

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 KENYATTA.....3RD RESPONDENT

AND

ATTORNEY-GENERALAMICUS CURIAE

AMICUS BRIEF

DRAWN AND FILED BY:

Githu Muigai, SC
Attorney-General
Attorney-General's Chambers
Harambee Avenue
NAIROBI.

TO BE SERVED UPON:

1. Murumba & Awele Advocates
Mirage Plaza, Mezzanine 1-Unit 7
Chiromo Road, Westlands
P.O. Box 22255-00505

NAIROBI.

2. Independent Electoral & Boundaries Commission
Anniversary Towers, 6th Floor
University Way
P.O. Box 45371-00100

NAIROBI.

3. Chairman
Independent Electoral & Boundaries Commission
Anniversary Towers, 6th Floor
University Way
P.O. Box 45371-00100

NAIROBI.

4. H.E President Uhuru Kenyatta

NAIROBI.

AMICUS BRIEF BY THE ATTORNEY-GENERAL

The President and Hon. Judges of the Supreme Court,

1.1 Constitutional and Legal basis for joinder of the Attorney-General as *Amicus Curiae* in the Proceedings

1. The Attorney-General pursuant to Article 156 (5) & (6) of the Constitution, Section 6(2)(a) of the Office of the Attorney General Act, Section 24 (1) of the Supreme Court Act, 2012, Rules 23, 54 (1) (a), (2) of the Supreme Court Rules, 2012, Rule 17 (1) & (2) of the Supreme Court (Presidential Election Petition) Rules, 2017 is mandated to be enjoined at any stage of the proceedings as an amicus curiae, where the Government is not a party in order to assist the court advance the Rule of Law and defend the public interest.

2. In particular;

- i. The Attorney-General is authorised under Article 156(5) of the Constitution to appear, with leave of court, as a friend of the court in any civil proceedings to which the government is not a party;
- ii. Article 156(6) of the constitution obligates the Attorney-General to promote, protect and uphold the rule of law and defend the public interest;
- iii. Under section 6 (2) (a) of the Office of the Attorney General Act, 2012, the Attorney-General is also authorised with leave of court or tribunals to appear in any civil proceedings; and
- iv. Rules 25 and 54 of the Supreme Court Rules, 2012 define the procedural legal basis for joinder of a party as *Amicus Curiae* in any proceedings.

- v. That the significant role of the Attorney-General as *Amicus* in presidential election disputes has been affirmed by this Court in its previous decision in Raila Odinga & 5 Others v IEBC and Others.¹
3. The Attorney-General submits that the conduct of Presidential elections is a matter of great public interest necessitating the participation of the Attorney-General as the principal legal advisor to the Government, promoter, protector of the Rule of Law and defender of the Public interest.

1.2 The Proposed issues for submission by the Attorney-General as *Amicus Curiae*

4. The Attorney-General submits that the Petition raises questions regarding the proper interpretation and application of Articles 10, 38, 81, 86, 138 and 140 of the Constitution which have implications on the conduct of Presidential elections. In this regard, the Attorney-General intends to make *Amicus* submissions on the following questions:-
 - i. What is the proper Constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both Articles 81 and 86 of the Constitution?
 - ii. What were the changes to the elections infrastructure post 2013 and its effect on the conduct of presidential elections; to wit; the elections laws (amendment) Act No.36 of 2016 and Elections Laws (amendment) Law No. 1 of 2017?
 - iii. What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of IEBC- vs- Maina Kiai & 4 Others² (hereinafter “the

¹ eKLR 2013

² Civil Appeal No. 105 of 2017

Maina Kiai case”) on how IEBC conducted the presidential election in issue?

- iv. How should the Court treat rejected/spoilt votes in respect to votes cast in terms of Article 138 (4) of the Constitution?
- v. What is the proper Constitutional and legal threshold for invalidating a Presidential election under Article 140 of the Constitution?
- vi. What remedies can the Court grant in determining a Presidential election petition under Article 140 of the Constitution?

1.3 Submissions on the specific questions

1.3.1 What is the proper Constitutional and legal standard applicable to the conduct of Presidential elections in Kenya as envisaged under both Articles 81 and 86 of the Constitution?

5. The Attorney-General submits that the determination of the presidential election dispute should be made within the context of the principles for the electoral system set forth under both Articles 81 and 86 of the Constitution. Which sets out both the qualitative and quantitative principles applicable to the conduct of presidential elections in Kenya.
6. The Attorney-General respectfully adopts the view of Hon. Justice (Prof) Otieno-Odek Esq³ where he stated as follows at page 6;

“Articles 81 (e) and 86 represents the quantitative and qualitative principles of Kenya’s electoral systems. Whereas Article 81 (e) is essentially qualitative, Article 86 is primarily quantitative. The requirement for an accurate, verifiable and accountable electoral system imposes a quantitative assessment of the

³ Judge of Appeal and Director, Judiciary Training Institute in his paper titled, Election Technology Law and the Concept of “Did the Irregularity Affect the Result of the Election?” presented at the annual judges colloquium in Mombasa in the month of July 2017

electoral results. The concept that the elections must be free from violence, intimidation, improper influence, and corruption buttresses the qualitative aspects of electoral process. Equally, the requirement that the electoral process must be transparent and administered in an impartial, neutral and efficient manner is qualitative in nature. It is noteworthy that as a general principle, qualitative requirements cannot be measured quantitatively. The essence of qualitative requirements is to appraise the entire electoral process prior to and during the voting day. Qualitative requirements evaluate whether the environment in which election was conducted was free and fair within the meaning of Article 81 (e) of the Constitution. Substantial non-compliance with the qualitative requirements render the entire electoral results void." (emphasis added)

7. The Attorney-General submits that in essence, the qualitative context of the election results as captured under Article 81(e) of the Constitution is as good as the process that led to those results. On the quantitative requirement under Article 86 of the Constitution, the Court is called upon to deal with numbers and figures regarding the threshold for declaration of Presidential results envisaged under Article 138 (4) of the Constitution.
8. In the case of Winnie Babihuga V Masiko Winnie Komuhamia & Others⁴, Justice Musoke Kibuka expressed as follows regarding the application of qualitative and quantitative test;

‘The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the Court has to determine whether or not the election was free and fair.’
9. The Attorney-General submits that the fundamental question as to the conduct of presidential elections involves the interpretation of Articles 81 (e) (v) and 86 on whether the election was administered in free, fair taking in to account of the principles of impartiality, neutrality, efficiency, accuracy and accountability.
10. The Attorney-General submits that in considering what constitutes free and fair elections, the court has to contextualize the qualitative and quantitative principles

⁴ HCT-OO-CV-EP-004-2001

within the parameters of the constitutional and legal framework of the electoral processes in Kenya.

11. The Attorney-General submits that the principles listed under Article 81 of the Constitution are meant to safeguard and promote the centrality of the voter as captured under Article 38 of the Constitution. Article 38 of the Constitution provides;

- (1) *Every citizen is free to make political choices, which includes the right-*
 - a) *To form, or participate in forming, a political party;*
 - b) *To participate in activities of, or recruit members for, a political party; or*
 - c) *To campaign for a political party or cause.*

- (2) *Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-*
 - a) *Any elective public body or office established under this Constitution; or*
 - b) *Any office of any political party of which the citizen is a member.*

- (3) *Every adult citizen has the right, without unreasonable restrictions-*
 - a) *To be registered as a voter;*
 - b) *To vote by secret ballot in any election or referendum; and*
 - c) *To be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

12. The Attorney-General submits that the standards for the conduct of a free and fair election are universal and is articulated in various international instruments.

13. The Attorney-General submits that, **Article 25 of the International Covenant on Civil and Political Rights 1966** provides for the formal obligations under the right to election in the following terms:

'Every citizen shall have the right and opportunity...to take part in the conduct of public affairs, directly or through freely chosen representatives...to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free

expressions of the will of the electors...and ...to have access on general terms of equality, to public service in his country.'

14. The Attorney-General respectfully adopts the tenets of democratic elections as captured in the African Declaration of the Principles Governing Democratic Elections In Africa 2002⁵ to wit; at part 2(4) thereof it details how democratic elections (basis of the authority of democratic government) should be conducted follows:

- i. Freely and fairly;
- ii. Under democratic constitutions and in compliance with supportive legal instruments ;
- iii. Under a system of separation of powers that ensures in particular, the independence of the judiciary;
- iv. At regular intervals provided for in regular Constitutions;
- v. By impartial, all- inclusive competent, accountable electoral institutions staffed by well trained personnel and equipped with adequate logistics.

15. The Attorney-General submits that The Inter-Parliamentary Union, a worldwide Organization of Parliaments established in 1889 to which Kenya is a member, In its declaration adopted by the Inter-Parliamentary Council at its 154th Session(Paris, 26th March 1994) outline the essential attributes of free and fair elections to include the following:

- i. Establishment of an effective, impartial and non-discriminatory procedure for the registration of voters;
- ii. Establishment of clear criteria for the registration of voters such as age, citizenship, and residence, and ensure that such provisions are applied without distinctions of any kind;
- iii. Provide for the formation and free functioning of political parties, possibly regulate the funding of politiaa;

⁵ AHG/Decl.1(xxxviii),2002

- iv. Initiation and facilitation of national programmes of civic education on election procedures and issues;
- v. Establishment of a neutral, impartial and balanced mechanism for the management of the election;
- vi. Ensure the registration of voters, updating of electoral rolls and balloting procedures;
- vii. Provision of clear balloting procedures;
- viii. Encourage parties, candidates, and the media to accept and adopt a code of conduct to govern the election campaign and the polling period;
- ix. Ensure the integrity of the ballot through appropriate measures to prevent multiple voting by those not entitled thereto;
- x. Ensure the integrity of the process for counting votes.

16. The Attorney-General respectfully adopts the decision of the Constitutional Court of South Africa in the case of, Richter V Minister For Home Affairs & 2 Others⁶ where at paragraph 53 it held;

"The right to vote is symbolic of our citizenship.....In entrenching the right of every citizen to vote, sections 19 of our Constitution (South Africa) affirms the symbolic value. But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues,..... democracy itself will be imperiled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civil responsibilities and willing to take the trouble that exercising the right to vote entails."

17. Further, the Attorney-General respectfully adopts the decision of the Supreme Court of Uganda in the case of Rtd Col Dr. Kiiza Besigye .V. Yoweri Kaguta

⁶ (2009) ZACC3

Museveni And Electoral Commission⁷, where the Court defined free and fair elections in the following terms:

“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. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time.”

18. The Attorney-General submits that the application of the standard of free and fair elections as provided under Article 81 of the Constitution, international legal instruments and best practices should be done within the framework of electoral laws, subsidiary legislations and administrative procedures that govern the conduct of elections.
19. The Attorney-General submits that the principles of free, fair and regular elections under Articles 38, 81 (e) and 86 of the Constitution have been complemented by the applicable electoral legislations.⁸

⁷ Presidential Election Petition No.1 of 2001 ODOKI CJ

⁸ The Election Act of 2011 and the regulations made therein which include:(Elections (Registration of Voters) Regulations, 2012,Elections (voter Education) Regulations, 2012,Elections (General) Regulations, 2012,Rules of Procedure on settlement Disputes, Elections (Technology) Regulations, 2017,Elections (Party Primaries and Party Lists) Regulations, 2017,Elections (Voter Education) Regulations, 2017,Elections (Parliamentary and County Elections) Petition Rules, 2017);The Election Campaign Finance Act, 2013; The Elections Offences Act, 2016;The Political Parties Act;The Independent Election and Boundaries Commission Act, 2011.

1.3.2 What were the changes to the elections infrastructure post 2013 and its effect on the conduct of presidential elections to wit; the elections laws (amendment) Act No.36 of 2016 and Elections Laws (amendment) Act No. 1 of 2017?

20. The Attorney-General respectfully draws the attention of the court to reforms on election laws geared towards enhancing the conduct of free and fair elections.

21. The Attorney-General submits that in order to secure a free and fair election administered in an impartial, Neutral, efficient, accurate and accountable manner, a bi partisan joint parliamentary committee was constituted with the mandate:

“...legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission and improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner...”

22. The Attorney-General submits that the committee after extensive deliberations and stakeholder participation involving expert on electoral laws and the Attorney General, made the following key recommendations;

- i. The use of ICT systems that would be impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent;
- ii. That section 44 of the Elections Act be amended to require the use of technology in the electoral process;
- iii. That the Independent Electoral and Boundaries Commission ensures that the necessary hardware and software are in place to support the use of technology in the 2017 General Elections;
- iv. That the Elections Act be amended to limit the number of voters in each polling station to a maximum of five hundred (500); and
- v. A recommendation that the Elections Act be amended to provide for the electronic transmission of the tabulated results of an election for the President from a polling station to the constituency centres and to the national tallying centres.

23. The Attorney General submits that the recommendations detailed in the Parliamentary committee report informed the amendments to the Election Act; to wit:

(i) The Election Laws (Amendment) Act No. 36 of 2016

24. The Attorney-General submits that **Section 39** was amended to provide for the manner in which results would be declared and published after the close of a polling station. **Section 39 (1)(C)** specifies the use of the technology in the transmission of such results;

“(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 publish the polling result forms on an online public portal maintained by the Commission.*
- c. publish the polling result forms on an online public portal maintained by the Commission.”*

25. The Attorney-General submits that in giving effect to Section 39 (1) (C), **Regulation 79** of the Elections (General) Regulations as amended by Legal Notice Number 72 of 2017 introduced **forms 34A, B and C** for purposes of declaration of Presidential Election Results.

26. The Attorney-General submits that Regulation 83 of the Elections (General) Regulations regarding tallying and announcement of election results was amended to introduce Regulation 83 (2) to provide as follows;

- (1)*
- (2) The Chairperson of the Commission shall tally and verify the results received at the national tallying centre.*

(ii)The Election Laws (Amendment) Act No. 1 of 2017

26A. The Attorney-General submits that vide **Section 44, the Elections Act** was amended to provide for the use of technology in the conduct of elections. Section 44 (1) and (7) (a) of the Elections Act states:

“(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.

.....

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

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

b).....”

27.The Attorney-General submits that vide Section 19 of the Election Laws (Amendment) Act, 2017, Section 44A was introduced. This was for the provision of a manual system that would **complement** the electronic system in case the latter failed. Section 44A states:

“Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.”

28.The Attorney-General submits that the complementary mechanism envisaged under Section 44A of the Elections Act was a support mechanism to complement the integrated electronic electoral system, a position which was upheld by the Court of Appeal in **National Super Alliance (NASA) Kenya -v- The Independent Electoral and Boundaries Commission & 2 others**⁹ where it considered the meaning and nature of complementary mechanism and held that the complementary mechanism envisaged under Section 44 A is a manual

⁹ Civil Appeal No. 258 of 2017

identification of voters and manual transmission of results in accordance with Regulation 69 and 83 of the Elections (General) Regulations.

29. The Attorney-General submits that pursuant to **section 109 of the Elections Act**, IEBC vide regulations 69, 82 and 83 of the Elections (General) Regulations IEBC put in place a complementary mechanism for identification of voters and transmission of election results, the constitutionality of which was upheld by both the High Court and Court of Appeal in **National Super Alliance (NASA) Kenya -v- The Independent Electoral and Boundaries Commission & 2Others** to be inter-vires the tenure and scope of section 44A of the Elections Act.

30. The Attorney-General submits that Regulation **69(e) of the Elections (General) Regulations 2012 (enacted vide amendments contained in L.N. 72 of 21st April 2017)** provided for a mechanism of resorting to and use of a defined complementary system as follows-

(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall—

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

(ii) complete verification Form 32A in the presence of agents and candidates;

(iii) identify the voter using the printed Register of voters; and

(iv) once identified proceed to issue the voter with the ballot paper to vote.

iii. **Impact on Electoral Process in the conduct of 8th August, 2017 elections**

31. The Attorney General submits that the application of Section 39, 44 and 44A to the conduct of the General election was to ensure that the use of technology would ensure that the elections are free and fair and administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. The Court should however, note that the use of technology in the 2017 general elections was restricted to **biometric voter registration**, **biometric voter identification** and **electronic result transmission system**.

32. In the case of IEBC -v- Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017, the court ruled that electronic transmission of results would enhance accuracy;

“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...”

33. The Court further held;

“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.”

1.3.3 What was the effect of the jurisprudence enunciated by the Court of Appeal in the Maina Kiai case on how IEBC conducted the presidential election in issue?

34. The Attorney-General respectfully draws the attention of this Court to the litigation before the Court of Appeal whose decision the Attorney-General humbly submits provided the parameters within which the presidential election was to be conducted by the IEBC.

35. The Attorney-General submits that when the court of Appeal upheld the determination of the High Court, the upshot was that Section 39 (2) & (3) of the Elections Act and Regulation 87 (2) (c) of the Elections (General) Regulations 2012 were rendered **unconstitutional** to the extent that they provided that the results of returning officers were provisional and subject to confirmation by IEBC.

36. The Attorney-General observes that the appeal arose from the judgment of the High Court sitting at Nairobi in Maina Kiai & 2 Others –vs- IEBC & Others¹⁰ delivered on 7th April, 2017. In the said case, the Court made the following orders regarding the constitutionality of the provisions of section 39 (2) & (3) of the

¹⁰ Petition number 207 of 2016

Elections Act and Regulation 87 (2) (c) of the Elections (General) Regulations 2012;

- i. A declaration that to the extent that section 39 (2) and (3) of the Elections Act provides that the presidential election results declared by the constituency returning officer are provisional is contrary to Articles 86 and 138 (2) of the Constitution and is therefore null and void.*
- ii. A declaration that to the extent that Regulation 87 (2) (c) of the Elections (General) Regulations 2012 provides that presidential election results declared by the constituency returning officer are provisional is contrary to Article 86 and 138 (2) of the Constitution and is therefore null and void.*
- iii. A declaration that to the extent that Regulation 83 (2) of the Elections (General) Regulations 2012 provides that presidential election results declared by the constituency returning officers are subject to confirmation by the commission is contrary to Article 86 and 138 (2) of the Constitution and is therefore null and void.*
- iv. A declaration that the presidential election results declared by the constituency returning officer are final in respect of the constituency, and can only be questioned by the election Court.*
- v. A declaration that to the extent that the first Respondent (IEBC) interprets section 39 (2) and (3) of the Elections Act and Regulations 83 (2) and 87 (2) (c) to mean that it can confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in the particular constituency is contrary to Articles 86 and 138 (2) of the Constitution and is therefore null and void.*

37. The Attorney-General notes that IEBC being aggrieved by the judgment and decree of the High Court lodged an appeal to the Court of Appeal. At page 24 paragraph 2 of the judgment, the court identified the issue for consideration before it as:

“Whether section 39 (2) and (3) of the Elections Act and Regulations 83 (2) and 87 (2) (c) are inconsistent with Articles 86 and 138 (3) of the Constitution?”

38. The Attorney-General observes that the Court of Appeal in its judgment upheld the decision of the High Court. At page 31 and 32 of the judgment, the Court of Appeal made the following finding of the issue;

“Pursuant to the Constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the Presidential Election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the Constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the Constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying center.

The dispute is on what should happen at the national tallying centre. While the Appellant and the fourth Respondent insist that, by the provision of the Constitution, the Act and the Regulation, the Appellant is authorised to “verify the results” and/or “confirm” them, the first, second and third as well as the fifth and sixth Respondents for their part have maintained that the results declared or announced at the polling stations are final and no person or entity can purport to have power to verify, confirm or vary them.”

39. The Attorney-General submits that the Court of Appeal decision was arrived at based on the following reasoning:

- i. The adoption and use of the electronic transmission of the already tabulated results from the polling station contained in the prescribed forms is a critical way of safeguarding the accuracy of the elections.
- ii. The Court of Appeal was not persuaded on how IEBC or any of its officers could vary or even purport to vary election results particularly when it was clear by Article 86 (d), section 2 of the Act and Regulation 93 (1), all election materials(ballot boxes, ballot papers, counterfoils, information

technology equipment for voting, seals and other materials) are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared. The court noted that it is a criminal offence to interfere with election materials which is punishable, on conviction, by a fine not exceeding Kshs. 500,000/- or imprisonment for a term not exceeding five years or both.

- iii. The court noted that a polling station is the true locus for the exercise of the voters' will through an open transparent and participatory approach. The court therefore found that the count at the polling station is clothed with finality not to be exposed to any risk of variation or subversion by IEBC.

1.3.4 How should the Court treat rejected/spoilt votes in respect to votes cast in terms of Article 138 (4) of the Constitution?

40. The Attorney-General submits that the issue on how to treat rejected/spoilt votes in determining the total votes cast in presidential elections seems to be of continuing concern in developing jurisprudence in Kenya.

41. The Attorney-General recalls that the issue was alive in 2013 in **Raila Odinga case** (supra) where the inclusion of rejected votes by IEBC while streaming the provisional results of the presidential election in the computation of percentages of the candidates was objected to by Mr. Kuria, Mr. Itumbi and Ms. Sergon.

42. The Attorney-General notes that vide a judgment in the **Raila Odinga case** (supra) delivered on 16th April, 2013 held that only valid votes should have been used in the computation. The Court determined that a broad and purposive interpretation of the Constitution in the context of constitutional electoral principles would lead to the exclusion of rejected votes in the computation of the percentage vote requirement. The court concurred with the decision in the case of

Popular Democratic Movement vs Electoral Commission¹¹ where it was held that in interpreting Article 78 and paragraph 3 of Schedule 4 of the Constitution of Seychelles, the only valid votes should be used in computing the percentages for each candidate. Burhan J faced with the question whether a rejected vote could be considered a cast vote held that rejected ballot papers are not be counted as votes therefore the term votes cast and will not include rejected ballot papers.

43. The Attorney-General submits that the Supreme Court decision in the **Raila Odinga case** remains good law to guide in the computation of the percentages of votes for each presidential candidate in a presidential election in terms of the 50% + 1 threshold as provided for under Article 138 (4) of the Constitution.

44. The Attorney-General submits that by dint of Article 82(d) of the Constitution of Kenya, Parliament is empowered to enact legislation to provide for the conduct of elections and referenda, and for the regulation and efficient supervision of elections.

45. The Attorney-General submits that pursuant to Article 82 (d) of the Constitution, Parliament did enact the **Elections Act, 2011 (Act No. 24 of 2011)**, which confers upon IEBC the power to make regulations for the conduct of elections. The Act at Section 109 (1)(p) provides that IEBC may make Regulations to:

“prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid”.

46. The Attorney-General submits that Regulation 77 (e) of the Elections (General) Regulations, 2012, specifically provides that spoiled/rejected votes shall not be counted. It states:

“(1) At the counting of votes at an election, any ballot paper –

(a) which does not bear the security features determined by the Commission;

¹¹ 85 (2011) SLR 354

- (b) on which votes are marked, or appears to be marked against the names of, more than one candidate;*
- (c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;*
- (d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or*
- (e) is unmarked, shall... be void and shall not be counted.”*

47. The Attorney-General is further persuaded by how other jurisdictions treat the matter by dint of legislation;

- i. In the United Kingdom, a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated.¹²
- ii. In New Zealand, sections 178-179 of the Electoral Act 1993 makes a distinction between a vote and an informal vote. Informal votes are rejected and not included in the count of the votes for the candidate;
- iii. In South Africa, section 47 (3) of the Electoral Act 1993 provides for the procedure for the rejection of votes and Regulation 25 of the Election Regulations 2004 clarifies the procedure for counting the votes, clearly indicating that rejected ballots are not counted as part of the votes.

48. The Attorney-General shares the views of the Justice (Prof.) Otieno-Odek¹³ in which he exemplified the rationale for excluding rejected or spoilt votes from determining the results of an election to stem from the notion that the election is basically a process in which popular will is expressed. He correctly postulates that voters are the true holders of democratic power which is to be placed. He further states that if an eligible citizen does not appear to vote or spoils his vote he/she does not express his/her preference for any candidate. Therefore, due to absence of any preferred candidate, constitutional rules attribute no weight to this type of vote and it is simply not counted for election results purposes.

¹² Sections 47-50 of the Representation of the People's Act 1983

¹³ Supra

49. The Attorney-General submits that the will of the voter is ring-fenced by the provisions of Article 38 (2) of the Constitution which states:

“Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors...”

1.3.5 What is the proper Constitutional and legal threshold for invalidating a Presidential election under Article 140 of the Constitution?

50. The Attorney-General submits that this Court has the onerous task to balance the scale of justice between the sovereign power of the people of Kenya which is exercised periodically by the participation of the people in a democratic national election as dictated by Article 1(2),(4),136 and 138 of the Constitution on one side and on the other side of the scale in exercise of its power of oversight ensuring that the sovereign power and will of the people as exercised is reflected in the representation of the leaders elected under the framework of the Independent electoral and Boundaries Commission, the institution entrusted in facilitating the conduct of the elections in conformity with Article 81,82,86,88 and 138 of the Constitution.

51. The Attorney-General submits that the constitutional and legal threshold for invalidating a presidential election should be considered within the context of the applicable legal and evidential burden of proof, the standard of proof and the irregularity in issue.

52. The Attorney-General submits that there exists a rebuttable presumption in law as to the validity of election results declared by respective returning officers. That presumption creates a legal and evidential burden of proof upon the person who seeks to upset it.

53. The Attorney-General concurs with the decision of the Supreme Court of India in the case of Jeet Mohinder Singh –v- Harminder Singh Jassi¹⁴ where the court upheld the presumption of validity of election results as follows:

“The success of a candidate who has won at an election should not be lightly with. Any person such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the Court shall be vigilant that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences for the returned candidate and constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.”

54. The Attorney-General submits that within the facet of the burden of proof, a petitioner has a legal burden to prove a contested fact either by a preponderance of evidence or beyond reasonable doubt as well as the evidentiary burden to adduce sufficient evidence of a particular fact in issue in order to justify a decision of that fact in his favour.

55. The Attorney-General submits that this Court had occasion to address the question of the burden of proof in the Raila Odinga decision (supra) in which it stated:

“There is apparently a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness in which he/she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to a firm and an unanswered case has been made.

We find merit in such a judicial approach as is well exemplified in several cases from Nigeria. Where a party alleges non-conformity with 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

¹⁴ AIR 2000 SC 256

burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularities 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.

56. The Attorney-General submits that the legal proposition on a party who bears the burden of proof is captured in our **Sections 107** as read together with **Section 109** of the **Evidence Act**.

57. The Attorney-General submits that the burden of proof must be effected to the required standard of proof which mainly concerns the quantum or cogency of evidence that a party must lead in order to succeed in its claim.

58. The Attorney-General submits that to the extent that presidential elections are *sui generis* in character, the standard of proof varies between balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non-compliance with the electoral laws in issue. In the case of **Miller vs Minister of Pensions**¹⁵, Lord Denning defined proof beyond reasonable doubt as follows:

“(T)hat degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence ‘of course it is possible but not in the least probable’, then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

¹⁵ (1947) 2 ALLER 372

In respect of proof on a balance of probabilities, Lord Denning stated:

“(I)t must carry a reasonable degree of probability but not as high as is required in criminal cases. If the tribunal can say ‘we think it more probable than not’, the burden is discharged but if the probabilities are equal, the burden is not discharged. The degree of cogency in burden of proof required as less than in criminal law.”

59. The Attorney-General submits that case law from other jurisdictions are persuasive and constitute an exposition of jurisprudence on the question of standard of proof in election matters. In the case of Simmons v Khan¹⁶, Justice Mawrey QC, stated the position as follows;

*“The court when listening to election petitions should apply both criminal and civil standard of proof. The criminal standard of proof (beyond reasonable doubt) will be applied:
As to the charges that the Respondent has been guilty of corrupt or illegal electoral practices.
As to whether the general there has been general corruption, fraud or electoral offences, the civil standard of proof (the highest preponderance of probability) will be applied to the question of whether the general corruption, fraud or electoral malpractices have or did affect the results of the election.”*

60. The Attorney-General therefore submits that no election is to 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 appropriate elections rules if it appears to the Court, having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not substantially affect the result.

61. The Attorney-General submits that this universal, general position of law is captured in our statute under Section 83 of the Elections Act 2011 which provides;

“No elections 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

¹⁶ EWHC B4 (QB) (2008)

was conducted in accordance with the Principles laid down in the Constitution and in that written law or that non-compliance did not affect the results of the elections.”

62. The Attorney-General submits a positive interpretation/reading of Section 83 of the Elections Act provides for two instances when an election can be declared as void , these instances are;

- i. When the elections are in non-compliance with any written law relating to that elections and the conduct of such election factoring in the non-compliance was not in accord with the principles laid down in the Constitution and the written law; and
- ii. The non-compliance (i) above) affected the results of the election.

63. The Attorney-General accordingly submits that, there is no doubt that the Supreme Court is vested with the jurisdiction to declare an election invalid if it considers that there was major breach of the electoral law. The Supreme Court in the Raila Odinga case (supra) pronounces itself that;

“[300] It follows that this Court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office, if there is any major breach of the electoral law, as provided in the Constitution and the governing law.”

64. Hence, the Attorney-General submits that the threshold required to disturb the election is such that the evidence has to disclose profound irregularities in the management of the electoral process. A claimant is entitled to relief not merely on the basis of proven non-compliance but where it is shown that substantial non-compliance with electoral regulations has resulted in a variation of the allocation of votes between the contenders.

65. In the case of Zachary Okoth Obado -v- Edward Akongo Oyugi & 2 Others SC¹⁷ at paragraph 126 of its Judgment, the Supreme Court observed that a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election.

66. The Attorney General concurs with the decision of the Supreme Court in **Raila Odinga's case** where it stipulated the guiding criteria on disturbing an election result by the election Court as follows;

"[304] Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election".

67. The Attorney-General submits that the petitioner in any Presidential Petition must be able to demonstrate that there was non-compliance with the electoral laws to the extent that it affected the validity of the election. Ultimately, it has to be something that materially affects the outcome of the election.

68. The Attorney-General submits that the substantive nature of an irregularity as a key guiding criteria in disturbing an election result has been affirmed by comparative judicial decisions. The Supreme Court in Ghana in Nana Addo Dankwa Akufo-Add & others v. John Dramani Mahama & Electoral Commission & Anor¹⁸ in determining the question of the threshold for declaring a Presidential Election invalid pronounced itself as hereunder;

"We wish to conclude with the words of Kennedy, J. in the Islington West Division Case, Medhurst v. Laugh and Casquet (1901) 17 T.L.R. 210 (at page 230): "An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that

¹⁷ Petition No. 4 of 2014

¹⁸ (Writ 1/6/2013)

the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters.”

And again, the judgment in the case of Woodward v Sarsons (1875) 32L.T(N.s.) 867 at pp.870-871:

“... we are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election law: . . . But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament.””

This is much the same as Canadian case of Opitz v. Wrzensnewskyj 2012 SCC 552012-10- in which the court said as follows: “The practical realities of election administration are such that imperfections in the conduct of elections are inevitable ... A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical on-the-job experience... The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system. This overarching concern informs our interpretation of the phrase “irregularities ...that affected the result.” (Rothsterin and Moldaver JJ).” (emphasis added)

69. Further, the Attorney-General concurs with the decision of the Canadian Supreme Court case of Ted Opitz V BorysWrzesnewskyj [2012] SCC 55 where the Court held that;

“No election is to 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 appropriate election rules. If it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the rule was affected.”

70. Further, the Court in Opitz Case (supra) found on page 42 (paragraph 66) that;

“By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter’s control, and is caused solely by the error of an election official.”

71. The Nigerian Supreme Court applied a higher standard in General Muhammadu Buhari v. Independent National Electoral Commission & 4 Ors.¹⁹ Tobi JSC Addressed himself at paragraph 75 as follows;

“It is manifest that an election by virtue of [the applicable statute] shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the [applicable statute]. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted.”

72. The US Supreme Court in Bush v. Al Gore²⁰ where the Court found that in ordering a state-wide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. It was held thus;

¹⁹(2008) 12 S.C. (Pt. I) 1

²⁰ 531 U.S. (2000)

“The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.”

...

“The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non arbitrary treatment of voters necessary to secure the fundamental right. Florida’s basic command for the count of legally cast votes is to consider the “intent of the voter.” 772 So. 2d, at 1262. This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.”

1.3.6 What remedies can the Court grant in determining a Presidential election petition under Article 140 of the Constitution?

73. The Attorney-General submits that while Article 140 of the Constitution requires the court to declare the election valid or invalid, no other reliefs are provided for. That notwithstanding, the Constitution by dint of Article 163(8) mandates the Supreme Court to make rules for the exercise of its jurisdiction. The Supreme Court (Presidential Election Petition) Rules 2017 set out the powers of the court to include:

- i. Dismissing the petition;
- ii. Declaring the election of the president-elect to be valid or invalid;
- iii. Invalidating the declaration made by IEBC.

74. The Attorney-General submits that considering that Article 143 of the Constitution provides for only two reliefs of declaration of validity or invalidity of presidential election results, the court has to issue reliefs/remedies within the confines of Article 140. The Court in granting reliefs in a Presidential Petition has to confine itself within the parameters set in law. The Supreme Court in Samuel Kamau Macharia

& another v Kenya Commercial Bank Limited & 2 others ²¹at paragraph 68 *held as follows;*

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

75. The Supreme Court in The Case of Raila Odinga (Supra) addressed itself to the question of the nature and extent of the Court’s jurisdiction in Presidential Petitions and held as follows;

“[205] It is clear that the Supreme Court’s jurisdiction in a Presidential election is both original and exclusive – a position well clarified in our Advisory Opinion No. 2 of 2012, In the Matter of an Application for Advisory Opinion under Article 163(6) of the Constitution of Kenya. No Court other than the Supreme Court has the jurisdiction to hear and determine disputes relating to an election for the office of President.

[206] This jurisdiction, however, is not boundless in scope: it is circumscribed in extent and in time. Limited in extent, in that it relates only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the validity or invalidity of a Presidential election.

[207] The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the Constitution itself.

[208] A petitioner against the declaration of a candidate as President-elect, under Articles 163(3)(a) and 140 of the Constitution as read together with the provisions of the Supreme Court Act, 2011 (Act No. 7 of 2011) and the Supreme Court (Presidential Elections) Rules, 2013, is required to present a specific, concise and focused claim which does not purport to extend the

²¹ [2012] eKLR

Supreme Court's jurisdiction beyond the bounds set out in the Constitution. It follows that the Court will only grant orders specific to the Presidential election.” (emphasis added)

76. The Attorney-General submits that incidental to the final orders of a declaration of validity or invalidity of presidential results, the Supreme Court has inherent and statutory power to order for scrutiny of votes in order to determine the integrity and credibility of an electoral process.

77. The Attorney-General submits that by dint of section 82 of the Elections Act, the Court on its own motion or on application by any party to the petition, may order for scrutiny of votes during the hearing of an election petition.

78. The Attorney-General recalls that section 82 of the Elections Act was invoked in the **Raila Odinga** case (supra) where the Court *suo motu* ordered for the scrutiny of all Forms 34 and Forms 36. The Court thus held;

“[169] On 25th March 2013, the Court ordered the scrutiny of all Forms 34 and Forms 36, which were used in the country’s 33,400 polling stations. The purpose of the scrutiny was to better understand the vital details of the electoral process, and to gain impressions on the integrity thereof.

[170] The Court also ordered a re-tallying of the Presidential votes in 22 polling stations, using Forms 34, 36 and the Principal Register, as these stations had featured in the Petitioner’s grievance. The purpose of the re-tally was to establish whether the number of votes cast in these stations exceeded the number of registered voters as indicated in the Principal Register.”

79. Therefore, the Attorney-General submits that from the foregoing the Supreme Court’s power to issue final remedy is only restricted to a declaration of validity or invalidity of presidential election results, which they can only affirm or annul. However, by dint of the inherent and statutory powers of the Court as donated by the Elections Act, the Supreme Court can issue interlocutory orders to facilitate the final determination of the dispute.

80. The Attorney-General notes that the petitioner has asked for an order of a determination of criminal liability on the part of IEBC officers. The Attorney General respectfully submits that it is trite jurisprudence that where a superior court is seized of the matter or there is a separate mechanism of determination of the dispute provided for in law, the Court should defer the determination of the issue. The proposition was upheld in the case of Nana Addo Dankwa Akufo-Add & others v. John Dramani Mahama & Electoral Commission & Anor (supra).

1.3.7 Conclusion

81. The Attorney-General is grateful to the court for the opportunity to submit as *amicus* on this dispute of great public interest to which the ultimate determination thereof will not only settle the dispute but set a jurisprudential standard for the future conduct and determination of presidential elections. The Attorney-General is hopeful that the submissions will go a long way in assisting the court in arriving at a just, fair and judicious determination of the dispute.

DATED at NAIROBI this day of 2017.

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GITHU MUIGAI, SC
ATTORNEY-GENERAL

DRAWN AND FILED BY:

Githu Muigai, SC
Attorney-General
Attorney-General's Chambers
Harambee Avenue
NAIROBI.

TO BE SERVED UPON:

1. Murumba & Awele Advocates
Mirage Plaza, Mezzanine 1-Unit 7
Chiromo Road, Westlands
P.O. Box 22255-00505

NAIROBI.

2. Independent Electoral & Boundaries Commission
Anniversary Towers, 6th Floor
University Way
P.O. Box 45371-00100

NAIROBI.

3. Chairman
Independent Electoral & Boundaries Commission
Anniversary Towers, 6th Floor
University Way
P.O. Box 45371-00100

NAIROBI.

4. H.E President Uhuru Kenyatta

NAIROBI.