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

BETWEEN

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

AND

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....……...1ST RESPONDENT
THE CHAIRPERSON OF INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION....2ND RESPONDENT
H. E. UHURU MUIGAI KENYATTA……..…….3RD RESPONDENT

PETITIONERS' WRITTEN SUBMISSIONS

"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

The people may exercise their sovereign power either directly or through their democratically elected representatives.

Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

Parliament and the legislative assemblies in the county governments;

the national executive and the executive structures in the county governments; and

the Judiciary and independent tribunals.

The sovereign power of the people is exercised at—

the national level; and

the county level."

Article 1 of the Constitution of Kenya 2010

Introduction

1. Following the General Election conducted on 08th August 2017, the 3rd Respondent was declared as the winner of the presidential election and the president elect. The Petitioners being aggrieved by the conduct of the election and the declaration of the 3rd Respondent as the president elect, have filed this petition pursuant to Article 140 of the Constitution of Kenya. The Petitioners are challenging both the conduct of the presidential election and the validity of the result declared.

2. The underlying premise of the Petition is simple yet fundamental. The Petitioners contend that the Presidential Election was so badly conducted, administered and managed by the 1st Respondent that it failed to comply with the Constitution and other laws relating to the election. Throughout these submissions, we shall demonstrate and prove that before the election, during the election and after the election not only did the 1st Respondent fail prepare to deliver a free, fair and credible election, they deliberately set out to subvert the sovereign will of the Kenyan people.

3. In the end, the Petitioners submit that it does not matter who won or was declared as the winner of the Presidential Election; the validity of the Election was irredeemably marred and compromised.

A. LEGAL ANALYSIS OF THE APPLICABLE LAW

a) Jurisprudential analysis of section 83 of the Elections Act

4. This Petition will turn largely on the interpretation of Section 83 of the Elections Act.

5. Section 83 of the Elections Act, No. 24 of 2011 states:

> "No election shall be declared to be 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 principles laid down in the constitution and in that written law OR that the non-compliance did not affect the result of the election".

6. The Elections Act, 2011 was preceded by the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya (Repealed). Section 28 of provided as follows:

> "No election shall be declared to be void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election."

7. An analysis of the history of section 83 is necessary for a proper interpretation of the provision. The provision traces its ancestry from the UK legislation that are almost in similar terms. The first UK legislation was the 1872 English Ballot Act which reads as follows:

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 to this Act, or any mistake in the use of the forms in Schedule 2 to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, AND that such non-compliance or mistake did not affect the result of the election"

8. It is important to note that the English Ballot Act, 1872 used the term 'AND' instead of 'OR'. The implication of this is that the two tests are conjunctive instead of disjunctive.

9. The English Ballot Act was repealed by the 1983 Representation of the People Act which states at Section 23(3) thereof that:

> "No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that—
> (a) the election was so conducted as to be substantially in accordance with the law as to elections; AND
> (b) the act or omission did not affect its result."

Once again, this legislation uses the conjunctive term 'AND' instead of the disjunctive term 'OR'.

10. The legal concept in parliamentary elections set out in the two sections above was imported into resolution of disputes in local government elections through the Representation of Peoples Act 1949. Section 37(1) of the said Act provided,

> "No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections OR that the act or omission did not affect the result".

11. Unlike the sections on Parliamentary elections, the above provision used the disjunctive term OR instead of the conjunctive term 'AND'. From the foregoing it emerges that the UK legal system at one point had two separate approaches in respect of parliamentary elections and local government elections. It is submitted that when comparative cases from the UK are being used, one must interrogate whether the case in which they are being used is interpreting the parliamentary conjunctive 'AND' terminology or the local government disjunctive 'OR' terminology.

12. In the famous English Case of *Morgan versus Simpson*[1], while interpreting section 37(1) of the Representation of Peoples Act, 1949, the Court correctly interpreted the word 'OR' disjunctively noting as follows:

> "Under S. 37(1) an election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections', or (b) if the irregularities had affected the result. Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected".

[1] (1974) 3 All ER 722

13. In the *Raila Petition (2013),* the Court interpreted the word 'OR' conjunctively instead of disjunctively with the resultant effect that a Petitioner is required to prove both non-compliance and effect on the result on an election in order invalidate or void the elections. This approach to the interpretation of section 83 failed to appreciate and draw appropriate comparative lessons and differences from the British system from which our legislation borrowed.

14. First, the Court proceeded on the basis that the issue of the correct interpretation of section 83 of the Election Act, whether conjunctive or disjunctive was well settled law. Relying on 'several cases from Nigeria' the Court concluded that the interpretation was conjunctive.[2] The Court held 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. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

15. When discussing extra textual context in the interpretation of the Constitution and legislation, Dr. John Mutakha Kangu in "Constitutional Law of Kenya on Devolution" (2015) Strathmore University Press, pp 45-46 identifies foreign law and decisions as one of the extra textual sources. He underscores the importance of foreign law and decisions and the need to take to into account their context in the following manner:

> "Foreign law and decisions also play some role as extra-textual sources in the effort to establish the purpose of a constitutional provision. These are relevant because most modern constitutions cannot be described as unique pieces of work since they have borrowed, adopted and adapted provisions from constitutions of other countries. Kriegler J observed that 'where a provision in our constitution is manifestly modelled on a particular

[2] Para 196

provision in another country's constitution, it would be folly not to ascertain how jurists of that country have interpreted their precedential provision. The Kenyan constitution, like many others written in the past few decades, extensively borrowed from the experiences of other countries. Thus its interpretation will benefit from comparative foreign decisions on related matters or in *pari materia* provisions, 'particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us'. In *Jasbir Singh Rai,* Mutunga Chief Justice underscored the pivotal role that commonwealth and international jurisprudence will continue to play in the development of Kenyan jurisprudence".

However, such foreign decisions must be used with circumspection, aimed at 'finding principles rather than extracting rigid formulae,' seeking 'rationales rather than rules.' Use of such comparative methods requires knowledge not only of foreign law but also of its social and above all its political context as it can become an abuse if it is legalistic and ignores context. When one is borrowing and transplanting, care must be taken so as to anchor comparative borrowing, both within the context of the text from which the authority emanates and the context of the nature and purpose of the text of the borrowing country. To uncritically borrow from foreign sources without considering the appropriate context is a dangerous exercise. It would appear that it was this kind of counsel in mind that the Chief Justice in *Jabsir Singh Rai* warned against 'mechanistic approaches to precedent' that rely on foreign decisions without an inquiry into their respective contexts. He concluded that 'while our jurisprudence should benefit from the strengths of foreign jurisprudence it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched'. Likewise in Communications Commission of Kenya, the Supreme court warned of the danger of 'unthinking deference to canons of interpreting rules of common law, statutes and foreign cases (which) can subvert the theory of interpreting the constitution'. The interpreter must always bear in mind that it is the Kenyan constitution being interpreted and not the constitution of other country being used as a comparative source. As Chaskalson in the South African case of S v Makwanyane cautioned, 'in dealing with comparative law we must bear in mind that we are required to construe the South African constitution and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own constitution'."

16. Secondly, the Court failed to appreciate the fact that at one point the British had two different formulations of the rule. As already noted, section 83 of the Elections Act borrows from the British Representation of Peoples Act,

1949 dealing with local government elections which uses the disjunctive word 'OR' and not the English Ballot Act which uses the conjunctive word 'AND'. It is submitted that British court decisions that are relevant to interpretation of our section 83 are those, which take the approach taken in *Morgan –versus- Simpson* (supra) which correctly interpreted the 1949 legislation disjunctively.

17. Although *Morgan –versus- Simpson* was cited to this court in the *Raila Petition* (2013), this Court arrived at a conjunctive interpretation of section 83 without taking into account: first, the fact that our section 83 borrows the text of the 1949 legislation and not the 1983 legislation; second, the correct disjunctive interpretation of the borrowed text in *Morgan –versus- Simpson.* If the context of the British legislation explained above is taken into account, the correct interpretation of section 83 would be that the use of the term 'OR' in that section is disjunctive.

18. Thirdly, the interpretation approach taken by the Court failed to appreciate the difference between the British and the Kenyan constitutional systems. While the British constitutional system is founded upon the concept of parliamentary sovereignty, the Kenyan constitutional system is premised upon the concept of constitutional supremacy. The essence of parliamentary sovereignty is that the highest institution in the land is parliament which has unlimited power to make and unmake any law. In this context, the role of the judiciary is limited to interpretation and enforcement of what parliament has enacted. The judiciary plays no major role in the political and policy process in the country, and cannot question the laws made by parliament. It is on this basis that the British courts developed an approach to the interpretation of statutes, which limits the courts to finding the intention of the legislature and enforcing it without question however absurd the consequences may be. On the other hand, in a system of constitutional supremacy such as the Kenyan one, the highest institution in the land is the supreme constitution as the expression of the will of the people as the sovereign. The essence of this is that the power of parliament to make and unmake laws and to limit rights is itself subject to constitutional limitations. Thus, any law or action that is inconsistent with constitutional provisions is void and any act or omission that is in contravention of the Constitution is invalid. The courts in this kind of system are the custodians of the supremacy of the Constitution and therefore play a major role in the political and policy processes in the country. The courts can question laws and actions that are inconsistent with the Constitution and declare them invalid.

19. Our own courts and judges have on previous occasion adopted and applied the purposive approach of Lord Denning in *Morgan v Simpson*[3] as we are now urging should be done .The Honourable Justice Maraga (as he then was) in *Joho v Nyange*[4], a case decided before the *Raila Petition (2013)* aptly held that:

> "The law is therefore clear as to when an election can be nullified. An election will be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting the elections which, however trivial, are found to have affected the result of the elections."

20. Notably, even after the *Raila Petition (2013)*, Justice Maraga (then sitting in the Court of Appeal) when confronted with a similar issue touching on the interpretation of section 83 in the case of *Moses Masika Wetang'ula v Musikari Nazi Kombo*[5] maintained the positions that,

> "This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election. Lord Denning succinctly stated this principle in Morgan v Simpson [1974]3 All ER 722 at p. 728 thus: collating all these cases together, I suggest that the law can be stated in these propositions: If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not…
>
> If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls…But, even though the election was conducted substantially in accordance with the

[3] [1974] 3 All ER 722 at p. 728

[4] [2008] 3 KLR (EP)

[5] [2014] eKLR

> law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated."

21. The *Wetangula Case* was pursued on appeal before the Supreme Court, yet this Court did not interfere with the Court of Appeal's finding above, adding only that the Court would not condone illegalities in the electoral process. The Court held that,

> "[137] Section 83 of the Elections Act empowers the election Court to declare an election to be valid or invalid, following an election petition, on the basis of certain conditions. The Court cannot appear to condone illegality in the election process, and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial. The office of Director of Public Prosecutions becomes relevant, insofar as evidence of general offence may emerge in election petition proceedings; and the Court then has the duty to forward this for further investigations, and possible criminal charges. The election Court, thus, affords the criminal-prosecution office a special opportunity to take up the relevant matter for possible criminal trial."

22. The reasoning above is applicable to all questions before the Court not just to those in relation to election offences.

23. In *Abdikhaim Osman Mohammed v Independent Electoral and Boundaries Commission*[6], the Court of Appeal, *(Maraga JA (as he then was) J, Mwilu JA (as she then was) and Mwera JA)* held that section 83 has been interpreted disjunctively in other jurisdictions:

> "as authorizing the nullification of an election only if the irregularities committed in the conduct of an election violate the Constitution or the electoral law *or* affect the result of an election."

24. For completeness, we should point out the difference between section 28 of the National Assembly and Presidential Elections Act Chapter 7 (Repealed)

[6] [2014] eKLR at para 26

which is the precursor of the present section 83. Section 28 did not take cognisance of the supremacy of the Constitution because the old Constitution did not have any explicit constitutional principles governing elections. However since the new Constitution has express constitutional principles governing elections, section 83 recognizes that elections must comply first and foremost to the constitutional principles.

Section 28 of the National Assembly and Presidential Elections Act Cap 7 (Repealed)	**Section 83 of the Elections Act No. 24 of 2011**
No election shall be declared to be void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election."	No election shall be declared to be 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 **principles laid down in the constitution** and in that written law OR that the non-compliance did not affect the result of the election".

25. A conjunctive and narrow interpretation of section 83 of the Elections Act undermines the supremacy of the Constitution under Article 2 of the Constitution and suggests that an act can remain valid despite its transgression of the constitution so long as it does not affect the result.

26. We submit that the correct interpretation of Section 83 is as per the decision in *Morgan –versus- Simpson* (supra) in that:

    a) Any election that does not comply with the constitutional principles is *ipso facto* invalid.

    b) Any election that does not comply with written laws and regulations will be invalid if the effect of the non-compliance affects the results.

27. We therefore urge the Honourable court to adopt a purposive and progressive interpretation of section 83 of the Elections Act to give effect to the spirit and letter of the law.

28. It has been submitted that the essence of section 83 of the Elections Act is that for elections to be valid, they must comply with the 'principles laid down in the constitution', written law and regulations. The constitutional

principles governing elections in Kenya are established by Articles 81, 86 and 38.

29. Article 81(e) of the Constitution establishes the principle of free and fair elections and provides for some of the ingredients for free and fair elections as follows:

> "The electoral system shall comply with the following principles:
> (e) free and fair elections, which are:
> (i) by secret ballot;
> (ii) free from violence, intimidation, improper influence or corruption;
> (iii) conducted by an independent body;
> (iv) transparent; and
> (v) administered in an impartial, neutral, efficient, accurate and accountable manner."

30. The Constitution has elevated the principle of free and fair elections to the status of a fundamental right provided for under Article 38.

31. Article 86 goes further to stipulate additional principles that focus on the system of election; the casting, counting and tallying of the votes; the transmission of the results; and the appropriate structures and mechanisms for elimination of malpractices:

> "At every election, the Independent Electoral and Boundaries Commission shall ensure that—
>
> (a) whatever voting system is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
>
> (b) the votes are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
>
> (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
>
> (d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of election materials."

32. More importantly, the Constitution imposes an obligation on the 1st Respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. The main objective of these

principles is to avoid the possibility of manipulation of the system. The atmosphere in which elections are conducted determines the quality, integrity and credibility of the election results.

What is the meaning of the principles laid out in Article 86 of the Constitution that are relevant to this Petition?

(a) Accurate – it means that the election results must be mathematically precise and competent. Ballots must be correctly counted, results must be properly tabulated, totals must be correctly calculated.

(b) Verifiable – means supported by a legal instrument that authenticates the contents. In respect of an election, this would mean the recording of the results in the prescribed form, the execution of those prescribed forms by the appropriate electoral officers and the publication of those prescribed forms in the appropriate media.

(c) Secure – electoral processes and materials must be protected from manipulation and interference. Election materials and data must be protected from loss and damage.

(d) Accountable – the election must be capable of being scrutinized on the basis of its own records. In the context of an election, the national tally must be capable of being audited by the constituency tally, and the constituency tally must be capable of being audited by the polling station tally and the polling station tally must be capable of being audited by the ballot papers.

(e) Transparent – an election is transparent when its processes are open and easily accessible to observation by the stakeholders and the public. This means that there must be admission of agents into polling, counting and tallying centres, the open announcements of all results, open furnishing of copies of the documents to all the agents and the timely publication of the polling results forms on the public portal

33. As will be demonstrated later in these submissions, the elections conducted on 8th August, 2017 fundamentally violated the above principles.

b) <u>Effect of non-compliance with principles laid down in the Constitution and written law</u>

<u>Malpractices v Results?</u>

34. Article 2(1) establishes the principle of constitutional supremacy and states that:

> "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

35. In the context of elections, this provision binds the 1st Respondent in the manner it conducts elections. The principles established by Articles 81 and 86 prescribe the constitutional manner and form of conducting elections, which must be complied with.

36. The failure of compliance with these principles is stated in Article 2(4) which provides that:

> "(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

37. Even before these principles were enacted, Justice Kimaru in *William Kabogo Gitau-v- George Thuo & 2 Others*[7] observed that the Court should look more into the entire electoral systems and processes rather than results alone in dealing with malpractices. The learned Judge noted at page 30:

> "The validity of an election is not dependent on the results alone but is a factor of the entire electoral process as recognized under the Constitution, the National Assembly and Presidential Elections Act and the Regulations made thereunder and International law and the Conventions and Treaties which Kenya is signatory to and party to."

38. Applying the above principle to the case that was before him, Justice Kimaru held,

> "Taken in totality, the irregularities and electoral malpractices complained of by the petitioner are of such magnitude that the results of Juja

[7] [2010] eKLR

> parliamentary election held in the 2007 cannot stand the credibility and integrity test. The said election cannot be said to have been transparent, free and fair. This court therefore holds that the petitioner established to the required standard that there were indeed massive irregularities and electoral malpractices in the conduct and the declaration of results of Juja parliamentary election that negates and voids the said results."

39. Expressing a similar view in the election petition of *Benard Shinali Masaka -v- Boni Khalwale*[8] the Honourable Justice Lenaola (as he then was) held.

> "where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results".

40. The courts take the drastic step of invalidating a noncompliant election because of the grave consequences that would emanate from allowing a non compliant election to stand. As stated earlier, elections are a mechanism through which the people as the ultimate source of all authority in a republican system delegate the exercise of some of their sovereign power to their representatives.

41. An election that does not comply with the constitutional principles results in a usurpation of the peoples sovereignty by false representatives who do not represent the peoples will and who are not accountable to them. This goes contrary to the essence of Article 4 of the Constitution, which establishes Kenya as a sovereign Republic.

42. According to James Madison:

> "we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified…"

[8] (2011) eKLR

c) **Standard of Proof**

43. In the *Raila Petition 2013* this Court stated[9]:

> "The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the *principles of the Constitution*, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be *above the balance of probability*, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of *data-specific electoral requirements* (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

44. In the above holding, we respectfully submit that Court erred in holding: firstly, that there exist in law various standards of proof, criminal standard of beyond reasonable doubt, civil standard of balance of probabilities and several other intermediate standards in between.

45. Generally, in election petitions, the relevant standard was one intermediate between the criminal and civil standard.

46. In respect of some issues, and in particular what the court referred to as *"data specific electoral requirements"* the relevant standard of proof was beyond reasonable doubt. There have been varying interpretations regarding standards of proof from various jurisdictions in the world in which each jurisdiction has been left to decide for itself what standard of proof to apply.

47. This Court did review several of the positions in the various jurisdictions and observes in the above passage that "the lesson to be drawn from the several authorities is, "in our opinion, that this Court should freely determine its standard of proof, on the basis of the *principles of the Constitution*, and of its concern to give fulfillment to the safeguarded electoral rights".

[9] Paragraph 203.

48. However, emerging jurisprudence led by the House of Lords in England is that in law there are only two standards of proof i.e. criminal standard of beyond reasonable doubt and the civil standard of reasonable probabilities. In *Re B (Children)*[10], the House of Lords revisited the subject of intermediate standard of proof. Lord Hoffman noted,

> "some confusion has however been caused by the dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention) but nevertheless thought that, because of the serious consequences of the proceedings the criminal standard of proof or something like that should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged".

49. Lord Hoffman concluded as follows:

> "…I think the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in McCann's case (at 812) that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard".

50. Baroness Hale of Richmond in the same case observed at paragraph 37 that:

> "Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary (see *Re H(minors) (sexual abuse: standard of proof) [1996] AC 563 586D-H*

[10] 2008 UKHL 35

> per Lord Nicholls of Birkenhead)…Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of those views."

51. The difference between the position of the House of Lords and the Kenyan Supreme court approach is that as per the House of Lords the general rule remains that: a) there are only two standards of proof and there is no intermediate standard b) the general rule is that in all civil matters the standard of proof is always on a balance of probabilities.

52. However, the court noted that in serious allegations particularly those involving criminal conduct, the court could heighten the standard of proof within the ambit of the civil standard of a balance of probabilities. Lord Hoffman gave an example of how this heightened standard of proof would operate at paragraph 15 where he stated:

> " … Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

53. Lord Hoffman in paragraph 37 quoted above seemed to suggest that in some circumstances you could heighten the standard of proof to that of the criminal standard.

54. However, while expounding on the heightened standard argument, Baroness Hale of Richmond at paragraphs 70 – 72 maintained that the heightening of the balance of probabilities in civil cases must not be elevated to the criminal standard of beyond reasonable doubt. In her view, neither the seriousness of

the allegation nor the seriousness of the consequences should serve to change the standard of proof.

> " [70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequence should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, whether relevant, in deciding where the truth lies.
>
> [71] As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat his or other children in the future.
>
> [72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then, there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drugs abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is inside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lion's enclosure when the door is open, then it may well be more likely to be a lion than a dog."

55. This latter view found sway with the Canadian Supreme Court in the case of *FH –versus- Ian Hugh McDougall* [11]where Rowles, JA at paragraphs 41 and 45 held:

> "[41] First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of

[11] (2008) 3 SCR 41

> criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused."
>
> "[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

56. In conclusion, the Court held that:

> "In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not than an alleged event occurred."[12]

57. Besides Canada, the approach in the House of Lords has recently been followed by the Constitutional Court of Seychelles in *Wavel John Charles Ramkalawan versus The Electoral Commission*[13]. The Constitutional Court of Seychelles did in fact consider the position taken in Election Petition No. 5 of 2013 and rejected the position taken by the Kenyan Supreme Court that there was an intermediate standard.

58. This court did not appreciate the currency of this new approach within the commonwealth when it considered the judgment of the Judicial Committee of the Privy Council in *Jugnauth v. Ringadoo and Others* [2008] UKPC 50. The court did not appreciate that while upholding the judgment of the Supreme Court of Mauritius, the Judicial Committee of the Privy Council relied on the holding of the House of Lords which had been passed a few months earlier and had been adopted by the Supreme Court of Canada. This decision should have been more persuasive to this court than the holdings that the court relied on in deciding on intermediate standard.

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[12] Paragraph 49

[13] (2016) SCC 11

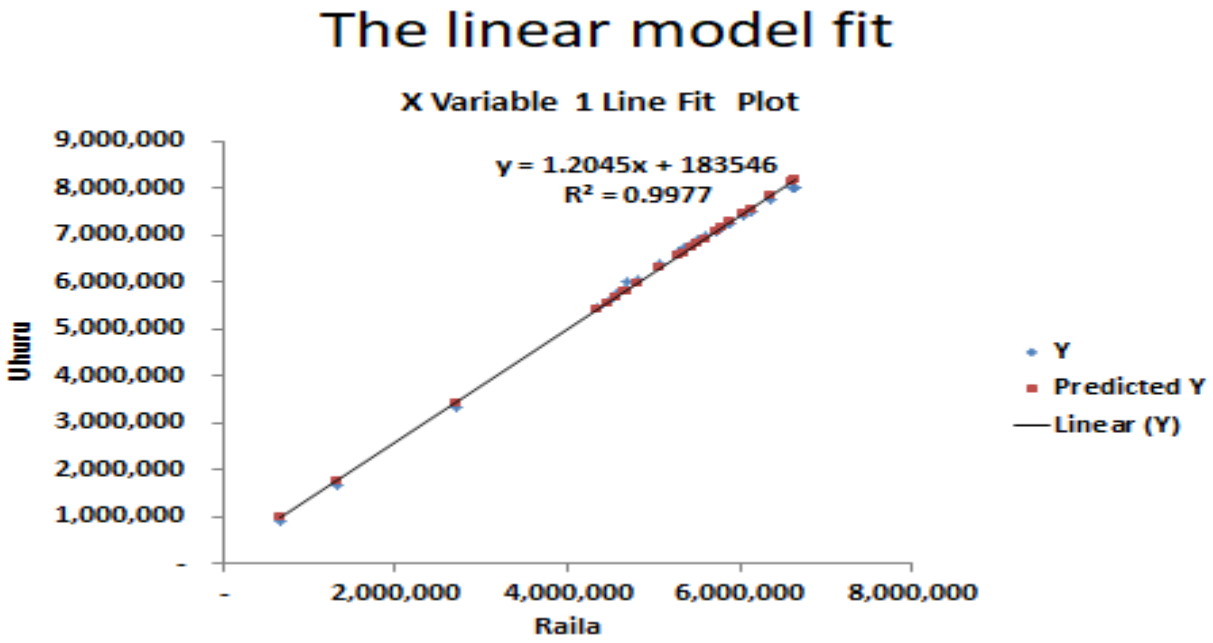
59. We will urge the Court to adopt the emergent jurisprudence and find that the applicable standard of proof to determined the issues in this Petition is the civil standard that is based on a balance of probabilities.

B. EVIDENTIAL ANALYSIS

a) Computer generated results

57. The Petitioners maintain that the results declared do not reflect the will of the people but are merely generated by computers through interference with the actual results recorded. Instead of giving effect to the sovereign will of the Kenyan people the 1st Respondent delivered preconceived and predetermined computer generated leaders (Petition, paragraph 16).

58. Evidence presented by the Petitioners shows that during the tallying of the presidential vote tally, a constant, consistent and impossible progression percentage difference of about 11% was maintained between the Petitioner and the 3rd Respondent throughout in spite of the fact that the purported results were coming in an alleged random manner. The constant percentage difference assumes that the results that were being randomly transmitted from the Petitioners' and the 3rd Respondent's strongholds simultaneously maintained a uniform sequence and progression which is statistically impossible (See paragraph 8 of Dr. Edgar Ouko Otumba's affidavit).



59. Secondly, that the results were computer generated is evident from the fact that the Form 34As and 34Bs were tailored to reflect the ammonized results and not instructed by the primary data which ought to have been the case. The 1st Respondent summoned some of its Returning Officers and Presiding Officers to append their signatures on forms that had been generated to conform to the results that had already been generated (paragraph 232 of Dr. Nyangasi's affidavit).

60. Third, the results were displayed and declared without having been verified and without having been accompanied with copies of the requisite verification forms (paragraph 16 of Ole Kina's affidavit). The 1st Respondent by its conduct, actions and/or omissions deliberately and/or negligently compromised the security of the integrated electoral management system (commonly known as KIEMS) and thereby exposed it to unlawful interference by third parties and compromised the verifiability and security of the key component of the Presidential election i.e. tallying and transmission of results. Without prior reasonable notice to stakeholders and barely 2 days to the presidential elections, the 1st Respondent announced over 11000 polling stations that were purportedly out of range for the 3G and 4G network and which were therefore expected to transmit election results from locations other than gazetted polling stations and/or manually. This action was in my view an unreasonable ambush that compromised my

ability to put in place adequate measures to secure transmission of results from the 11,000 polling stations (approximately 7,700,000 votes) (paragraph 9(a), 20 of Raila's affidavit).

61. There are glaring instances of interference and/or frustration of the elections in relation to transfer and tallying of results and the only reasonable inference from the foregoing events is that the security of the integrated electronic electoral systems was deliberately and/or negligently compromised so much so that the presidential election was substantially conducted using manual processes, methods and/or techniques that are totally incompatible with the transformative principles of the electoral system under Article 81 and 86 of the Constitution or at all (paragraph 22, 24 and 26 of Raila's affidavit, paragraph 4 of Oichoe's affidavit and paragraphs 19 and 22 of Osotsi's affidavit). All the foregoing in addition to other instances explicitly showing that the results were computer generated are submitted on below.

b) Validity of elections

62. Elections can stand only if the 1st Respondent conducts the same in accordance with the Constitution and national legislation relating to elections (petition, paragraph 14 and 17). The Constitution and the Elections Act provide for the mandatory requirements in conducting of the election process. These conditions are what are summarized as "free, fair, credible, verifiable and accountable" election process. Where an election process falls short of these requirements then the process ought to be declared a sham and the elections nullified (petition).

63. The Petitioners submit that, as shown hereunder, the elections were conducted so badly and marred with such grave irregularities that it does not matter who won or was declared the winner of the Presidential elections (petition, paragraph 14, paragraphs 7, 9, 20, 21 and 27 of Raila's affidavit and paragraph 7, 8, 11, 14 and 15 of Wamuru's affidavit, paragraphs 10, 11, 12, 20, 21 and 40 of 1st Osotsi's affidavit).

64. Further, and as shown in the 2nd affidavit of Godfrey Osotsi, Mr. Wako Shuke, the 1st Respondent's ICT staff, explained the process of tallying and transmission both sets of results, those with Form 34As and those without Form 34As based on text messages only. This was contrary to earlier undertakings by the 1st Respondent that text message results would be

accompanied by images of respective form 34As before being displayed in the public portal (doc 8 paragraph 9).

65. On the same date of 8th August 2017, at a meeting with the Petitioners' Chief Agent Hon Musalia Mudavadi and other ODM representatives, the 1st Respondent's ICT consultant who supplied the KIEMS gadgets confirmed that they were receiving results without form 34As for the reason that some officials had network challenges hence could not submit images because of lack of 3G services (para 10 of Osotsi's 2nd affidavit).

66. The Petitioners were subsequently supplied with about 32000 Forms and 11000 forms were not supplied. Upon review of the electronic Form 34As files provided by the 1st Respondent, the deponent noted that the Forms in terms of the file sizes did not exceed 1 Megabyte and were well within conventional range to be submitted by the 1st Respondent's KEIMS gadgets even within areas with as low as 2G network. Despite the foregoing, the 2nd Respondent declared the 3rd Respondent as the president elect notwithstanding that the Petitioners and the general public did not have access to at least 8,883 form 34 As. Furthermore, by the time the declaration was being made the portal gave a breakdown of the Form 34As as follows; autovalidated declaration forms 29,681 (72.58%); invalid declaration forms 10,393 (25.42%). These invalid forms were text only data submitted without the Form 34As; not transferred forms 34as-809 (2%). (see para 13 of Osotsi's 2nd affidavit).

c) *Independent and Electoral Boundaries Commission vs Maina Kiai (Maina Kiai case*)

67. The Court of Appeal in the Maina Kiai decision was to the effect that a polling station was the final point of declaration of presidential results. However, the 1st Respondent went contrary to this by resorting to have the County as the final point of declaration (petition, paragraph 21.5).

68. The 1st Respondent went contrary to the said decision by failing to electronically collate, tally and transmit the results accurately; by declaring the results per county the 1st Respondent failed to make the results at the polling station final; by allowing transmission and display of unverified results not provided for in law; posting contradictory and ever changing results in Forms 34A, 34B and the portal; declaring final results on 11th August 2017 before receiving all results from all polling stations; colluding

with the 3rd Respondent and ejecting agents of the Petitioners from various polling stations in the Central and Rift Valley Regions; and allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes (petition, paragraph 21.5).

d) Undue influence to announce results prematurely

69. There is no explanation and none can be fronted as to why the 1st and 2nd Respondents were in a hurry to declare the results of the presidential elections when the results had not been verified as required. All returns without the IEBC's official stamp not bearing the particulars and signatures of the Returning Officers, not bearing the particulars and signatures of the agents and those not borne on the prescribed forms are invalid and ought to have been so declared by the 1st Respondent before hurriedly declaring the unverified results (petition, paragraph 23.4).

70. By announcing the results which were unverified the 1st and 2nd Respondents were playing to the tune already planted in the public mind by the display of the unverified results, that is, that there could not be any contrary results other than the one displayed. It is therefore the submission of the Petitioners that by declaring the results before the same were verified the 1st and 2nd Respondents declared the results prematurely and in total disregard to the legal requirements.

e) Curious streaming of results from about 5:07 pm

71. The official closing time for polling stations was 5.00 pm. Upon the close of the polling stations, the Presiding Officers together with the agents present were to start the tallying and counting process. This process normally takes some time as there has to be verification of the results and that the votes are ascribed to the right person in addition to making determinations on *inter alia* rejected votes.

72. In these elections and surprisingly so, a few minutes after the official closure of the polling stations results started streaming in. The first results hit the NTC at about 5:07pm barely ten minutes after closure of the polling stations (paragraph 6 of Ole Kina's affidavit). This is quite weird and unexpected unless prior to the election process there was already an interference with the 1st Respondent's systems or immediately upon the closing of the polling stations the results were being transmitted and relayed without verification.

The 1st Respondent ought to have therefore verified these results before displaying the same to the public.

f) Results streamed and publicized before and without verification

73. The results that were being streamlined and publicized on TV screens were done so before receipt of all forms 34A and 34B and therefore before prior verification at the constituency level and by the 1st Respondent through the prescribed form. After persistent request for the outstanding Forms Mr. Wako of the 1st Respondent sent an email with an excel sheet with results from 10056 polling stations. Out of these 100 had more than 700 registered voters in each polling station while some had abnormally higher numbers of rejected votes (page 12 exhibit C of Osotsi's 2nd Affidavit).

74. Further, the 10056 polling stations were the ones where text only results were submitted without form 34As. On review of the data against the public notice of network coverage issued by the 1st Respondent it was discovered that various inconsistencies in terms of areas indicated as not affected by network coverage existed. Polling stations shown as covered nevertheless transmitted text only data as shown in the table below.

COUNTY	**NO. OF P/STATIONS(THAT CAME WITHOUT FORM 34As & RESULTS TRANSMITTED WAS TEXT ONLY)**	**IEBC ADVERT**	**VARIANCE ON AREAS IEBC ANNOUNCED WOULD BE LESS AFFECTED BY NETWORK COVERAGE YET RESULTS TRANSMITTED WERE BASED ON TEXT ONLY.**	**VARIANCE ON AREAS IEBC ANNOUNCED WOULD NOT BE AFFECTED AT ALL BY NETWORK COVERAGE YET RESULTS TRANSMITTED WERE BASED ON TEXT ONLY**
BARINGO	174	378		
BOMET	102	14	88	
BUNGOMA	273	14	259	
BUSIA	433	641		
ELGEYO MARAKWET	80	169		
EMBU	194	29	165	
GARISSA	70	117		
HOMABAY	591	892		

ISIOLO	30	56		
KAJIADO	98	138		
KAKAMEGA	391	18	373	
KERICHO	135	40	95	
KIAMBU	180	224		
KILIFI	135	93	42	
KIRINYAGA	257	461		
KISII	631	922		
KISUMU	397	579		
KITUI	272	175	175	
KWALE	74	20	54	
LAIKIPIA	115	81	34	
LAMU	29	12	17	
MACHAKOS	226	7	219	
MAKUENI	225	81	144	
MANDERA	138	329		
MARSABIT	107	129		
MERU	270	153	117	
MIGORI	509	528		
MOMBASA	39	0		39
MURANG'A	411	916		
NAIROBI	99	0		99
NAKURU	171	153	18	
NANDI	153	30	123	
NAROK	100	213		
NYAMIRA	440	332	108	
NYANDARUA	123	33	90	
NYERI	416	428		
SAMBURU	85	182		
SIAYA	596	775		
TAITA TAVETA	42	56		
TANA RIVER	86	134		
THARAKA	98	45	53	
TRANSNZOIA	27	17	10	
TURKANA	255	468		
UASIN GISHU	135	13	122	
VIHIGA	300	440		
WAJIR	140	248		
WEST POKOT	185	372		
TOTAL	**10037**	**11155**	**21192**	**138**

(See Doc 8 page 13 to 14 and exhibit e page 15 of Osotsi's 2nd affidavit)

75. The Petitioners submit that the public notice on polling stations without network coverage was unlawful, arbitrary and non-verifiable as it was published only two days to the General Elections contrary to the requirement of publication 45 days to the general elections. This was in breach of Regulation 21, 22 and 23 of the Elections (Technology) Regulations 2017. It should be noted that the 1st Respondent's averments were misleading and contradicted the publicly available Communications Authority of Kenya Access Gap Study Report 2016 which shows that only 164 sub-locations are not network covered and that 94% of the population is covered by at least 2G network services. The 1st Respondent further failed to publish its details of telecommunication network service providers on its website as required by Regulation 19 (1) of the Elections (Technology) Regulations2017.

76. More fundamentally, the 1st Respondent brazenly displayed results from polling stations which at the time were still compiling and tallying results and had not announced the final results (see Doc 9 para 10 of Ogla Karani's affidavit).

g) No verification of results allowed or undertaken before display

77. Section 39 (1A)(ii) & (iii) and 1(C) of the Elections Act mandatorily required the 1st Respondent to appoint constituency returning officers to collate and announce the results from each polling station in the constituency for the election of *inter-alia* the President and to submit, *in the prescribed form*, the collated results to the national tallying centre. In this regard, the 1st Respondent was mandatorily required to 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 and to tally and verify the results received at the national tallying centre; and publish the polling result forms on an online public portal maintained by the Commission. In essence the law mandatorily required that ALL results transmitted from a polling station must be validated instantaneously in order to avoid manipulation as had been the case in past elections. Indeed this was one of the mischiefs that informed the amendment of the laws.

78. This provision sought to secure the sanctity and integrity of the voters register and to ensure the accountability, security, verifiability and accuracy

of the ballots cast in the election (Raila's affidavit, paragraph 14). The rush to display the results without prior verification of the results as required by law is a clear indication that the 1st Respondent did not intend to allow electronic transmission and verification to work.

h) System compromised and manipulated by 3rd parties

79. The Petitioners submit that the electronic system of transmission was compromised by 3rd parties who manipulated it and generated number for transmission to the National Tallying Centre. The electronic system was in fact compromised by unauthorized third parties and data therein manipulated and subsequently unlawfully transmitted to the constituency and national tallying centers (paragraph 25 of Raila's affidavit and paragraph 4 of Oichoe's affidavit).

Six ways of compromise

The 1st Respondent's system and database was compromised in a total of six different ways.

80. First, the database was accessed as already submitted hereinabove leading to the adjustment of the results in the portal which is the second compromise. Thirdly many voters' details were lost and they therefore could not exercise their right to vote. In addition, there were strange incidents occurring such as strange returns in the manner and style of exercise books. Lastly as at the time of declaring the results only 29,000 forms 34A had been received by the 1st Respondent (refer to paragraph 4 of Oichoe's affidavit)

i) Curious case of multiple versions of rejected votes

81. A number of critical factors including the registration of voters affected the votes cast, their numbers and the final result of the election. These include the rejected votes which account for about 2.6% of the total votes cast (petition, paragraphs 18 and 19). In these elections, there is a disjunct in the number of rejected voters as per Forms 34A, 34B and in the 1st Respondent's portal. In actual summation of Forms 34B the number is 477,195, 403,495 as per the 1st Respondent's portal and 81,685 as per the 1st Respondent's Form 34C (petition, paragraph 25).

82. The 1st Respondent failed to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in the results displayed in its portal. As at the time of announcing the final presidential results the 2nd Respondent did not announce the number of rejected votes. This by itself is a fatal omission. To aggravate the situation, the total rejected votes as shown on the public portal and national television was 401,093 while the same portal showed rejected votes as at 18th August 20017 as 403, 495. The differences are substantial and a clear demonstration of manipulated results to meet a predetermined outcome of the 3rd Respondent's vote tally. The differences show the illegitimacy of the 1st Respondent's figures (see Doc 8 para 14 and 15 of Kegoro's affidavit, Doc 11 para 5, 6,7 and 8 of Benson Wasonga's affidavit)

83. The various versions of the results do not by any stretch of imagination conform to the constitutional requirement of accurate, verifiable and accountable conducting of elections as anticipated by the Constitution. The instances of varying numbers of rejected votes include Voi Constituency (paragraph 93 of Nyangasi's affidavit).

j) Wrongly allowed display of provisional results not provided for in law

84. As per Section 39 (1A)(ii) & (iii) and 1(C) of the Elections Act the 1st Respondent was required to verify the results forwarded by ensuring that the results transmitted to it were accompanied by corresponding Forms 34A before displaying or otherwise publishing the results. Contrary to the unambiguous provision of the law the 1st Respondent allowed unverified and what it termed as provisional results to be publicly displayed. Upon being required to stop the display and first verify the result, the 1st Respondent disowned the displayed results terming them as provisional, which provisional results have no place in law (paragraph 31 of Raila's affidavit).

k) Final results wrongly declared

85. Even after disowning the displayed results and terming them as provisional, the 1st and 2nd Respondents proceeded to make a declaration of the unverified results as the final results of the presidential elections and this declaration was based on the displayed unverified results in as much as it disowned the live-streamed results. The final results as declared was erroneously declared for the simple reason that the same was declared without verification of results from 11,883 polling stations amounting to

about 7 million votes. The 1st Respondent admitted that as at 15th August 2017, about 4 days after declaring the results, it had not yet received all the Forms 34B. There were even some Constituencies such as Nyando, whose entire results were omitted at the time of the declaration of the results.

86. The Petitioners therefore submit that the declaration was done hurriedly and before receipt of all requisite forms (about 11,883 form 34As and about 100 34Bs) and that the declaration was based on unverifiable data/results and went contrary to the legal and constitutional requirements of verifiability of the results (paragraphs 6, 28 of Raila's affidavit, paragraph 4 (v) of Oichoe's affidavit, paragraph 13-21 of Ole Kina's affidavit and paragraph 8 of Osotsi's affidavit).

87. It is the Petitioners' submission that the results were hurriedly declared in order to conform to the results already streamed to the public without verification and to save the 1st Respondent's face and for the reason that the public was already conditioned to expect no change in the results. There was no intention by the 1st Respondent to verify the results.

l) Unprecedented and unbelievable case of varying results in portal and form 34B provided

88. Other than streaming and displaying unverified results, the 1st Respondent's impropriety in the manner it conducted the election is evident by the sheer number of discrepancies in the results in its own portal vis a vis the Forms 34B (paragraph 30 of Raila's affidavit). In Bureti Constituency (page 309 of document 7) there is discrepancy in the tally of vote and in Wajir South Constituency the discrepancy is on rejected votes. Further discrepancies can be seen in Ndaragwa Constituency (page 91 doc7); Ol Jorok Constituency (page 93 doc7); Wajir North Constituency.

89. In addition, the results from in excess of 10,000 polling stations transmitted to the NTC did not comply with the mandatory requirement as the results were not conveniently accompanied by electronic image of Forms 34A and there was no verification of such results leading to the discrepancies stated above and the afterward attempt by the 1st Respondent to sanitize its systems by recalling officials to sign manufactured forms.

m) If verified, results in portal should match 34As and 34Bs

90. The 1st Respondent, contrary to law, was streaming results absent of verification.

91. The Petitioners submit that if the results would have been verified then the results as per Form 34As, 34Bs and the declared results would have been the same and consistent throughout which is not the case. The inconsistencies outlined show and prove that the entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre (NTC) and from the constituency tallying centres to the NTC was not simple, accurate, verifiable, secure accountable, transparent, open and prompt inline with the constitutional and statutory underpinnings required in elections.

n) In translocating results from 34As to 34Bs thousands of Petitioners' votes omitted while 3rd Respondent's votes increased

92. By craft or negligence, the translocation of results from Forms 34A to 34B resulted to omission of votes for the Petitioner and addition of votes to the 3rd Respondent. Instances of such include Igembe South (Document 5 vis a vis page 120 of document 7); Rabai Road Primary School Polling Station Number 1 of 4 (refer to page 66 of Document 5 and page 188 of Document 7); Jobenpha Community School Polling Station Number 17 of 21(page 69 of Document 5); Kewi-South C Polling Station Number 3 of 8 (page 71 of Document 5 and page 164 of Document 7); Nyanchenge Primary polling station number 1 of 2 in Bobasi Constituency; Rusinga Primary polling station number 1 of 2 within Bobasi Constituency; Amabiria Primary polling station number 1 of 1 within Nyaribari Chache Constituency; Kaptembwo Primary polling station number 4 of 8 within Nakuru Town West Constituency; Ilmotioo Primary polling station number 1 of 1 in Kajiado Central Constituency; Kiegoi Primary polling station number 2 of 2 within Igembe South Constituency; Nkiriana polling station number 1 of 2 within Igembe North Constituency; Sigowet / Soin Constituency; Mulolongo polling station in Mavoko Constituency; Bomet Central Constituency all show that the 3rd Respondent's votes as between Forms 34A and 34B have been increased.

93. On the contrary Form 34A submitted by the Petitioners' agent in respect of Getare Tea Buying Centre Polling Station Number 1 of2 in Nyari Bari Masaba Constituency has no corresponding reflection in Form 34B;

94. In addition in Nyabieyo Primary School Polling Station; Nyanchenge Primary polling station number 1 of 2 in Bobasi Constituency; Cheptoroi polling station 2 of 3 within Njoro Constituency in Nakuru County; Kaptembwo Primary polling station number 4 of 8 within Nakuru Town West Constituency; Kiyanka Primary polling station number 2 of 2 within Igembe South Constituency; Nkiriana polling station number 1 of 2 within Igembe North Constituency; Dandora III City Council Hall polling station number 9 of 9 within Embakasi North Constituency; Jetview polling station and Mulolongo polling station both in Mavoko Constituency; Gem Constituency; Turkana Central Constituency; Bomet Central Constituency; Turbo Constituency all show a substantive deduction of votes from the Petitioners.

95. Further still, the declared results in the presidential *vis a vis* gubernatorial and parliamentary results showing that a total of 482,202 people were given six ballots but chose to vote for the president and not their governors while a total of 567,517 opted not to vote for their Members of Parliament is suspect.

96. These are only samples of the polling stations and scrutinized and analyzed and which leads to the conclusion that it would be difficult to determine with conciseness who won the elections. In addition, these inconsistencies lend credence to the submission that the presidential election process was inconsistent with the provisions of Article 138 (2) of the Constitution and provisions of the Elections Act.

o) Instances of petitioners' votes reduced in 34A and/or 34B

97. Funyula Constituency (pages 54 and 55 of document 7); Igembe South Constituency; Tonye Primary School in North Kamagambo Constituency (page 74 of document 5); Memba Primary School in West Asembo Ward (page 70 doc 5); Karachuonyo Constituency (page 1-2 doc 7 and 29 Doc 7(B)).

p) Up to 3 or 4 versions of 34Bs. Note the original forms were provided by Al Gurhair

98. It is instructive to note that Forms 34A, 34B and 34C are contractual, accountable security documents in the prescribed form and formats which were part of the contractual documents to be delivered by Al Gurhair. These

Forms were formatted in a consistent manner, serialized, marked with Barcodes, watermarks and other security features. An examination of a variety of Forms provided by the 1st Respondent disclose starting variations in the order and details of particulars of candidates; in absence of prescribed particulars; in absence of the security features as to clearly demonstrate an attempt at falsification and forgeries by the 1st Respondent in collusion with the 3rd Respondent intended to defeat the ends of justice and subvert the will of the people.

99. In Lugari Constituency the first Form 34B as uploaded from the 1st Respondent's portal does not bear the serial number, IEBC's logo, total summation column nor the Returning Officer's details and stamp. The second form 34B issued to the Petitioner's agents bear all the aforesaid features (see Doc 8 paras 18, 19 and 20 Kegoro's affidavit and the annexures).

100. In Njoro's Constituency the uploaded for 34a indicate the same was signed by "NASA agents".it is instructive to note that NASA as a coalition did not have agents.

101. In Embakasi West there are two different Form 34B each containing different results in the 1st Mohamed Dida got 35 votes while the second indicates 15 votes for the same candidate (see annexures to Kegoro's affidavit).

q) Arithmetic inaccuracies in favour of 3rd Respondent

102. Our analysis reveals massive arithmetic inaccuracies which, by design, were made to favour the 3rd Respondent to the detriment of the Petitioners.

103. In Dagoretti North Constituency according to the Form 34B the total number of votes is 104,789 while a summation of the votes indicates total of 105,840 indicating that a total of 1,055 votes are unaccounted for.

104. These arithmetic discrepancies are equally present in Embakasi Central Constituency (pages 125, 187, 189 and 191 of document 5 and pages 185 and 229 of Document 7); Wajir South Constituency (page 122 of document 7 and 124 of document 5); Naivasha Constituency (page 267 of document 7and 484 of document 5); Turbo Constituency (pg 175 of document 7); Funyula Constituency (page 54 and 55 of document 7).

105. In Mandera North Constituency at Kalicha Primary School the figures in Form 34A show that all 594 registered voters voted! This is a clear falsification (Doc 12 para 6 affidavit of Mohamed Noor).

106. An examination of some sample counties demonstrates a clear and troubling pattern where tallies of the Petitioners' stronghold of Nyanza,Western and Eastern Regions are systematically reduced while the 3rd Respondent's strongholds of Central and Rift Valley Regions are systematically increased (see annexure GK-1 to Kegoro's affidavit in Doc 8).

107. A further examination of the figures further reveals anomalies in the overall turnout as follows:

    i. Voter turnout as announced by the 2nd Respondent on 11th August 20017 is 15,073,662;
    ii. Voter turnout as projected from the 1st Respondent's portal on the date was 15,518,971;
    iii. Voter turnout as recorded on the 1st Respondent's website is 15,586,401.

108. The legal effect of the foregoing is that since the 1stRespndent's announced turnout is less than what was shown on its portal as being on the national TV and on its website at the time of final announcement the declared final result is inaccurate, misleading and invalid.

109. A further examination of the 1st Respondent's documents reveal myriad startling anomalies in the number of registered voters as shown below;
    i. At the end of mass voter registration exercise the total number of registered voters 19,646, 673;
    ii. After the KPMG audit and subsequent clean-up of the register the number was stated 19,611,423;
    iii. When the 1st Respondent published the list of the number of ballots allocated to each polling station the number was stated as 19,613,846;
    iv. When the 1st Respondent announced the number of registered votes per county at the tie of declaration of presidential results the total number of registered voters amounted to 19,637,061

110. These differences demonstrated variances in the 1st Respondent's figures in 47 out of 49 counties with the resultant increment of 25,638 voters more than the certified total as at 11th August 2017 (see Doc 8 annexure GK1 Table 3).

111. A review of returns from various prisons as given by the 1st Respondent startlingly shows results in excess of 100% of registered voters as exemplified below:

a. Garissa Main Prison, 25 registered voter, portal shows 18 valid votes and 25 rejected votes totaling 43 votes cast. This amounts to 172% turnout
b. Kitale Medium Prison 7 registered voter, 9 total votes cast thus 129% turnout
c. Manyani Prison, 157 registered voters, 289 votes cast thus 184 % turnout
d. Moyale Prison, 6 registered voters, 10 votes cast 167% turnout.

112. The manipulation of the results, whether by design or negligence, in favour of the 3rd Respondent did in fact affect the final results tallied. The net effect of the systemic and systematic manipulation and distortion of the results renders it impossible to determine who actually won the presidential election and/or whether the threshold for winning the election under the Constitution was met.

r) Arithmetically incorrect

113. Instances of arithmetically incorrect entries include Kiogoro Tea Buying Centre polling station (page 36 doc 5); Amabiria Primary School polling station in Nyaribari Chache Constituency (pg 41 doc 5).

s) Exclusion of results from gazetted polling stations

114. Further to the inconsistencies in the postings between the Forms 34A and 34B as outlined, there are further glaring anomalies in the manner of gazetted polling stations with several voters which do not have any results and/or did not post any results. As such results from these gazetted polling stations were not factored in the final declaration of the presidential results and no reason or viable reason was given for such.

115. Such polling centres include Kamukunji Constituency (page 1 to 6 of Doc 6); Karachuonyo Constituency (page 29 to 33 of doc 6) Fafi Constituency (pg 25 to 28 of Doc 6) and Kandara Constituency (pg 34 to 39 of Doc 6).

116. The failure to include the results from these polling stations is a grave breach of the provision of the Constitution as the persons who voted in these stations were denied their right to exercise their sovereignty and their democratic right.

t) Inclusion of results from ungazetted polling stations and tallying centres

117. The 1st Respondent gazetted a list of all polling station. It was a legitimate expectation that only those gazetted polling station were supposed to remit results to the 1st Respondent for purposes of tallying and declaration of presidential elections. However, the 1st Respondent received and collated and did indeed publish votes from ungazetted polling stations thus rendering the election process a sham.

118. The existence of even one ungazetted polling station which posted a result is enough to declare the election process as having filed to conform to the provision of Article 81 and 86 of the Constitution.

119. The ungazetted polling stations from which results were transmitted include:

		OF THE POLLING STATION	LY GAZETTED LIST POLLING STATION

	142600139	Primary School	1 Primary Sch
	142600140	Primary School	1 Primary Sch
	142600141	Primary School	1 Primary Sch
	142600142	Primary School	1 Primary Sch
	142600143	Primary School	1 Primary Sch
	142600144	Primary School	1 Primary Sch
	142600145	Primary School	1 Primary Sch
	142600146	Primary School	1 Primary Sch
	142600147	Primary School	1 Primary Sch
	142600148	Primary School	1 Primary Sch
	142600149	Primary School	1 Primary Sch
	142600150	Primary School	1 Primary Sch
	142600151	Primary School	1 Primary Sch
	142600152	Primary School	1 Primary Sch

120. In Mandera North Constituency the gazetted tallying centre is Rhamu Arid zone Primary School. This was affirmed by the High Court in HC 362 OF 2017. In direct defiance, the 1st Respondent proceeded to use the sub-county Commissioner's Office Block as the Constituency tallying centre without notice or gazzetment of the same (see Doc 12 and 13 affidavit of Ibrahim Mohamoud and Mohamed Noor).

121. The presence of ungazetted polling stations which transmitted purported results to the NTC is a direct breach of Regulation 7 (1)(c) of the Elections (General) Regulations. Furthermore the existence of such ungazetted polling stations goes to the integrity of the elections and is a ground of nullifying the entire election as it is evident that the will of the people has been subverted.

122. In any event the results from these ungazetted polling stations ought to be quashed and such quashing inevitably affects the declared results of the election.

u) Curious case of ever increasing tallies in the portal

123. While the final presidential results were announced on 11th August 2017 with the 2nd Respondent declaring the 3rd Respondent winner by a final tally of 8,203,290 votes, the 1st Respondent's portal continues to reflect additional votes which now stand at 8,222,967 votes.

v) Curious case of ROs and POs summoned to adjust results after announcement

124. Having declared results unsubstantiated and unverified by the requisite forms, the 1st Respondent, in order to cover its nakedness, resorted to summon its officers to fill in and sign away the various forms so that the forms would tally with the declared results (petition, paragraph 23.7.5 and paragraph 28 of Osotsi's affidavit).

125. In Meru Primary School all agents signed using one handwriting and no results are given (page); in Kathugu Primary the purported form 34A shows the party agent to be the Petitioner while the 3rd Respondent is shown as the candidate; in Gem Constituency the stamp used is inconsistent with the Returning Officer's official stamp; in Konoin Constituency; North Imenti Constituency.

w) Ungazetted ROs signing forms 34B

126. It is trite law that the only officers given the authority to transact on behalf of the 1st Respondent are the gazetted officials. In some of the forms used by the 1st Respondent ostensibly to purport to verify the results, the official forms are not signed by the gazetted officials but by unknown persons. As such the authenticity of such forms comes into question as the forms offend the legal requirement that elections must be verifiable. As such the forms are unverifiable and a nullity with the consequence that the results from such centres have to be quashed.

127. Such areas include Maara Constituency (page 209 of document 5); Turbo Constituency (page); Wajir South Constituency; West Pokot (page 158 doc 3).

This is a breach of Article 81, 86 and 88 of the Constitution and sections 38, 39, 44 and 44A of the Elections Act and Regulation 79 of the Election (General) Regulations

x) Unauthorised and unsworn Presiding Officers

128. Evidence herein adduced demonstrates persons not trained, not sworn and not otherwise authorized acting as presiding officers. Specifically in Kalicha Primary School and Guticha Primary Schools respectively of Mandera North Constituency, Mr. Mohamed Noor Barre and Ibrahim Mohamud were recruited, trained and sworn to act as Presiding Officers. Strangely and unlawfully they together with 68 others POs were replaced by strangers who acted as POs in 70 polling stations (Doc 12 and 13 and respective affidavits of Mohamed and Ibrahim.

129. Further as shown in Document 52 DNO-3L page 8 the Presiding Officer as indicated in Form 34A is Ali Noor Maalim Ali and Hassan Abdikadira shown as Deputy Presiding officer (page 29) yet Form 34A on page 31 shows the PO as Hassan Ibrahim Aloow and the DPO as Mohamed Mohamud. This persons were not in the list of POs or DPOs (see page 6-9and 17-20 of affidavits of Mohamed Nor and Ibraahim Mohamud).

y) Same PO in multiple stations

130. Other than an ungazetted official signing the 1st Respondent's forms, there are equally instances where one presiding officer allegedly presides over more than one polling station and proceeds to sign Forms from more than one polling station.

131. The Presiding officer in Qaavine also signed for Gwakathi Primary school; in Nyaore Primary school and Ruora primary they are signed by an Isaac Omari; in Cheptterwo Dispensary and Kaminjewa Primary both are signed by a Derrick Ngetich; Kiptule polling station; in Sebetet and Chepkoin the forms are signed by Judy Doreen Chelagat.

z) Blank and signed forms

132. Blank and signed forms raise issues if integrity of elections.

For instance in Nairobi County (page 2 doc 5) is an example of blank forms which have been signed. This is a breach of Articles 81 and 86 of the Constitution and sections 38, 39, 44 and 44A of the Elections Act and Regulation 79 of the Election (General) Regulations.

aa) Instances of intimidation, undue influence, bribery and election offences

133. On 2nd August 2017 while campaigning in the County of Makueni, the 3rd Respondent while addressing residents of Makueni during campaign rallies openly threatened chiefs he complained were not actively campaigning for him with sacking upon his re-election. Despite clear and express provisions of the law that require them to be apolitical, the Cabinet Secretaries actively and openly abused their offices and state resources to actively solicit for votes and or further the political interests of the 3rd Respondent with his open complicity and connivance. In some cases, the said cabinet secretaries openly declared and sought support for the 3rd Respondent, sometimes accompanied by threats and intimidation.

134. Under the guise of launching official state projects and paying reparations to victims of the 2007 post-election violence in various parts of the country, the 3rd Respondents used the same platforms to canvass for votes for personal political gain in the said electoral areas contrary to the Election offences Act. The 3rd Respondent brazenly violated the law by actively causing to be published and advertised in the print and electronic media and in banners and billboards articles disguised as the government's achievements for his campaigns (paragraphs 33 to 38 of Raila's affidavit).

bb) Petitioners' agents locked out or denied access

135. In some polling stations within Central Kenya and the Rift Valley region legitimate agents of the Petitioner were chased away from the stations and replaced by imposters who were caused to create fictitious names and sign blank Form 34As (paragraph 4 of Moses Wamuru's affidavit).

cc) Case for scrutiny

136. There is a strong case for scrutiny and audit of the results.

First, at the time of the declaration, the 1st Respondent did not have verified results from a number of polling stations. Second, the 1st Respondent failed to test the system at least 60 days before the elections but tested the same only 2 days to the elections. Lastly, the 1st Respondent made a surprise announcement a few days to the election that there were some regions not covered by 3G network and therefore out of range (Osotsi's affidavit).

OTHER IRREGULARITIES

a) Forms 34A and 34B that do not tally

i. MERU, MIGORI, VIHIGA, KISII, NAIROBI, SIAYA, KAKAMEGA, NAKURU, KAJIADO-Dr, Nyangasi's Affidavit paragraphs 13-69 and pages 4-94 in annexure DNO-2; votes affected-
ii. TURKANA-Dr, Nyangasi's Affidavit at paragraph 72 and page 244 in annexure DNO-3;
iii. MACHAKOS-Dr. Nyangasi's Affidavit at paragraph 95 and page 149of annexure DNO- 3;
iv. ISIOLO-Dr, Nyangasi's Affidavit at paragraph 71 and page 243 of annexure DNO-3;
v. KERICHO-Dr, Nyangasi's Affidavit at paragraph 109 and page 165 of DNO. 03;
vi. NAKURU-Dr, Nyangasi's Affidavit at paragraph 111 and page 124 of annexure DNO. 03;
vii. TURBO-Dr, Nyangasi's Affidavit at paragraph 129 and page 199-201 of annexure DNO. 03;
viii. TURBO Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO. 03.

137. This is a breach of Article 81 and 86 of the Constitution and sections 38, 39, 44 and 44A of the Elections Act and Regulation 79 of the Election (General) Regulations.

b) Variations on FORM 34Bs and results on portal

i. KILIFI-Dr, Nyangasi's affidavit at paragraph 75 and page 208 of annexure DNO- 3; **votes affected-31,604**
ii. THARAKA NITHI-Dr. Nyangasi's affidavit at paragraph 76 and page 209 of annexure DNO- 3; **votes affected-**

iii. NYANDARUA-DR. Nyangasi's affidavit at paragraph 78 and page 129 of annexure DNO- 3; **votes affected-46,072**
iv. NYANDARUA-DR. Nyangasi's affidavit at paragraph 79 and page 130 of annexure DNO- 3; **votes affected-46,511**
v. MACHAKOS-Dr. Nyangasi's affidavit at paragraph 85 and page 135 of annexure DNO- 3; **votes affected-44,186**
vi. KERICHO-Dr. Nyangasi's affidavit at paragraph 86 and page 149 of annexure DNO- 3; **votes affected-69,173**
vii. TAITA TAVETA-Dr. Nyangasi's affidavit at paragraph 93 and page146 of annexure DNO- 3; **votes affected-57,658**
viii. TURKANA-DR. Nyangasi's affidavit at paragraph 107 and page 163-164 of annexure DNO- 3; **votes affected-53,951**
ix. NYERI-Dr, Nyangasi's affidavit at paragraph 114 and page 127 of annexure DNO. 03;
x. MANDERA-Dr. Nyangasi's affidavit at paragraph 117and page 118 of annexure DNO.03;
xi. TURBO-Dr, Nyangasi's affidavit at page 129 and page 199-203 of annexure DNO. 03.

138. This is a breach of Article 81, 86 and 88 of the Constitution and sections 38, 39, 44 and 44A of the Elections Act and Regulation 79 of the Election (General) Regulations.

c) Declaration day discrepancies (declaration of results without complete FORM 34As AND 34Bs)

i. KITUI SOUTH-Dr. Nyangasi's affidavit at paragraph 124 and page 112 of annexure DNO 03;
ii. TURBO-Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO. 03;
iii. MOMBASA-Dr, Nyangasi's affidavit at paragraph 131 and page 115 of annexure DNO. 03.

139. Breach of Article 81 and 86, section 39 of Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

d) Increment of results in the portal after declaration

i. NAROK-Dr, Nyangasi's affidavit at paragraph 110 and page 121 of annexure DNO. 03; **votes affected-30,138**

ii. GARSEN-Dr, Nyangasi's affidavit at paragraph 127 and page 107 of annexure DNO. 03.

140. Breach of Article 81 and 86 and Regulation 79, 82 and 83 of the Election (General) Regulations

e) Results not included in final tally

i. SIAYA-Dr, Nyangasi's affidavit at paragraph 100 and page 154 of annexure DNO-3;
ii. NAKURU-Dr, Nyangasi's affidavit at paragraph 111 and page 123 of annexure DNO. 03;
iii. BOMET-Dr, Nyangasi's affidavit at paragraph 123 and page 100 of annexure DNO. 03;
iv. TURBO-Dr, Nyangasi's affidavit at paragraph 129 and page 199-201 of annexure DNO. 03;
v. TURBO Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO. 03.

141. Breach of Article 81 and 86 and Regulation 79, 82 and 83 of the Election (General) Regulations.

f) Variance in rejected votes

i. BUSIA-Dr, Nyangasi's affidavit at paragraph 74 and page 96 of annexure DNO-3; **votes affected-1,201**
ii. NYANDARUA-DR. Nyangasi's affidavit at paragraph 77 and page 129 of annexure DNO- 3; **votes affected-46,072**
iii. NYANDARUA-DR. Nyangasi affidavit at paragraph 78 and page 130 of annexure DNO- 3;
iv. HOMABAY-Dr. Nyangasi's affidavit at paragraph 81 and page 133 of annexure DNO- 3;
v. BARINGO-Dr. Nyangasi's affidavit at paragraph 82 and page 134 of annexure DNO- 3;
vi. NAIROBI-DR. Nyangasi's affidavit at paragraph 104 and page 159 of annexure DNO- 3;
vii. NYERI-Dr, Nyangasi's affidavit at paragraph 114 and page 127 of annexure DNO. 03;
viii. NAKURU-Dr, Nyangasi's affidavit at paragraph 115 and page 124 of annexure DNO. 03;

ix. MANDERA-Dr. Nyangasi's affidavit at paragraph 117 and page 118 f annexure NO.03;
x. BOMET-Dr, Nyangasi's affidavit at paragraph 123 and page 100 of annexure DNO. 03;
xi. GARSEN-Dr, Nyangasi's affidavit at paragraph 127 and page 107 of annexure DNO. 03;

142. Breach of Article 81 and 86 and Regulation 79, 82 and 83 of the Election (General) Regulations

g) Various variations on FORM 34Bs

i. KIRINYAGA-Dr, Nyangasi's affidavit t paragraph 113 and page 125 of annexure DNO.03;
ii. NAKURU-Dr, Nyangasi's affidavit at paragraph 115 and page 124 of annexure DNO.03;
iii. TRANS NZOIA-Dr, Nyangasi's affidavit at paragraph 121;
iv. BOMET-Dr, Nyangasi's affidavit at paragraph 123 and page 100 of annexure DNO. 03;
v. TURBO-Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO.03;
vi. MOMBASA-Dr, Nyangasi's affidavit at paragraph 131 and page 115 of DNO. 03;

143. Breach of Article 81 and 86 and Regulation 79, 82 and 83 of the Election (General) Regulations.

h) Unsigned FORM 34As

144. MANDERA-Dr. Nyangasi's affidavit at paragraph 117 and page 118 of annexure DNO.03;

The total votes affected-140,439

145. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations

i) Incomplete FORM 34As (NOT FULLY FILLED)

i. KAJIADO-Dr, Nyangasi's affidavit at paragraph 112 and page 142 of annexure DNO.03;
ii. BOMET-Dr, Nyangasi's affidavit at paragraph 123 and page 100 of annexure DNO.03;
iii. KITUI SOUTH-Dr. Nyangasi's affidavit at paragraph 124 and page 112 of annexure DNO. 03;
iv. KURESOI NORTH-Dr. Nyangasi's affidavit at paragraph 126 and page 113 of annexure DNO.03;
v. TURBO-Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO.03.

146. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

j) FORM 34As with alterations

i. NAKURU-Dr, Nyangasi's affidavit at paragraph 111 an page 123 of annexure DNO.03;
ii. KIRINYAGA-Dr, Nyangasi's affidavit at paragraph 113 and page 125 of annexure DNO.03;
iii. BOMET-Dr, Nyangasi's affidavit at paragraph 123 and page 100 of annexure DNO.03;
iv. TURBO-Dr, Nyangasi's affidavit at paragraph 130 and page 199-201 of annexure DNO.03;

147. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

k) Unstamped 34As

i. KERICHO-Dr. Nyangasi's affidavit (88-91) and annexure DNO- 3 (page 141)
ii. MOMBASA-Dr. Nyangasi's affidavit and annexure DNO- 3 (page 143-145)
iii. MACHAKOS-Dr. Nyangasi's affidavit (95) and annexure DNO- 3 (page 149)
iv. KILIFI-Dr. Nyangasi's affidavit (96) and annexure DNO- 3 (page 150)
v. NAIROBI-Dr. Nyangasi's affidavit (99) and annexure DNO.03 (page 153)

vi. MOMBASA-Dr. Nyangasi's affidavit (102) and annexure DNO.03 (page 156)
vii. HOMABAY-DR. Nyangasi's affidavit (106) and annexure DNO- 3 (page 161)
viii. KERICHO-Dr, Nyangasi's affidavit (109) and annexure DNO. 03 (page 165)
ix. MERU-Dr. Nyangasi's Further Affidavit (5) and annexure DNO-2C(pages 1-466)
x. MOMBASA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO-2F (pages 1-914)
xi. MACHAKOS-Dr. Nyangasi's Further Affidavit (5) and annexure DNO-2H (pages 1-409)
xii. MACHAKOS-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -2K(1-410)
xiii. KILIFI -Dr. Nyangasi's Further Affidavit (5) and annexure DNO -2O(1 -313)
xiv. NAIROBI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -2I(1001-1349)
xv. NAIROBI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -2I(501-1000)
xvi. WEST POKOT-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3G(1-196)
xvii. EMBU-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3H(1-275)
xviii. TAITA TAVETA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3A(1-127)
xix. LAIKIPIA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3F(1-150)
xx. WAJIR-Dr. Nyangasi's Further Affidavit (5) and annexure DNO - 3S(1-29)
xxi. KERICHO-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3R(1-401)
xxii. KWALE-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -2L(1-200)
xxiii. TANA RIVER -Dr. Nyangasi's Further Affidavit (5) and annexure DNO - 3J(1-52)
xxiv. MANDERA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO -3L(1-35)
xxv. THARAKA NITHI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO - 2B(1-204)

xxvi. GARISSA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO
xxvii. SAMBURU-Dr. Nyangasi's Further Affidavit (5) and annexure DNO
xxviii. MAKUENI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO
xxix. TURKANA-Dr. Nyangasi's affidavit (120) and annexure DNO. 03 (203)
xxx. MALAVA-Dr. Nyangasi's affidavit (122) and annexure DNO. 03 (117)
xxxi. MOMBASA-Dr. Nyangasi's affidavit (131) and annexure DNO. 03 (115);

Total number of votes affected-2,095,133.

148. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

l) FORM 34As not signed by RO and deputy RO

i. WAJIR-Dr. Nyangasi's affidavit (98) and annexure DNO.03 (152)
ii. NAKURU-Dr. Nyangasi's affidavit (101) and annexure DNO.03
iii. UASIN GISHU -Dr. Nyangasi's affidavit (105) and annexure DNO.03 (160)
iv. LAMU -Dr. Nyangasi's affidavit (118) and annexure DNO.03
v. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
vi. WAJIR-Dr. Nyangasi's affidavit (125) and annexure DNO.03 (104)

149. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

m) FORM 34As arithmetically incorrect

i. NAIROBI-Dr. Nyangasi's affidavit (99) and annexure DNO.03 (153)
ii. UASIN GISHU -Dr. Nyangasi's affidavit (105) and annexure DNO.03 (160)
iii. NAKURU-Dr. Nyangasi's affidavit (111) and annexure DNO.03 (123)
iv. TURKANA-Dr. Nyangasi's affidavit (120) and annexure DNO.03 (103)
v. TURBO -Dr. Nyangasi's affidavit (129) and annexure DNO.03 (199-201)
vi. TURBO-Dr. Nyangasi's affidavit (130) and annexure DNO.03 (199-201);

Total number of votes affected-2,177.

150. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

n) FORM 34As signed by NASA agents (there were no NASA agents. Coalition parties had their own agents

151. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

o) Forms signed by agents from single parties

i. WAJIR-Dr. Nyangasi's affidavit (116) and annexure DNO.03 (xx)
ii. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
iii. TRANS NZOIA-Dr. Nyangasi's affidavit (121) and annexure DNO.03
iv. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
v. BOMET-Dr. Nyangasi's affidavit (123) and annexure DNO.03 (100)

152. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

p) Unclear FORM 34As

153. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

q) FORM 34A with similar handwriting and signatures

154. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

r) FORM 34As bearing forged stamps

i. WAJIR-Dr. Nyangasi's affidavit (98) and annexure DNO.03 (152)
ii. NAIROBI-Dr. Nyangasi's affidavit (104) and annexure DNO.03 (159)
iii. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
iv. KITUI SOUTH -Dr. Nyangasi's affidavit (124) and annexure DNO.03 (112)
v. WAJIR-Dr. Nyangasi's affidavit (125) and annexure DNO.03 (104)
vi. WAJIR-Dr. Nyangasi's affidavit (128) and annexure DNO.03

155. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

q) FORM 34Bs not properly delivered or received (handing over notes)

i. ISIOLO-Dr. Nyangasi's affidavit (71) and annexure DNO.03 (243)
ii. TURKANA-Dr. Nyangasi's affidavit (72) and annexure DNO.03 (244)
iii. BUSIA-Dr. Nyangasi's affidavit (74) and annexure DNO.03 (96)
iv. KILIFI-Dr. Nyangasi's affidavit (75) and annexure DNO.03 (208)
v. THARAKA NITHI-Dr. Nyangasi's affidavit (76) and annexure DNO.03 (209)
vi. NYANDARUA-Dr. Nyangasi's affidavit (77) and annexure DNO.03 (129)
vii. NYANDARUA-Dr. Nyangasi's affidavit (78) and annexure DNO.03 (130)
viii. NYANDARUA-Dr. Nyangasi's affidavit (79) and annexure DNO.03 (131)
ix. WAJIR-Dr. Nyangasi's affidavit (80,98) and annexure DNO.03 (132,152)
x. BARINGO-Dr. Nyangasi's affidavit (81) and annexure DNO.03 (134)
xi. HOMABAY-Dr. Nyangasi's affidavit (82) and annexure DNO.03 (133)
xii. MACHAKOS-Dr. Nyangasi's affidavit (83,95,97) and annexure DNO.03 (205,138,151)
xiii. BOMET -Dr. Nyangasi's affidavit (84) and annexure DNO.03 (206)
xiv. KERICHO-Dr. Nyangasi's affidavit (85) and annexure DNO.03 (139)
xv. ELGEYO MARAKWET-Dr. Nyangasi's affidavit (86) and annexure DNO.03 (140)
xvi. MOMBASA-Dr. Nyangasi's affidavit (87) and annexure DNO.03 (143)
xvii. NAIROBI-Dr. Nyangasi's affidavit (91) and annexure DNO.03
xviii. TAITA TAVETA-Dr. Nyangasi's affidavit (92, 93) and annexure DNO.03 (146-147)
xix. LAMU-Dr. Nyangasi's affidavit (94) and annexure DNO.03 (148)
xx. KILIFI-Dr. Nyangasi's affidavit (96) and annexure DNO.03 (150)
xxi. NAIROBI-Dr. Nyangasi's affidavit (99) and annexure DNO.03 (153)
xxii. NAKURU-Dr. Nyangasi's affidavit (101) and annexure DNO.03 (155)
xxiii. MOMBASA-Dr. Nyangasi's affidavit (102) and annexure DNO.03 (156)
xxiv. WEST POKOT-Dr. Nyangasi's affidavit (103) and annexure DNO.03 (158)
xxv. NAIROBI-Dr. Nyangasi's affidavit (104) and annexure DNO.03 (159)
xxvi. UASIN GISHU -Dr. Nyangasi's affidavit (105) and annexure DNO.03 (160)
xxvii. HOMABAY-Dr. Nyangasi's affidavit (106) and annexure DNO.03 (161)

xxviii. TURKANA-Dr. Nyangasi's affidavit (107) and annexure DNO.03 (162-163)
xxix. NYERI-Dr. Nyangasi's affidavit (108) and annexure DNO.03 (164)
xxx. KERICHO-Dr. Nyangasi's affidavit (109) and annexure DNO.03 (165)
xxxi. NAROK -Dr. Nyangasi's affidavit (110) and annexure DNO.03 (122)
xxxii. NAKURU-Dr. Nyangasi's affidavit (111) and annexure DNO.03 (123)
xxxiii. KAJIADO-Dr. Nyangasi's affidavit (112) and annexure DNO.03 (142)
xxxiv. KIRINYAGA-Dr. Nyangasi's affidavit (113) and annexure DNO.03 (125)
xxxv. NYERI-Dr. Nyangasi's affidavit (114) and annexure DNO.03 (127)
xxxvi. NAKURU-Dr. Nyangasi's affidavit (115) and annexure DNO.03 (124)
xxxvii. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
xxxviii. KERICHO-Dr. Nyangasi's affidavit (119) and annexure DNO.03 (119)
xxxix. TURKANA-Dr. Nyangasi's affidavit (120) and annexure DNO.03 (203)
xl. KURESOI NORTH-Dr. Nyangasi's affidavit (126) and annexure DNO.03 (113)
xli. MOMBASA-Dr. Nyangasi's affidavit (131) and annexure DNO.03 (115)

156. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

r) Invalid Form 34As

i. LAIKIPIA-Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03T(1)
ii. NAIROBI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03T(2)
iii. KERICHO-Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03 (3)
iv. THARAKA NITHI-Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03T(5)
v. KERICHO-Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03T(6)
vi. OTHERS- Dr. Nyangasi's Further Affidavit (5) and annexure DNO.03T (4, 7, 8)

157. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

s) No indication of date and time

i. NAIROBI-Dr. Nyangasi's affidavit (99) and annexure DNO.03 (153)
ii. NAKURU--Dr. Nyangasi's affidavit (101) and annexure DNO.03 (155)
iii. MOMBASA-Dr. Nyangasi's affidavit (102) and annexure DNO.03 (156)
iv. WEST POKOT-Dr. Nyangasi's affidavit (103) and annexure DNO.03 (158)
v. NAIROBI-Dr. Nyangasi's affidavit (104) and annexure DNO.03 (159)
vi. UASIN GISHU -Dr. Nyangasi's affidavit (105) and annexure DNO.03 (160)
vii. HOMABAY-Dr. Nyangasi's affidavit (106) and annexure DNO.03 (161)
viii. TURKANA-Dr. Nyangasi's affidavit (107) and annexure DNO.03 (162 - 163)
ix. NAKURU-Dr. Nyangasi's affidavit (108) and annexure DNO.03 (123)
x. KAJIADO-Dr. Nyangasi's affidavit (112) and annexure DNO.03 (142)
xi. NAKURU-Dr. Nyangasi's affidavit (115) and annexure DNO.03 (124)
xii. MANDERA -Dr. Nyangasi's affidavit (117) and annexure DNO.03 (118)
xiii. MOMBASA-Dr. Nyangasi's affidavit (131) and annexure DNO.03 (115)

158. Breach of Article 81 and 86, section 38, 39, 44 and 44A of the Elections Act and Regulation 79, 82 and 83 of the Election (General) Regulations.

C. SUBMISSIONS ON BRIBERY, INTIMIDATION & IMPROPER INFLUENCE

159. It is widely understood that the effectiveness with which a country manages its electoral system and the viability of its electoral laws are the ultimate indicators of the strength of a democratic society. Elections give voice to the people. At the same time, political power is pursued or maintained through electoral processes.

160. For this reason, if not properly structured and managed, elections can generate conflict and violence. Thus, for any election to be valid, it must be conducted within the confines of the Constitution and other written legislation –and free from intimidation, bribery and abuse of public resources. It must also be conducted within the provisions of Article 84 of the Constitution, which provides that in every election, all candidates and all

political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.

161. With regard to the presidential elections held on the 8th of August, 2017, rampant instances of undue influence, voter bribery and treating, intimidation as well as blatant abuse of office were witnessed as follows:

What is the appropriate standard of proof of electoral offences for the purposes of making a determination under Section 83?

162. An election court is a civil court not a criminal court. However, the Petition requires it to consider conduct which amounts to the commission of criminal offences under the Election Offences Act, 2015 or other electoral legislation. The court is not called upon to pass a verdict, but only determine if the conduct complained of is a non-compliance with the electoral law for the purposes of section 83 and articles 81, 86 and 138. Nevertheless section of the Elections Act, 2011 only provides that where the court determines that an electoral malpractice of a criminal nature *may* have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

163. In contrast, in certain jurisdictions such as the UK at the end of an Election Petition alleging corrupt or illegal practices, the court can directly convict a person of such practices. Section 159(1) of the UK 1983 Act provides: If a candidate who has been elected is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void. Since the election petition in UK involves a direct finding of guilt by the court, the standard of proof is beyond reasonable doubt as was held in *Simmons v Khan*[14]

164. Such an approach also emerges from the Queen's Bench decision in *Robert Elwyn James Watkins v Philip James Woolas*[15]

> It is common ground between the parties both that the petitioner has the burden of proving the respondent is guilty of the alleged illegal practice and that, although these proceedings are civil in

[14] [2008] EWHC B4 (QB) at 62

[15] [2010] EWHC 2702 (QB)

> their nature, the standard of proof is not on the balance of probabilities but is the criminal law standard of proof beyond reasonable doubt, that is to say we must be sure the respondent is guilty of the alleged illegal practice.

165. The proof of guilt beyond reasonable doubt was reiterated in *Simmons v Khan* [2008] EWHC B4 (QB) where it was stated that the Court will apply: the criminal standard of proof to the charges that Mr Eshaq Khan and/or his agents have been guilty of corrupt or illegal practices;the criminal standard of proof to the question of whether there has been general corruption; but insofar as any standard of proof is appropriate, the civil standard of proof to the question of whether the general corruption may reasonably be supposed to have affected the result of the election

166. A similar approach is taken by the Judicial Committee in *Jugnauth v Ringadoo and Others* [2008] UKPC 50 at para 19:

> It follows that the issue for the election court is whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition. In practice, as explained in the passages just quoted, as a matter of common sense rather than law, the court is unlikely to be satisfied on the balance of probabilities that there has been bribery, unless there is cogent evidence to that effect. But the matter is simply one for the court assessing the position in the light of all the available evidence

167. In the Ghanaian case of *Nana AddoDankwa Akufo-Addo& 2 Others v John DramaniMahama& 2 Others* (Writ J1/6/2013) the majority of the judges of the Supreme Court found that Election Petitions are "a species of a civil case" and adopted the civil standard of proof, which is proof by a "preponderance of probabilities".

168. Similarly, in the Ghanaian case of *Nana Addo Dankwa Akufo-Addo v John DramaniMahama& 2 Others* (Writ J1/6/2013) the majority of the judges of the Supreme Court found that Election Petitions are "a species of a civil case" and adopted the civil standard of proof, which is proof by a "preponderance of probabilities".

169. Having reviewed a number of decisions including *Lewanika and Others v Chiluba* [1998] ZMSC (1999) 1 LRC 138 (Zambia); *Nana Addo* (*Ghana); Besigye v Museveni, [2007] UGSC 2* (Uganda) and the decision of this Court

in *Raila Petition (2013)* the Seychellen Supreme Court in *Wavel John Charles Ramkalawan v Electoral Commission (2016) SCCC 11* reiterated that elections are a civil matter, even if there are some findings of criminal activity involved. The Court further held that the provisions on electoral offences envisage two distinct processes- one in terms of voiding elections and the other in terms of reporting persons to the Electoral Commission for committing illegal practices with the possibility of the Electoral Commission striking the person off the electoral register. The court therefore state that the essential elements for the proof that an illegal practice voids an election are:

i. That the illegal practice as outlined in provisions of section 51(3) was committed
ii. In connection with the election
iii. By the candidate or his agent
    i. 4.With the knowledge, consent or approval of the candidate or his agent.
iv. The illegal practice was not done in good faith, inadvertence, or by accidental miscalculation or reasonable cause
v. The illegal practice was intended to induce the voter to vote, refrain from voting or induce the voter to vote in a particular way in the election.

170. Thus, from comparative judicial experience, the correct standard of proof as to whether the electoral offences alleged may reasonably be said to have affected the result of the election; where a question of conviction on guilt does not arise, is that of unless there is a prospect of conviction.

171. The Petitioners submits that the 3rd Respondent and his agents; with the knowledge, consent or approval of the 3rd Respondent or his agents; in circumstances other than good faith, inadvertence, or by accidental miscalculation or reasonable cause; intending to induce voters to vote, refrain from voting or to vote in a particular way in the election, committed the following illegal practices in connection with the Presidential election held on 8th August, 2017.

D. <u>VOTER BRIBERY AND TREATING</u>

172. Black's Law dictionary, 8th Edition, defines Bribery as:

"The corrupt payment, receipt, or solicitation of a private favour for official action."

173. Section 9 of the Elections Offences Act (No. 37 of 2016) provides that:

> "A person who, during an election period—
> Directly or indirectly offers a bribe to influence a voter to—
> Vote or refrain from voting for a particular candidate or political party;
> Attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;
> In any manner unlawfully influences the result of an election;
> Directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.
>
> A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both."

174. Despite the fore stated provisions of the law, the Petitioners herein aver that the the 3rd Respondent herein and by extrapolation his political party, engaged in acts of voter bribery and treating all through the electoral process with blatant impunity contrary to the express provisions of the law herein above stated.

175. In so doing, the 3rd Respondent herein further contravened the inviolable provision of **Article 81 (e) (ii)**of the Constitution of Kenya whichprovidesin unambiguous terms that:

> (a) "The electoral system shall comply with the following principles: -
> ii. freedom of citizens to exercise their political rights under Article 38;
> iii. ……
> iv. ……
> v. ……
> vi. free and fair elections, which are
> vii. by secret ballot;
> viii. <u>free from violence, intimidation, improper influence or</u>

corruption;

ix. conducted by an independent body;

x. transparent; and

xi. administered in an impartial, neutral, efficient, accurate and accountable manner." (Emphasis mine)

176. Corruption is defined under Section 2 of the Anti Corruption and Economic Crimes Act (No. 3 of 2003)to mean:

xii. an offence under any of the provisions of sections 39 to 44, 46 and 47;

xiii. bribery;

xiv. fraud;

xv. embezzlement or misappropriation of public funds;

xvi. abuse of office;

xvii. breach of trust; or

xviii. an offence involving dishonesty

vi. in connection with any tax, rate or impost levied under any Act; or

vii. under any written law relating to the elections of persons to public office"

177. In the case of *Moses MasikaWetangula v. Musikari Nazi Kombo& 2 Others,*[16]; The Court of Appeal ((Maraga (Presiding), Azangalala& J. Mohammed JJA) while considering allegations of bribery, which commission was upheld by the Supreme Court held as follows at paragraph 33:

> "It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however, for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance, no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed,it is not "simple, accurate, verifiable, secure, accountable and transparent"; as well asif "appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place"; and the counting and collation of votes and announcement of the results are not open and accurate. What Section 83 of the Elections Act excuses are minor infractions of these principles or requirements that arise from inadvertent, not deliberate or negligent, human activities in the

[16] Kisumu CACA No. 43 of 2013

effectuation of these principles but do not affect the result of the election." (Emphasis added)

178. In our particular instance, the Petitioners herein aver that the legal infractions and electoral malpractices by the 3rd Respondent were so widespread and grossly violated the constitution to the effect of nullifying the same as follows:

i. On or about the 6th of June in Kisii and Nyamira Counties, under the guise of launching official state projects and paying reparations to victims of the 2007 post-election violence in various parts of the country, the 3rd Respondent herein used the same platforms to canvass for votes for personal political gain in the said electoral areas contrary to the provisions of the Election Offences Act and the Constitution.(Annexure OK-1 of the supplementary Affidavit dated 25th august 2017 at page ……of the record)

ii. On 22nd of July, 2017 In TaitaTaveta County, the Devolution Cabinet SecretaryMwangiKiunjuriurged the residents to vote for the 3rd Respondent during the next election due to various developments the government had introduced in that area, for example the road network from Voi to mwatate. (Annexure ……. of the Affidavit dated…… at page ……of the record)

iii. Uhuru Kenyatta and His Deputy William Rutoduring the launch of the Sigiri bridge in Budalangi urged the residents of Busia to vote for him on 8th August 2017 as he had fulfilled his promise to construct that bridge. (Annexure OK-1 of the Affidavit dated 25th August 2017 at page ……of the record)

179. In the Indian case of *Azhar Hussein v. Rajiv Gandhi*[17] The Supreme Court of India while considering corrupt practices in elections held as follows**:**

> "In a democratic polity 'election' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the Election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the 'true' will of the people is reflected in

[17] 1986 SCR (2) 782

the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation.In order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established...I In matters of election the will of the people must prevail and Courts would be understandably extremely slow to set at naught the will of the people truly and freely exercised. If Courts were to do otherwise, the Courts would be pitting their will against the will of the people, or countermanding the choice of the people without any object, aim or purpose. But where corrupt practices are established the result of the election does not echo the true voice of the people. The Courts would not then be deterred by the aforesaid considerations which in the corruption-scenario lose relevance. Such would be the approach of the Court in an election matter where corrupt practice is established." (Emphasis added)

180. Article 10 (2) of the Constitution of Kenya provides that:

"The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) **good governance, integrity**, transparency and accountability;

(d) sustainable development."

181. Article 73 (1) of the Constitution further provides that:

"Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;
(ii) demonstrates respect for the people;
(iii) brings honour to the nation and dignity to the office; and
(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them."

182. With regard to the foregoing, the Petitioners herein contend that the presidential elections conducted on the 8th of August 2017, were so flawed that the said results can't be inferred to be have been free and fair and as such a voice of the people. The voter bribery and treating as proved herein were of such a nature as to render naught the whole electoral exercise for having been conducted under a shadow of corrupt and illegal practice by both the 3rd Respondent and his agents.

183. In the case of *Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others*, supra; the Court of Appeal concluded by quoting Paragraph 113 of Halsbury's Laws of England, Vol. 153rd Edition as follows:

> "Due proof of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances maybe…"

Abuse Of Office And State Resources By Public Officers

184. Article 232 (1) of the Constitution of Kenya provides that

> (1) the values and principles of public service include—
>
> (a) high standards of professional ethics;
> (b) efficient, effective and economic use of resources;
> (c) responsive, prompt, effective, impartial and equitable provision of services,

185. Article 232 (2) of the Constitution further provides that

> "The values and principles of public service apply to public service in—
>
> (a) all State organs in both levels of government; and
> (b) all State corporations.

186. In line with the foregoing provisions, Article 73(2) of the Constitution

provides that:

> "The guiding principles of leadership and integrity include—
> (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
>
> (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
> (c) selfless service based solely on the public interest, demonstrated by—
> (d) honesty in the execution of public duties; and
> (e) the declaration of any personal interest that may conflict with public duties;
> (f) accountability to the public for decisions and actions; and
> (g) discipline and commitment in service to the people.

187. In the same vein with the foregoing provisions of the Constitution, Section 16 of the Public Officer Ethics Act (No. 4 of 2003) provides that:

> (1) "A public officer shall not, in or in connection with the performance of his duties as such—
>
> (a) act as an agent for, or so as to further the interest of, a political party; or
>
> (b) indicate support for or opposition to any political party or candidate in an election.
>
> (2) A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.

188. Section 12 of the Political Parties Act (No. 11 of 2011)also provides that:

> (1) A public officer shall not—
>
> (a) be eligible to be a founding member of a political party;
> (b) be eligible to hold office in a political party;
> (c) <u>engage in political activity that may compromise or be seen to compromise the political neutrality of that person's office</u>; or
> (d) <u>publicly indicate support for or opposition to any political party or candidate in an election.</u>

(2) Subsection (1) shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a county assembly.

(3) Until after the first elections under the Constitution, subsection (2) shall apply to the Prime Minister."

189. The effect of all the forestated provisions is that the law presupposes that all appointed public officers should exercise impartiality and neutrality in the delivery of services so as to bring dignity to that office. Despite the foregoing express provisions of the law, the Presidential elections held on the 8th of August 2017, was marred with gross instances of abuse of office and state resources being used in favour of not only a particular presidential candidate, but also a particular political party thus bringing disrepute to the office of the particular state officers involved, majority of whom were cabinet secretaries.

190. Specifically, on or about the 15th April,2017, the Water Cabinet Secretary Hon. Eugene Wamalwa during the burial of William Gatuhi Murathe in Muranga County stated that he had every right to campaign for the re-election of President Uhuru Kenyatta and The Jubilee Government and that he had no apologies to make for his statement and actions.(Annexure OK-1 of the Affidavit dated 25th August 2017 at page …….of the record)

191. On or about 20th June 2017, ICT Cabinet Secretary Joe Mucheru in an interview with KTN Reporter Sofia Wanuna told Kenyans that he would vote for jubilee government and he had the mandate as a political appointee to vote for him.(Annexure OK-1 of the Affidavit dated 25th august 2017 at page …….of the record)

192. On the 23rd of May 2017 Hon. Najib Balala, CS Tourism while in Kwale County during a public rally in Tiwi Grounds urged the citizens to vote for the 3rd Respondent and also stated that he had every right to vote and campaign for him.(Annexure OK-1 of the Affidavit dated 25th of August, 2017 at page …….of the record)

193. As can be discerned from the facts presented herein above, state officials were not only campaigning for the Presidential Candidate Hon. Uhuru Kenyatta, but there was also targeted use of state machinery and resources by appointed public officials in favour of Jubilee candidates as against other political parties and candidates contrary to the express provisions of the law.

This was exposed by way of public officers donning the Jubilee Party attire during rallies, use of state vehicles to transport jubilee party candidates and access by jubilee candidates to state resources.

194. Section 2 of the Elections Act (No. 24 of 2011) defines "public resources" to include—

> "any vehicle, or equipment owned by or in the possession; or premises owned or occupied by,any government, state organ, statutory corporation or a company in which the Government owns a controlling interest*;"*

195. Section 14 of the Election Offences Act (No. 37 of 2016) provides that:

> (1) "Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.
>
> (2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.
>
> (3) For the purposes of this section, the Commission shall, in writing require any candidate, who is a member of Parliament, a county governor, a deputy county governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office."

196. Section 15 of the said Act further provides that:

> (1) "A public officer who—
>
> (a) engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
> (b) publicly indicates support for or opposition against any party, side or candidate participating in an election;
> (c) engages in political campaigns or other political activity; or
> (d) uses public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county, commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.
>
> (2) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not

exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(3) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.*"*

197. Despite the foregoing provisions, the 3rd Respondent herein together with his Cabinet Secretaries and other public officers, blatantly misused state resources in favour of specific candidates and the Jubilee Party as a whole.

198. In the case of *Rtd Col Dr. Kiiza Besigye v Yoweri Kaguta Museveni and Electoral Commission, Uganda Presidential Election Petition No. 1 of 2001,* Odoki C.J. stated as follows with regard to the term "free and fair elections"

> "To ensure that elections are free and fair, there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or government ministers and officials do not have unfair advantage.The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people… Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to sever sanction…."

199. Further in the case of *Charles Omanga v Independent Electoral and Boundaries Commission Nairobi High Court Petition No. 2 of 2012; J. Lenaola* (as he then was) held as follows with regard to the importance of impartiality for public officers:

> "I also wish to state that the impartiality of public servants is a cardinal value enshrined in Article 232 (1) (a) of the Constitution which provides that the public servant and service must be "Responsive, prompt, efficient, impartial and equitable" in the provision of services…let this judgement sound as a preparatory gong to them; they cannot have one leg in public service and another at their elective arena."

200. Equally, in *Amama Mbabazi v. Yoweri Kaguta Museveni & The Electoral Commission & Attorney General Election Petition No. 1 of 2016* it was held that:

> "Be that as it may, we would like to state that it is inappropriate to involve public officers in political campaigns. It is a time honoured principle that public officers should not be involved in partisan politics. The non-partisan nature of public service should be protected. Whereas public officers may have political views and are entitled to participate in voting for a political party or candidates of their choice, they are required to publicly maintain their neutrality and to present an image of non-partisanship to the general public whom they serve. Speaking at a candidate's political campaign undermines this image There are more appropriate avenues for public officers who are not politicians to explain their programmes than in a candidate's political campaigns. A level playing field must be maintained at all times."

201. The foregoing sentiments cannot ring more true.

202. It is thus the Petitioners' contention that by public officers applying state resources in favour of some particular political and certain individuals as against others, the playing field is unfairly skewed in favour of the 3rd Respondent the effect of which is that the Presidential elections held on the 8th of August, 2017 could not be termed as free or fair. Articles 81 (e), 232 and 73 (2) of the Constitution of Kenya were therefore grossly violated, the remedy of which can only be a nullification of the said results.

203. It has been averred by the Respondents herein that Section 23 (1) of the Leadership and Integrity Act (Cap 182 of the Laws of Kenya) which provides that:

> (1) "An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—
>
> (a) act as an agent for, or further the interests of a political party or candidate in an election; or
>
> (b) manifest support for or opposition to any political party or candidate in an election."

204. The Petitioners herein aver that the same cannot hold given that the said provision is evidently inconsistent with the constitution, specifically Articles 232 and 73 (2) of the Constitution and as such null and void.

205. Further to the foregoing, the Petitioners herein aver that Article 152 of the Constitution of Kenya, specifically with regard to the appointment of Cabinet Secretaries, provides that:

> (a) "...
>
> (b) The President shall nominate and, with the approval of the National Assembly, appoint Cabinet Secretaries.
>
> (c) A Cabinet Secretary shall not be a Member of Parliament."

206. It remains vital to note that the foregoing provisions of the law duly capture the desire by Kenyans to have professionals rather than politicians appointed in the positions of Cabinet Secretaries for purposes of ensuring that there is fairness and impartiality, not only in the provision of services but also in the process of elections. The 3rd Respondent with the nod of the 1st and 2nd Respondents blatantly went against the law and the Constitution. The use of such state officials to advance the agenda of a specific political party went against the letter and the spirit of the law.

Intimidation & Improper Influence

207. In the case *Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua and 3 Others*[18], the Court of Appeal described undue influence as follows:

> "…improper influence is a new concept introduced by the Constitution that is a wider concept than undue influence, while undue influence has always been in the laws of Kenya, may on the face of it appear attractive. Yet, it must be remembered that the repealed Elections Offences Act, Cap 66 Laws of Kenya which previously prohibited undue influence in elections also prohibited similar conduct that is prohibited by the Constitution and the Elections Act such as violence, intimidation, treating of voters, bribery, and corruption. Can it then be argued by parity of reasoning that since Article 81 of the Constitution speaks to an electoral system free of violence, intimidation, treating of voters, bribery, and corruption, these are also new concepts? We do not see anything that suggests that prohibition of treating of voters, bribery, and corruption is a brand new invention of the Constitution of Kenya, 2010. Nor is improper influence. We would therefore see the relevant provisions of the Constitution as not necessarily creating new concepts but as provisions more attuned to spur greater impetus in combating the malpractices that

[18] (2014) eLKR, CA 39 of 2013

have always dogged our elections and to provide a more rigorous enforcement framework and mechanism that lacked in the former Constitution.

208. Article 81of the Constitution of Kenya,provides in unambiguous terms that:

> "The electoral system shall comply with the following principles:-
> (a) freedom of citizens to exercise their political rights under Article 38;
> (b) ...
> (c) …
> (d) …
> (e) free and fair elections, which are
> i. by secret ballot;
> ii. free from violence, intimidation, improper influence or corruption;
> iii. conducted by an independent body;
> iv. transparent; and
> v. administered in an impartial, neutral, efficient, accurate and accountable manner."

209. Article 91 (2) of the Constitution of Kenya further provides that:

> "A political party shall not—
> (a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;
> (b) <u>engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;</u>
> (c) …;
> (d) engage in bribery or other forms of corruption; or
> (e) except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections." (emphasis mine)

210. Section 10 of the Election Offences Act (No. 37 of 2016) provides that:

> (1) "A person who, directly or indirectly in person Undue influence or through another person on his behalf, uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—
> (a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;
> (b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c) Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.

(2) …

(3) A person who directly or indirectly by duress or intimidation—

(a) Impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) In any manner influences the result of an election, commits an offence."

E. SUBMISSIONS ON TECHNOLOGY AND ICT

211. Sections 39 and Section 44 of the Elections Act as amended by the Elections Laws (Amendment) Acts No. 36 of 2016 make provision for the use of technology in Kenya's electoral law. Section 39 of the Elections Act provides that:

> (1) "The Commission shall determine, declare and publish the results of an election immediately after close of polling.
>
> (1A) The Commission shall appoint constituency returning officers to be responsible for—
>
> (i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;
>
> (ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and
>
> (iii) Submitting, in the prescribed form, the collated results for the election of the President to the national tallying center and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.
>
> (1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) 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.

(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed."

212. Sections 44 of the Elections Act provides;

(1) "Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

(a) Procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and

(b) Test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for —

(a) the transparent acquisition and disposal of information and communication technology assets and systems;

(b) testing and certification of the system;

(c) mechanisms for the conduct of a system audit;

(d) data storage and information security;

(e) data retention and disposal;

(f) access to electoral system software source codes;

(g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;

(h) telecommunication network for voter validation and result transmission;

(i) development, publication and implementation of a disaster recovery and operations continuity plan; and

(j) the operations of the technical committee established under subsection (7).

(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

(a) be restricted to the process of voter registration, identification of voters and results transmission; and

(b) be procured at least one hundred and twenty days before the general election."

213. To facilitate the implementation of the aforesaid provisions, the following regulations of the Elections (Technology) Regulations are relevant:

3. Assessment

(1) The Commission shall regularly conduct a requirements analysis to determine the specific requirements to upgrade or supplement existing election technology, or to acquire new election technology with the purpose of enhancing the integrity, efficiency and transparency of the election process.

(2) Based on the requirements analysis conducted under sub regulation (1), the Commission shall prepare a solution design and feasibility report for any required upgrades or acquisitions.

6. Maintenance

The Commission shall carry out regular inspections and servicing of the election technology, as well as establish a support and maintenance contract with a service level agreement to ensure the serviceability, reliability and availability of the election technology.

8) Testing;

The Commission shall carry out timely end-to-end testing of election technology before deployment for the election process.

10. Certification

(1) After the conduct of the necessary testing, the Commission shall prepare a report to certify that the election technology meets the user requirements and specifications developed under regulation 4, and that it is accessible.

(2) The Commission shall request assurance by a professional reputable firm to certify that the election technology meets user requirements and specifications developed under regulation.

14. Information security

(1) The Commission shall put in place mechanisms to ensure data availability, accuracy, integrity, and confidentiality as set out in the First Schedule.

(2) For the purpose of sub regulation (1), the Commission shall adopt tools to detect, prevent and protect against attacks and compromise of the election technology.

21. Telecommunication network service availability

(1) The Commission shall identify and communicate in a timely manner to all stakeholders the network service available at different polling stations.

(2) In areas where there is no telecommunication network, the Commission shall inform the stakeholders and publish this information in a timely manner.

(3) In order to enhance network availability during the election period, the Commission may engage the services of a consortium of telecommunication network service providers.

(4) Where the Commission engages a consortium telecommunication network service providers in the manner specified in sub regulation (3), the Commission shall require the consortium to use internal roaming services.

22. Appropriate infrastructure

The Commission in collaboration with a telecommunication network service provider or providers shall put in place the appropriate telecommunication network infrastructure to facilitate the use of election technology for voter validation and results transmission and shall publish the network coverage at least forty-five days before the date of a general election.

23. Obligations for service providers

The telecommunication network service providers shall ensure the security, traceability and availability of the network during the election period or during any other period as may be required by the Commission.

31. Establishment of the Committee

The Committee established under section 44 (8) of the Elections Act, 2011 shall be known as the Elections Technology Advisory Committee.

32. Mandate and functions of the committee

(1) The Committee shall advise the Commission on adoption and implementation of election technology which may include—

(a) the development of policies for the progressive use of election technology in the electoral process;
(b) the participation of stakeholders in the implementation and deployment of election technology; and
(c) the development of an operations continuity plan, as set out in regulation 24.

(2) The Committee shall—

(a) regularly engage with stakeholders in order to sensitize them on the progress of adoption and use of election technology in the electoral process; and

(b) receive regular updates on the status of election technology.

33. Composition of the Committee

(1) The Committee shall be composed of—
(a) at least three members of the Commission and designated staff of the commission;
(b) the Registrar of Political Parties;
(c) a representative of the—
(i) Majority Party in Parliament;
(ii) Minority Party in Parliament;
(iii) Political Parties Liaison Committee; and
(iv) Information Communication Technology professional bodies.

214. The legal framework governing the Electronic transmission of results and the entire Electronic elections management system must be benchmarked against the Constitution of Kenya 2010.

215. The entire gamut of the ICT infrastructure as established under section 44 of the Elections Act and the technology regulations thereto were intended to give effect to the constitutional rights, values and principles. Their profundity cannot however be appreciated without first appreciating the historical context to their enactment.

216. The Constitution of Kenya that underpins all laws including electoral laws in Kenya was the product of a history of several failed attempts for constitutional reform. The unfortunate circumstances of the post-electoral violence in late 2007 to February 2008 eventually offered Kenya a constitutional moment to reinvigorate the stalled constitutional process. The African Union through the Panel of Eminent Persons led by the former United Nations Secretary General, Kofi Annan thence brokered a delicate agreement which was signed by His Excellency the President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga on 28th February 2008. This agreement inter-alia laid the foundation for the formulation and implementation of constitutional and institutional reforms aimed at guaranteeing the political stability of Kenya in the long term.

217. Four main agenda items for reform were identified by the Kenya National Dialogue and Reconciliation Team (KNDR) including *Addressing long term issues, including constitutional, legal and institutional reforms…and addressing impunity, transparency and accountability*. Pursuant to this commitment, a statutory roadmap for the completion of the review process was enacted in December 2008 through the new Constitution of Kenya Review Act. The statutory framework also provided for four organs of review including the Committee of Experts (CoE) which drafted the Constitution. One of the key approaches of the CoE to its functions was extensive consultation which inter-alia considered reports related to Agenda Four including '*The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007, 2008 (The Kriegler Report) on electoral* reforms'[19]

218. In essence the Kriegler Report was a foundational text in the drafting of the national values and principles and most importantly the principles of Kenya's electoral system under Article 38, 81, 86 and 138 of the Constitution. The following recommendation in the Kriegler report is particularly instructive;

> 'IREC recommends that without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying center, and the integration of this results-handling system in a progressive election result announcement system.' – See page 36 of the Kriegler report.

219. Transmission of results was accordingly a critical element in the application of Article 38, 81, 86 and 138 of the Constitution. Although there were attempts to develop an integrated and secure tallying and data transmission system in the elections immediately following the promulgation of the constitution i.e. in the 2013 elections as recommended by the Kriegler Report and in accordance with the broad constitutional framework, the Elections Act No. 24 of 2011 was enacted in such permissive and discretionary terms that the 1st Respondent could literally abandon the

[19] See chapters 2 and 4 generally of the final report of the committee of experts on constitutional review of 11th October, 2010.

system and supplant it with a manual system as it in fact did in the 2013 Presidential elections.

220. The relevant provisions of the Elections Act before the 2016 amendments provided:

> 39. Determination and declaration of results
>
> (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.
>
> (2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.
>
> (3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.
>
> 44. Use of technology
> The Commission may use such technology as it considers appropriate in the electoral process

221. That the aforesaid provisions were discretionary and/or permissive as was later to be confirmed by the Court which went even further to hold that the law in fact contemplated a manual election. The Court noted that,

> "an objective reading of the Regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of 4th March 2013, were not envisaged to be conducted on a purely electronic basis. *Regulation 60 of the Elections (General) Regulations, 2012* illustrates that if the elections are to be facilitated by electronic means only, the relevant guidelines shall be availed to the public. Regulation 59 provides that voting is done by marking the ballot paper, *or* electronically. Thus, the voting system envisioned in Kenya appears to be *manual*. Regulation 82, and Section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only *provisional*. Can there, therefore, be an invalidation of *final* results, because of the non-transmission of *provisional* results?
>
> [237] From case law, and from Kenya's electoral history, it is apparent that electronic technology has *not* provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only *incremental,* over time. It is not surprising that the applicable law has entrusted a *discretion* to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This *negates the Petitioner's contention* that, in the instant case, *injustice, or illegality in the conduct of*

election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

222. Consequently, the Elections Act No. 24 of 2011 was amended vide the Elections Laws Amendment Act No. 36 of 2016 in a bi-partisan process by all stakeholders to introduce concrete and/or robust measures that would truly guarantee the integrity of the electoral processes in conformity with the principles set out under Articles 81 and 86 of the Constitution of Kenya 2010.

223. In this regard, the Election Laws (Amendment) Acts 2016 brought sections 39 and 44 (as amended) establishing mandatorily, an integrated electronic electoral system that enables *biometric voter registration, electronic voter identification and electronic transmission of results*. These laws now made the application of technology mandatory and were ultimate codification of the Kriegler Report on identification of voters and transmission of results in keeping with Article 259(1) of the Constitution.

224. The amended provisions obligated the 1st Respondent to ensure that the technology is simple, accurate, verifiable, secure, accountable and transparent and to procure and put in place the same at least eight months before the general elections. In relation to the Presidential election, Section 39(1A)(ii) & (iii) and 1(C) of the Elections Act requires the Commission to appoint constituency returning officers to collate and announce the results from each polling station in the constituency for the election of inter-alia the President and to submit, *in the prescribed form*, the collated results to the national tallying centre.

225. Section 44 of the Elections Act as amended, obligates the Commission to 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 and to tally and verify the results received at the national tallying centre; and publish the polling result forms on an online public portal maintained by the Commission.

226. Before the Election, the Commission publicly informed the public and stakeholders that the KIEMS gadgets to be used for that purpose were designed in a way as to ensure text results could NOT be transmitted in the KIEMS gadget without images in the prescribed form embodying election

results. A key component that informed the adoption of electronic transmission of results was the need to ensure *efficient, secure and prompt* transmission of results to avert manipulation and/or interference with the same between a polling station and the Constituency Returning centre and thereafter the national tallying centre as was the case before the amendments to the Elections Act.

227. To ensure the success of the system, the Elections (Technology) Regulations established a number of safeguards including:
    a) testing and certification of the system;
    b) mechanisms for the conduct of a system audit;
    c) data storage and information security;
    d) data retention and disposal;
    e) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;
    f) telecommunication network for voter validation and result transmission;
    g) development, publication and implementation of a disaster recovery and operations continuity plan; and
    h) the operations of a technical committee.

228. The Petitioners' submit that the only lawful, credible and secure way to conduct, tally and transmit the 2017 presidential election results is strictly as provided by section 39(1C) of the Elections Act as amended i.e. vide electronically in prescribed forms in a prompt and efficient manner. The Court of Appeal in *IEBC -v- Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017, affirmed the use of information technology to guarantee the accuracy and integrity of the results of the election. The Court stated at pages 70-71 of its judgment that:

> "We are satisfied that the electronic transmission of the already tabulated results from the polling station is a critical way of safeguarding the accuracy of the outcome of the elections... The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced result.""

229. Throughout the pre-election period, the 1st Respondent publicly sought to assured the public and stakeholders that it was committed to abiding by the aforesaid laws and regulations to ensure a free, fair and credible process. For instance, vide a letter dated 28th February 2017 annexed at page 37 in the annexures to Godfrey Osotsi's Affidavit 2, the Commission in response to queries raised by the NASA Coalition in their letter of 7th February 2017 gave an assurance at paragraph 16 of the matrix attached to its letter that it is *'committed to abiding by section 39 of the Elections Act that provides for a clear process for the declaration of results outlining the distinct roles of the constituency and county returning officers.*

230. Further in a letter dated 4th April 2017 addressed to the 1st Petitioner annexed at page 66 in the annexures to Osotsi's Affidavit 2, the Commission appreciated that results transmission was one of the key aspects of KIEMS and claimed that they had taken all measures to '*ensure that the system is able to deliver secure results and to avail scanned copies of the results that shall be published on a public web portal as per the law'* i.e. that the transmission of results from polling stations to Constituency and the NTC would be by text simultaneously with images of the prescribed forms 34.

231. The video of the 1st Respondent's former director of ICT, the late Chris Msando (adduced by Mr. Godfrey Osotsi, Dancun Anunda and Doreen Owino, in support of the petition) is particularly compelling in this regard.

232. The 1st Respondent therefore created a legitimate expectation that the laws, rules and regulations once established, would be complied with to the letter. The doctrine of legitimate expectation is well recognized and established in law. In *Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others*[20] the Supreme Court stated that legitimate expectation would arise when a body, by representation or by past practice, *has aroused an expectation that is within its power to fulfil.*Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. The Petitioners and Kenyans at large were expectant of a free, fair and credible election pursuant to Article 38 of the Constitution. In flagrant violation of that expectation the IEBC not only ignored the peremptory provisions of the said laws but in some instances deliberately and/or negligently superintended their

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contravention as set out in the affidavits of Mr. Godfrey Osostsi, Ms. Aprielle Oichi and Mr. Koitamett Ole Kina.

233. Having reviewed the 1st Respondent's conduct the Petitioners submit that the failure of the results transmission system amounted to negligent dereliction of duty. When considered together with the anomalies highlighted in the prescribed forms these things substantially affected and/or impacted the outcome of the presidential election.

234. Most importantly, the Petitioners submit that the breaches complained of violated cardinal principles of the Constitution and to that extent rendered the presidential election a nullity altogether.

235. Under the constitution, some of the most fundamental constitutional precepts that permeate each and every action by a state organ, whether in interpreting statute or implementing a policy decision are the national values and principles of governance enshrined under Article 10 of the Constitution including *democracy and participation of the people*, *inclusiveness*, *good governance*, *integrity*, *transparency and accountability*. In the case of *IEBC vs National Super Alliance and Others* C.A No. of 2017, the Court of appeal held that these principles are justiciable as a matter of right. The court held thus;

> In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.
>
> Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

236. These national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them-

a) Applies or interprets the Constitution;
b) Enacts, applies or interprets any law; or
c) Makes or implements public policy decisions.

237. These values are further emphasized in the Constitution, with respect to the right of the Citizenry to free and fair elections. Article 81 (1)(e) of the Constitution of Kenya provides that the electoral system shall comply with the following principles—

(e) free and fair elections, which are—
…
(iv) transparent; and
(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

238. Article 82(1) of the constitution provides that Parliament shall enact legislation to provide for—

…
(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections;
…
(2) Legislation required by clause (1)(d) shall ensure that voting at every election is—
…
(b) <u>transparent;</u>

239. Article 86 provides that at every election, the Independent Electoral and Boundaries Commission shall ensure that—

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

240. Article 88(5) provides that the Commission shall exercise its powers and perform its functions *in accordance with this Constitution and national legislation.*

241. In the *Petition of the President of the Republic (Estonia)* to declare the Local Government Council Election Act Amendment Act, passed by the Riigikogu on 28 June 2005, unconstitutional; the case laid down the basis of the argument of 'one man one vote' as follows; 'the principle of uniformity means that all voters have equal possibilities to affect the voting results, i.e. an equal number of votes will be taken into account per voter. The principles of uniformity and generality in their conjunction require that the participation in voting, guaranteed to voters, be as convenient as possible. It went on to state as follows; The possibility to change the vote given by electronic means renders the influencing of the will of a voter by illegal means useless and pointless, and is thus an additional guarantee, supplementing the measures of penal law, for guaranteeing the principle of free voting when voting by electronic means.''

242. In the case of Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76; the supreme court of Canada pronounced itself in the judgement at para 25 and 26 as follows;

> The Court elaborated further as follows; 'In construing the meaning of "irregularities . . . that affected the result", we have taken into account a number of aides to statutory interpretation, among them: (1) the constitutional right to vote and the objectives of the Act ; (2) the text and context of s. 524 ; and (3) the competing democratic values engaged.'

243. In essence the principle of universal suffrage espoused at Article 38(2) of the Constitution must be construed to mean that tampering with the collating and the transmission of results breached the right to a transparent, efficient, accurate and accountable election and accordingly invalidates the entire election. This is more so where interference is with the primary and/or only platform recognized in law for the transmission of collated results.

244. In *Macfoy vs. United Africa Co. Ltd*[21](cited with approval in Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR) Lord Denning delivering the opinion of the Privy Council at page 1172 (1) stated the general law on nullities thus;

[21] [1961] 3 All E.R. 1169

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

245. The argument therefore that an irregularity such as non compliance with the Constitution or statute or irregularity must answer to the question ''did the irregularity or non compliance affect the result is a misnomer and a complete distortion of section 83 of the Constitution which was enacted to give effect to Article 81 and 86 of the Constitution and not to restrict its interpretation and effect. An election that was done in breach of the law and in particular the Constitution or in this case in breach of the sections 39 of the Elections Act and section 44 is incurable.

246. Hon. Justice (Prof.) Otieno – Odek, Judge of the Court of appeal in his paper; ''Election Technology Law and The Concept ''*did the irregularity affect the results of the elections*'', correctly states that (at page 12 paragraph 3 that ''violation of the constitutional provisions and non compliance with election technology law ipso facto denotes that there has been irregularity in conduct of the elections i.e. that the elections as conducted did not conform to the legal framework enshrined in the Constitution and the Elections Act.

247. That the entire election transmission platform for this year's general election was premised on an exclusive electronic platform and therefore a compromise on that system affected the credibility of all election results declare by the 1st Respondent.

248. The narrow interpretation of section 83 of the Elections Act imports the argument (In *Morgan versus Simpson*) that it does not matter how badly an election is conducted or how the result is arrived it, if the alleged irregularity does not affect the outcome fails to take into consideration the 2010 Kenya Constitution which at Article 2 (1) declares itself supreme and that any act or omission in contravention of it is invalid.

249. The Petitioners' submit that the only reasonable explanation consistent with the aforesaid turn of events is that the text results forming the basis of the 1st Respondent's declaration of presidential election results were manipulated and thereafter unlawfully sanitized to legitimize the announced result. The

anomalies and fraudulent irregularities identified in forms 34As and Bs as detailed in *Dr. Nyangasi's affidavit* were accordingly not a coincidence.

250. The Petitioners received the documents filed by the 1st Respondent in response to the Petition. Having analysed the 54,000 pages and the Forms 34A therein, the Petitioners have discovered startling evidence of a fraudulent attempt to conceal and manipulate the fatal anomalies and irregularities after filing of the Petition and weeks subsequent to the purported declaration of a **final result** allegedly based on the same documents. Herein below marked Appendix A is the analysis.

251. The Petitioners also reviewed the documents provided vis a vis the list of gazetted returning officers. The examination reveals that at least sixty eight (68) persons who signed the Forms 34B were not gazetted as returning officers for respective constituencies. Herein marked Appendix B is the analysis.

252. Further, the Petitioners having received the foregoing documents analysed the Forms 34B therein, and equally made similar startling revelations. Herein marked Appendix C is the analysis.

253. Finally, the Petitioners further analysed the unique security features of the Forms 34B provided. Other than noting that most Forms did not conform to the contractual security specifications provided to Al Ghurair suggesting that the Forms were locally and fraudulently generated, a bar code analysis of the Forms supposed to indicate the respective constituencies startlingly discloses the same as belonging to restaurants, World Health Organisation, MicroDrivers and other strange entities. This revelation completely vitiates the entire presidential election outcome and renders the entries therein void. Herein marked Appendix D is the analysis.

DATED at NAIROBI this **25th** day of **August** 2017.

MURUMBA & AWELE ADVOCATES

FOR THE PETITIONERS/APPLICANTS

Copies to be served upon:

1. V. A. NYAMODI & CO ADVOCATES
   LOWER HILL DUPLEX, HSE NO. 7
   LOWERHILL ROAD, UPPER HILL
   P. O. BOX 51431-00200
   NAIROBI

2. ISEME, KAMAU & MAEMA ADVOCATES
   IKM PLACE, 5TH FLOOR
   FIFTH NGONG AVENUE
   OFF BISHOPS ROAD
   P.O. BOX 11866-00400
   NAIROBI (Ref: IND-006-0047)

   Tel: 254 20 2710992/2711021/2711050
   Email: info@ikm.co.ke

3. OGETO OTACHI & CO. ADVOCATES
   AMBASSADOR COURT, BLOCK C,
   2ND FLOOR, DRC-6,
   JAKAYA KIKWETE ROAD
   P. O. Box 79438-00200
   NAIROBI

Lodged in the Registry at Nairobi on the …….of …… 2017

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Registrar