

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

RAILA AMOLLO ODINGA.....1ST PETITIONER
STEPHEN KALONZO MUSYOKA.....2ND PETITIONER

AND

**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

THIRD RESPONDENT’S RESPONSE TO THE PETITION

A. PARTIES

1. The 3rd Respondent is the President of the Republic of Kenya and was the Presidential candidate for the Jubilee Party (JP) in the 2017 general elections. The 3rd Respondent’s address of service for purposes of this petition is Care of Ogetto, Otachi and Co Advocates, Sifa Towers ,7th Floor ,Lenana/Ring Road Kilimani Junction, P.O Box 79438-00200 Nairobi.
2. The 3rd Respondent adopts, as further answers to the petition, all the affidavits filed herein on his behalf in opposition to the petition.
3. The 3rd Respondent has been the President of the Republic of Kenya since Tuesday the 9th day of April 2013, having been elected President during the general elections conducted on 4th March 2013. He was therefore the President of the Republic of Kenya at all times material to this petition.
4. Having been nominated as the JP Presidential candidate in the 2017 general elections, the 3rd Respondent was for the period after this nomination until the election was conducted both the President of the Republic of Kenya and the JP Presidential candidate.
5. The 3rd Respondent was declared the President-elect by the 1st Respondent following the 2017 general elections.

6. The 1st Petitioner was the Presidential candidate of the National Super Alliance Coalition (NASA) in the 2017 general election, on an Orange Democratic Movement (ODM) party ticket. The 2nd Petitioner was the running-mate of the 1st Respondent.
7. Prior to the formation of NASA, the 1st and 2nd Petitioners were leaders of the Coalition for Reform and Democracy (CORD). The 1st and 2nd Petitioners contested the 2013 general election as the Presidential candidate and his running-mate, respectively, of CORD on an ODM party ticket.

B. FACTS

8. The affidavit of Davis Kimutai Chirchir filed on behalf of JP and the 3rd Respondent sets out facts that occurred prior to the 2017 general election, on the date of the election, and in the period immediately after the election date that the 3rd Respondent considers to be relevant and/or material in the determination of this petition.
9. Among other facts that constitute relevant pre-election occurrences and activities:
 - 9.1. In or about May 2016, CORD, which is the predecessor of NASA, under the leadership of the Petitioners, conducted nationwide protest rallies to agitate for the removal from office of the then Commissioners of the 1st Respondent and the amendment of the Elections Act. These protest rallies led to a bipartisan Parliamentary process that culminated in the amendment of the Elections Act, the resignation from office of the then Commissioners of the 1st Respondent, and the appointment of new Commissioners of the 1st Respondent who ultimately oversaw the 2017 general election.
 - 9.2. NASA, its predecessor CORD, and various members of NASA filed various cases in court to challenge legal provisions relating to the conduct of elections and some decisions that had been made by the 1st Respondent on the manner in which it would undertake certain obligations in the process of overseeing the elections. As a result of the pre-election litigation, many aspects of the manner in which IEBC was to conduct the elections and other matters relating to the elections were spelt out by the Courts, including:
 - (i) A determination by the Court of Appeal in **IEBC v Maina Kiai & others [2017] eKLR** that the declaration form containing the results at a polling station (Form 34A) is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station. The Court of Appeal also upheld “*the determination of the High Court that to the extent that section 39(2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the returning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void.*” This was an appeal from the decision

of the High Court in **Petition No. 207 of 2016 Maina Kiai & 2 others v IEBC & another.**

- (ii) A determination by the Court of Appeal in **Civil Appeal No. 258 of 2017 NASA v IEBC & Others** upholding the decision of the High Court that the complementary mechanism for identification of voters had been put in place in terms of section 44A of the Elections Act in that the 1st Respondent, with public participation, had made Regulations to operationalize section 44A of the Elections Act.

9.3. The 1st Respondent held a number of stakeholder consultative meetings to consult and brief election stakeholders, including Presidential candidates and political parties, on various aspects of the general election.

9.4. An audit of the register of voters was carried out in accordance with the law.

9.5. The register of voters was published for inspection in accordance with the law and in the manner directed by the High Court in **Judicial Review No. 447 of 2017 Republic v IEBC ex parte Gladwell Otieno.**

9.6. Procurement of ballot papers and other voting materials was done in accordance with the law.

10. Despite the challenges faced by the 1st Respondent in its preparations for the elections, including the fact that the new Commissioners took office only some seven months to elections and the numerous court cases mainly instigated by NASA and its members that threatened to derail or delay the preparations for the elections, the 1st Respondent ensured everything was in place for the delivery of a free, fair and credible election.

11. In the assessment of the 3rd Respondent and JP, the 1st Respondent complied with the law, and specifically the determinations that were made by the Courts in the various cases relating to elections, in its preparations for the elections and when conducting the elections on 8th August 2017.

12. On 8th August 2017, the voting process started on time in a vast majority of the polling stations and continued smoothly until the process ended at the prescribed time.

13. The voting process, and subsequent processes until the declaration and announcement of the Presidential election results were done in accordance with the law and in a transparent manner. Among other facts that show that the election process was conducted by the 1st Respondent in a satisfactory manner that complied with the law are:

13.1. Election materials, including biometric voter verification kits and ballot papers, were received in all polling stations across the country;

- 13.2. The biometric voter verification kits were successfully used in all polling stations, and where they malfunctioned prompt action was taken to repair them.
- 13.3. In the event that the biometric voter verification kit failed to identify a voter, the prescribed complementary identification mechanism was used.
- 13.4. The voting process continued smoothly throughout the country, and voting closed on time in a vast majority of polling stations across the country. Where voting started late, the voters were allowed commensurate additional time to vote before polling was closed.
- 13.5. Candidates and/or their agents and the agents of political parties were allowed at the polling stations to monitor the process of voting, counting of the votes, recording of the results, and transmission of the results.
- 13.6. Vote counting was done at the polling stations in the presence of the candidates and/or their agents. The presiding officers of the polling stations then recorded the count of the vote in a tallying sheet in Form 33 and drew up a statement in Form 41 showing the number of rejected ballot papers with reasons. After the process of counting and signing the Forms 34A, the presiding officers of the polling station sealed each respective ballot box.
- 13.7. The presiding officer of each polling stations submitted the Form 34A in electronic form in the presence of the candidates and/or their agents, keyed in results from the Form 34A and then submitted it to the Constituency Tallying Centre through scanning them to the returning officers at the Constituency Tallying Centre. This was done before the hard copies of the Form 34A was taken to the Constituency Tallying Center.
- 13.8. At each Constituency Tallying Centre, the Forms 34A received from the polling stations were collated by the returning officer and a declaration in the form of Form 34B was signed by the returning officer together with the candidates or their agents to confirm that the various Forms 34A received were a true reflection of the count recorded by the presiding officers at the polling stations.
- 13.9. The signed Forms 34B were thereafter scanned and transmitted to the National Tallying Centre electronically.
- 13.10. All transmitted Forms 34A were made accessible to all parties. All Forms 34B were printed and given to the Presidential agents at the National Tallying Centre.
- 13.11. The 1st Respondent established an area where agents of each of the candidates could access and scrutinise the Forms 34A and Forms 34B that had been received at the National Tallying Centre.

- 13.12. The Presidential election results were declared and announced on account of the results declared in Forms 34A at the polling stations and tallied in Forms 34B at the Constituency Tallying Centres. The 2nd Respondent announced the Presidential election results at the National Tallying Centre on 11th August 2017, within the time stipulated by law.
14. These facts demonstrate that the IEBC acted in a lawful and transparent manner during the entire exercise of the 2017 general elections, including the preparations for elections, voting process, vote counting at the polling stations, tallying at the Constituency and National Tallying Centres, and transmission of results at all levels. The general election was efficient, accountable, accurate and credible.

C. OVERVIEW OF THE LAW AND RESPONSE TO THE PETITIONERS' GENERAL ASSERTIONS AT PARAGRAPHS 5 TO 21 OF THE PETITION.

15. Paragraphs 7, 8, 9, and 10 of the petition are correct to the extent that they are a reproduction of various provisions of the Constitution.
16. With regard to the other paragraphs in this part of the petition, the 3rd Respondent responds as follows.
17. The petitioner makes general allegations without offering any particulars, explanations or supporting facts at:
- 17.1. Paragraph 5 of the petition, where there are unsubstantiated allegations that the Presidential election was so badly conducted, administered and managed. The petitioner does not demonstrate how the election did not comply with the governing principles under the various provisions of the Constitution that are mentioned or the Elections Act and the Regulations made thereunder.
- 17.2. Paragraphs 6 and 15 of the petition, where it is alleged that there was massive, systemic, systematic and deliberate non-compliance with the Constitution and the law, and that the nature and extent of the flaws and irregularities significantly affected the results. The petition in its totality does not demonstrate these allegations. In any event, as the 3rd Respondent demonstrates herein and in the affidavits filed in opposition to the petition, the Presidential elections were free, fair and credible and complied with the Constitution and election laws. The winner of the Presidential election was determined through a process that is accurate and verifiable.
- 17.3. Paragraph 12 and 16 of the petition, that the 1st Respondent abdicated its role and duty to exercise, protect and safeguard the sovereign will of the people of Kenya and that the 1st Respondent subverted the will of the people. These allegations are based on speculation and conjecture. Nothing in the petition supports the allegations. As has been demonstrated and is further demonstrated in subsequent sections of this response, the 1st Respondent acted in accordance with the law and obeyed all the Court decisions that were made with regard to the conduct of the elections. Kenyan voters turned out to

vote, braved some harsh weather conditions in various parts of the country, stood patiently in queues and awaited their turn to vote for their preferred leaders. To assert that the result of that process is “*preconceived and predetermined computer generated leaders*” as the Petitioners do at paragraph 16 of the petition is unfortunate at best, and an insult to Kenyan voters.

- 17.4. Paragraph 14 of the petition, that the Presidential election was so badly conducted and marred with irregularities that it does not matter who won or was declared the winner. Once again, the petition does not demonstrate the petitioner’s assertions. Contrary to the Petitioners’ assertions, the 1st Respondent conducted the Presidential elections in a commendable manner by complying with the law and ensuring that the entire process was free and fair and led to a credible result. The choice of President is one that Kenyan voters make, in the exercise of their sovereign power under the Constitution. It **does** matter who is elected the President of the Republic of Kenya. The 3rd Respondent was elected the President of the Republic of Kenya by Kenyan voters in a free, fair and credible process.
18. The 1st Respondent is established under Article 88(1) of the Constitution. Pursuant to Article 88(4) of the Constitution, the 1st Respondent is “*responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament...*”
19. Pursuant to Article 249(2)(b) of the Constitution, the 1st Respondent is an independent Commission that is not subject to direction or control by any person or authority.
20. The 3rd Respondent, in his assessment as a stakeholder and participant in 2017 general election, is satisfied that the 1st Respondent exercised its powers and performed its functions in relation to the 2017 general election in accordance with the Constitution and national legislation, including the Elections Act, in compliance with Article 88(5) of the Constitution.
21. In response to paragraph 17 of the petition, the 3rd Respondent states that:
- 21.1. Section 83 of the Elections Act provides that “*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 principals laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.*”
- 21.2. It follows that for a petitioner to succeed in getting an election declared void for noncompliance with written law he must demonstrate either that the election was not conducted in accordance with the principles laid down in the Constitution and in that written law or the noncompliance affected the result of the election. This is consistent with the decision of this Court in **Presidential Election Petition No. 5, 4 & 3 of 2013 (Consolidated) Raila Odinga & 2 others v Independent Electoral and**

Boundaries Commission & 3 others [2013] eKLR (hereinafter “the 2013 Petition”) that:

*“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.”* (Emphasis added)

22. With regard to paragraphs 18 to 21 on the issues of rejected votes, the computation of the percentage of a candidate’s votes in relation to the “votes cast”, and whether this Court should depart from its decisions on these issues in the **2013 Petition**, the 3rd Respondent states:

22.1. In the **2013 Petition**, this Court made a well-reasoned decision on whether spoilt, disputed and rejected votes should count as part of the “votes cast” in computing the percentage of votes obtained by the various Presidential candidates to ascertain if the winning candidate has met the requirements of Article 138(4)(a) of the Constitution. Article 138(4) (a) of the Constitution requires a candidate to receive “*more than half of all the votes cast in the election*” for the candidate to be declared elected as President.

22.2. This Court reached the conclusion that the use of “votes cast” at Article 138(4) of the Constitution “*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.*” See paragraph 285 of the **2013 Petition**. In reaching this conclusion, the Court was primarily “*guided by a purposive approach, founded on the overall design and intent of the Constitution.*”

22.3. While this Court is not bound by its past decisions, there is need for the decisions of the Court to “*ensure predictability, certainty, uniformity and stability in the application of the law.*” See **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai, Estate of & 4 others [2013] eKLR** (paragraph 42). Indeed, it follows that this Court being an apex Court, can only depart from its previous decision “*for good cause, and after taking into account legal considerations of significant weight.*” See **Jasbir Singh Rai** (*supra*), paragraph 43.

22.4. Previous decisions of this Court, while not binding on the Court, should be followed as much as possible by the Court for the reasons already mentioned. “*Such institutionalization of the play of law gives scope for regularity in... spheres of social and economic relations.*” See **Jasbir Singh Rai** (*supra*), paragraph 43.

22.5. Decisions of foreign courts may be of persuasive value but are not binding on this Court. This Court, in this respect, may be persuaded by either the majority opinion or the minority opinion of a Court. It does not, therefore, matter that in reaching its determination on the interpretation of “votes cast” as used in Article 138(4) of the

Constitution, this Court was persuaded by the minority opinion of the Seychelles Constitutional Court (Curhan, J) in **Constitutional Case No. 16 of 2011 Popular Democratic Movement v. Electoral Commission**. Indeed, this Court opted to be guided by the minority opinion of the Constitutional Court of Seychelles with full knowledge of that fact. It should also be noted that when the matter went before the Court of Appeal in Seychelles, the Court of Appeal overturned the majority opinion and held in a manner consistent with the minority opinion of Curhan J. This Court, for instance, stated at paragraph 277 of the **2013 Petition** that:

*'Under the Constitution of Seychelles, the broad term "votes cast", just as in Kenya, has been adopted; and it became necessary for the Constitutional Court, in **Popular Democratic Movement v. Electoral Commission** (supra) to hold upon a literal interpretation, that "votes cast" included both spoilt votes and valid votes. Objections were raised, and this matter came before the Court of Appeal, which overturned the decision, and held that the term "votes cast" must be construed to mean only valid votes cast.'* (Emphasis added)

- 22.6. There are good grounds for holding that only valid votes count in the computation required by Article 138(4) of the Constitution. The reasons stated by this Court in the 2013 petition are sufficient by themselves, but there are in fact other good grounds.
- 22.7. It should be noted, for instance, that what constitutes rejected ballot papers or "rejected votes", as they are more commonly referred to, in the Presidential election includes ballot papers – whether properly or improperly marked by the voters – that are intended for elections other than the Presidential election but are wrongly deposited by voters in the Presidential election ballot boxes. For example, a voter having marked a ballot paper for the gubernatorial election may wrongly deposit it in the Presidential election ballot box. This will be counted as a "rejected vote" in the Presidential election. To include such "rejected votes" in the count of "votes cast" when computing the percentage of the vote obtained by a Presidential candidate would be absurd.
23. Part B of the petition does not therefore disclose any legitimate grievance that the petition deals with. It is replete with speculation, conjecture, baseless allegations and vexatious assertions.
24. The allegations made by the Petitioners are so general that they amount to a challenge on the credibility of the entire 2017 general election as opposed to only the Presidential election. A party that makes such far reaching allegations ought to back up their allegations with sound evidence and should be subjected to a burden and standard of proof higher than that which a petitioner ought to discharge in a petition that only challenges the Presidential election.

D. RESPONSE TO SPECIFIC GROUNDS AND ARGUMENTS ADVANCED BY THE PETITIONER

I. The 2017 General Election was Free, Fair, Efficient, Accountable, Verifiable, and Credible.

25. The Petitioners' assertions at paragraph 22 on page 7 of the petition that there was a violation of the principles of a free and fair election and electoral process are not supported by the facts of the manner in which the 1st Respondent conducted the elections and do not therefore have merit.
26. The 2017 general elections complied with the general principles for the electoral system set out in Article 81 of the Constitution, and was certainly conducted in the most impartial, neutral, efficient, accurate, accountable and verifiable manner in the history of elections in Kenya.
27. The more specific response to specific allegations made by the Petitioners with regard to various aspects of the electoral process is as follows.

Transmission of Results

28. In response to paragraph 21.2 on page 8 of the petition, the 3rd Respondent states that the Petitioners have not specified any instances of non-compliance that might support their assertions with regard to the process of relay and transmission of results at any level. Needless to mention, without any cogent factual basis for the allegations, a conclusion that the process was substantially compromised and affected the requirement of free and fair elections is just as unsound as the allegations are baseless.
29. The Petitioners make assertions at paragraphs 21.2.1 on page 8 of the petition to paragraph 21.2.3.3 on page 10 of the petition that are both factually and legally misleading with regard to transmission of results from polling stations to Constituency Tallying Centres and the National Tallying Centre. The correct legal and factual position is as follows:
- 29.1. The 1st Respondent's obligations with regard to the transmission of results are set out in section 39(1)(c) of the Elections Act which provides that:

“For purposes of a Presidential election the Commission shall —

- (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;*
- (b) tally and verify the results received at the national tallying centre; and*
- (c) publish the polling result forms on an online public portal maintained by the Commission.”*

- 29.2. The presiding officer at a polling station is mandated by Regulation 5(1A)(d) of the Elections (General) Regulations, 2012 (the Regulations) to electronically transmit the results of the Presidential election results to the Constituency, County and National Tallying Centres.

29.3. For purposes of the Presidential elections, the process of vote counting and transmission of results by presiding officers at polling stations during the 2017 general election was:

- (i) Upon closing the voting process, the presiding officer would call up the agents, and open the ballot boxes for purposes of counting;
- (ii) The presiding officer would then count the votes in the presence of the agents and fill Form 34A;
- (iii) The presiding officer would then enter the results in the KIEMS Kit and send them, together with a scan image of the filled Form 34A, simultaneously to the Constituency Tallying Centre and the National Tallying Centre whenever there would be network coverage.
- (iv) The Presiding Officer would then arrange to deliver the original filled Form 34A to the Constituency Tallying Centre for purposes of tallying of results at constituency level.

29.4. To safeguard against potential inaccurate entries into Forms 34A and the KIEMS Kit, party agents are involved at every step of the process described above, from vote counting to the transmission of the results. The purpose of this is to ensure that political parties have the opportunity to monitor the process through their agents. There is a field in Forms 34A for party agents to sign to signify that they were involved in the process. Where a party agent is dissatisfied with the manner in which the process is conducted, he can make an adverse comment on the Form 34A.

29.5. These processes were followed at all polling stations where JP had its agents and the 3rd respondent is therefore satisfied that the 1st Respondent, through its presiding officers, complied with the requirements of law and its own internal procedures aimed at safeguarding against transmission of inaccurate results.

29.6. The 1st Respondent has discretion to determine the means that it will employ to electronically transmit the results. Regulation 82(1) of the Regulations only provides that ***“The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.”*** (emphasis added)

29.7. While there is no obligation under the Elections Act or the Regulations that the data entered into the KIEMS must be sent simultaneously with an image of the Form 34A, the presiding officers followed this procedure around the country. Even if there was a failure to simultaneously transmit the results data and the scan image of the Form 34A at some polling stations, it would not be a violation of the law. Without a statutory obligation to simultaneously transmit the data entered into the KIEMS and the image of Form 34A on the part of the 1st Respondent, the Petitioners cannot claim to have had

a legitimate expectation that the data and Forms 34A would be transmitted simultaneously.

29.8. The procedure laid down in law having been followed by presiding officers in polling stations around the country, the results that were transmitted were accurate. In any event, there were further opportunities for verification of the transmitted results at both the Constituency and National tallying Centres where party agents were involved in the process for purposes of verification.

29.9. Various election observer reports indicate that the procedure of tallying the votes and approval of the Forms 34A was conducted properly across the country.

30. The allegations at paragraphs 21.2.2.3 (page 9), 21.2.2.6.2 (page 9) and 21.2.3.1 (page 10) of the petition are inaccurate. Other than minimal human errors, which should be expected, the data entered in the KIEMS particularly with regard to the votes received by the various Presidential candidates, was accurate. Nevertheless, the results electronically transmitted through the KIEMS were provisional results and did not constitute the final results which were announced by the 2nd Respondent. The final results were reached after:

30.1. The tallying at the Constituency Tallying Centre of results reflected in Forms 34A from the polling stations, which led to the production of a Form 34B at each Constituency Tallying Centre; and

30.2. The tallying at the National Tallying Centre of the results reflected in Forms 34B from the Constituency Tallying Centres, which led to the production of Form 34C with the final results at the National Tallying Centre.

31. The facts and law with regard to the tallying of Presidential election results in the 2017 general elections is as follows:

31.1. The Court of Appeal in **IEBC v Maina Kiai & others [2017] eKLR** held that the declaration form containing the results at a polling station (Form 34A) is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station. Thus, the results declared in Forms 34A at the polling stations are final.

31.2. In the **Maina Kiai case** (*supra*), the Court of Appeal also upheld “*the determination of the High Court that to the extent that section 39(2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the returning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void.*” Therefore, the Forms 34B produced by the Constituency Returning Officers upon tallying the results from the polling stations as contained in Forms 34A are binding upon the 2nd Respondent at the National Tallying Centre.

- 31.3. The duty of the 2nd Respondent at the National Tallying Centre is therefore to tally the results contained in Forms 34B to produce Form 34C which contains the final results of the Presidential elections.
- 31.4. The Constituency Tallying Officers and the 2nd Respondent discharged their obligations in this regard in accordance with the law at, respectively, the Constituency Tallying Centres and the National Tallying Centre.
32. The allegations at paragraph 21.2.4 (including the subparagraphs thereunder) at page 10 of the petition and paragraph 21.2.5 (including the subparagraphs thereunder) at pages 10 to 11 of the petition) are untrue.
- 32.1. The Petitioners have not demonstrated any instances where the results reflected in Forms 34A from all the polling stations in a specific Constituency do not add up to the results reflected in the Form 34B from that Constituency Tallying Centre.
- 32.2. Even if the allegations at paragraph 21.2.4 were true, the errors in question would be ordinary clerical errors which would not have affected the result of the election in light of the huge difference between the votes obtained by the 3rd Respondent and those obtained by the 1st Petitioner in the Presidential elections.
- 32.3. The Petitioners have not demonstrated the alleged inaccuracies and inconsistencies in the tabulation of results in Forms 34B which it alleges at paragraph 21.2.5 (including the subparagraphs thereunder) at pages 10 to 11 of the petition.
- 32.4. There is no demonstration whatsoever of how the alleged inaccuracies and inconsistencies account for at least 7 million votes as alleged at paragraph 21.2.5.3 at page 11 of the petition.
- 32.5. Requirements of law were followed by the 1st Respondent in tallying the results at Constituency Tallying Centres and the National Tallying Centre.
33. The allegations at paragraph 21.2.3.3 on page 10 of the petition are inaccurate. The accuracy and verifiability of the results was ensured by the 1st Respondent complying with election law, including compliance with the provisions for party agents at the polling stations, Constituency Tallying Centres and the National tallying Centre to verify that the various Forms filled at those levels reflect the outcome of the election.
- 33.1. Regulation 79(1) of the Elections (General) Regulations, 2012 requires the presiding officer of every polling station together with the candidates or their agents to sign Form 34A which contains the Presidential election results. Where any candidate or agent refuses or otherwise fails to sign form 34A, the candidate or agent is required to record the reasons for the refusal or failure to sign.
- 33.2. Regulation 79 (2A) requires the presiding officer of each polling station to immediately announce the results at the polling station before communicating the

results to the returning officer, request each candidate or agent present to append their signature, provide each candidate or agent with a copy of form 34A and affix a copy of form 34A at the public entrance to the polling station.

- 33.3. These provisions were complied with at all polling stations.
 - 33.4. At Constituency Tallying Centres, the Forms 34A received from polling stations were collated by the returning officers and a declaration in the form of Form 34B was signed by the returning officer together with the candidates or their agents to confirm that the various Form 34As received were a true reflection of the count recorded by the presiding officers at the polling stations.
 - 33.5. The signed Forms 34B were thereafter scanned and transmitted to the national tallying centre electronically. The hard copies of Form 34Bs and form 34As were delivered to the National Tallying Centre by the Constituency Returning Officer as soon as practical. This was done in the presence of all the Presidential agents.
34. With regard to the electronic transmission of results, and particularly the allegations at paragraphs 21.2.3 (page 9), 21.2.3.2 (page 10), and 21.2.6 to 21.2.7 (page 11) of the petition, the 3rd Respondent avers that:
- 34.1. The votes indicated in the KIEMS were uploaded by the presiding officers of the various polling stations that had concluded the counting and tallying of votes.
 - 34.2. The results that were being transmitted were provisional results that would have to be verified using the scanned copies of Forms 34A. This information was communicated by the 1st Respondent not only to agents and representatives of political parties at the National Tallying Centre but also to the general public.
 - 34.3. The 1st Respondent made it clear that in the event of any difference between the alpha-numeric results sent through the KIEMS and the results reflected on the Form 34A, the results on Form 34A would prevail.
 - 34.4. The provisional results generated from entries made by presiding officers in the KIEMS were relayed by the media in the full knowledge of the media and the public that they were only provisional results which were subject to verification.
 - 34.5. There are no material differences between the provisional results and the results that were ultimately declared based on Forms 34A. The 1st and 2nd Respondents, however, relied on the results reflected on Forms 34B from Constituency Tallying Centres at the time of declaring the final results at the National Tallying Centre, as required by law.
35. The allegations at paragraph 21.2.8 are inaccurate. All forms 34B were available at the National tallying Centre at the time of the announcement of the final results, and these forms were made available to party agents and representatives for inspection and verification before the results were announced. This was made clear by the IEBC from the

beginning. Therefore, any inaccuracies in the KIEMS system did not affect the final tally of votes at the national tallying centre and declaration of the final winner.

36. The 1st Respondent has also complied with the requirements of section 39(1C)(c) of the Elections Act to publish the polling result forms on an online public portal maintained by the 1st Respondent.

The 1st Respondent was Impartial, Neutral, Efficient, Accurate and Accountable in the Manner it Conducted the 2017 General Elections.

37. The petitioners have not provided any evidence of, or set out the factual basis upon which they allege failure to comply with Article 81 of the Constitution and manipulation and distortion of votes at paragraph 21.3 on page 11 of the petition.

38. The results of the Presidential election that were announced by the 2nd Respondent reflect the outcome of a free, fair, efficient, accurate, verifiable and credible electoral process that was conducted by an impartial and independent constitutional commission.

39. The process of voting, counting of votes, tallying and transmission of results that has been explained in detail in the preceding section of this response was used by the 1st Respondent, which at all times acted in accordance with the law.

40. The process of vote counting, tallying and transmission is designed such that there are opportunities for political parties' agents and representatives to verify what the 1st Respondent is doing, and this procedure was followed as follows:

40.1. The counting of votes was conducted after close of the polling stations in the presence of the candidates and/or their agents or the party accredited agents. The presiding officers of the polling stations recorded the count of the vote in a tallying sheet in Form 33 and drew up a statement in Form 41 showing the number of rejected ballot papers with reasons. After the process of counting and signing the Forms 34A, the presiding officers of the polling station sealed each respective ballot box.

40.2. The presiding officers of the polling stations submitted the Forms 34A in electronic form in the presence of the candidate and or their agent, keyed in results from the Form 34A and then submitted to the Constituency Tallying Centre through scanning them to the returning officers at the Constituency Tallying Centre. This was done before the hard copies of the Forms 34 A were taken to the Constituency Tallying Centre.

40.3. At the Constituency Tallying Centre, the Forms 34A received were collated by the returning officers and a declaration in the form of Form 34B was signed by the returning officer together with the candidates or their agents to confirm that the various Forms 34A received were a true reflection of the count recorded by the presiding officers at the polling stations.

- 40.4. The signed Form 34Bs were thereafter scanned and transmitted to the national tallying centre electronically. The hard copies of Form 34Bs and form 34As were delivered to the National Tallying Centre by the Constituency Returning Officer as soon as practical. This was done in the presence of all the Presidential agents.
41. In the circumstances, it was not possible for the 1st Respondent to manipulate, engineer and/or distort the votes cast and counted in favour of the Petitioners as alleged by the Petitioners at paragraph 21.3 (including the subparagraphs thereunder) at pages 11 to 12 of the petition. The 1st Respondent could, similarly, not inflate the votes cast in favour of the 3rd Respondent.
42. The results announced by the 2nd Respondent as the final results of the Presidential election were a true reflection of the will of Kenyan voters. The assertions by the Petitioners at paragraph 21.3.5 on page 12 of the petition are untrue. It was easy to determine that the 3rd Respondent won the Presidential election from a tally of the votes declared by presiding officers at polling stations across the country following the procedure for tallying laid down in law. Indeed, the outcome of the Presidential election was consistent with the outcome of all the other elections held on the same day in which the 3rd Respondent's JP won a majority of the elective positions as set out in detail in the affidavit of Winnie Guchu.

Operational Transparency and Verifiability of the Process

43. Contrary to the generalised allegations by the Petitioners at paragraphs 21.4 on page 12 of the petition to paragraph 21.9 on page 13 of the affidavit that there were massive failures in operational transparency, the 1st Respondent acted in a transparent manner during the entire vote counting, tallying and transmission exercise.
44. It is not true that the 1st Respondent disregarded the decision of the Court of Appeal in the **Maina Kiai case**. If anything, the decision in the **Maina Kiai case** seems to have informed the manner in which the results were tallied and transmitted from the polling stations until the final results were announced at the National Tallying Centre by the 2nd Respondent.
45. There is a deliberate attempt by the Petitioners to mislead this Court on the import of decision of the Court of Appeal in the **Maina Kiai case** at paragraph 21.5 on page 12 of the petition, and particularly by the suggestion at paragraph 21.5.1 that the decision required the 1st Respondent to electronically collate, tally and transmit the results. The process of tallying and transmission of results as prescribed by law has been discussed in the previous sections of this response.
46. In specific response to the allegations at paragraph 21.5 on pages 12 to 13 of the petition, the 3rd Respondent avers that:
- 46.1. The 1st Respondent followed the procedure prescribed by law, including the decision of the Court of Appeal in the **Maina Kiai case**, in vote counting, tallying, transmission of results, and declaration and announcement of results.

- 46.2. The declaration of results was done by presiding officers at every polling station, and by the returning officers at the Constituency Tallying Centre. The role of the 2nd Respondent was simply to tally the results obtained from the returning officers in Forms 34B accompanied by Forms 34A and make an announcement of the final results. In making the announcement, it made sense for the 2nd Respondent do it County by County because there is a threshold requirement of a certain percentage of votes in a number of counties for one to be declared President-elect.
- 46.3. The provisional results that were displayed did not affect in any way the final results that were announced by the 2nd Respondent. The final results were informed by the entries in Forms 34A and Forms 34B which were accurate and verifiable. Indeed, agents of the various political parties were given an opportunity to scrutinize and verify the results declared on the various forms at all levels from the polling station to the National Tallying Centre.
- 46.4. At the time the final results were declared, all Forms 34A and 34B had been received by the 1st respondent and made available to the agents of the political parties at the National tallying Centre.
- 46.5. It is not true that the Petitioners' agents were ejected from polling stations in Central and Rift Valley regions.
- 46.6. The allegation that there are 14,000 fatally defective results that affect over 7 million votes is a sensational statement that is not backed by any evidence
47. The allegations that the 1st Respondent lacked transparency is untrue and unfair to the 1st Respondent for the following reasons:
- 47.1. At the polling stations and Constituency tallying Centres, the agents of the political parties participated fully in the process of vote counting and tallying as prescribed by law.
- 47.2. The 1st Respondent was in constant communication with the agents of the candidates at the National Tallying Centre.
- 47.3. The 1st Respondent informed all agents when it received Forms 34A and Forms 34B from the returning officers.
- 47.4. There were a number of consultative and informative meetings between the 1st Respondent and the agents of Presidential candidates at the National Tallying Centre.
- 47.5. The 1st Respondent also established an area where agents of each of the candidates could access and scrutinise the Forms 34A and Forms 34B that had been received at the National Tallying Centre.

48. The Petitioners' assertions at paragraphs 21.6 to 21.9 on page 13 of the petition are misleading and malicious. The 1st Respondent conducted the elections in compliance with the law and specifically adhered to the decision of the Court of Appeal in the **Maina Kiai case**. There is nothing in the **Maina Kiai case** that stopped the 1st Respondent from transmitting the Presidential election results in the manner that it did, and the final results announced by the 2nd Respondent were reached at following the procedure stated by the Court of Appeal in the **Maina Kiai case**.

49. The allegations at paragraphs 21.10 to 21.13 on page 14 of the petition are similarly not supported with any evidence, and are false.

49.1. The results declared and the returns made by the 1st Respondent are a reflection of the will of Kenyan voters who turned out to vote on 8th August 2017 in the Presidential election. They meet the test of verifiability and were indeed verified by the political parties and candidates involved in the election through their agents. The Petitioners were given an opportunity, like all other candidates, to verify the results through their agents.

49.2. The allegation that the information in Forms 34A is inconsistent with the information recorded in Forms 34 B is another sensational but baseless statement made by the Petitioner. The Petitioners offer no evidence in support of this general allegation. Inconsistencies in numbers should be easy to demonstrate, if there were any.

49.3. The information in Forms 34B is obtained from Forms 34A. These are by law the verified official results. The results streamed electronically through the KIEMS directly from the polling stations are provisional results. In any event, the discrepancies, if any, between the unverified provisional results and the verified final results are minimal and indicative of a process that is accurate, verifiable and credible.

II. The Voting, Counting and Tabulation of Results Complied with the Legal Requirements.

50. The allegations at paragraphs 22.1 to 22.5 on page 15 of the petition are not accurate. As has already been demonstrated, voting, vote counting, tallying and transmission of results proceeded in the manner required by law.

51. The allegation at paragraph 22.1 that the votes cast in a number of polling stations were not counted, tabulated and accurately collated is preposterous, especially as it is not supported by any evidence. The Petitioners have not identified any polling stations in which there was no vote counting.

52. Similarly, the Petitioners have made allegations at paragraph 22.2 on page 15 of the petition that in a significant number of polling stations the votes cast as captured in Forms 34A differ from the results as captured in Forms 34B, but does not provide evidence of these. The Forms 34B were produced at the Constituency Tallying Centres from entries in Forms 34A from the polling stations.

53. The petitioners have not proven their allegations to the sufficient standard. In the absence of proof of wrongdoing there cannot be a violation of Article 81 and the results of the Presidential election are accurate.
54. The results declared in Forms 34B upon the tallying of results in Forms 34A are the accurate results of the Presidential election. Paragraph 22.4 on page 15 of the petition is misleading.

III. Response to Allegations of Substantive Non-Compliance, Irregularities and Improprieties

55. From the onset, the 3rd Respondent states that the 2017 general election was the most efficient, free, fair, verifiable and credible in the history of Kenya.
56. Various election observer groups have monitored the conduct of the elections and have given the elections a general clean bill of health save for a few isolated incidents. Some of the election observer groups that have published reports on the 2017 general election include:
 - 56.1. The African Electoral Observation Group which released a statement in the Daily Nation edition of 8th August 2017 where it described the voting process as free, fair, transparent, and credible.
 - 56.2. The Elections Observation Group (ELOG), which deployed over 8000 observers across the 47 counties and 290 constituencies. In their Press Statement of 9th August 2017 on the voting and counting process reported that the only major incident was the malfunctioning of the KIEMS but pointed out that the incidents were isolated with many resolved by the 1st Respondent.
 - 56.3. The EAC-Observer Mission which stated that the voting process ran smoothly and noted that voting was faster than in previous elections.
 - 56.4. The ICGLR-Mission which noted that there was a peaceful environment on election day, free of campaign materials, that the biometric system enhanced voting and that party agents and observers were present during the counting of votes.
 - 56.5. The AU-Mission which noted that the process was peaceful except for isolated incidents, the party agents were present throughout the process, the closing of stations was consistent with when they were opened, the counting of ballot papers, filling and scanning of the forms was done in a transparent manner in the presence of party agents.
 - 56.6. The Commonwealth Mission which noted that in spite of slight delays, the opening, voting, closing and counting process were credible, transparent and inclusive.

57. The Petitioners' allegations of substantive non-compliance, irregularities and improprieties lack merit. The 3rd respondent responds to the specific allegations as follows.

Alleged ungazetted and undesignated polling stations

58. The allegations at paragraphs 23.1 on page 15 of the petition and paragraph 23.2 on page 16 of the petition are false.

59. Only gazetted polling stations were used for the purposes of the 2017 general election. In some cases, there was a change of name of polling stations, but in no circumstance was an ungazetted polling station used, neither were any results submitted that did not originate from a valid polling station.

Alleged ungazetted and undesignated returning and presiding officers

60. The allegations at paragraphs 23.3 to 23.6 on page 16 of the petition are also false. All the presiding officers and returning officers that oversaw the elections were appointed by the 1st respondent in accordance with the law.

61. The Petitioners have not provided any evidence of individuals who were not duly appointed by the 1st respondent serving as presiding officers or returning officers at any polling station or Constituency Tallying Centre, respectively.

Alleged improper and invalid returns

62. A significant portion of this response has been dedicated to demonstrating that the processes of voting, vote counting, tallying, transmission of results and the declaration and announcement of results were carried out in accordance with the law without irregularities.

63. Different sections of the petition are replete with unsubstantiated allegations touching on Forms 34A and 34B, with allegations of manipulation of results without providing any particulars of such manipulations being made multiple times.

64. The 3rd Respondent denies all these allegations, and specifically the allegations at paragraph 23.7 on page of 16 of the petition to paragraph 23.7.20 at page 19 of the petition.

65. In response to the specific allegations, the 3rd Respondent states that:

65.1. There was no manipulation of results by the 1st Respondent by use of different Forms 34A and 34B or in any other way.

65.2. The allegation that Forms 34B are "*contradictory, defective and bear fatal irregularities affecting 14,078 polling stations out of the 25,000 Forms 34B*" is not supported by any facts and is manifestly wrong as there are only about 290 Forms 34B,

each from the Constituency Tallying Centres. The reference to 25,000 Forms 34B makes it difficult to comprehend the allegation, let alone respond to it.

65.3. The allegations of tampering with Forms 34A and 34B at paragraph 23.7.4 are denied.

65.4. The allegations at paragraphs 23.7.15 to 23.7.20 are not admitted. No evidence has been provided by the Petitioners to support the allegations.

Alleged contradictory and inconsistent operational procedures

66. It is not true that the elections were conducted in a manner that is inconsistent with the procedures prescribed established by law. As has been demonstrated in this response, the election was conducted in compliance with the law and all the required legal processes were followed. Paragraphs 23.8 to 24 are therefore denied.

67. Voter identification was conducted in the manner required by the Elections Act and Regulations. Indeed, the 1st Respondent's proposed complementary voter identification mechanism was challenged in Court prior to the elections and the Court of Appeal in **Civil Appeal No. 258 of 2017 NASA v IEBC & Others** ultimately upheld the decision of the High Court that the complementary mechanism for identification of voters had been put in place in terms of section 44A of the Elections Act in that the 1st Respondent, with public participation, had made Regulations to operationalize section 44A of the Elections Act.

68. The handover of Forms 34A by presiding officers to returning officers at the Constituency Tallying Centres, and the delivery and handover of both Forms 34A and 34B by constituency presiding officers at the National Tallying Centre was transparent, followed the law, and involved party agents.

69. The allegations of inconsistent or contradictory procedures therefore lack merit.

IV. Issues Relating to Rejected Votes/Ballots

70. While it is true that the number of rejected votes reflected in Form 34C is different from that on the public portal on which the electronically transmitted results were displayed, the inferences made and conclusions reached by the Petitioners with regard to the reasons for the discrepancy are false.

71. In response to paragraphs 25 to 28 of the petition, the 3rd Respondent states that:

71.1. Form 34C, which is the statutory basis upon which the Presidential results were announced indicates that there were 81,685 rejected votes.

71.2. The public portal on which the electronic results were posted however indicates that there were 403,495 rejected votes.

71.3. In light of this self-evident discrepancy, Ms. Winnie Guchu who was the Deputy Chief Agent of JP during the 2017 general election undertook a thorough analysis which helped her and JP to understand where the discrepancy arose. She has sworn an affidavit detailing her findings.

71.4. The analysis revealed that in 688 polling stations , accounting for 294, 271 votes spread out all over the country, electoral officers, in what are obviously honest and/or genuine instances of mis-posting, inserted the registered number of voters in their respective polling stations in the field reserved for rejected votes in the KIEMS results transmission kits since the field or slot for registered voters was already pre-filled and incapable of manipulation as one of the fraud / ballot stuffing prevention innovations implemented in electoral planning for the 2017 general election.

71.5. The error was quite easy to make since the manual/paper Form 34A has the number of registered voters in a polling station as the first slot an electoral officer fills into Form 34A. The aforesaid 688 electoral officers, under pressure and some under less than ideal lighting conditions, clearly inserted the number of registered votes set out in the manual Form 34A into the KIEMS kit slot reserved for rejected votes when transferring the results from the manual form into an electronic document.

71.6. The official results were nevertheless declared on the basis of results collated from Forms 34B which were themselves compiled from manual Forms 34A which did not have this error having been initially transmitted as scanned copies of a manual document and subsequently delivered to the returning officer's at the Constituency Tallying Centre physically.

71.7. No prejudice was therefore suffered by any candidate.

71.8. The allegation at paragraph 27 of the petition that 395,510 votes were deducted from the 1st petitioner and added to the 3rd Respondent is unsubstantiated, false, sensational and malicious.

72. With regard to the averment at paragraph 29 of the petition that this Court should consider the total number of verified rejected votes in ascertaining whether any candidate met the constitutional threshold, the 3rd Respondent avers that this Court should maintain the position it took in the 2013 Petition as set out in Part C (paragraphs 22.1 to 22.5) of this response.

V. Other alleged Contraventions and Violations.

73. The 3rd Respondent denies the alleged contraventions of law and violations of rights at paragraphs 30 to 35 of the petition.

74. There was no violation of the Petitioners' right under Article 35(2) of the Constitution as alleged at paragraph 30 of the petition or at all. The streaming of provisional results could not have violated the Petitioners' rights for the following reasons:
- 74.1. The streaming of the results by the 1st Respondent was intended to ensure that the tallying process was open and transparent.
- 74.2. The 1st Respondent is not prohibited from streaming the electronically transmitted results provided the same are verified using the forms before the declaration of the results.
- 74.3. The streaming of results electronically could not, in any event, have affected the results finally declared. The final results were based on Forms 34B obtained from the Constituency Tallying Centres.
75. The unsubstantiated allegations of intimidation, improper influence, contravention of the rule of law, coercion of public officers and improper influence of voters made against the 3rd Respondent at paragraphs 31 to 33 of the petition are denied in toto. The 3rd Respondent has sworn an affidavit that responds to these allegations. No evidence has been adduced to demonstrate any of the allegations.
76. The averments at paragraphs 34 and 35 of the petition are not supported by the facts or law. The fact of the matter is that the Presidential election was conducted in a manner that is free, fair, efficient, accurate, verifiable, and credible, and the results that were declared on at every level from the polling stations to the final announcement by the 2nd Respondent on 11th August 2017 reflect the will of Kenyan voters. A vast majority of the independent observers that monitored the electoral process have given it a clean bill of health.
77. The petition does not disclose any violations of the Constitution or other law that could justify a nullification of the Presidential elections held on 8th August 2017 or the results thereof.

E. BURDEN AND STANDARD OF PROOF

78. The burden of proof is on the Petitioners to prove the allegations made in their petition.
79. The standard of proof in election petitions is higher than the "balance of probabilities" standard but lower than "beyond reasonable doubt." However, where allegations amount to electoral offences, such as some of the allegations made against the 3rd Respondent at paragraphs 31 to 33 of the petition, the standard of proof is beyond reasonable doubt.
80. Where the nullification of an election is sought on the basis of non-compliance with any written law, then, as has already been demonstrated, section 83 of the Election Act requires the petitioner to not only demonstrate that there was noncompliance with the written law but also that the noncompliance affected the results of the election.

81. The 3rd Respondent avers that the Petitioners have failed to discharge the burden of proof that falls squarely on them and the petition therefore lacks merit.

WHEREFORE, the 3rd Respondent prays that:

- I) The petition dated 18th August 2017 be dismissed.**
- II) A declaration that the election of the 3rd Respondent was valid.**
- III) The 3rd Respondent be awarded the costs of the Petition.**

DATED at Nairobi this 24th day August of 2017

**OGETTO OTACHI & COMPANY
ADVOCATES FOR THE 3RD RESPONDENT**

DRAWN AND FILED BY:

OGETTO, OTACHI & COMPANY ADVOCATES
SIFA TOWERS, 7TH FLOOR,
LENANA/RING ROAD KILIMANI JUNCTION
P.O. BOX. 79438-00200
NAIROBI
CELL:-020-02309060

TO BE SERVED UPON:

1. MURUMBA & AWELE ADVOCATES
MIRAGE PLAZA, MEZZANINE 1,
UNIT 7 WESTLANDS, CHIROMO ROAD
P.O. BOX 222505-00200
NAIROBI
Cell- 020-2004420
Email: legal@maadvocates.co.ke
2. V.A NYAMODI & CO. ADVOCATES
LOWERHILL DUPLEX, APT HSE 7
LOWERHILL ROAD
P.O. BOX 51432,00200
NAIROBI
3. ISEME, KAMAU & MAEMA ADVOCATES
IKM PLACE
5TH FLOOR, TOWER A
5TH NGONG AVENUE
NAIROBI