

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

3RD RESPONDENT'S AFFIDAVIT IN REPLY TO THE PETITIONERS' AFFIDAVITS

I, DAVIS KIMUTAI CHIRCHIR, a resident of Nairobi and of care of P. O Box 19200-00501 Nairobi make oath and swear as follows:

1. I was the Chief Presidential Agent of the Jubilee Party (JP) for the 2017 General Elections and I am duly authorized to make this affidavit on its behalf and on behalf of the 3rd Respondent. JP is the party on whose ticket the 3rd Respondent contested the presidency in the 2017 General Elections. A copy of the letter from JP to IEBC is annexed herein and marked “**DKC-1**” at page 1-2.
2. I am a holder of Master of Business Administration degree, majoring in International Management from University of London, Royal Holloway School of Management. I also do hold a Post Graduate Diploma-Teletraffic Engineering at Central Training School, Nairobi and a Bachelor of Science, Computer Science & Physics degree, University of Nairobi.
3. I am conversant with the conduct of elections including voting, counting, tallying and, transmission of results from the training given by IEBC to party agents and others, my own knowledge and from my role as the Chief Presidential Agent of JP .
4. I have read the Petition and I am competent to respond to the issues raised therein. I make this Affidavit in response to the Petition dated 18th August 2017 and the affidavits of Raila Amollo Odinga and Stephen Kalonzo Musyoka.

5. The Petitioners are co-principals in a political outfit christened National Super Alliance (NASA). The 1st Petitioner was its presidential candidate with the 2nd Petitioner as the running mate.
6. The 1st Petitioner in his Affidavit dated 18th August, 2017 at paragraph 9 sets out four (4) grounds upon which he alleges that the elections were not free, fair, transparent, accountable, credible or verifiable. All these allegation are unfounded and untrue. More specifically it is untrue that:
 - a. The security of the Kenya Integrated Electral Management System (KIEMS) was compromised or that there was any unlawful interference in the course of the general elections that took place on the 8th day of August 2017;
 - b. That there were any procedural flaws, illegalities or irregularities that affected the collation, tallying, verification and transmission of Presidential elections results which in any way interfered with the credibility of the final results declared on the 11th of August, 2017;
 - c. That the results declared by the IEBC were substantially at variance with the actual results tallied and declared at the gazetted polling stations; and,
 - d. There was undue influence or improper influence exerted on voters by the 3rd Respondent either by himself or through anybody as alleged or at all.
7. In view of the above, and the evidence contained in the Affidavits filed in response to the Petition, I wish to firmly state that the Elections were free and fair and were conducted in accordance with the Constitution and the Elections Act.
8. A comparison of Form 34A and the actual announced result together with the text transmitted result confirms that there was no interference.
9. I verily believe that it is necessary to examine the background to the general election of 8th August, 2017 when determining this petition.

Events prior to the conduct of the elections

10. I am aware that on or about May 2016, the Coalition for Reforms and Democracy (CORD), the predecessor to the National Super Alliance (NASA) and which was composed of largely the same political parties as NASA, held a series of nationwide protest rallies to agitate for electoral reform. The Petitioners participated in calling for these protest rallies and on a number of occasions led the protest rallies in Nairobi. I annex herein and mark “**DKC2**” at page **57-59** copies of newspaper articles reporting the same.

11. The electoral reform proposed by CORD was on the issues of the use of technology in elections, legal framework for the verification for the principal register of voters and the removal of the then commissioners of the Independent Electoral and Boundaries Commission (IEBC).
12. The nationwide protests organized by CORD led to violent confrontations between protestors and the National Police Service.
13. CORD also agitated for the amendment of the Elections Act, 2011 before the general election of August 2017.
14. As a result of CORD's actions, a joint parliamentary select committee was established to *inter alia* agree on electoral reforms that had to be undertaken before the general election of August 2017.
15. The joint parliamentary select committee held several meetings to discuss the demands for electoral reform by CORD and came up with the Election Laws (Amendment) Bill, 2016. This Bill was discussed in both houses of Parliament, amended and passed. The Election Laws (Amendment) Bill, 2016 was signed by the President of the Republic of Kenya on 13th September 2016 and came into operation on 4th October 2016.
16. The Election Laws (Amendment) Act, 2016 (the Amendment Act) made provision for *inter alia*:
 - a. Resignation from office of the Chairperson and Commissioners of the IEBC;
 - b. The Audit of the Register of Voters by a reputable professional firm;
 - c. The establishment of an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results; and,
 - d. Opening the Register of Voters for verification of biometric data by members of the public.
17. I verily believe that the electoral reforms contained in the Amendment Act were as a result of the process initiated by CORD due to their dissatisfaction with the manner in which the 2013 general election was conducted.
18. As a result of the nationwide protests organized by CORD, the Chairperson and Commissioners of IEBC resigned, on 5th October 2016, barely ten(10) months before the general election. This paved the way for a new team to be appointed to oversee the 2017 general election.
19. I am aware that on or about 11th October 2016, the President of the Republic of Kenya appointed the IEBC selection panel which was comprised of:

- a. Four persons nominated by the Public Service Commission – Evans Monari, Mary Karen Kigen-Sorobit, Rtd. Justice Tom Mbaluto and Ogla Chepkemoi Karani;
 - b. One person nominated by the Kenya Conference of Catholic Bishops – Bernadette W. Musundi;
 - c. One person nominated by the National Council of Churches of Kenya – Rev. Canon Peter Karanja Mwangi;
 - d. One person nominated by the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya – Prof. Abdulghafur H.S. El-Busaidy;
 - e. One person nominated by the Evangelical Alliance of Kenya – Bishop Dr. David Oginde; and,
 - f. One person nominated by the Hindu Council of Kenya – Dr. Loman Lumba.
20. Of the four persons nominated by the Parliamentary Service Commission, two were nominated by CORD and two were nominated by JP.
21. I am aware that a total of 760 people applied for the positions of Chairperson and Commissioners of the IEBC. The selection panel shortlisted 36 candidates for 6 Commissioners positions and 13 candidates for IEBC Chairman.
22. The selection panel began its interviews on or about 1st December 2016 to fill the 6 six slots available for commissioners and on 19th December, 2016 for the slot of the IEBC Chairman. I am aware that on 22nd December 2016, the selection panel forwarded the final shortlist of the candidates to the President for nomination.
23. I am aware that on 29th December 2016, President Uhuru Kenyatta presented to Parliament the names of individuals nominated to head the IEBC. The candidates were vetted through a special sitting of Parliament and were approved on 17th January 2017.
24. IEBC was therefore reconstituted in January 2017 following this bipartisan process. Effectively, the Commissioners took office seven (7) months before elections. President Uhuru Kenyatta formally appointed Wafula Chebukati the Chairman of the IEBC alongside new commissioners including Roselyn Akombe, Abdi Guliye Consolata Nkatha, Boya Molu, Margaret Wanjala and Paul Kurgat.

Litigation prior to elections

25. Prior to the conduct of the elections, NASA and members of political parties which constitute NASA, initiated several court actions against IEBC. There are at least 41 cases that were filed within the past twelve months.
26. A majority of the cases challenged the implementation of the Amendment Act by the IEBC. The subject matter of the cases included *inter alia*, the procurement processes of the technology and voting material that was used in the 2017 general election, the complementary mechanism set up by IEBC for identification of voters and for transmission of election results and the finality of results declared at the constituency level by the Constituency Returning Officer.
27. I am informed by the 3rd Respondent's Advocates on record which information I verily believe it to be true that some of the cases that NASA, or persons affiliated to NASA, filed relating to the 2017 general election include:
- a. **Republic versus IEBC ex-parte Coalition for Reforms and Democracy Misc App No 648 of 2016** where CORD challenged the decision of IEBC to award KPMG Kenya the tender to audit the register of voters under section 8A of the Elections Act. The application was struck out by the court.
 - b. **Okiya Omtatah Okoito versus IEBC and 2 others Petition 129 of 2017 [2017] eKLR** which challenged IEBC's decision to award KPMG Kenya the tender to audit the register of voters under section 8A of the Elections Act. The petition was dismissed and the court noted that the petitioner was not acting in public interest but as a proxy of CORD.
 - c. **Civil Appeal No. 105 of 2017 IEBC v Maina Kiai & Others [2017] eKLR**, an appeal from **Petition No. 207 of 2016 Maina Kiai & 2 Others v IEBC and Another** which challenged provisions that provide that the results declared by the returning officer are provisional. The court described the polling stations as the locus of the elections and held that the presidential results declared at the polling station are final and the declaration forms containing those results (Forms 34 A) is the primary document.
 - d. **Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR** Constitutional Petition No. 399 of 2016 which challenged section 8 A (1) of the Elections Act which provides that the Commission may engage the services of a reputable firm to audit the register of voters. The Court held that it does not violate the Constitution by creating a scenario where the IEBC cedes its constitutional mandate to another body. It held that this provision enables the IEBC to exercise its constitutional mandate.
 - e. **Republic v IEBC and Another Ex parte CORD JR Misc. Application No. 637 of 2016 [2017] eKLR** which challenged the award of tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers, election result declaration forms and poll

registers to AlGhurair Print and Publishing Company. The court held that because the offices of the Chairman of the IEBC and the Commissioners had been declared vacant at the time the tender was signed it was not lawfully awarded. The tender process was to be started afresh.

- f. **Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR** Civil Appeal Petition 47 of 2017 (Ruling) which sought an order prohibiting the IEBC from closing voter registration exercise slated for closure on 14th February 2017 until the petition is heard and determined. The petition was allowed in part. The court extended the exercise until 19/2/2017 to give any would be voter time to register as a voter.
- g. **Republic v Al Ghurair Printing and Publishing LLC, The Attorney General. The Jubilee Party, Dr. Ekuru Aukot & Third Party Alliance, Samuel Waweru, Stephen Owoko Oganga and Ex Parte Applicant The National Super Alliance (NASA) Kenya Judicial Review No. 378 of 2017** which also challenged the award of the tender for the supply and delivery of ballot papers, election result declaration forms and poll registers to AlGhurair Print and Publishing Company. The High Court allowed the application on the basis that there was no public participation. This decision was set aside by the Court of Appeal in **Civil Appeal 224 of 2017**.
- h. **Republic v Independent Electoral and Boundaries Commission, Jubilee Party, Ex Parte Applicant Gladwell Otieno Judicial Review No. 447 of 2017** which sought judicial review orders to compel IEBC to publish and open up for public inspection the register of voters as clustered per polling station and to publish and gazette the register. The court held that Section 6(1) and 6(2) of the Elections Act requires the IEBC to cause the register of voters to be open for inspection by members of the public at all times for the purpose of rectifying the particulars therein. IEBC was directed to publish a notice indicating that the register of voters is available for inspection.
- i. **Titus Alila & 2 others v Independent Electoral and Boundaries Commission, Petition No. 9 of 2017** which asked the court to compel IEBC to declare provisional presidential election results within (7) seven hours of the official closure of polling stations on election-day. The court dismissed the petition and held that IEBC has the discretion and flexibility to announce presidential results within the time prescribed by Article 138(10) of the Constitution.
- j. **African Centre for Open Governance & another v Independent Electoral and Boundaries Commission & 4 others – Petition No. 388 of 2017** which challenged the directive of the Cabinet Secretary, Ministry of Interior and Coordination of National Government's directive barring people from being within 400 metres of the polling station. The court held that that since Regulation 63 of the Elections (General)

Regulations 2012 granted the presiding officer in conjunction with the police such powers and that there was nothing unlawful about the powers granted.

28. NASA, the Petitioners' sponsoring party its predecessor CORD, and its members, through the many cases they filed in court ensured that the manner in which IEBC was to conduct the elections and other matters relating to the elections were spelt out by the Courts at their instance.
29. NASA and its members challenged any action done by IEBC in order to conduct and supervise the 2017 general election that it felt was not carried out in accordance with its wishes.
30. I verily believe that NASA's habit of constantly filing cases challenging the decisions of IEBC on the conduct of the 2017 general election was designed to ensure that IEBC conducted the 2017 general election on NASA's terms.
31. As a consequence of the many cases filed by NASA and its members, the Courts made pronouncements on various specific aspects of the elections, including the declaration of results. The landscape of the 2017 elections was therefore set by NASA and its members in a major way. Among other determinations that were made by the Courts upon petitions by NASA or its members:
 - (a) 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. 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.*"
 - (b) The Court of Appeal in **Civil Appeal No. 258 of 2017 NASA v IEBC & Others** upheld the decision of the High Court that the complimentary mechanism for identification of voters had been put in place in terms of section 44A of the Elections Act in that IEBC, with public participation, had made Regulations to operationalize section 44A of the Elections Act.
32. I know from my own observation and the communications from IEBC to all parties that the 2017 general elections were conducted in compliance with the various decisions of the Courts with regard to the various aspects of the elections.

Conduct of elections

33. I am aware that on 8th August 2017 election materials including biometric verification kits and ballot papers were received in all polling stations across the country.
34. There was no incident of lack of ballot papers. There were insignificant cases of malfunctioning of the electronic voter identification devices. Elections Observation Group (ELOG) report states that the malfunction amounted to 7.6% which was however, provided for. The provision had already been notified by IEBC to all parties prior to the general election. The provision was that there would be available a number of stand-by identification devices at every Constituency Tallying Centre that would be delivered at the shortest notice of mal-function. I annex hereto and mark “**DKC-3**” page 4-9 a copy of the said report together with the other observer reports.
35. The 2017 elections was an improvement from the 2013 elections in that it deployed the use of technology to enhance transparent, accountable, credible and verifiable elections.
36. The procedure and steps which married the use of technology and the manual elections process was that:-
- (a) a voter was required to produce the identification document used at the time of registration as a voter;
 - (b) The election official ascertained that the voter had not already voted;
 - (c) The voter placed his finger on the fingerprint scanner and the election official crossed out the name of the voter from the register once the image had been retrieved;
 - (d) The election official called out the number and name of the voter as stated in the polling station;
 - (e) In the event that the electronic voter identification device failed to identify a voter the presiding officer undertook the following steps:
 - i. invited the agents and candidates in the station to witness that the voter cannot be identified using the device;
 - ii. completed verification Form 32A in the presence of agents and candidates;
 - iii. identified the voter using the printed Register of voters; and
 - iv. once identified proceeded to issue the voter with the ballot paper to vote;
 - (f) The voter was then issued with the six (6) ballot papers for the six elective positions. The voter then proceeded into one of the polling booth and secretly marked his or her ballot paper;

- (g) The voter folded the ballot paper so as to conceal his or her vote, and then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.
- (h) After closing the voting process, the presiding officer would call up the agents, open the ballot boxes for purposes of counting;
- (i) In respect to the Presidential Elections, the presiding officer at a polling station would count the votes in the presence of the agents and fill Form 34A and then; send to Constituency Tallying Centre for purposes of Constituency Tallying and filling of Form 34B. Simultaneously, the presiding officer would send a text message (fed into a prescribed format) and a scan image copy of Form 34A whenever there would be network coverage to the National Tallying Centre. The presiding officer would then arrange to deliver the original Form 34A to the National Tallying Centre.

37. In view of the above procedure, the elections process was neither wholly and exclusively manual nor electronic. Indeed, it was a hybrid complementary process in that technology was incorporated into a manual process to enhance accountability and transparency. Indeed the said 2017 general elections were paper based.

38. 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.

39. IEBC informed all the agents and representatives of political parties at the National Tallying Centre that the final results that would be ultimately declared would be based on Form 34B. That the results that were being transmitted were provisional based on the text message transmissions (the alpha numeric). The screened results were provisional subject to confirmation of the Form 34B from the Constituency. In the event of any discrepancy between the televised data (based on the alpha-numeric data) and Form 34B, the Form 34B would prevail.

40. I am informed by the 3rd Respondents Advocates on record which I verily believe to be correct that :-

- (a) 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. This however does not stop the result from being announced.

- (b) Regulation 79 (2A) requires the presiding officer of each polling station to immediately request each candidate or agent present to append their signature, announce the results at the polling station before communicating the results to the returning officer, 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.
41. The candidates or their agents are allowed to be present when the votes for each polling station are being counted and tallied. I verily believe that the purpose of regulation 79 of the Elections (General) Regulations, 2012 was to ensure transparency and accountability in the tallying process.
42. I have been informed by various agents who were appointed by the JP which information I verily believe to be true that:
- (a) The counting of votes was conducted after close of the polling stations in the presence of the candidates and/or their agents. Candidates were expected to accredit their 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 Form 34As, the presiding officers of the polling station sealed each respective ballot boxes.
 - (b) The presiding officers of the polling stations submitted scanned Form 34As in electronic form in the presence of the candidate and or their agent and keyed in results from the Form 34A. The presiding officer would then submit them to the Constituency Tallying Centre. This was done before the hard copies of the Form 34 As were taken to the Constituency Tallying Center.
 - (c) At the constituency tallying center, the Form 34As 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 Form 34As received were a true reflection of the count recorded by the presiding officers at polling stations and properly tallied in Form 34B at the constituency tally centre.
43. The signed Form 34Bs were thereafter scanned and transmitted to the national tallying center electronically. The hard copies of Form 34Bs were delivered to the National Tallying Center by the Constituency Returning Officer as soon as practical.
44. I verily believe that the IEBC acted in a transparent manner during the entire vote counting, tallying and transmission exercise. All Forms 34As were made accessible to all parties at polling stations. All Forms 34Bs were given to candidates or their agents at constituency tally centre and again (print copy) availed at the National Tallying Centre.
45. It is not true that the IEBC lacked transparency in the manner it conducted the elections. IEBC was in constant communication with the agents of the candidates at the National Tallying Centre.

IEBC informed all agents when it received Form 34As and Form 34Bs from the presiding and returning officers respectively. There were a number of consultative and informative meetings between IEBC and the presidential agents. At all times IEBC was accessible and interactive.

46. In demonstration of the IEBC's responsive approach it established an area where agents of each of the candidates could access and scrutinise the Form 34As and Form 34Bs that had been received at the National Tallying Centre.

47. It is not true that the Petitioner's agents were ejected from polling stations in Central and Rift Valley regions or anywhere else. I have not seen any evidence showing that an agent was forcefully evicted from a polling station.

48. The Petitioners are making sensational statements without providing any evidence to support their claims. Some of the unsubstantiated claims made by the Petitioners include allegations that:

- a. There are 14,000 fatally defective results that affected over 7 million votes.
- b. In more than half of the 290 constituencies the returning officers failed to indicate the number of Forms 34A.
- c. IEBC is yet to receive 5,015 Form 34As which represent in excess of 3.5 million votes.
- d. The Form 34As the Petitioners have received from IEBC have shown "fatal and irredeemable irregularities".
- e. The votes cast as captured in forms 34A differ from results as captured in Forms 34B.
- f. Rejected votes/ballots were unlawfully deducted from them and added to the 3rd Respondent.

49. As an illustration, I annex hereto and mark "**DKC6**" an analysis showing that the total voters in areas gazetted by IEBC as not having network was 4,433,652 voters not the 7,700,000 voters (in the 11,000 polling stations) alleged by the petitioners. Out of these total of 4,433,652 voters a sum of 3,506,558 voters representing 79 % turned up to vote and their votes tallied.

50. I am aware that various election observer groups have been monitoring the conduct of 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:

- (a) The African Electoral Observation Group who released a statement in the Daily Nation edition of 8th August 2017 where it described the voting process as free, fair, transparent, and credible.

- (b) 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 they reported that the only major incident was the malfunctioning of the KIEMS(7.6%) but pointed out that the incidents were isolated and were resolved by the IEBC.
- (c) The EAC-Observer Mission stated that the voting process ran smoothly and noted that voting was faster than in previous elections.
- (d) The ICGLR-Mission 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.
- (e) The AU-Mission 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.
- (f) The Commonwealth Mission noted that in spite of slight delays, the opening, voting, closing and counting process were credible, transparent and inclusive.

51. I annex hereto and mark as “DKC3” at page 3, 4-9, 10-14, 15-18, 19-23, 24-25, 26-31 respectively the Observer Reports.

52. In addition to the observer reports, I annex herein and mark DKC 10 an audio/video recording of one of the international observer team led by John Kerry who endorsed without qualification the integrity of the 2017 general election process.

Election results

53. I am aware that the JP won a majority of the seats with respect to the election of Governors, Senators, Members of National Assembly, Members of Senate, Women Representatives and Members of County Assembly. The seats won by the JP can be summarized as follows:

- a. Governors: 25 out of 47 seats which represents 53.2%.
- b. Senators: 24 out of 47 seats which represents 51%.
- c. Women Representatives: 25 out of 47 seats which represents 53.2%

d. Members of National Assembly: 138 out of 290 seats which represents 47.6%.

54. It is crystal clear that JP was able to retain their popularity in the 2013 elections strongholds and additionally spread their popularity in 2017 to new frontiers hitherto assumed to be petitioners'/NASA strongholds as of 2013.

The Statistical analysis of the various elective offices shows JP's numerical strength consistent with its 54.3% (8,203,290) win in the 2017 elections. I annex herein and mark "**DK-4**" maps and graphic illustrations of the said numerical strength at **pages 32-56** respectively showing the 2013 and 2017 enhanced JP's votes.

55. In further evidence and as averred above, the 3rd Respondent's performance in the election, I annex hereto and mark "**DKC-5**" copies of the Sunday Nation, 13th August, 2017 and Sunday Standard, 13th August, 2017 publications at pages **57-59**.

56. It is clear that the JP was the preferred party across the Republic of Kenya in all elective positions including the elections for the President of the Republic of Kenya.

57. I verily believe that by winning the most elected seats the JP's policies were the most appealing to the people of the Republic of Kenya.

58. It is not true that IEBC illegally streamed results not verified by Forms 34A to create an impression that the 3rd Respondent was winning. I am informed by 3rd Respondent's Advocates, which advice I verily believe it to be true that:

- a. The streaming of the results by the IEBC was intended to ensure that the tallying process was open and transparent.
- b. IEBC is not prohibited from streaming the electronically transmitted results provided the same are verified using the forms before the declaration of the results.
- c. 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.

59. I am aware that the Petitioners by themselves and through their representatives have commented on these proceedings in an approach that is deprecatory and contemptuous of this court. The comments include:-

- (i) A press conference on 16th August 2017 on what he referred to as "the 2017 election fiasco". During the press conference he stated as follows with respect to the Supreme Court of Kenya:

“We have decided to move to the Supreme Court despite the history and other recent circumstances. In similar circumstances in 2013, we moved to the Supreme Court to challenge the declaration by IEBC of Uhuru as President-elect.

The manner in which the court handled that petition was a travesty of justice. The court decided all interim applications in favour of Kenyatta. The court also allowed the counter petition filed in favour of Kenyatta but disallowed the two petitions against him. Uhuru won 100 per cent and we lost 100 per cent in court.

Our decision to go to court constitutes a second chance for the Supreme Court. The court can use this chance to redeem itself, or, like in 2013, it can compound the problems we face as a country.”

- (ii) A press statement signed by the 1st Petitioner dated 22nd August, 2017 during the swearing in of Mombasa Governor in which he inter-alia said:-

“Elections should end with the counting of votes The Supreme Court is made up of seven judges. The discretion of seven individuals, however wise, can either represent nor substitute the voice of 15 million people.

Seven individuals can be intimidated, they can be compromised and they can make genuine mistakes.

Kenyans are still trying to understand what exactly happened in the Supreme Court in 2013 when a decision about their votes was delivered in minutes and a paragraph.

Institutionalizing the determination of elections by courts is a deliberate cynical ploy to lend a cloak of legal respectability to fraud, subversion of democracy, and abuse of the court process. If we accept doing it this way, the courts will never allowed to be independent by those who want to rely on them to subvert the will of the people.

We had hoped that other individuals and organizations would move to the courts and at least offer Kenyans a chance to know the truth about what happened to their vote. But soon, it became clear that the Jubilee administration was determined to still all voices and keep Kenyans in the dark about the systematic theft of elections. Jubilee immediately cracked down on brave and independent organizations it merely suspected to be planning to go to court. And so we decided to move to court ourselves to give Kenyans a chance to know the truth.

Whichever way the court rules, the petition will not of itself cure electronic impunity. It will not bring to justice those who plotted and executed the theft of our votes. It will not bring to justice those who murdered Chris Msando in order to steal votes. It will not bring to justice those who plotted and executed the theft

of our votes. It will not bring to justice those who murdered Chris Msando in order to steal votes. It will not hold to account those who sought to cow us into submission by unleashing terror in Mathare, Kibera and Kisumu.”

60. At the inauguration of the Vihiga Governor on 21st August, 2017, Hon. Musalia Mudavadi attempted to make demands on how the Supreme Court should conduct the Petition to the effect that:

“We don’t want justice to be frustrated. Let them read their verdicts individually and tell Kenyans their stand in broad daylight,” he demanded.

61. I further observe as stated above, the press statements made by the Party sponsoring the petitioners had issued a statement stating that the nature of the alleged theft is that the votes contained in the 1st Respondent’s server had been overlooked, and results based on unknown source used to announce. The party stated that:

“We have now received the data, which confirm the authentic and legitimate result of the presidential election, shows that the two leading candidates obtained the following votes:

- **Raila Amolo Odinga 8,041,726 votes**
- **Uhuru Kenyatta 7,755,428 votes**

Screen shots of the results as displayed on the IEBC website and monitors at Bomas show the following results:

- **Uhuru Kenyatta 8,056,885**
- **Raila Amolo Odinga 6,659,493**

Evidently, the accurate and lawful results in the presidential election is the transmission received from the polling stations and contained in the IEBC servers and not the unverified displays.

We are releasing to the media and the public the un-doctored authentic and legitimate results of the Presidential Election as contained in the IEBC servers.”

I annex hereto and mark **“DKC-8”** at pages **66-79** copies of the articles referred to herein above.

62. I verily believe that:

- a. The Petitioner’s statement was an attack on the Supreme Court of Kenya;
- b. Was designed to bully and intimidate the Supreme Court to rule in favour of the Petitioner.

- c. Was designed to erode the confidence the people of Kenya have in the Supreme Court and diminish the credibility of the Supreme Court before the people of Kenya, especially the Petitioner's supporters.
63. The petitioners' unfortunate rhetoric about the death of Mr Musando, the Deputy ICT director is reckless, irresponsible and sensational to distract from the real issues in the case in that:
 - a. The said death is under investigations and the petitioners are welcomed to avail the investigative agencies whatever evidence they have on the death;
 - b. The KIEMS was not handed over to IEBC but remained in the hands and management of the contracted consultant French firm Safran; and,
 - c. To the best of my knowledge, IEBC had well established structures including sufficient well trained ICT personnel and best practices.
64. The Deponent avers at Paragraph 16 that the process delivered a preconceived and a predetermined computer generated result\ algorithm\ "computer chicks" (vifaranga vya computer). The electronically submitted data, with timestamps, has been analyzed and the results of accumulated votes for candidates Uhuru and Raila accumulated for the span of transmission so as to plot a graph of Uhuru Votes minus Raila Votes as a percentage against the timestamps of submission. From what can be observed from the graphs, data shows that the lead oscillated between the two at the start of transmission. Splitting the transmission times into time sections, the first hour shows oscillations between the two ranging between 42.6% and 3.2% percentage difference which can be observed to be very random.
65. The graphs are not horizontal and therefore no basis for the claim. Also comparison of Forms 34A and the online results does not show variances to support the averment.
66. I annex and mark "**DKC-7**" pages 80-847 and "**DKC-9**" pages 61-65 copies of data from IEBC showing timings at which results arrived (**DKC-8**) and an analysis of the matrix showing how the computer maintained the data with percentages (**DKC-9**).
67. The allegation as to a substantial number of rejected votes is vain. Thee rejected votes were erroneously entered on the text transmissions of votes that were provisional. In the end they did not count. This is because the rejected votes were properly captured in Forms 34A and Form 34B. The correct rejected votes eventually went into Form 34C and informed the final declaration of the results. For emphasis, none of the candidates was in any way deprived of their legitimate votes in the postings of the rejected votes. The rejected votes do not exceed 90,000 votes.

68. 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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