



September 13, 2017

Keriako Tobiko
The Director of Public Prosecutions
NSSF Building
Nairobi

Dear Mr. Tobiko:

Re: Petition to Undertake Investigation and necessary prosecution on IEBC Staff

Purpose

This is a Petition under Article 37 of the Constitution to seek your urgent intervention in regard to criminal offences committed by the commissioners and members of staff of the Independent Electoral and Boundaries Commission (IEBC) in relation to the general election held on August 8, 2017. We are presenting this Petition in discharge of our constitutional obligation under Article 3 – to respect, uphold and most importantly defend the Constitution.

Your Constitution and Statutory Obligation

This Petition invokes your powers under Article 157 and refers you to your obligation under Articles 3 and 10 of the Constitution. More specifically though, the Petition refers you to Section 21 of the Elections Offences Act 2016. That Section provides:

21. Powers of prosecution

The Director of Public Prosecutions shall have the power to order investigations and to prosecute offences under this Act.

We further note that Section 4 of The Office of the Director of Public Prosecutions Act provide the principles that must guide the work of your office including the following:

4. **Guiding principles**

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

Mandate and Role of IEBC

As you are aware, the IEBC is established by Article 88 with one of its primary mandate being to conduct elections in accordance with the constitution and national legislation. Article 249(1) requires that the IEBC in undertaking its functions do so by:

- protecting the sovereignty of the people;
- securing the observance by all State organs of democratic values and principles; and
- promoting constitutionalism.

The national legislation that are directly applicable in the conduct of the IEBC's mandate are the Independent Electoral Boundaries Commission Act 2011, The Elections Act 2012 and The Elections Offences Act 2016.

In undertaking elections, IEBC must ensure that the elections meet the standards set out in Article 81 and 86 of the constitution, including being free and fair, being accurate, verifiable, secure, accountable and transparent. Additionally, the elections have to be conducted in accordance with the statutes on elections, regulations, rules and guidelines set out by the Commission.

The Conduct of 2017 General Elections

We note that the Supreme Court in its decision in **Raila Odinga & Anr v. The Independent Electoral and Boundaries Commission and Ors – Election Petition No. 1 of 2017**, made the following findings regarding the conduct of the 2017 presidential election:

- 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.

We note that the Supreme Court only dealt with the conduct of the Presidential elections, yet it is our view that the violations or non-compliance with the law identified by the Supreme Court does apply to other elections conducted on August 8, 2017.

Moreover, in an Internal Memo from the Chairperson of the IEBC to its Secretary dated September 5th, 2017, the Chairperson catalogued numerous violations of the law, policies and guidelines committed by the IEBC's secretariat during the conduct of the 2017 general elections. Most of those listed infractions are of criminal nature. We submit to you that that is further and *prima facie* evidence from the IEBC itself that the 2017 general elections was not conducted in accordance with the constitution and the law and that criminal acts were committed by IEBC officials.

Additionally, we note that the IEBC failed to substantially comply with the Ruling of the Supreme Court issued on August 27, 2018 further bolstering the Court's finding that the Presidential Election – and in our view general elections – were not conducted in compliance with the constitution and the law.

Offences Committed by Commissioners and Staff of IEBC

We believe that numerous offences were committed by IEBC officials, including the Chairperson, commissioners, the Secretary to the commission and senior management staff. We list below some of the offences, for which, in our view there is sufficient evidence and reasonable grounds to believe were committed and which require your office to direct that investigations be conducted and prosecutions carried out. These includes those offences listed in Section 6 of The Elections Offences Act and especially the following:

6. Offences by members and staff of the Commission

A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who—

- (a) makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;

- There is ubiquitous evidence of wrongful information being entered in Forms 34As, 34Bs and given the Supreme Court determination the information entered in Form 34C was false. There is overwhelming evidence that this illegal practice was carried over to other elective positions.

(e) wilfully rejects or refuses to count any ballot paper which they know or have reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;

(f) wilfully counts any ballot paper as being cast for any candidate which they know or have reasonable cause to believe was not validly cast for that candidate;

- There is compelling evidence of suppression of votes cast against certain candidates, vote switching, improper recording of the actual votes cast for each candidate

(h) where required under the Elections Act (No. 24 of 2011) or any other law to declare the result of an election, fails to declare the results of an election;

(j) without reasonable cause does or omits to do anything in breach of his official duty;

- There is credible evidence) that IEBC officials numerously contravened their oath of office, failed to follow the law and IEBC policies and guidelines in undertaking their work in respect of the August 8, 2017 general elections. For example, the Chairperson's Memorandum lists acts of omission and commission by IEBC secretariat. Additionally, there is incontrovertible evidence that IEBC officials failed to follow clear laws and regulations on results counting, transmission, tallying, verification and clearly undertook their duties in total disregard of the Court of Appeal's Judgment in **Maina Kiai & 2 Ors v. IEBC Court of Appeal Civil Appeal No. 275 of 2017.**

(k) colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate;

- There is emerging circumstantial but compelling evidence that some officials of the IEBC may have colluded with officials or agents of Jubilee Party of Kenya to give undue advantage to the party and its presidential candidate, including evidence of collusion in allowing Jubilee Party officials access to IEBC Server.

(l) wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or

(m) fails to prevent or report to the Commission or any other relevant authority, the commission of an electoral offence committed under this Act, commits an offence

and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

- It is our view that the various violations of the law by IEBC officials were premeditated, preplanned and hence wilfully executed to give advantage to Jubilee Party and its presidential candidate, and that even those senior IEBC officials who never directly participated in the machinations were aware of this fraudulent scheme and did nothing to prevent or report the commission of the offences.

We also have the strong believe, given the evidence filed by the Parties to the Supreme Court Petition and the Supreme Court Report on the audit of Forms 34A, 34B, 34C, that IEBC officials committed crimes of forgery.

We further note that Section 17 of The Elections Offences Act provides for election offences relating to technology. We strongly believe, just based on publicly available information that senior IEBC officials individually or in concert committed all those offences listed in Section 17 of the Elections Offences Act. For your ease of reference Section 17 provides:

17. Offences relating to the use of technology in elections

A person who, in relation to the electoral process—

- (a) steals or intentionally causes damage to electronic equipment;
- (b) knowingly or intentionally conceals, destroys, alters or knowingly or intentionally causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network;
- (c) with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person, destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility;
- (d) accesses the whole or any part of a computer system without authorisation;
- (e) intercepts, by technical means and without authorisation, any nonpublic transmission of computer data to, from, or within a computer system including electromagnetic emissions from a computer system carrying such computer data;
- (f) intentionally or recklessly alters or interferes with the functioning of a computer or computer network by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or a computer program, electronic document, or electronic data message without authority, including by the introduction or transmission of viruses;
- (g) uses, produces, sells, procures, imports, distributes, or otherwise makes available, without lawful authority—

(i) a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences under this Act; or

(ii) a computer password, access code, or similar data by which the whole or any part of a computer system may be accessed with intent that it be used for the purpose of committing an offence under this Act;

(h) knowingly inputs, alters, or deletes computer data with the intent that the result be considered or acted upon for legal purposes as if it were authentic, regardless of whether or not the data is directly readable and intelligible; or

(i) intentionally acquires, uses, misuses, transfers, alters or deletes another person's identification information, commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding ten years or to both.

Justification for Investigation and Prosecution

Given the decision of the Supreme Court, the contents of the Memorandum from the Chairperson to the Secretary of the IEBC, and publicly available information on how the 2017 general elections were conducted and information exclusively available to the IEBC officials and their agents, but which disclosure is compellable, we have reasonable grounds to believe that all IEBC Commissioners including the Chairperson and numerous senior officials led by the Secretary have committed numerous electoral and other criminal offences and ought to be investigated and prosecuted.

We are aware that the Supreme Court is yet to issue its full reasons for its decision and judgment. However, it is view that your office cannot afford to procrastinate on this matter especially given the high likelihood of destruction or concealment of evidence by IEBC officials if urgent investigative and prosecutorial action is taken. Such action will assist in taking necessary and timely steps to secure and preserve the evidence and to forestall further commission of criminal offences by IEBC officials.

Conclusion

We therefore Petition you and your office to undertake your mandate under Article 157 and Section 21 of the Elections Act, honestly and diligently and cause to be investigated and bring charges against the named individuals and any other persons found to have been involved in the commission of electoral and other criminal offences relating to the 2017 General Elections.

We look forward to your swift, diligent and decisive action.

Yours sincerely,

KURA YANGU SAUTI YANGU