REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NUMBER 1 OF 2017

BETWEEN

H.E. RAILA AMOLO ODINGA…….....1ST PETITIONER
H.E. STEPHEN KALONZO MUSYOKA…….....2ND PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION…….....1ST RESPONDENT
THE CHAIRPERSON OF INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION….…….....2ND RESPONDENT
H.E. UHURU MUIGAI KENYATTA…….....3RD RESPONDENT

1ST & 2ND RESPONDENTS' WRITTEN SUBMISSIONS

INTRODUCTION

1. Following the **8th of August 2017** General Elections, the 2nd Respondent, being the Returning Officer for the presidential election pursuant to **Article 138 (10) (a)** of the Constitution, declared the results of the said election, to wit, the valid votes cast as follows:

    i) John EkuruLongoggy Aukot….....**27,311 (0.18%)**
    ii) Mohamed Abduba Dida.....**38,093 (0.25%)**
    iii) Shakhalaga KhwaJirongo.....**11,705 (0.08%)**
    iv) Japheth Kavinga Kaluyu.....**16,482 (0.11%)**
    v) Uhuru Kenyatta.....**8,203,290 (54.27%)**
    vi) Michael Wainaina Mwaura.....**13,257 (0.09%)**
    vii) Joseph William Nthiga Nyagah.....**42,259 (0.28%)**
    viii) Raila Odinga.....**6,762,224 (44.74%)**

2. The 3rd Respondent was declared elected as President after receiving 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 pursuant to **Article 138 (4)**of the Constitution. It is this outcome that the Petitioners have now challenged before this Honourable Court.

3. The 1st and 2nd Respondents in their joint Answer to the Petition filed on **24th August 2017** have disputed the averments in the Petition and pray that this Honourable Court dismisses the Petition with costs. The 1st and 2nd Respondents have also filed replying affidavits in response to the affidavits filed in the Petition.

ISSUES FOR DETERMINATION

4. The issues for determination and adjudication in the Petition can be broadly summarised under three thematic areas as follows;

   *(i) Whether the 3rd Respondent was validly elected and declared the President-elect by the 2nd Respondent during the presidential elections held on **8th August 2017**; and*

   (ii) What reliefs should this Honourable Court grant?

Whether the presidential election held on the 8th of August 2017 was conducted in a free, fair, transparent and credible manner in compliance with the constitution and applicable laws

THE CONSTITUTIONAL AND STATUTORY THRESHOLDS FOR A FREE, FAIR, CREDIBLE, ACCOUNTABLE AND TRANSPARENT ELECTION

5. From the outset, the 1st& 2nd Respondents submit that the election of a President is a process. ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** **[2012] eKLR Supreme Court of Kenya Advisory Opinions Application 2 of 2012**, this Court held as follows;

*"**Election of the President is a process, beginning from primary elections to the final election which will lead to the identification of a president-elect', and further that ' a presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for the election as President"- and this touches on the tasks of agencies such as political parties which deals with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election**."*

6. Since the last General Election held on**4th March 2013**, the 1stRespondent in just over a period of 4 years has satisfactorily executed a significant number of tasks towards a successful electoral process. As stated in the replying affidavit of Ezra Chiloba, the 1st Respondent has undertaken the following;

   a) Designing and implementing the new **Strategic Plan 2015-2020** setting out key priorities for strengthening electoral systems and processes in Kenya. The Plan was launched in **July 2015**;

   b) Designing and implementing the two-year **Elections Operations Plan 2015-2017** as a roadmap towards free, fair and credible 2017 General Election, and launching the same in **January 2016**;

   c) Concluding the law reform agenda through support for various electoral laws and regulations including:

      i) The Election Laws (Amendment) Act, No. 36 of 2016;
      ii) The Election Laws (Amendment) Act, No. 1 of 2017;
      iii) The Election Offences Act, 2016;
      iv) The Elections (General) (Amendment) Regulations, 2017;
      v) The Elections (Registration of Voters) (Amendment) Regulations;
      vi) The Elections (Technology) Regulations;
      vii) The Elections (Party Primaries and Party Lists) Regulations, 2017; and

viii) The Elections (Voter Education) Regulations, 2017

d) Conducting two (2) phases of Mass Voter Registration in **2016** and **2017**, including registration of Kenya Citizens in Prisons and the Diaspora respectively and increasing the number of registered voters from **14.4 million** in **2013** to **19.6 million** voters in **2017**;

e) Conducting an audit of the register of voters as required by **Section 8A** of the **Elections Act, 2011**, as amended;

f) Closing the registration of voters on the **7th March 2017** pursuant to **Regulation 15** of the **Election (Registration of Voters Regulations 2012**;

g) Opening the register of voters for verification of biometric data by members of the public in accordance with **Section 6A (1)** of the **Elections Act** between **10thMay 2017**– **9th June 2017**;

h) Certification of the register of voters in accordance with **Section 6A(3)(a)** of the **Elections Act**;

i) Publication of the timetable and roadmap for the party primaries and General Election through the Gazette Notice of **17th March 2017**;

j) Resolving disputes arising from nomination of candidates. Over **70%** of the disputes the 1stRespondent handled were from the Orange Democratic Movement Party;

k) Registering over **14,500** candidates to participate in the 2017 General Election which is an increase of approximately **16%** from the 2013 General Election;

l) Gazettement of **40,883** polling stations and **338** tallying centres across the country including the prisons and for the Diaspora;

m) Gazettement of County Returning Officers, Deputy County Returning Officers, Constituency Returning Officers and Deputy Constituency Returning Officers through various Gazette Notices, Addenda and Corrigenda;

n) Acquisition and deployment of an integrated electoral management system for voter registration, voter identification, candidate registration and results transmission;

o) Procurement and distribution of election materials to polling stations across the country;

p) Recruitment, training and deployment of over **360,000** election officials across the country;

q) Undertaking continuous voter education programmes across the country using different strategies and platforms;

r) Accreditation of over **15000** election observers, **105** international observer institutions, **255** local observer institutions, more than **7,000** journalists from over **30** local and international media houses;

s) Enabling the development and implementation of a Code of Conduct for candidates and parties participating in the elections;

t) Throughout engaging all stakeholders through a constant flow of information on its website iebc.or.ke, established the Political Parties Liaison Department, organised the National Elections Conference 2017 and continuously availed itself to consult with stakeholders and in particular, political parties;

u) Engaging Parliament on the reform of election laws and despite delays occasioned in the legislative process, developing and implementing regulations including those for political party primaries wherein the Commission assisted political parties to adopt the Candidate Results Management System that improved political party processes;

v) Streamlining and enhancing its processes and documentation including procuring Results Declaration Forms and Ballot Papers with improved and enhanced security features;

w) Deploying and testing technology and trained staff on its use. By mid-June 2017, the Commission had deployed nearly all the KIEMS (Kenya Integrated Elections Management System) gadgets (after configuring them to ensure that data from the Register of Voters was copied accurately into the correct system). The KIEMS have two key functionalities-the Electronic Voter Identification Device (EVID), and the Results Transmission System (RTS). Linkage and communication of the register of voters, electronic identification of voters and electronic transmission of results was therefore achieved. In addition, the technology allowed for political party and candidate registration systems;

x) On or about **8th May 2017**, launched the Election Security Arrangement Programme to facilitate a multi-agency election risk assessment and response centre; and

y) Executed all necessary tasks.

7. During the period, the 1st Respondent had to contend with several amendments to the Elections Act and particularly in **2016** and **2017**. These amendments constricted the timelines of the Commission and called for decisive urgent action in order to ring-fence the scheduled processes and programs.

8. Most of the amendments to the statutes had the effect of sealing gaps capable of compromising the conduct of free and fair elections, and gave political parties and their members adequate time to conduct party primaries and to audit the electoral processes on a consistent basis. The following are examples of key amendments to the **Elections Act, Act No. 24 of 2011**:

i) **Section 3A** of the Act that allowed for registration using a registration slip for a citizen who has attained the age of 18 but may only vote using the Identity Card was deleted by **Act No. 36 of 2016**;

ii) **Section 6** now requires the opening of the Register of Voters **90 days** from the date of the General Election for inspection for at least **30 days** or such period as the Commission may consider necessary. Previously the period prescribed was **60 days** from the General Elections and inspection over **14 days** or such period as the Commission may consider necessary;

iii) **Section 6A** introduced the verification of biometric data not later than **60 days** before the General Election and the Commission opens the Register of Voters for verification of biometric data by members of the public at their respective polling stations, and the Commission shall make the necessary revision and publish in the Gazette (**Section 5** of Act **No. 36 of 2016**and **Section 5** of **Act No. 1 of 2017**);

iv) A new **Section 8A** requires the audit of the Register of Voters at least **6 months** before a general election by a reputable firm. The Commission shall implement the recommendations of the Audit Report (**Section 6** of **Act No. 36 of 2016**);

v) **Section 13(3) (c)** has been amended to increase the period to the election when political parties shall nominate candidates to **55 days**. Previously this period was **45 days**;

vi) A new **Section 38A** provides that for the purposes of providing efficient and effective conduct of elections, the number of voters per polling station shall not exceed **700** (**Section 16Act No. 36 of 2016, Act No. 1 of 2017**);

vii) **Section 39(1) A** now requires the Commission to appoint Constituency Returning Officers who shall be responsible *inter alia* for collating of and announcing of the results from each polling station for the election of president, county governor, senator, and county women representative to the

National Assembly, submitting in the prescribed form the collated results for the election of president to the National Tallying Centre;

viii) **Section 39(1) C**, provides that for purposes of the presidential election the Commission shall electronically transmit in the prescribed form the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre, tally and verify the results received at the national tally centre and publish the polling result forms on an online public portal maintained by the Commission;

ix) Under the **Section 44**, use of technology is liberally and laboriously amplified. The Commission shall establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. (**Act No. 36 of 2016, Act No. 1 of 2017**). **The Elections (Technology) Regulations**, **Legal Notice No. 68 of 2017** were gazetted on **21st April 2017**.

9. Stakeholders and in particular, the Petitioners' sponsoring parties and Coalition Partners severally challenged various aspects of the Elections Laws and the process leading to elections in a number of cases as set out hereunder;

a) On register of voters:

i) ***Republic vs. Independent Electoral and Boundaries Commission ex Parte Gladwell Otieno*, Judicial Review No. 447 of 2017, [2017] eKLR** (Odunga J) on 3 rd August 2017)

The issues for determination were whether the IEBC was required to publicize and gazette the final register of voters per polling station before the general elections scheduled for **8th August 2017**, and whether the IEBC had failed to open up the voter register for inspection and allowed for sufficient time for revision of the register taking into account the public views from the inspection. The Court

ordered that the Register of Voters be availed for inspection to the Public at all Polling Stations, by way of public web portal or any other medium the Commission may approve. The Court also ordered the Commission to publish in the media a confirmation that the Register of Voters is open for inspection and the manner of and the period for such inspection by the Public within the following **48 hours**.

b) <u>On procurement of ballot papers</u>:

ii) ***<u>Republic v. Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others</u>*** **Judicial Review No. 637 of 2016, [2017] eKLR** *(Tender Number IEBC/01/2016 – 2017 to Al Ghurair Print and Publishing Company Limited of Dubai*) (Odunga J on **13th February 2017**)

The issues for determination were whether the IEBC was properly constituted at the time when the tender for supply of ballot papers was issued. Other issues for determination were whether the changes in the legislative framework should have been taken into account, and whether in view of the impending general elections, public interest would be served if the tender was nullified. The Learned Judge held that there are no enabling provisions in the Constitution of Kenya that would allow members of the Commission who have resigned from office to extend tenure and make decisions in an acting capacity. The award of the tender for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers ought to have taken into account the current legislative framework that has been put in place to ensure the constitutional threshold is attained. Contravention of Constitutional or statutory provisions cannot be justified on grounds of public interest. An order for certiorari quashing the award of tender for supply and delivery of ballot papers to Al Ghurair Print and Publishing Company and IEBC be at liberty to restart the tender process.

iii) ***Republic v. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others*, Judicial Review No. 378 of 2017, [2017] eKLR** (Joel Ngugi G.V. Odunga John M. Mativo. JJ, on **7th July 2017**)

The issues before the Court were whether the decision to award the tender for the procurement of ballot papers to Al Ghurair Print and Publishing Company Limited was accentuated by bias, and whether the IEBC was constitutionally obliged to facilitate public participation as part of the tender process for the printing of Election Materials including Ballot papers for Presidential Elections. In the event that IEBC was obliged to facilitate public participation was there sufficient public participation in the award of the tender to print Election Materials including Ballot Papers for Presidential Elections, and whether the court should decline to grant the reliefs sought on public interest grounds. On the facts before it, the court could not come to the conclusion that the process followed by the IEBC in awarding the tender to the 1st Interested Party was marked with bias and improper considerations. Public participation must apply to all procurement the only variation being the degree and form which is dependent on the circumstances of the procurement being done. The absence of a legislative framework on public procurement does not hinder the court from applying the national values and principles of governance. Therefore, given that public participation is one of the national values and principles of governance, then IEBC was constitutionally obliged to facilitate it in the circumstance. The threshold and standards of public participation as set out in the Constitution and Case Law was not met by the IEBC. Public interest does not override the grant of Judicial Review orders as it has not been established that such a grant would make it impossible for the IEBC to carry out its constitutional mandate. The Court issued an order of certiorari for the purposes of being quashed the decision of the Independent Electoral and Boundaries Commission (IEBC) awarding the tender for the printing of election materials including ballot papers for the Presidential

elections scheduled for 8th August 2017 to the 1st Interested Party, and an Order of mandamus compelling the Independent Electoral and Boundaries Commission (IEBC) to commence de novo the procurement process for the award of the tender for the printing of election materials for the Presidential elections scheduled for 8th August 2017 in accordance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws so as to ensure that free, fair, credible and transparent elections are conducted on the said date.

iv) ***Al Ghurair Printing and Publishing LLC v. Coalition for Reforms and Democracy & 2 Others*****, Civil Appeal No. 63 of 2017, [2017] eKLR**(A. K. Murgor, S. Gatembu Kairu, D. K. Musinga JJA on **26th April 2017**)

(being an appeal against Republic v. Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others **Judicial Review No. 637 of 2016, [2017] eKLR)**

The issues for determination on appeal were whether the IEBC was properly constituted at the time of making the impugned award, whether there was non-compliance with the **Election Laws (Amendment) Act, 2016 (ELAA)** at the time of award of the tender and whether the said law was applicable retrospectively, and whether public interest militated against grant of the orders sought in the Judicial Review application. The court agreed with the High Court Judge that there is no constitutional provision that allows Chairperson and Commissioners of the IEBC to remain lawfully in office and discharge both constitutional and statutory mandate after their offices being declared vacant.Given that the Commission was not properly constituted when the procurement contract was executed, the said contract was void in law. The decision of the IEBC was therefore properly quashed by the trial court. The trial judge's view that the award of the tender ought to have taken into account the current

legislative framework could not be faulted. The same should however not be taken to mean that the ELAA was applicable retrospectively but that the IEBC should have had the legal development in consideration before it executed the said procurement contract. The court agreed with the trial judge that contravention of Constitutional or statutory provisions cannot be justified on a plea of public interest. The court added that Public Interest cannot override constitutionalism. The court by majority thus upheld the decision of the trial court and dismissed the Appeal.

v) ***IEBC v. NASA & 6 Others Court of Appeal at Nairobi*, Civil Appeal No. 224 of 2017 (Unreported)** (Githinji, Visram, Nambuye, Mohammed, Otieno-Odek JJA) on **20th July 2017**)
(Being an appeal from Nairobi, High Court Judicial Review No. 378 of 2017)

The issues before the Court were whether NASA had proved the allegations of close association between the 2nd Respondent therein and the President, whether there was still time available for the IEBC to procure election materials; and whether the learned judges erred in law in finding that public participation is a mandatory pre-condition in direct procurement conducted pursuant to the provisions of the **Public Procurement and Asset Disposal Act, 2015**. Other issues were whether the learned Judges erred in imposing a constitutional threshold of public participation which does not exist, and whether the learned judges erred in law and fact in failing to appreciate that the orders sought by the 1st Respondent were not capable of being granted because they had the effect of splitting the tender in contravention of **Section 54** as read with **Section 176(a)** of the **Public Procurement and Asset Disposal Act, 2015**. It was also urged that the learned Judges erred in law and fact by failing to correctly weigh and apply the principle of public interest, and that the trial court did not err in arriving at the conclusion that the 1stRespondent did not tender tangible and sufficient evidence to prove allegations of close

association between the 2nd Respondent and the President. In addition, it was urged that the learned judges erred in law when they found that there was still time available to the Appellant to procure election material, and public participation must apply to all procurements though the degree and form of such participation will depend on the peculiar circumstances of the procurement in issue. The learned Judges of Appeal held that the scope and degree of competitiveness and public participation is progressively reduced as one approaches the direct procurement method. The trial court erred when it imposed a requirement for public participation prior to the Appellant making the decision to adopt direct procurement method to procure election material and ballot papers for presidential elections. The Contract between the Appellant and 2nd Respondent is severable in accordance with the contract itself and in law. The Court erred in granting the orders of certiorari and mandamus without due weight and consideration to public interest and the statutorily regulated timelines for the tendering process embodied in **Regulations 36**, **40**, **46**, **54(5)** of the **Procurement Regulations 2005**, and **Section 80 (6)** of the **Public Procurement and Asset Disposal Act, 2015**. The appeal was allowed and the Judgment of the High court set aside to the extent that the Court erred in finding that public participation is a mandatory requirement in public procurement. The Court of Appeal also found that the Court erred in granting orders of certiorari and mandamus without due weight and consideration to public interest and the statutorily regulated timelines for the tendering process. The Court set aside the orders of certiorari and mandamus issued by the High Court.

c) <u>On recruitment of returning officers</u>:

vi) ***<u>NASA v. IEBC</u>*, Nairobi Judicial Review Application No. 238 of 2017**

The issues for determination were whether there was compliance with **<u>Regulation 4</u>** of the **Elections (General) Regulations** that requires the

involvement of political parties and independent candidates in the appointment of returning officers. The Parties by consent agreed that going forward, the Respondent would avail to all duly registered political parties and eligible independent candidates a list of all Returning Officers for the General Election scheduled to be held on **8thAugust 2017** by close of business on **22ndJune 2017**, the IEBC would publish the list of Returning Officers on its website and this would constitute adequate notification for purposes of the Election (General) Rules. Political Parties and independent candidates were at liberty to make representations, in writing, to the Respondent regarding the officers on the list by **6thJuly 2017**. The matter was duly marked settled with no orders as to costs.

d) <u>On technology deployment</u>:

vii) ***<u>NASA v. IEBC</u>*,Nairobi Constitutional Petition No 328 of 2017, [2017] eKLR**(Kimondo, Mabeya, Ongúndi JJ on **21st July 2017**)

The issues for determination were whether the IEBC ought to have developed a complementary mechanism for the identification of voters and transmission of election results within **60 days** before the general elections pursuant to **<u>Section 44A</u>** of the **Elections Act** and had failed to do so. The Court held that nowhere in **<u>Section 44A</u>** is there any reference to timelines as to when the Regulations, if any, under that section were to be enacted. The complementary mechanism in **<u>Section 44A</u>** need not be similar to the one set out in **<u>Section 44</u>** of the Act. It should add to or improve the electronic mechanism in **<u>Section 44</u>** of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. IEBC had put in place a complementary mechanism for identification of voters and transmission of election results as required by **<u>Section 44A</u>** of the Act as set out in **<u>Regulations 69</u>** and **<u>83</u>** of the **Elections (General) Regulations** which regulations had not been challenged. If the exclusive electronic system failed, it would throw the entire election into jeopardy and imperil our

democracy. The Court, therefore, found that it would not be feasible to declare that the elections held on **8th August 2017** be exclusively electronic.

viii) ***NASA v. IEBC*, Court of Appeal at Nairobi Civil Appeal No. 258 of 2017** (Nambuye, Koome, Musinga JJA), being an appeal on the decision of the Judgment and Decree of the High Court of Kenya at Nairobi in **Constitutional Petition No. 328 of 2017** (Kimondo, Mabeya and Ong'undi, JJ.) delivered on **21st July 2017**.

Following the agreement by all parties to adopt the Internal Memo issued by the 1st Respondent on **27th July 2017**, the contents of the 1st Respondent's Internal Memo dated **27th July 2017** would be adhered to by all concerned persons in application of **Regulations 69** and **83** of the **Elections (General) Regulations, 2017**. Each party to bear its own costs of both the Petition in the High Court and the Appeal.

ix) ***Khelef Khalifa, Maina Kiai & Others v. IEBC*, Nairobi Constitutional Petition No 168 of 2017** (Mativo J on 19th July 2017)

The issue for determination was whether or not IEBC violated the provisions of **Sections 44 (1)**, **(2)**&**(4)** of the **Elections Act**, and **Legal Notice No. 78** of **15th July 2005**. The Court found that all the electronic devices had undergone physical inspection and laboratory testing of the KIEMS and by KEBS and had been certified as meeting the proper standards.

e) On results declaration:

x) ***IEBC v. Maina Kiai & Others*, Court of Appeal at Nairobi Civil Appeal No 105 of 2017, [2017] eKLR** (Asike-Makhandia, Ouko, Kiage, M'Inoti, Murgor JJ.A on **23rd June 2017**)being an appeal against the decision by the High Court in **High Court Petition No. 207 of 2016**that challenged the constitutionality of **Sections 39 (2)**&**(3)**

of the **Elections Act**, **Regulations 82(2)**, **84(1)** and **87(2)(c)** of the **Elections (General) Regulations 2012** on tallying, announcement and declaration of results of the presidential election.

The issues for determination were whether results announced by the Constituency Returning Officer in respect of the elections of the President are provisional and subject to confirmation by the IEBC. The Court upheld the determination of the High Court that to the extent that **Section 39(2)** and **(3)** of the **Elections Act** and **Regulation 87(2)(c)** of the **Elections (General) Regulations** provide that the results declared by the returning officer are provisional, and to the extent that **Regulation 83(2)** provides that the results of the retuning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void.

10. The 1st and 2nd Respondents submit that virtually all key aspects of the electoral process have been litigated upon by the Petitioners and other stakeholders. In complying with the decisions made by the High Court and Court of Appeal of competent jurisdiction have contributed an additional level of assurance of a free, fair and transparent process.

11. The Petitioners and their sponsoring parties, coalitions and supporters seized every opportunity to undergird the electoral process not only in Parliament through the legislative process, but also in the Courts of law where every perceived vulnerable space attracted court proceedings. The IEBC was throughout engaged in implementing the electoral processes in accordance with the law and ensuring compliance with Court Orders with a view to achieving a free and fair election, which it did, the time constraints notwithstanding.

12. The Petitioners aver in **paragraphs 5** and **6** of the Petition that:

"…the Presidential Election was so badly conducted, administered and managed by the 1st Respondent 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; the Elections Act …and the Regulations made there under including the Electoral Code of Conduct and other relevant provisions of the Law' and that 'the massive, systemic, systematic and deliberate non-compliance with the Constitution and the Law goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya; undermines the foundation of the Kenyan system as a sovereign republic where the people are sovereign under Article 4 of the Constitution; and severely undermines the very rubric and framework of Kenya as a nation State' and in paragraphs 14 and 15 that 'the Presidential Election was so badly conducted and marred that with irregularities that it does not matter who won or was declared as the winner…the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1st Respondent cannot accurately and verifiably determine what results any of the candidates got."

These sentiments, it is humbly submitted, are sensational, unjustified and without factual basis and merely echo the report findings by the **Independent Review Commission on the General Elections held in Kenya** on **27th December 2007** (the Kriegler Report) where the summary of conclusions was damning (**pages 8-10**) and included the following dire findings:

i) *A materially defective voter register;*

ii) *Delimitation that had not been carried out;*

iii) *Fraud and manipulation of the vote as was attested to by numerous eyewitness accounts and election observer reports;*

iv) *Defective planning of tallying, recording, transcribing, transmitting and announcing of results;*

v) *Incompetence, to the effect that 'the conduct of the 2007 elections was so materially defective that is was impossible for IREC or anyone else*

to establish the true or reliable results for the Presidential and Parliamentary elections'; and

vi) *The appointment of Commissioners to the then Electoral Commission of Kenya that was materially defective.*

13. As submitted earlier, the electoral environment in Kenya has significantly improved with tremendous milestones achieved in the legal and statutory framework, the organisational structure of the IEBC and its administrative functions to support elections and the adoption of more effective technology. It is not a *'doomed decade'* as the Petitioners would have this Honourable Court believe.

2. 1ST RESPONDENT'S MANDATE TO CONDUCT ELECTIONS

14. **Article 88** of the Constitution grants the 1st Respondent the mandate for conducting or supervising referenda and elections to any elective body or office established by the Constitution. The attendant activities including the continuous registration of voters, the regular revision of the voters' roll, the delimitation of constituencies and wards, the regulation of the process by which parties nominate candidates for elections, the settlement of pre-electoral disputes, the registration of candidates for election and voter education are the responsibility of the IEBC.

15. **Article 81**of the Constitution requires the 1st Respondent to set up a system and manage elections in accordance with the general principles set out in the Constitution. The components of a free and fair election are ***by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner***.

16. The electoral system, must also comply with **Article 86**of the Constitution which provides that whatever voting method is used, the system should be:

i) ***Simple, accurate, verifiable, secure, accountable and transparent;***

ii) Votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

iii) The results from the polling station are openly and accurately collated and promptly announced by the returning officer; and

iv) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of electoral materials.

The **Elections Act, No. 24 of 2011**, as amended from time to time, gives effect to these constitutional principles.

3. THE ELECTORAL PROCESS

17. The electoral process entails the following processes:

i) *Register of voters (Inspection, updating and audit, verification of biometric data);*
ii) *Registration of voters;*
iii) *Voter education;*
iv) *Appointment of polling officials;*
v) *Establishment of polling stations;*
vi) *Nomination of candidates;*
vii) *Voting;*
viii) *Counting of Votes;*
ix) *Declaration of results*
x) *Tallying;*
xi) *Transmission;*
xii) *Dispute resolution*
xiii) *Post-Election Audits*
xiv) *Reform of Electoral Laws*

18. The Petitioners have challenged the following processes:

i) *Appointment of polling officials;*

ii) *Establishment of polling stations;*

iii) *Voting;*

iv) *Counting of Votes;*

v) *Tallying;*

vi) *Transmission; and*

vii) *Declaration of results.*

The 1st and 2nd Respondents will address each of the challenges raised in respect of the above processes sequentially. With respect to the allegations in the Petition, the 1st and 2nd Respondents refer The Court to the decision of the Supreme Court of India on the need to plead complaints with clarity and precision in the case of ***Charan Lal Sahu& Others vs. Giani Zail Singh & Another*** [1984] AIR 309. The court held as follows;

> *'It is not open to a Petitioner in an election Petition to plead in terms of synonyms.* ***In Election Petitions pleadings have to be precise, specific and unambiguous so as to put the respondent on notice. The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary.***
>
> ***Precision in pleadings particularly in Election Petitions is necessary. The importance of a specific pleading in election petitions can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet.*** *He cannot be kept guessing whether the Petitioner means what he says. The Petitioner cannot be allowed to keep his options open until the trial and adduce such evidence as seems convenient and comes handy. It is therefore impermissible to substitute the word consent for the word 'connivance' which occurs in the pleadings of the petitioners.'*

i) Appointment of polling officials

19. The Petitioners, under the sub- titling ***'ungazetted and undesignated returning and presiding officers'*** aver in **paragraph 23** of the Petition that a significant number of **Forms 34B** were executed by persons not gazetted as Returning Officers and not accredited as such by the 1st Respondent thereby rendering those results invalid. This, it is alleged, was in breach of **Regulation 5** of the **Elections (General) Regulations** in the appointment of presiding officers. The Petitioners have not substantiated their

claim and have not identified any **Form 34B** that was executed by a person not gazetted as a constituency returning officer.

20. The 1st and 2nd Respondents submit that the allegation and complaint is unfounded. Regulations that govern the appointments of returning officers are **Regulations 3** and **4** of the **Elections (General) Regulations**. **Regulation 5** governs the appointment of presiding officers. The regulation does not require the gazettement of presiding officers appointed by the 1st Respondent.

21. **Regulation 5** of the **Elections (General) Regulations** provides for a transparent and competitive appointment of presiding officers for every polling station and such deputy presiding officers as may be necessary. **Regulation 5(2)** provides that prior to the appointment, the Commission shall provide a list of persons proposed for appointment to political parties and independent candidates at least **14 days** prior to the proposed date of appointment to enable them make any representations. The 1st Respondent duly complied with this statutory requirement as set out in the affidavit of Ezra Chiloba sworn on 24th August 2017.

22. The Petitioners also contend that the 1st Respondent did not provide a list of persons proposed for appointment as presiding officers, and a significant number of returns were allegedly signed by strangers who could not be held to account thereby rendering those results invalid and unconstitutional. This allegation is unsubstantiated and the Petitioners have not identified any polling station where the returns were signed by 'strangers'. No affidavit evidence has been tendered in support of this claim.

23. With regard to the allegations by **Ibrahim Mohamud Ibrahim** and **Mohamed Noor Barre** in their separate affidavits sworn on the **18thAugust 2017**, there is no proof that they were appointed to serve as presiding officers at **Guticha Primary School** and **Kulicha Primary School** respectively in **Mandera North Constituency** or that they took an oath of secrecy as alleged. Furthermore, they do not disclose particulars of the alleged **70** other persons who allegedly suffered a similar fate. They have also not given any details or proof of the alleged report made to Rhamu Police Station. The sensational allegation should therefore be rejected.

24. With regard to the same allegations in **paragraphs 67**, and **229** of the affidavit sworn by **Dr Nyangasi Oduwo** on **18th August 2017**, we submit that the deponent has not given any particulars to substantiate the claim.

25. The list of persons proposed for appointment as presiding officers was duly forwarded to all Political Parties through the Office of the Registrar of Political Parties as required under the Regulations. Ms Lucy Ndun'gu, the Registrar of Political Parties has, in **paragraph 12** of her affidavit sworn on **24th August 2017**, confirmed that she notified all political parties of all persons who the 1st Respondent proposed to recruit as presiding officers. In the premises no strangers presided in any polling stations as alleged.

ii) <u>Establishment of polling stations</u>

26. **<u>Regulation 7</u>** of the **Elections (General) Regulations** provides for assignment of an electoral area, appointment of a place at which the polling station or stations for each electoral area shall be established. The Commission shall publish in the Gazette and publicise through electronic and print media of national circulation a notice specifying the polling station established, the distinguishing numbers or letters assigned to each polling station and the places designated for the establishment of the polling stations for each electoral area.

27. The Petitioners allege in **paragraph 23** of the Petition that the 1st Respondent ***"illegally and fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election"***. Further, that the alleged results 'materially' affected the result of the Presidential Election. The Petitioners have not identified the alleged 'secret and ungazetted' polling stations, the results declared and when they were added to the final tally by the 1st and 2nd Respondents.

28. With regard to the same allegations in **paragraphs 67**, and **229** of the affidavit by **Dr. Nyangasi Oduwo** sworn on **18th August 2017**, we submit that the deponent has not

given any particulars to substantiate the claim and the allegation should be rejected by this Court.

29. The 1st Respondent has addressed the allegations by the Petitioners at **paragraphs 70**, **73** and **206** of the affidavit by **Ezra Chiloba** sworn on the **24th August 2017** in response to the allegations in **paragraphs 67**, and **229** of the affidavit by **Dr. Nyangasi Oduwo** sworn on **18th August 2017**.

30. **Ibrahim Mohamud Ibrahim** and **Mohamed Noor Barre** in their separate affidavits sworn on**18th August 2017**, have also alleged violation an Order issued by Justice E.C. Mwita on **31stJuly 2017** in **Nairobi Constitutional Petition No. 362 of 2017**, ***Mohamud Ibrahim Alio & 2 Others v. IEBC***. The 1st and 2nd Respondents submit that the *Court of Appeal in Civil Application Number 188 of 2017; IEBC versus Mohamud Ibrahim Alio & 2 Others,* issued a stay order of the High Court decision and consequently, the **Mandera North Constituency Tallying Centre** remained at the Sub-County Commissioner's Office Block as Gazetted by the IEBC. In the premises, there has been no disobedience of any court order as alleged by the deponents.

31. The 1st Respondent therefore submits that it fully complied with **Regulation 7**of the **Elections (General) Regulations** in the establishment of the polling stations and Tallying Centres.

iii) Voting

32. In **paragraph 21.5.6.** of the Petition, the Petitioners allege that the 1stRespondent colluded with the 3rd Respondent and allegedly ejected the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions. The same allegation is made in **paragraph 11** of the affidavit of **Dr. Nyangasi Oduwo** sworn on **18th August 2017**. None of these claims are substantiated and no particulars whatsoever are given as required by law.

33. In addition, one **Moses Wamuru**, in his affidavit sworn on **18th August 2017** makes general allegations that NASA agents were ejected from various polling stations in

Embu County. He does not however identify the agents who were allegedly ejected, the presiding officers who allegedly ejected the agents or the affected polling stations. The allegation does not meet the threshold of precision required of affidavits in election petitions. In any event, NASA is not a political party eligible to appoint agents pursuant to **Section 30** of the **Election Act**, as read together with **Regulation 5** and **62** of the **Election (General) Regulations**. (Possibility of verification).

34. Mr. Wamuru also makes sweeping and generalized allegations that in many polling stations including **Gichera Primary**, **Runyenjes Central**, and **Ngurweri**, indelible ink was not used and voters confessed to have voted more than once. The deponent does not identify the number or the particulars of the voters who committed the alleged electoral offence. In view of the seriousness of the allegation, no explanation is given why a report was not made at the nearest police station for the arrest of the voters and the election officials who would have brazenly permitted such offences to go unpunished.

35. Furthermore, Mr.Wamuru makes wild allegations that at **Karurumo Polytechnic**, Kyeni South that voters were being given two and three and at one point even eight ballots. In the latter event he alleges that he intervened and the excess papers were taken away from the voter who was then allowed to proceed and vote. These allegations are totally unsubstantiated as no contemporaneous complaint was made to the returning officer of the electoral area or the police by either the deponent or NASA. Further, there are no details given of the identity of the errant polling clerks, presiding officers and voters. We invite the Court to take judicial notice that two Police Officers were deployed to each polling station and the fact that the deponent does not demonstrate the steps taken to bring this to the attention of these officers is confirmation that these allegations are false and mischievous.

36. In summary Mr.Wamuru has spun an incredible yarn in his affidavit, on strange happenings in Embu County that were not brought to the attention of the Police, election observers, NASA leaders or even the IEBC Headquarters. The false claims by Mr. Wamuru should be rejected.

iv) Counting of Votes

37. The Petitioners in **paragraphs 21.3.1-21.3.5** of the Petition allege that the 1st Respondent deliberately distorted the votes cast and counted by suppressing the Petitioners' votes and inflating the 3rd Respondent's votes. The Petitioners have not identified the polling stations where the alleged distortion of votes cast was executed and absolutely no evidence has been tendered to support these grave and wild allegations.

v) <u>Results Declaration</u>

a) Stamping of Form 34As and 34Bs

38. The Petitioners, in **paragraph 23.4** of the Petition contend that all returns without the IEBC's official stamp not bearing the particulars and signatures of the Returning Officers, not bearing the particulars and signatures of the agents, and those not borne on the prescribed forms are invalid. In **paragraph 23.7.8** the Petitioners aver that a substantial number of **Forms 34A** and **34B** do not bear the IEBC authentic stamp or at all.

39. The 1st and 2nd Respondents submit that in a presidential election, the only forms that require stamping are the ballot papers and **Form 34D**. This is the purport of **<u>Section 109 (1)(u)</u>** of the **Elections Act** as read together with **<u>Regulations 79(1)</u>**,**<u>83(1)(f)</u>** and **(g)** and **<u>87(2)(c)</u>** and **<u>87(3)(f)</u>**. In the circumstances, there is nothing irregular about the **Forms 34A** and **Forms 34B**not being stamped.

40. With regard to **Forms 34A** and **Forms 34B** not bearing the particulars and signatures of returning officers, the 1st Respondent had put in place mechanisms and structures to prevent electoral malpractice and designed **Forms 34A** with distinct security features to authenticate all the results and returns made. All **Forms 34A** and **Forms 34B** issued to presiding and returning officers all had serial numbers, bar codes, and the IEBC's watermark and **Forms 34A** were carbonated to ensure that only one form was filled by the Presiding Officer to generate six copies. These security features enabled the 1st Respondent to authenticate and verify the results at each polling station before transmission to the Constituency tallying Centre and the National Tallying Centre.

41. The failure to sign any **Forms 34A** or **Forms 34B** did not affect the outcome of the results declared at the polling stations or aggregated at the Constituency Tallying Centres. We submit that the position in law on these allegations was settled by this Court in the case of ***Nathif Jama Adam vs Mohamed & 3 Others*** **[2014] 3 EA 177 at page 202** as follows**:**

> ***'From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped Forms 35 had not been the subject of challenge. But there had been an irregularity in the handling of statutory forms from the polling station. There was no explanation of how that irregularity affected the results of the election****. This, clearly, is a censurable condition.* ***But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the constitutional franchise-right of the people inhabiting the electoral area. It is this, to be protected, in circumstances such as those unfolding in this instance - the default in view being, that of election presiding officers failing to have forms duly signed and stamped****. In a similar situation, in the Nana case from Ghana, the learned Judges had thus held:*
>
> > *.. "****An election being a process as opposed to it being an event, where all stages have been gone through and therefore the elections could be said to have been substantially held in accordance with the regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission. In my view, visiting the sins of some public official on innocent citizens who have expressed their choice freely would run counter to the principle of universal adult suffrage, one of the pillars of our democracy, and perpetuate an injustice****" [emphasis supplied].*
>
> *The trial Judge, in the instant case, quite properly arrived at his determination, which we affirm, as follows [paragraph 89]:*
>
> > ***"In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for themto demonstrate that such failure affected the result of the election."***

The appellate Court's stand in this matter, with respect, lacks anchorage in facts and statistics - both being aspects in respect of which the trial Court's determination is firm. ***The electoral process, therefore, was in substantial compliance with the Constitution, even though there were irregularities. The respondents had an obligation, in the circumstances, to show that the irregularities were of such a gravity as to vitiate the results, and the winner is no longer, in real terms, the winner. This is to be done by way of a numerical analysis. Although the appellate Court properly apprehended the applicable test, that Court had no basis for holding that the election was "indeterminate" as the winning margin was "significantly narrowed down or obliterated."***

We hold that the learned appellate Judges erred, in their application of the standard of proof. ***We uphold the trial Judge's finding, that the irregularities did not affect the election-outcome, and that the election conformed substantially to the terms of Articles 38; 81(a), (d) and (e); 86, and 87 of the Constitution.****'*

42. The 1st and 2nd Respondents therefore submit that the allegation that Forms 34A and 34B were not stamped or signed did not affect the results declared and no challenge to the results was raised at any of the polling stations.

Alleged Non-Compliance with the Law and the Effect on the Declared Results

43. The 1st and 2nd Respondents submit that preponderance of legal authority shows that non-compliance with the law alone, without evidence that the electoral process or the result has been materially and fundamentally affected is not a basis for invalidating the electoral outcome.

44. **Section 83** of the **Elections Act, 2011** provides as follows:

*"****No election shall be declared 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 that written law or that the non-compliance did not affect the result of an election****."*

45. S**ection 83 of the Elections Act** has been interpreted and applied in numerous cases and the position now in law is settled. In ***Raila Odinga & 5 Others vs. Independent***

Electoral and Boundaries Commission & 3 Others **[2013] eKLR**, this Court held as as follows:

> *"The 1st Petitioner also cited variations in the numbers of registered voters, as a factor of illegality in the conduct of the Presidential election. Learned counsel, Mr. Oraro submitted that at the close of the register on 18th December, 2012 the total number of registered voters was 14,333,339; but that at the time of gazettement, the number was shown as 14,352,455. We have, however, found no major anomalies between the total number of registered voters and the total tally in the declaration of Presidential-election results made by the 2nd Respondent on 9th March, 2013****. Although, as we find, there were many irregularities in the data and information-capture during the registration process, these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st Respondent, for the purpose of causing prejudice to any particular candidate."***

46. Justice Maraga (as he then was) observed in ***Joho v. Ngare& Another*** **(2008) 3 KLR EP 500** as follows:

> *"In my view the errors made and the irregularities committed in this petition fall into two categories.* ***The first ones are errors or mistakes that I would call innocent even though negligent. The second category are those deliberate irregularities or forgeries that were committed****.*
>
> ***In respect of the first category, I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity****. But where deliberate irregularities or forgeries are committed, different considerations come into play.* ***In either case however, serious consideration should be given as to what effect, if any, those errors, whether innocent or deliberate, have on an election before the same is vitiated.As I have said if they are minor and do not affect the election or its results they should be ignored****. This is what I understand section 28 of the National Presidential and Elections Act ...****But when is an election said not to have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election by ballot? This is how Stephen LJ expressed this point in the case of Morgan vs Simpson (1974) 3 All E R 122 at 731.***
>
> > ***"For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such departure would be allowing voters to vote for a person who is not in fact a candidate***

or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proposition of qualified voters"

***And the result of an election is affected when the cumulative effect of the irregularities reverse it. For instance when a large proposition of the voters are by some blunder in the conduct of the elections, as happened in Harrison Garama Kombe v Ali Omar & Others, Civil Appeal No. 52 of 2006 (CA); do not turn up to vote, the result is said to be affected**."*

47. In the case of ***John Kiarie Waweru v. Beth Wambui Mugo& 2 Others,*****[2008] eKLR** the Petitioner filed a petition seeking to nullify an election on the grounds that it was marred by electoral malpractices. The Respondent opposed the application and averred that the grounds raised in the petition did not *prima facie* disclose sufficient grounds for granting relief sought. The learned Judge held that:

"This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti constituency to elect a representative of their choice. ***This court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December 2007**."*

48. In the Botswana case of ***Pilane v. Molomo & Another*****(1990 BLR 214) (HC),**the view was expressed that the provisions of the Act with regard to the instances where there are irregularities in an election are not to be construed as an enabling section affirmatively setting out circumstances in which a new election should be held; but as an enabling provision setting out circumstances in which, despite irregularities, a new election need not be held and relied on ***Levers v. Morris and Another*** **[1972] 1 Q.B. 221** at **pp. 229** to **230.** The Court also referred to ***Morgan v. Simpson*** **[1975] 1 Q.B. 151** at **164** where Lord Denning M.R. usefully summarized the law in three propositions as follows:

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

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

***3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated**."*

49. The Court of Appeal in Nigeria in the case of ***Olusola Adeyeye v. Simeon Oduoye & Others*, (2010) LPELR-CA/I/EPT/NA/67/08**stated as follows:

"It is clear from the provisions of Section 35 (1) (now 136) of the Electoral Act (2002) that proof of a breach of any provisions of the Electoral Act will per se not lead to the nullification of an election. ***To make a case for nullification the Petitioner needs to go further and prove that the breach of the provision of the Act resulted in the election not been conducted substantially in accordance with the principle of the Act and/ or the result of the election. It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election against his interest. The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices**."*

50. In the case of ***Ibrahim v. Simon Mbugua& 2 Others*, [2011] eKLR** the court cited with approval, the holding in the English case *of* ***Morgan & Others v. Simpson and Another*[1975] 1QB151.**

51. In the case of ***Baqwasi vs. Morueng & Another*** **Miscellaneous Civil Application No. F228 of 2004**,the High Court of Botswana observed as follows:

"Where therefore the court finds that an election has been conducted in accordance with the principles of Part VI and Part VII and that any proven mistake or non-compliance with the provisions of those parts did not affect the result of the election, it shall not set aside the election. The crucial finding by the court must be (a) that a mistake or non-compliance with the Act has occurred; (b) that there has or has not been substantial compliance with the principles in the Act, and (c) that any mistake or non-compliance has or has not

affected the result of the election. These are matters on which a petitioner must adduce evidence in proof thereof. The mere determination that there was a mistake or a failure to comply with the provisions of Part VI and Part VII of the Act is therefore not a sufficient basis on its own to set aside an election. The court must look at all the evidence and decide whether there was substantial compliance with the relevant statutory provisions as to elections and whether the mistake or non-compliance affected the result."

52. In theNorthern Irish High Court decision of***Cooper vs.Gildernew*****[2001] IQB 36(19th October 2001)**the court ruled as follows:

> *"**The final issue is that contained in section 23(3)(a) of the 1983 Act, whether the election was so conducted as to be substantially in accordance with the law as to elections. In our view this phrase refers to the election as a whole, not to the proceedings at the particular polling station. Statements of the law suggest that for the breach of election law to be regarded as substantial there has to be something which would make one have serious doubt whether the election was a proper manifestation of the wishes of the electorate in choosing their member. So in Morgan v Simpson [1975] QB 151 at 168 Stephenson LJ said:***
>
> > ***"For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot."***
>
> ***The decided cases show that a fairly considerable departure from proper procedure has been required before the court will set aside an election on this ground:*** *see Parker's Law and Conduct of Elections, paras 19.89 to 19.91. In particular, irregularities in respect of opening hours at a single polling station have not been regarded as sufficient to avoid the election: see Drogheda 2 O'M& H 201; Islington, 5 O'M & H 201; East Clare 4 O'M & H 162. We take into account also the remark of Willes J retailed by Martin B in Warrington 1 O'M & H 42 at 44, that a judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter and not lightly to be set aside….*
>
> *"This finding enables us to reach a conclusion on the issue posed by the terms of section 23(3)(b) of the 1983 Act, whether the presiding officer's breach of the regulations in keeping the poll open after 10 pm affected the result of the election. If we assume in favour of the petitioner that the poll was open in the first instance until 10.05 pm, then was re-opened for a further period of ten minutes, that makes a maximum of fifteen minutes. We do not consider that the number of voting papers issued in that time could be materially more than thirty, and that number falls well short of the successful candidate's majority of 53 votes. Although Kennedy J in Islington (1901) 5 O'M & H 120 at 130 said that the burden is on the successful candidate to show that the result was*

not affected, this is doubted in Parker's Law and Conduct of Elections, para19.92. We do not need to determine the matter by resort to the burden of proof, for we are affirmatively satisfied on the balance of probabilities that materially fewer than 53 voting papers were issued after 10 pm on polling day. We therefore hold that the breaches of the regulations did not affect the result of the election."

53. In the Nigerian case of***Buhari v. Obasanjo*****(2003) CLR 11**the Supreme Court had the following to state:

*"**A petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify to the illegality or unlawfulness of the votes cast and prove that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election; not those who picked the evidence from an eye witness. No. They must be eye witnesses too**.*

***Both forms and witnesses are vital for contesting the legality or lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the petitioner to tender only the documents. It is incumbent on him to lead evidence in respect of the wrong doings or irregularities both in the conduct of the election and the recording of the votes; wrong doings and irregularities which affected substantially the result of the election. Proving an election petition or proof of an election petition is not as easy as the Englishman finding coffee on his breakfast table and seeping it with pleasure**; particularly in the light of section 146(1) of the Electoral Act. .~ petitioner has a difficult though not impossible task.*

In my view, the most important complaint in an election petition is the disenfranchisement of eligible voters who reported within the statutory time to cast their votes but could not for reasons of violation of the Electoral Act. If there is evidence that despite all the non-compliance with the Electoral Act, the result of the election was not affected substantially, the petition must fail. In other words, Election Tribunal, must, as a matter of law, dismiss the petition; and that accords with section 146(1) of the Electoral Act….

*These are the non-compliances with the Electoral Act raised in the 1st and 2nd Appellants/Cross-Respondents' issues for determination. As can be seen not all of them have been fully proved. **Section 135(1) of the Electoral Act provides that an election shall not be invalidated by reason of noncompliance with the provisions of the Electoral Act, if it appears that the election was conducted substantially in accordance with the principles of the Electoral Act and that the noncompliance did not affect substantially the result of the election. The evidence adduced, at the trial in the Court of Appeal, by the 1st and 2nd Appellants/Cross-Respondents was not sufficient***

to enable the Court of Appeal hold that the election was not held substantially in accordance with the principles of the Electoral Act. This was so despite the Court of Appeal nullifying the election in Ogun State*."*

54. In the case of***Gunn & Others v. Sharpe & Others*** **[1974] 2 All ER 1058 at 1053,** upholding the dictum of Grove J in *Hackney Case, Gill v Reed and Holms (1874) 31 LT at 71, 72*

> *"An election is not to be upset for an informality or a triviality…**The objection must be something substantial, something calculated really to affect the result of the election…the judge is to look to the substance of the case and to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election."***

55. In the English authority of***John Fitch v. Tom Stephenson & 3 Others***[2008] EWHC 501 (QB)**

> *" …**The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches….This is because where possible, the courts seek to give effect to the will of the electorate**…."*

56. Further in this case, the English Court in construing **Section 48(1)** of **Representation of People Act 1983 (England)** also with similar other provisions held at **paragraphs 43** and **44**:

> *"**These cases clearly establish that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the rules, or the duties of election official providing that the result of that election was unaffected by those breaches.The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing the erroneous result to stand**. Thus…it is inappropriate for the court to declare that an election should be avoided where breaches of the rules at the counting stage have not, in fact affected the result."*

Counting of Votes

57. The Petitioners in paragraphs 21.3.1-21.3.5 of the Petition allege that the First Respondent deliberately distorted the votes cast and counted by suppressing the

Petitioners' votes and inflating the 3rd Respondent's votes. The Petitioners have not identified the polling stations where the alleged distortion of votes cast was executed and absolutely no evidence has been tendered to support these grave and wild allegations. All Presidential candidates had the right to appoint agents to all polling stations and were at liberty to request for a recount of votes under Regulation 80. The Petitioners have not tendered any evidence of any request for recount made by any of their agents in any of the 40,883 polling stations. The allegations regarding this complaint are without merit and should be rejected.

Results Declaration

Form 34A

58. Regulation 79 (2) (a), prescribes Form 34A as the form for declaration for the presidential election results. Under Regulation 79(2) (a), the presiding officer, upon announcing the results at the polling station, before communicating those results to the returning officer, is required to request each of the candidates or agents present, to append his or her signature, provide each political party candidate or agent with a copy of the declaration of the results and affix a copy of the declaration of the results at the public entrance to the polling station or any place convenient and accessible to the public at the polling station.

59. The Court of Appeal in the case of the ***Independent Electoral and Boundaries Commission versus MainaKiai and 5 Others; Civil Appeal No. 105 of 2017*** held as follows:

> *"The presiding officer, the candidates or agents are required to sign the declaration in respect of the presidential elections in Form 34. Each political party, candidate, or their agent are supplied with a copy of the declaration before the results are communicated to the returning officer. Any candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted, at most twice. Until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right for a recount no steps can*

be taken on the completion of a count or recount of votes. A copy of the results is affixed at the entrance to the polling station

We bear in mind that presidential election, where two or more candidates are nominated, are held in each constituency and the foregoing process is undertaken at the constituency, the details of which are recorded at the end of the exercise in Form 34. It is inconceivable that those details, arrived at after such an elaborate process can be viewed as provisional, temporary or interim. The inescapable conclusion is that it is final and can only be disturbed by the election court.

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes 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. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth."

60. We submit that the Regulations cited hereinabove as interpreted by the High Court and affirmed by the Court of Appeal, confirm that the polling station is the true locus for the free exercise of the voters' will and where verification of the voting process is undertaken. As no challenge of all processes that took place at the Polling Stations was raised by the Petitioners, those results are final unless disturbed by this Court as the Presidential election court. We submit no grounds have been advanced and no basis has been laid for any of the declared results to be disturbed.

Tallying and Announcement of Election Results

FORM 34B

61. Section 44 of the Elections Act, as amended in 2016 and 2017, provides for the use of technology. The First Respondent established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.. Section 44A provides that notwithstanding the provisions of Section 39 and Section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of results that is simple, accurate, verifiable, secure and accountable and transparent to ensure the

Commission complies with Article 38 of the Constitution (Act No. 36 of 2016, Act No. 1 of 2017). The Elections (Technology) Regulations, Legal Notice No. 68 of 2017 were gazetted on 21st April 2017.

62. With regard to the presidential elections, Regulation 83 of the Elections (General) Regulations provides that immediately after the results from all polling stations from a constituency are received, the returning officer shall in the presence of candidates or observers if present, tally the final results from each polling station in a constituency for the election of president, collate and publicly announce to the persons present the results from each polling station for the election of president.

63. The returning officer is required to sign and date Form 34B. Whilst Form 34B is not specifically mentioned in Regulation 83, the same is provided for in Regulation 87 (1) (b) as a document delivered to the National Tallying Centre. In our submission, it follows the requirements with respect to the other forms under Regulation 83 are applicable to Form 34B. Upon signing and dating Form 34B, the returning officer is required to deliver to the Chairperson of the First Respondent the collated results for the election of the president to the National Tallying Centre.

64. In the ***MainaKiai*** case, the Court of Appeal interpreted the role of the First Respondent under Article 138(3) (c) of the Constitution as follows;

> *'Our interpretation of this Article is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the result of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification. It is equally instructive that regulation 83(3) recognises the finality of the results declared at the Constituency.*
>
> *It states that; "83(3) The decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition".*

65. The Petitioners, from paragraph 21.2.4- 21.2.8, allege the following:
    i) The information in Forms 34A is not consistent with the information recorded in Forms 34B; in the result the Form 34Bs were not accurate, verifiable, internally consistent and are consequently invalid;

ii) The nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated; and

iii) The Petitioners aver that the inaccuracies and inconsistencies affect and account for at least 7 million votes.

66. The correct factual position in answer to the Petitioners' allegations is set out in the in the Affidavits of Immaculate Kassait and the respective presiding and returning officers in the affected area all sworn on the 24th of August 2017. In summary, the First and Second Respondents' answer to the allegation may be clustered as follows;

i) The Petitioners complained about wrong numbers of tallied votes whereas it is the Petitioners who have failed to capture the correct tallied votes (see paragraphs 14, 15 of Kassait's affidavit);

ii) Vote (data) entry error which has been explained (See Kassait'sAffidavit paragraphs 16, 17, 19)

iii) Unfounded allegations of transmission of incomplete form 34Bs (Paragraphs 19 of Kassait's Affidavit),

iv) Transposition errors with no material effect on the results;

v) Clerical errors;

vi) Unfounded demand by the Petitioner's that handover notes accompany Form 34As. This is not a requirement in law;

vii) Unfounded allegations that the statistics transmitted and projected at the National Tallying Centre were different from those in Forms 34As; and

viii) Unfounded allegations that results were declared from non-existent polling stations.

67. Our submissions are that to the extent indicated in the First and Second Respondents' replying affidavits, any errors in Forms 34As and 34Bs wereminor, inadvertent and in their totality did not materially affect the declared final result. The Petitioners' allegations that the minor and isolated errors in the filling of Forms 34As and 34Bs invalidated the declared result has no basis in law. Further, the claim that the alleged 'inaccuracies and inconsistencies' affect 7 Million votes has not substantiated and no particulars have been provided as required by law. The Petitioners' claim is speculative and incendiary and should be rejected.

Electronic Transmission of Results

68. The Petitioners allege that the entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre on the one hand; and from the constituency tallying centres to the National Tally Center on the other; was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. They allege that Article 81(e) (iv) and (v) of the Constitution was substantially compromised.

69. They also allege that data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS Kits at the individual polling stations. It was also mandatorythat the data entered into the KIEMS Kits must be accompanied by an electronic picture or image of the prescribed Forms 34A.

70. Furthermore, they allege that the Practice Manual which was verbally communicated by the 1st Respondent to the parties, stakeholders and observers and also publicly demonstrated that the transmission of any data from the KIEMS Kits to the National Tally Centre was only possible if the data was simultaneously accompanied by the image of the Forms 34A.

71. In responding to the Petitioner's allegations the First and Second Respondents invitethe Court to consider and appreciate the historical background and context to the deployment of technology in the electoral process. This is set out in paragraph 4-8 of Mr James Muhati's Affidavit sworn on the 24th August 2017.

72. Under Articles 81(e),(v), 86 (a), (d) and 88(4) of the Constitution, the First Respondent is under an obligation to conduct free and fair elections which are administered in an impartial, neutral, efficient, accurate and accountable manner. Pursuant to Section 4(m) of the Independent Electoral and Boundaries Commission Act and Section 44 of the Elections Act, 2011, the First Respondent put in place a secure, reliable and efficient integrated electronic electoral system for the registration, voter identification and transmission of results commonly referred to as the Kenya Integrated Elections Management System (KIEMS).

73. As deposed by **James Muhati,** the KIEMS was successful and it enabled voters to verify their biometric data in the Register during the May 10th – June 9th verification exercise as required by law, verify voters on polling day; andtransmit the results of the General Election from the polling stations to the constituency tallying centre and the national tallying centre. The KIEMS was able to transmit the data and the image component of the results from polling stations as explained in MrMuhati's Affidavit. The First Respondent was able to avail and publish all the Form 34As and 34Bs in a public portal as required by law.

74. To the allegations that the First Respondent did not achieve the constitutional threshold set out in Article 81 of the Constitution, that the electronic transmission of results was insecure and unverifiable, we invite the Court to consider the elaborate explanation on security features and safeguards in paragraphs 30-47 of MrMuhati's Affidavit. In summary, thesesafeguards and security features eliminated and continue to protect against any possibility of intrusion by an unauthorised third party. We submit that the system was not compromised nor were the results in any way manipulated as alleged in the petition. The Petitioners have offered no evidence whatsoever to support these allegations.

75. The Second and Third Respondents submit that the Petitioners confused the public portal where the Forms 34A and 34B were published with the statistics that were displayed by the Media. The results of the presidential election were contained in Form 34As from all polling stations and aggregated in Form 34B by the Constituency Returning Officers. The results of the presidential election were declared on the basis of the results in Form 34Bs.The First and Second Respondents therefore submit that they did not create a false narrative as alleged and discharged their mandate in accordance with the law.

Should rejected and spoilt votes count towards the total votes cast and in the computation of the final tally of the Presidential Election?

76. In paragraphs 19, 20, 21, 25, 26, 27 and 29 the Petitioners argue that this Honorable Court should depart from its decision in the First Presidential Election Petition 2013 that rejected votes should not be counted in the computation of the threshold percentage for a

win. Furthermore, they aver, this Court relied on the reasoning of a minority dissenting opinion in the Seychellois Case of *Popular Democratic Movement v Electoral Commission* Constitutional Case No. 16 of 2011. However, the majority held that the total number of votes cast in an election refers to all votes cast whether valid or not; that once a vote is cast into a box regardless of whether it will turn out to be valid or not that vote has been cast and belongs to the context of votes cast.

77. The Petitioners also state that the quantity and percentage of the allegedly rejected votes in this Presidential Election, standing at a colossal 2.6% (477,195) in actual summation of Forms 34B, 403,495 as per the 1st Respondent's portal and 81,685 as per the 1st Respondent's Form 34C of the total votes cast is unprecedented, contradictory, unbelievable and deserving of an inquiry.

78. The Petitioners also allege that 395,510 of the rejected and spoilt votes were unlawfully deducted from the 1st Petitioner and added to the 3rd Respondent.

79. Our submissions are that the Petitioners' allegations are general and unsubstantiated and are sufficiently rebutted in Paragraph 44 (c) of the Affidavit by Ezra Chiloba sworn on 24th August 2017. On the contrary, the total number of rejected votes was 81,685 and not 477,195. The Petitioners have misconstrued the statistics published on the public display mode of KIEMS which was not a result within the meaning of law. Ezra Chiloba affirms that the cause of variance between the actual number of rejected votes and the public portal are as a result of human error.

80. We submit that this Honorable Court's determination on the status of rejected and spoilt votes was settled in the First Presidential Petition Decision 2013. No useful or rational basis is advanced by the Petitioners that should cause this Court to disturb its decision. We cite *in extenso* this Honorable Court's finding.

'In paragraph 280:

> 'The Regulations made by IEBC have no provision for "rejected votes", though they provide for "rejected ballot papers", "spoilt ballot papers", and "disputed votes". It is clear that "spoilt ballot papers" are those which are not placed in the ballot box, but are cancelled and replaced where necessary, by the presiding officer at the polling station. This differs from the "rejected ballot papers" which, although placed in the ballot-box, are subsequently

declared invalid, on account of certain factors specified in the election regulations – such as fraud, duplicity of marking, and related shortfalls'.

In paragraph 281:

'No law and no Regulation brings out any distinction between "vote" and "ballot paper", even though both the governing statute and its Regulations have used these terms interchangeably. We have to draw the inference that neither the Legislature, nor IEBC, had attached any significance to the possibility of differing meanings; which leads us to the conclusion that a ballot paper marked and inserted into the ballot-box, has consistently been perceived as a vote; thus, the ballot paper marked and inserted into the ballot-box will be a valid vote or a rejected vote, depending on the elector's compliance with the applicable standards.

In paragraph 282:

'Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate'.

In paragraph 283:

'In that sense, the rejected vote is void. This leads to the crucial question in Petition No. 3: why should such a vote, or ballot paper which is incapable of conferring upon any candidate a numerical advantage, be made the basis of computing percentage accumulations of votes, so as to ascertain that one or the other candidate attained the threshold of 50% + 1 – and so such a candidate should be declared the outright winner of the Presidential election, and there should be no run-off election?'

In paragraph 285:

'Taking into account the progressive character of the Constitution, and in particular its declared "national values and principles of governance" [Article 10], we hereby render the interpretation that the provision of Article 138(4),
"A candidate shall be declared elected as president if the candidate receives –
(a) more than half of all votes cast in the election; and
(b) at least twenty-five per cent of the votes cast in each of more than half of the counties" –
refers only to valid votes cast, and does not include ballot papers, or votes, cast but are later rejected for non-compliance with the terms of the governing law and Regulations. We are, in this regard, guided by a purposive approach, founded on the overall design and intent of the Constitution. We respectfully agree, on this point, with the position taken by the Constitutional Court of Seychelles in Popular Democratic Movement v. Electoral Commission (see para. 266, supra)'.

81. It is true that this Honorable Court did rely on the dissenting opinion of Burhan J. in the case of **Popular Democratic Movement v Electoral Commission (2011) SLR 354** delivered on 25th October 2011. He was of the opinion that "total votes cast" did not include rejected votes. He held,

> *" In my view therefore that the term "votes cast" referred to in paragraph 2 of Schedule 4 should be interpreted to mean the total of all the "valid votes cast" for or on behalf of all the competing political parties. To include rejected votes into the equation, will not in actual fact represent the actual strength or popularity of the competing political parties as it is only valid votes that do so and would also as discussed earlier be in contravention of the provisions of the Elections Act mentioned above*

82. However, on 9th December 2011, the Seychelles Court of Appeal in the case of **Popular Democratic Movement v Electoral Commission (2011) SLR 385**, overturned that majority decision that the total votes cast included rejected votes and ruled that total votes cast meant the valid votes cast and upheld the reasoning of the minority and dissenting judgment and held:

> *"If one includes spoilt votes in such computations, one is interpreting the intention behind the spoilt votes. What we can guess perhaps, in the present case is that a large number of persons in the elections of October spoilt their votes as a gesture of protest against what they saw as illegal elections taking place as a result of the purported illegal dissolution of the Assembly. However, a number of people also spoilt their votes as they did not know how to validly cast their votes or inadvertently spoilt their votes as is evidenced by previous figures in other elections.* ***It is impossible to separate those "real" spoilt votes from the "intentional" spoilt votes; It is also impossible to say how any of these persons voted. To count the number of spoilt votes into total votes and ascribe to it the meaning of valid votes is to deliberately interpret the latent vote of a voter into a patent one. This then makes meaningless the distinction between spoilt votes and valid votes.***
>
> ***In the circumstances and for all the aforementioned reasons I hold that the term "votes cast" in Schedule 2 part 4 of the Constitution means, "valid votes cast" and cannot include the number of spoilt votes for the computation of proportional representative seats to the National Assembly of Seychelles.***
>
> ***There is no legal provision either in the Constitution or in any other law by which to assume that a spoilt vote that is rejected has any status in determining the will of the people to develop a democratic system or to be counted in the determination of the number of proportionately elected members.*** *Undoubtedly the political realities of the times and the voices of the*

people, who decide to stay away from voting or deliberately spoil the vote, should have the consideration of anyone interested in the democratic process but to give effect to them in the selection of the members of the National Assembly, should be in accordance to the constitutional framework. One cannot ignore the fact that the two parties which contested the general election had received 67.7% of the total votes (both valid and rejected) cast, which indicates that a majority of those who voted exercised their right to vote with the intention of choosing their representatives to the National Assembly and to have maximum representation of their representatives in the National Assembly as envisaged by article 78 of the Constitution.

A democratic constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. Constitutional provision is to be interpreted in the light of the basic structure of the Constitution. The Constitution makes provision for an electoral process whereby every citizen may take part in the conduct of public affairs either directly or through freely chosen representatives. Therefore any constitutional interpretation which subverts or goes against the democratic process is anti-constitutional. It was held in case of Prof Manubhai D Shah v Life Insurance Corp (1981) 22 Guj LR 206 and Fatechand Himatalal v State of Maharashtra (1977) MP LJ 261 (SC) that;

It is the basic and cardinal principle of interpretation of a democratic Constitution that it is interpreted to foster, develop and enrich democratic institutions. To interpret a democratic Constitution so as to squeeze the democratic institutions of their life is to deny to the people or a section thereof the full benefit of the institutions which they have established for their benefit.

I also issue a writ of mandamus ordering the 1st respondent to make a fresh determination and declaration regarding the number of proportionately elected members the two political parties that contested at the general election of 2011, may nominate on the basis that the term 'votes cast' referred to in paragraph 2 of Schedule 4 of the Constitution means only the 'valid votes cast'*."*

83. In the Seychelles Court of Appeal (Highest Court) case of **Ramkalawan v Electoral Commission & Ors (SCA CP1/2016 b) [2016] SCCA 27** delivered on 9th December 2016, the Court cited with approval the Raila Case and stated:

"*We have no difficulty in accepting the proposition of Mr Bernard Georges that there was a purpose behind putting the bar at 50% for a Presidential candidate to be elected. Our difficulty, however, lies in accepting learned counsel's proposition that to reach the threshold of 50%, one needs to take into account not all the votes that were cast in the election but all the ballots*

which found their way into the ballot box. In the submission of learned counsel, all the ballots included the rejected ones save for the torn or mutilated ones. On such an interpretation, the submission has been that neither candidate will have obtained the over 50% constant that is a mandatory requirement for the election of a President.

It is one thing to say that the Constitution should be interpreted fairly and liberally as we are enjoined to do under the Rules of Interpretation of the Constitution in paragraph 8, Schedule 2. But it is quite another to interpret it fancifully. The will of the people is to cast their votes in an election for the purpose of forming a government which braces itself to govern.

If the argument is that all ballots which entered the ballot box should have been counted, then we would be equating votes with ballots when these two words carry different meanings. A ballot is a document in which the choice of a candidate is made by an elector. A vote is a document in which the candidate has made the choice as required under the law. Had the framers of the Constitution intended that the threshold of 50% should be assessed from the number of votes the candidate obtained with reference to all the ballots which entered the ballots for the election, they would have said so. ***The 50% is not in relation to the turnout at the various voting booths but in relation to what the candidate has received and what he receives is only what is valid so that there is merit in saying that when paragraph 8(1) of Schedule 3 of the Constitution reads: "more than 50% of the votes cast in the election," the word "cast" reinforces the argument that the counting of ballots do not enter the equation by merely entering into the ballot boxes.*** *As this Court stated in the case of* ***Popular Democratic Movement v Electoral Commission (2011) SLR 385.***

> *"the term 'valid' in relation to a vote cast at a Presidential or National Assembly election or referendum has always been mere surplusage in view of our Constitutional framework."*

The word "valid" in relation to the words "vote cast" is redundant in the sense that the vote will go to the candidate only after it has been validated by the Returning Officer. Votes cannot mean anything but ballots which have

been validated for the purpose for which they have been intended: for casting votes for the purpose of electing a candidate mentioned in the ballot paper. Once that validation has taken place in accordance with the law, the ballots which became votes with the elector's choice becomes a valid vote for the election of the candidate indicated by the elector. Ballot papers where electors have not complied with the requirements of electoral law are spoilt ballots or spoilt votes. They may be votes which have been cast but votes cast are not necessarily valid votes to the same extent as ballots are not votes. The Constitutional Court referred to a number of situations where the law refers to vote cast instead of vote. There is no mystery about it. The term "votes cast" connotes the activity of the elector and changes nothing in the legal status of a vote… ***For the determination of the over 50% threshold, the votes received by the respective candidates should be counted against the valid votes cast and not against the number of ballots that found their way into the ballot box.***

If we adopted the latter meaning, we would be, as a court of law, engaging ourselves in judicial legislation. "Votes in an election" means votes in an election of a candidate by an elector." It does not mean "votes in a non election of a candidate by an elector." That then will not be interpreting the Constitution in a fair and liberal way as a whole but fancifully experimenting with the Constitution, which would be a pernicious exercise to undertake in the name of the election of the Head of State of the Republic."

Burden and Standard of Proof in Election Petitions

84. The Raila Decision restates the standard that has been consistently applied by election courts in this country on burden and standard of proof. This Honorable Court stated as follows;

In paragraph 187:

> 'That high standards of proof are required in cases imputing election malpractice, appears to be the norm, as is also confirmed in the Zambian case, Akashambatwa Lewanika & Others v. Fredrick Chiluba [1999] 1 LRC 138'

In paragraph 191:

‘Comparative judicial practice on the burden of proof helps to illuminate this Court’s perceptions, in a case which rests, to a significant degree, on fact. In a Ugandan election case, Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001, the majority on the Supreme Court Bench held:

“....the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court.”

In paragraph 192:

‘Similarly in the Canadian case, Opitz v. Wrzesnewskyj 2012 SCC 55-2012-10-256 it is thus stated in the majority opinion:

“An applicant who seeks to annul an election bears the legal burden of proof throughout.....”

In paragraph 193:

‘Such a line of judicial thinking is also found in the Nigerian case, Buhari v. Obasanjo (2005) CLR 7K, in which the Supreme Court stated:

“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…. He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party.”

In paragraph 194:

‘In another Nigerian case, Ibrahim v. Shagari & Others (1985) LRC (Const.) 1, the Supreme Court held:

“[T]he Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be

> avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. Further, the Court will take into account the effect if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election....The duty to satisfy the Court that a particular non-compliance with the provisions of Part II of the Electoral Act....lies on the petitioner."

In paragraph 195:

> 'There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made'.

In paragraph 196:

> 'We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law'.

In paragraph 197:

> 'IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the people's political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting'

In paragraph 198:

‘To what standard must such initial burden be discharged? The practice in this respect varies from one jurisdiction to another. In some countries, it is held that election petitions are litigation much in the nature of civil proceedings – and that the standard of proof should be the same as in civil causes. Thus in Mauritius, in Jugnauth v. Ringadoo and Others [2008] UKPC 50, the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. The following passage occurs in the judgment of the Privy Council:

> “....the legislature...deliberately chose to approach the matter as one in which the court should adopt the civil standard of proof. There was no question of the Court applying anything other than the civil standard of proof and in particular, no question of the application of an intermediate standard. It followed that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition. In practice, as a matter of common sense rather than law, the Court was unlikely to be satisfied on the balance of probabilities that there has been bribery without cogent evidence to that effect. In the instant matter the Supreme Court was correct to reach its factual conclusions on the balance of probabilities.”

In paragraph 199:

‘In the Jugnauth Case, the Court observed that election petitions are civil in nature, and the proper test should be the balance of probability. The same principle was also stated in the Canadian case, Opitz (supra).

In paragraph 200:

‘In certain jurisdictions, a higher standard of proof has been required, depending on the specific element in the cause being proved. Thus, in Shri Kirpal Singh v. Shri V.V. Giri (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567 the Supreme Court of India stated:

> “There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so. 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.

In paragraph 201:

> ‘Some jurisdictions have adopted a standard of proof that goes beyond the balance of probability but falls slightly below proof-beyond-reasonable- doubt. Zambia adopted such a standard in Lewanika and Others v. Chiluba (1999) 1LRC 138. Five petitioners challenged the election of the respondent as President, on 18th November, 1996 on the ground that he was not qualified to stand as a candidate, as neither he nor his parents were citizens of Zambia by birth or by descent, as required under Article 34(3), Schedule 2 to the Constitution of Zambia Act, 1991 as amended in 1996. The petitioners also alleged electoral flaws, including bribery and corruption, irregularities and flaws in the electoral system; they sought the nullification of the elections for having been rigged, and being not free and fair. The Court thus held, on standard of proof:
>
> “[W]e wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity.”

In paragraph 202:

> ‘But in another Zambian case, Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others SCZ/EP/01/02/03/2002, the Supreme Court held that the Court, in determining the standard of proof, should take into account the facts of the particular case:
>
> > “We accept that the issue of standard of proof may turn out to be more a matter of words than anything else. There can be no absolute standard of proof. The degree must depend on the subject matter. In the case under consideration, the standard of proof must depend on the allegations pleaded.”

In paragraph 203:

> ‘The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the

basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.'

85. The Petitioners have urged this Court to depart from your decision and abandon what has crystallized as a sound standard in determination of electoral disputes. We do not agree with them as no justifiable reasons have been advanced.

CONCLUSION

86. In conclusion, we rely on the case of

Boardman Vs Esteva 323 50.2d 259, 265, 267 (Fla. 1975) Supreme Court Of Florida

"We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interest certainly, but the office they seek is one of high public service and of utmost importance to the people thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right."

REASONS WHEREFORE, the Respondents invite this Honourable Court to find and hold that:

(a) The Respondents were not in breach of and did not contravene the provisions of the Constitution, the Elections Act or of any other statute;

(b) The presidential election was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the presidential election made;

(c) The 3rd Respondent was validly elected as the President of the Republic of Kenya;

(d) The people of Kenya exercised their sovereign power of the vote and their decision should be respected;

(e) The Petition lacks merit and should be dismissed; and

(f) The Petitioners should bear the costs of the Petition;

DATED at NAIROBI this day 25th day of August 2017

V.A Nyamodi & Co.

Advocates for the 1st Respondent

Iseme Kamau & Maema

Advocates for the 2nd Respondent

DRAWN & FILED BY

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