

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko,
SCJJ)

PRESIDENTIAL ELECTION PETITION NO. E005 OF 2022

(Consolidated with)

PRESIDENTIAL ELECTION PETITION NOS. E001, E002, E003, E004, E007 & E008 OF 2022)

–BETWEEN–

RAILA ODINGA	}	1ST PETITIONERS
MARTHA KARUA		
JOHN NJOROGI KAMAU		2ND PETITIONER
YOUTH ADVOCACY AFRICA	}	3RD PETITIONERS
PETER KIRIKA		
KHELEF KHALIFA	}	4TH PETITIONERS
GEORGE OSEWE		
RUTH MUMBI		
GRACE KAMAU		
DAVID KARIUKI NGARI		5TH PETITIONER
OKIYA OMTATAH OKOITI	}	6TH PETITIONERS
NYAKINA WYCLIFE GISEBE		
VICTOR OKUNA		
JOHN MAINA		
JULIAH NYOKABI CHEGE	}	7TH PETITIONERS
JOSEPH MUTUA NDONGA		
SIMON MWAURA NJENGA		

–AND–

WILLIAM RUTO	1ST RESPONDENT
RIGATHI GACHAGUA	2ND RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION 3RD RESPONDENT
WAFULA CHEBUKATI..... 4TH RESPONDENT
JULIANA CHERERA 5TH RESPONDENT
IRENE MASIIT 6TH RESPONDENT
JUSTUS NYANG'AYA 7TH RESPONDENT
FRANCIS WANDERI 8TH RESPONDENT
PROF. ABDI YAKUB GULIYE 9TH RESPONDENT
BOYA MOLU 10TH RESPONDENT
ATTORNEY GENERAL 11TH RESPONDENT

–AND–

LAW SOCIETY OF KENYA }
ICJ KENYA }
JOHN WALUBENGO..... }
DR. JOSEPH SEVILLA..... }
MARTIN MIRERO } ***AMICI CURIAE***

JUDGMENT OF THE COURT

**(Pursuant to Rule 23(1) of the Supreme Court (Presidential Election
Petition) Rules, 2017)**

THE PRESIDENTIAL ELECTION OF 9th AUGUST 2022

A. INTRODUCTION

This Judgment is rendered pursuant to Rule 23(1) of the Supreme Court (Presidential Election Petition) Rules, 2017.

[1] Kenya is a sovereign multi-party democratic state whose foundations are firmly spelt in the Constitution. The Kenyan people's quest for electoral reforms since independence is well documented. That notwithstanding and even without going back to the pre-1992 era, every cycle of elections has been highly contested with the exception of 2002. This speaks to a background of distrust of the administration of our electoral process. Informed by this setting, Kenyans made a decision to vest the Supreme Court with the jurisdiction to determine questions regarding the validity of a Presidential Election under Article 140 of the Constitution. The reactions following the declaration of results of the Presidential Election of 9th August, 2022 shows that the Independent Electoral and Boundaries Commission (IEBC) has not yet garnered universal public confidence and trust in the internal management of the Commission and elections. On 15th August, 2022, six days after the General Elections were held, Mr. Wafula Chebukati, the Chairperson of IEBC announced the following results:

CANDIDATES	VOTES	PERCENTAGE
Raila Odinga	6,942,930	48.85
William Ruto	7,176,141	50.49
David Waihiga	31,987	0.23
George Wajackoyah	61,969	0.44

[2] Based on the aforesaid results, the Chairperson of the IEBC declared William Samoei Ruto, (the 1st respondent), the Presidential Candidate for the United Democratic Alliance Party, as the President-elect. This declaration precipitated a total of nine (9) Presidential Election Petitions filed before this Court to wit;

(i) Presidential Election Petition No. E001 of 2022 - John Njoroge Kamau vs. Wafula Chebukati and 3 Others

(respondents) and Raila Amolo Odingaa and 7 Others (interested parties).

- (ii) Presidential Election Petition No. E002 of 2022 - Youth Advocacy Africa & Another vs. IEBC & 12 Others.***
- (iii) Presidential Election Petition No. E003 of 2022 - Khelef Khalifa & 3 Others vs. IEBC & 3 Others.***
- (iv) Presidential Election Petition No. E004 of 2022 - David Kariuki Ngari vs. IEBC & 9 Others.***
- (v) Presidential Election Petition No. E005 of 2022 - Raila Amollo Odinga & Another vs. IEBC & 8 Others.***
- (vi) Presidential Election Petition No. E006 of 2022 - Moses Kuria & Others vs. Hon. Raila Amolo Odinga and 4 other interested parties.***
- (vii) Presidential Election Petition No. E007 of 2022 - Okiya Omtatah Okiiti & Others vs. IEBC & Others.***
- (viii) Presidential Election Petition No. E008 of 2022 - Juliah Nyokabi Chege & 2 Others vs. IEBC & 3 Others.***
- (ix) Presidential Election Petition No. E009 of 2022 - Reuben Kigame Lichete vs. The Independent Electoral & Boundaries Commission (IEBC), and Others.***

[3] Further, a total of twenty-four (24) interlocutory applications and one (1) preliminary objection were filed and determined by this Court. Two of the Presidential Election Petitions were struck out, that is, Presidential Election Petition Nos. E006 and E009 of 2022 for failure to meet the constitutional threshold as set out under Article 140 (1) of the Constitution.

[4] On 29th August, 2022 this Court also admitted three *amici curiae* briefs by the Law Society of Kenya (LSK), the Kenyan Section of the International Commission of Jurists (ICJ Kenya Chapter) and John Walubengo and 2 Others.

A. CONSOLIDATION OF PETITIONS

[5] Upon perusing and considering the issues raised in the remaining Presidential Election Petition Nos. E001, E002, E003, E004, E005, E007, and E008, the responses and the submissions filed thereto; this Court found that all the seven Petitions substantially raised similar issues and sought similar reliefs. Consequently, on 30th August 2022, this Court Ordered that the seven Petitions be consolidated and designated Presidential Election Petition No. E005 of 2022 as the lead file.

B. ISSUES FOR DETERMINATION

[6] From the consolidated Petition, responses and submissions filed thereto by all the parties, the Court crystallised the following issues for determination:

- 1. Whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results;***
- 2. Whether there was interference with the uploading and transmission of Forms 34A from the Polling Stations to the IEBC Public Portal;***
- 3. Whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and the Forms 34A issued to agents at the Polling Stations;***
- 4. Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa counties, Parliamentary***

elections in Kitui Rural, Kacheliba, Rongai and Pokot South Constituencies and electoral wards in Nyaki West in North Imenti Constituency and Kiwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition no. E005 of 2022;

- 5. Whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions;***
- 6. Whether the IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138(3)(c) and 138(10) of the Constitution;***
- 7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138(4) of the Constitution;***
- 8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election;***
- 9. What reliefs and orders can the Court grant/issue?***

[7] Having considered and deliberated upon the consolidated Petition, the attendant responses, submissions and the *amici curiae* briefs we now make the following determination:

(i) Whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results

[8] As noted in the introduction, lack of trust in the electoral system has endured in Kenya for a long time. This led to the introduction of electoral technology following the recommendations made by the Independent Review Commission on the General Elections held on the 27th December, 2007 (***Kriegler Commission Report***). The Report recommended integration of technology into Kenya's electoral processes for registration, identification of voters and transmission of results. These were enacted in Section 44 of the Elections Act, 2011. By this statute, IEBC is enjoined to adopt technology in the electoral process. As a consequence, the IEBC developed a technology known as Kenya Integrated Electoral Management System (KIEMS) making Kenya's election process hybrid as it employed both technology and manual processes.

[9] The 1st, 3rd and 4th petitioners in the consolidated Petition, challenge the technology used by IEBC during the 2022 General Election. They plead that the manner in which technology was deployed and utilized fell short of the prescribed constitutional and statutory standards. As regards the audit of the Register of Voters, they urge that IEBC, pursuant to its Elections Operations Plan, committed itself to conducting an audit of the Register of Voters by 31st March 2022. To the contrary, they allege, it only publicly availed the audit report on its website on 2nd August 2022, 7 days to the election.

[10] In this report, it was noted that the auditors established serious gaps and risks to the electoral process including; numerous cases of change of voting stations without knowledge or approval of the affected voters; grant of voter update privileges in IEBC IDMS to 14 user accounts unrelated to voter registration;

reducing the accountability of user activities in the Register of Voters; presence of 11 active generic accounts on the ABIS application and two ABIS users with the same log in identification; risking unauthorized system users possible transference; change of particulars or deactivation of voters in the system; IEBC's failure to set up access recertification and user activity review process; and IEBC's failure to respond to request by auditors for crucial information.

[11] On the integrity of the technology deployed, the 7th petitioner contends that in order to comply with Article 86 of the Constitution and Section 44 of the Elections Act, the technology deployed must be simple, accurate, verifiable, secure, accountable and transparent. On the simplicity of technology, the 7th petitioner contends that the KIEMS kit failed the test as they were not easily usable by ordinary citizens without expert knowledge. They further assert that IEBC was expected to procure and put in place a technology necessary for the conduct of the General Election at least one hundred and twenty (120) days before the election and ensure consultation with the relevant agencies, institutions and stakeholders.

[12] Furthermore, the petitioners allege that IEBC violated its constitutional duty by delegating the design, implementation and conduct of the KIEMS component of the election to a foreign company-Smartmatic International Holding BV (Smartmatic). As a result, IEBC's staff and the public did not have full comprehension of the KIEMS component. They conclude therefore that IEBC abdicated and surrendered its role to conduct elections to Smartmatic; and that IEBC vigorously fought any attempt to subject Smartmatic's activities to accountability and transparency including the safeguards required by Regulations 61(4)(a), 69(1)(d), (e)(iii) and 75(6) of the Elections (General) Regulations, 2012.

[13] In response, IEBC has submitted that the electoral system met the constitutional threshold; that all necessary information was accessed only by authorized persons; the information was accurate, complete and protected from

malicious modification either by authorized or unauthorized persons; it maintained an audit trail on activities related to information; and the information was available and could be authenticated through the use of various security features.

[14] In further response, IEBC contended that they engaged KPMG on 7th April 2022 to conduct an Audit of the Register of Voters, which was submitted on 18th June 2022. In addition, it issued a briefing on the Report on 20th June 2022, summarizing the thematic areas therein and disclosing its findings as well as actions taken to remedy the issues identified. It also conducted its annual audit in compliance with Regulations 11 and 12 of the Election (Technology) Regulations, 2017 and a Certification of Compliance issued to it on 3rd August 2022.

[15] IEBC relied on affidavits sworn by Michael Ouma, Moses Sunkuli and Marjan Hussein Marjan on 26th August 2022 to the effect that it published the interim report by KPMG on 8th June 2022 and embarked on remedial measures aimed at effecting the recommendations ahead of publication of the final report. It was asserted that it could not publish the full final Audit Report as doing so would compromise the integrity and security of the electoral technology system, considering the provisions of the Data Protection Act, which imposes a duty to protect the data of Kenyan voters.

[16] On the other hand, the 1st and 2nd respondents urge that even if there was failure of technology, it did not vitiate the result of the Presidential Election.

[17] Upon considering all the pleadings, submissions and the ICT scrutiny and Inspection, tallying and recount Report which fully examined the IEBC's Result Transmission System (RTS), we are not persuaded by the allegation that the technology deployed by IEBC failed the standard of Article 86(a) of the

Constitution on integrity, verifiability, security and transparency for the following reasons:

- (a) Whereas it is true that the KIEMS kit failed in 235 polling stations, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. This happened successfully in Kibwezi West Constituency and parts of Kakamega County.***
- (b) While the Audit Report was released to the public seven days before the 9th August election, the Register of Voters was used at the election without any apparent anomalies.***
- (c) Smartmatic was procured to provide the necessary technological infrastructure as IEBC did not have the capacity to do so. No credible evidence meeting the requisite standard of proof of access to the system by unauthorized persons was adduced by the petitioners.***
- (d) The Scrutiny Report prepared by the Registrar of this Court did not reveal any security breaches of the IEBC's RTS.***
- (e) IEBC successfully deployed a Biometric Voter Register (BVR) system which captures unique features of a voter's facial image, fingerprints and civil data, to register and update voter details across the country and in the diaspora. These features are unique to each voter.***
- (f) In compliance with Section 6A of the Elections Act, 2011, IEBC opened the Register of Voters for verification of***

biometric data by members of the public for a period of 30 days. Thereafter, the Register was revised to address issues arising from the verification exercise. KPMG then audited the Register and we are satisfied that the inconsistencies and inaccuracies identified during the Audit were successfully addressed.

(ii) Whether there was interference with the uploading and transmission of Forms 34A from the polling station to the IEBC Public Portal

[18] The 1st petitioner alleged staging, that a person who had access to the RTS, intercepted, detained or stored Forms 34A temporarily to convert or manipulate them before uploading them on IEBC's public portal. It is alleged also on 11th August, 2022 IEBC dumped over 11,000 Forms 34A on the public portal between 1101-1109 hrs.

[19] To rebut this allegation, IEBC and its Chairperson in their response dated 26th August, 2022 denied staging and unauthorized intrusion of the RTS. In that regard, they urge that every image of Form 34A was uploaded immediately after the transmitted result form was received as evinced by the time stamp. Similarly, the 1st respondent denied this allegation.

[20] It is our finding that—

(a) No credible evidence was presented to prove that anyone accessed the RTS to intercept, detain or store Forms 34A temporarily before they were uploaded onto the Public

Portal. The allegation that 11,000 Forms 34A were affected by staging was similarly not proved.

- (b) The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the Portable Document Format (PDF) format that eventually appeared on the Public Portal was sufficiently explained when IEBC demonstrated how KIEMS captured and transmitted the image of Form 34A. Accordingly we dismiss the allegation.***
- (c) During the ICT scrutiny it turned out that the transmission logs produced in the affidavit of Justus Nyang' aya were of no probative value.***
- (d) The Registrar's Report shows that the original Forms 34A from the contested polling stations which were allegedly intercepted were exactly the same as those on the Public Portal and the certified copies presented to this Court under Section 12 of the Supreme Court Act, 2011.***
- (e) Regarding the allegation that the integrity of the Public Portal was compromised, this was disproved by evidence of consistent attributes such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results.***
- (f) The RTS was configured on a Virtual Platform Network (VPN) and the SIM cards locked to a specific polling station.***

The server was also configured to accept results only from authorized and properly mapped KIEMS kit. In our view, the petitioners failed to produce credible evidence to the contrary.

(g) A review of some of the logs presented as evidence of staging showed that they were either from logs arising from the 2017 Presidential Election or were outright forgeries. In our considered view, there was no evidence of a man in the middle server configured to the IEBC's VPN network; and no evidence was produced to show that the Chairperson of IEBC and staff were part of the alleged conspiracy to stage the transmission process.

(iii) Whether there was a difference between Forms 34A uploaded on the IEBC Public Portal, the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the Agents at the Polling Stations

[21] On this issue, the 1st petitioners' case was that there was deliberate manipulation and tampering with Forms 34A as demonstrated in their affidavits to the effect that votes were being deducted from the 1st petitioner and added to the 1st respondent.

[22] To support this, the Petition is supported by the evidence contained in the affidavits of Martha Wangari Karua sworn on 21st August 2022, Celestine Anyango Opiyo sworn on 21st August 2022 and 28th August 2022, Arnold Ochieng Oginga sworn on 19th August 2022 and 28th August 2022, John Mark Githongo sworn on 21st August 2022 and 28th August 2022, Dr. Nyangasi Oduwo sworn on 21st August 2022 and Martin E. Papa sworn on 20th August 2022.

[23] On the other hand, IEBC and its Chairperson urge that all Forms 34A transmitted to the IEBC portal were not interfered with or manipulated. Further, that the Forms 34A signed at the polling station and issued to the agents were identical to the Forms 34A uploaded on the Public Portal and delivered to the National Tallying Centre (Bomas). It was contended that in any event, IEBC used the original physical Forms 34A to tally, verify and declare the Presidential Election results.

[24] The Court ordered scrutiny of the Forms 34A from the 41 polling station outlined in the affidavit of Celestine Opiyo to ascertain allegations of interference.

[25] It is our finding that—

- (a) There were no significant differences captured between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to Bomas that would have affected the overall outcome of the Presidential Election.***
- (b) No credible evidence was presented to support the allegation that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report by the Registrar of this Court confirmed the authenticity of the original forms in the sampled polling stations.***
- (c) The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed that all the Forms 34A attached to those affidavits and purportedly given to them by agents at select***

polling stations were significantly different from the originals, certified copies and those on the Public Portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective affidavits was not only inadmissible, but are also unacceptable. It has been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two have gone ahead to depone on matters that are not within their knowledge.

(d) This Court cannot countenance this type of conduct on the part of counsel who are officers of the Court. Though it is elementary learning, it bears repeating that affidavits filed in Court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this Court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

(e) Section 114 of the Penal Code states that:

“Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour.”

One of the most serious losses an advocate may ever suffer is the loss of trust of Judges for a long time. Such conduct amounts to interference with the proper administration of justice.

- (f) The contents of the affidavit of John Mark Githongo, which may contain forgeries, are dismissed for not meeting the evidential threshold. They contained no more than incredible and hearsay evidence. No admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. In fact, his two affidavits amount to double hearsay, and incapable of being proved at each layer.***
- (g) We turn to Form 34A for Gacharaigu Primary School which was sensationally presented by Julie Soweto, Advocate, to show that one, Jose Carmago, accessed the RTS and interfered with the result contained therein turned out to be no more than hot air and we were taken on wild goose chase that yielded nothing of probative value.***

(h) The KIEMS kit relating to Psongoywo Primary School which bore the same serial number with another was admitted by IEBC as an inadvertent manufacturer's error. We are also satisfied that the two kits had other identifying features that were markedly different including the time stamps and polling code. Nothing turns on that anomaly.

[26] Therefore to the question whether there was a difference between Forms 34A uploaded on the IEBC Public Portal, those received at the National Tallying Centre, and those issued to the candidates' agents at the Polling Stations, we have found none.

(iv) Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba Rongai and Pokot South Constituencies and electoral wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No. E005 of 2022

[27] It is common knowledge that IEBC postponed elections for various seats during the General Elections of 9th August, 2022 due to mix-up of ballot papers in the above named electoral units.

[28] It is the combined case of the 1st and 2nd petitioners that, in terms of Articles 136(2)(a), 177(1), 180(1) as read with Article 101 of the Constitution, the Chairperson of IEBC had no jurisdiction to postpone elections in those areas; that Section 55B of the Elections Act is inconsistent with the Constitution and therefore void to the extent that it purports to donate to IEBC power to postpone elections in the Constituency, County or ward contrary to the Constitution and the postponement undermined the conduct of free, fair and credible elections by

depriving the voters an opportunity to vote for all the candidates on the date stipulated by the Constitution. The petitioners further contend that, the postponement of elections had the overall effect of suppressing voter turnout in the electoral units in question which was prejudicial to them.

[29] Both the 1st and 3rd petitioners also believe that elections were deliberately postponed in Kakamega and Mombasa, Counties. It was alleged that these areas are considered to be 1st petitioner's strongholds, and as such, the postponement of elections worked to his disadvantage and handed a benefit to the 1st respondent.

[30] These assertions were denied by IEBC and its Chairperson. They however, admitted that they experienced confusion with the printed ballot papers and explained that they only discovered the mix-up on the eve of the Election when the ballot papers were being distributed to the polling stations; that as a practice, ballot papers can only be opened on the eve of the Election Day to avoid any mischief; and that by the time the mix-up was discovered, it was logistically impossible to print and replace the ballots papers in time for the election.

[31] For this claim to succeed, it must be demonstrated, first, that IEBC had no authority in law to postpone the elections and secondly, that the postponement was deliberate and calculated to suppress voter turnout so as to affect the result by reducing the 1st petitioner's overall votes.

[32] Section 55B of the Elections Act, 2011 provides for circumstances when elections can be postponed in a particular electoral unit including in cases of emergency.

[33] We are therefore satisfied that on the basis of the foregoing provision, that the 3rd respondent had the requisite power to postpone election in the Constituencies, Counties and wards in question.

[34] Concerning the allegation of voter suppression, we note that voter suppression is generally recognized as a political strategy which takes many forms but whose practical effect is ultimately to reduce voting by deliberately discouraging or preventing targeted groups of people from exercising their right to vote and thereby influence the outcome of an election. It therefore goes against the letter and spirit of Article 38 which guarantees every citizen the right to make political choices based on universal suffrage.

[35] Regarding this allegation, it has not been shown that, by postponing elections in the named electoral units, IEBC acted in bad faith or was influenced by irrelevant factors and considerations. From the explanation tendered, we are satisfied that the postponement was occasioned by a genuine mistake, which in our view, could have been avoided had the members and staff of the IEBC been more diligent when they went to inspect the templates in Athens, Greece where the printing of ballot papers was undertaken.

[36] In the absence of any empirical data, we cannot find a basis upon which to conclude, as a matter of fact or evidence that the postponement affected voter turnout as a consequence of which the 1st petitioner, alone, as a Presidential candidate suffered a disadvantage. At any rate, the nature of the ballot being an individual decision and secret, there may be other variables to which the turnout in the named units can be attributed. From the evidence on record, however, it appears to us that this year's General Election recorded one of the lowest turnout since the reintroduction of multi- party political system, some 30 years ago. If there was a low voter turnout, it affected all the six categories of candidates and its explanation, in our view lies elsewhere but certainly not a calculated suppression.

[37] On the other hand, in rebuttal to these claims, the IEBC illustrated, with examples to our satisfaction that there was no nexus between the postponement of elections and voter turnout in the affected units. Far from the fact that this claim was undoubtedly just another red herring, it has nothing to do with the question

under review, and accordingly we reject it and hold that there is no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.

(v) Whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions

[38] The 1st petitioner was categorical that there was systematic ballot stuffing in certain Counties mainly in the Rift Valley and central parts of Kenya, where, according to him a total of 33,208 votes were cast for President only without corresponding votes for the other elective positions.

[39] On their part, IEBC and its Chairperson, while acknowledging that, indeed in some instances there was vote differential between those cast for President and for other positions, maintained that they were insignificant; that the instances related to votes by prisoners and citizens in the diaspora who only voted for President but not for the other elective positions. The differential also includes rejected ballot papers and stray votes which do not count as valid votes.

[40] The well-established principle that the person who asserts a fact must prove it casts the burden upon the 1st petitioner to demonstrate that there were instances of ballot stuffing of such a magnitude as to justify the nullification of the Presidential Election.

[41] Ballot stuffing, which is the illegal addition of extra ballots, is a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document has been presented by the 1st petitioner to prove systematic ballot stuffing. A figure of 33,208 votes relied on in this claim is based on unproven hypothesis, that since the number of votes cast for President is higher than those for the other positions then,

without more, it must follow that there was fraud. Fraud is a serious criminal offence and must be proved beyond reasonable doubt . Under Section 5 (n) of the Election Offences Act, it is an offence for a person to vote more than once in any election.

[42] IEBC has proffered a plausible explanation for the vote differential. There are categories of voters who only vote for the President, such as prisoners and Kenyans in the diaspora. There were an insignificant number of stray votes, whose combined effect cannot justify nullification of the election.

[43] Finally, a General Election in Kenya comprises of six (6) different and separate elections held concurrently on the same day. Such elections are held by secret ballot and one cannot predetermine the voter turnout or how voters will vote in each election. None of the parties has flagged anything so significant that it would have affected the outcome of the Presidential Election *vis á vis* the other five elections held on that day. We find therefore that there were no unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions.

(vi) Whether the IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138 (3) (c) and 138 (10) of the Constitution

[44] This issue arises from the pleadings in all the Petitions as consolidated. Based on the said pleadings, the affidavits sworn in support thereof, and the written and oral submissions by the parties, two viewpoints regarding the meaning, scope, and application of Article 138 (3) (c) and (10) of the Constitution have been advanced.

[45] On the one hand, the petitioners submit that pursuant to the foregoing provisions, the role of verifying and tallying of votes as received from polling stations countrywide, is vested in the Commission as a corporate entity and not the Chairperson of the Commission. It is their argument that the Chairperson cannot undertake this task to the exclusion of other Commissioners. They submit that the language of Article 138 (3) (c), does not envisage a situation where the Chairperson, can arrogate to himself unfettered authority to verify and tally the results at the National Tallying Centre, without involving the other Commissioners. Such action, they contend, would not only be unconstitutional, but would be sufficient ground without more, to nullify an election of a President-elect. In support of their argument, the petitioners cite the Court of Appeal decision in **IEBC v. Maina Kiai & 5 Others** as affirmed by this Court in **Raila 2017**. The petitioners further submit that Regulation 87 (3) of the Elections (General) Regulations is unconstitutional, to the extent that it purports to vest the power of verification and tallying in the Chairperson of IEBC.

[46] On the other hand, the 1st, 2nd and 3rd respondents submit that the power to verify, tally, and declare results of a Presidential Election at the National Tallying Centre, is the exclusive preserve of the Chairperson of IEBC. According to them, there is nothing unconstitutional about Regulation 87 (3) of the Elections (General) Regulations. The said Regulation, the respondents submit, makes no mention of Commissioners, other than the Chairperson. At any rate, the respondents argue, Article 138 (3) (c) of the Constitution, does not envisage a situation where it is the Commissioners who personally undertake the task of verifying and tallying the results as entered onto the thousands of Forms 34A. Such an undertaking, would be humanly impossible, they submit. For good measure, the respondents

submit that Section 11A (a) of the IEBC Act provides that the Chairperson and members of the Commission are responsible for the formulation of policy and strategy of the Commission and oversight. In their view, the Act does not contemplate a situation where Commissioners would be directly involved in the verification and tabulation of Presidential Election results. The task of verification and tallying, submit the respondents, is executed by staff of the Commission under the direction and supervision of the Commission Secretary, who in turn reports to the Chairperson.

[47] As to whether the Chairperson acted unilaterally in verifying and tallying the Presidential Election results at the National Tallying Centre, the petitioners claim that indeed, this is what happened. It is the petitioners' case that the Chairperson, published Gazette Notice No. 4956 of 2022 in which he designated himself as the 'Presidential Returning Officer', a position unknown in law and the Constitution. Having done so, the petitioners state that the Chairperson proceeded to conduct the verification and tallying process, to the exclusion of the other Commissioners each of whom he had assigned peripheral roles unrelated to the verification and tallying exercise.

[48] On his part, the Chairperson of IEBC submits that although he has the exclusive authority to verify and tally the Presidential Election results as received at the National Tallying Centre, he did involve all the other Commissioners in the exercise, before eventually declaring the final result. He submits that he did this in the spirit of teamwork. The Chairperson of IEBC states that indeed, the four Commissioners were involved in the preparation of the 9th August General Elections from the time of their swearing into office, all the way to the verification and tallying of the results at the National Tallying Centre, until they withdrew from the exercise, just when he was set to declare the final result.

[49] Having considered all parties' submissions, we find that, pursuant to Article 138 (3) (c) of the Constitution, the power to verify and tally Presidential Election results as received at the National Tallying Centre, vests not in the Chairperson of IEBC, but in the Commission itself. The latter carries out this exercise through its secretariat staff, technical personnel, and any other persons hired for that purpose under the oversight and supervision of the Chairperson, and other members of the Commission. In line with this Court's decision in ***Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others*** [2017] eKLR (***Raila 2017***) and the Court of Appeal in ***Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others*** [2017] eKLR (***Maina Kiai Case***), we also find that the Chairperson cannot arrogate to himself the power to verify and tally the results of a Presidential Election, to the exclusion of the other members of the Commission. Indeed, Article 138 (10) of the Constitution, although the power to declare the result of a Presidential Election after verification and tallying, is vested in the Chairperson, he does so only as a delegate of the Commission.

[50] Consequently, to the extent that Regulation 87 (3) of the Elections (General) Regulations purports to vest the power of verifying and tallying Presidential Election results, as received at the National Tallying Centre, solely on the Chairperson to the exclusion of other members of the Commission, the same is contrary to and inconsistent with the provisions of the Constitution.

[51] That said, we however take cognizance of the fact that the 5th, 6th, 7th and 8th respondents herein, actively participated in the verification and tallying exercise, from the beginning, up-to and until just before the declaration of the result by the Chairperson. They took turns announcing the results as

verified and tallied and were present and active during the actual verification and tallying at Bomas. An example is Justus Nyang'aya, stood on the podium to announce to the public, an adjustment that had been occasioned by errors of tabulation.

[52] The events of 15th of August, 2022 therefore came as a surprise. As the public waited for the Chairperson of the IEBC to declare the final result, sporadic violence broke out at Bomas. The violence was swiftly contained by security forces, but there was unexpected drama, as two different factions of the Commission began to emerge. Kenyans found themselves watching an appalling split screen scenario on their television sets. On one part of the screen was the Chairperson, readying himself to declare the result in accordance with Article 138 (10) of the Constitution. On the other part of the screen were four Commissioners on the lawns of the Serena Hotel-Nairobi, from where they announced that they would not “own” the results that were soon to be declared by their Chairperson.

[53] The four Commissioners informed the public of their rejection of the yet to be announced results, terming them “opaque” due to the manner in which the Chairperson had been conducting the verification and tallying exercise. In his affidavit dated the 25th August, 2022 Justus Nyang'aya averred that the Chairperson's actions during the tallying and verification exercise at Bomas, made it difficult to ascertain the total number of votes cast, and the actual number of votes attained by each candidate, so as to enable him authoritatively state whether the Commission had declared accurate results.

[54] All the petitioners have anchored their arguments for the nullification of the 9th August Presidential Election, *inter alia*, on the walk-out from the

Bomas by the four Commissioners. They contend that by rejecting IEBC's results on grounds of opaqueness of the verification and tallying process, they called into question, the credibility of the entire election. They further submitted that being in the majority out of the seven-member Commission, their view should prevail and the election should be nullified. It is the petitioners' argument, therefore, that a dysfunctional Commission cannot deliver a credible election.

[55] We note that apart from their eleventh-hour denunciation of the verification and tallying process, and their averments regarding the conduct of the Chairperson, the four Commissioners have not placed before this Court, any information or document showing that the elections were either compromised or that the result would have substantially differed from that declared by the Chairperson of IEBC. Critically, they have not explained why they participated in a verification process when they knew that it was opaque up until the last minute. Indeed, at the Serena Hotel press briefing, the four Commissioners acknowledged that thus far, the entire election had been managed efficiently and credibly. The Chairperson on his part, did not make matters any better by maintaining a stoic silence even as things appeared to be falling apart. All this in our view, points to a serious malaise in the governance of an institution entrusted with one of the monumental tasks of midwifing our democracy. An institution that obviously needs far-reaching reforms, of which we shall say more in our detailed reasons.

[56] But are we to nullify an election on the basis of a last-minute boardroom rapture (the details of which remain scanty and contradictory) between the Chairperson of the Commission and some of its members? In the absence of any evidence of violation of the Constitution and our electoral laws, how can we upset an election in which the people have participated without

hindrance, as they make their political choices pursuant to Article 38 of the Constitution? To do so, would be tantamount to subjecting the sovereign will of the Kenyan people to the quorum antics of the IEBC. This we cannot do. Clearly the current dysfunctionality at the Commission impugns the state of its corporate governance but does not affect the conduct of the election itself.

[57] In view of the foregoing, we are satisfied that notwithstanding the divisions apparent between the Chairperson and the four Commissioners, IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138 (3) (c) and (10) of the Constitution.

(vii) Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138(4) of the Constitution

[58] The 1st, 2nd and 3rd petitioners averred that the 1st respondent did not garner 50% + 1 of the total votes cast and therefore did not meet the threshold provided by Article 138(4)(a) of the Constitution. They anchored their claims on the basis that in order to determine whether a candidate has attained 50% + 1 of the votes cast, this ought to be calculated based on the total number of votes cast excluding rejected votes. They urged that 50% of 14,353,165 which in their view were the valid votes cast, amounted to 7,176,582.77 votes. They contended that by attaining 7,176,141 votes, the 1st respondent did not meet the constitutional threshold to be declared President-elect.

[59] Supporting the claim that the 1st respondent did not meet the 50%+1 constitutional threshold was the 6th petitioner. His contention was founded on the backdrop of a press briefing issued by the Chairperson of IEBC after the official closure of voting on 9th August 2022. According to the 6th petitioner, the Chairperson of IEBC announced that the voter turnout was 65.4% of the total

number of registered voters, based on the verification of the KIEMS kits which were functional during the process of voting. In addition, the 6th petitioner urged that the voter turnout of 65.4% did not include 238 polling stations where the KIEMS kits had malfunctioned necessitating use of the manual register. It was therefore urged that the minimum number of votes cast could not be less than 14,466,779. Additionally, that, this number was bound to increase once the number of votes from the areas that used the manual register were included. The 6th petitioner further claimed that a summation of the minimum number of votes cast and untallied manual votes would represent the actual voter turnout.

[60] In challenging the declaration made by the Chairperson of IEBC, the 6th petitioner averred that the final tally published in Form 34C only accounted for 14,326,641 votes cast, including 113,614 rejected ballots. The 6th petitioner contended that this tally did not factor in 140,138 votes cast using the manual register. The 6th petitioner computed this number by subtracting 14,326,641 declared votes cast from 14,466,779 generated by the 6th petitioner as representing 65.4% of the voter turnout.

[61] Referring to the tallies in Form 34C, the 6th petitioner summed the number of votes cast for each candidate as follows: Raila Odinga (6,942,193), William Ruto (7,176,141), Waihiga Mwaure (31,987) and George Wajackoyah (61,969) adding to a total of 14,213,027. He then added 140,138 alleged to be untallied votes. This yielded a total of 14,353,165 total valid votes which the 6th petitioner used to compute the percentages garnered by each candidate as follows: Ruto (49.9%), Raila (48.372%), Waihiga (0.22%) and Wajackoyah (0.431%). It is on this basis, that the 6th petitioner grounded the claim that none of the candidates met the Constitutional threshold set in Article 138(4)(a).

[62] IEBC and its Chairperson, disputed the 6th petitioner's claim. They submitted that the declaration of results is based on the number of people identified as having

voted on the KIEMS kit and not the total persons on the voter's register, as alleged. They contended that the final voter turnout comprising of voters who were identified through the KIEMS kits and those who voted manually was 64.76% and not 65.4% as alleged by the petitioners. They urged, that the announcement error by the Chairperson of IEBC on 10th August 2022, was immediately clarified during the same press briefing. Evidence of this correction was provided to this Court in the Affidavit of the 1st and 2nd respondents in Presidential Election Petition No. E007 of 2022.

[63] According to IEBC and its Chairperson, 14,239,862 voters were identified using the KIEMS kit while 86, 889 voters were identified using the printed voter register. Thus, the total **valid votes** cast were 14,213,137 while the total number of rejected ballots were 113,614 constituting 14,326,751 **total votes cast**. They illustrated that the 1st respondent garnered 7,176,141 votes against 14,213,137 total valid votes cast yielding a percentage of 50.49% to meet the requisite constitutional threshold for a candidate to be declared President-elect. In the upshot, the percentage attained by each candidate was as follows: Raila Odinga (48.84%), William Ruto (50.48%), David Waihiga Mwaure (0.22%) and George Luchiri Wajackoyah (0.43%).

[64] IEBC and its Chairperson also admitted that the KIEMS kits malfunctioned in 235 polling stations necessitating use of the printed voter register. In these polling stations, back up KIEMS kits were later deployed for purposes of results transmission.

[65] The 1st respondent in response to the question of 50%+1 constitutional threshold, maintained that he attained the threshold under Article 138(4) of the Constitution as elaborated by the IEBC and its Chairperson.

[66] This Court has considered the differing formulas and threshold arguments presented by various parties to this Petition. While the 1st, 2nd and 3rd petitioners raised pertinent questions connected to this issue, we shall address them together with those of the 6th petitioner who has addressed and focused on the issue as specifically framed in detail.

[67] It must be restated that the case made by the 6th petitioners concerns a data-specific threshold enunciated under Article 138(4) of the Constitution without the attainment of which, there can be no declaration. This data-specific threshold is what this Court in ***John Harun Mwau & 2 Others v. IEBC & Others***, Petitions Nos. 2 and 4 of 2017 (Consolidated) referred to as the ultimate yardstick for determining the winner in a Presidential contest.

[68] In ***Raila Odinga & 5 Others v. IEBC & 4 Others***, Petition No. 5, 3 & 4 of 2013 (Consolidated), [2013] eKLR, (***Raila 2013***), the Court asserted that rejected ballot papers do not constitute a vote cast to be included in calculating the final tally in favour of a Presidential candidate. We are not persuaded by the *amicus curiae's* (Law Society of Kenya) brief who attempted to persuade us to reconsider our position on this finding. We reiterate that rejected votes cannot be taken into account when calculating whether a Presidential candidate attained 50% +1 of votes cast in accordance with Article 138 (4) of the Constitution.

[69] Similarly, in the same ***Raila 2013***, the Court further laid down the parameters of burden and standard of proof in electoral disputes. More specifically, the burden and standard of proof required in disputes challenging the outcome of a Presidential election.

At Paragraph 203, the Court clarified that:

“In the case of data-specific electoral requirements (such as those specified in article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

[70] The question that follows, was whether the petitioners challenging the attainment of the 50%+1 constitutional threshold and the computations by the 6th petitioner in general, met the standard of proof settled by this Court in ***Raila 2013***.

[71] The premise of the 6th petitioner’s percentage computation was a press briefing made by the Chairperson of the IEBC on 10th August 2022. When the evidential burden shifted to IEBC and its Chairperson as it does in election cases, they produced video evidence correcting the percentage voter turnout to 64.6% (at the time of the briefing). This percentage however did not include reports from all the KIEMS kits and 86,889 voters who were identified manually using the printed Register of Voters.

[72] In our view, the assertion by the 6th petitioner that the percentage voter turnout was, firstly, predicated on the uncorrected percentage given by the Chairperson of IEBC, was negated by evidence adduced to prove the correction. Secondly, the 6th petitioner based his percentage of voter turnout on the total number of registered voters while the Chairperson of IEBC made reference, in the press briefing, to the number of registered voters who were identified through the KIEMS kits, progressively.

[73] The 6th petitioner also asserted that rounding off of votes cast in a Presidential Election as a means of assessing the threshold under Article 138(4) of the Constitution “kills” and “births” voters, which is illegal and unconstitutional. We

have deliberated on this proposition and found that it is not mathematically sound and that the rounding off done by IEBC and its Chairperson was correct.

[74] Consequently, we find that the petitioners did not provide a watertight case to warrant the setting aside of the results of the Presidential Election on the basis of not having met the threshold provided under Article 138(4)(a) of the Constitution.

[75] On voter turnout, therefore, we find that the formula predicated on the number of voters identified through the KIEMS kit progressively and used by IEBC and its Chairperson to generate a percentage of 64.76% was correct.

[76] Having settled the issue of voter turnout, we must ask ourselves whether in making the declaration, the Chairperson of IEBC applied the formula in Article 138(4) of the Constitution which is:

$$\frac{\text{Total votes cast (less rejected votes)}}{2} = 50\% + 1 \text{ vote}$$

Given the numbers that were presented to us by IEBC and its Chairperson, this will translate to:

$$\frac{14, 213, 137}{2} + 1 = 7,106, 569$$

[77] The question that must inevitably follow is whether this formula when applied, will confirm that 7,106, 569 is less than 7,176,141 which represents the number of votes received by the 1st respondent. We find that it is. As such, on the basis of the foregoing formula and from the numbers provided by IEBC and its

Chairperson, and the declaration by the Chairperson of the President-elect on 15th August 2022, it is our finding that the declared President-elect attained 50%+1 of all the **valid votes** cast in accordance with Article 138(4) of the Constitution.

(viii) Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election

[78] Although the petitioners have provided numerous averments pointing to possible irregularities and illegalities, marked by failures of technology, alleged voter suppression, printing and utilisation of Book 2 of 2, ill preparation by the IEBC and its Chairperson, Commission indiscretions, transposition anomalies, agent absences and many others, we are of the view that the pointed illegalities and irregularities were not of such magnitude as to affect the final result of the presidential election. We will delve into deeper details in our reasoned Judgement.

(ix) What reliefs and orders can the Court grant /issue?

[79] Article 163 (3)(a) of the Constitution provides that the Supreme Court shall have—

“a. exclusive original jurisdiction to hear and determine disputes relating to the election of the office of the president arising under Article 140”;

[80] Article 140 of the Constitution in turn provides:

“1. A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven

days after the date of the declaration of the results of the presidential election.

- 2. Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition, and its decision shall be final.***
- 3. If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.”***

[81] In exercising its jurisdiction pursuant to these provisions, the Court sits as an election court, with the mandate to determine the validity or otherwise of the election of the President-elect. It is clear to us that the jurisdiction of the Court is quite circumscribed in terms of the Orders or reliefs it can grant following the hearing and determination of an Election Petition under Article 140 of the Constitution.

[82] In the event the Court determines that the election of the President-elect is invalid, it must make an Order nullifying the election. Consequently, it has also to make an Order directing IEBC to hold a fresh election within sixty days after the determination.

[83] Should the Court determine that the election of the President-elect is valid, it shall issue a declaration to that effect. The Court has then as a matter of course, make an Order dismissing the Petition, with or without costs as the case may be.

[84] In the strict sense therefore, these are the only Orders that the Court may make under the Constitution. The Court cannot assume jurisdiction that goes beyond the purview of Articles 163 (3) and 140 of the Constitution. However,

nothing stops the Court from issuing “Orders” or reliefs by way of recommendations. Indeed, since 2013, this Court has issued many recommendations arising from the determination of three Petitions challenging the election of the President-elect. The recommendations are meant to improve our electoral landscape and hence aid in the development of our democracy. In this regard, the Court has been greatly aided by the contributions of *amici curiae*. The Court places a heavy premium on the *amici*-briefs that are filed by those it admits in such capacity.

C. FINAL ORDERS

In unanimity, we make the following orders:

- i. *The Presidential Election Petition No. E005 of 2022, as consolidated with Presidential Election Petition Nos. E001, E002, E003, E004, E007 & E008 OF 2022 is hereby dismissed.***
- ii. *As a consequence, we declare the election of the 1st respondent as President-elect to be valid under Article 140(3) of the Constitution.***
- iii. *This being a public interest, matter we order that each party shall bear their costs.***

It is so Ordered.

DATED and DELIVERED at NAIROBI this 5th Day of September, 2022.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE
SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR,
SUPREME COURT OF KENYA