

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 1 OF 2017

BETWEEN

RT. HON. RAILA AMOLO ODINGA 1ST PETITIONER

H.E. STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION 1ST RESPONDENT

THE CHAIRMAN OF INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION 2ND RESPONDENT

H.E. UHURU MUIGAI KENYATTA 3RD RESPONDENT

2ND RESPONDENT'S REPLYING AFFIDAVIT

I, WANYONYI WAFULA CHEBUKATI, a resident of Nairobi County within the Republic of Kenya and of P.O. Box 45371-00100 Nairobi, do hereby make oath and solemnly state as follows:

1. THAT I am the Chairperson of the Independent Electoral and Boundaries Commission (the “**Commission**”) appointed in accordance with Article 250(2) of the Constitution. I am conversant with the matters deponed to herein and therefore competent to swear this affidavit.
2. THAT in my capacity as the Chairperson of the Commission, I was the Returning Officer for the 8th August 2017 presidential election.
3. THAT I have read and understood the Petition dated 18th August 2017 and filed in Court on the same day together with the supporting affidavits of Raila Amolo Odinga, Stephen Kalonzo Musyoka, Dr. Nyangasi Oduwo,

Moses Wamuru, Apprielle Oichoe and Godfrey Osotsi, all sworn and filed on the same day.

4. THAT I have further read and understood the Response to the Petition filed herein and adopt the contents thereof. In addition to the issues outlined in the Response to Petition, I wish to state as follows.
5. THAT the Commission and I do not have a stake in the outcome of the 8th August 2017 elections at all. Throughout the election cycle, we were neutral referees. Our resolute mandate was to provide the electoral infrastructure for the people of Kenya to exercise their sovereign will to elect leaders of their choice.
6. THAT I confirm that after tallying all the votes in the 8th August General Election as is more elaborated later in this affidavit, the presidential candidate who emerged the winner was Uhuru Kenyatta, the 3rd Respondent. He garnered 8,203,290 votes. He was followed by Raila Odinga, the 1st Petitioner, who garnered 6,762,224 votes. This declaration is based on the contents of the Form 34C prepared from the 34Bs forwarded to National Tallying Centre from the constituency tallying centres plus the tally of the diaspora votes.
7. THAT given the election management infrastructure that was deployed, the primary results declaration forms (Form 34As and Form 34Bs) could not have possibly been interfered with at all. These forms were transmitted through the KIEMS system in the scanned format. The Form 34A and Forms 34B have special security features that could not be replicated. The security features included anti-photocopy and self-carbonated copies upto a depth of six (copies).

8. THAT the Presiding Officers at the 40,883 polling stations were required to scan and electronically transmit the original Forms 34A to both the constituency and National Tallying Centres. In turn, the Constituency Returning Officers were required to electronically submit to the National Tallying Center the Forms 34B for purposes of tallying and declaration of the results of the presidential election. In view of these, the outcome of the election can easily be verified by reconciling the figures in Forms 34A.

9. THAT when I assumed office as the Chairperson of the Commission on 19th January 2017, my fellow Commissioners and I embarked on a process of managing the remaining part of the election cycle to ensure that the 8th August 2017 election met all the constitutional and statutory ingredients of a free and fair election. Specifically, my task as the Chairperson was to provide policy leadership and strategic direction to the Commission to ensure that the entire electoral infrastructure for elections management was accountable, efficient, systematic and methodical. In addition, despite the numerous challenges arising from litigation against the Commission, the Commissioners and I ensured that the procurement of strategic electoral materials by the Commission's secretariat was done in a transparent and timely manner. In addition, we ensured that the other electoral cycle processes including the supporting technology were deployed in a manner that is congruent with the constitutional and legal requirements of simplicity, accuracy, verifiability, security, accountability, and transparency.

10. THAT I confirm that the Commission fully complied with Article 88(4)(a) and (b) of the Constitution as read together with Sections 4, 5, 6,7, 8 and 8A of the Elections Act No. 24 of 2011 the Commission ensured that by 8th

August 2017, all the required steps and processes were firmly in place for a free and fair election. Specifically, by 8th August 2017:-

- 10.1. Voter education was conducted throughout the country.
- 10.2. The Commissions' staff had been fully trained to manage the elections.
- 10.3. All the polling stations were gazetted.
- 10.4. The final register of voters was audited and uploaded in the Commissions' website (<https://www.iebc.or.ke/iebcreports/>) and hard copy printed and pasted at conspicuous places at each polling station after verification of voter details.
- 10.5. Mechanisms were set to facilitate the observation, monitoring, and evaluation of the elections in compliance with Article 88(4) of the Constitution.
- 10.6. The procurement and distribution of strategic and non-strategic election materials was completed.
- 10.7. In compliance with the requirements of Article 10 of the Constitution (good governance, integrity, transparency, inclusivity and public participation), the Commission held numerous consultative meetings with key stakeholders that included all the political parties to update them on the progress made at all fronts for the 8th August 2017 elections.

- 10.8. Complied with the decision of the Court of Appeal in Nairobi Civil Appeal No. 105 of 2017: Independent Electoral & Boundaries Commission Versus Maina Kiai & 5 Others on the counting, tallying, verification, and declaration of Presidential results at the Constituency and National Tallying Center.
11. THAT it is not correct, as the Petitioners have alleged, that the Commission presided over a shambolic 8th August 2017 presidential election. No single activity/process was done haphazardly.
12. THAT further, the allegation by the Petitioners that the entire electoral processes had failed before and during or that the 8th August 2017 elections were riddled with grave breaches of the Constitution and applicable laws long before 8th August 2017 and during the tallying and transmission of results are not true at all.
13. THAT I verily believe that the 8th August 2017 presidential election met all the requirements of free and fair elections in that:
- 13.1. The elections were conducted through secret ballot.
- 13.2. The elections were free from violence, improper influence or corruption.
- 13.3. The entire electoral cycle was exclusively administered by the Commission.
- 13.4. The elections were transparently conducted.

- 13.5. The elections were administered in an impartial, neutral, efficient, accurate and accountable manner.
14. THAT I am aware that in accordance with the stipulations in Article 138 (10) of the Constitution, I am mandated, within seven (7) days after the Presidential Election, to declare the result of the election, and deliver a written notification of the result to the Chief Justice and the incumbent President.
15. THAT throughout the electoral cycle, I discharged my mandate in full compliance with the Constitution, electoral laws and the applicable regulations. Specifically I:
- 15.1. oversaw the conduct of the election in a free and fair manner as required by Article 81(e) of the Constitution;
- 15.2. declared the result of the Presidential Election as set-out in Form 34C and delivered a written notification of the result to the Chief Justice and the incumbent president within seven (7) days as stipulated in Article 138 (10) of the Constitution;
- 15.3. in exercising my constitutional and statutory responsibilities I was not influenced by anyone at all; and
- 15.4. maintained high levels of professionalism as required by the Constitution.
16. THAT the Commission conducted and supervised the 8th August 2017 Presidential Election in accordance with Article 81(e) by ensuring that:-

- 16.1. every Kenyan citizen duly registered as a voter who participated in the General Election cast their vote by way of secret ballot;
 - 16.2. polling stations were adequately secured by members of the National Police Service to ensure the electoral process was free from violence, intimidation, improper influence and corruption;
 - 16.3. the election was conducted by the Commission which is an Independent body;
 - 16.4. every candidate including the presidential candidates as well as various observers were allowed to have their appointed agents present at the various polling stations to observe the voting process to ensure transparency;
 - 16.5. the said agents observed the closure of the voting process and were involved in counting of the votes at the various polling stations to ensure administration of the electoral process was done in a transparent, impartial, neutral, efficient, accurate, and accountable manner; and
 - 16.6. the presidential candidates' agents/representatives were given access to the various Forms including Forms 34A and 34B thereby increasing the 1st Respondent's transparency and accountability during the electoral process.
17. **THAT** the Commission rolled out an elaborate training programme for all staff who operated the KIEMS gadgets in good time. In addition, all the gadgets were configured with the register of voters. Functionally, the

KIEMS sought to ensure a transparent, secure, verifiable, reliable and accurate framework for elections management. The system allowed for integration of the biometric voter registration, the biometric voter identification, the electronic results transmission and the political party and candidate registration systems. It was successfully deployed on 8th August 2017 and significantly helped to increase efficiency, effectiveness and accuracy of the electoral process. It never failed at all.

18. **THAT** the Presidential Election results were relayed and transmitted to the Commission through pathways outlined in Section 39 of the Elections Act 2011 and Regulation 87 of the Elections (General) Regulations 2012, and the Court of Appeals' decision in Court of Appeal in Civil Appeal Number 105 of 2017: *Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy*.

Annexed hereto and marked WWC-1 is a true copy of the decision of the High Court and WWC-2 is the copy of the Court of Appeal decision.

19. **THAT** I was present at the National Tallying Centre between the 8th August 2017 and 11th August 2017 tallying and validating Forms 34B which were being electronically transmitted by the Constituency Returning Officers from the Constituency Tallying Centers.

Annexed hereto and marked WWC-3 are true copies of said Forms 34B.

20. **THAT** on receipt of the Forms 34B, I proceeded to collate and confirm the consistency of the results and availed the Forms 34B to the Petitioners' and other presidential candidates through their agents for confirmation; verification having been similarly done by the agents at Constituency level.

21. **THAT** upon confirmation of the Presidential Election Results on the Forms 34B by myself, the Commission and the presidential candidates through their appointed agents, I used the same results to tally and complete Form 34C in compliance with Section 39(3)(b) of the Elections (General) Regulations 2012.

Annexed hereto and marked WWC-4 is a true copy of Form 34C.

22. **THAT** on 11th August 2017, upon receipt of 290 Forms 34B from the constituencies and also the tally of the diaspora votes, the Presidential Election results were confirmed by the presidential candidates through their agents present as follows:

NAME OF CANDIDATE	VALID VOTES	% OF VOTES CAST	NO. OF COUNTIES THE CANDIDATES ATTAINED AT LEAST 25% OF THE TOTAL VALID VOTES CAST
John Ekuru Longoggy Aukot	27,311	0.18%	0
Mohamed Abduba Dida	38,093	0.25%	0
Shakhalaga Khwa Jirongo	11,705	0.08%	0
Japheth Kavinga Kaluyu	16,482	0.11%	0
Uhuru Kenyatta	8,203,290	54.27%	35
Michael Wainaina Mwaura	13,257	0.09%	0
Joseph William Nthiga Nyaga	42,259	0.28%	0
Raila Odinga	6,762,224	44.74%	29

23. THAT based on the above electoral tallying process and in compliance with Article 138(4) and 138 (10) of the Constitution, I publicly declared the above presidential results on 11th August 2017.
24. THAT I have seen the references in the Petition and the Affidavits in support thereof to computation errors in a few of the forms. As explained in the Affidavit of **Immaculate Kassait**, I am aware that there were inadvertent and/or arithmetic human errors in a few of the forms. The said errors were minor and did not have any effect on the outcome of the presidential election as evidenced in the attached form marked “**WWC-5**”.
25. THAT in response to allegations contained in paragraphs 3-9 of the affidavit sworn by **Godfrey Osotsi** on 18th August 2017, I wish to state that throughout the electoral cycle for the 8th August 2017 elections, the Commission variously engaged the Petitioners herein (in person and through their representatives), the 3rd Respondent through his agents, the public and other interested stakeholders in formulation of best electoral practices including the reform of electoral laws. Neither I, nor the Commission engaged in any partisan drive howsoever for the reform of electoral laws or at all.
26. THAT I am aware that the Commission fully complied with the law guiding the transmission of presidential results; including through the Commissions’ website, access was granted to the general public to download Forms 34A, 34B and 34C.
27. THAT in response to paragraph 17 of the said affidavit, I am aware that at the time of declaration of the Presidential Election results, the Commission had received all Forms 34B from the various constituency tallying centers.

28. THAT to ensure the transparency of the process, all the Form 34B and 34C were availed by the Commission to the Petitioners and their agents and all other presidential candidates for verification before declaration of the results for the presidential Election.
29. THAT in compliance with the Constitution and all electoral laws, all presidential candidates and/or their agents were allowed to attend to the National Tallying Centre at BOMAS to verify the said tally of the presidential votes, from commencement to declaration.
30. THAT in response to allegations in paragraphs 27-42 of the affidavit of Godfrey Osotsi, I wish to state that it is not true that the Commission sidelined the Petitioners during the tallying process at all. I personally chaired numerous consultative meetings with the Petitioners' agents to consider their concerns. To ensure transparency, legitimacy, and credibility of the process, the Petitioners and their agents were given opportunity and fully participated in the tallying of the presidential election results. I am aware that prior to the declaration of the final result the Petitioners' agents decided to leave the National Tallying center for unexplained reasons.
31. THAT in response to the affidavit of H.E. **Stephen Kalonzo Musyoka** the 2nd Petitioner sworn on 18th August, 2017, I wish to state that the declaration and announcement of the Presidential Election results on 11th August 2017 was done strictly and fully in compliance with the Constitution of Kenya and electoral laws.
32. THAT in response to the affidavit of Rt Hon. **Raila Amolo Odinga** the 1st Petitioner sworn on 18th August 2017, I wish to state that the Commission

notified the public throughout the electoral cycle of the anticipated challenges and demonstrated the alternative mitigation measures which included the confirmation of the Petitioners' agents in verification of voters in the polling stations, tallying of results and transmission of the results.

33. THAT in response to paragraphs 26 -31 of the said affidavit, I wish to state that the tallying process carried out by the Commission was in compliance with Article 81(e) and 86 of the Constitution as read together with Section 39 of the Election Act. Further, at every result management level, the Petitioners' were allowed to have their agents present to confirm the tallying, announcement and declaration of the results.
34. THAT I verily believe that the electronic transmission of the results by the Commission was secure, prompt, accurate, verifiable, accountable and efficient. All the results declaration Forms were subject to verification by the candidates' agents/representative and immediately thereafter forwarded to the National Tallying Centre.
35. THAT in response to the allegation in paragraph 32 of the affidavit, I am advised by my advocates on record, which I verily and conscientiously believe to be true, that this Honourable Court should take cognizance of the fact that the Petitioners through the deponent confirm that they were given access to the Forms 34B through their agents hence the issue of lack of transparency and accountability in the tallying process does not arise at all.
36. THAT the entire allegations contained in paragraph 33-40 of the affidavit are not true.

37. THAT in response to paragraph 224 of the allegations in the affidavit of **Dr. Nyangasi Oduwo** sworn on 18th August 2017, I wish to state that the declaration of the 3rd Respondent as the winner of the 8th August 2017 Presidential Election was done subject to verification of supporting documents. All presidential candidates and their agents or representatives were invited to verify the results before the declaration. Therefore, I verily believe that the declaration of the winner of the Presidential election was procedural, lawful and constitutional.
38. THAT in any event, to ensure the integrity and verifiability of the process, I did not announce the final results of the presidential election until receipt and validation of the Forms 34B from the constituency tallying centers.
39. THAT I wish to state that on 10th August, 2017 the Commission received a letter dated 10th August 2017 from the Petitioners' Deputy Chief Agent, James Orenge raising concerns over the presidential election results. Upon receipt of the letter, the Commission internally considered all the issues and communicated its response via letter dated 10th August 2017.

Annexed and marked WWC-6a and 6b are copies of the said correspondence dated 10th August 2017.

40. THAT I have noted the allegation in the Petition to the effect that the Commission failed to take steps against the 3rd Respondent for alleged breach of the provisions of Section 14 of the Election Offenses Act. That allegation is untrue. I confirm that on 21st June 2017, I wrote a letter to the Director of Public Prosecutions (DPP) informing him of the alleged breach for his action. The DPP responded via a letter dated 6th July 2017 where he informed me that he had directed the Director of Criminal investigations to take action.

Annexed and marked WWC-7 are copies of the correspondence on the issues

41. THAT I swear this affidavit in opposition to the Petition filed herein.

42. THAT the facts deponed to herein are true to the best of my knowledge, information and beliefs save for facts deposed to on information, sources whereof I have disclosed.

SWORN at NAIROBI]
On this 24th day of August, 2017]
By the said]
WAFULA WANYONYI CHEBUKATI].....
] DEPONENT
BEFORE ME]
]]
]]
]]
COMMISSIONER FOR OATHS]

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Lodged in the Registry at Nairobi on the **24th** day of **August** 2017

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Registrar