

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 MUGAI KENYATTA.....3RD RESPONDENT

**3RD RESPONDENT'S AFFIDAVIT IN REPLY TO THE AFFIDAVIT OF MR.
KOITAMET OLE KINA**

I BRIAN GICHANA OMWENGA, a resident of Nairobi and of care of P. O Box 1067-00517 Nairobi do make oath and swear That:-

1. I am a Technology Advisor employed by Jubilee Party (JP). I am a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT). I am a PhD Candidate in Computer Science, and I lecture Computer Science at the University of Nairobi. I am the Chairman of the Industry Technical Committee that sets software and systems engineering standards for the Kenya Bureau of Standards (KEBS). I am also an information Technology Consultant.
2. I have seen, read and have had the contents of Mr. Koitamet Ole Kina's Affidavit sworn on 18th August, 2017 in support of the Petition explained to me by the 3rd Respondent's Advocates and wish to respond as follows:
3. In the build-up to the elections date, the 1st Respondent, trained, educated and explained to all the parties including the Petitioners the process, procedures, workings and systems that would be deployed in the process and all parties expressed satisfaction at the set-up and preparedness for elections. Consequently, the complaints by the Petitioners are due to their failure to understand the processes or the same are in attempt to distort obvious facts.
4. In respect to the contents of paragraph 6, I wish to state that, I arrived at the Bomas of Kenya in Karen around 5.30 pm on 8th August, 2017. This was where the National

Tallying centre for the Independent Electoral and Boundaries Commission (IEBC) was located. I was in the company of Mr. Davis Chirchir and Mrs. Winnie Guchu.

5. At the outset, I wish to contest the deliberate distortions made by Mr. Koitamet Ole Kina as to how the Presidential elections were conducted
 - a. He erroneously states at paragraphs 7, 9, 11, 12, 15, 16, 21, 22, and 24 he all through knows that Form 34A's [polling stations forms] were used to determine and tally Presidential Elections results at National Tallying Centre. The reality is that it was Form 34B's [constituency tallies reports] that were used to determine and tally presidential results at the National Tally Centre.
 - b. He erroneously states at paragraphs 25 that the elections were electronic, and that the integrity of the elections was lost when the use of electronic devise was discarded in favour of manual. On the contrary, the 2017 general elections were manual and paper based. The voter identification was electronic with an option of use of manual process whenever the electronic process was not effective. The marking of the ballots, casting of votes, counting of votes, tallying of the votes at polling station level, constituency level and national level together with the recording of the votes and related data and events into Form 34A, Form 34B and Form 34C were all manual.
6. The electronic transmission of the results from polling stations was done as follows:
 - a. After manually counting the cast votes, a presiding officer would fill-in Form 34A;
 - b. Have Presidential Agents sign the Form 34A;
 - c. Key the results into the electronic device - KIEMS Kit;
 - d. Scan the Form 34A using the KIEMS kit;
 - e. Then simultaneously send both (the keyed-in results and the scanned image) directly to the 1st Respondent's server at the National Tallying Centre and to the County server and Constituency server.
7. It should be noted that the keyed-in results would ordinarily get delivered. However, the transmission of the scanned image would either delay or fail in areas without 3G or 4G network coverage. However, whenever there was no network coverage the Form 34A would still have to be submitted manually.
8. Thereafter the original Form 34A would be delivered to Constituency Tallying Centre regardless of whether or not it had been transmitted.
9. The Form 34As would be used to tally the constituency votes and thereafter would be entered into Form 34B. The form 34B would thereafter be transmitted to the National tallying center as follows:

- a. The Returning Officer (RO) aggregates all Form 34As received from the Polling Stations and the Presidential agents at the constituency tallying center would then sign
 - b. The RO scans the aggregated Form 34B;
 - c. The RO uploads the Form 34B through a secure connection (FTP) from the Constituency Tally Center to the National data center;
 - d. The scanned forms are received at the National Tallying Center where they are authenticated and presented to the chief presidential agents.
10. Contrary to the contents of paragraphs 23, 24 and 25, to the best of my knowledge and to the extent of my involvement in the electoral process I aver that:
- a. The elections conducted by the 1st and 2nd Respondents can be audited and can also be verified, accounted for, are accurate, credible and transparent;
 - b. It is possible to confirm independently and accurately that the results declared and the contents of Form 34C are a true reflection of the votes cast by the Kenyan electorate on their choices of leaders. This is possible on the premises inter-alia that the results as announced at respective polling stations, and entered into Form 34A were faithfully maintained all the way to the declaration of final results and computation into the Form 34C.
11. In part response to the contents of paragraphs 16, 17, 18, 19, 20, 21, 23, 24 and 25, the time the final results were announced, virtually all Form 34B had arrived. They were necessary to facilitate the process of filling up Form 34C, tallying and, declaring the final results.
12. At all times, it was not necessary to have the form 34A at national tally level to facilitate the computation of the Form 34C and declaration of the results. The Petitioners misapplied their efforts and energies towards obtaining Form 34A as a condition precedent to the filling of Form 34C and declaration of results.
13. In further response to the contents of paragraph 7 to 22 and 24, the Forms 34A and 34B were always available to respective party's agents including those of the Petitioners at polling stations and Constituency Tally Centre respectively. The circumstances in which the Form 34A and 34B were given to respective agents at National Tallying Centre was out of an abundance of caution, and accountability, transparency and audit not as a source of information necessary to ascertain what votes were cast at respective polling stations and the constituency tally. To the extent the Petitioners allege that they wished to use the documents to ascertain the accuracy of the provisional results [not declared results] using Form 34A, they should have resolved by reference to the signed Form 34As.

14. In part response to the contents of paragraphs 7, 9 and 13, I wish to state that the allegations that a Consultant said there was a problem with the system is misleading. The fact is that all along the 1st and 2nd Respondents had advised all parties in advance that transmission of image copies of Form 34A and 34B would be problematic in areas without adequate network coverage. In such circumstances the image of Form 34A and 34B would be sent upon reaching areas with network coverage. I annex hereto and mark “**BGO-1**” a public notice issued by the 1st Respondent identifying the polling stations with network coverage challenges.
15. In further response and explanation of the contents of paragraph 9 to 12, I observe that out of desire to be responsive and interactive, the 1st and 2nd Respondents offered to create access to Forms 34As to the Petitioners and the other candidates. This however required adjustment and configuration of the system, which was done. For emphasis, based on my training given to us by the 1st and 2nd Respondents, there was no obligation in law to provide this access as the parties had their own Form 34A and 34B.
16. In part response to the contents of paragraph 12 to 25 and as explained above, the Form 34B was a collation and tally at Constituency level of all polling station votes captured in Form 34A. In the circumstances it was in order for the 1st and 2nd Respondents to announce and declare final results, using the Form 34B as provided to them, which contained the information retrieved from the relevant Form 34As.
17. In part response to the contents of paragraphs 6, 13 and 17, the results transmitted on the Television screens were provisional. They were not the final results. The final results were to be based on the Constituency tally in Form 34B. These were transmitted using dedicated, secure, encrypted means, coupled with manual delivery of the actual Form 34B and allegations that there were impropriety on account of discrepancy between the televised results and those in Form 34A and or Form 34B are inaccurate.
18. In part response to paragraphs 6 to 22 and 24 of Mr. Koitamet Ole Kina, the Petitioners by themselves and through their agents while at the National Tallying Centre, and in the name of counter-checking the integrity of technology and election process kept bombarding the 1st and 2nd Respondents with requests, demands, requisitions and ultimatums, written and oral, official and unofficial with the likely intention of distracting them from proceeding with their constitutional and statutory duties and with the process of the tallying and declaring the results.
19. In fact, the 3rd Respondent made requests that did not receive as much and as prompt attention as those made by the Petitioners, in part because the 3rd Respondent was comparatively more civil and responsive rather than aggressive and disruptive. I annex hereto and mark “**BGO-2**” page a copy of a letter to the 1st and 2nd Respondents sent by the agents of the 3rd Respondent and the reply thereto dated 14th August, 2017 and 15th August, 2017 respectively. To date, the 3rd Respondent has not received what he asked for.

20. Unless otherwise stated and the source of information clearly identified, the matters deponed to herein are within my knowledge.

SWORN at NAIROBI by the said]
BRIAN GICHANA OMWENGA]

This _____ day of _____ 2017]
BEFORE ME:]

DEPONENT

COMMISSIONER FOR OATHS

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