

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ. & P; Mwilu, DCJ & V-P; Ibrahim, 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

SUMMARISED DISSENTING OPINION OF OJWANG, SCJ.

[1] It is not necessary in this summarized Judgment – which is to be followed by a fully detailed and reasoned decision on an occasion already signalled by the Chief Justice and President of the Court – to give the comprehensive facts, submissions and legal principles bearing upon the instant petition.

[2] The important petition, which seeks the annulment of Kenya’s Presidential election results emanating from the General Elections of 8th August, 2017, is focussed on a limited number of contentions: (a) that the said Presidential

Election was not conducted in accordance with the relevant principles of the Constitution; (b) that the said Presidential Election was compromised by certain illegalities and irregularities; (c) that, consequently, the said General Election lacked integrity, and ought to be invalidated.

[3] Whereas the substance of the case founded on illegality and irregularity rests on the voting-results electronic transmission process, there is substantial information showing that, by law, the conduct of the election should have been mainly manual, and only partially electronic. Hardly any conclusive evidence has been adduced in this regard, which demonstrates such a manifestation of irregularity as to justify the invalidation of the election results.

[4] As regards the invocation of the Constitution as a basis for annulling the electoral process, only general attributions of impropriety have been made, and furthermore, without adherence to the prescription that the task of interpreting the Constitution with finality, rests with no one but the Courts – in this case, with this Supreme Court.

[5] Much of the evidence which the majority opinion adopts, is largely unascertained, apart from standing in contradiction to substantial, more credible evidence.

[6] In such a marginal state of merits in the case challenging the conduct of elections on 8th August, 2017, it is clear to me beyond peradventure, that there is not an iota of merit in invalidating the clear expression of the Kenyan people's democratic will, which was recorded on 8th August, 2017.

[7] The procedural law for assuring the integrity of elections is abundantly set out in the Elections Act, 2011 (Act No. 11 of 2011), and in the Electoral Code of Conduct; and the relevant provisions were conscientiously applied by the Independent Electoral and Boundaries Commission, which fully provided for the role of international and local observers, as well as agents, in the conduct of the Presidential Election. The resulting electoral process had all the vital features of merit, as all the observers publicly acknowledge.

[8] To disregard such outstanding features of merit in the just-concluded elections, is to overlook the most basic democratic principles which safeguard the electors' entitlement to choose their public office-holders.

[9] In summarized form, I hereby record, without equivocation, my dissent from the Judgment given by the numerical majority of the Supreme Court Bench. For my part, I would dismiss *in its entirety* the petition which came up before us, as it was devoid of requisite supporting evidence, just as it did not rest upon the

pillars of the Constitution, the ordinary law, or the pertinent elements inherent in the configuration of a democratic election.

[10] In accordance with the terms of Section 26(2) of the Supreme Court Act, 2011 (Act No. 7 of 2011), I hereby reserve the detailed, reasoned edition of my opinion, to be delivered within the next 21 days.

DATE and DELIVERED at NAIROBI this 1st day of September, 2017.

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J.B. OJWANG
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

**REGISTRAR
SUPREME COURT OF KENYA**