, 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:

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

> ***"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;*

*(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

[96] Royal Media Services v. AG, Petition No. 346 of 2012; [2012] eKLR following Olum & Another v. AG of Uganda, [2002] 2 EA 508.

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:

> 1. ***If the election was conducted so badly that it was not substantially in accordance with the law as to***

[97] *Halsbury's Laws of England* (3rd Ed) Para 582; Craies 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 and Another (2008) 3KLR (EP) 500 at page 512.
[99] Morgan v. Simpson [1974] 3 ALL ER 722.

***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:

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

> ***"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 Election 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, 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 8th August, 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 11th August 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 8th August, 2017 to 11th August, 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 17th August, 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, J.F. 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.

**[225]** There are many other authorities which speak to this proposition. In ***Kanhiyalal Omar v. R.K. 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***

[101] Likoti, J.F., "Electoral Management Bodies as Institutions of Good Governance: 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.) Alternate citation.
[102] Election Manual (Source Book), 1st edition, 2017.
[103] Supreme Court of India on 24 September, 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.

> ***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

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[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 Chad 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 No. 12 of 2013; (2013) eKLR.

[109] In the matter of the Gender Representation in the National Assembly and Senate, Advisory opinion No 2 of 2012; [2012] eKLR.

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 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*

[110] Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007) page 9 (Kriegler Report).
[111] Kriegler Report, page 9.

> *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,

[112] Kriegler Report, page 138.

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.

**[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 Election 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.

**[237]** 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 3rd respondent 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 p.m. 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 3rd respondent 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 10th August, 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 10th August 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 14th August 2017, the deponent wrote:

***"This is a follow up on our letter dated 10th August 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 14th August 2017, the Secretary and CEO of the 1st respondent wrote;

***"Reference is made to your letter dated 14th August 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 14th August 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..."***

**[264]** 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."***

**[265]** 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?

**[266]** 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 14th August 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.

**[267]** 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 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 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 8th August 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 15th August 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 28th August, 2017 to provide the information requested.

**[278]** In summary the following are 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. 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 5th August 2017 and 11th August 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 5th August 2017 to date (being the date of the Court Order which was on 28th August, 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 29th August, 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 28th August, 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

[113] C.M.A.W.M v. P.A.W.M. Civil Appeal No. 2 of 2014; [2014] eKLR (CA).

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.***"

**[286]** 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*.

**[287]** 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.

**[288]** 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.

**[289]** In the presidential election of 8th August, 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 11th August, 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.

**[290]** 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.

**[291]** 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.

**[292]** 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.

**[293]** 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*.

**[294]** 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 8th August, 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 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 8th August, 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 3rd respondent, 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 3rd respondent 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 3rd respondent 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***

[114] Apollo Mboya v. the Attorney General and 3 Others Petition No. 162 of 2017.
[115] Jack Munialo & 12 Others v. the Attorney General & the Independent Electoral and Boundaries Commission Petition No. 182 of 2017.
[116] In Re The Matter of the Interim Independent Electoral Commission, Reference No. 2 of 2011; [2011] eKLR.

***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 3rd respondent's alleged violation of the law by his misuse of public resources. In response, the 2nd respondent stated that he wrote a letter dated 21st June, 2017, informing the Director of Public Prosecutions (DPP) about the alleged misconduct of the 3rd respondent. 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 3rd respondent 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 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 2nd August 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 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,***

[117] 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 1984 AIR 309; 1984 SCR (2) 6.

***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 Singh*** **v.** ***Shri V. V. 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***

[118] Shiv Kirpal Singh v. Shri V. V. Giri 1971 SCR (2) 197.

***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, 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 8th August, 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 3rd respondent 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 3rd respondent 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."***

[119] In Re The Matter of the Interim Independent Electoral Commission, Reference No. 2 of 2011; [2011] eKLR.

**[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 ***S. K. 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 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

[120] S. K. Macharia and Anor v. KCB Sup. Ct. Application No.2 of 2011, [2012] eKLR

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 8th August, 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 8th August 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?

### *(iii) 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. P.L.O 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 8th August, 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 8th August 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 21st September, 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 28th August,

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 8th August 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 8th August 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

[121] National Super Alliance (NASA) Kenya v. The Independent Electoral & Boundaries Commission & 2 Others, Petition No. 328 of 2017; [2017] eKLR.

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"* 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

[122] Soli J Sorabjee, Rule of Law A Moral Imperative for South Asia and the World, Soli Sorabjee Lecture , Brandeis UniversityMassachusetts,14thApril 2010 at page 2. Available at http://www.brandeis.edu/programs/southasianstudies/pdfs/rule_of_law_full_text.pdf.
[123] [Lutisone Salevao, Rule of Law, Legitimate Governance and Development in the Pacific, (ANU Press, 2005)], Page 2.
[124] Independent Review Commission Report on the General Elections held in Kenya on December 2007 Chapter III, (Kriegler Report) at 32.
[125] Edwin Odhiambo Abuya 'Can African States Conduct Free and Fair Elections?', Vol. 8 Issued (Spring 2010) Northwestern Journal of International Human Rights, p.123.
[126] Ibid.

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***

[127] Edwin Odhiambo Abuya, 'Consequences of a flawed presidential election', Legal Studies Vol 29, Issue 1 March, 2009 pp127-158
[128] Above Note 1.
[129] Ponnala Lakshmaiah v. Kommuri Pratap Reddy & Others, Civil Appeal No. 4993 of 2012 arising out of S.L.P. (C) No. 20013 of 2010.

***of law and should not be 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 8th August, 2017 and 11th August, 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 J. B. Ojwang and N. S. Ndungu, SCJJ dissenting), we make the following final Orders:

***(i) A declaration is hereby issued that the Presidential Election held on 8th August, 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 irregularities and illegalities in the Presidential election of 8th August, 2017 were substantial and significant that they affected the integrity of the election, the results not- withstanding.***

***(iii) 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;***

***(iv) 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 1st September 2017 under Article 140(3) of the Constitution.***

***(v) Regarding costs, each party shall bear its own costs.***

**DATED** and **DELIVERED** at **NAIROBI** this **20th Day** of **September 2017.**

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|---|---|
| **.....** | **.....** |
| **D. K. MARAGA** | **P. M. MWILU** |
| **CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT** | **DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT** |
| **.....** | **.....** |
| **J. B. OJWANG** | **S. C. WANJALA** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |
| **.....** | **.....** |
| **N. S. NDUNG'U** | **I. LENAOLA** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

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

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