REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ. & P; Mwilu, DCJ & V-P; Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ)

PETITION NO. 1 OF 2017

– BETWEEN–

1. RAILA AMOLO ODINGA
2. STEPHEN KALONZO MUSYOKA **.....PETITIONERS**

– AND–

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
2. THE CHAIRPERSON OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION **...RESPONDENTS**
3. H.E. UHURU MUIGAI KENYATTA

THE DISSENTING JUDGMENT OF JUSTICE J.B. OJWANG

A. BACKGROUND

[1] So proximate to the moment of delivery of the Supreme Court's decision in this pivotal case, did I learn that I fell on the minority side. By the Constitution, the timeline for hearing and determination was below a fortnight, and so, full versions of the Judgment had to come later. My summarized dissent, thus, grasped only the compelling elements of the case. Today, I have the opportunity to set out my opinion in detail.

[2] The question before the Court was whether the *Presidential election*, conducted under one and the same electoral process with five other sets of

election (for Senate; National Assembly; County Governors; Women's Representatives; and County Assemblies), had been so compromised by operational irregularity and illegality, as to compellingly attract Orders of annulment.

[3] I learnt that the majority on the Bench had come to the unreserved resolution that the Presidential election was a nullity, and that the electorate must return to the polls. Such a position was thus summarized:

> ***"(i) As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections, upon considering*** *inter alia* ***Articles, 10, 38, 81 and 86 of the Constitution, as well as Sections 39(1C), 44, 44A and 83 of the Elections Act, the decision of the court is that the 1st Respondent failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the Constitution and*** *inter alia* ***the Elections Act, Chapter 7 of the Laws of Kenya.***
>
> ***"(ii) As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st Respondent committed irregularities and illegalities*** *inter alia*, ***in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgment of the court. The court however found no evidence of misconduct on the part of the 3rd Respondent.***
>
> ***"(iii) As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied***

that they did and thereby impugning the integrity of the entire Presidential Election."

[4] Having taken such standpoints, the majority proceeded to strike down the Presidential-election outcome, ordering as follows:

"(i) a declaration is hereby issued that the Presidential Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

"(ii) A declaration is hereby issued that the 3rd Respondent was not validly declared as the President elect and that the declaration is invalid, null and void;

"(iii) An order is hereby issued directing the 1st Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination under Article 140(3) of the Constitution."

[5] Thus, vital issues turning upon the *democratic principle*, issues of the *terms and essence of the Constitution,* of the *statute law,* and of the *judicial mandate* in the interpretation and crystallization of functional dimensions of the legal process, had been so cursorily dispatched – maybe in answer to *policy objects*, or *to political persuasions,* or to other general, *social calls*. For me, as an experienced lawyer and Judge, but more particularly, as a dedicated legal scholar, such an approach to contentious matters did short shrift to the *firm and*

principled, normative configuration of the law and the legal process – elements which alone, would temper the motions of the social and political order, and ensure that the mechanisms of governance remain attuned to the ideals of civilized process.

[6] I will, in this Judgment, examine the foregoing dimensions of law with greater focus, after adverting to the pertinent issues and evidence in the whole case.

B. MAIN CAUSE AND PRELUDE

(a) Prelude

[7] The petitioners were the Presidential and Deputy-Presidential candidates of the National Super Alliance [NASA] coalition of parties, and were running on the Orange Democratic Movement Party [ODM] and the Wiper Democratic Movement Party tickets, respectively.

[8] The 1st respondent is the Independent Electoral and Boundaries Commission [IEBC], an independent agency established under Article 88, as read with Articles 248 and 249 of the Constitution of Kenya, and the Independent Electoral and Boundaries Commission Act, 2011 (Act No. 9 of 2011) [the IEBC Act]. The 1st respondent bears the mandate of conducting and/or supervising referenda and elections for any elective body or office established under the Constitution, as well as any other elections provided for under the Elections Act, 2011 (Act No.24 of 2011).

[9] The 2nd respondent is the chairperson of the 1st respondent – and bears the mandate under Article 138(10) of the Constitution, to declare the outcome of the Presidential election, and to deliver written notification of the same to the Chief Justice and to the incumbent President. The 3rd respondent is the incumbent President, who was the candidate of the Jubilee Party, and who was declared the winner in the elections, on 11th August, 2017.

[10] The petitioners are aggrieved with the mode of conduct of the Presidential election of 8th August, 2017. They contend that the said election was conducted, administered and managed improperly by the 1st respondent, and that such mismanagement was deliberate and systematic, and having the effect that there was failure of compliance with the governing principles prescribed under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution; with the Elections Act; with the Regulations made thereunder; with the Electoral Code of Conduct; and with other relevant provisions of the law. The petitioners call for the invalidation of the 2nd respondent's declaration of the 3rd respondent as the duly elected candidate.

[11] The prelude to the main cause is marked by a set of preliminary applications. These, and the Court's determinations, may be enumerated in summary form:

(i) an application by the petitioners dated 25th August, 2017 – seeking an Order for the 1st respondent to give the petitioners direct access to data and information; this elicited the Order that the 1st respondent do grant the petitioners, as well as the 3rd respondent, a 'read-only access', with copying if necessary, for certain items of data; the Court also ordered its Registrar to give supervised access to *certified copies of original voting-record*

Forms 34A and 34B, to the petitioners and 3rd respondent; the Registrar being required to file a report on the exercise by 29th August, 2017 at 5.00 p.m.; parties to make submissions thereupon; the Court also designated an information and communication technology (ICT) officer from its staff, as well as independent ICT experts – to oversee the required access to the dissemination technology applied during the election;

(ii) an application by the 3rd respondent, dated 25th August, 2017 and seeking to strike out from Court record such documents as were not served out timeously; this was refused by the Court, on the premise that, in the interests of justice to all parties, its inherent jurisdiction favoured retaining the documents and annexures in question; and, to safeguard the applicant's right to fair hearing, the Court directed that the documents and annexures in question be served upon the 3rd respondent;

(iii) an application by the petitioners, dated 26th August, 2017, seeking to strike out documents filed by the 1st, 2nd and 3rd respondents, which had not been served upon counsel for the petitioners: this was dismissed, on grounds that if granted, it would terminate the entire case for the 1st, 2nd and 3rd respondents at this preliminary stage – and this would derogate from the interests of justice;

(iv) an application by 1st respondent, dated 26th August, 2017 and seeking Orders to expunge from the record documents filed out of time, which had the effect of raising a fresh cause of action, apart from carrying additional evidence: this was disallowed, on the basis that the question related to an application already before the Court;

(v) an application dated 21st August, 2017 by Information Communication Technology Association of Kenya for joinder as *amicus curiae*: this was dismissed, on the basis that it fell short of the applicable standard for admission;

(vi) an application dated 21st August, 2017 by *Mr. Ekuru Aukot*, one of the Presidential election candidates, seeking joinder as interested party: this was allowed, on the basis that the applicant had a personal stake in the outcome of the petition;

(vii) an application dated 23rd August, 2017 by *Mr. Michael Wainaina Mwaura,* who had been a Presidential election candidate, seeking joinder in some capacity – respondent, *amicus curiae*, or interested party: this being allowed (for interested party), on the basis that he had a personal stake in the outcome of the petition;

(viii) an application by *Mr. Aluoch Polo Aluochier*, dated 23rd August, 2017, seeking joinder as interested party: this being disallowed, on the ground that the applicant failed to meet the requisite legal threshold;

(ix) an application by *Mr. Benjamin Barasa Wafula* dated 24th August, 2017 seeking joinder as interested party: this being disallowed, for failure to meet threshold requirements;

(x) an application by learned counsel, *Mr. Charles Kanjama*, dated 25th August, 2017 seeking joinder as *amicus curiae:* this being disallowed for failure to meet threshold standards;

(xi) an application by the Law Society of Kenya dated 25th August, 2017, seeking joinder as *amicus curiae*: this being allowed, on the basis that the legal threshold was satisfied;

(xii) an application by the Attorney-General dated 25th August, 2017 seeking joinder as *amicus curiae*: this was allowed.

(b) Main Cause: Issues and Contentions

[12] It was the petitioners' contention that, during the Presidential election, being part of the General Election of 8th August, 2017, certain management improprieties came to pass, which affected the registration of voters, the votes cast, the vote count.

[13] One of the allegations related to the category of votes described as "rejected votes", said to have constituted 2.6% of the total votes cast. The issue being raised in this regard, came alongside a *contention* that an earlier decision of the Supreme Court, in ***Raila Odinga v. Independent Electoral and Boundaries Commission and Others,*** Sup. Ct. Petition No. 5 of 2013, should be reversed: insofar the Court had in that case held that "spoilt votes" are not to be taken into account, in computing the 50% +1 vote-strength threshold for determining the winner in a Presidential election.

[14] Such a claim is founded upon a desired legal yardstick, rather than on the prescribed, and operative law. The petitioners contended that the Supreme Court in the earlier case, had "improperly" arrived at its legal threshold, because it had been influenced by a dissenting opinion in a comparative case-citation noted by this Supreme Court – which by Kenya's Constitution (Article 163(7)), is the ultimate judicial authority, and "[a]ll courts, other than the Supreme Court, are

bound" by its decisions. The petitioners were invoking the case from Seychelles, ***Popular Democratic Movement v. Electoral Commission,*** Constitutional Case No.16 of 2011; they were urging that the majority stand in that case should determine *this* Supreme Court's position as regards "spoilt votes" in the electoral process: and that in that context, *there was* an impropriety in the Presidential-election vote-count, following the election of 8th August, 2017.

[15] The petitioners contended that the conduct of the Presidential election of 8th August, 2017 had contravened the principle of *free and fair election* under Article 81(e) of the Constitution as read with Section 39 of the Elections Act, and the applicable regulations.

[16] The burden of the petitioners' case lies on *the process of relaying and transmitting voting records from polling stations to constituency tallying centres and the National Tallying Centre:* they questioned this process as falling short of standards on *simplicity, accuracy, verifiability, security, accountability, transparency, promptitude.* They contended that such shortcomings had compromised the principle of free and fair elections in terms of Article 81(e) (iv) and (v) of the Constitution. The petitioners attributed impropriety to the electoral process on a plurality of grounds, such as that:

(i) the data and information recorded in Forms 34A at the individual polling stations had not been accurately and transparently entered into the electronic KIEMS kits, at the individual polling stations;

(ii) there had been non-compliance with the requirement that KIEMS kits be accompanied by an electronic image of the prescribed forms, as these were transmitted to the National Tallying Centre; and this was in contravention of Regulation 87(3) of the Elections (General) Regulations;

(iii) the 1st respondent had pre-determined the results of the Presidential election, and was therefore not impartial, neutral and accountable as required by Article 81(e) (v) of the Constitution;

(iv) the declared results were not verified in more than 10,000 polling stations, and the data entered in the electronic kits was not consistent with the information in the Forms 34A;

(v) the information in Forms 34A was not consistent with that in Forms 34B, and the figures were not accurate and verifiable;

(vi) the computation and tabulation of the results in a significant number of Forms 34B was not accurate, verifiable and internally consistent;

(vii) the results, recorded in the 1st respondent's Forms 34B were materially different from those relayed, and relayed again, as at the time of filing on its website;

(viii) the 1st respondent had espoused a false narrative and national psyche, as the stage for stealing the election on behalf of the 3rd respondent – by allowing the electronic media and the news channels to relay and continue relaying its results-data, which lacked a legal or factual basis; and

(ix) at the time of declaration of election result, the 1st respondent was not in possession of Forms 34B, and did not publicly display the same for verification.

[17] The petitioners contended that the Presidential election was *not impartial, neutral, efficient, accurate and accountable* as required under Article 81(e)(v) of the Constitution, as read with Sections 39, 44 and 44A of the Elections Act and

Regulations made thereunder, and Section 25 of the IEBC Act; and that there were instances in which vote-count had been distorted, manipulated, or inflated in favour of the 3rd respondent. The petitioners asserted that it was impossible to determine who had won the Presidential election, or whether the threshold for winning the election was met.

[18] The petitioners contended that there had been a deliberate failure in operational transparency, and that the respondent had disregarded the decision of the Court of Appeal in ***Independent Electoral and Boundaries Commission v. Maina Kiai,*** Civ. Appeal No. 105 of 2017, by failing to electronically collate, tally and transmit accurate results, and by declaring results by county, rather than by polling stations.

[19] The petitioners contended that the 1st respondent had allowed the transmission and display of unverified provisional results, contrary to law; that the 1st respondent had also posted contradictory results in Forms 34A and 34B; and that there were internal contradictions in Forms 34A. They contended that the 1st respondent had declared final results on 11th August, 2017 even before receiving results from all polling stations, and had allowed more than 14,000 defective forms from polling stations – with the outcome of distorting more than 7 million votes. The petitioners contended that the 1st respondent had colluded with the 3rd respondent to eject their legitimate agents from various polling stations in Central and Rift Valley regions. On the basis of such allegations, the petitioners contended that the 1st respondent had abdicated its responsibility for ensuring a transparent and an impartial voting process, apart from corrupting the process of transmission of results.

[20] The petitioners contended that the 1st respondent had failed to adhere to the Constitution, rule of law, Court Orders and decisions – and that such a condition rendered the processes of the Presidential election, the transmission of results, and the final outcome, a nullity, as it lacked integrity, fairness and transparency.

[21] The petitioners contended that there had been a violation of Article 86 of the Constitution, and that the votes cast in a significant number of polling stations were not counted, tabulated, and accurately collated as required under Article 86(b) and (c) of the Constitution, as read with the Elections Act. They contended that the results recorded in Forms 34A differed from the results shown in the 1st respondent's Forms 34B and displayed in the 1st respondent's website; and they asserted that the 1st respondent's Forms 34B were inaccurate, bearing statistical manipulation to favour the 3rd respondent.

[22] The petitioners contended that the 1st respondent had acted contrary to the terms of Articles 38, 81 and 86 of the Constitution as read with Sections 39(1c) and 44 of the Elections Act and the Regulations thereunder, as well as Section 25 of the IEBC Act.

[23] The petitioners contended that, contrary to Regulation 7(1)(c) of the Elections (General) Regulations, the 1st respondent had fraudulently established secret and ungazetted polling stations, wherefrom vote-count results were added to the final tally, thereby undermining the integrity of the Presidential election.

[24] The petitioners contended that a significant number of Forms 34B had been executed by persons not gazetted as Returning Officers, and not accredited as such by the 1st respondent – and that such election results as were carried in

such forms were invalid. They contended that all returns submitted without IEBC's official stamp, or which did not bear the signatures and particulars of Returning Officers and agents, were invalid.

[25] The petitioners averred that the returns used in a material number of polling stations were not in the prescribed Forms 34A and 34B, contrary to Regulations 79(2) (a) and 87(1)(a), and that the Forms 34B bore fatal irregularities affecting 14,078 polling stations out of the established 25,000. They contended that a number of the forms and returns were not signed; that some did not show the name of the Returning Officer; that some did not bear the IEBC stamp; that some Forms 34A and 34B did not bear the signatures of candidates' agents, nor the reason for lack of signature; that some were signed by the same presiding officer serving at different polling stations.

[26] The petitioners contended that the 1st respondent had violated their rights under Article 35(2) of the Constitution, by putting up inaccurate information which misled the general public. They also asserted that the Presidential election was compromised by intimidation and improper influence, or corruption, contrary to Article 81(e)(ii) of the Constitution as read with the Elections Act, and Regulations 3 and 6 of the Electoral Code of Conduct.

[27] On the basis of the foregoing *contentions*, the petitioners formulated certain specific issues for the Court's determination:

> *(i) whether the Presidential election was conducted in accordance with the Constitution;*
>
> *(ii) whether the Presidential election was conducted in accordance with the written law;*

(iii) whether the 1st respondent's non-compliance with the Constitution and/or the law, affected the result of the Presidential election;

(iv) whether the 1st respondent's non-compliance with the Constitution and/or the law affected the validity of the result of the Presidential election;

(v) whether the non-compliance, irregularities and improprieties affected the validity of the results of the Presidential election;

(vi) whether the non-compliance, irregularities and improprieties affected the result of the Presidential election;

(vii) whether the exclusion of 2.6% of the total votes cast, as "spoilt votes", substantially affects and/or invalidates the count and tally of the Presidential-election votes;

*(viii) whether the total number of verified, **"rejected votes"** should be considered in ascertaining the attainment by any candidate, of the constitutional threshold;*

(ix) whether the 3rd respondent was validly declared as President-elect;

(x) whether the said 3rd respondent committed election irregularities;

(xi) what are the appropriate Orders to be issued by the Court.

(c) What is the Evidence?

[28] The various *contentions* and *averments,* as a matter of vital *judicial methodology,* are to be lighted up by objective *evidentiary account*. I will now

consider the scope of validation for the petitioners' cause, coming forth by way of their main body of *factual testimony*.

[29] The 1st petitioner, *Mr. Raila Amolo Odinga*, tendered evidence by his affidavit of 18th August, 2017 which also represented the stand of the 2nd petitioner. He deponed that he had been a Presidential election candidate, duly nominated by the NASA coalition.

[30] The 1st petitioner deposed that the 1st respondent, acting through presiding officers, undertook the vote-count which culminated in the declaration of the 3rd respondent as President on 11th August, 2017, with 8,203,290 votes, as against the deponent with 6,762,224 votes. The deponent was aggrieved with the declaration, as he believed the Presidential election to have entailed breaches of the Constitution and the applicable laws – such breaches arising *before polling day, as well as during the processes of tallying and transmission of results.*

[31] The deponent stated his belief, that the Presidential election failed to meet the constitutionally-prescribed terms that require "free, fair, transparent, accountable, credible and/or verifiable elections." He deposed that the IEBC had "deliberately and/or negligently compromised the security of the integrated electoral management system (KIEMS)", and thereby *exposed it to unlawful interference by third parties*. He deponed that the collation, tallying, verification and transmission of the Presidential-election results had been compromised by *procedural flaws and illegalities*, upon such a scale as substantially qualified the credibility of the declared result. He averred that the poll results as declared, were substantially at variance with the actual results tallied and declared at the gazetted polling stations. He deponed that the 3rd respondent, in concert with Cabinet Secretaries and others serving under the charge of the 3rd respondent,

had abused their positions, by *bringing their influence and pressure to bear upon the potential voters.*

[32] The deponent averred that, while the 1st respondent had acted by virtue of Section 44 of the Elections Act, and developed the Elections (Technology) Regulations, 2017, under which the KIEMS system had been set up for the management of elections, the failings in the conduct of the Presidential elections had now *undermined the security of the electoral system, exposing it to third-party interference.* He deponed that the said electronic system had been misapplied, with the effect that the Presidential election was substantially conducted by manual processes. As an instance in that regard, the deponent averred that the 1st respondent acted contrary to law by failing to transmit electronically the vote-count results from the polling stations and the constituencies – with the consequence that *the transmission process was now exposed to unlawful manipulation.* He averred, in that context, that the consequential delay in transmitting election results with the prescribed forms, gravely affected the credibility and validity of the results.

[33] The deponent averred that a review of the election results, in relation to the available Forms 34A and 34B, had shown *substantial qualitative anomalies, such as put into question the credibility of the Presidential election.*

[34] The deponent averred that the 3rd respondent was guilty of undue influence, bribery, inducement and intimidation in relation to the free exercise of elective preference by the voters. In this regard the deponent averred that the 3rd respondent had, on 2nd August at Makueni, issued threats to those chiefs who did not mount political campaigns in his favour; that Cabinet Secretaries had actively campaigned for the 3rd respondent; that the 3rd respondent had taken decisions

involving public resource-deployment, in such a manner as to benefit his political campaign.

[35] Another deponent, *Ms. Oichoe*, averred that she was a cyber security expert, and had observed and followed the conduct of the 8th August 2017 General Election – in particular, the process of vote-count results transmission. The process, as she averred, entailed six primary scenarios in respect of which IEBC's operational systems and data base has to be tested. The first of these is *confidentiality:* this requires that information should only be accessed by authorized persons; the confidentiality of sensitive information is to be secured. Secondly, *integrity:* information used should be accurate, complete, protected from unauthorized modification – by authorized or unauthorized persons. Under this scenario, it was the deponent's averment that non-authenticated results had entered the IEBC's public portal – and so, this *should raise questions as to the integrity of the data.* The third element, *availability*, required that data systems be available when required by persons authorized to use them – and access thereto is to be in compliance with the terms of Articles 35 and 47 of the Constitution, and Section 44(b) of the Elections Act as read with Section 4 of the Access to Information Act, and Regulation 15(4) of the Elections (Technology) Regulations, 2017. She deponed that during the August 8, 2017 General Election, the voters' register had not been made available on request, until the last moment when an Order of Court had been made in aid of such access. The deponent averred that the next feature of the data-base system was *non-repudiation*: an audit trial is to be maintained on activities occurring. This ensures that should someone have access to the information or data-base, a footprint is left; and a log should be maintained to facilitate tracing-back to source. It was her averment *that it was emerging from the petition, that entry had been made into the data-base, and a strange return made in place of the statutory Form 34.* She deposed that a strange book had been posted on the IEBC website, and that such a

situation calls for explanation. She averred that since the statutory form for transmitting results is Form 34, the book posted in the website was "strange in law". The fifth website scenario, in the deponent's averment, is *authenticity*: the information itself, as well as its source, is to be shown to be genuine – this being attributable to Section 44B of the Elections Act. The deponent averred that, on the date of declaration of election results, only 29,000 Forms 34A were available, and the declaration was made on the basis of *forms of questionable authenticity*. Her last, essential data-base feature was *privacy:* Section 55A as read with Section 44B of the Elections Act contemplates privacy and security of data; and so, the deponent averred, *if it is proved that IEBC failed to secure its data and its public portal, then it would be necessary to have an audit of all its systems.*

[36] Another deponent, *Mr. Koitamet Ole Kina*, averred that he was a duly accredited agent of the NASA coalition, in the General Election of 8th August, 2017. He deposed that he had arrived at the IEBC co-ordination base, the Bomas of Kenya, on the election date at 16.30 hrs, for the purpose of activating his access card. Following some delay in activating the card, the deponent joined the company of fellow agents, and they witnessed the streaming-in of election results, which commenced at 17.15 hrs. Thereafter, he averred, his team came to learn that it was not possible to verify the result-announcements, as they came unaccompanied with hard copies of Forms 34A, or the soft copies from the server. The NASA team, being concerned, approached IEBC Commissioners (Professor Guliye and Ms. Roselyn Akombe) and the CEO, Mr. Ezra Chiloba, calling for Forms 34B as a basis of verification. As this initiative proved ineffectual, the deponent averred, the NASA agents demanded a meeting with the Commission, and obtained yet another fruitless promise of access to Forms 34A: these being received, with Forms 34B, only in limited numbers, on 11th August, 2017.

[37] The deponent recorded his *opinion,* regarding the unreliability of the supply of Forms 34A and 34B by the IEBC, that this was evidence of a determination on the part of the Commission to declare results that could not be verified as required by law. The deponent drew on the content of another affidavit, by *Dr. Oduwo*, and averred that dilatory responses to the demands for the said forms, showed the 1st respondent's announcements to have been *misinformed, and/or based on information such as failed the test of verification, accuracy, transparency and credibility.*

[38] *Mr. Moses Wamuru*, the NASA Presidential candidate's chief agent and co-coordinator for Embu County, deponed that he and his agent-colleagues had not only been harassed, but kept out of the polling station by IEBC officials and officers of the Provincial Administration, for most of the election day. He deponed that he had been forced by the Constituency Returning Officer, to sign the election declaration form, as a condition for being availed a copy of the election results.

[39] Another deponent, *Mr. Godfrey Osotsi*, for Amani National Congress (of the NASA coalition of parties), averred that he was an ICT expert who had been an observer of the August election vote-tallying. This deponent deposed not upon settled fact, but *urged this Court to order a system-audit: to trace transmissions so as to reveal the code used by IEBC for the more-than 40,000 polling stations;* for the purpose of identifying the IEBC officers who used such codes to transmit election results; to establish the time and place where such transmissions were originated; and to identify the person who applied the special identifier to effect results transmission.

[40] The deponent also gave *his opinion on matters of law*: that under the Election Act, 'election material' includes systems such as are contemplated under Section 17(1), and include the Kenya Integrated Electoral Management System (KIEMS) – which incorporates voter registration, voter identification, and the results-transmission system.

[41] The deponent proceeds on that same line of averment: a declaration of results has to come in the wake of a transmission "in the right manner, as prescribed", before reaching the National Tallying Centre. He *rested his affirmations upon other deponents' statements* in support of the petition: as at the time of declaration of Presidential election results, only 29,000 Forms 34A had been received, and their authenticity still stood to be ascertained; and, election results could only be declared when the Commission was already in possession of all the Forms 34A and 34B.

[42] The deponent averred that IEBC either lacked full control of its system, or had ceded such control to some other authority.

[43] Another affidavit was sworn by *Mr. George Kegoro*, the executive director of the Kenya Human Rights Commission, a civil society agency committed to fostering and safeguarding human rights, democratic values, human dignity and social justice. He deponed that his organization serves as secretariat for an initiative known as Kura Yangu Sauti Yangu (KYSY), which is wholly devoted to the cause of fair elections during Kenya's 2017 election cycle. He averred that KYSY had deployed some 500 agents in all the 290 constituencies, to observe and monitor the electoral process: and KYSY had found contradictions and anomalies in the election data emanating from IEBC, especially in relation to the Presidential votes as reflected on the IEBC website.

[44] An agent of the NASA coalition, *Ms. Olga Karani*, deponed that, concerns had been expressed by members of the public, about anomalies and irregularities in the vote tallying process – such anxieties also coming from the election candidates, as well as NASA agents. She averred that *the prescribed election forms were manually availed to the National Tallying Centre,* though sometimes they were also displayed on the IEBC website. It was *her belief that it was impossible to verify the authenticity of such forms*. She deponed that, by the time of announcement of the election results, the Commission had neither collated, nor availed any of the Forms 34B, nor had it responded to outstanding issues regarding Forms 34A, or to the questions being raised about results posted on the website. She *attributed lack of transparency to the actions taken by the 1st respondent*.

[45] Another deponent, upon whose averments several of the petitioners' witnesses relied, was *Dr. Nyangasi Oduwo*. He deponed that on 8th August, 2017 at 5.07 p.m., some 10 minutes after the closure of the polling stations, the 1st respondent started streaming results for the Presidential election. He averred that such announcements of results had maintained a constant gap of 11% between the vote-count for the 1st petitioner and the 3rd respondent – notwithstanding the random distribution of the constituency-locations. His averment expressed suspicion also on the basis that, as he perceived it, in numbers of polling stations within the central Kenya and Rift Valley regions, the petitioner's agents were "chased away" from the stations, and "replaced by imposters", and thereafter presiding officers were "caused to record fictitious results in favour of the 3rd respondent."

[46] *Dr. Oduwo* averred that, upon being asked by the petitioner to examine 5000 Forms 34A, supplied by presiding officers to the 1st petitioner's agents

across the country, and to compare these with Forms 34B supplied by the 1st respondent and Forms 34A posted on the 1st respondent's website, he found discrepancies.

[47] *Dr. Oduwo* made averments embodying *opinion* in clear terms. He asserted that the 3rd respondent and the Deputy-President, who were candidates in the Presidential election, were guilty of corruptly influencing voters in the run-up to the General Election of 8th August, 2017. He averred that the election was compromised by instances of undue influence, inducement, bribery and intimidation. The deponent, in a second affidavit, avers that certain anomalies had compromised the said election, instances being: forms marked with a rectangular, rather than an official, circular stamp; Returning Officers failing to sign Forms 34B, or recording their own names; lack of handing-over notes; discrepancies in numbers of valid votes; unstamped forms; corrected figures noted on forms; agents not signing statutory forms; discrepancies in vote-tally.

[48] Discrepancy in vote-tally records was also the subject of averments by *Mr. Benson Wasonga*, who deponed that the IEBC's summation of valid votes was 15,179,717 – with the 1st petitioner having 6,821,505; the 3rd respondent having 8,222,862; and the total rejected votes being 477,195; as compared to the IEBC portal showing as total votes cast, 15,180,381, 1st petitioner's vote as 6,821,877, 3rd respondent's vote as 8,223,163, and rejected votes as 403,495. These figures, it was deponed, varied from the specific figures (Form 34C), that were issued at the time of declaration of the 3rd respondent as the leading candidate: total valid votes, as 15,114,622; 1st petitioner's votes, as 6,762,224; 3rd respondent's votes, as 8,203,290; total rejected votes, as 81,685. The deponent deposed that the actual variation in the rejected votes, as between the IEBC's summation of the results, and the display on the portal, was 73,700 votes; and he averred that this

differential amounted to violation of the electoral law, to the prejudice of Presidential candidates other than the declared winner.

[49] The petitioners called two more witnesses, one of these being *Mr. Mohamed Noor Barre,* from Mandera County in the north of the country. He deponed that while he had been trained, and sworn to serve as presiding officer in the elections, the local IEBC office had informed him on 7th August, 2017 that he had been replaced by a different person. His averment was that the electoral process at his station had been conducted by 'strangers' as presiding officers.

[50] It is the same with *Mr. Ibrahim Mohamud Ibrahim*, also from Mandera, who deponed that although he had been appointed, training and sworn-in as presiding officer, he had been called to the local IEBC office on 7th August, 2017 and informed that his place had been taken up by a different person. He deponed that the elections which took place on the following day, had been conducted by "strangers", acting as presiding officers.

C. THE OTHER SIDE: RESPONDENTS' ANSWER

(a) Introduction

[51] Judicialism, the established framework for relieving the all so-frequent grievances, conflicts, frays and tensions in the social order, has evolved as a civilized tradition of durable rules and methods of accommodation. Such methods have their *objectivity and rationale,* lodged within the *discipline of law*, which, as will become evident in this Judgment, is the domain not of the most open-textured manifestations, nor the most elementary political suasions – but of *jurisprudence,* as methodical reasoning, of a normative and professional category.

[52] The established judicial method, which rests on the singular dependability of the *fact-base,* and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

[53] As I express this introductory perception, so as to shed more light on the instant matter, I admit my debt to legal scholarship; with Andrew Goodman in his learned work, ***How Judges Decide Cases: Reading, Writing and Analysing Judgments***, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009), in which he observes (p.44):

> "*However rarefied and abstruse the legal argument before the [Court],* ***it must be anchored on the facts of the case:*** *while the judges will feel free to expound upon the most general principles in order to provide guidance for the future,* ***the actual decision…will turn on the facts****, even if the detail of the argument is quite remote from them"* [emphases supplied].

[54] Such is a fundamental principle, invariably observed in the practice and application of law in this country, as in other countries, the constitutional and judicial systems of which have benefited from the integrity of the common law tradition. And such an approach is certain to lead to a fair, dependable and plausible basis of judgment, as well as set a just and tenable reference-point for the future.

(b) Issues and Contentions

[55] It was the 1st and 2nd respondents' assertion that the 3rd respondent, in the Presidential election of 8th August, 2017 had garnered the largest number of votes, and had satisfied the constitutional threshold prescribed in Article 138(4) of the Constitution, apart from complying with the terms of the applicable statute law. They denied the petitioners' claims of non-compliance with the terms of Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution as well as other applicable laws, asserting that all such claims of non-compliance were couched in *bare generalities*, and were devoid of any *factual basis*.

[56] The 1st and 2nd respondents stated that the conduct of the Presidential election had been attended with an elaborate management system, guided by all relevant electoral laws, and safeguarded by definite safety measures for assuring transparency, accountability and verifiability, in terms of Articles 81 and 86 of the Constitution.

[57] The 1st and 2nd respondents stated that they had duly verified, and accurately tallied the election results for all candidates, before declaring the outcome, in accordance with Article 138(10) of the Constitution, and duly taking into account the terms of the recent Court of Appeal decision in ***IEBC v. Maina Kiai and 4 Others***, Civ. App. No.105 of 2017 [which relates to vote tallying]. They denied the petitioners' claims, that they had conducted the electoral process in a manner that prejudiced the sovereign will of the voters, and that they had only delivered "preconceived and predetermined, computer-generated leaders."

[58] The 1st and 2nd respondents denied the petitioners' allegation, that the number of "rejected votes" in the Presidential election had been as much as 2.6% of the total votes cast, stating that such votes, as declared in Form 34C, constituted only 0.54% of the votes cast.

[59] The 1st and 2nd respondents contested the petitioners' claim that the right principle to guide this Court, in respect of the treatment of "rejected votes," should be that preferred by the Seychelles Supreme Court, in ***Popular Democratic Movement v. Electoral Commission,*** Const. Case No. 16 of 2011, rather than this Court's established precedent in ***Raila Odinga v. Independent Electoral and Boundary Commission & Others***, Pet. No. 5 of 2013. The respondents' stand was that "rejected votes" had been rightly excluded from the count of "votes cast," by this Court.

[60] The respondents stated that the *process of relay and transmission of results,* from the polling stations to the constituency tallying centre and the National Tallying Centre, had been simple, accurate, verifiable, secure, accountable, transparent and prompt.

[61] The 1st and 2nd respondents stated that the Presidential election had been conducted in a manner that was free, fair, and in accordance with the Constitution; a manner that gave fulfilment to the sovereign will of the voters. The respondents urged that in these proceedings, two basic questions fell for determination, namely:

> *(i) whether the 3rd respondent was validly elected and declared as President-elect by the 2nd respondent;*
>
> *(ii) what consequential declarations, Orders and reliefs the Court should grant.*

They asked the Court to find, with regard to the two questions, that –

(i) the respondents had not contravened the provisions of the Constitution, the Elections Act, or any other statute;

(ii) the presidential election was conducted in accordance with the Constitution and the Elections Act, and all other relevant statutes, and a valid declaration of the outcome duly made;

(iii) the 3rd respondent was validly elected as the President of the Republic of Kenya;

(iv) the people of Kenya exercised their sovereign power of the vote, and their decisions should be respected;

(v) the petition lacks merit, and should be dismissed;

(vi) the petitioners should bear the costs of the petition.

(c) Evidentiary Statements

[62] The 2nd respondent, in his affidavit sworn on 24th August, 2017 deponed that he had been the Returning Officer for the Presidential election of 8th August, 2017. He averred that neither he nor the 1st respondent had any private stake in the election outcome, and that they had been neutral referees – their sole mandate being to provide the electoral structure for the voters to exercise their sovereign will, by electing leaders of their choice.

[63] The deponent averred that, a tally of all the votes had shown Uhuru Kenyatta to have garnered 8,203,290 votes, followed by Raila Odinga, the 1st

petitioner herein, who garnered 6,762,224 votes. The declared results were expressed in Form 34C, which was itself abstracted from forms 34B, forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote-tallies.

[64] The deponent averred that, in view of the election-management infrastructure that was in place, the primary results-declaration forms (Forms 34A and 34B) were by no means compromised, in their accuracy and overall integrity. These forms had been transmitted through the KIEMS electronic system, in a scanned format, secured by non-replicable features. The security features, he averred, included anti-photocopy and self-carbonated elements, up to a span subsuming six copies.

[65] He deposed that the presiding officers at the *40,883 polling stations* were required to scan, and electronically transmit the original Forms 34A to both the constituency tallying centres and the National Tallying Centre. The constituency tallying centres for their part, were required to relay the Forms 34B to the National Tallying Centre, for the purpose of tallying: and so, for the Presidential election, the results could be verified by reconciling the figures in Forms 34A.

[66] The deponent averred that, his dedicated task in the said electoral process was to provide policy leadership, and strategic direction, to ensure that the Commission's infrastructure for election-management, was accountable, efficient, systematic and methodical.

[67] He deposed that, though afflicted by challenges occasioned by a multiplicity of suits against the Commission, it still ensured that the procurement

of electoral materials, by the secretariat, was done in a transparent and timely manner; and that other electoral processes, including supportive technological systems, were deployed in a manner consistent with *the constitutional and legal requirements of simplicity, accuracy, verifiability, security, transparency and accountability*.

[68] The deponent averred that, all due arrangements had been made by the Commission, in aid of the electoral process of 8th August, 2017 – noting in particular the following aspects:

(i) voter *education had been conducted throughout the country;*

(ii) staff training, for the management of elections, had been duly carried out;

(iii) all the polling stations had been duly gazetted;

(iv) the register of voters had been duly audited and uploaded in the Commission's website (https://www.iebc.or.ke/iebcreports), and hard copies printed and posted at conspicuous sites at each polling station;

(v) mechanisms were put in place to facilitate the observation, monitoring and evaluation of the elections, in compliance with the terms of Article 88(4) of the Constitution;

(vi) the procurement and distribution of strategic and non-strategic election materials was duly completed;

(vii) as required by Article 10 of the Constitution, the Commission had held many consultative meetings with key stakeholders, including – quite

significantly – political parties: to update them on the progress made on all fronts, in relation to the 8th August, 2017 elections;

(viii) the Commission had duly complied with the recent decision of the Court of Appeal in the ***Maina Kiai*** *Case, on the conditions attending the tasks of: vote-counting; tallying; verification; and declaration of Presidential-election results at the constituency level, and at the National Tallying Centre.*

[69] The deponent averred, *in the light of the foregoing safeguard-measures* taken, that, it was not true as alleged by the petitioners and their witnesses, that the Commission presided over a shambolic Presidential election, or that the entire electoral process was a failure, or that the election entailed breaches of the Constitution and the applicable laws relating to vote-tallying, and to the transmission of results.

[70] The deponent averred that the Presidential election had met all the requirements of free and fair elections, having been conducted by way of *secret ballot; being free from violence, improper influence or corruption; having been administered in a dedicated process conducted exclusively by the Commission; having been transparently conducted; and having been administered in an impartial neutral, efficient, accurate and accountable manner.*

[71] The deponent, on the course of action which he took following the elections, signalled his authority as emanating from Article 138(10) of the Constitution: he is mandated, within seven days following the election, to declare the result as set out in Form 34C, and to deliver written notice of the same to both the Chief Justice and the Incumbent President. He averred that, throughout

the electoral cycle, he had discharged his mandate in perfect accord with the Constitution, the electoral laws, and the applicable regulations. He averred that in the discharge of his obligations at election time, he had not been influenced by anyone, and had maintained the required standards of professionalism.

[72] The deponent deposed that he had conducted and supervised the election in accordance with the terms of Article 81(e) of the Constitution, and that in this respect, several elements in his discharge of duty stand out, namely:

> *(i) every registered voter who participated in the General Election, had cast his or her vote by way of secret ballot;*
>
> *(ii) polling stations were adequately secured by the police, to ensure that the electoral process was free from violence, intimidation, improper influence, or corruption;*
>
> *(iii) the election was independently conducted by the Commission;*
>
> *(iv) candidates and observers, were allowed to have their appointed agents at the various polling stations – to observe the voting process and to assure transparency;*
>
> *(v) the said agents observed the closure of the voting process, and were involved in the counting of votes at the various polling stations, to bear witness to manifestations of transparency, impartiality, neutrality, efficiency, accuracy and accountability in the voting and vote-count; and*
>
> *(vi) the agents of the Presidential-election candidates were given access to the various vote-recording forms, including Forms 34A and 34B – a further element in the 1st respondent's transparency and accountability.*

[73] The deponent averred, as regards the transmission set-up during the electoral process, that the Commission's staff managing the KIEMS gadgets, had been trained in good time, and the said gadgets had been configured with the register of voters. He averred that the KIEMS system was designed to allow for integration of the biometric voter registration, biometric voter identification, the electronic transmission of election results, and the political party, and candidate registration systems. He deposed that the said system had been successfully deployed on 8th August, 2017, and that it had significantly improved efficiency, effectiveness and accuracy in the operation of the electoral process.

[74] The deponent averred that he was present at the National Tallying Centre between 8th and 11th August, 2017, participating in the tallying and validation of Forms 34B that were being electronically transmitted by the constituency returning officers (and in this regard, he attached as evidence copies of Forms 34B, marked WWC-3). Upon receipt of these forms, he deposed, he had collated the same, and confirmed the consistency of the results, availing Forms 34B to the Presidential election candidates through their agents, for verification and confirmation. The deponent, thereafter, used the said results to tally and complete Form 34C, in compliance with Section 39(3)(b) of the Elections Act.

[75] The deponent makes specific averments on the vote tallies, as he received them on 11th August, 2017; on this occasion he received 290 Forms 34B from the constituencies, as well as the tally of diaspora votes: and the Presidential election results were confirmed by the agents, the particulars thereof standing as follows:

Name of Candidate	**Valid Votes**	**Percentage of Votes Cast**	**No. of Counties wherein**

			Candidate had at least 25% of the Votes Cast
JOHN EKURU LONGOGGY AUKOT	27,311	0.18%	0
MOHAMED ABDUBA DIDA	38,093	0.25%	0
SHAKHALAGA KHWA JIRONGO	11,705	0.08%	0
JAPHETH KAVINGA KALUYU	16,482	0.11%	0
UHURU KENYATTA	8,203,290	54.27%	35
MICHAEL WAINAINA	13,257	0.09%	0
JOSEPH WILLIAM NTHIGA NYAGA	42,259	0.28%	0
RAILA ODINGA	6,762,224	44.74%	29

On the basis of these results, the deponent avers, he acted in compliance with Article 138(4) and (10) of the Constitution, and *publicly declared the Presidential election outcome on 11th August, 2017.*

[76] The deponent averred that the Commission had found that, *in a few of the results-declaration forms, there were certain errors* – but that these were *inadvertent, minor errors which had no effect on the vote-tally and outcome of the Presidential election.* In support of the finding on the said errors, the deponent tendered in evidence a document marked WWC-5, attended with the detailed affidavit of *Ms. Immaculate Kassait* (1st respondent's Director of Voter Registration and Electoral Operations).

[77] *Mr. Chebukati* had specific averments to make in relation to certain depositions made on behalf of the petitioners. He deponed, in relation to the statement by *Mr. Godfrey Osotsi*, that, throughout the electoral process, the Commission had engaged the petitioners as well as the 3rd respondent (in person, and through their representatives), the public, and interested stakeholders – for the purpose of adhering to best practices in electoral matters.

[78] The deponent, in departure from the testimony of *Mr. Godfrey Osotsi,* averred that the Commission was already in possession of all Forms 34B, at the time of declaration of the Presidential election results: and all the Forms 34B and 34C were availed to the candidates and their agents for verification, before the declaration of results; and all Presidential election candidates were allowed to visit the National Tallying Centre to verify the results, as from the commencement, up to the moment of declaration. He averred that he personally chaired many consultative meetings with the petitioners' agents, whenever any issues of concern had been raised, even though for unexplained cause, the petitioners' agents had decided to depart from the National Tallying Centre, just prior to the declaration of results.

[79] In response to the 1st petitioner's claim of "procedural flaws, illegalities and/or irregularities" in the collation, tallying, verification and transmission of Presidential election results, the deponent averred that tallying as conducted by the Commission, was in compliance with Articles 81(e) and 86 of the Constitution as read with Section 39 of the Elections Act; and he deponed that at every forum of results-processing, the petitioners were allowed to have their agents, to confirm the tallying, the announcement and declaration of results. He averred as well, that *the electronic system of transmission of results was secure, prompt, verifiable and efficient*. He deponent that all the results-declaration forms had been subject to verification by the candidates' agents/representatives, and

immediately thereafter, forwarded to the National Tallying Centre. The deponent further averred that the 1st petitioner had deposed that he had been given access to the Forms 34B through his agents: and thus the charge of lack of transparency and accountability in the tallying process, was short on veracity.

[80] The deponent denied the 1st petitioner's assertion that IEBC had condoned voter intimidation, undue influence, bribery and/or flagrant electoral offences committed by the 3rd respondent. He similarly denied the assertion by one of the 1st petitioner's witnesses, *Dr. Nyangasi Oduwo*, that the 3rd respondent had been declared to be the winner without a verification of all the requisite documents. He averred that all the Presidential election candidates and their agents, or representatives, had been invited to verify the results, before declaration. And he deponed that he did not announce the final results of the Presidential election until he had received and verified the Forms 34B from the constituency tallying centres.

[81] The deponent averred that on 10th August, 2017 the Commission received a letter of the same date from *Mr. Orengo*, the petitioners' deputy chief agent, raising concerns about the Presidential election results; and the Commission internally considered the issues raised, before communicating its position by a letter of the same date (exh. WWC-6a and 6b). He averred that the declaration of Presidential election results on 11th August, 2017 was done in full compliance with the terms of the Constitution, contrary to the averments of the 2nd petitioner.

[82] The deponent averred that the petitioners' allegation that the Commission had failed to take steps against the 3rd respondent for breach of the provisions of the Election Offences Act, Section 14, was not true; for, on 21st June, 2017 he had written to the Director of Public Prosecutions informing him of the alleged

breach, and calling for his action. The Director of Public Prosecutions had responded by his letter of 6th July, 2017 informing the deponent that he had directed the Director of Criminal Investigations to take action as appropriate (exh. WWC-7).

[83] Another affidavit was sworn by the 1st respondent's Chief Executive Officer, *Mr. Ezra Chiloba* (24th August, 2017), who averred that the Commission had conducted the Presidential election on 8th August, 2017 in accordance with the terms of the Constitution (Articles 81, 83 and 86), the Elections Act, and the applicable regulations.

[84] *Mr. Chiloba* testified that, despite the complex political and legal environment in the run-up to the General election of 8th August, 2017, the 1st respondent had managed to put in place an effective infrastructure, with appropriate mechanisms, for the conduct of a free, fair and credible election. He averred that the election was conducted in a transparent, open and accountable manner, and that the process was peaceful and credible – just as was confirmed by both local and international observers. (In this regard, he annexed as evidence a copy of the various observer reports – exh. EC-12).

[85] The deponent averred that the tallying and transmission of election results took place at the polling stations, where the vote-count was collated and declared at the constituency tallying centre, and at the National Tallying Centre. Results thus processed and accounted for, the deponent averred, were in every sense credible, and truly represented the will of the voters. He deposed that there had been no compromise to, nor interference with the system for the transmission of results – before, during, or after the declaration of the outcome of the Presidential election. He deponed that the collation, tallying and

transmission of the results were in accordance with the terms of the Constitution, the Elections Act, and the Appellate Court's decision in the ***Maina Kiai*** Case.

[86] Referring to the documentary evidence on record, the deponent deposed that the election results as declared, were substantially consistent with, and were a true reflection of, the actual results tallied and declared at duly-gazetted polling stations.

[87] Responding to the assertions in the 1st petitioner's affidavit, the deponent averred that the electoral law had been recently updated, with the enactment of the Election Laws (Amendment) Act, 2017, allowing a four-month period within which to procure and establish the Kenya Integrated Electoral Management System (KIEMS); and that there was no basis for the allegation that this new electronic system had been compromised through the practice of "hacking", occasioning a distortion in the Presidential-election vote tallies. He denied the 1st petitioner's assertion that the 1st respondent had failed to put in place the requisite measures to assure the credibility of the KIEMS system, and averred that the said system had served well in the identification of voters, and for results transmission. He further deponed that the Commission's operations were not entirely dependent on KIEMS, as *a complementary mechanism was provided for by law, in the event of any breakdown in the electronic mechanism.*

[88] The deponent denied the petitioner's assertion that the conduct of vote-tallying in the Presidential election had not been in accordance with the terms of Article 86 of the Constitution. He deposed that the election results had been transmitted from polling stations and constituency tallying centres, as required by law. Denying the petitioners' statement that they were not supplied with Forms 34A and 34B, the deponent averred that the petitioners had indeed been

supplied with all Forms 34A and 34B available on the public portal; and that *by their own letter of 14th August, 2017 the petitioners acknowledged being accorded access to all the requested forms.* (The relevant correspondent in this regard is marked EC-15).

[89] To the petitioners' assertions that the Forms 34A and 34B had certain anomalies, such as brought into question the credibility of the Presidential election, the deponent averred that *the petitioners had not disputed the results as declared, but only alleged unsubstantiated qualitative anomalies.*

[90] The deponent averred that all presiding officers had been trained by the Commission to take the image of Forms 34A, for transmission through KIEMS, though there were a number of instances in which they chose to take *images of other documents;* and the consequence, in view of the fact that one of the security features was the capturing of only one image for the six sets of elections, was that, it was the test documents, rather than the Forms 34A, that ended up being transmitted. Upon noting this error, the 1st respondent uploaded the Form 34A for the affected polling stations, on the public portal. Such inadvertent transmission of wrong images, the deponent averred, *did not affect the election results as contained in Forms 34A.* (He annexed a typical example of such error, and its rectification, as exh. EC-18).

[91] Responding to the petitioners' affidavit sworn by *Ms. Apprielle Oichoe*, the deponent averred that the assertions made under the rubric, "The Travesty that was the Electoral Process in Kenya 2017", did not give a true account. The report in question had not, in the first place, been dated or signed, nor was its author or source indicated. The deponent averred that, quite to the contrary, the 1st respondent's tallying and transmission system were functional and credible in all respects.

[92] In response to the affidavit of *Mr. Benson Wasonga*, the deponent averred that the election results from each polling station were contained in Forms 34A; and the results-declaration for the Presidential election was made on the basis of results contained in Forms 34B from 290 constituencies and the diaspora. He averred that the total number of rejected ballots as declared in Forms 34C, was 81,685, and not 477,195 as alleged. He averred that *Mr. Wasonga* had misconstrued the statistics published on the public-display mode of KIEMS – which was not the result within the terms of the law. He deponed that the cause of the variance between the actual number of rejected ballots and the figure shown on the public website, was but on account of human error.

[93] In response to the statements made on behalf of the petitioners by *Mr. George Kegoro,* the deponent, firstly, adopted the detail, tenor and effect of the 1st respondent's depositions by *Ms. Immaculate Kassait*. Secondly, the deponent averred that the statistics electronically displayed did not, as such, constitute the results of the Presidential election: *the final result of the Presidential election is verifiable from an inspection of Forms 34A and 34B.*

[94] The deponent denied *Mr. Kegoro's* statement that the IEBC's portal showed varying levels of votes cast for the six different elective offices featuring in the General elections of 8th August, 2017. He averred that *Mr. Kegoro's* statement was unrelated to the fundamentals of the petition, as it lacked a foundation in the pleadings and the primary depositions of the petitioners – hence verging upon an attempt to litigate a substantial Presidential petition by the guise of "supporting affidavit".

[95] Responding to the affidavit of *Ms. Olga Karani*, for the petitioners, the deponent adopted the averments made by *Ms. Immaculate Kassait* and *Mr. James Muhati,* and deposed that all agents at the National Tallying Centre had been given access to the Forms 34A and 34B, and an opportunity to verify the results, before declaration.

[96] The deponent averred that the Presidential election of 8th August, 2017 was conducted in accordance with the Constitution and the electoral laws, and that the process was free, fair and credible. Among the elements of credibility in the said election, he enumerated the following:

> *(i) a substantial increase was realized in the number of voters – from 14.4. million in 2013 to 19.6 million in 2017, being some 78% of the eligible voters;*
>
> *(ii) an audit of the register had been conducted, before the date of voting;*
>
> *(iii) the register had been opened for verification of biometric data, by members of the public (10th May, 2017 – 9th June, 2017);*
>
> *(iv) a time-table had been published for political-party primaries –* ***Gazette Notice*** *of 17th March, 2017;*
>
> *(v) resolving of disputes from the nomination process for candidates;*
> *(vi) registering of over 14,500 candidates to participate in the 2017 General Election;*
>
> *(vii) gazettement of 40,883 polling stations and 338 tallying centres across the country, including the prisons and the diaspora; and*
>
> *(viii) gazettement of returning officers;*

(ix) acquiring of an integrated electoral management system for voter registration, voter identification, candidates' registration, results transmission;

(x) recruitment, training and deployment of over 360,000 election officials across the country;

(xi) continuous voter education programmes undertaken across the country, using different strategies and platforms; and

(xii) attracting over 15,000 individual observers; 105 international observer institutions; 254 local institutions; more than 7000 journalists from over 30 local and international media houses accredited to participate in the General Election.

[97] The next deponent, *James Muhati* who holds the office of Director in charge of Information and Communication Technology at IEBC, made depositions bearing upon the statements by the 1st petitioner, and by *Ms. Apprielle Oichoe* and *Mr. Godfrey Osotsi*. He averred that the Commissions had taken up suggestions made in the Kriegler Report which was formulated in the wake of the violent General Election of 2007, and had deployed certain technological mechanisms to support the management of the electoral process – these being the Biometric Voter Registration (BVR); the Electronic Voter Identification Device (EVID); the Candidate Nomination System; and the Result Transmission System (RTS). When the new electronic system was first utilized in 2013, the deponent averred, it was found to have certain imperfections; and it became necessary to amend Section 44 of the Elections Act, mandating IEBC to establish an integrated electronic system: this would facilitate the conduct of biometric voter registration; electronic voter identification; and electronic results transmission – that is, the Kenya Integrated Electoral Management System

(KIEMS). *This new system, the deponent averred, was successfully employed during the 8th August, 2017 General Election:* and it enabled IEBC to properly verify the biometric data during the 10th May, 2017 – 9th June, 2017 verification exercise, as required by law; it also enabled the proper verification of voters on polling day; and it enabled the due transmission of election results from polling station to constituency, and to the National Tallying Centre.

[98] The deponent averred that he was aware of the terms of the Constitution and the statutory and regulatory framework, within which the electoral process had been conducted: and in this context, he cited Articles 81 and 86 of the Constitution as read with Section 4(m) of the IEBC Act, which require the voting set-up to be simple, accurate, verifiable, secure, accountable and transparent. He deposed that the KIEMS had been established with the approval of the Elections Technology Advisory Committee (ETAC), under the terms of Section 44(8) of the Elections Act, and with the participation of relevant agencies and institutions, including political parties. (He annexed the supporting minutes – exh. JM – 1).

[99] On the role of ICT in the General Election of 8th August, 2017, the deponent averred that *a technological process had been used in voter identification, and the transmission of results; and that the transmission component in KIEMS had enabled the Commission to relay the Presidential election results and statistics from the polling stations to the constituency tallying centres and to the National Tallying Centre*. During the transmission of election results through KIEMS, the presiding officer would complete Form 34A as required by law, and then input on the KIEMS the results-statistics captured on Form 34A; the presiding officer would then take the image of Form 34A, and, *before sending the data, he or she would first show the entries made to the agents of the candidates and of the political parties, for confirmation*. (He

annexed as evidence, copies of the directions issued to the presiding officers, the training manual, and a transmission flow-chart (JM-5A; JM-5B and JM 5C, respectively)).

[100] It was the deponent's evidence that the petitioners' allegations that the relay and transmission was not "simple, accurate, verifiable, secure, accountable, transparent, open and prompt", and that there had been a contravention of the terms of Article 81 (e)(iv) and (v) of the Constitution, *did not represent the truth – especially as no evidence had been adduced to support the claims.*

[101] On the question of the security and verifiability of the electronic system, and in relation to the allegation that there had been some compromise to the KIEMS system by unauthorized third parties, the deponent averred that such claims have no relation to the true position, noting also that they are not supported by evidence. He averred that the Commission had engaged a competent support-team of experts, who subsequently partnered with internationally recognized and accredited institutions to provide the best information-security system. (He annexed copies of certification and accreditation documents from the providers – exh. JM-8A; JM-8B; JM-8C; JM-8D).

[102] The deponent gave testimony on the complementary system in the transmission of election results, for compliance with the terms of Article 38 of the Constitution. He averred that Regulation 83 of the Elections (General) Regulations, 2012 provided for the complementary system of transmission of election results, and that the complementary mechanism involves the physical delivery of Forms 34A by presiding officers to the Returning Officers, in the respective constituencies.

[103] IEBC's Director of Voter Registration and Electoral Operations, *Ms. Immaculate Kassait,* averred that, contrary to the negative impression given by some of the petitioners' witnesses on early transmissions of election results for some stations, such stations had only a few voters, sometimes numbering *between one and 10* – and counting these would take only a short time; she gave examples in this regard: *Boyani Primary School in Matuga Constituency; Arabrow in Wajir South Constituency; Ya Algana in North Horr Constituency; Lowangina Primary School in Tigania East Constituency*.

[104] The deponent denied the veracity of the claim by some of the petitioners' deponents, that there had been, in the transmission of election results, *a constant 11% difference in vote-strength between the 1st petitioner and the 3rd respondent*. She displayed a table in her affidavit, based on a 30-minute interval analysis of transmitted election-results data; and *this showed the vote difference to range in percentage between 9.095% to 25.573%*.

[105] The deponent denied the allegation in *Dr. Nyangasi's* affidavit, that the 1st respondent had chased away from polling stations the agents of the 1st petitioner, in central Kenya and in the Rift Valley. *She gave examples of polling stations in central Kenya in which, indeed, the petitioner's agents had duly executed Forms 34A*.

[106] The deponent admitted a case of an erroneous data entry in a station, where the petitioner had been credited with 2 votes instead of 561 votes, indicating that the circumstances in which such error occurred were explained in the 1st respondent's affidavit by *Mr. John Ole Taiswa*; she deponed that a similar explanation of error was also set out in the affidavit of *Ms. Rebecca Abwaku*.

[107] The deponent took on specific instances in which the depositions made for the petitioner, and which attributed misrepresentation of vote-count, were based on *untrue perceptions of fact: for instance, that a partial Form 34B was uploaded in respect of Karachuonyo Constituency; that in Kilome Constituency the original form 34B reflected 38,269 votes, while that uploaded in IEBC's portal showed 33,757 votes; that in Igembe South, the summation of total votes in Forms 34A for the 1st petitioner was 41,834, yet by Forms 34B in the Commission's portal, his total votes were 43,209; that the Forms 34A in respect of St. John's Primary School Polling Station indicated the total number of valid votes cast as 468, against the entry on Form 34B which showed 467; that there was a variance between the Forms 34B keyed-in on the KIEMS kit and that projected at the National Tallying Centre for Morrison Primary School Polling Station; that there were any discrepancies in Forms 34B for Embakasi South Constituency, and Forms 34A for Jobenpha Community School; that there were any discrepancies in Forms 34B and 34A in respect of Kiru Primary School Polling Station.*

[108] The deponent, while disagreeing with most of the claims made by the petitioners, *admitted the occurrence of certain errors, for instance: there were discrepancies in Form 34B in Bomet Central Constituency – to the extent that at Bomet Primary School, the form did not show any rejected votes, while there was one rejected vote; in the case of Kapkoross Primary School in Turbo Constituency, there was a computation error – though the total vote cast in respect of each candidate was correctly tallied; there was a computation error in the case of Dagoretti North Constituency, with the total valid votes being shown as 104,789, rather than 105,840; in the case of Naivasha Constituency, there were arithmetic errors in the completion of the forms for several polling*

stations; in the case of Kiangai Primary School in Ndia Constituency, Form 34A indicated the 3rd respondent's votes as 461, while Form 34B showed these as 467; there was a data-entry error in the case of Gem Constituency – with a variance between the total votes tallied, and the total valid votes.

[109] The 3rd respondent made depositions to the effect that he had at all material times been the President of the Republic of Kenya, as well as the nominated Presidential-election candidate for the Jubilee Party, following the earlier General Election of 4th March, 2013; and he had been declared as President-Elect by the 1st respondent, upon the conclusion of the General Election of 8th August, 2017.

[110] Regarding the integrity of the 1st respondent in its conduct of the 2017 General Election, the 3rd respondent deponed that the IEBC was a reconstituted team, drawing its origin from the endeavours of the NASA coalition's predecessor, CORD, which in May 2016, had held nationwide rallies culminating in the removal from office of the former Commissioners, and the amendment of the Elections Act. The said protests led to a bipartisan Parliamentary process, which crystallized a new legal framework, attended with the resignation from office of the then Commissioners, and the appointment of the current Commissioners, who managed the elections of 8th August, 2017.

[111] The deponent averred that the Presidential election of 8th August, 2017 had been preceded by considerable litigation on electoral matters, in the superior Courts, promoted by the CORD or NASA coalition – notable instances being: ***IEBC v. Maina Kiai and Others*** [2017] eKLR; ***NASA v. IEBC and Others,*** Civ. Appeal No. 258 of 2017; ***Republic v. IEBC*** *ex parte* ***Gladwell Otieno***, High Court Jud. Rev. No. 447 of 2017.

[112] It was the 3rd respondent's perception that the Commission had complied with the law, in the conduct of the General Election of 8th August, 2017 – especially with directions issued by the Courts in the various election-related cases. This perception is founded upon a certain set of facts, as follows:

> *(i) election materials, including biometric voter verification kits, and ballot papers, were timeously conveyed to all polling stations in the country at large;*
>
> *(ii) the biometric voter-verification kits were successfully applied in all polling stations – and where they malfunctioned, prompt action was taken to repair them, or to operationalize in their place the prescribed complementary identification mechanism;*
>
> *(iii) the voting process came up against no impediment, throughout the country; and voting closed on time, in the vast majority of polling stations; where voting began late, voters were allowed commensurate additional time to vote, before closure;*
>
> *(iv) candidates and/or their agents, and political-party agents, were allowed in, at the polling stations, to monitor the process of voting, tallying, recording and transmission of results;*
>
> *(v) presiding officers at each polling station not only submitted Form 34A in electronic form in the presence of the candidates and/or their agents, but submitted also the scanned copy of Form 34A to the constituency tallying centre – before the hard copies were taken to the constituency tallying centre; and wherever there was a failure to transmit*

simultaneously the results data and the scanned image of the Form 34A at a polling station, the same was not in violation of any law, there being no statutory obligation in that regard;

(vi) other than minimal human errors, which are to be expected, the data entered in the KIEMS, particularly with regard to votes received by the individual Presidential-election candidates, was accurate;

(vii) nonetheless, the results electronically transmitted through KIEMS were only provisional, and did not constitute the final figures which were announced by the 2nd respondent; it is notable in this regard that ***the 1st respondent had made it clear that in the event of any difference between the alpha-numeric results sent though KIEMS and the results reflected on the Forms 34A, the results on the Forms 34A would prevail;***

(viii) at each constituency tallying centre, the Forms 34A received from the polling stations were collated by the returning officer, and a declaration in the Form 34B, reflecting the same, was signed by the returning officer and the candidates or their agents, verifying that the Forms 34A received were a true reflection of the vote-count recorded by the presiding officers at the polling stations;

(ix) the signed Forms 34B were thereafter scanned and transmitted to the National Tallying Centre electronically;

(x) all transmitted Forms 34A were held accessible to all parties; and all Forms 34B were printed and availed to the Presidential-election agents at the National Tallying Centre;

(xi) the Presidential election results were declared by the 2nd respondent on the basis of the results declared in forms 34A at the polling stations, and tallied in Forms 34B at the constituency tallying centres.

[113] The 3rd respondent deponed that *the petitioners had failed to set out the particulars of the non-compliance with the Constitution and the law which they alleged, by the 1st respondent; hence their charge had rested merely upon conjecture and speculation.*

[114] As to the petitioners' contention that there were discrepancies between the Forms 34A and 34B bearing the election results, the 3rd respondent averred that no instances of such variance had been shown; and in his perception, even assuming such allegations were true, *the discrepancies would stand as no more than clerical errors, such as would affect the election result, in view of the large difference separating the 3rd respondent and the 1st petitioner in vote-strength.*

[115] The deponent averred that it would not have been possible for the 1st respondent to manipulate or distort the votes cast and counted in favour of the 3rd respondent, considering the rigorous statutory procedures observed by the 1st respondent; and moreover, *the final results of the Presidential election had been duly verified by the political parties and the individual candidates, through their agents – the effect being that such election results were a true reflection of the will of the voters.*

[116] In the 3rd respondent's perception, the 1st respondent, in the conduct of the General Election of 8th August, 2017, had all along acted in a lawful and transparent manner, as it undertook the tasks of various stages of the election – including early preparations; voting process; vote counting at the polling

stations; tallying at the constituency and the national tallying centres; and the transmission of results at all levels. The mode of conduct of the election, in the 3rd respondent's perception, was efficient, accountable, accurate and credible.

[117] The 3rd respondent averred that *he had garnered, at the Presidential election of 8th August, 2017, a substantial vote, represented in the figure of 1,401,286 above the number obtained by the 1st petitioner. Such a margin, in the deponent's view, emphatically demonstrated the sovereign will of the Kenyan people, which merits safeguard by the process of the law.*

[118] The 3rd respondent denied the petitioners' contention, that he had contravened the law and the declared principles for the conduct of free and fair election, through the medium of intimidation, coercion, or improper influence on voters. He averred that such allegations have been made without any evidentiary basis. He deponed that the Presidential election had been conducted peacefully, and in accordance with the law, as well as best international practice.

[119] The 3rd respondent deponed that he had difficulty in responding to *accusations emanating from the petitioners and their witnesses which were imprecise and lacked particulars.* While he found *Dr. Nyangasi's* depositions to be in the category of such generalized statements, he none-the-less went on to deny that he corruptly influenced voters in the run-up to the election of 8th August, 2017; he denied that he had used threats to get the support of local chiefs in Makueni; he denied being aware of any Cabinet Secretaries who abused their offices and accorded him electoral support, and invoked several other affidavits in support of his averments – those by *Dr. Kibicho, Mr. Wakahiu, Mr. Chirchir*, and *Ms. Guchu.*

[120] *Mr. Chirchir*, who had been the chief Presidential agent during the 2017 elections, deponed that the said elections had been free, fair, accountable, credible and verifiable. He deponed that the majority-vote cast for the 3rd respondent was *a natural reflection of the general national voting orientation, which gave the 3rd respondent's Jubilee Party the greatest number of votes for the five other categories of elective posts also filled through the same General Election of 8th August, 2017.*

[121] Denying the averments in *Mr. Kegoro's* affidavit for the petitioners, the deponent averred that the processes of voting, collating and tallying of votes, and declaration of results, had been conducted in compliance with the provisions of the Constitution and electoral laws, and that the Presidential election results announced by the 2nd respondent on 11th August, 2017 were accurate, and in compliance with the prescribed standards.

[122] The deponent averred that, at the time of declaration of the Presidential election outcome, the 1st respondent's online portal had not yet transmitted all the results; and these results were being retrieved from Forms 34A arriving from polling stations, which results had already been transmitted to the constituency level; and the inconsistency in the data displayed was on account of Forms 34A, 34B and 34C that had not yet been transmitted on the online portal. He deponed that, as at 21st August, 2017 at 8.14 am, the transmission rate was 99.99%; and this meant that the reported valid votes in the figure of 15,180,381 at the portal, did not include all valid votes from all the 40,883 polling stations of the country.

[123] It was *Mr. Chirchir's* averment that the violence witnessed several days following the declaration of results by the 2nd respondent, was occasioned by the *demands by the petitioners that they be declared President-elect and Deputy*

President-elect on the basis that the petitioners were already in possession of what they believed to be the genuine results, secured from the 1st respondent's servers. Such a crisis, the deponent averred, had been deepened by a press conference in which the petitioners urged their supporters to reject such vote-count results as would later be announced, on the basis of a collation of results in Form 34C.

[124] *Mr. Bryan Gichana Omwenga*, a technology advisor employed by the Jubilee Party, averred in his affidavit that it was not true as deposed by *Mr. Ole Kina,* that Forms 34A had been used to declare the Presidential election results; rather, he deponed, *it is the Forms 34B that provide the basis for declaring such results.*

[125] *Mr. Omwenga* deponed that the process of electronically transmitting Presidential election results *had not, in all cases, functioned without a hitch: sometimes, the scanned image would fail to load, or would delay in loading, especially in those parts of the country that lacked the 3G or 4G network coverage*. It was his testimony that such network challenges had been anticipated – and so, the *1st respondent had duly sounded necessary caution*. However, the deponent averred, regardless of whether the electronic system duly functioned, the Forms 34A would still be *physically delivered at the constituency tallying centre*; *and the Forms 34A would then be used to tally the constituency votes: and thereafter the results would be entered in Forms 34B*. The Forms 34B would then be transmitted to the National Tallying Centre – where the Commission would sum-up in Form 34C, which would be the basis for declaring the results. Consequently, the deponent averred*, it was not necessary to have Forms 34A in possession during the summation of Presidential election results.* It followed, therefore, that the early voting results transmitted on television screens were only

provisional, as the authoritative results would be based on the constituency tally in Forms 34B.

[126] *Dr. Karanja Kibicho,* in his affidavit sworn on 24th August, 2017 carries depositions focussed upon the statements made on behalf of the petitioners by *Dr. Nyangasi Oduwo.* He averred that, in his capacity as Principal Secretary in the Ministry of Interior and Co-ordination of Government, he had in July, 2017, received information that some chiefs in Makueni County were unlawfully using their positions, as well as government facilities, to participate in political campaigns – whereupon he duly informed the 3rd respondent, who issued the necessary warning to halt such a practice.

[127] *Ms. Marykaren Kigen-Sorobit,* the Jubilee Party's deputy chief executive officer, made depositions in response to the statements of *Mr. Wamuru* for the petitioners. She averred that *Mr. Wamuru* had cited non-existent polling stations, and claimed that the NASA coalition agents had been excluded from certain polling stations. The deponent annexed evidence in the form of Form 34A, showing that one *Ms. Eunice Muthoni Ndwiga* had been the NASA agent at the Karurumo Youth Polytechnic polling centre, and had duly signed the form, without any reservation.

[128] The deponent averred that *Mr. Benson Wasonga* for the petitioners, had stated that there were anomalies in the declaration of Presidential-election results, though without specifying the particulars of such anomalies. She deposed that *the summation of the total valid votes in the portal is 15,180,381; and that by Form 34C, the 1st petitioner's votes were 6,762,244 while those for the 3rd respondent were 8,203,290.*

[129] *Ms. Winifred Waceke Guchu* swore an affidavit on 24th August, 2017, in her capacity as the Executive Director of the Jubilee Party, and deputy chief Presidential agent for the 3rd respondent. She averred that *the difference of 1,441,066 votes that separated the vote tallies of the 3rd respondent and the 1st petitioner, was a strong enough signal by the voters, who were expressing their free and sovereign will;* and she perceived it as *relevant to the orientation in political choice, that the Jubilee Party won the majority of elective positions for the office of County Governor; Senator; Member of the National Assembly; Women's Representative in the National Assembly; and Member of County Assembly, all from the same General Election.*

[130] The deponent averred that *the petitioners had, on 10th August, 2017 written a letter to the 1st respondent, claiming to have in their possession Presidential election results which differed from the results being shown on the IEBC portal at the time; and just before issuing this letter, the petitioners had made widely-publicised claims that the results transmission system had been corrupted through hacking.*

[131] The deponent averred that *the Constitution imposes no duty on the 1st respondent to use electronic systems of results transmission exclusively:* the only mandate of the 1st respondent being, to *ensure that the electoral system is simple, accurate, verifiable, accountable and transparent.* She averred that Section 44A of the Elections Act entrusts to the 1st respondent a *statutory discretion to apply a complementary mechanism, where technology fails, or cannot meet the constitutional threshold of a free and fair election.*

[132] The deponent averred that upon the conclusion of voting, the counting exercise had begun, in the presence of all agents present, observers, police

officers, and all authorized persons. She deponed that according to ELOG, an observer group which deployed one of the largest observer-delegates, the petitioners had a good representation of agents. She believed that even where such agents failed to sign the prescribed forms, such failure would not invalidate the vote-count results, in the light of the terms of Regulations 62(3) and 79(6) of the Elections (General) Regulations, 2012. She deponed that *once the counting process at the polling station was concluded, the results were simultaneously dispatched electronically to the constituency tallying centre and the National Tallying Centre, and these were the results which then streamed onto the public portal at the Bomas of Kenya.*

[133] The deponent averred that since the 1st respondent did not own telecommunication network facilities, it relied on licensed service providers. Such service providers were under obligation, under Regulation 20 of the Elections (Technology) Regulations, 2017 to provide and deliver services as may be requested by the 1st respondent. The 1st respondent, in consultation with the service providers, was required under Regulation 21 of the said regulations, to identify and communicate in a timely manner, to all stakeholders, about the network service available at different polling stations, and in areas where there was no telecommunication network. Thus, the deponent averred, Parliament introduced Section 44A, to provide a complementary mechanism for the identification of voters and the transmission of results.

[134] The deponent averred that after the Court of Appeal decision in the ***Maina Kiai Case***, it had been confirmed that Regulation 83 would be the complementary system applicable in respect of the transmission of election results, in the event of failure of the technological mechanism. *The complementary mechanisms would take the form of the physical delivery of Forms 34A from the polling stations to the returning officers at the constituency*

tallying centre, while constituency Returning Officers would deliver Forms 34B to the National Tallying Centre in Nairobi.

[135] The deponent made averments regarding the claim of irregularity in the elections appearing in *Dr. Nyangasi Oduwo's* affidavit. She averred that in the overwhelming majority of the cases cited by *Dr. Oduwo,* the statement had not *revealed the features typified as irregular*. She deponed that neither the Elections Act nor the Election (General) Regulations requires that Forms 34A should bear the 1st respondent's stamp; and *the failure of an agent to sign the forms at the counting hall did not invalidate the results.*

[136] In response to allegations of discrepancies in Forms 34A and 34B, the deponent averred that no significant variations existed. She produced a report (exh. WG 13) which showed that after reconciling the discrepancies in the forms attached to *Dr. Nyangasi Oduwo's* affidavit, the effect was that *the petitioner's vote-tally improved by 595, while that of the 3rd respondent decreased by 1199 votes.*

[137] The deponent respondent to the deposition from the petitioners' side, that the final tally of Presidential-election votes had not included the results for Nyando Constituency, where the 1st petitioner had obtained 60,715 votes while the 3rd respondent obtained 214 votes: she deponed that such an oversight was not fatal, as, by Regulation 87 of the Election (General) Regulations, *the 2nd respondent has authority to declare the Presidential election results where, in the opinion of the Commission, results not yet received would not make a difference in the final results.*

[138] Responding to the claim by the petitioners that there had been a suspicious disparity between the Presidential vote totals and the totals for other elective offices in the same constituencies, the deponent exhibited an analysis of

results from 94 constituencies – showing that *the votes cast in one or more of the five other sets of elections, were more than the votes cast at those levels, for the Presidential candidates.*

[139] The deponent denied the allegation made in affidavits sworn for the petitioners, that the voting results streamed by the Commission had shown a constant 11% margin between the vote-count for the 1st petitioner and for the 3rd respondent: in line with other depositions for the respondents, she stated that *such a gap in vote-count percentages had kept shifting constantly.*

[140] The deponent responded to the averment from the petitioners' side, that the 3d respondent's electoral strength had benefited from running governmental actions which showed him in positive light, and thus constituted censurable undue influence. *She averred that there was no requirement in law that on-going government programmes be suspended during the election period; and that, as Article 35 of the Constitution safeguards the right to information, the required openness made a case for current government projects and activities to be held accessible to all.*

[141] In further support of the respondents' stand, is the affidavit by *Davis K. Chirchir,* sworn on 24th August, 2017. He avers that *the collation of election results in Form 34C and the announcement thereof, was done after all Forms 34B, save as regards Nyando Constituency, had been electronically transmitted to the National Tallying Centre. He deponed, in line with the depositions of Ms. Guchu, that the voting results for Nyando Constituency which had not been collated at the time of results declaration, had no effect on the outcome.*

[142] The deponent averred that, quite contrary to the reprobation of the vote-result transmission measures taken by the Commission, the actions taken had been based on the authority of the law. This transmission question had already featured in a High Court decision (***National Super Alliance v. IEBC and Others***, Petition No. 328 of 2017) and a Court of Appeal decision (***National Super Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission and 2 Others,*** Civ. Appeal No. 258 of 2017), where it was held that the 1st respondent had duly put in place a "complementary mechanism" in terms of Section 44A of the Elections Act, 2011 and that it had, with public participation, established regulations to operationalize the said statutory provision. In this context, *the deponent averred that any failure of the technological devices would not impair the electoral process, or become the basis for invalidity of the electoral process.*

[143] The deponent averred that *the petitioners' claim that the security of the integrated electoral management system (KIEMS) had been compromised, was not substantiated with any transcripts of video clips, or any other material reference.*

[144] The deponent averred that the 1st respondent had kept in full control of its electronic transmission system at all times, and that no evidence showed it to have ceded its management or authority in that regard, to any third party. He deponed that it was not true as alleged, that the transmission of results from 11,000 polling stations had been compromised – especially as none of the petitioners had contested the contents of Forms 34A from the relevant polling stations. He further averred *that it would not be true, as alleged by the petitioners, that a total of 11,000 polling stations would represent as much as*

7,700,000 voters, given that the number of registered voters per polling station varied from one to a maximum of 700.

[145] The deponent deposed that *it was not a factual statement coming from the petitioners, that the IEBC had the election results streamed on the website, represent a constant percentage of 54% and 44% respectively, for the 3rd respondent and the 1st petitioner: instead, the variation between the two had oscillated between 27.06% and 9.22% in favour of the 3rd respondent.*

[146] The deponent's perception, on the electoral process as a whole, was that, *the 3rd respondent had been duly elected in a free, fair, credible and valid election conducted on 8th August, 2017.*

D. DOES THE PETITIONERS' CASE REST ON FACT? HAVE THEY DISCHARGED THE BURDEN OF PROOF? DID THE RESPONDENTS DISCHARGE THE EVIDENTIAL BURDEN? WHO IS FAVOURED BY THE STATE OF THE EVIDENCE?

[147] The objective merits of this case must be drawn from the foundation of *fact*. I will subsequently revert to the vitality of "fact", in the configuration of jurisprudence – the juristic and scholastic preoccupation with the essence of *law,* and its defining role in social, economic, political, religious or other crucial human engagements.

[148] "Fact" is thus defined: "Something that actually exists; an aspect of reality…" (***Black's Law Dictionary***, 8th ed. (Bryan A. Garner, ed.) (St. Paul, MN: West Group, 2004), p.628).

[149] "Fact", therefore, is as reliable as the concrete foundations of a skyscraper; and it is to be counted upon as a basis of objectivity and truth. The practice of law, and more particularly, the motions of the judicial process *via* the minds and hands of Judges – society's trustees for justice – are invariably lodged upon the pillars of *fact*, this being proffered through *evidence*.

[150] The merits of the petitioners' case stand to be tested in the first place through evidence. What evidence did the petitioners adduce? And did they discharge their initial burden of proof, and complete it with an effective clearance of the constant *legal burden* resting upon them?

[151] The evidence scenario speaks for itself, as may be summarized here:

(i) the petitioners resort to *broad assertions of alleged wrongs on the part of the 1st and 3rd respondents;*

(ii) such alleged failings are lined up against the Constitution's prescription of *certain values, principles and norms;*

(iii) the petitioners' statements are often *plaintive, and inviting the Court to ascertain their true scope, in terms of legality and propriety in the measures taken by the respondents;*

(iv) what the petitioners present as fact, relates primarily to the *electronic transmission* of election results, rather than the *physical conduct of voting and enumeration of ballot;*

(v) and what the petitioners present as fact, in relation to polling day, and to the count of votes, *has been responded to in substantial detail in the consistent evidence emanating from the respondents;*

(vi) the deponents on the respondents' side have responded to the statements from the petitioners' side: they have given testimony *describing their actions in the conduct of the General Election of 8th August, 2017,* as regards the tally *and count of votes,* and the *recording, transmission* and *declaration of results.* The respondents have in the process, explained the actions they took just before, in the course of, and in the aftermath of voting day – *explaining such impediments as affected the electoral process,* and *invoking specific provisions of the Constitution and the law, by virtue of which they had acted.*

[152] Does one behold a clear evidence-scenario, such as ought to lead a duly-perceptive Court in some particular direction, of course, barring some weightier consideration of justice which compels a different course?

[153] From the evidence, the petitioners do not seek an ascertainment of the *true number of votes cast for the 1st petitioner and for the 3rd respondent* – even though these, as required by law, *had been delivered to the Supreme Court, and are kept in the custody of the Registry*. The petitioners have focussed the burden of their case on *apprehensions as to the perfect security of the transmission system, whereby the election results had earlier been relayed, before the physical records were received, organized and kept by the 1st respondent*. They have claimed an improper tallying of votes from different polling stations, though *this has been denied, on the basis of specific evidence, and exhibits showing the contrary*. They have spoken of improper conduct during election, on the part of certain government officials, said to have unduly benefited the 3rd respondent's

electoral platform – but these claims have been denied by witnesses for the respondents. The veracity of such averments have been brought to question by the detailed testimony of the respondents' witnesses, *Dr. Kibicho* and *Mr. Wakahiu*. The attributions to the 3rd respondent of improper influence, intimidation and corruption, therefore, are not just unsubstantiated, but also fail to meet the high standards of *proof required for criminal charges*.

[154] The petitioners assert, in broad terms, that the 1st respondent, in the conduct of elections, did not abide by the terms of Article 86 of the Constitution, which requires elections to be conducted in a manner that is *"simple, accurate, verifiable, secure, accountable and transparent"* [Article 86(a)]. Yet *the use of the manual ballot paper would clearly meet such conditions: the voter has no difficulty in marking it; its reality and visibility is not in doubt; it is verifiable, as a check so readily reveals the voter's exercise of his or her right of choice; it is secure; it is transparent; it is accountable.*

[155] The votes cast had been *announced at the polling stations*, where they were *tabulated*, and *results announced*. From that initial ascertainment of the voting situation, the results were *collated at the constituency tallying centre*, and *announced at that level*. The 1st respondent thereafter *provided the Forms 34A from all polling stations; Forms 34B from constituency tallying centres; and Forms 34C at the National Tallying Centre* – which was signed by all the Presidential election agents, save for the petitioners' agent. Thus, from the evidence in this Court's record, *the claim of non-compliance with the terms of Article 86 of the Constitution, does not stand up.*

[156] More substantial and more persuasive evidence, in my perception, has emanated *from the respondents side*. Several examples of such evidence may be set out here:

(i) *Mr. Chebukati*, who had been the Returning Officer for the Presidential Election, gave testimony that the verifiable, physical count of the votes cast showed *that the 3rd respondent had garnered 8,203,290 votes, as against the 1st respondent who received 6,762,224 votes;* and these results were duly recorded in Form 34C, which was itself abstracted from the Forms 34B forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote tallies.

(ii) *Mr. Chebukati* deponed that the primary results-declaration Forms (Forms 34A and 34B) had in no way been compromised, as regards their accuracy and overall integrity. He deposed that the Forms 34B had been duly forwarded from the constituencies to the National Tallying Centre, for verification with Forms 34A and for tallying.

(iii) *Mr. Chebukati* deponed that the Commission had taken all the necessary steps to ensure that the General Election in all its components, complied with the constitutional requirements of simplicity, accuracy, verifiability, security, transparency and accountability.

(iv) *Mr. Chebukati's* averments are *specific, matter-of-fact, and in line with vital evidence emanating from other deponents on the respondents' side*. For instance, *Mr. Chiloba*, the 1st respondent's Chief Executive Officer, confirms that the tallying and transmission of results took place *at the polling stations*, after which the vote-count was collated and declared at the constituency tallying centre and the National Tallying Centre. *Mr. Chiloba* gave a clear account of the

transmission system used by the 1st respondent, as well as of the context and modalities of the recently-introduced Kenya Integrated Electoral Management System (KIEMS).

(iv) *Mr. Muhati* in his affidavit, gave still more details on the working of the electronic transmission system – an account that was entirely consistent with the averments of both *Mr. Chebukati* and *Mr. Chiloba*.

(vi) Specific and credible evidence, in relation to the factual situation attending the conduct of the General Election of 8th August, 2017, is recorded by other deponents, such as *Ms. Immaculate Kassait*, the *3rd respondent*, *Mr. Wakahiu, Ms. Guchu, Mr. Chirchir, Dr. Kibicho, Mr. Omwenga,* and *Ms. Kigen-Sorobit*.

[157] Judges entertaining the competing claims of parties, constantly have to *form an opinion*, and, *from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth*. That has to be done in this instance. The factual accounts of the respondents are firm and gripping. They are *credible, and represent the substantial truth*. However, no account of equal strength is beckoning from the other side.

[158] I cannot but conclude that, on facts conveyed through evidence, in support of the petitioners' case, they are on weak grounds, as compared to the respondents. In establishing the merits of their case, the petitioners had both the ultimate *legal burden of proof,* and the *shifting evidential burdens* falling upon them. They did not, in my appraisal, discharge even the early evidential burden – the effect being, in the end, that they made *no valid case against the respondents*.

[159] The law of burden of proof, at the beginning and in the course of trial, has been the subject of scholarship. Dr. H. F. Morris in his learned work, ***Evidence in East Africa*** (London: Sweet & Maxwell, 1968) [p.134], thus considered this issue:

> *"The distinction is commonly made by commentators on the law of evidence between the use of the term in the sense of the burden which lies throughout the trial of establishing a case – usually called the general burden of proof – and in the sense of the onus of producing evidence at any particular stage during the trial. There is a general burden of proof, which lies throughout the trial upon one of the parties and never shifts to the other, to establish the case….In a civil case this burden lies upon the party who would lose if no evidence at all were to be produced, that is to say, in order to win he must establish his case by a preponderance of evidence and, coupled with the onus of discharging this burden, is his right to begin."*

[160] Such a position is reflected in Kenya's Evidence Act (Cap. 80, Laws of Kenya), which thus provides [Section 107]:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

E. THE PETITION: ANY OTHER BASIS OF CLAIM?

[161] How is the Court to be guided in relation to the petitioners' claims that "the Presidential election was *so badly conducted, administered and managed*…that it failed to comply with the governing principles established

under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163, and 249 of the Constitution…; the Elections Act… and the Regulations made thereunder including the Electoral Code of Conduct….”; and in relation to the assertion that “[t]he massive, systemic, systematic and deliberate non-compliance with the Constitution and the Law” “goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya”, “Undermines the foundation of the Kenyan system as a sovereign republic where people are sovereign under Article 4 of the Constitution”, and “severely undermines the very rubric [sic] and framework of Kenya as a nation State”?

[162] How is the Court to be guided in respect of the petitioners claims that: “[t]he Presidential Election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read with Section 39 of the Elections Act…”; that “[t]he entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre…and from the constituency tallying centres to the NTC…was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt…[and] substantially compromised and affected the requirement of free and fair elections under Article 81(e)(iv) and (v) of the Constitution”; that “[t]he data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS at the individual polling stations”; that “[t]he Presidential Election was not administered by the 1st respondent in an impartial, neutral and accountable manner as required under Article 81(e)(v) of the Constitution”; that “the 1st respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results, which the 1st respondent was aware had no legal or factual basis”, as well as other claims similarly couched?

[163] Such claims invoke the question as to the 1st respondent's compliance with the law in every detail, though without necessarily adverting to the objective facts, as borne by the evidence. The Court has to consider whether such contentions should be a basis for annulling the outcome of the Presidential election of 8th August, 2017. This takes us to *the line of jurisprudence now established, in electoral matters.*

F. KENYA'S JURISPRUDENCE IN ELECTION MATTERS

(a) The Terms of the Constitution

[164] The Constitution of Kenya, 2010, which represents the people's much laboured initiatives to find a pacific, rational and humane regulatory structure for governance, bears certain principles, and it safeguards certain rights and values in unambiguous terms. It safeguards "the rule of law, democracy and participation of the people" [Article 10(2)(a)]. It safeguards political rights, in detailed terms which include the provision [Article 38(3)(b) and (c)] that every adult citizen "has the right, without unreasonable restrictions", "to vote by secret ballot in any election"; and "to be a candidate for public office…and, if elected, to hold office."

[165] Such sacrosanct safeguards have to be so interpreted as to accord them true operational meaning. The same Constitution *entrusts the interpretive mandate to the Courts,* to which, for the faithful discharge of the task, the voters have entrusted their adjudicative sovereignty [the Constitution, Article 1(3)(c)].

[166] How are the Courts to interpret such rights and safeguards? The answer is provided in the Constitution itself. Article 20(3) thus stipulates:

"In applying a provision of the Bill of Rights, a court shall –

...

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

And if it is *the Supreme Court* that is undertaking such interpretation, then, just like the other Courts, it is under obligation [Article 20(4)(a)] to promote *"the values that underlie an open and democratic society based on human dignity, equality, equity and freedom."*

[167] The Supreme Court, just like the other Courts, in the course of performing its safeguarded interpretive mandate, is under obligation, certainly in the straightforward case, to be guided by the principle *that "justice shall be administered without undue regard to procedural technicalities"* [Article 159(2)(d)], and the principle that *"the purpose and principles of this Constitution shall be protected and promoted"* [Article 159(2)(e)].

[168] The Constitution enjoins all Courts, in the exercise of their interpretive mandate, to adhere to certain well-defined paths, these being:

(a) a manner that "promotes [the Constitution's] purposes, values and principles" [Article 259(1)(a)];

(b) a manner that "advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights" [Article 259(1)(b)];

(c) a manner that "contributes to good governance" [Article 259(1)(d)].

[169] The foregoing prescriptions, in the context of the exercise of *the people's electoral rights* as took place on 8th August, 2017*, are the firm foundation upon which I have founded my dissent from the majority opinion, in this critical election petition*. The majority decision, in my considered opinion, has not only

done short shrift to *the governing terms of the Constitution*, but also failed to adhere to the *clear path of the law which has evolved*, *including this Court's precedents on electoral law*.

(b) The Electoral Law

[170] Just as with the Constitution itself, so with the regulatory set of norms, including the statutes and regulations: they all fall to the *interpretive mandate of the Courts*. This fact, on the plane of legal scholarship, ought to be apprehended as *the inherent common law chain that runs through the motions of judicialism*, in Kenya, as in so many other countries of the common law world. The long-established *rationales of the judicial method* remain with us today: and they ordain the espousal of the *doctrine of precedent* – a universal concept which, indeed, is expressly *replicated in the Constitution of Kenya, 2010*.

[171] Thus, this Constitution stipulates:

> *"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court"* [Article 163(7)].

The Constitution prescribes *competence in common law principles* as prerequisite in the appointment of Judges, in the following terms [Article 166(2)]:

> *"Each judge of a superior court shall be appointed from among persons who –*

(a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction."

[172] The *common law interpretive method*, is the constant milieu within which the application of Kenya's electoral law, beginning from the Constitution to the subsidiary legislation, is to be apprehended.

[173] Once the Judge accomplishes the task of interpreting the electoral law as provided in the Constitution, the Judge comes down to a whole set of statutes and regulations – the latter category comprising –

(i) the Supreme Court Act, 2011 (Act No. 7 of 2011);

(ii) the Appellate Jurisdiction Act (Cap.9, Laws of Kenya);

(iii) the Elections Act, 2011 (Act No. 24 of 2011);

(iv) the Election Campaign Financing Act, 2013 (Act No.42 of 2013);

(v) the Election Offences Act, 2016 (Act No.37 of 2016);

(vi) the Independent Electoral and Boundaries Commission Act, 2011 (Act No. 9 of 2011);

(vii) the Political Parties Act, 2011 (Act No. 11 of 2011).

[174] How has the Court interpreted such laws? Where is the Supreme Court's earlier work recorded, in that regard? And since the applicable law is the pertinent one for each electoral dispute, *what is the current state of the law?* How does such law apply in relation to a petition before the Supreme Court, in relation to the General Election of 8th August, 2017? Does such law affect the

Presidential election of that date, differently from the manner in which it affects the *other five sets of elections* of the same date?

(c) The Rationale of the Case Law

[175] *Case law*, the law as interpreted and applied by Judges, on the recorded merits of each matter, has for ever been *the cornerstone of the common law*. It is precisely the common law's focussed and authentic appraisal of the *facts of each case,* that made it ever so compelling, as a defining strand in the *judicial contribution to progressive, modern governance in conditions of democracy*.

[176] Jurisprudential confirmation for the foregoing standpoint is found in the work of a distinguished Justice of the Supreme Court of the United States of America, *Benjamin Nathan Cardozo* (1870-1938) [***The Nature of the Judicial Process*** (New Haven: Yale University Press, 1921), pp.28-31]:

> *"[T]he problem which confronts the judge is…a twofold one: he must first extract from the precedents the underlying principle, the* ***ratio decidendi****; he must then determine the path or direction along which the principle is to move and develop….Cases do not unfold their principles for the asking. They yield their kernel slowly and painfully….*
>
> *"The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the line of justice, morals, and social welfare, the* ***mores*** *of the day; and this I will call the method of sociology."*

[177] Such challenges of adjudication dictate that, *the gains of the past, authoritative interpretation by a discerning and responsible Court, be perceived as representing a precious juristic civilization; and these are for keeps, as a reference-point for the conscientious and effective resolution of later disputes.*

[178] Now the judicial approach in the sphere of *electoral law* is obviously inseparable from the Constitution's values and the principles of *democracy*. It thus behoves us *to pay due deference to the fundamentals of the sets of cases that have, in the last several years, been determined by this Supreme Court, on the subject of elections* – including *Presidential elections*. Such is, quite conclusively, the most dependable course of the law that this country's lawyers must engage, in the first place.

(d) Case Law: Illustration

[179] In ***Raila Odinga and Others v. Ahmed Issack Hassan***, Sup. Ct. Petition No. 5 of 2013, this Court took into account the nature of the governance mandate under the Constitution, and, in response to a challenge to the integrity of the Presidential election, laid down a set of guiding parameters. The Court thus remarked [para.298]:

> *"An alleged breach of an electoral law, which leads to a perceived loss by a candidate…takes different considerations. The office of President is the focal point of political leadership and, therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted* ***strictly on the basis of majoritarian expression.*** *The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote."*

[180] Flowing from the crucial majoritarian factor in the filling of the primary office of the Executive branch, the Court, in that case, defined its orientation as regards the resolution of an electoral dispute, such as the one which has come up before us [para.299]:

> *"As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum entrusted under the Supreme Court Act, 2011 (Act No. 7 of 2011) with the obligation to 'assert the supremacy of the Constitution and the sovereignty of the people of Kenya' [Section 3(a), Supreme Court Act 2011 (Act No. 7 of 2011)], must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in the compliance with the law regarding elections."*

[181] The foregoing principle, in this Supreme Court's perception, dictated that even though the Court *must uphold the clear popular, electoral choice,* it will "hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of [the Presidential] office, [in case] there is any major breach of the electoral law…" [para.300].

[182] The foregoing point, regarding the Supreme Court's obligation of vigilance, is expressed still more clearly [para.301]:

> *"The Judiciary in general, and this Supreme Court in particular, has a central role in the protection of the Constitution, and the realization of its fruits, so these may inure to all within our borders; and in the exercise of that role, we choose to keep our latitude of judicial authority unclogged: so the Supreme Court may be trusted to have a watchful eye over the play*

of the Constitution in the fullest sense. Even as we think it right that ***this Court should not be a limiting factor to the enjoyment of free political choices by the people,*** *we hold ourselves ready to address and to resolve any grievances which flow from any breach of the Constitution, and the laws in force under its umbrella"* [emphasis supplied].

[183] Such guiding principles were clear enough, and, in my perception, were attended with special merit. *These principles, today, represent the vital backdrop to Kenya's electoral law*.

[184] In the foregoing case, this Court, *suo motu*, undertook a sample re-tallying of votes, coming to the conclusion that, *"by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office"* [para.303]. The Court, while being mindful of the several imperfections noted during the sample re-tallying, mainly directed its mind to the *emerging majoritarian intent,* asking itself the following question, before upholding the electoral outcome [para.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."*

[185] The *precedent-setting decision* was distinctly endorsed by subsequent electoral dispute cases: and it must now be regarded as the *pillar of the scheme of*

electoral law in Kenya – founded upon a beneficent interpretation of the Constitution, and of the whole body of electoral law. This point, for good measure, is consistent with the comparative adjudicatory experience in election matters. As the retired Israeli Justice of the Supreme Court, *Aharon Barak* [***The Judge in a Democracy*** (Princeton: Princeton University Press, 2006), p.200] observes:

> *"Comparative law can help judges determine the objective purpose of a constitution. Democratic countries have several fundamental principles in common. As such, legal institutions often fulfil similar functions across countries. From the purpose that one given democratic legal system attributes to a constitutional arrangement, one can learn about the purpose of that constitutional arrangement in another legal system. Indeed, comparative constitutional law is a good source of expanded horizons and cross-fertilization of ideas across legal systems."*

[186] On such a basis of principle, the law and practice in the United Kingdom of Great Britain may be cited, for its relevance in the instant case. An apt summary of that position was made by a distinguished scholar, *Stanley A. de Smith*, who was Downing Professor of the Laws of England in the University of Cambridge [***Constitutional and Administrative Law***, 3rd ed. (Harmondsworth: Penguin Books, 1977), p.252]:

> *"Petitions based on …irregularities at…elections are now extremely rare; this is partly because very close contests are uncommon and even if the court finds that irregularities were present* ***it may determine that the result ought to stand since they were unlikely to have affected the results"*** [emphasis supplied].

[187] Such a state of the law is reflected in yet another decision of this Court, ***Munya v. Kithinji and Two Others***, Sup. Ct. Petition No. 2B of 2014, in which it was thus held [paras. 217, 218]:

> *"If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on the ground of irregularities.*
>
> *"Where, however, it is shown that the irregularities were of such a magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election."*

[188] On the same principle, the Supreme Court thus held, in ***Kidero and Four Others, v. Waititu and Four Others,*** Sup. Ct. Petition No. 18 of 2014 [2014] KLR-SCK [para. 341]:

> *"...generally, an election can only be declared void if that election did not substantially comply with the written law... – in this regard, the Constitution, the Elections Act, and the Regulations made thereunder, and any other relevant law; and, where there is substantial compliance with the written law in an election, the irregularities must indeed have affected the result of the election for that election to be invalidated."*

[189] Yet another authoritative decision of this Court is ***Obado v. Oyugi and Two Others,*** Sup. Ct. Petition No. 4 of 2014; [2014] KLR – SCK, in which it was thus held [para.139]:

"Although the Court of Appeal cited the decision of this Court in the ***Raila Odinga Case****, it did not apply the principle that a Court should consider the effect of the irregularity in the contested results****. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and the results of the election are unaffected"*** [emphasis supplied].

[190] The Supreme Court ever so clearly defined the operative electoral law, on the basis of the ***Raila Odinga*** petition of 2013, in the subsequent petitions. The Court was scrupulously affirming the synchrony of two express edicts of the Constitution of Kenya, 2010 – in *Article 1(3)* and *Article 159(1):* the first defining the *"sovereignty of the people*", and the second *delimiting the judicial authority*. By Article 1(3), the people's sovereign power is partly delegated to "the Judiciary and independent tribunals" [Article 1(3)(c)]; while Article 159(1), which constitutes the judicial authority, thus provides:

"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

[191] The foregoing principle was constantly reflected in the Supreme Court's decisions rendered in 2013 and after – as is exemplified in ***George Mike Wanjohi v. Steven Kariuki and Two Others,*** Sup. Ct. Petition No. 2A of 2014, [2014], eKLR. In that case the Court thus pronounced itself [para.131]:

"This Court should in principle, not substitute a sitting [elected representative] with another, without ***allowing the people to execute their political rights, as enshrined under the Constitution. To do otherwise would be to undermine the values and principles***

of democratic governance that bind us, in the execution of our judicial authority. It would also lead to an upset in the composition of the elected [office-holders] who bear the people's sovereignty, and would stand out as a clear disregard of the founding provisions of the Constitution" [emphasis supplied].

[192] In hindsight, the foregoing passage in the ***Mike Wanjohi Case*** touches on the very nub of *judicial responsibility,* as it relates to the *sovereignty of the people*, who established the totality of the current governance system, through the Constitution of Kenya, 2010.

[193] It hence follows that the general guiding path for the disposal of electoral disputes such as the instance one, could not have been stated more conscientiously and more effectively than it was in that case, thus [para.110]:

> *"By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 of the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid until the contrary is shown…."*

[194] A consideration of the merits of an electoral petition such as the instant one, therefore, takes one straight back to the *evidence tendered*; and here there is an inseparable *link between constitutional principle, and the pillars of evidence.* Since, as I have already determined, the petition herein fails on the pillars of *evidence,* it becomes clear that the majority decision lacks validity from the standpoint of governing principles.

[195] *Evidence* is the bearer of tell-tale signs of electoral victory, or of electoral defeat. The *physical form of the ballot* is directly visible, and is readily subjected to the test [Constitution of Kenya, 2010, Article 86] of simplicity, accuracy, verifiability, security, accountability and transparency. This physical evidence, quite clearly, is the *natural starting point in ascertaining who has won an election:* and hence the majority Judgment would have been expected to begin from a *foundation of numerical assessment*, before invoking any other parameters. For such other elements are essentially subjective, and are inherently destined to compromise the *sovereign will of the voters* which the Constitution expressly safeguards.

[196] Only from such a foundation of the physical vote-count, does one secure a *proper viewpoint for the other dimensions of the electoral process,* including the *credibility* of the entire operation. Indeed, in view of the relative strength of the evidence emanating from the two sides, the only objective conclusion would have been that, *within the measure of the possible, the conduct of the election by the 1st respondent was entirely credible.*

[197] The *emerging principle*, regarding the initiation of claims by way of election petitions, is that *all proof should commence from the foundation of the physical ascertainment of voting records*. All other claims then, must revolve around that pillar, and must establish that *some gross impropriety had affected the electoral process, and should lead to its annulment*. I am constrained to propose this scheme as a *proper agenda for the reform of Kenya's electoral law*. Such legal reform would need to institute *all appropriate security back-ups around the physical records, and would ensure the establishment of safety-nets around the votes cast*.

G. ISSUES OF BROAD, AND FREQUENT POLICY-MAKING, POLITICS, AND EXIGENCY: JURISPRUDENTIAL QUESTIONS

[198] The instant case has evoked intense national debate, involving professionals, politicians, observers, and others – the consequence being a justification, in this Judgment, for a clarification of the implications of *judicial intervention* in situations that entail the legitimate exercise of the citizen's momentary inclinations, on matters of *politics and daily exigency*. Falling squarely within such a category are the *people's legitimate preferences*. What is the proper stand for the Supreme Court, in such matters? How does the Judge's requisite approach relate to the majority decision, in the instant petition? My consideration of such issues confirms my position in this dissenting Judgment.

[199] By Article 160(1) of the Constitution –

> *"the Judiciary…shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."*

[200] The Constitution, while safeguarding the Judiciary's adjudicatory space, entrusts certain governance-spaces to *other agencies* – primarily the *Legislature* and the *Executive*: and this is the basis for the constitutional principle, the *separation of powers* – a principle the validity of which, in the Kenyan constitutional order, has not ever been seriously contested.

[201] The Judiciary is the trustee of the people's sovereign power [Article 1(3)] with regard to the *interpretation and application of all the terms of the Constitution, and of all other law*. Clearly, a substantial initiative in the motions

of the entire sphere of *law, legality and jurisprudence*, has been reserved to the *Courts*.

[202] As the *outer limits* of such reserved competence has not been specified in express terms, it follows that the frontier areas of such power, at least potentially, admit of *conflicting interpretive approaches*. But, as already noted earlier, the proper trustee of the boundary-delimiting ethics must be *the Judiciary* – an arm of the state which is endowed with the special facility of *juristic values; objective criteria of conflict resolution; a placid mien, such as facilitates professionalism, justice and fairness; and the benefit of access to relevant comparative lessons*.

[203] The Judiciary, in the exercise of such an exclusive mandate, ought to enter upon its task by *taking into account the uncontestable reserved remits of the other agencies of the state*. The people, in exercise of their *sovereign power,* have expressly delegated some of that power to "Parliament and the legislative assemblies in county governments" [Article 1(3)(a)]; and they have exclusively entrusted some of their sovereign powers to "the national executive and the executive structures in the county governments."

[204] There is no basis for abridging Parliament's power and mandate; for the Constitution [Article 94(1)] prescribes that *"the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament."*

[205] Similarly there is no basis for detracting from the *general character* of executive power, Article 129(1) prescribing that "*Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.*"

[206] Unlike the Judiciary, the work-orbit of which is *lined up with laws, principles and jurisprudential yardsticks,* both the Legislature and the Executive, in view of their *electoral and policy foundations*, may quite properly be described as "political agencies." They relate to the largest number of Kenyan people, in a close and direct proximity; they influence and are influenced by, the *momentary concerns* which, therefore, justify *the conception and espousal of policy and politics conceived and executed within short time-frames*.

[207] This is in stark contrast with the relationship between the ordinary citizen, and the *Courts of law*: and if the Courts overlook this reality, it will constitute a groundswell for *failure of judicial responses in line with the professional, juristic remit*.

[208] The prolonged history of judicialism, in all democratic countries, demonstrates that the proper role of the Courts has been *professional, judicial, and founded upon cardinal principles which draw lines of correctness and propriety in situations of dispute,* so as to *secure a certain optimum level of safeguards for the rights of the citizen*. Beyond that level of safeguard and fulfilment, it falls to the *political agencies* to pursue constantly, such *policy stands* as will satisfy, and give fulfilment to the national populace.

[209] On these principles of institutional disposition, it follows that it falls not to the Court, to make undue haste in assuming the policy mantle; a stampede is destined not only to disrupt the delicate institutional balances, but to weaken the *reliable jurisprudential bedrock,* which assures the citizens of an ultimate governance safety-net.

[210] In the context of the foregoing reasoning, it follows, in my view, that the majority on the instant petition, has made a precarious move, that is destined to prove detrimental to the dependable setting of relations among essential governance entities – to the detriment of the rights and legitimate expectations of the citizen.

[211] The majority on the Bench thus pronounced itself:

> ***"(i) As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections, upon considering*** *inter alia* ***Articles 10, 38, 81 and 86 of the Constitution as well as…Sections 39(1C), 44A and 83 of the Elections Act, the decision of the court is that the 1st Respondent failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the Constitution and*** *inter alia* ***the Elections Act….***
>
> ***"(ii) As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st Respondent committed irregularities and illegalities*** *inter alia****, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgement of the court…***
>
> ***"(iii) As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire Presidential election."***

[212] From such findings, the majority went on to make Orders nullifying the election results, as follows:

> ***"(i) A declaration is hereby issued that the Presidential Election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;***
>
> ***"(ii) A declaration is hereby issued that the 3rd Respondent was not validly declared as the President elect and that the declaration is invalid, null and void;***
>
> ***"(iii) An order is hereby issued directing the 1st Respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination...."***

[213] Such a determination is in clear departure, in the first place, from the *state of the evidence*. As already indicated herein, the petitioners' case rests on just one dimension of the electoral process – *electronic transmission of results*. Moreover, the bulk of the assertions made as regards transmission, is just that, contentions, with only limited testimonial ingredient: it is hardly "evidence" – what ***Black's Law Dictionary,*** 8th ed. (Bryan A. Garner) (St. Paul, MN: West, 2004) (p.595) thus rightly depicts:

> *"Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact...."*

On the other hand, evidence in the true sense, *a set of probative facts*, is what came forth from the respondents: and its tenor and effect was that, there were only *limited instances of failure of results-transmission*; only limited cases of irregularity in vote-addition and tabulation, not affecting the ultimate compilation and summation; the lawful *complementary device* was put in service, in cases of failure in the transmission process; *all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry, and could have been re-counted, to confirm that the 3rd respondent had been properly declared as the President-elect*.

[214] Thus, on *basic elements of trial,* the essence of burden of proof was undischarged; and it was, in effect, a reversal of the conventional process of judicial inquiry and determination – making a finding in favour of the petitioners.

[215] Secondly, the majority would appear to have taken leave of the juristic obligation to *interpret the terms of the Articles of the Constitution* invoked by the petitioners; the obligation to break these down, so as to ascertain the *discrete demands of the law;* the obligation to consider the pertinence of the specific statements of evidence from the petitioners, such as would answer to the constitutional and legal principles invoked.

[216] Thirdly, the majority departed, as it would seem, from the placid frame of the juridical setting, and assumed direct responsibility for the immediate calls of policy or politics – by altering the design of momentary, popular inclinations which are, by the terms of the Constitution, legitimate in all respects.

[217] The damage such as may flow from such a deportment, is not yet plain to all, as is quite clear from common perceptions recorded in the media, ever since the delivery of the majority Judgment. Alexander Chagema [*The Standard*, 7th September, 2017, p.15] wrote of *"a little shock therapy from the Supreme Court."* Wycliffe Muga [*The Star*, 7th September, 2017, p.20] thus wrote:

> *"[When] I listened to the Supreme Court ruling on the presidential petition [...] I knew very well that I was watching history being made."*

The *Nairobi Confidential* of 4-10 September, 2017 [p.2] thus remarked:

> *"The Supreme Court ruling that nullified the election of [the 3rd Respondent] on Friday has thrown Kenya into one of the most complex and expensive political situations."*

And Decky Omukoba in *The Standard,* 11th September, 2017 [p.14] thus wrote:

> *"What we have experienced as a nation is definitely a shift! The recent ruling by the Supreme Court to nullify a presidential election has never happened before in the history of this nation, or even this continent but it is undoubtedly a political and judicial shift that has risen from years of tectonic plates of power pushing on each other within a constricted democratic space."*

[218] The general perception associates the majority Judgment with an *overtly political inclination*. This, precisely, is the Judgment's obvious departure from the *professional plane of jurisprudence*, as the proper platform of the judicial arm of the state. The majority position would, of course, make history, emanating from a basic principle aptly depicted by the distinguished historian, Professor Bethwell A. Ogot ***[History as Destiny and History as***

Knowledge: Being Reflections on the Problems of Historicity and Historiography (Kisumu: Anyange Press, 2005), p.8]:

> *"To tell the story of a past so as to portray an inevitable destiny is for humankind, a need as universal as tool-making. To that extent, we may say that a human being is, by nature,* ***historicus.****"*

So, by the "magic jolt" of 1st September, 2017, *general political history* would have been made, even though, as I maintain, this represents a departure from the jurisprudence of democratic systems, which so much cherishes the *separation of powers,* and which so studiously commits the Judiciary to the *professional task of line-drawing,* to ensure the *sustenance of regular safeguards of the Constitution and the law,* for all.

[219] In future inquiries, it may be established that the law, as advanced by its interpreters and scholars, has its anchorage on the *adjectival plane*, from which it addresses the *primary motions of social, economic and political activity* – agriculture, architecture and engineering, land development, seafaring, sport, transport and communications, and others. The law stands to be formulated, moulded, interpreted and applied, not for its own sake and in its own cause, but *in relation to the said primary motions, which preoccupy citizens and communities.*

[220] Thus, in the instant case, *the electoral process had taken place*, and now, its motions had to be matched to the law *as interpreted.* By the interpretive scheme of the law, it does not stand the test of rationality or efficacy, to merely allege some unspecified impropriety in the electoral process. The relevant clause of the Constitution must be taken through an *analytical process*, and subjected to *definite categorizations* which crystallise the specific concepts and elements said

to have been violated. By this criterion, most of the contentions of the petitioners in the instant case, on account of their *broad generality*, would not stand up. The interpretive task, as it thus relates to the adjectival essence of the law, is inherently *professional* – and is reflected in the concept of *jurisprudence*, which "deals with thought about law" [R.W.M. Dias, *Jurisprudence*, 4th ed. (London: Butterworths, 1976), p.17].

[221] The Court, in the normal performance of its role, *under the Constitution,* is engaged in the *specialized process* of jurisprudence. It follows that the more immediate, urgent and primary motions of basic policy-making, inherently devolve to *the political arms of the State*, rather than the more specialized entity which is *the Judiciary*.

[222] This Judgment, apart from the occasion it proffers for a reflection on the law relating to elections, is a basis for a rethink on *law as a concept*, and as a *professional engagement*, defined in a regulatory framework applicable to the citizens' primary undertakings. From such a platform, it emerges that the law's design in the hands of the judge, the lawyer and the scholar, rests in unity with the fundamentals of constitutional governance – an important element of which is the *independence of the judiciary*. On the basis of this principle, it is to be recognized that *the judge's proper mandate lies several removes from the citizen's momentary policy and political desires and expectations* – which generally devolve to *the state's political agencies*. By this perception, the judge's proper remit has its focus upon *professional engagement, founded upon objective scenarios, or criteria*.

[223] Such a perception of *law and legal process,* in retrospect, will be found to be in conformity with the analytical schemes that mark the dedicated works of

great jurists of the past. Definite exemplars, in this regard, are the following jurists:

(i) *Lord Mansfield* (1705-1793) – see W.S. Holdsworth, "Lord Mansfield", ***The Law Quarterly Review***, Vol. 53 (1937), pp. 221-234; Edmund Heward, ***Lord Mansfield***, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2011);

(ii) *Professor Frederic William Maitland* (1850-1906) – see O.W. Holmes, "In Memoriam: Frederic William Maitland," ***The Law Quarterly Review***, Vol.23 (1907), pp.137-138; Robert L. Schuyler (ed.), ***Frederic William Maitland Historian: Selections from His writings*** (Berkeley: University of California Press, 1960);

(iii) *Lord Atkin of Aberdovey* (1867 – 1944) – Atkin, "Law as an Educational Subject", ***Journal of the Society of Public Teachers of Law*** (1932), pp. 30-58; Geoffrey Lewis, ***Lord Atkin***, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008);

(iv) *Justice Oliver Wendell Holmes, Jr* (1841 – 1935) – see Holmes, ***The Common Law*** (Boston: Little, Brown and Company, 1881);

(v) *Justice Benjamin Nathan Cardozo* (1870-1938) – see Cardozo, ***The Nature of the Judicial Process*** (New Haven: Yale University Press, 1921);

(vi) *Professor Stanley Alexander de Smith* (1922 – 1974) – see de Smith, ***Constitutional and Administrative Law***, 3rd ed. (Harmondsworth: Penguin Books, 1977);

(vii) *Lord Denning of Whitchurch* (1899 – 1999) – see Denning, ***What Next in the Law*** (Oxford: Oxford University Press, 1982).

[224] The special contribution of these judges and law scholars was to light up the *orbit of jurisprudence*, as a dedicated sphere of thought, learning and preoccupation, that secured the requisite motions of the different spheres of human activity, while affirming the perceptions of integrity and propriety.

[225] Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the Court may, *quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates*. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the *intellectual and jurisprudential domain* – rather than upon the *workaday motions of general policy and politics* which devolve to the citizens themselves, and to the political agencies of state.

[226] On these premises, I hold that the majority decision fails to resonate with the Constitution and the law, and with all relevant guiding principles. I would dismiss the petition with costs.

DATE and **DELIVERED** at **NAIROBI** this **20th** of **September**, 2017.

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA