

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

BETWEEN

H. E. RAILA AMOLO ODINGA.....1ST APPLICANT

H. E. STEPHEN KALONZO MUSYOKA.....2ND APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

CERTIFICATE OF URGENCY

I, **ONYANGO JACKSON AWELE**, an Advocate of the High Court of Kenya having conduct of this matter on behalf of the Petitioners/Applicants do hereby certify this application is extremely urgent for reasons **THAT**:

1. On the 8th of August 2017 the Independent Electoral and Boundaries Commission [IEBC], the 1st Respondent herein, conducted and supervised the Presidential Election and on the 11th of August 2017, announced and declared H.E. Uhuru Muigai Kenyatta, the 3rd Respondent as President Elect vide Gazette Notice Vol. CXIX- No. 115 [Special issue NO.7718].

2. The Petitioners, being aggrieved by the said declaration have filed a Presidential Election Petition dated 18th August 2017 challenging the said Presidential Election.
3. The Petition is premised on grounds inter-alia that the impugned declaration of the Presidential results was made in absolute breach of the Constitution of Kenya and the national legislation governing elections, and in particular the Elections (Technology) Regulations, 2017 [Legal Notice No. 68] (Kenya Gazette Supplement No. 61); and section 39(1C) of the Elections Act, No. 24 of 2011 which mandatorily require that the results at the Polling Station are final and must be transmitted electronically by the presiding officer in the prescribed form.
4. The Petitioners contend in the Petition that the electronic transmission system of results from polling stations to the constituency tallying centres and to the national tallying centres was not secured as to deliver a free, fair, secure, credible, transparent, accurate, accountable, and verifiable election in compliance with Articles 81 and 86 of the Constitution.
5. As the hearing and determination of the Petition is within a limited time frame fixed by law; and in light of the Practice Directions issued by the Honourable Chief Justice on 21st August 2017 in relation to this Petition, it is necessary and expedient that this application be heard and determined urgently before Friday the 25th August 2017 in order to ensure a just and fair determination of the all the issues in the Petition.
6. No prejudice shall be occasioned on the Respondents in granting the orders sought.

7. It is just and fair therefore that the order sought in the application be granted.

DATED at NAIROBI this 23rd day of August 2017.

MURUMBA & AWELE ADVOCATES
FOR THE PETITIONERS/APPLICANTS

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H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

NOTICE OF MOTION

*(Under Articles 19, 20, 22, 23(3), 35, 81, 86, 140, 159 and 258 of the Constitution of Kenya 2010; Section 39 and 44 of the Elections Act No. 24 of 2011; Section 27 Independent Electoral and Boundaries Commission Act No. 9 of 2011 [Rev.2016]; Sections 12, 23 & 26 of the Supreme Court Act No. 7 of 2011; Rule 18 of the Supreme Court (Presidential Election Petition) Rules, 2017; **Access to Information Act**; the Elections (Technology) Regulations, 2017 [Legal Notice No. 68]; and all other enabling provisions of the Law)*

TAKE NOTICE that this Honourable Court will be moved on the.....day of August 2017, at 09:00 O' Clock in the forenoon or so soon thereafter as Counsels for the Applicants may be heard on an Application for

ORDERS THAT:

1. This application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.

2. The application be heard and determined expeditiously and in priority to the Petition but in any event before 25th August 2017.

3. **This Honourable Court be pleased to order the 1st Respondent** to give access to all parties, for purposes of scrutiny, and supply to the Court and to the Parties, the following information and data that is in its exclusive possession:
 - a. The IEBC Election Technology System Network Architecture for the period of 30 days before the elections to the date of the order of this Court; comprising but not limited to:
 - i. All the servers used during the Elections;
 - ii. number of servers;
 - iii. location of servers;
 - iv. firewalls;
 - v. IP addresses;
 - vi. Operating systems;
 - vii. Software running applications

 - b. The IEBC Election Technology System Security Policy comprising but not limited to:
 - i. Password policy;
 - ii. Password matrix;
 - iii. Owners of system administration password(s)
 - iv. System users and levels of access

 - c. The IEBC Election Technology System Redundancy Plan comprising:

- i. Business continuity plan;
 - ii. Disaster recovery plan

- d. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:
 - i. Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations , 2017; and
 - ii. Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations , 2017

- e. **In relation to KIEMS Kits:**
 - i. Import testing certification in relation to all KIEMS Kits;
 - ii. Static IP addresses of each KIEMS Kit used during the Presidential Election;
 - iii. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 5th August 2017 and 11th August 2017;
 - iv. Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;
 - v. Polling station allocation for each KIEMS Kit used during the Presidential Election;
 - vi. Audit log of what each KIEMS Kit used during the Presidential Election transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses

Application Protocol Interface (API)(logs of media data update).

Log must also show:

- (a) Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and
- (b) Time of transmission from IEBC Result Transmission Database to the Media Houses API;
- (c) Count of Identified Voters by each KIEMS Kit;
- (d) Soft copy of Ids captured in each KIEMS Kit;
- (e) Audit log of transmission of scanned Forms 34A from each of the KIEMS Kits

f. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

- i. List of the technical partners;
 - ii. Kind of access they had;
 - iii. List of APIs for exchange of data with the partners
- g. Log ins for the period of 30 days before the elections to the date of the order of this Court of trails of showing the trail of users and equipments into all the IEBC Servers.
- h. Log in for the period of 30 days before the elections to the date of the order of this Court of trails of users and equipments into the KIEMS Database Management Systems
- i. Administrative access log into the IEBC public portal between 5th August, 2017 to date.

4. The 1st Respondent be compelled to give access to and supply to the Court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34A prepared at and obtained from the Polling Stations and Presiding Officers.
5. The 1st Respondent be compelled to give access to and supply to the Court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34A's and B prepared at and obtained from the Constituency Tally Centres and Returning Officers and delivered to the Supreme Court.
6. This Honourable Court be pleased to grant leave to the Petitioner/Applicants **TO:**
 - (a) Rely on and or File further affidavits in support of the Petition and or the affidavits of **(i) Rt. Hon. RAILA AMOLO ODINGA, (ii) OMAR YUSUF MOHAMED, (iii) DR. EDGA OUKO OTUMBO and (iv) NORMAN NORMAN MAGAYA**) dated 24/8/2017 be admitted on record and or be deemed to have been properly filed.
 - (b) File such other affidavits in response to or reply to any responses filed by the Respondents.
7. This Honourable Court be pleased to grant any other reliefs that it may deem just and fit to grant.

WHICH APPLICATION is supported by the annexed affidavits of RAILA AMOLO ODINGA and OMAR YUSUF MOHAMED and other affidavit and premised on the following grounds inter alia **THAT:**

1. On the 8th of August 2017, the 1st Respondent conducted and supervised the Presidential Election and on 11th of August 2017 announced and declared the 3rd Respondent as the President Elect vide Gazette Notice Vol. CXIX- No. 115 [Special issue NO.7718].
2. The Petitioners being aggrieved by the conduct of the said Presidential Election and the resultant declaration have filed a Presidential Election Petition dated 18th August 2017 challenging the Election.
3. The Petition is premised on grounds inter-alia that the impugned declaration of the Presidential results was made in absolute breach of the Constitution of Kenya and national legislation, and in particular the Elections (Technology) Regulations, 2017 [Legal Notice No. 68) (Kenya Gazette Supplement No. 61); and section 39 (1C) of the Elections Act, No. 24 of 2011 which stipulates that the results at the Polling Stations are final and shall be transmitted electronically by the presiding officer in the prescribed form.
4. Section 44 of the Elections Act as amended established the Kenya Information Electoral Management System (KIEMS), a platform that integrated voter registration, identification and results transmission.
5. With respect to transmission of results, Section 39(1C) of the Elections provides as follows:

“For purposes of a presidential election the Commission shall —

- (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to

the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

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

6. The Petitioners contend in the Petition that the electronic transmission system of results from polling stations to the constituency tallying centres and to the national tallying centres was not secured as to deliver a free, fair, secure, credible, transparent, accurate, accountable, and verifiable election in compliance with Articles 81 and 86 of the Constitution.
7. The Petitioners contend that the IEBC Elections Technology System was penetrated and/or deliberately compromised and used in a matter not intended by law, so as to interfere with and affect the result of the Presidential Election.
8. Prior to 08 August 2017, the 1st Respondent deliberately refused to respond to or accede to numerous requests that were made by NASA through its CEO and agents. The information that was sought and which the 1st Respondent refused to supply was largely similar to what is sought in the application.
9. By law the stakeholders who include the Petitioners were and are still entitled to this information.

10. The information and data that is sought is critical to demonstrate that the 1st Respondent did not conduct a free, fair, secure, verifiable, accountable and transparent Election. The Petitioners have no other means of securing the information and data that is exclusively in the 1st Respondent's possession, except through an order of the Court.
11. The grant of access to the information and data sought is coterminous with the 1st Respondent's duty to be transparent and accountable.
12. In order to ensure a just and fair determination of the Petition and in particular the accuracy, security, verifiability, accountability and transparency of the said transmission system, it is only proper and just that the Honourable Court and the parties be granted access to all the information and data sought.
13. As the hearing and determination of the Petition is within a limited time frame fixed by law; and in light of the Practice Directions issued by the Honourable Chief Justice on 21st August 2017 in relation to this Petition, it is necessary and expedient that this application be heard and determined urgently before Friday the 25th August 2017 in order to ensure a just and fair determination of the all the issues in the Petition.
14. No prejudice shall be occasioned on the Respondents in granting the orders sought.
15. It is just and fair therefore that the orders sought in the application be granted.

DATED at NAIROBI this 24th day of August 2017.

**MURUMBA & AWELE ADVOCATES
FOR THE PETITIONERS/APPLICANTS**

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H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

**1ST PETITIONERS’/APPLICANTS’ AFFIDAVIT IN SUPPORT OF THE
APPLICATION FOR THE AUDIT OF IEBC SYSTEMS
AND IN FURTHER SUPPORT OF THE PETITION:**

I, RT. HON. RAILA AMOLO ODINGA a resident of Nairobi and of Post Office Box Number 10311-00100 Nairobi do hereby make oath and state as follows:

1. I am a Kenyan Citizen, voter and adult of sound mind, residing and working for gain in the Republic of Kenya. I was duly nominated by the Coalition of Parties known as the National Super Alliance (NASA) to contest the Presidential Election held on 8th August 2017 for the position of President.
2. I am well versed with the facts and circumstances relating to the Petition and to the present application. I am therefore competent to swear affidavit on my own behalf and on behalf of the 2nd Petitioner.
3. I have the authority and consent of the 2nd Petitioner to swear this affidavit.
4. I have read, understood and had explained to me the contents of the notice of motion application dated 24th of August, 2017 and I swear this application both in support of the application and in further support of the Petition.

5. The issues raised in this Affidavit are germane both for the Petition and the instant application and shall seek the leave of the Court to rely on it in both occasions.
6. Save as otherwise expressly stated herein, the contents of this affidavit are based on my personal knowledge acquired in my above mentioned capacity and are true. To extent that any matter in this affidavit is based on information and/or belief, I have disclosed the source and/or ground (as the case may be) of the same, and verily believe the same to be true as informed and advised by my advocates on record.
7. I know of my own knowledge and information that on the 8th of August 2017 the Independent Electoral and Boundaries Commission [IEBC], the 1st Respondent, conducted and supervised the Presidential Election and on 11th of August 2017, declared Mr. Uhuru Muigai Kenyatta - 3rd Respondent as President Elect vide Gazette Notice Vol. CXIX- No. 115 [Special issue NO.7718].
8. Being aggrieved by the conduct of the Election and the outcome thereof, H.E. Stephen Kalonzo Musyoka and I have filed the Presidential Election Petition dated 18th August 2017 challenging the election.
9. We categorically contend in the Petition that the declaration was made in complete breach of the Constitution of Kenya and national legislation, and especially the Elections (Technology) Regulations, 2017 (Legal Notice No. 68 published in Kenya Gazette Supplement No. 61 and section 39 of the Elections Act, No. 24 of 2011 which stipulates that the presidential election results declared at the Polling Stations are final and must be transmitted by the presiding officer electronically in the prescribed form.

10. I am advised by my Advocates on record and believe the same to be true that Section 44 of the Elections Act as amended established the Kenya Information Electoral Management system (KIEMS), a platform that integrated voter registration, identification and results transmission.

11. I am advised by my Advocates on record and believe the same to be true that With respect to transmission of results, Section 39(1C) of the Elections provides thus;

“For purposes of a presidential election the Commission shall —

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

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

12. I am advised by my Advocates on record and believe the same to be true that Not only did the 1st Respondent act in breach of the above provisions of law; there are numerous inconsistencies and inaccuracies between the results carried in the statutory returns generated by the 1st Respondent and its various agencies and the results publicly carried and conveyed electronically by the 1st Respondent.

13. I have personally seen copies of Forms 34A brought in by our agents in the Field which are at variance with the information posted and published by the 1st Respondent in Forms 34B and on their public portal.
14. A summarised schedule of polling stations whose results recorded in Forms 34A is different from what is recorded in Forms 34B and in the IEB portal; and a bundle of some of those forms and copies of the respective screen shots from the IEBC Portal are annexed in affidavits of OMAR YUSSF MOHAMED.
15. I have personally seen copies of Forms 34A brought in by our agents in the Field which are at variance with the information posted and published by the 1st Respondent in Forms 34B and on their public portal.
16. I have been advised by Information Technology experts attached to the National super alliance [NASA] COLAITION and which information I verily believe that the IEBC Elections Technology System was penetrated and/or deliberately compromised and used in a manner not intended by law, so as to interfere with and affect the result of the Presidential Election.
17. I am personally aware that in the run up to the Election, the 1st Responded deliberately refused to respond to or accede to numerous requests that were made by NASA through its CEO Norman Magaya. These are matters that were discussed or routinely brought to my attention The information that was sought and which the 1st Respondent refused to supply was largely similar to what is sought in the application. *A bundle of the said*

correspondence are annexed to the affidavit of NORMAN MAGAYA in his affidavit dated 24th August, 2017.

18. I am advised by my Advocates and Information Technology Experts on record and believe the same to be true that Briefly, the relevance and purpose of the information and data sought is to show and prove the following among other things:
- (a) The 1st Respondent did not comply with the law;
 - (b) Computer and system logs are permanent and leave a permanent audit trail that are relevant to answering the fundamental questions in the Petition;
 - (c) The 1st Respondent deliberately tampered with the results and continues to do so. This is especially clear in those instances where the results Forms 34A are not in consonance with results in Forms 34B and on the IEBC Portal;
 - (d) That the inaccuracies between Forms 34A and 34B and the IEBC Portal was not random, accidental or inadvertent but rather widespread and deliberate;
 - (e) Through the logs the Petitioners can prove to the Court that there was deliberate failure to transmit the results as required by law and that during that intervention, the 1st Respondent manipulated the results;

- (f) The logs and information sought will show if the KIEMS Kits were deployed, accessed and used to relay information and results from their intended locations;
- (g) The logs and information sought will show from where and which polling stations were able to finish and close voting at 5:00pm and by 5:15pm had managed to count, tally and transmit the results. This is particularly important as the Petitioners' witness Koitamet Ole Kina has testified that results began streaming into the National Tallying Centre as early as 5:15pm on 08th August 2017;
- (h) At the time of the declaration of the Presidential Election, the 1st Respondent admitted that it did not have over more than 11,000 Forms 34A which account for more than 7 million votes and more than 100 Forms 34B, yet the 1st Respondent proceeded to declare the result. The logs and information sought will show the purported basis for the declaration of the Presidential Election.
- (i) By law the stakeholders who include the Petitioners were and are still entitled to this information.

19. I am advised by my Advocates on record and believe the same to be true that The information and data that is sought is critical and necessary to demonstrate that the 1st Respondent did not conduct a free, fair, secure, verifiable, accountable and transparent Election. The Petitioners have no other means of securing the information and data that is exclusively in the 1st Respondent's possession, except through an order of the Court.

20. I am advised by my information Technology expert and believe the same to be true that The grant of access to the information and data sought is coterminous with the 1st Respondent's duty to be transparent and accountable.
21. I am advised by my information Technology expert the electronic transmission system was not properly secured as to deliver a free, fair, credible, transparent, accurate, accountable, and verifiable election in compliance with Articles 81 and 86 of the Constitution.
22. I am advised by our Advocates on record, which advice I verily believe to be correct that section 12 of the Supreme Court Act No. 7 of 2011 requires that upon the filing of a Petition, the Respondent shall within 48 hours of service of the Petition, deliver to the Court all forms used to announce and declare results. These should in light of the aforesaid laws and for good order include the information requested for in the application hereof.
23. Since the hearing and determination of the Petition is by law fixed to be within a maximum of 14 days from the date of filing the Petition, it is only proper and just that the Court and the parties be granted access to the requested information forthwith in order to ensure a just and fair hearing and determination of the Petition and in particular the accuracy, verifiability, accountability and transparency of the conduct of the Election, the results transmission system and the results declared by the 1st Respondent.

24. In further support of the Application, I also rely upon the annexed affidavit of **OMAR YUSUF MOHAMED**, which is filed herewith.
25. I have read and understood the contents of the affidavit of Omar Yusuf Mohamed a statistician and a data analyst and has filed an Affidavit which I have read, understood and had explained to me. The affidavit tackles the twin issues or have analysis on (1) How the Commission allowed manipulation or access to their data systems and portal so as to process the results being stream at a location or a holding place within the portal before the results were streamed in and beamed at the National tallying of IEBC at Bomas and the National Televisions.
26. I have also read his affidavit in respect of how the Commission configured its or allowed its systems to be corrupted so as to inflate the number of rejected votes in manner that had an effect on the number of both the myself and the 3rd Respondent **UHURU MUIGAI KENYATTA**.
27. I have listened keenly and seen a demonstration or illustration from an analysis by Mr. OMAR YUSSUF that leads to an inescapable conclusion that the results streamed and beamed on television at the National tallying centre could not have been the results counted, tallied, verified, scanned and transmitted from the gazetted tallying centre.
28. I have been persuaded and I verily believe this to be true that the results leading to the Declaration of the 3rd Respondent were computer generated from a computer algorithm that had an 11% factors marinated throughout the transmission of results with small variations, of adding to and

subtracting variously from each of the two main candidates that is myself and Uhuru Kenyatta.

29. I have listened to the explanation and analysis by OMAR YUSSUF which explanation and analysis I verily believe is true that had results streamed randomly from each of the 40,803 polling stations the pattern of the results streamed could not have maintained a constant 11% factor based on a predetermined mathematical formula.
30. In the final analysis I am convinced based on persuasion and explanations from ICT experts namely OMAR YUSSUF, GODFREY OSOTSI AND NYANGASI all of whom have filed affidavits.
31. I am also persuaded that the computer and the mathematical formula and fixed algorithm factor predetermined the elections in favour not only of the Presidency leading to declaration of UHURU KENYATTA, but also that the Computer took over the sovereign will of the people expressed in Article 1 (2) of the Constitution, the supremacy of the Constitution Article 2, the principle of one man one vote at Articles 38 and 81 of the Constitution and the principles under Article 86 that whatever the voting system and results transmission system employed by the Commission, it shall be free, fair, transparent, accountable and verifiable and that the results, once counted and tallied shall be scanned and transmitted to the Constituency tallying centre and then to the National tallying centre and that such results shall be final in line with the Court of appeal decision **CIVIL APPEAL NO. 105 of 2017: IEBC & OTHERS VERSUS MAINA KIAI.**

32. It is in light of the foregoing that I am advised my Advocates on record and believe the same to be true that only a system audit of all the Commission's infrastructure, can answer the many questions and gaps surrounding why, what was supposed to a seamless system of integration of voter registration, voter identification and results transmission, failed at the tail end.
33. I reiterate my statement that the leaders that have been declared pursuant to this fraud on the People of Kenya are computer generated and products of a computer predetermined fraud.
34. I can say without fear of contradiction that unless this Court moves to deal with this anomaly Kenyans might as well forget taking time to register, spending long hours on queues to vote when the leaders will have been predetermined by a mathematical formula that take away their sovereign right and will as the true sovereign of this Republic.

THIS IS THE PEOPLE'S PETITION NOT RAILA ODINGA:

35. This Petition though filed in my name is in truth the People's Petition and what is truly on trial is the question we have Constitutional Democracy based on constitutional supremacy or whether we have an autocracy where the sovereign will of the People is subordinate to class and other interest protected by the "Deep state" and actuated by state organs including IEBC.
36. I must end this affidavit by expressing my displeasure at how the Supreme Court treated me in **SUPREME COURT PETITION NO. 5 OF 2013: RAILA ODINGA VERSUS INDEPNDENT ELECTORAL AND**

- BOUNDARIES COMMISSION**, when the Court, based on application of technicalities rather than substance, declined to grant leave to file a crucial affidavit. The result of this is that a 900 page affidavit with evidence was thrown out only for the same Court to turn around and state that the irregularities presented did not affect the results of the election.
37. I have had occasion to read and re-read the Supreme Court **RAILA ODINGA VERSUS IEBC case of 2013** over and over again and even though I disagree with its reasoning, even on the question of technology and its effect of the election, if this Court had the opportunity now to revisit the issue in light of the current electoral law on Technology, I am advised by my Advocates on record and believe the same to be true that the outcome would be different.
38. I have perused the portion of the Judgement between paragraphs 133, 231 to 237 and it states as follows:

[133] It is rightly argued by the Respondents, in our opinion, that the Court must be alive to the fact that most polling stations are in the rural areas, where the primary-school polling stations are dilapidated, and the supply of electricity, to-date, is a distant dream. Yet voters still go to such polling stations to exercise their right to vote, and to discharge their civic duty. Of this fact, the Court will take judicial notice, in deciding whether Presidential elections can be invalidated due to non-compliance with regulations requiring electronic transmission.

Technology in Kenya's Electoral Process

[231] The main Petition before this Court is founded, significantly, on the contention that the Petitioner was prejudiced by an inconsistent application of electronic devices and, in particular, by IEBC's abandonment of such technology and resort to the manual electoral procedure. While there is sufficient evidence

to guide the Court in this matter, it is apposite to set out relevant principles on the application of *electronic technology* in elections.

[232] Failure of technology is relied upon by the Petitioners, on the footing that it disrupted the transmission of election results, and so, these results ceased to be in keeping with the secure standards required by law. The Petitioners contend that section 39 of the Elections Act, 2011 as read with Regulation 82 of the Elections (General) Regulations, 2012 creates a *mandatory obligation to provide for the electronic transmission of the results*.

[233] We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

[234] In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ong'ondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the *procurement process* – squabbles which occasioned the *failure to assess the integrity of the technologies in good time*. It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: and *we recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects*.

[235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to *revert to the manual electoral system*, as was done.

[236] We note from the evidence that the said manual system, though it did serve as a vital fall-back position, has itself a major weakness which IEBC has a public duty to set right. The ultimate safeguard for the voter registration process, namely “the Green Book”, has data that is not backed-up, just in case of a fire, or other like calamity. *We signal this as an urgent item of the agenda of the IEBC, and recommend appropriate redressive action.*

[237] From case law, and from Kenya’s electoral history, it is apparent that electronic technology has *not* provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only *incremental*, over time. It is not surprising that the applicable law has entrusted a *discretion* to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This *negates the Petitioner’s contention* that, in the instant case, *injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology.* It follows that the Petitioner’s case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

(vi) *Institutional Independence, Discharge of Public Responsibility, and Exercise of Discretion.*

[238] A major element in the Petitioner’s case turns on the Constitution’s conferment upon IEBC of *institutional independence*, as a basis for the discharge of its public, electoral responsibility. How ought the responsibility to be exercised, and what is the role of *discretion* in this?

[239] The Petitioners impugn the manner in which IEBC conducted the tallying of votes at the National Tallying Centre, and in particular, the fact that the Commission had, at some stage, restricted the operations of political party agents during the tallying. The 1st and 2nd Respondents *admitted* having imposed certain

limitations on the said agents, but averred that such action was taken in exercise of essential discretion. These Respondents aver that, sometime in the evening of 5th March, 2013, the political party agents inside the tallying hall became rowdy and quarrelsome, and engaged IEBC staff in paralyzing confrontations. IEBC responded to the mischief by taking the decision to relocate the party agents to a boardroom in the auditorium at the National Tallying Centre, where they were regularly supplied with the forms and documents necessary for the verification of vote-tallies.

[240] Was this a lawful exercise of discretion by IEBC? Did such exercise of discretion vitiate the quality of tallying, and of the electoral process, so as to lead to the conclusion that the electoral process was not lawfully conducted?

[241] The Constitution, by Article 138(3)(c), takes cognizance of the fact that the counting of votes takes place at the polling stations, after which IEBC tallies, verifies and declares the results. On this basis, it is clear that *IEBC has the mandate* to count, tally and verify the voting results. However, Regulation 85(1)(e) of the Elections (General) Regulations, 2012 allows political party agents to be present at the Tallying Centre.

[242] What is the legal and public standing of the party agents at the National Tallying Centre? In our opinion, it is all about the *public perception*, and *legitimacy*, which are of the essence in a distinctly political process such as a Presidential election. IEBC is expected to operate *transparently*, without retreating from the public forum of visibility, and without disengaging from the stakeholders of the electoral process. However, as there is no sharp definition of the mode of such engagement, IEBC is to be guided by the “*national values and principles of governance*” declared in the Constitution, namely “*good governance, integrity, transparency and accountability*” [Article 10(2)(c)].

[243] Such values, in the context of a large-scale exercise such as the Presidential election, will operate optimally only in conditions of *good order, peace and security*; and it is in the first place the responsibility of the machinery of IEBC to

ensure that such conditions prevail. *Discretion* is of the essence, in the exercise of such responsibility: and it follows, as the basic evidence of the state of affairs at the National Tallying Centre was not contested, that IEBC, indeed, had *an obligation* to resolve any kind of impasse afflicting the tallying of Presidential-election votes.

[244] This Court has had occasion, in the past, to pronounce itself on the proper functioning of the various independent Commissions and agencies established under the Constitution. The following two passages in the Court’s Ruling, from *In the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Const. Application No. 2 of 2011, are apposite:

i. “[It is] a matter [of] which we take judicial notice, that the real purpose of the ‘independence clause’ with regard to [the] Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices by other persons, or other institutions of government.”

ii. “[While] bearing in mind that the various Commissions and independent offices are required to function free of subjection to ‘direction or control by any person or authority’, we hold that this expression is to be accorded its ordinary and natural meaning and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.”

[245] From the principles we have set out, and from the *evidence* on record, we are able to dispose of the issue regarding the *tallying of votes at the National Tallying Centre*. We must come to the conclusion that tallying was indeed conducted in *accordance with the law*, and the relocation of political party agents *did not* undermine the credibility of the tallying, nor provide a basis for annulling the outcome of the Presidential election.

[246] A related claim by the Petitioner is that there were instances in which the vote-tallying operation inflated the 3rd Respondent’s votes, while deflating the

Petitioner's. What is offered as proof of this assertion is only the *apprehension* that the initial electronic vote-transmission had maintained a suspect, steady differential between the two sets of tallies – and that this suggested manipulation and impropriety on the part of IEBC. The Petitioner, besides, sought to introduce belatedly, during the submissions, certain information suggesting mismatches between the contents of Forms 34 and 36 used at the National Tallying Centre. Hardly any matter of significance, at this stage, came before the Court such as would alter the thrust of the overall evidence and the submissions on law; and we must hold that *no challenge to the tallying process* has been made such as to lead to an order of annulment.

39. I know of my own knowledge and information that based on a forensic analysis that I commissioned to be carried on the 2013 General Elections, a copy of which is attached, it emerged that about 2,000,000 voters turned out to vote only for the President and did not cast a ballot for other elective seats. These were among other facts and evidence the Supreme Court could have benefitted from in 2013 had a proper inquiry and forensic audit carried out.

I believe in institutions and the Law and wish to reiterate that it is for that reason, notwithstanding my initial reluctance to lend my name to a Petition before this institution and court called the Supreme Court, I nevertheless decided to prosecute this “People’s Petition” again before this Court. This represents a second opportunity for this Court to redeem the hopes of 40,000,000 Kenyans in the new Constitution 2010, its supremacy and their sovereign will and not the will of a few through computer generated outcomes.

40. I am also aware from my own knowledge and reading on international affairs in the United states that similar issues to deal with audit of servers and systems on electronic technology has been ordered and access given

to private servers on crucial information necessary for public knowledge about their elected leaders.

41. Attached And marked RAO 1 are all copies of documents referred.
42. What is stated above is true and to my own knowledge, save as to matters deponed to on information and belief, the sources and grounds whereof have been specified and set out hereinabove

SWORN at NAIROBI)

On this 24th day of August 2017)

By the said **RAILA AMOLO ODINGA**)

BEFORE ME)

DEPONENT

COMMISSIONER FOR OATHS)

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Lodged in the Registry at Nairobi on theof 2017

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REGISTRAR