

IN THE SUPREME COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. _____ OF 2022

BETWEEN

KHELEF KHALIFA.....1ST PETITIONER

GEORGE OSEWE2ND PETITIONER

RUTH MUMBI.....3RD PETITIONER

GRACE KAMAU.....4TH PETITIONER

AND

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT → (0

THE CHAIRPERSON OF INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

H.E. WILLIAM RUTO.....3RD RESPONDENT

ATTORNEY GENERAL.....INTERESTED PARTY

PETITION

(Under Article 140 of the Constitution)

THE HUMBLE PETITION OF KHELEF KHALIFA, GEORGE OSEWE, RUTH MUMBI
AND GRACE KAMAU WHOSE ADDRESS OF SERVICE FOR THE PURPOSE OF THIS
PETITION IS CARE OF OTIENO OGOLA & CO. ADVOCATES, 11TH FLOOR CMS
AFRICA HOUSE, CHANIA AVENUE OFF MARCUS GARVEY ROAD, P.O. BOX 22671- -20
00100 NAIROBI, Email Address info@otienogolaadvocates.co.ke. IS AS FOLLOWS:-

A. THE PARTIES

1. The Petitioners are two adult males and two adult females of sound mind, citizens of the Republic of Kenya and duly registered voters in the Republic of Kenya. The Petitioners' address of service for the purposes of this Petition shall be **c/o OTIENO OGOLA & CO. ADVOCATES, 11TH FLOOR CMS AFRICA HOUSE, CHANIA AVENUE OFF MARCUS GARVEY ROAD, P.O. BOX 22671-00100 NAIROBI,**
Email Address info@otienogolaadvocates.co.ke; Tel. 0721 976194

2. The 1st Respondent is the Independent Electoral and Boundaries Commission (IEBC). The 1st Respondent is an independent commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya and the IEBC Act No. 9 of 2011. — (0
The 1st Respondent is constitutionally charged with the mandate and responsibility to conduct and/or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by the Elections Act. **Article 138 (3) (c)** of the Constitution vest the 1st Respondent with the responsibility to verify and tally all the results of the presidential elections conducted in all constituencies in Kenya.

3. The 2nd Respondent is the Chairperson of the 1st Respondent herein. The 2nd Respondent is constitutionally mandated under Article 138(10) of the Constitution of Kenya to a) declare the result of the presidential election; and b) deliver a written notification of the result to the Chief Justice and the incumbent President.

4. The 3rd Respondent was the United Democratic Alliance Political Party presidential — 20
candidate in the August elections, and was declared the winner of the said elections by the 2nd Respondent on 15 August 2022.

5. The Interested Party is the Attorney General of the Republic of Kenya vested with the responsibility of representing the national government in court and his participation in the proceedings is necessary since there are factual expositions in regard to processes the national government and some of its institutions have undertaken that are relevant to the fair determination of this dispute including acts that border on criminality and abuse of office that have been investigated and information to that effect made public.
6. This Petition relates to and challenges the conduct and results of the presidential elections held on the 9th August 2022 and which results were publicly announced by the 2nd Respondent on the **15th August 2022**.
7. The results announced by the 2nd Respondent which are the subject of challenge in the —|0 Petition herein are as follows;
- | | |
|------------------------------|------------------|
| a) William Ruto | 7,176,14 |
| b) Raila Amolo Odinga | 6,942,930 |
| c) George Wajackoya | 61,969 |
| d) David Wahiga | 31,987 |
8. The total valid votes cast in the elections as declared by the 2nd Respondent were **14,213,137** and the total rejected votes in the elections were **13,614**.

9. The total registered voters in Kenya that were eligible to participate in the elections as declared by the 1st Respondent are 22,102,532 in the Country; prisons 7,483; diaspora 10,443 adding to a total number of **22,120,458** registered voters.

B. BRIEF OVERVIEW OF THE LAW AND THE GROUNDS OF THE PETITION

10. The Petitioners aver that the Presidential Election was so badly conducted, administered and managed by the 1st Respondent 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 of Kenya; the Elections Act (as specifically set out herein below) and the Regulations made thereunder including the Electoral Code of Conduct and other relevant provisions of the Law.

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11. The massive, systemic, systematic and deliberate non-compliance with the Constitution and the Law as will be shown and proved by the Petitioners:

- a) 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;
- b) undermines the foundation of the Kenyan system as a sovereign republic where the people are sovereign under Article 4 of the Constitution; and
- c) severely undermines the very rubric and framework of Kenya as a nation State.

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12. Article 1 of the Constitution sets out the foundation and framework of the Nation of Kenya and the social contract between the people and their elected representatives. Article 1 of the Constitution states that:

- (1) "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives
- (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
 - (a) Parliament and the legislative assemblies in the county governments;
 - (b) the national executive and the executive structures in the county governments; and
 - (c) the Judiciary and independent tribunals.

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- (4) The sovereign power of the people is exercised at—
 - a) the national level; and
 - b) the county level."

13. Article 4 of the Constitution establishes a republican system of governance, which is — 20

founded on the sovereignty of the people and under which the conduct of periodic elections is one of the mechanisms by which the people delegate their sovereign power to their representatives. Article 4 states,

- (1) Kenya is a sovereign Republic.
- (2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in **Article 10.**”

14. Article 38 of the Constitution sets out the mechanism and framework by which the sovereign people of Kenya exercise their sovereign will under Article 1 and 4 of the Constitution. Article 38 provides that,

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- (1) Every citizen is free to make political choices, which includes the right—
 - (a) to form, or participate in forming, a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; or
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - (a) any elective public body or office established under this Constitution; or
 - (b) any office of any political party of which the citizen is a

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member.

(3) Every adult citizen has the right, without unreasonable restrictions—

- a) to be registered as a voter;
- b) to vote by secret ballot in any election or referendum; and
- c) to be a candidate for public office, or office within a political party of which the citizen is a member, and if elected to hold office.

15. The 1st Respondent is an institution established under the Constitution by the Kenyan people in exercise of their sovereign will in accordance with Articles 1, 4 and 38 of the Constitution. —10

16. Article 88(4) and (5) of the Constitution sets out in the manner stated below the role of the 1st Respondent in conducting elections:

The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates

- for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82 (1)(b) relating to nomination of candidates by parties.”

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17. **Article 138** of the Constitution provides the procedure to be adopted at presidential elections and it proceeds to provide at sub article (3) that in a presidential election;

- a) All persons registered as voters for the purposes of parliamentary elections are entitled to vote;
- b) The poll shall be taken, by secret ballot on the day specified in Article 101 (1) at the time, in the places and in the manner prescribed under an Act of Parliament; and

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c) After counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

18. A plain reading of Article 138 (c) in relation to the presidential elections vests a responsibility on the Independent Electoral and Boundaries Commission to tally and verify the count and to declare the result. The responsibility to tally and verify the result is vested in the IEBC as a Commission and not on the Chairperson as an individual.

19. A reading of Article 138 reveals a four-tier process of presidential elections;

Tier 1- Polling station

Tier 2- Constituency RO

Tier 3- Commission of the IEBC

Tier 4- Chairperson announcement

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20. A break in one tier completely destroys the election process. In respect to the next tier and that next tier cannot in that regard proceed to act without impeding the entire process of that election. The constituency returning officer cannot act without polling station returns, the Commission cannot verify and tally results without the constituency returning officers and so also the Chairperson cannot act without the tallying and verification by Tier 3 which is the Commission.

21. It is the Petitioner’s case that in the conduct and management of the Presidential Election of 9th August 2022, the 2nd Respondent usurped the roles and functions of the 1st — 20

Respondent to exercise, protect and safeguard the sovereign will of the people of Kenya. Furthermore, the 2nd Respondent became a law unto himself in breach of the sovereign will of the people of Kenya and in abrogation of the functions and duties of the 1st Respondent and thereby subverted the sovereign will of the people.

- 22. The Petitioners aver that the Presidential Election was so badly conducted and marred with illegalities and irregularities that it does not matter who won or was declared as the winner of the Presidential Election the primary responsibility of the 1st Respondent to tally and verify the results of the presidential elections having been taken over and performed solely by the 2nd Respondent in a manner inconsistent with the constitution and the law.
- 23. The Petitioners aver that the nature and extent of the flaws and irregularities significantly — 10 affected the results to the extent that **the 1st Respondent cannot accurately and verifiably determine what results any of the candidates got.**
- 24. Instead of giving effect to the sovereign will of the Kenyan people, the 2nd Respondent delivered a preconceived and predetermined outcome of the elections by declaring the 3rd Respondent winner of the said elections in a manner inconsistent with **Articles 86 and 138 of the Constitution.**
- 25. Section 83 of the Elections Act contemplates that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and — 20 rendered invalid, the Petitioners position is that the non-compliance with the Constitution

and the written law is by itself sufficient to invalidate the Presidential Election.

26. Under section 87 of the Elections Act, 2011 concerning reports of the court on electoral malpractices;

(1) An election court **may**, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature **may have** occurred.

(2) Where the election court determines that **an electoral malpractice of a criminal nature may have occurred**, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

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(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —

(a) direct an investigation to be carried out by such State agency as it considers appropriate; and

(b) based on the outcome of the investigations, commence prosecution or close the matter.

C. GROUNDS AND ARGUMENTS SUPPORTING THE PETITION

Violation of the principles of a free and fair election and electoral process

27. The Presidential Election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read together with Sections 39 of the Elections Act and the Regulations there under.

28. Article 81 of the Constitution stipulates that the electoral system shall comply with the following principles—

(a) freedom of citizens to exercise their political rights under Article 38;

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

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Unconstitutional Failure To Lawfully Tally, Verify And Declare The Presidential election result as required under Articles 86 and 138 (3) (c) of the Constitution

29. Accountability demands that the independent body vested with responsibility to conduct the elections must account and as a body explain and justify to the people of Kenya the entire process of the elections and its outcome. To the extent that the Chairperson and a

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majority of the Commissioners cannot as a body account to the entire process of the elections fails the accountability test of the elections.

- 30. The elaborate transparent process of establishing a Commission with seven members including a chairperson and granting it independence under the Constitution is borne out of the history of the Republic in the conduct of elections and it is imperative that the Commission exercises its duties with utmost fidelity to the law and the duties of the Commission cannot be performed by an individual.
- 31. The Independent Review Commission (Kriegler Commission) upon reviewing the conduct of the 2007 general elections that led to bloodshed and instability in the country recommended that the composition of the electoral management body should be done in a way that infuses confidence in the electoral process. Arbitrary and singular appointment of Commissioners by a player largely contributed to the mistrust of the Commission. — 10
- 32. In similar vein, Commissioners having been transparently appointed to office, one of their members should not singularly and arbitrarily purport to exercise its functions to the exclusion of the others.
- 33. If it were the intention the framers of the constitution and the people of Kenya to vest absolute power to oversee the elections they would have opted for a singular person or body to oversee the elections and not provided elaborate mechanisms that vested the decision making process of the electoral body on a Commission that is composed by seven (7) persons. — 20

34. Article 86 (b) and (c) provides that at every election, the Independent Electoral and Boundaries Commission shall ensure that **the votes cast** are counted, tabulated and the results announced promptly by the presiding officer at each polling station and the results from the polling stations are **openly and accurately collated** and promptly announced by the returning officer.
35. The final declaration of the presidential result was substantively and procedurally unlawful: substantively, for failing to comply with the constitution; binding decisions of both the supreme court and the court of appeal and procedurally, for flagrant breach of the decision process of the IEBC.
36. A plain reading of **Article 138 (c) of the Constitution** in relation to the presidential —(1) elections vests a responsibility on the Independent Electoral and Boundaries Commission to **tally** and **verify** the count and to declare the result. The responsibility to tally and verify the result is vested in the IEBC as a Commission and not on the Chairperson as an individual.
37. It is the Petitioners' case that the technology deployed by the 2nd Respondent in the elections was compromised and vulnerable to infiltration and manipulation that it could not be said to meet the constitutional standards of transparent, accountable free and fair elections.
38. At any rate, the candidate declared president elect **did not attain** the constitutional threshold of "**more than half of all the votes cast in the election**" under Article 138(4)(a). —(2) Petitioners will request the court to depart from its *Raila Odinga 2013* decision that "all

the votes cast” means “valid votes” and thus excludes “rejected votes” including where the voter’s clear intention is to abstain from the vote or to reject all the candidates.

Substantive violations, the Constitution, the Elections Act and differences with the Commonwealth

39. The 2nd Respondent on the 15th August 2022 purported to unilaterally and to the exclusion of other commissioners without authority tally, verify, and declare the result of the presidential elections held on the 9th August 2022.
40. In performing the said function, the 2nd Respondent did not involve the Commission in the exercise thereby undermining the provisions of the IEBC Act on the conduct and affairs of the 1st Respondent’s business. In any case the 1st Respondent did not participate in the verification and tallying of the results coming from all the 290 constituencies. —10
41. The 2nd Respondent purported to solely exercise powers which he does not have constitutional mandate to exercise in the presidential elections. Neither the constitution nor the Elections Act gives the 1st Respondent declared as the Returning Officer of the Presidential Election nor give him the power to tally and verify the results solely.
42. The Court of Appeal decision in the *Maina Kiai* case read together with the principles of elections under article 81 and the powers and duties of the IEBC under Articles 86 and 88 make it absolutely clear that the 2nd Respondent has no discretion- let alone the roving plenary discretion assumed in this case- with regard to any aspect of any election in Kenya, let alone the Presidential election at issue. —20

- 43. The proper repository of the plenary power over all aspects of the elections- registration, supervision, voting, counting, transmission, tallying, verifying and declaring of results vest in the 1st Respondent in its corporate character. The 2nd Respondent cannot announce tally, verify and declare whom he pleases without a completed corporate process of internal tallying, verification and approval of tallies by the Commission.

- 44. Article 138 (3) says that all those registered to vote for parliamentary elections are entitled to vote and that a poll shall be taken at “the time, in the places and in the manner prescribed under an Act of Parliament” and most important that at the polling station under **Article 138(3)(c) “the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”** Nowhere in the whole of Article 138 does the **constitution vest the duty to tally and verify the result on the 2nd Respondent.**

- 45. A reading of **Article 138 (3) (c)** confirms that the first declaration of result of the election is made by the 1st Respondent after a tallying and verification exercise by the Commission. It is safe to conclude that the first declaration of the result is made by the Commission before the chairperson proceeds to make the declaration within seven days of the date of the elections.

- 46. Article 138(10) that the 2nd Respondent purported to singularly rely on in making a declaration of results provides that “within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall declare the result” of the presidential election.

- 47. The general duty and power to tally, verify and declare results has already been vested in the Commission in Articles 86 and 138 (3) (c) and sub-clause 10 only permits the chair to announce the result and **NOT** to tally or verify.

- 48. The architecture of Article 138 makes it clear no plenary power to conduct, tally, verify and declare an election is vested in any person individually. That structure and architecture means that clause 10 must be read as only to be executed after the exercise of the powers and duties under Articles 86 and 138 (3) (c) of the Constitution. If the drafters had intended that clause 10 should be the supervening clause then 138(3)(c) would have been framed as ‘subject to’ sub-clause 10.... On this reading sub-clause 10 must be read as elaborating, adding to, the powers of the commission to tally, verify and declare. — 10

- 49. There is no independent, stand-alone provision of the constitution that gives the IEBC chairperson any substantive power to do anything that appertains to any election whatsoever.

Substantive violations, Interpretation of the Constitution and the Elections Act by the Court of Appeal in the Case of IEBC vs. Maina Kiai Civil Appeal No. 105 of 2017 which was binding on the 1st and 2nd Respondents

- 50. The cited case appreciated the quest of Kenyans for a robust electoral system founded on “directive and obligatory principles... immediately and presently binding on all.... persons whenever [they] apply, or interpret the Constitution... any law.. or make or implement public policy decisions.” These principles “are broad and all inclusive in their reach, — 20

sweeping in their sway and peremptory in their command.” The court held in the following words;

51. **Role of Commission vis a vis Role of Chair:** At issue, as framed by the Court of Appeal was, interpretation of “**the constitutional and statutory requirements for declaration of the result of the presidential elections**” and in particular the role of the chairperson vis a vis the commission. In resolving the matter, the court detailed the different layers of election administration, highlighting the various ways in which different responsibilities were parcelled out and shared amongst different actors – at the polling station, the constituency, the county and the national level – and concluded that the role of the chairperson was ‘narrow and circumscribed.’

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52. Given this, the court found illegitimate regulations that permitted the chairperson to act without acting in concert with the Commission. It noted:

‘To suggest that there is some law that empowers the chairperson of the appellant, as an individual to alone correct, vary, confirm, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency tallying centres, is to donate an illegitimate power. Such a suggestion would introduce opaqueness and arbitrariness to the electoral process - the very mischief the Constitution seeks to remedy. ’

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“[T]here is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless

powers in one individual, the chairperson of the appellant. The responsibility of the appellant to deliver a credible and acceptable election in accordance with the Constitution is so grave and so awesome that it must approach and execute it with absolute fealty, probity and integrity. The appellant must in all its dealings be truly above suspicion and command respect of the people of Kenya for whom it acts. Much depends on it, indeed the present and future peace of the country.”

53. The Court of Appeal concluded on the role of the 1st Respondent and the 2nd Respondent — 10 in tallying and verifying results in the following manner;

‘the appellant (IEBC), as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of president electronically transmitted to it from the near 40,000 polling stations is required to tally and ‘verify’ the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of the process, in Article 138 (10) the chairperson then declares the result of the presidential election and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how

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**circumscribed and narrow the role of the chairperson
and the appellant is'**

54. Article 10 of the Constitution sets out as one of the principles of governance to be the rule of law which is to the effect that decisions of Courts of law are binding on public administrators and any other person affected or subject to them.
55. The 1st and 2nd Respondents were bound by the decision of the Court of Appeal in the Maina Kiai case and it clearly shows that it was the responsibility of the 1st Respondent as a Commission and not the sole responsibility of the Chairperson to verify and tally the results from the polling stations.
56. In solely tallying, verifying the results of the presidential elections, the 2nd Respondent —(0) deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of *Independent and Electoral Boundaries Commission v Maina Kiai* Court of Appeal Civil No. 105 of 2022 as shown below:
- i. By declaring result on his own without tallying and verification by the 1st Respondent, the 2nd Respondent usurped the role and functions of the 1st Respondent and made himself a constitutional Commission;
 - ii. The Court of Appeal had specifically provided it is the 1st Respondent, upon receipt of prescribed forms containing tabulated results for election of President electronically

transmitted to it from the near 40,000 polling stations, is required to tally and 'verify' the results received at the national tallying centre without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre.

57. The reason and purpose of the Court decision was to set out a clear and transparent procedure on the process and requirements of the transmission of results, tallying and verification of results received at the national tallying centre, the role of the 1st and 2nd Respondents in the processing of results and to maintain the Rule of Law.

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a. The tallying, verification and announcement of the Presidential Election results was deliberately carried out in defiance and contravention of the decision of the Court of Appeal on the roles of the 1st and 2nd Respondent and the 2nd Respondent in utter disregard of the rule of law and binding nature of decisions of Superior Courts proceeded to usurp the role and functions of the 1st Respondent in tallying and verifying the results.

b. The failure to comply with the Court's decision setting out the process betrays the 2nd Respondent's predetermined scheme and intention to deliver a predetermined outcome.

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- c. As a result of the foregoing failure, the 2nd Respondent declared final results that were not based on the results declared at the polling stations and constituency tallying centres in a substantial number of cases and that were not tallied and verified by the 1st Respondent.
- d. The 2nd Respondent's deliberate failure to respect, follow and abide by the Constitution and the Rule of Law which includes Court orders and decisions, rendered the process of the Presidential Election and the tallying and verification of results and final outcome a nullity as it lacked in integrity, fairness and transparency.
58. The decision-making process of the IEBC is detailed in the Second Schedule to the IEBC Act. The Schedule titled **Provisions as to the Conduct of the Business and Affairs of the Commission** is made pursuant to section 8 of the Act which authorises the Commission to regulate its own business. Neither the Schedule nor section 8 exempt the Commission from tallying, verifying and declaring electoral results from the procedures for the conduct of business. — 10
59. Under paragraph 5 of the Second Schedule the quorum for the conduct of business at a meeting of the Commission is at least **five (5)** members of the Commission provided that at no time would the quorum be "less than three members."
60. Paragraph 7 shows that the preferred decision method in the Commission should be by consensus: it provides that "unless a unanimous decision is reached, **a decision on any matter** before the Commission shall be by a majority of the members present and voting." — 20

In order to ensure that these structures are observed paragraph 10 obliges the Commission to keep “minutes of all proceedings of meetings” and to cause these “to be entered in books for that purpose.”

61. The 2nd Respondent in conducting the tallying and verification of results solely without the participation and involvement of the Commission violated the provisions of the Constitution on the role of the 1st Respondent in the conduct of presidential elections. He further failed to comply with the statutory provisions that regulate the conduct of the business and affairs of the Commission.
62. The responsibility to conduct the elections is vested on the IEBC under Article 88 and not an individual in the capacity of the Chairperson. He cannot on his own conduct the elections and declare the results independent of the Commission. To purport to solely conduct a tally of the results and declare the same without a majority of the Commissioners is contrary to the provisions of Article 88. —10
63. The principle of impartiality in the conduct of elections as captured in Article 81 (e) (v) is to the effect that the elections must be conducted without any side being favoured by the independent body vested with the responsibility of conducting the elections.
64. That the 2nd Respondent and a majority of the members of the 1st Respondent have taken diametrically opposite positions on the conduct of verification, tallying and declaration of results in the 2022 presidential elections thereby undermining the constitutional principle of impartiality of the body vested with responsibility to conduct the elections. —20

65. The Chairperson and four commissioners have shown that they were not impartially conducting the elections. The independent body vested with responsibility to conduct the elections did not come up with a neutral and impartial result of those elections.
66. To hold the declared outcome of the elections as announced by one person to the exclusion of the majority of the Commissioners violates this principle.

Substantive non-compliance, irregularities and improprieties

Multiple Illegalities in the purchase, testing and deployment of electoral technology

67. In so far as IEBC's deployment of technology in voter identification (without a backup system) deprived voters of the right to vote the same is unconstitutional and violates Article 38, 81, and 138. — 10
68. The 1st and 2nd Respondents failed to procure and deploy appropriate technology that would facilitate the constitutional provisions for the conduct of free, fair, transparent and accountable elections.
69. The 1st and 2nd Respondents set out to procure and deploy technology that would not facilitate the exercise of free and fair elections, and this can be seen in their conduct in handling technology in the period from the 2017 general elections to the 2022 general elections.

70. Section 44 (1) of the Elections Act requires the 1st respondent to establish “*an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.*”
71. Apart from failing to provide a secure integrated electronic electoral system that fulfils all the statutory requirements set out in this section, the 1st Respondent violated virtually all provisions governing the deployment and use of Electoral Technology in elections.
72. Prior to this, the 1st Respondents own internal audits and external audits conducted on the technological deployments by the 1st Respondent all confirm deployment of a weak electoral technology whose cumulative impact was to affect the exercise of the franchise of the people of Kenya
73. **Table 2** below itemises the violations of technological breaches committed by the 1st Respondent that affected the verifiability, accountability and transparency requirements of the presidential elections;

Table 2: Itemisation of Violations

Provision	Obligation: IEBC to...	Violation	Effect
Section 44(2)	...develop a policy on progressive use of technology	Policy was developed but not implemented in 2017 and there is no public information about 2022	Weak framework for the management and use of technology including its security and integrity

		(see KPMG Audit Report 2017)	
44(3)	...ensure that that technology deployed is simple, accurate, verifiable, accountable and transparent	Electoral technology deployed since 2013 has been neither simple nor transparent, nor verifiable nor accountable.	Opacity in elections which generates doubts and lack of trust in elections and has done so successively in 2013, 2017 and now in 2022.
44(4)	procure electoral technology in an open and transparent manner at least 120 days before the election	Procurement of electoral technology has been invariably late, corrupt and beset with difficulties (see Auditor General Special Audit Reports for 2013 and 2017 Elections)	Has institutionalised procurement corruption at the IEBC and leaves it unclear whether the right equipment has been bought at all.
	... test, verify and deploy such technology at least 60 days before the election	The IEBC invariably conducts performance testing (which the technology invariably fails) but never conducts- at least not publicly other critical tests such as: a) Acceptance testing – These are tests carried	Without these other tests, voters, political parties and other stakeholders have no way of satisfying themselves that the technology in place can ensure an election that meets the constitutional and statutory standard of simple, accurate, verifiable, accountable and transparent. As the German Constitutional Court stated in BVerfG,

		<p>out before delivery whose results should be available for review by stakeholders</p> <p>b) Stress-testing – These are tests to assess the stability of the system that involve a determination whether it can operate at the limit of its operational capacities.</p> <p>c) Security testing – This involves establishing whether the system can protect the data as intended</p> <p>d) Usability testing – This is to determine how real users interact with the system</p> <p>e) Source-code review - This is meant to help both the IEBC and stakeholders review</p>	<p>Judgement of the Second Senate of 3rd March 2009-2BvC-, paras.1-166- if technology makes an election unverifiable, it is unconstitutional.</p>
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		and rectify any software mistakes.	
44(5)	Make regulations for		
	...transparent acquisition and disposal of electoral technology	If the regulations have been made, they have not been followed (see Auditor General's Reports 2013 and 2017)	Electoral technology has never been acquired transparently in Kenya
	... testing and certification of technology	Testing is inadequate and insufficient to guarantee the integrity, robustness and security of the system whether the regulations have been made or not	Technology has failed, in total (2013) or in part (2017) or has been hacked (2022) thus undermining both the integrity of the data and the final result.
	...mechanisms for system audit	The voters' register has been audited twice but the integrated electoral management system has never been audited.	The audit of the voters register in both 2017 and 2022 indicates the electronic platforms on which this database rests has serious and systemic defects.(KPMG audit reports for 2017 and 2022)
access to electoral system software source code	Source codes have never been made available so the vulnerability of the system to hacking or the presence	Not easy to determine effect but the problems experienced with hacking indicates an underlying software

		of software glitches and failures is unknown.	vulnerability (affidavit by a technical person)
44(A)	... institute a complementary mechanism that is simple, accurate, verifiable, secure, accountable and transparent	The court mandated a complementary mechanism consisting of the printed manual register but in some stations the IEBC instructed presiding officers not to use it.	In a number of polling stations there were only KIEMs kits (no complementary mechanism) In some of these some voters were turned away. In other polling stations, there were manual registers but POs had been instructed not to use them. The effect of the two points was substantial voter suppression.

Breach of duty to publicise the KPMG audits of the Voters' Register

74. Section 27(1) of the IEBC Act requires the IEBC to “publish and publicise all important information within its mandate affecting the nation.” Where elections are concerned nothing is of greater importance than the integrity of the Register of voters.
75. Section 8A (1) of the Elections Act empowers the IEBC - at least six months before a general election- to engage a professional reputable firm to conduct an audit of the Register of Voters in order to a) verify the accuracy of the Register; (b) recommend mechanisms of enhancing the accuracy of the Register; and (c) update the register.

76. The provisions on audit were introduced as part of the 2016 Electoral reforms, following the many questions and concerns about the register of voters raised by the 2013 elections. The point of a periodic register is as a mechanism for providing assurance to the IEBC – and more crucially to the voter- that the register has integrity. On this view, the accuracy of the register is crucial to the right to vote.
77. Any information that shows defects and lack of integrity in the register is information needed to exercise a right in terms of Article 35(1)(b). Under that article, every citizen has a right to access information held by the state. However, and most important for the purpose of this election, any information in an audit conducted under section 8A of the elections act falls squarely under Article 35(1)(b) of the constitution and section 27(1) of the IEBC Act. Article 35(1)(b) gives every citizen the right to access “information held by another person and required for the exercise or protection of any right or fundamental freedom.”
78. The 1st Respondent failed to release the totality of the KPMG Audit Report 2022 which even from the excerpts released confirmed the ICT’s system's exceptional vulnerability to hacking and manipulation.
79. The 2017 audit by **KPMG** found an electoral system without integrity and characterised by lack of accountability, as follows (see copy of the 2017 and a summary of the 2022 Audit Report)

Negligent failure to remedy glaring defects and weaknesses in critical databases since 2017

- 80. The irresistible inferences from the two audit reports is that the register of voters- and by implication the electoral technology deployed by the 1st Respondent has no integrity; it is managed by the 1st Respondent in an extremely casual and unprofessional manner; it is insecure and extremely vulnerable to attack.
- 81. The two audit reports demonstrated discloses wanton recklessness and gross negligence in the management of critical electoral infrastructure by the IEBC;
- 82. **The 2017 Audit: When KPMG audited the Register of Voters in 2017 it made the following findings:**

The Architecture and integrity of the system had no integrity nor was it secure: KPMG found an opaque system characterized by:

- ✓ inadequate authentication and testing and insufficient auditability.
- ✓ The 1st Respondent had an ICT policy but this had not been approved;
- ✓ the database controls and infrastructure security were defective;
- ✓ the ‘security governance framework’ was weak and exposed the Commission’s databases to key risks;
- ✓ the 1st Respondent did not have adequate continuity controls over the Register of Voters;
- ✓ network connections between the head office and the regional offices lacked redundancy;

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- ✓ system changes were not strengthened with ‘user acceptance testing’
- ✓ the contract signed between 1st Respondent and Morpho SAS for provision of “Biometric Vendor Support and Maintenance Services” was not backed by sufficient ‘user acceptance documentation’ which created the risk that changes could be made to the functionality of the system without the 1st Respondent having an inbuilt ability to track whether these were aligned to its requirements, a central element in accuracy. (For example, though the 1st Respondent had asked Morpho to provide additional modifications to include the national ID card as a unique primary field with its own validations as well as a separate unique field for the Kenya passport, those changes had not been done at the time of the audit)

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Rogue Management of the RoV database and the Technology

83. In addition to lack of integrity and poor security, the administration of the 1st Respondent’s system was so defective and so negligent as to border on gross incompetence. The Audit Reports disclosed that;

- ✓ KPMG was not shown any of the forms granting Returning Officers and Administrators access to the BVR system. In some cases, Returning Officers were not mapped onto their constituencies at the database level.

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- ✓ The datacenter fire alarm and suppression system was faulty: one out of three Uninterrupted Power Supply batteries meant to ensure the system works in cases of power outages was not working. Though the operating temperature recommended by the vendor for the UPS was in the range of 16-18 degrees Celsius, the temperature readings on the ACs in the datacenter on one of the audit days was 28 degrees Celsius and on a second AC, 37 degrees Celsius. KPMG observed that the high temperatures had caused two of the four ACs to malfunction on the weekend leading to May 1, 2017.

- ✓ The audit could not establish whether, in fact, the IEBC ICT manager ever reviewed the logs of activities performed by users: he said performed such reviews on an ad hoc basis. — 10

- ✓ The system Access Revocation Procedures were weak and hardly enforced. There were, for example, system accounts for staff who had already left IEBC that showed logs long “after their last working day at the Commission.” One officer whose last working day was September 1 2014 had a last system log dated April 1, 2015, that is, 447 days after the last date on which her access should have been revoked.¹ Another officer left the Commission on January 12 2015 but had a last system log with a date of 29th March 2016, that is, 442 — 20

¹ An officer named Florence. See KPMG, Independent Audit of the Register of Voters at p. 156

days after the last date on which his access should have been revoked.²

- ✓ Though there were clear stipulations permitting Returning Officers to only have access to and make changes in Constituency Registers onto which they are mapped in the Register of Voters' database, there were instances of a returning officer being linked to two constituencies³; another was mapped onto a constituency in which a different person was named as the returning officer⁴ and there were instances of which constituency coding was duplicated and each of the codes mapped to different returning officers.⁵

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System vulnerabilities:

- 84. As a consequence of lack of integrity and poor management the 1st Respondent's databases were found to be dangerously exposed and vulnerable to attack. The Audit report found the following;

² An officer named James. See KPMG, Independent audit of the Register of Voters at p. 156

³ See p. 157 KPMG, Independent Audit of the Register of Voters, regarding a Returning Officer named 'msimiyu'.

⁴ See p. 157 KPMG, Independent Audit of the Register of Voters, regarding Bomet Central (which was duplicated and then coded as both as 'bometcentral' and 'bomet central' where the constituencies were mapped to a returning officer with user IDs 'drono' and 'DRono' but whose returning officer, gazette on 16th January 2017 vide gazette notice no. 396 of that date was one Emurua Dikirr. — 20

⁵ See p. 157 KPMG, Independent Audit of the Register of Voters regarding Ainamoi Constituency which was duplicated with two different constituency codes with each mapped to a returning officer with two user IDs 'iruto' and 'jngeno'.

- ✓ At the administrator level, the system had obvious lapses: the Oracle System that IEBC used allowed high-level administrator accounts with default passwords which should be disabled except two (for system processing). When these accounts are left open, they allow unauthorized sessions.

- ✓ KPMG found that three of default administrator level accounts at the IEBC were open and that contrary to normal practice, the passwords for these accounts had not been changed after then initial set up which made it possible for an authorised but rogue employee to use the default account passwords to add or remove voters records and to quit the system without leaving a trace, concealing the unauthorised changes.

- ✓ The Register of Voters' database was found to be susceptible to a Transport Network Substrate poisoning attack. That means that unauthorised data sources- both external and internal to the IEBC - could be configured to transmit data to the IEBC databases, in effect allowing an unauthorised person- inside and outside IEBC- to add, amend or delete the voters' records.⁶

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⁶ See p. 161 KPMG, Independent Audit of the Register of Voters.

- ✓ The settings within the database permitted an administrator to “clone another user’s access rights”, giving such administrator accounts ‘excess privileges’. The implication is that an administrator can clone another user’s access rights, make unauthorised changes to the Register and having done so revert to their own privileges, thereby concealing the irregular and unauthorised access.

The 2022 Audit:

85. When KPMG audited the Register of Voters in 2022 it made findings that were adverse to the integrity of the voter register. Amongst the identified systemic failures are;

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86. Malafides in the conduct of audit: The overall impression one gets from the available summary of the 2022 audit report is the 1st Respondent’s extreme bad faith in the way it went about executing it.

- ✓ To begin with even the 1st Respondent truncated the summary to conceal all the findings of the Report.
- ✓ In terms of the audit itself, there are obvious poor corporate governance practices:
 - Sometimes information requested by the auditors was not provided; a meeting was sought with Smartmatic (the system

vendors) but this was not facilitated⁷ before the final report was submitted;

- Information needed to assess the integrity of the system by reviewing access controls was provided on the eve of the auditors' reporting date⁸;
- The Register of Voters containing biographic data- but not biometrics- was only made available to the auditors on 2nd June 2022, a mere two months to the election with the biometrics being handed over on the 7th of June, 2022;
- The register of voters given to the auditor did not -at least by the 8th of June- include changes that the IEBC had already made to the Register over that period which the audit stated would 'have a material impact'⁹;
- The voter verification exercise concluded on the day the register was given to the auditors meaning that the findings of the audit would end up- like in 2017- being purely for archival purposes rather than for strengthening the integrity of the Register.

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⁷ See Audit Report p. 25

⁸ See p. 25 Audit Report

⁹ See Audit Report p. 18

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87. The key findings of the 2022 audit were as follows:

Key biographic failures and errors

- a) There were **481,711** records with duplicated or blank identity cards or passport references (30% of these- 144,674 had not been deactivated by the date of the final audit on June 2022); a total of 4,757 individuals who had registered more than once(only 24% of these had been deactivated by the date of final audit); **164,269** records with invalid document reference numbers in the Register of Voters when compared with the National Registration Bureau (only 11% of these had been deactivated by the date of the final audit) and **246,465** records in the Register who are in the list of deceased persons provided by the Civil Registration Service. — 10
- b) The 481,711 records were those discovered by a sampling. Sampling databases for duplicates generally captures only a fraction of the duplicates, so the vulnerability of the register is fragile on a larger scale if the whole register were to be subjected to an audit.
- c) A review of the period 2017-2022 revealed- as the 2017 audit had revealed- major weaknesses in key controls, including the following with regard to the transfer of voters:

- i. Transfers of voters from one voting area to another had been done in the system but the source documents on which such transfer should be based could not be found¹⁰;
- ii. Voters had been transferred without their knowledge or approval;¹¹ 1,368,604 inter-county and inter-constituency transfers showed ‘trends of irregular voter transfers’;¹²
- iii. The auditors found that the IEBC’s own Quality Assurance Review of Voter Transfer had ‘null IDs’, IDs with Alphabets and Duplicate IDs.
- iv. Of most concern, in the final audit, 460,546 records had identical IDs and name

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Lack of System Integrity and Data-base Security

88. There were serious gaps in the IEBC’s new Voter Registration System, that is to say, the Automatic Biometric Information Systems (ABIS); the Biometric Duplication System (BDS) and the Identity Management System I(IDMS) as well as the voter update and register generation system. Among these weaknesses were the fact that the Registration

¹⁰ See Commission Secretary’s Copy, Independent Audit of the Register of Voters, Final Audit Report, 16th June 2022 at p. 23

¹¹ Id at p. 23

¹² Id at p. 23

Officers had elevated privileges in IDMS so that they could effect the transfer of voters; change voter particulars or deactivate deceased voters. However the audit found that:

- a. Unaccountable generic user accounts: Constituency registration officers' user accounts in IDMS were not allocated named users but were instead given the constituency names. Such generic user accounts weaken accountability because they cannot be attributed to an individual "with a reasonable level of assurance."¹³
- b. Assignment of user accounts to unmandated officers: Though the update of the Register of Voters was the role of Registration officer, ROs, there were 14 non-ROs User Accounts, that had been granted voter update privileges and 11 active generic accounts in the Automatic Biometric Registration System Application and 2 ABIS users with the same login ID. — 10
- c. Poor user certification and weak access review: At the time of audit, IEBC did not have an "access recertification and user activity review process" which raised KPMG's concern that unauthorised users may process transfers, change voter particulars or deactivate voters in the system. However, IEBC rejected the auditors request to be provided with an extract of the log of user activities in IDMS and ABIS so KPMG was "unable to report on the nature of the activities carried out by the users in the ABIS and IDMS systems."¹⁴ — 20

¹³ Id KPMG 2022 Audit Report p. 24

¹⁴ Id at p. 24

d. Lack of effective controls on access to critical databases: The IEBC frustrated audit of access controls to critical databases by declining to provide information requested by the auditors and failing to facilitate meetings with Smartmatic, the system vendors. Even with such obstruction, the auditors found that:

- ✓ Audit trails on the IDMS were not activated;
- ✓ Audit trails on the ABIS database were only available from the 9th of June 2022 even though User accounts on the ABIS application had been created since the 11th of April 2022, two months earlier; — 10
- ✓ There were 7 generic active accounts in the IDMS database, 5 of which had log-in activity between 24th May and 9th June 2022.
- ✓ There were 6 generic accounts on the ABIS database.
- ✓ One User on the IBIS database, ironically named Abis, had been granted privileges to 'delete', 'insert', 'trigger', 'truncate' and 'update'. In the meantime, the default user, Postgres, had not been deactivated. Postgres accounts had super user access to the database.
- ✓ Database passwords had been set inconsistently with good password policies so that passwords were to expire after 180 days rather than 60. — 20

89. In its comments on the 2022 audit report the 1st Respondent claimed to have fixed many of the problems identified by the auditors. There has been no public or privately shared information to political parties confirming the fixed considering in particular that;

- ✓ Some of the key issues raised by the auditors relate to the dangers of unauthorised access to critical data-bases. By the time the 1st Respondent came round to fixing the problem- if indeed these have been fixed- the databases had been exposed to manipulation and therefore compromised.

- ✓ Many of the security lapses in database management are similar to the very ones identified by the same auditors in 2017. That the same failures and lack of integrity characterised the system in 2022 shows that the 1st Respondent took no remedial measures in the intervening 5 years. There is no reason to believe that they have fixed in two months problems that they did not fix in 60 months.

- ✓ The systematic nature of the technology vulnerability, especially the multiple generic accounts and super user access privileges for some of those generic users indicates a policy of allowing the unauthorised to gain access to the commission's data-bases.

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90. The 1st Respondent has never conducted a deduplication of the voter register to remove the duplicates found after the audit. To achieve a deduplication of the register would be a biometric verification exercise which the 1st Respondent did not undertake nationally after the release of the Report.
91. A biometric database cannot be deduplicated without a biometric verification exercise. Biometric deduplication is a critical anti- fraud activity that ensures that a party has not created a duplicate account.
92. Biometric identity deduplication matches biometric records of voters with previously stored biometric data. Without deduplication nothing stops a person from voting multiple times or a user with rogue access to critical databases from voting on behalf of voters whose records are duplicated.
93. Equally important, even if biometric verification had been done, deduplication is a massive database operation. Each voter has 10 fingerprints so in a database of 22 million voters, there are 220 million finger-print data references against which to check each of the 10 fingers. To verify the fingers of one voter entails 2.2 billion checks which the 1st Respondent never undertook after the Audit findings.
94. The sum total of the technological glitches enumerated above in the Petition is that the 1st Respondent deployed a vulnerable and weak technology in the elections that could not facilitate the democratic exercise of the franchise of the people of Kenya.

95. That the 2nd Respondent failed to open the voter register for inspection as required under Section 6 of the Elections Act thereby proceeding to conduct the elections that had duplicitous voters whose cumulative number as determined by the KPMG Report 2022 was more than the declared margin of victory between the announced 1st and 2nd runners up and way above the margin by which the announced winner crossed the 50 % plus one vote needed to be declared a winner. The determined figure of duplicate persons in the register was 487,711 hence it is way above the declared margin of victory.
96. Section 6A(1), the Elections Act requires the 1st Respondent to conduct an exercise to verify the voters biometric data. The Act requires the exercise to be done **“not later than sixty days before the date of a general election.”** — 10
97. For this to happen, the IEBC must keep the Register of Voters open for thirty days so that the public can verify their biometrics at their respective polling stations. The biometric verification did not happen, which means that the IEBC did not, as required by section 6A(2) revise the Register to 1) remove duplicate records and b) take account of any changes in the voters particulars that may have occurred. In fact sixty days to the election the IEBC was still finalising the audit of the register.
98. The KPMG Report 2022 showed that **481,711** records were those discovered by a sampling. Sampling databases for duplicates generally captures only a fraction of the duplicates, so the vulnerability of the register is fragile on a larger scale if the whole register were to be subjected to an audit. — 20

2ND RESPONDENT'S IMPUNITY HAS IRREPARABLY DAMAGED THE IEBC'S INTEGRITY AND ABILITY TO DELIVER AN HONEST ELECTION


99. The 2nd Respondent's decision to declare Mr. William Samoei Ruto validly elected president of Kenya without complying with article 138(3)(c) of the Constitution; sections, 6, 39(1), 44 of the Elections Act, the Court of Appeal's decision in the Maina Kiai case and in imperious disregard of the IEBC own decision procedures (over the objections of a majority of the commissioners) is just one more episode in a tenure characterised by opacity and wanton disregard of the laws of Kenya.

100. The 2nd Respondent has led a Commission accountable to no one: not to the judiciary, not to parliament and most important not accountable to the people of Kenya. 

The evidence of the 2nd Respondent's impunity is as follows:

Disobedience and contempt of court decision and orders

101. In the course of the 2017 presidential petition in Odinga and another v. the Independent Electoral and Boundaries Commission and 6 others, the Supreme Court ordered 'after strenuous objections' from the 2nd Respondent that the petitioner be granted 'access' to the IEBC database. Even so, the 2nd Respondent disregarded the court order as follows:

102. The 2nd Respondent's compliance with the court order was malicious and dishonest: He agreed to provide the petitioners with all scanned and transmitted forms 34As and 34Bs from the all the polling stations but did so only two hours to the close of court proceedings 

and with 'Read Only'¹⁵ rights. Neither the court nor the parties could use the information in the time left;

- a) The 2nd Respondent failed to provide information on internal firewall configurations: the court appointed experts disagreed with the IEBC argument that providing such information would expose the IEBC databases and affect the vulnerability of the system. Without the firewall information the court was seeking, it was impossible to tell whether the system was or was not hacked;
- b) The 2nd Respondent refused to provide certified copies of certificate of penetration tests: these certificates were meant to show what penetration tests the IEBC had conducted prior to the election to provide assurance that the system was secure. Rather than provide the documents ordered, IEBC – contrary to Regulation 10 of the Elections (Technology) Regulations, 2017 submitted uncertified documents and certificates. Without this information the security and integrity of the system could not be determined.
- c) The 2nd Respondent disregarded the order to provide the specific GPRS location of each KIEMS kit: Though the order was specific what the court required, the 2nd Respondent knowingly and misleadingly provided information he was never ordered to provide: the GPS location of the polling stations. Without this information the court could not tell

¹⁵ See Paragraph 268 of Odinga and another v. The Independent Electoral and Boundaries Commission and 6 others.

whether there were rogue KIEMs kits or even who had access to and what they were doing with the Kits that had not

- d) The 2nd Respondent only partially complied with the order on deployed and undeployed KIEMs kits: the 2nd Respondent was required to provide information on all KIEMs Kits not merely those deployed. The information he provided on whether the kits had been deployed or not was not comprehensive.
- e) The 2nd Respondent was ordered to but failed to provide Technical Partnership Agreements for IEBC Election Technology System that included a list of technical partners, their access rights and a list of Application Programming Interface, APIs, for exchange with partners. The documents that he supplied excluded the list of APIs without which the court experts could not determine what kind of activities had taken place.
- f) The 2nd Respondent was ordered to but failed to provide the petitioners with the log in trails of users and equipment into the IEBC servers, the log in trails of users and equipment into the KIEMs Database Management System and the Administrative Access log into the IEBC public portal.
- g) The 2nd Respondent was ordered to release particular information he consistently provided different and alternative information which if

adopted would have been useless or misleading indicating an intention to deceive. Instead of providing log-in trails he provided pre-downloaded logs in a hard disk and evenso refused to disclose their source. Ordered to provide access to the petitioner, he gave them Read-only access, granting partial live access only two hours to closure of court proceedings. He provided general documents on Technical Partnership Agreements for IEBC Election Technology System and withheld the list of APIs that would have revealed any unauthorised access to the system. The Supreme Court was completely dissatisfied with the 2nd Respondent. It described his conduct as “*contumacious disobedience*” of a court order saying that the exercise – of ordering access to IEBC’s databases- “therefore a complete violation of the court order and access was not useful to the parties or the court.” Reduced to its essentials the court conclusion is in effect: a) the IEBC and the 2nd Respondent were in contempt of court and b) his actions- and those of the IEBC- had defeated the ends of justice or interfered with the administration of justice.


Grave findings of corruption and incompetence by the Public Accounts Committee


103. In 2019 the public Accounts Committee issued its “Report on the Examination of the Report of the Auditor General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017.”¹⁶ The audit revealed gross failures including violation of the Leadership and Integrity Act; the Procurement laws

¹⁶ See The Public Accounts Committee, Report on the Examination of the Report of the Auditor General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017

as well as Election Laws. The PAC's finding shows a commission and a chairperson that cannot be trusted – even on the most lenient standard- to run an honest election.

104. **Breach of Leadership and Integrity act:** The PAC found that contrary to section 16(1) of the Leadership and Integrity; sections 42 of the Anti-Corruption and Economic crimes Act, section 12 of the public officer ethics act and contrary to paragraph 3 of the code of conduct for members of the Commission contained in the Fourth Schedule of the Independent Electoral and Boundaries Commission Act,
105. The 2nd Respondent's former law firm, Cootow and Associates, was not only pre-qualified but was also contracted to provide legal services to the Commission. The 2nd Respondent was the chair of the IEBC's legal committee which was in charge of ~~considering~~ considering issues of legal representation and fees. Decisions arising from the Committee would be ratified in plenary meetings which the 2nd Respondent also chaired.
106. The PAC noted that “despite being aware that his former law firm had been contracted, the 2nd Respondent failed to take steps (which he ought to have taken in the first meeting of the commission or as soon as he became aware) to manage the potential conflict of interest in relation to his former law firm.
107. The PAC did not accept the 2nd Respondent's defence that he was not conflicted because he was not involved in the pre-qualification of his former law firm and that he had resigned as partner.

108. **Incompetence in overseeing the affairs of the IEBC:** The chairman is not the CEO of the IEBC but he has a critical oversight role so that he can communicate with stakeholders and initiate remedial measures.
109. The 2nd Respondent did not provide such leadership in 2017 and he has not done so in 2022. In its audit of the 2017 election the PAC said that the evidence before it depicted “a commission running on auto-pilot. The Commissioners, individually and collectively, failed to exercise oversight as envisioned under section 11(A)(a) of the Independent Electoral and Boundaries Commission Act, 2011, thereby plunging the institution into a crisis.”
110. The PAC report concluded that the evidence evinced “an inexcusable level of  incompetence given the importance of their role in the electoral process.” Three commissioners who ran that election were also involved in the 2022 election. The four new commissioners that were not involved in 2017 have disagreed with those three that were. The illegalities, incompetencies and failures of that Commission are detailed in the PAC report.
111. The upshot of the PAC Report alluded to herein is to demonstrate that the 1st Respondent suffers systemic failures that undermine the facilitation of free fair and credible elections as required under the Constitution and the Supreme Court should take note of the systemic failures.

Engaging in Corporate governance practices designed to defeat accountability, verifiability  and transparency

Opaque management of the Audits of the register:

112. The 2nd Respondent has overseen two audits of the register but
In both instances he has taken steps to ensure that the audits would not serve their statutory function of verifying the voters' biometrics and assuring the country of the integrity of the register. Ensuring that the audit itself is based on solid information is part of discharging that duty.
113. The 2nd Respondent took active steps to undermine the audit process and remedying the deficiencies identified. This is in a manner surmised below;
- a. Failing to provide information requested by the auditors. For example the auditors requested a meeting with Smartmatic (the system vendors) but this was not facilitated¹⁷ before the final report was submitted;
 - b. Providing critical information so late that it could not be incorporated into the audit. For example, information needed to assess the integrity of the system by reviewing access controls was provided on the eve of the auditors' reporting date.¹⁸ The 1st Respondent refused to provide this very information to the court in 2017.
 - c. Delaying the submission of the register with biometric information to the auditors. The IEBC first provided the Register of Voters containing biographic data - but not biometrics - on June 2, 2022, a mere two months to the election, handing in the one with the biometrics on June 7, 2022;

¹⁷ See Audit Report p. 25

¹⁸ See p. 25 Audit Report

- d. Providing the results of the voter verification exercise too late, ensuring thereby that the findings of the audit would end up- like in 2017- being purely for archival purposes rather than for strengthening the integrity of the Register.

Criminal activities that undermined the electoral process involving elections materials

114. It is the Petitioners' case that in the run up to the general elections, officers of the Government of Kenya publicly released information that they had arrested foreign nationals with election materials thereby putting into doubt the credibility of the elections.
115. On or about 28th July, the Independent Electoral and Boundaries Commission and the Directorate of Criminal Investigations (DCI) announced in a press statement that they had peacefully resolved the stalemate surrounding the arrest of three Venezuelans who were found in possession of electoral materials. -P
116. The arrest of the Venezuelan nationals raised the following matters of potential criminality:
 - a) Allegations that unauthorised persons had access to and were handling electoral material for the 2022 elections.
 - b) Allegations that the Venezuelan nationals were travelling on expired passports which, if true, is both an immigration offence and a security risk.

- c) Allegations that there had been established and there were now in existence illegal methods of communication between the IEBC and the Venezuelans.
- d) Allegations that the Venezuelans were in a secretive and unacknowledged arrangement involving the management of elections 2022.

117. The way the issues surrounding the Venezuelans were handled is questionable and did not meet the accountability and transparency requirements in the conduct of elections as provided under Article 81 of the Constitution. The following questions have remained unanswered:

- a) What did the investigations by the DCI on the Venezuelan nationals reveal?
- b) Were crimes against the Elections Act committed? -10
- c) What is the status of the investigations?
- d) While this matter was of utmost public interest, which its initial management acknowledged, it was eventually shrouded in secrecy and disappeared from the public discourse. Why was this the case?
- e) Given what is now known about these elections, what role, if any, did the Venezuelan nationals play in the elections and to what effect?

- f) The 2nd Respondent came out in defence of the Venezuelan nationals, what did he know about them and why was it his place to defend them?

118. It is imperative that the national government agencies that were part of investigating the engagement of the foreign nationals in the elections provide a response of their investigations for a fair determination of the dispute and to assess if prima facie criminal acts had been committed against the electoral infrastructure.

Cumulative effect of all the cited unconstitutional, unlawful acts and irregularities

119. The sum total of the adverse findings by various bodies on the integrity of the electoral processes and deployed technology point that the infrastructure that the 1st Respondent was operating under to conduct the elections were so contaminated and compromised that it could not facilitate the exercise of the free franchise of the voters in the manner required under the Constitution. — 10
120. The role of technology is to make the election simple, transparent, verifiable and accountable" and that if technology as it did in the presidential elections the same undermined the principles of the Constitution and cannot stand.
121. The vulnerability of the technology deployed in the presidential elections ended up confirming that whoever had control of the technology would determine the results of the elections; IEBC or a Hacker is the one that decides the result of Kenyan elections - transferring sovereignty from the people of Kenya to 'little digital citizens who live inside

IEBC's Machines; **the people of Kenya had their say in the elections but technology had its way.**

122. That there a minimum of **481,711** duplicate voters were in the register is a confirmation that the number of persons who were not entitled to participate in the presidential elections were maintained in the register affected the outcome of the presidential elections in the sense that the declared margin of victory and passage of the threshold of 50 % plus one of the votes needed is less than the number of unqualified persons who were in the register.
123. In totality, the manner in which the Presidential Election was conducted, administered and managed by the 1st Respondent as to contravene and violated **Articles 10, 38, 81, 86, 88 and 138 of the Constitution of Kenya and Sections 6, 39 and 44 of the Elections Act** and the **Second Schedule** to the Independent Electoral and Boundaries Commission Act.
124. The effect of the foregoing is that the Presidential Election and the resultant declaration of the 3rd Respondent as the winner of the Election subverted the will and intentions of the people of Kenya is unconstitutional, invalid and a nullity and should be declared as such.

D. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:

125. The following are the questions or issues for determination as considered by the Petitioners:
- a) **Whether the Presidential Election was conducted in accordance with and in compliance with the Constitution, written law and national legislation;**

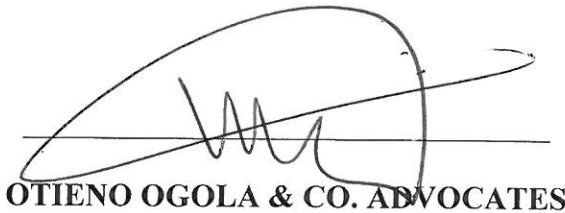
- b) Whether the 1st Respondent's non-compliance with the Constitution and the Law in the conduct of the Presidential Election affected the conduct, result, and validity of the Presidential Election announced by the 2nd Respondent;
- c) Whether the non-compliance, irregularities and improprieties affected the validity of the result of the Presidential Election announced by the 2nd Respondent;
- d) Whether the 2nd Respondent can usurp and singularly perform the duties and functions of the 1st Respondent;
- e) Whether the 3rd Respondent was validly declared as the president elect; - P
- f) Whether the 2nd Respondent has repeatedly violated the Constitution and should be barred from presiding over the fresh presidential elections;
- g) What are the appropriate orders to be made by the Court?

E. RELIEFS SOUGHT IN THE PETITION

- a. Immediately upon the filing of the Petition, the 1st Respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours;
- b. A declaration that the unconstitutionality, non-compliance, illegalities, irregularities and improprieties in the Presidential Election were substantial and significant that they affected the result thereof;
- c. A declaration that the Presidential election held on 9th August 2022 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;
- d. A declaration that the 3rd Respondent was not validly declared as the president elect and that ¹⁰ the declaration is invalid, null and void;
- e. An order directing the 1st Respondent to organise and conduct a fresh Presidential Election in strict conformity with the Constitution and the Elections Act;
- f. A declaration that the 2nd Respondent committed election irregularities, illegalities in the presidential elections and malpractices and a report to that effect be sent to the Director of Public Prosecutions;
- g. A declaration that a forensic audit of the electoral technology deployed in this election be conducted forthwith;

- h. A declaration that the 1st Respondent grants access to the Petitioners for a secured review of all KIEMs kits- deployed and undeployed in the 2022 general elections with full disclosures of their GPRS locations from the 8th of August to the 15th August 2022 or thereabouts;
- i. Costs be provided for;
- j. Any other orders that the Honourable Court may deem just and fit to grant.

DATED at **NAIROBI** this 22 day of **August** 2022.



OTIENO OGOLA & CO. ADVOCATES

FOR THE PETITIONER

DRAWN & FILED BY:-

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10

COPIES TO BE SERVED ON:

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NAIROBI

2. H.E. WILLIAM RUTO

NAIROBI

3. ATTORNEY GENERAL

NAIROBI

LODGED in the Registry at Nairobi on the _____ day **August** of 2022.

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REGISTRAR