

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

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

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION 1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

H.E. UHURU MUGAI KENYATTA3RD RESPONDENT

3RD RESPONDENT’S AFFIDAVIT IN REPLY TO THE AFFIDAVIT OF GODFREY

OSOTSI

I, DAVIS KIMUTAI CHIRCHIR, a resident of Nairobi County within the Republic of Kenya and of Post Office Box Number 19200-00501 Nairobi do make oath and state as follows:

1. I am a male adult of sound mind, a citizen of Kenya and a holder of a Masters of Business Administration-International Management degree from the University of London, a Bachelor of Science in Computer Science and Physics degree from the University of Nairobi and a Post Graduate Diploma in Teletraffic Engineering from Central Training School Nairobi.
2. I was the Chief Presidential Agent nominated by the 3rd Respondent and authorised to make this Affidavit on his behalf.
3. The 3rd Respondent was nominated by the Jubilee Party and my duties included being the titular head of all the election agents.
4. On 8th August 2017 all the JP election agents were ultimately answerable to me pursuant to a hierarchy established by JP.
5. I am therefore conversant with the conduct of elections including voting, tallying of results and transmission of results from my own knowledge and from my role as the individual to whom all JP elections agents answered to.
6. Having read Godfrey Osotsi’s 2nd Affidavit sworn and filed on 18th August 2017 (hereinafter referred to as the ‘**Affidavit**’) I am competent to respond to the issues raised therein and I make this affidavit in response and in opposition to Godfrey Osotsi’s 2nd Affidavit on the basis of matters within my own knowledge and as regards matters of law, on the basis of advice from the Advocate on record which advice I verily believe to be correct.

7. It is clear to me that the deponent of the Affidavit has exaggerated facts, peddled outright falsehoods and suppressed material facts in a bid to mislead this Honourable Court and obtain an unjust advantage in favour of the Petitioners to the prejudice and subversion of the will of the Kenyan people expressed in a free, fair and credible election.
8. For avoidance of doubt, I deny all the allegations, both specific and vague, set out in the Affidavit, regarding the irregularities attributed to the 1st and 2nd Respondents and state as follows:-
 - a. As far as I am aware the process of voting, collating, tallying and declaration of results was conducted and done in full and/or substantial compliance with the provisions of the Constitution and all electoral laws.
 - b. To the best of my knowledge, the Presidential results announced by the 2nd Respondent on 11th August 2017 were indeed accurate and verifiable in accordance with the standards established by law and were announced in a transparent and lawful manner as contemplated by Article 86 of the Constitution and the Elections (General) Regulations, 2012.
 - c. Most local and international observers who were accredited by the 1st Respondent have issued preliminary reports terming the election substantially free, fair and credible notwithstanding the minor transmission problems experienced during the election process.
 - d. The 1st Respondent has posted on its website scanned copies of each and every Form 34B received in its servers, which upon tallying and collation into Form 34C, (save for Nyando Constituency Form 3B which was not collated at the time of declaration and which does not alter the outcome) demonstrates that the election results announced on 11th August 2017 were accurate, verifiable, transparent and lawful.
9. In response to paragraphs 4, 5, 7 and 8 of the Affidavit, it is clear that the Petitioners have a culture and history of disputing an election outcome when they are losers in such an election. I am aware Isaac Hassan the immediate former Chairman of the 1st Respondent was hounded out of office following protests led by the Petitioners because the Petitioners could not accept defeat in the 2013 General elections. This culture is still ongoing with the latest utterances that the Petitioners have made in public calling out to their supporters to participate in civil disobedience irrespective of the determination that will be made by this court.
10. In response to paragraph 6 of the Affidavit, the Supreme Court of Kenya in Petition No.5 of 2013-Raila Amolo Odinga vs. IEBC & Others disallowed the admissibility of the 839 pages Petitioners affidavit for being filed out of time. However, the Supreme Court of Kenya declined a demand by the Petitioner for production of the election materials on the basis that the Petitioner had not satisfied the court for an award of such a demand.
11. In response to paragraph 11, 12, 17, 18 and 28, I reject all the allegations contained therein and state as follows:

- a. After manually counting the cast votes, a presiding officer would capture/fill-in Form 34A, have the Presidential Agents present to witness through signing the Form 34A, then key-in the alpha numeric results into the KIEMS kit, scan the Form 34A using the KIEMS kit, and electronically transmit the keyed in results together with scanned image directly to the 1st Respondent's server at the National Tallying Centre and simultaneously to the County server and Constituency server.
 - b. The results would automatically be streamed and immediately displayed for the public on the 1st Respondent's display monitors at the National Tallying Centre, County Tallying Centre and Constituency Tallying Centre.
 - c. Once the results reached the Constituency server, the Constituency Returning Officer would collate the results by transcribing the results from the received and printed scanned copy of Form 34A into Form 34B, and when all the polling stations results for that constituency had been received and transcribed to Form 34B, tally the results, get the political party agents present to sign the Form 34B, scan the form using KIEMS kit and immediately transmit the same electronically to the National Tallying Centre.
 - d. It was only after all the Form 34Bs from all the constituencies (save for Nyando Constituency) had electronically been transmitted to the National Tallying Centre that the same were collated into Form 34C which was the basis of the announcement of Presidential results by the 2nd Respondent on the 11th August 2017.
12. In response to paragraph 13, 20 and 29 of the Affidavit, I reject all the allegations contained therein and state as follows:
- a. If any component of the electronic system fails the entire election may very well be rendered a nullity. It is not clear to me why the Petitioners, who are no doubt aware of this fact, would then indicate that electronic systems should be exclusively used to transmit results yet this matter was well settled in the High Court of Kenya Petition No.328 of 2017-National Super Alliance vs IEBC and 2 Others resulting in Civil Appeal No.258 of 2017.
 - b. The Court of Appeal in Civil Appeal No.258 of 2017 affirmed the High Court's finding that the 1st Respondent had put in place a complimentary mechanism in terms of Section 44A of the Elections Act 2011 and that it had with public participation set up regulations to operationalize section 44A aforesaid.
13. In response to paragraph 16 of the Affidavit, I reject all the allegations contained therein in totality on the basis that the said allegations are unsubstantiated and should not be admitted as evidence. However, it is important to note that this Honourable Court in Petition No.5 of 2013-Raila Amolo Odinga vs. IEBC and Others held that it is apparent that electronic technology has not provided perfect solutions and any contention that injustice or illegality in the conduct of election would result if the 1st

Respondent did not consistently employ electronic technology was untenable. This Honourable court confirmed that failed technological devices would not nullify the Presidential election.

14. In response to paragraph 19 of the Affidavit, I verily believe that the 1st Respondent had full control of its systems at all material times and that there is no evidence of it having ceded its authority to third parties.
15. In response to paragraph 21 and 22 of the Affidavit, it is not true that transmission of results from 11,000 polling stations was jeopardised as non of the Petitioners agents have challenged the contents of Form 34As from those polling stations. Furthermore, it is not accurate to state that 11,000 polling stations would represent 7,700,000 voters since the number of registered voters per polling station varied from the maximum of 700 voters per station to 1 voter per station an example being Busia Women Prison. Annexed hereto and marked **DKC-1** is a copy of Form 34B for Busia Women Prison.
16. In response to paragraphs 23 and 25 of the Affidavit, I am aware that the Petitioners attempts to challenge the alleged failure by the 1st Respondent to put in place technology systems 60 days to the election date was litigated upon and decided in Nairobi High Court Judicial Review No.447 of 2017 where the court held that failure by the 1st Respondent to avail the Voter's register for inspection was not fatal to the elections.
17. In response to paragraph 26, I verily believe the veracity of the contents thereof is uncertain. The deponent has referred to his own affidavit which does not contain the corroboration alluded to therein.
18. In response to paragraph 27 of the Affidavit, I reiterate the contents of paragraph 10 herein above.
19. In response to paragraph 30, 31, 32, 33, 34, 35, 36, 39 and 40 of the Affidavit, I verily believe that the allegations therein are pure hearsay as the same have not been substantiated in any way hence the same should not be admitted as evidence.
20. In response to paragraph 41 of the Affidavit, I am aware that the 1st Respondent's system is accessible and any allegation to the contrary is untrue.
21. In response to paragraph 42 and 43 of the Affidavit, the Court of Appeal in Civil Appeal No.105 of 2017 by its judgment of 23rd June 2017 upheld the High Court's decision which declared that section 39(2) and (3) of the Elections Act was unconstitutional and affirmed that the presidential vote tally announced at the Constituency Tallying Centre was final.

22. 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]
DAVIS KIMUTAI CHIRCHIR]

This _____ day of _____ 2017]
BEFORE ME:]

DEPONENT

COMMISSIONER FOR OATHS

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