

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

–AND–

WILLIAM RUTO 1ST RESPONDENT

RIGATHI GACHAGUA	2ND RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION	3RD RESPONDENT
WAFULA CHEBUKATI.....	4TH RESPONDENT
JULIANA CHERERA	5TH RESPONDENT
IRENE MASIT	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	} AMICI CURIAE
ICJ KENYA	
JOHN WALUBENGO.....	
DR. JOSEPH SEVILLA.....	
MARTIN MIRERO	

DETAILED JUDGMENT OF THE COURT

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

A. INTRODUCTION

[1] Every five years, millions of Kenyans cast a ballot for a Presidential candidate and five other elective positions. From our history, it is almost inevitable in the course of electoral competition that disputes will arise at all these levels. This calls for effective electoral dispute resolution mechanisms because, again from our past, such disputes may lead to either overt or covert social conflict. Therefore, Kenya’s

quest for enhancement of democratic governance through electoral reforms has been long and is well documented. The paramount goal of these reform initiatives has been to secure the peoples' right of franchise and the integrity of the electoral process. It is in this context that the Constitution sets out values, principles, and rules which embody standards aimed at ensuring that elections reflect the will of the people. Towards this end, the Constitution explicitly protects political rights, including the right to vote; stipulates principles of the electoral system; establishes the Independent Electoral and Boundaries Commission (IEBC) as the body vested with the mandate of conducting and supervising elections; and vests courts, including the Supreme Court, with the duty of resolving post-election disputes.

[2] The above constitutional framework is reinforced by an array of legislation whose overall objective is to guarantee fairness, credibility and legitimacy of the electoral process. The standards and norms stipulated in the Constitution and electoral laws are deliberately detailed. They prescribe the system of registration by eligible citizens as voters; how they cast the votes and how the votes are counted. Beyond voting and counting of votes, the laws regulate the mode of transmission of results to the tallying centres, verification, tallying and declaration of the final results.

[3] Despite efforts to reform the electoral process as aforesaid, some of the reactions from segments of the electorate that followed the declaration of the Presidential Election result on 15th August 2022, remains as a clear indication that IEBC is yet to gain universal public confidence and trust, with regard to its internal management of the Commission and of elections. At the heart of this consolidated Presidential Election Petition (consolidated Petition), are contestations around one question; whether IEBC complied with the constitutional and legal standards in the conduct of the Presidential Election held on 9th August, 2022. However, sight must not be lost of the fact that election related disputes are an intrinsic part of the electoral process. The credibility, integrity and legitimacy of that process is

ultimately determined by the courts. In respect of a Presidential Election, this duty is reposed by the Constitution in the Supreme Court.

[4] To contextualize the controversy in this Petition, the following brief factual basis is essential.

B. BACKGROUND

[5] There cannot be any doubt that this [2022] Presidential Election was a close race between the two top contenders, premised on the following declaration of 15th August, 2022 by Wafula Chebukati, the Chairperson of IEBC:

Candidate	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

From these results, the Chairperson of IEBC, being satisfied that the terms of Article 138(4) of the Constitution had been met, declared William Samoei Ruto, (the 1st respondent) as the President-elect and Rigathi Gachagua, (the 2nd respondent) as the Deputy President-elect. Subsequently, the Chairperson issued Gazette Notice No. 9773 of 16th August, 2022 to formalize the declaration.

[6] It is the foregoing declaration that precipitated a total of nine Presidential Election Petitions to this Court namely:

i. Presidential Election Petition No. E001 of 2022 - John Njoroge Kamau v. Wafula Chebukati & 3 Others.

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

Interlocutory Applications

[7] While the Petitions were pending the Court's directions, some of the parties filed a total of twenty-three (23) interlocutory applications seeking a raft of orders, including notices of preliminary objection to strike out some of the Petitions. Upon the Court's consideration of these applications and objections, it struck out Presidential Election Petition Nos. E006 and E009 of 2022 for failure to meet the constitutional requisites under Article 140(1) of the Constitution. The Court, in

response to applications for joinder as *amici*, admitted the Law Society of Kenya (LSK), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya Chapter), John Walubengo, Dr. Joseph Sevilla and Martin Mirero as *amici curiae*. On its own motion, the Court consolidated the remaining seven (7) Petitions and designated Presidential Election Petition No. E005 of 2022 (With Raila Odinga and Martha Karua as the 1st petitioner) as the lead file.

[8] Further, pursuant to applications made by the 1st, 3rd and 4th petitioners, the Court on 30th August, 2022, partially granted the applications and ordered an ICT scrutiny, inspection and recount of ballots in specified polling stations under the supervision of the Registrar of the Court. At the end of that said exercise, the Registrar prepared and submitted to the Court, the ICT Scrutiny and Inspection, Tallying and Recount Report dated 1st September, 2022 (the Registrar's Report), to which further reference will be made later. Having considered the pleadings and written submissions by all the parties involved, the Court delineated the following nine (9) issues as arising for its examination and final determination:

- 1. *Whether the technology deployed by IEBC for the conduct of the 2022 General Election 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 IEBC's Public Portal.***
- 3. *Whether there was a difference between Forms 34A uploaded on IEBC's 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 Kwa 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 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?**

[9] In view of the strict timelines within which the Court must hear and determine the Petition, the consolidated Petition proceeded for hearing by way of written submissions and oral arguments between 31st August, 2022 and 2nd September, 2022. On 5th September, 2022 pursuant to Rule 23(1) of the Supreme Court (Presidential Election Petition) Rules, 2017, the Court delivered its Judgment and

by unanimity of its members, dismissed the consolidated Petition. It reserved the detailed reasons for that decision for 26th September, 2022, being twenty-one days from the date of the Judgment. Consequently, the subsequent details are the reasons for each of the framed issues.

C. DETERMINATION OF ISSUES

1. ***Whether the technology deployed by IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results***

[10] As noted earlier in the introduction, lack of trust in the electoral system has endured in this country for a long time. This led to the introduction of election technology following recommendations made by the Independent Review Commission on the General Election held on the 27th December, 2007 (***the Kriegler Commission Report***), whose history needs no repeating in this Judgment. The Report recommended *inter alia* integration of technology into Kenya's electoral processes for registration, identification of voters and transmission of results. These were later enacted into law as Section 44 of the Elections Act, No. 24 of 2011. By this provision, IEBC is enjoined to adopt an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. However, electronic transmission is limited to a Presidential Election. The Section also requires IEBC to develop a policy on the progressive use of technology in the electoral process, and to ensure that the technology employed is simple, accurate, verifiable, secure, accountable and transparent. Finally, IEBC is required to transparently procure and put in place the technology necessary for the conduct of a General Election, at least one hundred and twenty days before such elections; and to test, verify and deploy it at least sixty days before a General Election. As a consequence, IEBC developed a technology known as Kenya Integrated Electoral

Management System (KIEMS) making Kenya's election process a hybrid one, embracing both technology and manual processes.

[11] The 1st, 3rd, 4th and 7th petitioners challenged the technology used by IEBC during the 2022 General Election. They contend that the manner in which technology was deployed and utilized, fell short of the prescribed standards under Article 86 of the Constitution and Section 44 of the Elections Act, because in their judgment it was not simple, accurate, verifiable, secure, accountable and transparent.

[12] As regards the audit of the Register of Voters, they urged that IEBC, pursuant to Section 8A (1) and (6) of the Elections Act and its Elections Operations Plan, committed to conduct an audit of the Register of Voters by 31st March, 2022, only for it to avail the Audit Report on its website on 2nd August, 2022, 7 days to the election, which date, the petitioners contended, was too late to enable any meaningful engagement by stakeholders.

[13] The petitioners equally stated that the auditors identified 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's Integrated Database Management System (IDMS) to 14 user accounts unrelated to voter registration; reduction of the accountability of user activities in the Register of Voters; presence of eleven (11) active generic accounts on the Automated Biometric Identification System (ABIS) and two ABIS users with the same log in identification; risk of unauthorized system users; and change of particulars or deactivation of voters in the system. The risk was further allegedly compounded due to IEBC's failure to set up access re-certification and user activity review process; and to respond to requests by auditors for crucial information, some of which were only shared on the eve of the audit reporting.

[14] On the simplicity of technology deployed during the 2022 General Election, the 7th petitioner specifically contended that the KIEMS kits failed the test of simplicity as they were not user friendly to the ordinary citizens without expert knowledge; that the failure of KIEMS kits in some polling stations, coupled with the fact that members of the public were not able to examine the transmission of the results from the system, affected the transparency of the process; and that most of the technologies deployed in election management were foreign owned and susceptible to manipulation by third parties without the knowledge of voters.

[15] The petitioners further asserted that IEBC was expected to procure and put in place the necessary technology 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. They claimed that IEBC violated this constitutional duty by delegating the design, implementation and use of the KIEMS component of the election to a foreign company, Smartmatic International Holding BV (Smartmatic), to an extent that IEBC's staff and the public did not have visibility of the KIEMS component, thereby abdicating its role of conducting the elections to Smartmatic. The petitioners also held the view that IEBC vigorously rejected any attempt to subject Smartmatic's activities to accountability and transparency in terms of the safeguards provided for under Regulations 61(4)(a), 69(1)(d), 69(1)(e)(iii) and 75(6) of the Elections (General) Regulations, 2012. According to the petitioners therefore, it was Smartmatic's opaque activities, that made it difficult to ascertain voter turnout and verify accuracy of transmission of the images of Forms 34A.

[16] It was also contended that IEBC failed to engage a professional reputable firm to conduct annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the said technology pursuant to Regulations 11 and 12 of the Elections (Technology) Regulations, 2017.

[17] In response to these claims, IEBC and its Chairperson maintained that they adopted a hybrid system where the first phase relied on technology for purposes of biometric registration and voter identification during voting to avoid double voting and electronic transmission of results, while the second phase consisted of manual counting, recording, tallying, transmitting (partly) and verification of the votes cast. It was also contended that the continuous reinforcement of the electoral process and system had ensured a considerable degree of certainty and outcome of IEBC's activities.

[18] IEBC submitted that all necessary information in its electoral system was accessed only by authorized persons; and that the information was accurate, complete and protected from malicious modification either by authorized or unauthorized persons. It also maintained an audit trail on activities related to technological information; and the said information was available and could be authenticated through the use of various security features.

[19] It was IEBC's further contention that it engaged KPMG—a reputable audit firm—on 7th April, 2022 to conduct an audit of the Register of Voters, which exercise was completed when the latter submitted its Report on 18th June, 2022. Thereafter, IEBC 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 was asserted that IEBC could not publicly publish the full final Audit Report as doing so would compromise the integrity and security of the election technology system and violate the provisions of the Data Protection Act, 2019, which imposes a duty to protect the data of Kenyan registered voters.

[20] IEBC furthermore urged that it complied with Regulations 11 and 12 of the Election (Technology) Regulations, 2017 by engaging the firm of Serianu Limited in July 2022 to conduct the annual audit of its election technology system. The scope of the audit entailed Biometric Voter Registration Systems Tests, Biometric Voter Identification Tests, Result Transmission System Tests, Web Portal for

publishing the Election results online (IEBC Website) Test and Candidate Registration System Test. Proof of the audit was in the form of a Certificate of Compliance which was annexed to the affidavits of the Chairperson of IEBC and that of Michael Ouma, IEBC's Director in charge of Information and Communications Technology (ICT).

[21] It was also submitted that complementary mechanisms were adopted in relation to voter identification and result transmission. IEBC further stated that it had issued guidelines on the details of what should happen, in the event of failure to transmit results from a polling station. It also submitted that voters were identified using printed registers in 229 polling stations, and only 6 polling stations experienced voting challenges due to violence. In effect, a total of 86,889 voters were identified manually in the subject polling stations that had a total of 114,916 registered voters.

[22] IEBC explained that prior to the deployment of the KIEMS kits, it undertook a series of tests on the KIEMS system including public testing on 9th June, 2022 being 60 days before the election and a similar simulation was carried out on 15th July, 2022. IEBC was thereafter satisfied that the KIEMS kits deployed were efficient since they were successfully used to verify biometric data of millions of voters from 4th May, 2022 to 2nd June, 2022 as required by Section 6A of the Elections Act, and on polling day. The system thus effectively transmitted the Presidential results from the polling stations to the online Public Portal on the polling day.

[23] Regarding capacity building, IEBC maintained that it developed a robust training manual and schedule aimed at capacity building of IEBC staff and candidates' agents on all the polling processes. Pertaining to the security of the KIEMS system, it was deponed that some of the security parameters included: configuration of pre-determined tablets to enable round the clock automated monitoring; the entire network spectrum was secured with twin high level

perimeter firewalls; robust database management solution with all recommended security options including pre-encryption of results before transmission and having transmission over a secure Virtual Private Network (VPN); and deployment of a fourth-tier security measure, granular role-based access control and user management for the entire results transmission system, among others. All these measures were introduced to ensure integrity in the process. There was thus no evidence to demonstrate any compromise, intrusion or unauthorized access of the system by any person; and as such, IEBC argued, that the allegations as framed in the consolidated Petition were ambiguous, unsubstantiated and baseless. Besides, IEBC urged, KIEMS could not allow more voters than those provided for in the specific polling station and could therefore, not transmit more votes cast than the number of registered voters.

[24] On their part and in answer to the allegations by the petitioners, the 1st and 2nd respondents urged that even if there was failure of technology, the same did not vitiate the result of the Presidential Election. Moreover, they contended that IEBC had established complementary mechanisms to facilitate the identification of voters in the event of the failure of some KIEMS Kits as guided by the Court of Appeal in *United Democratic Alliance Party v. Kenya Human Rights Commission & 12 Others* Civil Application No. E288 of 2022 (*United Democratic Alliance Party Case*). The 1st respondent specifically, deponed that the low voter turnout in Kakamega and Makueni Counties attributed to failure of the KIEMS kits by the petitioners, was self-serving, speculative and hypothetical. This was because other neighbouring Counties to Kakamega and Makueni where there was no failure of KIEMS kits had comparable voter turnouts. Further, the respondents argued that in general, the voter turnout in 2022 was lower than that of 2017 General Election. In conclusion, IEBC and the 1st and 2nd respondents prayed that in view of the foregoing, the Court ought to find that the electoral system, deployed during the 2022 Presidential Election met both constitutional and legislative thresholds.

(i) Analysis of evidence

[25] Needless to state, IEBC is the body constitutionally mandated to conduct elections in Kenya. Elections are considered free and fair when they are held in consonance with the general principles for the electoral system as articulated in Article 81(e) of the Constitution as read with Section 25 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 (IEBC Act) that is, if they are, conducted by secret ballot, free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

[26] At every election, IEBC is thus required by Article 86 of the Constitution to ensure that:

“...

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- (a) the votes cast are counted, tabulated and the result announced promptly by the Presiding Officer at each polling station;**
- (b) the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer; and**
- (c) appropriate structures and mechanisms to eliminate electoral malpractices are put in place including the safekeeping of electoral materials.”**

[27] The question, whether or not the 2022 Presidential Election passed constitutional and legal muster, can only be answered upon consideration and with reference to the threshold of the burden and standard of proof borne by the petitioners. It is ultimately therefore, a question of evidence tendered by the petitioners.

[28] The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and Judges are 'blind', in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the Court.

Section 2 of the Evidence Act, declares that the statute:

“(1)... shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator.” [emphasis added].

Specific on the burden of proof, Section 107 of the Evidence Act states as follows:

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

[29] On proof of peculiar and particular facts, Section 109 of the Evidence Act requires that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[30] And finally, Section 110 provides that:

“The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

[31] This Court first pronounced itself on these twin issues of burden and standard of proof in a Presidential Petition in ***Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others***, SC Petition Nos. 5, 3 & 4 of 2013 (consolidated); [2013] eKLR (***Raila 2013***); and reiterated them in its decisions in ***Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others***, SC Petition No. 1 of 2017; [2017] eKLR (***Raila 2017***) and ***John Harun Mwau & 2 Others v. Independent Electoral and Boundaries Commission & 3 Others***, SC Petition Nos. 2 & 4 of 2017 (consolidated); [2017] eKLR (***Harun Mwau Case***).

[32] Suffice to stress that the Court has been consistent that a petitioner who seeks the nullification of elections for alleged non-conformity with the Constitution or the law or on the basis of irregularities and illegalities, has the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the Court. Once the Court is convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.

[33] In this context, we reiterate the words of this Court as stated in ***Raila 2013*** as follows:

***“[196] Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.*”**

[197] While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”

[34] As to the standard of proof, the Court’s position rests with its decisions in ***Raila 2013***, ***Raila 2017*** and the ***Harun Mwau Case*** in which it adopted the intermediate standard striking a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, save for two instances; where allegations of criminal or quasi-criminal nature are made; and where there is data-specific electoral pre-condition and requirement for an outright win in the Presidential Election, such as those

specified in Article 138(4) of the Constitution. In those instances, the standard of proof must be beyond reasonable doubt. We are alive to the fact that different standards have been adopted in other jurisdictions across the globe, as demonstrated in the *amici* briefs in this Petition on behalf of LSK and ICJ-Kenya Chapter but we find no justification and we are not prepared at this point in time to depart from the test now firmly laid and applied in this jurisdiction. We can, in that regard, only reiterate, by way of emphasis, the observation made at paragraph 153 by the Court in ***Raila 2017*** that–

“We recognize that some have criticized this standard of proof as unreasonable. However, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.”

There are therefore only two categories of proof in relation to election-related Petitions in this country: the application of the criminal standard of proof of beyond reasonable doubt, as explained and the intermediate standard of proof.

[35] With the foregoing clarification, we now turn to the issue under review; whether the technology deployed by IEBC met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results. There are also two related audit exercises that the petitioners have challenged; the systems audit under Regulations 11 and 12 of the Elections (Technology) Regulations, 2017 and the audit of the Register of Voters under Section 8A of the Elections Act. Bearing in mind always what we have said in the preceding paragraphs about the burden and standard of proof, the starting point is what the law sets as the yardstick of use of technology in electoral processes, and that is Section 44 of the Elections Act. It provides as follows:

“44. Use of technology

- (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.***
- (2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.***
- (3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.***
- (4) The Commission shall, in an open and transparent manner—***
 - (a) procure and put in place the technology necessary for the conduct of a General Election at least one hundred and twenty days before such elections; and***
 - (b) test, verify and deploy such technology at least sixty days before a General Election.***
 - (c) The Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for***

the better carrying into effect the provisions of this section.”

[36] For the reason that one of the complaints against IEBC is that it failed to engage a professional reputable firm to conduct an audit of the Register of Voters, it is apposite to also set out Section 8A of the Elections Act which provides for audit of the Register of Voters as follows:

“8A. Audit of the Register of Voters

(1) The Commission may, at least six months before a General Election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

...

(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.”

[37] There are divergent positions presented by both sides to the present dispute on the issue at hand. On the one hand, the petitioners have argued that the requirements of Section 8A of the Elections Act were not met, while on the other,

IEBC maintained that, on 7th April, 2022, it did engage the firm of KPMG to carry out an audit of the Register of Voters. This exercise was completed and a Report submitted to IEBC on 16th June, 2022.

[38] IEBC, however conceded that KPMG in its Report, pointed out several gaps on the state of the register. In addition to disclosing the findings contained in the Report by way of a briefing on 20th June, 2022, it embarked on remedial measures aimed at implementing the recommendations ahead of publication of the final Report. Some of the remedial measures it undertook included committing to reviewing in the medium term, its registration processes with a view to strengthening them through the development and implementation, *inter alia*, of automated data input validation controls and exploring the use of Integrated Population Registration System in the enrolment process. In addition, IEBC committed to conducting periodic comparison of the Register of Voters with data held by relevant Government agencies.

[39] IEBC further confirmed that, by the time of the release of the Audit Report, on 16th June, 2022 all transactions relating to the questionable transfer of voters had been reversed. Moreover, it suspended five (5) of its employees for their involvement in this infraction and referred the matter to the Office of the Director of Public Prosecutions for further investigation and action. Having taken all the necessary steps required of it by the KPMG Report, IEBC submitted the Audit Report to the Speakers of the National Assembly and Senate pursuant to Section 8A of the Elections Act, and availed copies to political parties and any interested party.

[40] The petitioner's submissions as supported by the sworn affidavits, regarding the integrity of the Register of Voters, were enough in our view, to shift the evidentiary burden of rebuttal to IEBC. IEBC undertook this burden, by giving a detailed explanation of the remedial measures it had instituted, to address the shortcomings as highlighted in paragraphs 38 and 39 above. Consequently, in the

absence of evidence to the contrary, we find merit in IEBC's explanation. We further take note that, 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 as a medium for identification of voters without any apparent anomalies. Likewise, IEBC successfully deployed a Biometric Voter Register (BVR) system which captured 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.

[41] Furthermore and in compliance with Section 6A of the Elections Act, IEBC opened the Register of Voters for verification of biometric data by members of the public for a period of 30 days from 4th May, 2022 to 2nd June, 2022. 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.

[42] In the context of simplicity of the technology deployed, we note that the electoral system is designed to handle voter registration of over 22 million voters with unique biometric details. Further, in all the 46,231 polling stations KIEMS kits are mapped to the specific geographical area of the polling stations and to specific Presiding Officers. It is also designed to be as secure as possible to prevent infiltration. The Public Portal, on the other hand, is designed to handle numerous visits to the website to access the transmitted Forms 34A without causing it to crash. Such a system by design cannot be expected to be a simple one in the ordinary sense. Its features are not configured for ordinary everyday use by everyone without suitable training. In any event, there has been no specific complaint by any voter, agent or member of the public over their inability to use or frustrations in the use of this technology.

[43] It is, clearly for this reason that IEBC, rolled out an elaborate training program aimed at building capacity and competence of its staff members and candidates' agents on the KIEMS system. It also conducted voter education and

sensitization activities across the country targeting stakeholders including political parties, civil society and Government agencies through print and electronic media, in fulfillment of the provisions of Article 88(4)(g) of the Constitution as read with Section 40 of the Elections Act. That was the evidence of its Chairperson, which was never rebutted.

[44] Guided by Section 44 (2) of the Elections Act which requires IEBC to “... ***develop a policy on the progressive use of technology in the electoral process***”, we note that the KIEMS system was initially created as four different systems operated separately during the 2013 General Election, but since 2017 the said system has been fully integrated. Generally therefore, there is consensus that there has been a gradual but sustained advancement in election technology from pre-2007 and 2013 elections.

[45] Technology, like all human inventions, no matter how advanced, is bound to fail at one point or another, leading to a bad user experience. Hardware breaks, software gets bugs, and connectivity disappears, among many challenges in automation. It is perhaps this realization that led the Court in ***Raila 2013, Raila 2017*** and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Petition No. 2B of 2014; [2014] eKLR (***Gatirau Munya Case***) to state that it is a global truism that no conduct of any election can be perfect. Similar reflections may have informed the insertion of Section 44A to the Elections Act directing IEBC to avail, alongside the use of technology required by Section 44, a complementary mechanism in the event of technical failure. Section 44A provides as follows:

“Notwithstanding the provisions of Section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.”

We restate our position that the practical realities of election administration are such that imperfections in the process are inevitable. Some imperfections may have far-reaching ramifications, which in turn may lead to nullification of an election while others may not reach that level or degree of significance. The nullification of the Presidential Election of 2017 was partly based on this reality.

[46] The petitioners claimed and IEBC admitted that KIEMS kits failed in certain polling stations. But the latter, guided by the law and the decision of the Court of Appeal in *United Democratic Alliance Party Case*, explained that the complementary mechanisms that it had put in place took two forms; where a voter could not be identified using their biometric data, the Presiding Officers were to use the alphanumeric search in the presence of agents and once found, the voter was to fill Form 32A. The second complementary system took the form of a printout of the Register of Voters which was used where the KIEMS kits failed completely with no possibility of repair or replacement. Once the details of the voter were confirmed manually, the Presiding Officer would then allow the voter to cast his/her vote.

[47] Whereas, it is not in dispute that the KIEMS kits failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. As such, the failure of the KIEMS kits in the identified polling stations cannot be taken as a yardstick of the performance of KIEMS kits in the whole country. In any case, all affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually.

[48] In addition to the above, by dint of Section 44(4) aforesaid, IEBC must in an open and transparent manner, procure and put in place the technology necessary for the conduct of a General Election at least one hundred and twenty days before

such elections. The two limbs to this provision are the open and transparent procurement of the technology and the timelines within which to put it in place. According to Michael Ouma, in his affidavit evidence, on 14th April, 2021, IEBC advertised an open international tender for the supply, delivery, installation, testing, commissioning, support and maintenance of the KIEMS, hardware equipment and accessories. At the close of the tender period, it received bids from five firms and upon evaluation, Smartmatic was successful and was awarded the tender thereto. A contract between IEBC and the firm was concluded on 25th November, 2021. This award of contract was contested before the Public Procurement Administrative Review Board, the High Court and eventually the Court of Appeal with the ultimate result that the award was upheld. It is not open for any party or even this Court to revisit that tender in the circumstances.

[49] We have also considered the affidavit by the Chairperson of IEBC wherein he categorically averred that IEBC did not have and was not expected to have the capacity to set up and design the technology of that magnitude by itself; that it relied on suitably qualified bidders to design and provide the technology that would deliver the support required. He however clarified that IEBC remained in charge of all decisions as to the deployment and use of the technology supplied by Smartmatic; that it had full visibility of the technology developed and supplied including the KIEMS kits; and that the provisions of Section 44 (4) (a) and (b) of the Elections Act, as well as those of Regulation 4 (1) of the Elections (Technology) Regulations, 2017 were fully complied with. The latter provides that:

“4. Procurement

- (1) Based on the requirements analysis conducted under regulation 3 (1) and the solution design and feasibility report conducted under regulation 3(2), the Commission shall develop specifications for the procurement of new or updated election***

technology, in accordance with the Public Procurement and Asset Disposal Act, 2015 (No. 33 of 2015) and its regulations.”

[50] Even as we prefer homegrown solutions and that we develop our own systems, the law recognizes and we reiterate our finding above, that IEBC may not have the capacity to develop such a system and therefore directs that it procures such a system. This is in recognition of the fact that although computer hardware, software, and other related services are essential for election operations, it is doubtful that an elections body would have the capacity to avail for itself most of these complex services that underpin elections—from voter registration and election management systems to results transmission devices. In many known instances these are procured from private vendors. Once procured, installed and operationalized, the systems can be managed by staff of the election body.

[51] Considering the affidavit evidence of IEBC in this respect, we find, contrary to the assertion by the petitioners, that IEBC did not abdicate its role in the procurement of the technology used in the last General Election or in the conduct of the Presidential Election. It complied with Section 44 of the Elections Act and with the procurement procedures under Regulation 4 (1) of the Elections (Technology) Regulations, 2017. We are further satisfied, from what we have said earlier, that the procurement of the system was within the law, as confirmed by the concurrent decisions of the Public Procurement Administrative Review Board, the High Court and the Court of Appeal.

[52] Did IEBC at the time of the elections of 9th August, 2022 have visibility and control at all times of its election technology? The answer is found in the Registrar’s Report to the effect that IEBC granted the team, comprising agents of all the petitioners, supervised access to the server for interrogation for the entire duration of the exercise; that IEBC in compliance with the orders of the Court provided its password policy, password matrix, system users and levels of access, workflow

chats of the system, architecture, diagram, tallying, transmission and posing of the portals as well as the system architecture. It only declined to provide the owners of system administration's passwords as they considered doing so would expose the names and identities of the system administrator posing a threat to their security. That position is understandable and we have no doubt that the petitioners, through their agents, were not handicapped in any way during the scrutiny exercise and they had access to all material relevant to the scrutiny and the petitions before us. Any other access would not have been of use to us or themselves.

[53] To our minds therefore, and in the absence of evidence to the contrary, it is safe to conclude on this aspect of the dispute that IEBC had visibility of the system and that its technical members of staff, who conducted the scrutiny had control of the electoral system at all times. We further find that no evidence at all, meeting the requisite standard of proof, was presented by the petitioners to show that there was access to the system by unauthorized persons. Similarly, the Registrar's Report did not reveal any security breaches of the Result Transmission System (RTS) by any unauthorized person(s).

[54] Due to the nature of the complaint by the petitioners that IEBC failed to carry out an annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the election technology pursuant to Regulations 11 and 12 of the Elections (Technology) Regulations, 2017, it is vital to reproduce below the terms of these regulations.

“11. The Commission shall conduct annual audits of the election technology, or as may be required, to –

- (a) guarantee data integrity;***
- (b) ensure that the technology functions effectively as specified; and***
- (c) ensure that the internal controls of the technology are effective.***

- 12. (1) The Commission shall engage a professional reputable firm to conduct a systems audit of the election technology annually.**
- (2) The Commission shall conduct the systems audit to evaluate the confidentiality, integrity and availability of the election technology by assessing—**
- (a) the security access to the system;**
 - (b) the vulnerability of the system configurations;**
 - (c) the accuracy and the completeness of the data; and**
 - (d) any other mechanisms that may be determined by the Commission.**
- (3) Where the Commission engages a professional reputable firm under sub regulation (1), the firm shall present its audit findings to the Commission, which findings shall be incorporated into a report as set out in regulation 13.”**

[55] The petitioners do not dispute the assertion by IEBC that it engaged the firm of Serianu Limited in July, 2022 to conduct the annual audit of its election technology systems. This was proved by a Certificate of Compliance issued on 3rd August, 2022 and annexed to the affidavits of the Chairperson of IEBC and Michael Ouma. We also note that Michael Ouma deponed, without being controverted by the petitioners, that prior to the deployment of the KIEMS kits, IEBC undertook a series of tests on the KIEMS system; that there was public testing of the kits on 9th June, 2022, being sixty (60) days before the election; and a similar simulation carried out on 15th July, 2022. In the result, the petitioners made allegations that they have been unable to prove, and to which IEBC has been able to respond by

demonstrating that it followed the law as regards auditing of the electoral system pursuant to Regulations 11 and 12 of the Elections (Technology) Regulations, 2017.

[56] Ultimately on this issue, upon considering all the pleadings, submissions and the Registrar's Report which fully examined IEBC's RTS and flowing from our findings above, 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.

(ii) Findings and Conclusion

[57] In concluding on this issue, we reiterate the Court's findings in the Judgment delivered on 5th September, 2022 as follows:

- (a) Whereas it is true that the KIEMS kits 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. No prejudice was shown to have been occasioned to any voter or party.**
- (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 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.

(f) In compliance with Section 6A of the Elections Act IEBC opened the Register of Voters for inspection and 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.

2. *Whether there was interference with the uploading and transmission of Forms 34A from the polling station to IEBC Public Portal*

[58] The 1st petitioner contended that the technology deployed and utilized by IEBC during the last General Election fell below the prescribed standards under Article 86 of the Constitution and Section 44 of the Elections Act. In particular, they asserted that the KIEMS technology failed to encompass the five main principles of confidentiality, integrity, availability, non-repudiation and authenticity, which ensure that the constitutional standard of a secure and transparent electoral system is met. Therefore, according to them, the result

yielded and declared for the Presidential Election by IEBC was unverifiable, inaccurate and invalid.

[59] The 1st and 3rd petitioners, in the above context, believed that Forms 34A submitted through the RTS from the polling stations to the National Tallying Centre (NTC) were manipulated. By way of illustration, they alleged that at the point of procurement of the KIEMS kits, IEBC had indicated that the Presidential Election results contained in Forms 34A and completed at the polling stations would be transmitted to the NTC by a compressed colour photo image which complied with the Joint Photo Experts Group (JPEG) standard. However, the Forms 34A on IEBC's online Public Portal were not only in black and white but also in the Portable Document Format (PDF) despite being captured in JPEG format by the KIEMS kits. They claimed that the process of converting an image to another form altered the substance and undermined the purpose and integrity of the transmission process; that the new version of the document was no longer a true likeness of the image of the original Forms 34A which were uploaded at the polling station. To these petitioners, the only reasonable inference to be drawn from this state of affairs was that the process of conversion of the files from JPEG to PDF, whether automated or manual by human intervention, was predisposed to manipulation either through replacement of whole files or amendment of sections thereof.

[60] The 3rd petitioner, relying on the averments by Manyara Muchui Anthony, argued that those alterations were definitely effected because the RTS lacked a transport layer security to insulate Forms 34A, exposing the Forms to open and easy access by domains that apply cookie data manipulation to websites. In addition, they urged that IEBC used the UBUNTU operating software which is a free open-source software that can be subject to external manipulation.

[61] The 1st petitioner on their part claimed that the RTS was liable to manipulation through 'man in the middle attack' or 'machine in the middle attack'.

In other words, they contended that an authorized or an unauthorized person(s) could intercept and manipulate data before the same finally became visible to the public on IEBC's online portal. To prove the vulnerability of the system, Benson Wesonga, on their behalf, went on to allege that on 11th August, 2022, IEBC dumped over 11,000 Forms 34A onto its online Public Portal between 1101 and 1109 hours. This, according to the 1st petitioner suggested that the system was designed to allow 'staging' where any person with access to the RTS could detain the Forms for a while in order to make changes to them before releasing them to the intended destination, that is, the Public Portal.

[62] They cited amongst other instances where this occurred as Kagera Primary School, St. Martin's School Kibagare, Borut Primary School, Mugumo Primary School and Thumaita Primary School polling stations whose versions of Form 34A on IEBC's online Public Portal were believed to have been manipulated. Moreover, they urged that there were differences between the physical copies of Forms 34A and the Forms 34A uploaded on IEBC's Public Portal, where the 1st petitioner's votes were reduced in favour of the 1st respondent and gave 41 polling stations in Bomet, Kiambu and Kakamega Counties as examples of this. For this claim, the 1st petitioner relied on the affidavit evidence of Celestine Anyango Opiyo and John Mark Githongo. What is more, Benson Wesonga deposed that there were glaring disparities between the results entered in Forms 34B and 34C which, in his view was further evidence of alteration of the results in Forms 34A to conform to a specific outcome.

[63] Equally, Prof. Walter Richard Mebane, a Professor of political science and statistics, deponed that he undertook an e-forensics analysis of the 2022 Presidential Election based on data retrieved from IEBC's Public Portal, according to which, there was not only electoral fraud in the 2022 Presidential Election but that the fraud involved was greater than that committed in 2017. Those findings, are contained in a report, "E-forensics Analysis of the Kenya 2022 Presidential Election" annexed to his affidavit.

[64] In the 1st petitioner's opinion, IEBC had thus deliberately set the RTS to be vulnerable for a pre-determined purpose and outcome, considering the choice of Smartmatic, a company allegedly mired in controversy over its election management technology in places like Venezuela, Philippines, and the USA. As far as they were concerned, IEBC had also intentionally hired Jose Gregorio Camargo Castellos, Joel Gustavo Rodriguez Garcia, and Salvador Javier Sosa Suarez to facilitate the irregularities and illegalities which compromised the integrity of the electoral system.

[65] The 3rd petitioner, for their part, alleged that there was corroborated evidence that manifested manipulation of the Forms by the fact that Forms 34B were designed in a way that the agents and Returning Officers' signature page was always separate and stood-alone, making it easy to manipulate figures in Forms 34A without the need to recall agents and the Returning Officer to sign afresh. Further, that a review of Forms 34B availed by IEBC from Nakuru, Kiambu, Samburu, Kisumu, Meru, Kakamega and Mombasa Counties revealed that the 1st respondent's votes were inflated by 180,000 votes. And that, since Forms 34B are intended to mirror the results in Forms 34A from polling stations, it was absurd and statistically abnormal that errors in the transposition of results would be in the thousands and only in favour of one candidate, to wit, the 1st respondent.

[66] Furthermore, they claimed that as at 11.02 am on 10th August, 2022, a day after polling, there were over 75,000 KIEMS kits that were yet to transmit data related to the electronic identification of votes (EVI), yet all tablets closed successfully. This data ought to have been transmitted to the NTC when voting closed on 9th August, 2022, they asserted. Instead, an email from Mr. Wachanga Mugo, IEBC's ICT support coordinator, showed that there were 687 kits still reading as open, suggesting that the kits in question were still being actively used to transmit manipulated and unauthorized data from polling stations. This, in their opinion explained why the Chairperson declared results that were inconsistent

with his own declaration of voter turnout of 65.4% confirming that the results transmission and management system for Forms 34A, 34B and 34C was compromised hence his inability to accurately relay reliable and accountable results.

[67] The 1st petitioner also alleged that, on 12th August, 2022 in the evening at the NTC, a bag containing a laptop belonging to Koech Geoffrey Kipngosos, an agent of UDA Party, was left unattended at the verification auditorium. The same was confiscated by officers from the Directorate of Criminal Investigation (DCI) who conducted an onsite forensic image of the laptop to determine what it was being used for. Apparently, there was a consensus among the parties that no agent would be permitted to use a laptop in the verification auditorium. The petitioners claimed that a forensic analysis of the said laptop showed that it was connected to an external IP that does not belong to IEBC; and that Forms 34A were being stored temporarily in this external IP, downloaded and then re-uploaded to IEBC's portal through an application for sharing data.

[68] The 1st petitioner claimed in addition that the KIEMS kits were able to transmit Forms from other unrecognized polling stations despite an assurance from IEBC in a communique dated 10th June, 2022, that each KIEMS kit would be able to send only one Form 34A that is uniquely geo-fenced and tied to the KIEMS kit by a unique QR code.

[69] Through the further affidavit of Benson Wesonga, the 1st petitioner thus produced alleged transaction logs from an IEBC server to prove that access had been granted to users with permission to read, write, modify or edit as well as to delete documents. As a result, they averred that users accessed IEBC's system, either through IEBC's local network or remotely, and proceeded to manipulate records by uploading Forms 34A from the polling stations onto the server; that IEBC's server infrastructure and the entire electoral process was not secure but susceptible to manipulation; and that the log statements showed that certain

unauthorized or authorized operations were being carried out before, during and even after the polling day, bringing into sharp focus, the integrity of the entire process. Besides, they alleged that documents in the electronic document management platform that allowed for audit trail and document retention were altered or deleted; and therefore, the document retention policy of IEBC was not adhered to before and after the polling process.

[70] Justus Nyang'aya, the 7th respondent and a Commissioner at IEBC, supporting the 1st petitioner's case in this regard, claimed that Gudino Omor was able to access IEBC's server using a username ID shown as 'O', where through such access, he was able to pull down the results from the Forms 34A uploaded from the polling stations; and that through his log-in credentials, Omor was able to upload fresh results. He deponed that Omor was active on the server from 1st June, 2022 and remained active beyond the election day. He attached logs as proof of the said Omor's access to the server, yet IEBC never gave any access rights to the said Omor. Over and above access to the server by Omor, Nyang'aya claimed that 377 other people also accessed IEBC servers. Some of these people included staff of IEBC, Abdidahir Maalim, Moses Sunkuli and Gideon Balang.

[71] Disputing these claims, the 1st respondent described the alleged staging, alteration and dumping of 11,000 Forms 34A within eight minutes between 1101 and 1109 hours as a false narrative supported by falsified logs; that the logs presented contained glaring inconsistencies which indicated that the data was not genuinely sourced from IEBC's server as alleged; and that the entries were comparable to a report of alleged interference with the 2017 election that had been shared by Prof. Makau Mutua, a spokesperson of the Raila Odinga Presidential Campaign Secretariat on his twitter platform.

[72] In addition and in support of the 1st respondent's position, Eric Mulei Kitetu prepared a report comparing the data on the logs and noted the apparent similar entries with the report shared by Prof. Makau Mutua. He pointed out some of the

similarities to include an entry of the date showing the year as 2017 instead of 2022. He also took issue with the dates and times indicated in the screenshots as 17/08/2022 at 23¹⁵ hours. He deponed also that his attempt to log into IEBC's platform with a view of establishing the security regime, and the source of the screenshots of logs presented established that a log-in attempt had been made and a screenshot taken that was later edited by adding data to form the six screenshots produced by the 1st petitioner. He also set out other inconsistencies in the entries including the texts, spacing, time stamp and the naming regime which varied from that on IEBC's server.

[73] Furthermore, the 1st respondent claimed that, if there was failure of technology, it could not vitiate the result of the elections as declared by the Chairperson of IEBC in light of the availability of a complementary mechanism. He denied knowledge of the alleged hacking or infiltration of IEBC systems to manipulate the election result.

[74] IEBC and its Chairperson, on their part, strongly denied that there was manipulation, interference or compromise of the RTS. They were clear that the system was incorruptible and impossible to manipulate. To them, what the 1st petitioner produced to demonstrate manipulation was doctored and photo shopped documents as well as false oral evidence. Relying on the affidavit evidence of Martin Nyaga, they maintained that the Forms used to declare the result were scrutinized in the presence of IEBC, and the parties' agents; and that the originals were all authentic and un-doctored. IEBC further claimed that it produced in Court the certified Forms used in the declaration of the final Presidential Election result to dispel the false narrative advanced by the 1st petitioner on manipulation of its system.

[75] IEBC and its Chairperson equally denied the authenticity of the logs presented as evidence in Justus Nyanga'ya's affidavit and maintained that IEBC's RTS was safe, secure and could not easily be accessed by unauthorized persons;

that IEBC could detect, thwart and monitor external and internal threats to prevent security breaches; and it could also detect compromised machines thereby preventing attackers posing a threat to the system.

[76] Hilda Kavonga also swore an affidavit in which she denied Justus Nyang'aya's claim that Moses Sunkuli, Gideon Balang or Abdidahir Maalim unlawfully accessed the RTS. She maintained that only Presiding Officers in the polling stations across the country had access to the RTS through the KIEMS kits, which access only involved transmission of Forms 34A onto IEBC's portal. Once transmitted, the Presiding Officers had no other rights, for example to remove or delete forms from the system. She went on to explain that Gudino Omor was the technical lead for the Smartmatic team, who provided support on the technology supplied by Smartmatic; that his role was limited to accessing only the infrastructure deployed by Smartmatic which did not involve access to the RTS. It was the case of IEBC and its Chairperson therefore that no foreigner, whether a service provider or otherwise, had access to the RTS.

[77] Further, IEBC outlined the measures it had taken to protect the RTS. These included configuring firewalls; providing its sites with digital certificates and secure socket layer certificates to enable anyone accessing its website to do so securely; placing an access control mechanism in place; and doing a penetration test on its computer systems with an aim of evaluating its security. IEBC also evinced its commitment to ensure the system was secure by conducting a stress and loading test to examine the performance of RTS. It stated, it implemented network business continuity to ensure that its operations continued in case of downtime. It caused to be certified and audited its election technology and also ensured that there were digital signatures on the Forms 34A to provide additional security features to prevent tampering.

[78] IEBC argued that claims of staging and unauthorized intrusion of the RTS were therefore without any foundation and false. According to IEBC, all Forms

34A were immediately uploaded on IEBC portal upon receipt of the transmitted result. They would be verified and only accepted upon confirmation of the additional features of a digital signature and a date and time stamp to signify the actual date and precise time when the image was captured and uploaded on the system. For purposes of transparency and accountability, all Forms 34A were available to the public at all times. On the other hand, the original Forms 34A were authenticated by the security features on the Forms that included UV sensitivity security marks, like IEBC logo; microtext with the words 'Independent Electoral and Boundaries Commission; tapered serialization; anti-copy features; and, watermark. All these assertions were made by IEBC in a bid to vehemently dispel the allegations made by the 1st petitioner.

[79] IEBC also set out in detail, the security parameters in the KIEMS kits system and information management environment. It stated in that regard that only authorized pre-determined KIEMS kits were configured to be able to relay or transmit results into IEBC servers, and therefore, all the tablets used were polling station specific. This meant that the information could be traced from the source, with the KIEMS system being continuously monitored; the entire network spectrum was secured with twin (external and internal) high-level perimeter firewalls which filtered all the information and only defined and authorized transmission would be permitted through these filters; that IEBC had also deployed a robust database management solution with recommended security options all availed including pre-encryption of results before transmission; and having the transmission over a secure VPN sourced from Mobile Network Operators (MNOs). In addition, the database was set up in clusters to assure its availability.

[80] In addition, IEBC described how it had deployed a fourth-tier security measure, a granular role-based access control, and user management for the entire RTS application, which meant that only authorised users could access the system

through issue of credentials, none of which was biometric; the permitted users had distinct but interdependent roles at different levels. With this arrangement it was not possible for one to perform an end-to-end operation in the system, particularly considering that no password was issued to any of the alleged unauthorized users of the system. That political parties were only given API access to the portal; that even though IEBC had outsourced the network provision services from MNOs, it ensured the establishment of technical safeguards to guarantee the integrity of the process. It introduced the use of unique specialised SIM cards configured on secured APN for the result transmission of the KIEMS kits; Static Internet Protocol addresses for use in specific gadgets where the SIM cards could only be used within IEBC's Access Point Network; the use of specialised SIM cards MSISDN which did not allow any duplication and was disabled for any SIM card cloning; the SIM cards being disabled for voice or text messaging; and, a unique Internet Mobile Subscriber Identity (IMSI) with a unique identifying number within the network which is the primary identifier of the subscriber.

[81] IEBC went on to explain that all the SIM cards supplied and used in the process of transmission were placed under constant monitoring. Periodic reports would be generated confirming that the cards were active throughout the election period and capable of transmitting data. No intrusion or compromise was noted in the system as the electronic transmission system was configured in a way that enabled it to detect a SIM card which was not in the list of those assigned by the MNOs. Furthermore, the SIM cards in the KIEMS kits transmitted the results in the form of HTTP (Hyper Text Transfer Protocol) packets encrypted with SSL (Secure Socket Layer) technology, which is a concealed protocol used by the internet to define how messages are formatted. It was IEBC's case in that context that the link is meant to secure all the data with a code not availed to any of the MNOs, meaning they only transmitted the data and monitored the continuous flow of such data through the respective networks and nothing more.

[82] In addition to the above, it was pointed out that the election results were transmitted wirelessly across the 3G & 4G networks installed and secured by IEBC which had full control to its access. All access left a clear trail and event logs that would capture log-on and log-off data according to time and user name. In support of this process, the MNOs also generated and provided call data records that were forwarded to IEBC at intervals. This feedback mechanism showed that transmission of data did not stop at any time and neither was there intrusion by any strange and unidentified number.

[83] Through these monitoring and control tools, the MNOs generated and provided Call Data Records (CDRs) which were forwarded to IEBC at intervals. Michael Ouma in his affidavit further demonstrated that the CDRs showed no stoppage in transmission of data or intrusion by any strange unidentified number; that the CDRs contain useful but critical information like the serial number of each SIM card, the SIM cards calling number (MSISDN), SIM static and active internet Protocol addresses, the Internet data volume generated by the SIM card, the time of last connection and the specific type of network, whether 2G, 3G or 4G.

[84] To enhance the security of the system and integrity of the transmission, IEBC put in place cyber security procedures introducing a third layer of firewalls that filtered all incoming and outgoing data while restricting any third party or unauthorized access. The firewalls had an inbuilt report back and alert mechanism in case of any unauthorized attempted access or unusual activity in the system and were continuously being monitored for such attempts to intrude.

[85] From the affidavit of Moses Sunkuli, IEBC submitted that the RTS had a digital security authentication that validated the authenticity of the Forms 34A. Upon opening the online portal, it was ascertained that all Forms uploaded were only Forms 34A, the polling station codes on them matched those on the Forms, and the KIEMS kits serial numbers and the time stamp being the date and the time to the mini second when the image was transmitted were evident. There was

further authentication of Forms 34A through a digital electronic signature where the Forms uploaded upon opening using the adobe acrobat program, would show a signature panel on the periphery of the Form; that upon clicking on the signature panel, the signature details would appear and the same would indicate whether the Form 34A had been modified or not, from the moment it was uploaded, and that if any Form was tampered with, the system would indicate on the signature panel that the Form had been tampered with.

[86] In conclusion, IEBC and its Chairperson maintained that, in view of these measures and safeguards, the allegations of compromise or intrusion by third parties were made without any factual or technical basis and were merely aimed at misleading the public and to garner sympathy from the Court.

(i) Analysis of evidence

[87] The claim of dumping of 11,000 forms as alleged by the 1st petitioner remained central at the hearing of the Petition. The manner in which it was described to us, suggested that there was ‘staging’ which implied there were other users who had been granted access to the system and who had the ability to intercept and withhold Forms 34A, manipulate them by changing the results before dumping them onto IEBC’s portal.

[88] Learned Senior Counsel, Mr. Murgor attempted to give a graphic description of how this would happen. He submitted that the Presiding Officers would take a picture of the Forms 34A with the KIEMS kit, save the forms in PDF form, but before the Forms 34A would reach IEBC’s Public Portal, they would be intercepted midway, downloaded and converted into the CVS system (comma separated values), which is an editable document format from the original PDF form. It is this format, according to Counsel, that would enable the third party to change the results. Upon being asked by the Court to clarify the reference to CVS, Counsel sought to withdraw the submissions on the reference to CVS and clarified that he

meant PDF and not CVS. We note however that the reference to JPEG remained on record.

[89] The question to be asked is, how was this possible? How was a coloured JPEG Form converted to PDF? How was it possible to intercept Forms 34A midway, falsify the numbers by the so-called ‘man in the middle’ or ‘machine in the middle’, upload the Forms with falsified figures and send them to IEBC’s portal?

[90] Were these claims established by evidence meeting the threshold set out earlier? From the 1st and 3rd petitioners’ interlocutory applications to access information, devices and documents in the custody of IEBC and for scrutiny, it appears to us that, according to those petitioners, that is where the evidence would be found. Their applications were granted in the following terms:

“1. IEBC to Provide to the applicants copies of its technology system, security policy comprising but not limited to password policy, password matrix, owners of the system administration password(s), system users and levels of access, and workflow charts for identification, tallying, transmission and posting of portals and any APIs that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.

2. IEBC be compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and which are forensically imaged to capture a copy of the Form 34C which is the total votes cast.

3. IEBC shall provide the applicants with certified copies of penetration tests conducted on IEBC election technology system ...”

[91] We have alluded earlier to the ICT scrutiny exercise and access presided over by the Registrar of this Court. The 1st and 2nd petitioners as well as the 3rd and 4th petitioners were represented in the exercise by agents, mostly advocates and ICT experts, who appended their names and affixed their signatures to the Report. From the Report, parties reviewed the transmission of Forms 34A from the KIEMS kit to the online Public Portal, and were satisfied that once the Presiding Officer took a picture of Form 34A, the KIEMS kits would, at that point, scan the Form into PDF which would then be transmitted to a storage server. At the storage server, the Form is processed by an application to ascertain compliance with security features. Once this is confirmed, Form 34A is then published on the online Public Portal. But if it lacks these security features, it is dropped and information of the anomaly is duly recorded.

[92] It is also a common factor that Forms 34A as transmitted from the polling stations were handwritten by the Presiding Officers. IEBC clarified as we have stated elsewhere in this Judgment, that the KIEMS kit has an inbuilt scan application that enables the scanning of Forms into PDF before transmission to the receiving server. This categorical finding settles the issue of alleged image conversion. The totality of evidence by IEBC in rebuttal thus leaves us in no doubt that the system in terms of its configuration, design and disposition would not allow the intrusion and interference in the manner as alleged by the petitioners' side. The 1st, 2nd, 3rd and 4th petitioners, illustration of how a document which is handwritten and with signatures, is scanned and uploaded through the KIEMS – then uploaded on an external platform – where it is converted into another format, amended, then converted back into PDF format to finally be re-uploaded onto IEBC's portal, is therefore not believable. The scrutiny exercise put this postulation beyond argument.

[93] Similarly, any alteration of the Forms 34A as transmitted would have required the person to have information on the voter turnout. Expressed differently, one cannot purport to alter the votes of a polling station by increasing the number of votes in favour of one candidate without, first establishing the exact number of voters that turned out to vote. To alter votes in the manner alleged by the petitioners would require the ‘man or machine in the middle’ to have had agents in all the 11,000 polling stations, where it is alleged that Forms 34A were held in abeyance for manipulation, before being uploaded with finality to IEBC’s online Public Portal within 8 minutes. That is almost a technological impossibility. The claims of access to the RTS to interfere with Forms 34A, and that 11,000 Forms 34A were affected by staging were not proved and remained just but mere allegations.

[94] Furthermore, according to the Registrar’s Report, the 1st petitioner’s agents wanted to know, particularly, whether there were suspicious users who logged into the system on 12th August, 2022; the particulars of the users who logged-in recently; and whether there was deletion or alteration of any file from the server. The logs from 8th August, 2022 to 29th August, 2022 were retrieved and sampled for user root during the election period. There was also a general review of the server audit logs and the users’ administrative privileges (sudo users). The findings in the Report on these issues were that:

“A review of the access logs did not show the users who logged in on 12th August, 2022 or any suspicious activity on user activity.

Information on the system users was also retrieved and shared and it was noted that the users with the user names ‘vito’ ‘ogudino’ and ‘provisio’ accessed the system on the dates between 20th July, 2022 and 28th July, 2022. It is however

noted that from the logs retrieved between 8th-29th August, 2022, there was no suspicious activity by the said users.

It was also noted that there were no records of file deletion or removals that were discovered.

A review of the general server audit logs also showed that there was no suspicious activity involved.”

[95] In addition, upon scrutiny of the original Forms 34A from the contested polling stations which were allegedly intercepted, the Registrar’s Report revealed that the forms 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. Where then are we to find the evidence of interception? We found none where the petitioners led us to and indeed a scrutiny of the RTS server as confirmed by the Registrar’s Report was conclusive that no sign of interference was detected.

[96] Apart from the fact that IEBC has provided detailed measures and safeguards to the RTS, the scrutiny exercise also confirmed that the allegations of intrusion and penetration of the system by foreigners on 8th, 9th, 11th, 14th and 16th August, 2022 which was before, during and after the date of the General Election, were not proven.

[97] Some of the logs presented as evidence of staging and dumping when reviewed were also found to be either from logs arising from the 2017 Presidential Election or were from unknown and unauthenticated sources. The evidence of John Mark Githongo was particularly startling. His affidavit, which he subsequently purported to withdraw, was the fulcrum of the 1st petitioner’s case. It gave the impression that there was direct incriminating evidence from a hacker detailing how he and others were tasked to intercept and manipulate Forms 34A transmitted from the KIEMS kit and thereafter transmit the altered Forms to IEBC

portal. Once IEBC responded to those averments, it became apparent that the particulars of the entries in question emanated from the 2017 Presidential Election. Prof. Makau Mutua who was named as the source of the 2017 logs did not deny the assertion and Githongo's attempt to recant or explain away issues pointing to forgery did not help matters as the initial logs had been produced under oath.

[98] In the same breath, the evidence of Benson Wesonga also turned out to be no different. The specific allegation that on 10th August 2022, IEBC dumped 11,000 Forms into the Public Portal between 1101 and 1109 hours fell flat on its face when the result transmission server was scrutinized, in the presence of agents including one, George Njoroge, an IT specialist for the Azimio La Umoja One Kenya Coalition Party. No such evidence was apparent and it turned out that this evidence was predicated on no more than speculation.

[99] According to the Registrar's Report, IEBC actually provided a live demonstration for the agents of the parties during the scrutiny exercise for all to understand the RTS. It was also clarified by Mr. Nkarichia, Advocate for IEBC before the Court and confirmed by the Registrar's Report, that there were no deletions or alterations or any history of such deletions or alterations on the logs.

[100] *Amici* John Walubengo, Dr. Joseph Sevila and Martin Mirero impressed upon us the importance of understanding the RTS application workflow and the management of the thousands of Forms 34A transmitted through the RTS from the polling station to the NTC and how they are organized and presented to the online Public Portal, and the access levels and how each user at the Backoffice interacted with the data centre infrastructure. As suggested by John Walubengo, Dr. Joseph Sevila and Martin Mirero as *amici*, Mr. Nyaga of IEBC was able to demonstrate during scrutiny, the process of transmission of the Forms 34A from the KIEMS kits to the Public Portal; that once the Presiding Officer at a polling station scanned the Form 34A, the Form was relayed through the RTS to a

Backoffice application that receives and processes the information. It is from the Backoffice that the Forms are then transmitted to the Public Portal as received.

[101] *Amici* also contended that one of the ways through which IEBC proves its system is not compromised is by providing appropriate server logs that record digital services happening on the computer system. It was their submission that in presenting server logs as digital evidence, which is a critical component in digital forensic science, this places the Court in a position to determine the credibility of the digital evidence before it. This we did, and we reiterate that from the scrutiny exercise, that IEBC provided the logs during the review of the server audit logs where no suspicious activities were discovered, answering this submission in the affirmative.

[102] Furthermore, according to the Registrar's Report, IEBC identified the main server used for the elections, with the agents present agreeing to proceed with supervised access on the server. Again, the 1st petitioner's agent, George Njoroge, was present, as were other agents during demonstration of IEBC system architecture, storage and transmission information. IEBC identified 'the main server' holding Form 34C which was scrutinized through supervised access. As we have earlier pointed out, once the KIEMS kits scan the Forms 34A into PDF, the Forms 34A are transmitted to a storage server. The exercise verified that at all times of transmission, only one server is involved in the result transmission. However, the Report also disclosed that, though there is only one physical server, the same server hosts several small virtual servers whose functions are not related to elections. But this alone did not compromise transmission of results. We affirm that it is by an order of this Court that supervised access to the main transmission server was granted and not to other servers, which were irrelevant in the results transmission process. We are satisfied that IEBC provided access to this server during scrutiny and we have explained the result of that access.

[103] This now takes us to the evidence of Celestine Anyango Opiyo, an Advocate who purported in her affidavit to produce documents on behalf of unnamed agents. We propose to deal with her evidence while addressing Issue No.(iii) but suffice it to say here that her evidence was, upon analysis and in its totality, most wanting in value and did not point to any staging of Forms 34A as alleged. That also must be said of the evidence of Justus Nyang'aya who, we have in the preceding paragraphs noted, attached logs that were of no probative value and were unhelpful to the petitioners. All other allegations on hacking, staging, dumping, penetration and infiltration do not require our attention as there was no evidence produced to show how that happened, and we have said as much. In the absence of evidence to prove interference with RTS, we are of the view that there was no hacking of the system in any form.

[104] In addition, the 1st petitioner claimed that IEBC had hired Jose Gregorio Camargo Castellanos, Joel Gustavo Rodriguez Garcia, and Salvador Javier Sosa Suarez to facilitate the irregularities and illegalities which compromised the integrity of the electoral system. We were convinced otherwise. We find that the role of the Venezuelans was technical in nature as they were part of the team from Smartmatic tasked to provide support on the technology. Their role was limited to only accessing the infrastructure deployed by Smartmatic. We are persuaded that this did not in any way grant them any access to the RTS as no such evidence was revealed during the ICT scrutiny exercise. Furthermore, no evidence was adduced to link them with the uploading of any documents in the RTS or doing anything unlawful on the system. It is evident that any unauthorized access to the system would leave a trail of logs and none were found. The logs from the scrutiny exercise demonstrated this fact.

[105] Regarding the allegation that the integrity of the Public Portal was compromised, we are persuaded that this was disproved by evidence of consistent attributes securing the system 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. It has been shown, to our satisfaction that the KIEMS kits were configured to transmit the results into IEBC server, with all the tablets being used for specific polling stations. It was easy, with this configuration to trace where the Forms 34A were transmitted from. Equally, the network was secured with external and internal perimeter firewalls only authorising transmission of the Forms 34A through the network and no other information. The results of the Forms 34A were also encrypted before transmission over a VPN provided by the three mobile network operators.

[106] It is therefore clear, and we do so find that the RTS was configured on a 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 kits. In our view, the petitioners failed to produce evidence to the contrary.

[107] Evidence before this Court also shows that the KIEMS kits were capable of detecting the legitimacy of the Forms as they would take images using the specific markings identifying the Forms 34A and ensuring that only legitimate Forms were transmitted. We are also persuaded that there was integrity of the process by adding a third layer of firewalls that filtered all incoming and outgoing data while restricting any third party or unauthorized access. The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the PDF format that eventually appeared on the Public Portal was sufficiently explained as an impossibility. Accordingly, we dismiss this allegation and the consequence is that the petitioners have failed to discharge the legal burden of proof so as to shift it to IEBC.

(ii) Findings and Conclusion

[108] We therefore reiterate our findings in the Judgment delivered on 5th September 2022 as follows:

- (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 PDF 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.**
- (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 or machine in the middle server configured to 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.

3. Whether there was a difference between Forms 34A uploaded on IEBC's Public Portal, the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the Agents at the polling stations

[109] On this issue, the 1st petitioner's case was two pronged. First, that IEBC and its Chairperson fraudulently ordered the firm printing the ballot papers, Inform Lykos Hellas SA, to print a parallel set of Forms 34A. The first Form was marked "1 of 2" while the second Form 34A was marked "2 of 2" at the bottom of the Forms.

In addition, they declined to order for the printing of the requisite Forms 34B contending that the Forms 34B would be self-generated from the KIEMS kits after close of polling. The petitioners submitted that in response to their letter dated 27th July, 2022 questioning the decisions aforesaid, IEBC and its Chairperson invited all Presidential Election stakeholders to a consultative meeting. It was agreed that IEBC would print the Forms 34B and not use the Form 34A booklet 2 of 2, which would be sealed in a tamper proof envelope. IEBC issued guidelines reflecting the terms of the consent, which were gazetted vide Gazette Notice No. 9280 of 2nd August, 2022.

[110] Secondly, it was their case that there was a systematic pattern of criminal and fraudulent interference with the electronically transmitted results in Forms 34A in IEBC's portal after declaration of results at the polling stations. The effect of this, they alleged, is that votes were being deducted from the 1st petitioner and added to the 1st respondent without there being a change in the total vote count in order to camouflage the alterations. In that regard, they pointed to 41 polling stations in Bomet, Kiambu and Kakamega Counties where the alterations were allegedly done. Relying on the affidavits of Celestine Anyango Opiyo, they urged that there were startling differences between the physical copies of Forms 34A and the ones uploaded onto IEBC's portal. Relying further on the affidavit of Arnold Ochieng Oginga, they gave a tabulation of the affected Counties and specific polling stations in Baringo, Nairobi, Vihiga, Mombasa, Kajiado, Bomet, Kakamega, Narok, Bungoma, Busia, Siaya, Kisumu, Homabay, Migori, Kisii, Nyamira, Muranga, Marsabit, Turkana, Samburu, Trans Nzoia, Nandi, Kericho, Embu, West Pokot, Nakuru and Diaspora where the Forms 34A issued to the agents at the polling stations were allegedly different from what was uploaded to the Public Portal.

[111] They also contended that, from the 41 Forms analysed, it was evident that there was a premeditated scheme to deduct and/or rob votes from the 1st petitioner in favour of the 1st respondent. It was also contended that the serial numbers on the altered Forms 34A on IEBC's portal remained the same but the contents were

different from the Forms 34A issued to their agents at polling stations. They added that the manipulation of the transmitted results could only be done by somebody with opportunity to access IEBC's portal, coupled with the capability to interfere with the results remotely and electronically. They asserted that out of the 41 sampled Forms, the total number of votes reduced from the 1st petitioner and added to the 1st respondent was 2, 793 votes. They used the 41 polling stations as a basis to argue that the same pointed to a widespread pattern that would significantly alter the results of the Presidential Election in general.

[112] Furthermore, they claimed that they had been monitoring the Public Portal since 15th August, 2022 and noted abnormal activities such as, transmitted results Forms which were missing from IEBC's portal yet at the time when the impugned results were declared, the Chairperson of IEBC had stated that he was declaring results contained in the portal.

[113] They also argued that several results declaration Forms did not have the security features as stated in the affidavits of Martha Karua, Dr. Nyangasi Oduwo and Saitabao Kanchory; that the Forms 34A did not have the anti-copy features or IEBC logs at the bottom left corner of the Form; that the Forms at the NTC did not show at the foot/tail end as 1 of 2 or 2 of 2 and; that some of the Forms did not have the security features as set out in the tender document or as demonstrated by the service provider during the inspection visit. It was therefore their claim that in the absence of the physical distinction between the two Forms, it was not possible to ascertain which sets of Forms were used at the polling station calling into question the integrity of the transmission process.

[114] The 1st petitioner also stated that IEBC was continuously deleting and uploading Forms 34A and Forms 34B containing different results from what they had initially posted and which were used as a basis for result declaration. Relying on the averments by Arnold Ochieng Oginga they produced computer print outs of the timestamps of the portal status of transmission and display of results.

[115] On contamination and tampering with Forms 34A, the petitioners' case was supported by the evidence of Martin Papa and Susan Wambugu who are both forensic document examiners. The two are said to have examined hundreds of Forms from various Constituencies and filed a report thereon. The report shows that contrary to the guidelines issued in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017; [2017] eKLR (*Maina Kiai*), the result transmitted to the Public Portal was not the result contemplated in Article 138 (3) (c) of the Constitution. Consequently, they believed that there was interference with election materials contrary to Regulation 17 of the Elections (Technology) Regulations, 2017 and that the Forms purportedly uploaded on the Public Portal from polling stations were of questionable credibility and integrity.

[116] The 1st and 2nd respondents, on the other hand, argued in response that there was no variance or discrepancy between the Forms 34A issued to the candidate's agents, those electronically transmitted by the KIEMS kits and those published on IEBC's portal. They specifically averred that there was no variance or discrepancy between Forms 34A issued to their agents and those posted on IEBC's website and therefore the authenticity of the Forms 34A alluded to in the Petition was questionable.

[117] It was their further assertion that it would have taken enormous logistical mobilization, running to several days to execute the sort of fraud alleged. This would in addition require IEBC to alter the Forms given to agents in polling stations while getting the agents to sign on new originals to complete the fraud. They relied on the affidavit sworn by Veronica Nduati which faulted the evidence of Susan Wambugu as perjury and containing matters outside the deponent's knowledge; further that the petitioners' case was predicated upon counterfeit documents, fake Forms 34A and what she referred to as a 'bogus' document examiner.

[118] Silas Kiptoo Kibii, one of UDA's agents, swore an affidavit and deponed that he examined the affidavit sworn by Susan Wambugu and the attached document titled "Forensic Document Examiner's Report" from the DCI which includes various Forms 34A in 90 polling stations which for the purposes of the purported forensic audit were copies, not originals. He made the following observations: (a) the allegation that entries were made by the same authors in the 90 polling stations was baseless for there is no legal requirement that all the agents must fill the forms in their own handwriting while witnessing the Form 34A so long as they append their signatures; and (b) that the report made incomprehensible conclusions and findings and lacked certainty while proffering personal opinions that are of no probative value. Consequently, in his view, the report was not a forensic analysis in the true sense of that term.

[119] The conclusions in the Forensic Document Examiner's Report were that some of the Forms 34A had entries made by the same author. According to the 1st and 2nd respondents, none of those whose signatures were being questioned, that is, Presiding Officers, their deputies, agents or observers, had rejected them or denied having signed the same. It is for these reasons that the 1st and 2nd respondents prayed for a finding that the report by Susan Wambugu be declared to be of no probative value on the issues it sought to speak to.

[120] John Macharia Wangui, another UDA agent at Kabete Vetlab Primary School polling station 9 of 12 in Kitisuru Ward, Westlands Constituency Nairobi County swore that, as an agent, he observed and took note of the tallying exercise and upon completion, all the agents at the polling station were each issued with a copy of the duly signed Form 34A and he instantly submitted a copy to his party electronically. He asserted that the Form 34A produced in the affidavit of Arnold Ochieng Oginga was not the true copy of the Form 34A that he obtained from the Presiding Officer and was certainly not the copy he submitted to the UDA party.

He annexed the copy he submitted to the party and which he contended was similar to the Form uploaded on IEBC Public Portal.

[121] IEBC and its Chairperson on their part denied that there was any manipulation of the Forms 34A or that the physical Forms 34A were different from the Forms 34A transmitted to the NTC. They submitted that the electoral process and system met the standards established in the Constitution and the law. Additionally, they submitted that the 1st petitioner had failed to discharge the burden to the required standard to prove that there was tampering of the Forms 34A.

[122] Both Moses Ledama Sunkuli, Acting Director, Voter Registration and Electoral Operations, in his affidavit in response to Arnold Oginga as well as Andrew Maina, Returning Officer Gatundu North Constituency, Kiambu County in his affidavit in response to Celestine Opiyo, deponed that at all the polling stations, party agents were issued with carbonated copies of Forms 34A which appeared like “pencil” copies of the original and were not coloured. They also asserted that the copies of Forms 34A were issued to the Chief Agents at the NTC, which copies had a running head or banner with the word “copy” appearing repeatedly to indicate the document was a copy. It is for these reasons that they both contended that the Forms 34A annexed to the affidavits of Celestine Opiyo and Arnold Oginga as evidence of Forms received from their party agents were not carbon copies and also lacked the two aforesaid features. They contended that the annexures were copies of Forms downloaded from IEBC’s portal and which were subsequently doctored and manipulated to create a desired but false narrative.

[123] In further answer to Arnold Oginga’s assertions, Moses Sunkuli confirmed that IEBC verified all Forms 34A from all polling stations in all Constituencies before announcing the results, save for 6 polling stations which were affected by violence and were not included in the final tally of Form 34C. He went a step

further and pointed out discrepancies in the Forms 34A annexed to Arnold Oginga's affidavit. Specifically, he pointed to page 46 of the annexures which contained a Form 34A that appeared to have been paper punched for purposes of filing. He contended that this was evidence of forgery as IEBC did not avail paper punches at any of its polling stations. As for Ngaina polling station of Tiaty Constituency, he argued that Arnold Oginga wrongfully asserted that the Form was sent by an Azimio agent, yet there were no agents present for any of the candidates at that polling station.

[124] In addition to these affidavits, IEBC relied on several affidavits sworn by its Constituency Returning Officers as well as the Presiding Officers in the polling stations highlighted by the 1st petitioner. They included the affidavit sworn by David Huho Kimani, Presiding Officer, Kawaida Primary School polling station 1 of 6, Kiambaa Constituency, Kiambu County on 25th August, 2022. On the allegation that some agents produced Forms 34A not matching the ones on IEBC Public Portal, he deponed that he duly filled the Form 34A of his station in the presence of the agents for political parties and forwarded the same to the Constituency Tallying Centre (CTC). He denied that the Form produced by Arnold Oginga was prepared by him and instead asserted that the Forms 34A appearing on IEBC's Public Portal were the same as the physical Forms submitted to the NTC.

[125] These averments were echoed by Judith Ndaara, Presiding Officer, Kawaida Nursery School polling station 1 of 5, in Cianda Ward, Kiambaa Constituency, Kiambu County, Kelvin Mungai Mworira, Presiding Officer, Kawaida Nursery School, polling station 2 of 5, Cianda Ward, Kiambaa Constituency, Kiambu County; John Otieno Owino, Presiding Officer, Vetlab Primary School polling station 2 of 12 Kitisuru Ward; Collins Barasa Ndamwe, Presiding Officer Kabete Vetlab Primary School polling station 7 of 12; Kachepkai Pkiyeny Meshack, Presiding Officer, Oronto Craze Primary polling station 1 of 1, Tiroko Ward, Tiaty Constituency, Baringo County; and Kaptisia Samuel, Presiding Officer, Kapedo

Primary School polling station 1 of 1, Tirioko Ward, Tiaty Constituency, Baringo County in their separate affidavits. They too reiterated that the Forms 34A appearing on IEBC Public Portal were the same as the physical Forms submitted to the NTC. The only logical explanation, in their opinion for the difference in content, was that the 1st petitioner's Forms were forgeries and doctored. Lastly, that the purported agents of the 1st petitioner must have been engaged in the manipulation of the Forms that they presented to Court.

(i) Analysis of evidence

[126] On this issue, the 1st petitioner's 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. The respondents in answer, have urged the point that none of the Forms 34A transmitted to IEBC's Public Portal was interfered with or manipulated. They also urged by way of several witness affidavits that the Forms 34A signed at the polling stations and issued to the agents were identical to the Forms on IEBC's Public Portal and delivered to the NTC. They all asserted that in any event, going by the *Maina Kiai Case*, IEBC used the original physical Forms 34A to tally, verify and declare the Presidential Election results.

[127] The Court in its Ruling delivered on 30th August 2022, granted the following Orders on scrutiny:

“Having noted the above, we hereby grant the following orders:

...

5. That the ballot boxes for the following polling stations be opened for inspection, scrutiny and recount: Nandi Hills and Sinendeti Primary School in Nandi, Belgut,

Kapsuser and Chepkutum Primary Schools in Kericho County; Jomvi, Mikindani and Ministry of Water Tanks Polling Stations in Mombasa County; Mvita, Majengo and Mvita Primary Schools in Mombasa County; Tinderet CONMO, in Nandi County; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;

- 6. That the Error Forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10th to 15th August 2022 be provided to the applicants.*
- 7. That IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election SUBJECT to the applicants providing to IEBC specific contested polling stations for compliance thereof.*
- 8. That the above exercise shall be conducted within 48 hours of these orders that is from 2 pm on Tuesday, 30th August to 2 pm on Thursday, 1st September 2022.*
- 9. Each Party shall be represented by two agents during the exercises above and they shall at times be under the supervision of the Registrar of the Court and her staff. The Registrar shall file her report by 5 pm on 1st September 2022 and avail copies to all parties.*
- 10. Any party is at liberty to submit on the report before conclusion of the hearing as shall be directed by the President of this Court.”*

[128] The Registrar's Report confirmed that in compliance with Order 5 of the Ruling, (above), scrutiny was conducted on the ballot boxes from 47 polling stations. A further scrutiny was carried out in respect of 41 polling stations pursuant to Order 7 (above). The Report noted that the alleged polling station called Tinderet Conmo in Nandi County did not exist although the 1st petitioner alleged infractions in that polling station.

[129] On the outcome of the scrutiny and verification of votes cast and garnered by each of the Presidential candidates per polling station, save for four polling stations, the Report indicates that there was no variance between results as captured in Form 34A and recount.

[130] The four polling stations were as follows; Chepkutum Primary School 2 of 3, where one vote for the 1st petitioner was counted for the 1st respondent. In Kapsuser Primary School 2 of 3 there was a computation error noted on the total valid votes cast, but the votes in respect of each candidate remained the same. In Sinderet Primary School 1 of 2, the ballot box did not contain Form 34A. However, the recount of votes matched what was captured in Form 34C. In Nandi Hills Primary School 2 of 4 there was an error in the votes indicated on Form 34A where the 1st petitioner received one vote less.

[131] Before we make our determination whether there were significant differences between Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC and the Forms 34A issued to party agents, we need to examine the evidence presented by IEBC in rebuttal.

[132] Like in the previous grounds, IEBC and its Chairperson maintained that they placed sufficient safeguards to ensure that both the RTS and the KIEMS kits were secure enough to prevent any intrusion by unauthorized third parties. It explained the nature of the copies of the Forms issued to the agents *vis-à-vis* those appearing on IEBC Public Portal. We also take note of the evidence produced by IEBC in the

form of numerous affidavits by the Constituency Returning Officers and Presiding Officers dismissing the petitioners' contention that the Forms 34A appearing on IEBC's Public Portal were different from the physical Forms submitted to the NTC.

[133] Further, we have considered the 1st and 2nd respondents' witness affidavit sworn by John Macharia Wangui, their agent at Kabete Vetlab Primary School polling station 9 of 12 in Kitisuru Ward, Westlands Constituency Nairobi County who corroborated the evidence of IEBC's witnesses. Finally, there is the affidavit of Eric Atuma sworn on 26th August, 2022 filed by counsel for the 1st and 2nd respondents, who deponed that he was the ODM/Azimio agent at the St. Martin's School Kibarage polling station 2 of 7 in Kitisuru Ward, Westlands Constituency, Nairobi County; that as the agent who was present and signed the Form 34A at the polling station, the Form 34A annexed to Arnold Oginga's affidavit and purported to be from his polling station was not the electronic copy that he submitted to the ODM/Azimio party. He produced the true copy that he submitted to the party and which he pointed out was in consonance with what was published on IEBC's Public Portal.

[134] In light of all the aforementioned affidavits, and the totality of the evidence, we find no credible evidence to support the 1st petitioner's claim that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report by the Registrar's Report confirmed the authenticity of the original Forms in the sampled polling stations. There were no significant differences between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC that would have affected the overall outcome of the Presidential Election.

[135] The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed evidence to the contrary. 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 was 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 had gone ahead to depone on matters that were not within their knowledge. It is worth noting that the two are Advocates of the High Court and are on record as representing the 1st petitioner in the Petition before us.

[136] 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 to.

[137] In stating so, we echo the words of *Ringera, J.* in ***Kisya Investment Limited & Others v. Kenya Finance Corporation Ltd*** H.C.C.C. NO 3504 of 1993 (Unreported) that:

***“It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.*”**

Besides that, the counsel’s affidavit is defective for the reason that it offends the proviso (to) Order XVIII rule 3 (1) (now Order 19 rule 3 of the Civil Procedure Rules failing to disclose who the sources of his information are and the grounds of his belief.”

[138] We must also remind counsel who appear before this Court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, Cap. 63 Laws of Kenya, that swearing to falsehoods is a criminal offence, and that it is also an offence to present misleading or fabricated evidence in any judicial proceedings. 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.”

[139] 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. Further, it puts counsel in jeopardy of being found in contempt of court. This Court in the case of ***Republic v. Ahmad Abolfathi Mohammed & Another***, SC Petition No. 39 of 2018; [2019] eKLR underscored the vital role that advocates play in assisting the Court to effectively carry out its duty of administering justice. We can do no more than reiterate the words of the Court as follows:

“[6] On admission to the Bar, all Advocates make an affirmation, as Officers of the Court. Section 15(4) of the Advocates Act provides that an aspiring Advocate:

“shall take an oath or make an affirmation as an Officer of the Court before the Chief Justice in such form as he shall require, and shall thereafter sign the Roll in the presence of the Registrar or a Deputy Registrar who shall add his signature as witness.”

[7] The status of an Advocate as an Officer of the Court, is expressly provided for in Section 55 of the Advocates Act. An Advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, Advocates bear the ethical duty of telling the truth in Court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the Court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.

.....

[11] It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity.” [Emphasis added]

[140] We now turn to the sad issue of affidavits containing misleading or fabricated evidence and specifically to the affidavit of John Mark Githongo, to which reference has been made. The 1st petitioner, through Githongo's affidavit contended that they had direct incriminating evidence from a hacker contracted by the 1st respondent's agent, Dennis Itumbi, detailing how he and others were tasked to intercept and manipulate Forms 34A transmitted from the KIEMS kits and thereafter transmit the altered Forms to IEBC's portal. John Githongo produced video evidence as well as transcription of the interview he had with a young man whose face and voice are both obscured. He also annexed purported digital logs and digital footprints showing the transaction ID, time stamps, generic user names, IP addresses and functions of IEBC.

[141] It was on the basis of these logs that the 1st petitioner's witness, Benson Wesonga, swore three affidavits on 20th and 21st August, 2022 wherein he claimed to have carried out an analysis of the same. He contended that he found evidence of access being granted to users with permissions to read, write, modify or edit and delete documents. He contends that from the screen grab, a user with a pseudo name or account wchebukati@iebc.or.ke deleted and uploaded certain files for polling stations onto the server repository, thereby compromising the quality of the system.

[142] The 1st and 2nd respondents through the affidavits of Dennis Itumbi, Davis Chirchir, Eric Mulei, Raymond Kiprotich dismissed the logs produced and argued that they were not genuinely sourced from the server as alleged but rather were the same as the ones posted by Prof. Makau Mutua on twitter relating to the 2017 Presidential Election Petition.

[143] In light of that response, John Githongo swore a further affidavit on 28th August 2022, withdrawing the purported logs contending that they did not emanate from himself or the 1st petitioner. He added that the same was only meant for purpose of demonstration. Obviously, neither the withdrawal of the logs nor

the explanation thereof are acceptable and amount to outright dishonesty. It was also a radical departure from the pleadings of the 1st petitioner and completely altered the substance of their Petition fatally. A party or witness cannot approbate and reprobate, more so under oath.

[144] Without saying more, we dismiss the contents of the affidavit of John Mark Githongo, which may contain forgeries, for not meeting the evidential threshold. It was incredible and contained no more than hearsay evidence. We further note that 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.

[145] In the aforesaid video interview by John Githongo with the young self-confessed hacker, the latter asserted how he and others were tasked and did intercept and manipulate Forms 34A transmitted from the KIEMS kits in favour of the 1st respondent and thereafter transmitted the altered Forms to IEBC's portal; that this was made possible through collusion with IEBC, its Chairperson, IEBC's ICT Department and Smartmatic; and that they were enabled to access the back-end of IEBC server. Of interest is paragraph 13 of the affidavit of Githongo of 21st August, 2022 where the young man confirmed that his team was also able to manipulate the gubernatorial results in some key Counties, as well as those for the Presidential Election. It is common knowledge that Governors' results are not transmitted electronically, in the same manner as those of Presidential candidates. That statement alone should have been sufficient to cast serious doubts on the credibility of that witness. It was therefore improper for Githongo to accept such evidence and to present it to this Court as the linchpin for the nullification of the results of the Presidential Election, and even worse, go ahead to swear that those facts were, to his knowledge, true.

[146] Although John Githongo withdrew his earlier averments, this does not prevent the Court from examining the same. In truth, his affidavit together with those of Celestine Anyango, Arnold Oginga and Benson Wesonga were the anchors upon which the 1st petitioner's case was predicated. Without this foundation, the 1st petitioner's case on the instant issue must fail.

[147] The 1st petitioner had also alleged through forensic reports attached to the affidavits of Martin Papa and Susan Wambugu that there was evidence of erasures, alteration and falsification on the original Forms 34A and the Forms 34A uploaded on the online Public Portal. It was further stated that, handwriting on some of the Forms 34A appear to have had a common origin.

[148] We are convinced that the original Forms 34A were authenticated by their unique security features, including UV sensitive security features; Microtext with the words 'Independent Electoral and Boundaries Commission', tapered serialization, anti-copy features and water mark that enhanced the security of the information management environment therefore eliminating and protecting the system against the possibility by any unauthorized third party.

[149] Again, as we have explained, in the Registrar's Report, it is noted that after the exercise, the physical and original Forms 34A were the same as those on the online Public Portal. In addition, the Forms 34A were carbonated to ensure that only one Form was filled by the Presiding Officers and acted as a measure to help authenticate the results at the polling stations before transmission.

[150] Moreover, expert opinion, as a general rule is not binding on the Court. It is only an opinion. In reaching its determination, the Court is entitled to consider other relevant facts and the evidence as a whole. For reasons given above and having found that the Forms submitted to the experts were not authentic, we find that the forensic reports cannot be used as evidence and basis that the Forms 34A were tampered with.

[151] We must now turn to another sensational piece of evidence produced on behalf of the 1st petitioner. Julie Soweto, Advocate, took this Court through a demonstration of how the Forms 34A were interfered with and graphically pointed to Gacharaigu Primary School polling station, submitting that IEBC's stamp on the Form 34A on the portal gave the impression that it had been super-imposed over another stamp. Further, she also demonstrated to the Court that at the top left hand corner, the name of Jose Camargo appeared, an indication to her, that he had access and opportunity to interfere with the Forms 34A uploaded on the system. Also, from the same polling station, she demonstrated that the Form 34A had laid over a document written 'Jose Camargo', as one of the Venezuelans claimed to have interfered with the elections.

[152] Ms. Soweto again pointed out to the Court that Thunguma Primary School in Nyeri Constituency polling station and the polling station at Psongoywo Primary School had the same serial number on the KIEMS kit with the same ID number which was F230450M00204133, the only difference being that the KIEMS kit from Thunguma Primary School transmitted the Form 34A on 9th August 2022, at 2349 hours while the KIEMS kit from Psongoywo primary school did so on the same date, 9th August 2022, but at 1956 hours, despite the two polling stations being located hundreds of miles apart. It was counsel's argument in this context that, this incident disproved IEBC's claim that each Form 34A could only be transmitted on its own unique KIEMS kit with its own unique IP address. This evidence, in Ms. Soweto's opinion substantiated her claim that the Forms 34A on the online Public Portal were different from the physical Forms 34A.

[153] Learned Counsel Mr. Mahat, for IEBC disputed this narrative by availing to the Court the original Form 34A from Gacharaigu Primary School and explained that Jose Camargo's name was on the register of the QR code that had been printed by Smartmatic in his name; and that the image was an overlay on the Form 34A. He submitted that, from that understanding, the Presiding Officer took the picture

of the Form 34A above the QR register which had the name ‘Jose Camargo’. The name was not on the Form 34A or any election material. The original Form, that was being impugned, was produced before the Court by IEBC and we were able to determine that there was no name of ‘Jose Camargo’ on the same. We therefore find the explanation of the overly credible, and a convincing rebuttal to Ms. Soweto’s claim on the issue. Mr. Mahat however admitted that, the two KIEMS kits had the same serial number as alleged but that they had different IP addresses from the two different polling stations, and therefore, had distinct identifiers. Similarity in serial numbers, he said, could only be attributed to a manufacturer’s fault. We find the reasons for the irregularity plausible. In any event, it has not been established that these minor infractions and errors were of a magnitude that would lead to a different result from that declared by IEBC.

[154] Therefore, to the question whether there was a difference between Forms 34A uploaded on IEBC’s Public Portal, those received at the NTC, and those issued to the candidates’ agents at the polling stations, we have found none.

(ii) Findings and Conclusion

[155] It is our finding in conclusion on this issue and flowing from our Judgment of 5th September, 2022 that:

- (a) There were no significant differences captured between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC 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 deposed. 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) 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.***
- (f) The Form 34A for Gacharaigu Primary School which was sensationally presented by Julie Soweto, Advocate, to show that one, Jose Camargo, 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.***
- (g) 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.***

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 Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No. E005 of 2022

[156] On the eve of the election, 8th August 2022, IEBC through its Chairperson in his periodic press briefing to the nation, announced that it would suspend gubernatorial elections in Mombasa and Kakamega Counties; Member of National Assembly elections for Kitui Rural Constituency in Kitui County, Kacheliba Constituency in West Pokot County, Pokot South Constituency in West Pokot County, Rongai Constituency in Nakuru County; and Member of County Assembly Ward Nyaki West in North Imenti Constituency, Meru County and Kwa Njenga Ward in Embakasi South Constituency in Nairobi County.

[157] From the statement, the postponement was occasioned essentially by the wrong pictures and details of the candidates on the ballot papers. The elections in these electoral units were “**suspended to a later date that will be announced through a gazette notice.**” The following day which was indeed the polling day, the Chairperson in his first update reiterated the fact of the postponement, without giving any specific date. It was at the second briefing on the same day that the Chairperson declared that:

“3. The Commission has resolved to hold by-election in eight electoral areas due to court orders and mismatch of material content on 23rd August 2022”.

[158] Subsequently, on 12th August 2022, through Gazette Notice No. 9617 and citing Article 88 (4) of the Constitution of Kenya, Sections 38, 39 and 55B (1) (b) of the Elections Act, and Regulation 64A (1) (b) of the Elections (General) Regulations 2012, the Chairperson formally confirmed that date. However, in a subsequent Gazette Notice No. 9865 of 19th August 2022, the elections were for the second time postponed on account of what the Chairperson termed as threats and harassment of the Commission's officials and staff. However, the new date remained indeterminate. Finally, the elections were held on 29th August 2022, twenty days after the General Election.

[159] It is emphasized that save for the specified units and seats, the postponement did not affect the Presidential or other elections which went on as scheduled. Of course, the postponement did not go without protestation from some of the candidates and parties. For example, in Mombasa 3 residents, Thani Mohamed, Moses Aran and Kevin Nzuki filed a Petition at the Mombasa High Court (Constitutional Petition No. E036 of 2022) seeking to compel IEBC to conduct elections in the eight electoral areas on a date not later than 30th August, 2022. In addition, Dr. William Kingi, the then Deputy Governor of Mombasa challenged in court (Constitutional Petition No. E038 of 2022) the constitutionality of IEBC's decision to postpone the County's gubernatorial election. In Kakamega, Fernandes Barasa, now the Governor, together with Ayub Savula filed a Petition at the Kakamega High Court (Constitutional Petition No. E012 as consolidated with Nos. E011, E013 and 4 of 2022) also challenging the postponement of the Kakamega gubernatorial poll.

[160] In this Petition, it is the combined case of the 1st, 2nd and 3rd petitioners through the affidavit evidence of Martha Karua, Saitabao Kanchory, John Njoroge Kamau and Manyara Muchui Anthony that the postponement of elections in many electoral units was unprecedented in Kenya's electoral history. They have argued 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; that such power is not only contrary to the Constitution but also undermines the conduct of free, fair and credible elections; and that this particular postponement deprived the voters of an opportunity to vote for all the candidates on the date stipulated by the Constitution. In the petitioners' view therefore, the postponement was intended to have and indeed had the overall effect of suppressing voter turnout in the areas in question.

[161] It was their further contention that the postponement could only be attributed to the 3rd respondent's inefficient planning and complicity in suppressing voter turnout in areas that have a history of overwhelmingly voting for the 1st petitioner. They believed therefore that the postponement of gubernatorial elections in Kakamega and Mombasa Counties and no other Counties was deliberate and targeted the 1st petitioner's stronghold Counties with the aim of handing a benefit to the 1st respondent. They deposed further that, as a result of the postponement, there was a dip in voter turnout in the two Counties. In Kakamega, for instance, using an average voter turnout of 72% in the last three General Elections *vis-à-vis* the 60.29% turnout in 2022, the 1st petitioner lost 73,958 votes while the 1st respondent lost 29,127 votes. In Mombasa, using an average voter turnout of 56% in the last three General Election, *vis-à-vis* the 43.76% turnout in 2022, the 1st petitioner lost 47,624 votes while the 1st respondent lost 33,786 votes. By these simulations, in their opinion, the 1st petitioner's overall tally would be 7,064,512 and the 1st respondent's overall tally would be 7,239,054. This would bridge the gap between the declared total votes to 174,542 and not 233,211 as announced.

[162] Further, the petitioners have argued that there was voter apathy and suppression following the failure of KIEMS kits in some Constituencies in Kakamega and Makueni Counties, where the kits were deliberately mismatched between those Constituencies. It was the petitioners' case that all these were

schemes to reduce the 1st petitioner's votes so as to fraudulently benefit the 1st respondent.

[163] IEBC, through the affidavits of Marjan Hussein Marjan, its Secretary and Chief Executive Officer, Moses Ledama Sunkuli and its Chairperson, denied claims that the postponement of elections was deliberate and aimed at voter suppression. They however, admitted that, due to an error on the part of the printer, there was a mix-up of the photographs of candidates; and that despite their spirited efforts to have the printer replace the ballot papers, it was logistically impossible to complete the exercise in time for elections which were due the next day. This is because the mix-up was only discovered on the eve of the election when the ballot papers were being distributed to the polling stations; and that as a practice, ballot papers can only be opened on the eve of the election day to avoid any mischief.

[164] They forcefully denied the suggestion that the mix-up was a deliberate scheme to suppress voter turnout. They demonstrated that low voter turnout was experienced countrywide and gave examples of voter turnout in the neighbouring Counties where elections were not postponed to demonstrate this.

(i) Analysis of evidence

[165] Article 38 (3) (b) of the Constitution guarantees every adult citizen the right, without unreasonable restrictions, to vote by secret ballot in any election. The freedom of citizens to exercise their political rights under this Article is considered a key principle of the electoral system, the fulfilment of which IEBC is required by Article 81 to ensure.

[166] In the same vein, voting in 'periodic genuine elections' is a well-established right according to international human rights law. It is enshrined in the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR). The decision to postpone an

election and prevent citizens, albeit temporarily, from exercising their regular right to vote is therefore a weighty choice which should be made only in a very limited and exceptional set of circumstances.

[167] Previously, in history and even today, these circumstances would include major crises such as civil wars, natural or humanitarian disasters, the prevalence of a deadly pandemic and technical delays related to logistical issues. There may also be certain inevitable constraints such as fire incidents, bad weather, insecurity, or violence.

[168] The 2019 elections in Nigeria were for example postponed by the Independent National Electoral Commission (INEC), the equivalent of IEBC due to logistical and operational challenges which included delays in transporting elections material to some polling centres.

[169] There is no doubt that election postponement can have far-reaching ramifications in a country's democratic process and economic activities. It disrupts voters plans, schedules and activities, which in turn affect the voter and the candidates financially, emotionally and psychologically. It can lead to electoral apathy as citizens tend to lose interest in voting when they feel that it may be a waste of their time. This will then impact on the turnout among registered voters. There is also economic loss associated with postponement of election, in addition to loss of reputation of a nation in the international community. The citizens, political parties and candidates are the main victims of election postponement. The latter two categories invest heavily in elections by campaigning, deployment of agents in the polling stations and generally spend huge sums of money to monitor the elections.

[170] Many voters travel long distances to ensure that they are present at their polling units to participate in the voting process. Many others close their businesses in order to make the journeys. The postponement of the election will

also have an impact on foreign observers, media outlets, security agencies, employers and employees, as well as students. Although in this case it was IEBC that postponed the election, it would have been bound to incur extra costs to deploy personnel and materials for the election but the printers offered to print fresh ballot papers at no extra expense. In addition, its credibility would be damaged by the postponement.

[171] We have examined the petitioners' claim against the aforesaid background. For this claim to succeed, the petitioners must demonstrate, first, that IEBC had no authority under the Constitution or in law to postpone the elections under any circumstance and secondly, that the postponement was deliberately calculated to suppress voter turnout so as to affect the result by reducing the 1st petitioner's overall votes in order to benefit the 1st respondent.

[172] IEBC under the Constitution has a wide mandate in so far as the conduct and supervision of elections to any elective body or office is concerned. In the discharge of its general functions and exercise of its powers pursuant to Articles 88 and 252 of the Constitution, IEBC may perform any functions and exercise any powers prescribed by legislation, in addition to those conferred by the Constitution itself.

[173] By Section 55B (1) of the Elections Act there are distinct circumstances when elections can be postponed by IEBC as follows:

“55 B. Postponement of Elections by the Commission

- (1) The Commission may, where a date has been appointed for holding an election, postpone the election in a Constituency, County or Ward for such period as it may consider necessary where***

—

- (a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;***
- (b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,***
- (c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.” [emphasis added].***

[174] We are satisfied, on the basis of the foregoing provisions of the Constitution and statute, and for the reasons proffered, that IEBC had the requisite constitutional and legal authority to postpone elections in the Counties, Constituencies, and Wards in question.

[175] Concerning the allegation of voter suppression, we start by stressing 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. The ultimate aim of this scheme is to influence the outcome of an election in favour of a preferred candidate. Suppression of votes may range from the seemingly harmless requirements, like strict voter identification rules. If, for instance a registered voter cannot be identified by the KIEMS kit it may amount to suppression if the election officials were to turn away the voter, instead of resorting to the voters’ manual register, and if this is on a scale that is likely to lead to systemic disenfranchisement.

[176] Though the very purpose of voter registration is to ensure that every adult person who qualifies to vote in an election is registered as a voter, voter registration

can be used as a tool for suppressing votes of some communities by not availing registration facilities in time or at all to those communities.

[177] Under Article 88(4) of the Constitution, IEBC is not only responsible for the continuous registration of voters but also for the regular revision of the voters' roll. This latter role is critical in cleaning up the voters roll by removing from the roll voters who have died, or become ineligible to vote for other reasons or updating it with newly registered voters or those who have transferred their votes to other stations. Yet this process may be turned into a tool of mass disenfranchisement, purging eligible voters from rolls for illegitimate reasons or by design retaining deceased voters. A single purge can stop many people from voting. Often, voters will only learn they have been erroneously purged when they show up at the polls on election day and when it is too late to correct the error, considering that not every voter utilizes the window before election to verify their details in the roll.

[178] These are but only examples of how voter suppression can be achieved using the very legal structures and processes that are meant to realize the principles of our electoral system, which include universal suffrage based on the aspiration for fair representation and equality of vote; free and fair elections; and elections that are free from improper influence or corruption.

[179] By way of comparative experience, in the Democratic Republic of the Congo, now a partner State of the East African Community, during the elections held on 30th December, 2018 there were allegations of serious instances and methods of voter suppression as reported by the Human Rights Watch in an article “**DR Congo: Voter Suppression, Violence**” (2019), where it is reported that more than 1 million eligible voters were denied the right to cast their ballot. The article makes note of the following:

“More than a million Congolese were unable to vote when voting was postponed until March 2019 in three opposition areas. Other voters were unable to cast votes because of the last-minute closure of more than 1,000 polling stations in the capital, Kinshasa, problems with electronic voting machines and voter lists, and the late opening of numerous polling places across the country. People with disabilities, or who are elderly or illiterate, faced particular difficulties at polling places or using the voting machines, which had never before been used in Congo. Election observers were also denied access to numerous polling stations and vote tabulation centers.”

[180] The very essence of voter suppression, to disenfranchise voters, therefore goes against the letter and spirit of Article 38 of the Constitution which guarantees every citizen the right to make political choices based on universal suffrage.

[181] The Constitution enjoins IEBC in Article 86 to ensure that, whatever voting method is used in an election, the system must be simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly. Voting must therefore be as easy and accessible as possible and our nascent democracy will work best when all eligible voters can participate and have their voices heard in the ballot.

[182] Back to the ultimate question under the second limb of this ground, whether there was voter suppression, the burden rests on the petitioners to demonstrate that as a result of the postponement of elections in the named electoral units, a particular number of voters or a specific group of people were unable to cast their ballots. This in our view, requires presentation of empirical evidence.

[183] The petitioners have not only failed to present any such evidence, but have also not shown that the postponement was actuated by malice or bad faith or that it was influenced by irrelevant factors and considerations. However, from the explanation tendered by IEBC, we are satisfied that the postponement was occasioned by a genuine mistake, attributed to the printers, who are based abroad, in Athens, Greece. This fact and the discovery having been made only on the eve of the election, placed the situation out of hand. In our view, though, this mix-up could have been avoided had the members and staff of IEBC been more diligent when they went to inspect the templates in Athens. In that delegation too, were representatives of political parties and other groups. A mistake of this nature could have been avoided if IEBC exercised due diligence by counter checking and verifying the correctness of every detail in all the templates before approval of the printing. This is a basic standard operating procedure in printing especially of such a magnitude.

[184] However, despite this infraction or lack of due diligence on the part of IEBC, there is absence of any empirical data, to persuade us that the postponement of elections was meant to suppress voter turnout. The data presented by the petitioners which was countered by IEBC with data from neighboring Counties as demonstrated elsewhere in this Judgment cannot form a basis upon which we can 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 turnouts 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.

[185] On the other hand, in rebuttal to these claims, IEBC illustrated, with examples, to our satisfaction that there was no nexus between the postponement of elections and voter turnout in the affected units; and that voter turnout in the neighbouring Counties was no different from the two Counties in question. For instance, the voter turnout for Kakamega, Vihiga and Bungoma Counties was 60.29%, 60.13% and 63.51% respectively. Similarly, the voter turnout in Mombasa County compared to Kilifi County was shown to be 43.76% against 49.03%. 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.

(ii) Finding and Conclusion

[186] We conclude this issue by stating that:

- (a) We are satisfied that IEBC had the requisite constitutional and legal authority to postpone election in the Counties, Constituencies and Wards in question.***
- (b) The petitioners have not only failed to present any evidence to prove that the postponement led to suppression of voter turnout, but also to show that the postponement was actuated by malice or bad faith or that it was influenced by irrelevant factors and considerations.***

5. *Whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions*

[187] The 1st and 3rd petitioners urged that there was systematic voter suppression in the 1st petitioner's strongholds and ballot stuffing in certain Counties in the Rift Valley and Central parts of Kenya in favour of the 1st and 2nd respondents. They alleged that upon analysis of Forms 34C alongside Forms 37C, 38C and 39C in eight Counties namely; Kwale, Nyandarua, Nyeri, Kirinyaga, Turkana, West Pokot, Vihiga and Migori, they discovered some variance between the total number of votes cast for the Presidential Election and other three elective positions of Governor, Senator and Women Representative. In their estimation, 33,208 votes were cast for the President without corresponding votes for the other three elective positions.

[188] By way of samples, based on the affidavit evidence of Martha Karua, Celestine Anyango Opiyo, Arnold Ochieng Oginga and Manyara Muchui Antony, the petitioners alleged that:

- (i) In Othaya Constituency in Nyeri County the votes cast were 61,879; 62,492 and 44,205 for the Senator, member of the National Assembly and President, respectively. This translated to 18, 287 voters who were unaccounted for the Presidential votes.
- (ii) In North Imenti Constituency in Meru County, the number of registered voters for the National Assembly was 96,241 yet the number of registered voters for the President was 96,623. The registered voters for the President exceeded the registered voters of the National Assembly by 382.

- (iii) In the same Constituency, North Imenti, the total number of valid votes and rejected votes for the National Assembly was 62,196 and the number of valid votes and rejected votes for the President was 62,258, meaning that 62 more people voted in favour of President than for member of National Assembly.

[189] Based on these allegations, it was the 1st petitioner's position that these irregularities impugned and affected the integrity of Presidential results declared by IEBC; that according to Regulation 69 (2) of the Elections (General) Regulations, 2012—as amended—the Presiding Officer must ensure that in a multiple election a voter is “... **issued with ballot papers for all the six elections therein at the same time and shall after receiving the ballot papers... cast his or her votes in accordance with Regulation 70 without undue delay**”. In other words, all the six ballot papers must be dropped in each of the six ballot boxes appropriately marked for each elective position.

[190] The 1st petitioner argued that if Regulation 70 was followed, the total votes cast for the six positions ought to have been reasonably close, if not exactly the same. In their opinion, the differences between total votes cast for each position ought to have been fully explained by the total number of rejected or invalid votes; and any variance not so explained was *prima facie* evidence of fraud with the burden of proof shifting to IEBC.

[191] The 3rd petitioner expressed similar sentiments of vote differential after sampling votes from twelve Counties. According to Manyara Muchui Antony, the sampled Counties of, Nyeri, Nyandarua, Muranga, Kirinyaga, Kiambu, Laikipia, Tharaka Nithi, Embu, Nakuru, Lamu, Kajiado and Nairobi, revealed that the Presidential votes were 5,009,871 while those of Members of County Assemblies (MCAs) were 4,669,068, making the vote differential between these two positions 340,803 votes. From these figures, the petitioners have urged us to conclude that, either 340,803 voters committed election offences under Section 5(g) of the

Election Offences Act, 2016 which prohibits any person without authority to take out of a polling station any ballot paper; or in the alternative, that there were 340,803 incidents of ballot stuffing. To buttress this point, they relied on the decision of the Court in the ***Gatirau Munya Case*** wherein the Court held that where there was evidence of irregularities of such magnitude that are likely to affect the election result, then such an election stands to be invalidated.

[192] The 1st respondent's response to these claims was through the affidavit of Ashif Kassam sworn on 26th August, 2022. Ashif Kassam is an Executive Chairperson of RSM Eastern Africa LLP, a firm of certified accountants licensed by the Institute of Certified Public Accountants of Kenya. He was instructed by the 1st respondent to undertake an analysis of the votes captured in Form 34A and 34C and to respond to the issues raised by the petitioners. His evidence was to the effect that the vote differential in respect of the eight Counties cited by the petitioners related to votes from prisoners, who voted only for the President and not the other positions. The other factor to be considered was the rejected votes and stray ballots which are not included in the count for valid votes.

[193] On the variance of 33,208 votes in respect to 8 named Counties, Ashif Kassam responds as follows:

- (a) Kwale County - The total valid results for gubernatorial should exclude the votes from 63 prisoners who do not vote for other elective positions including governor, but for President only.
- (b) Nyandarua County – variance is 608 votes.
- (c) Nyeri County - The figure in the Petition for gubernatorial results reflected as 335,709 is wrong as the actual declared valid votes is 328, 295 based on Form 37C. The Presidential votes stated does not consider 368 rejected votes and the votes from prisons in that County.

- (d) Kirinyaga County – The figure of 237,183 in the Petition for gubernatorial results is incorrect as the actual declared valid votes is 261, 823 from Form 37C, and from which there are 136 votes from prisons.
- (e) Turkana County - The votes from prisons in that County is 26.
- (f) West Pokot County - The figure of 174,775 in the Petition for gubernatorial results, is incorrect as the actual declared valid votes are 174,709 according to Form 37C, with votes from prisons in that County being 16.
- (g) Vihiga County had 20 votes from prisons for the Presidential position.
- (h) Migori County - The votes from prisons were 34 votes for the Presidential position.

[194] Further, the deponent stated that the petitioners' analysis and the figure of 33,208 failed to factor in stray ballots, which are not accounted for in either of the A's series Forms for either election, considering that ordinarily stray ballots would vary for each election thus creating a variance. In light of the foregoing, Ashif Kassam concluded that the overall variance for the mentioned Counties added up to 718 votes and not 33,208. Overall, his analysis of all 47 Counties revealed that there were 791 less votes cast for the President than for the other County positions.

[195] The Chairperson of IEBC and Moses Ledama Sunkuli in their sworn evidence agreed with the analysis of Ashif Kassam on the question of variance between votes cast for the Presidential Election and the other positions, but reiterated that the alleged variance is not a strange phenomenon given that the same was in this election occasioned by a myriad of factors including; voters in diaspora and prisons who are eligible to vote **only** for the President, stray ballots, rejected votes and spoilt votes.

[196] The postponement of gubernatorial elections in Mombasa and Kakamega Counties was another factor, so was the exclusion of votes cast in Dawardey Community Planning polling station in Garissa County which had 90 registered voters in the tally for the gubernatorial election.

(ii) Analysis of evidence

[197] Have the 1st and 3rd petitioners discharged the burden and proved their claim to the required standard? As discussed in preceding paragraphs, were there unexplainable discrepancies between the votes cast for Presidential candidates and those of other elective positions equal to 33,208 votes which therefore affected the overall results?

[198] We understand ballot stuffing, which includes illegal addition of extra ballots, to be 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 or 3rd 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 committed in the form of ballot stuffing.

[199] The petitioners have also cited Regulation 69(1)(d) of the Election (General) Regulations, 2012 in order to emphasize the fact that, because IEBC failed to cross out voters' names from the printed register after they had cast their votes, the variance in Presidential votes must logically lead to the conclusion that there was fraudulent ballot stuffing.

[200] Regulation 69 states:

“69 Voting Procedure

1. Before issuing a ballot paper to a voter, an election official shall—

- (a) require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;**
- (b) ascertain that the voter has not voted in that election;**
- (c) call out the number and name of the voter as stated in the polling station register;**
- (d) require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved.”**

[201] We understand the petitioners to be saying that failure to cross out the name of the voter from the printed copy of the register once the image has been retrieved by the KIEMS kit allowed “overvoting” particularly in respect of the Presidential position as manifested by the variance in the votes cast for different positions.

[202] Under the complementary mechanism, the Presiding Officers could only use the printed register in case the KIEMS kits completely failed. There is no requirement, therefore, as claimed by the petitioners, for recourse to the printed register, whether for purposes of voter identification or for crossing out the name after identification.

[203] Moreover, the mere crossing out of the name from the voters’ register does not in itself address the issue of votes cast as the voter turnout is sufficient to determine the number of votes cast for whatever position. From the functionality

of the KIEMS kit, it is possible to tell how many people were identified at any given polling station.

[204] Fraud being a serious criminal offence its proof requires a higher standard; 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. This Court in ***Raila 2017*** declared in the passage below that where there are allegations of a criminal nature, the standard of proof remains the one required in criminal cases, beyond reasonable doubt:

“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt...” [emphasis added].

[205] IEBC, in response to the claims of vote differential has proffered plausible explanation as follows. There are categories of voters who only vote for the President and no other candidate in an election. These are prisoners and Kenyans in the diaspora. There were also an insignificant number of stray votes, whose combined effect do not meet the threshold in Section 83 of the Elections Act to demonstrate that there was systematic stuffing of ballots in favor of the 1st respondent so as to justify nullification of the election.

[206] Finally, a General Election in Kenya comprises six (6) different and separate elections held concurrently on the same day with voting being by secret ballot. It is impossible to predetermine the voter turnout or voters’ candidate preferences in each election. None of the parties has flagged anything so significant that would have affected the outcome of the Presidential Election *vis á vis* the other five elections held on that day.

(ii) Finding and Conclusion

[207] We find, in those circumstances, that:

- (a) There were no unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions.***
- (b) The explanation for this differential was satisfactorily given those voters who only vote for the President and no other candidate in an election, prisoners and Kenyans in the diaspora. There were also an insignificant number of stray votes.***

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

[208] 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 were advanced.

[209] On the one hand, the petitioners submitted 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 IEBC. It was their argument that the Chairperson cannot undertake

this task to the exclusion of other Commissioners. They submitted 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 NTC, without involving the other Commissioners. Such action, they contended, 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 cited the Court of Appeal decision in the *Maina Kiai Case* as affirmed by this Court in *Raila 2017*. The petitioners further submitted that Regulation 87 (3) of the Elections (General) Regulations, 2012 is unconstitutional, to the extent that it purports to vest the power of verification and tallying in the Chairperson of IEBC.

[210] On the other hand, the 1st, 2nd and 3rd respondents submitted that the power to verify, tally, and declare results of a Presidential Election at the NTC, 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, 2012. The said Regulation, the respondents submitted, makes no mention of Commissioners, other than the Chairperson.

[211] At any rate, the respondents argued, 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 submitted. For good measure, the respondents submitted that Section 11A (a) of 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, submitted 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.

[212] As to whether the Chairperson acted unilaterally in verifying and tallying the Presidential Election results at the NTC, the petitioners claimed that indeed, this is what happened. It was 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 stated 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.

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

(i) Analysis of evidence

[214] The Court must therefore interpret and settle the meaning, scope, and application of Article 138 (3) (c) and (10) of the Constitution. The first port of call is Article 259 (1) of the Constitution. It stipulates:

“(1) This Constitution shall be interpreted in a manner that:

- a) *Promotes its purposes, values and principles;*
- b) *Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;*
- c) *Permits the development of the law; and*
- d) *Contributes to good governance.*

(2) ...

(3) ...

Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...

[215] We must also emphasize that the starting point of constitutional interpretation is the text itself. As long as the text is clear and unambiguous, courts of law have to remain faithful to the natural and literal meaning of the words used in the Constitution. However, as this Court has previously cautioned in past decisions, care should always be taken to avoid textual absurdity. We cannot over-emphasize the fact that the Constitution, is a living document that is always speaking.

[216] It is against this background, that we seek to clarify the dictates of the Constitution regarding the mandate of IEBC and its Chairperson, in terms of their interconnected roles in the verification, and tallying of Presidential Election votes. Article 88 (4) of the Constitution provides that – IEBC shall be responsible *inter alia* for:

“... conducting or supervising referenda and elections to any elective body or office established by [the] Constitution, and any other elections as prescribed by an Act of Parliament...”

[217] Article 88(5) provides that:

“The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.”

[218] The provisions of Article 88 of the Constitution must be read together with the provisions of Chapter Fifteen of the Constitution on ‘Commissions and Independent Offices’. Article 248(2)(c) lists IEBC as a Constitutional Commission, to which the provisions of Chapter Fifteen apply. It is notable that Article 248 creates two categories of bodies: Commissions, which are multi-member bodies consisting of at least three but not more than nine members by dint of Article 250(1); and Independent Offices, those which vest the mandate of such bodies in a single office holder. In terms of Section 5(1) of IEBC Act, the Commission consists of a Chairperson and six other members. At the time of the Presidential Election, the Commission was fully constituted.

[219] It is not lost to us that as with all multi-member bodies, the position of Chairperson is provided for to preside over the Commission. Pursuant to this reality, Article 250 and Sections 5 and 6 of IEBC Act provide for appointment of the Chairperson and members of the Commission. The mandate and powers of the Chairperson so created is provided for in the Constitution and to a certain extent, the enabling legislation.

[220] Pursuant to Article 88(4) of the Constitution and similar provisions replicated under Section 4 of IEBC Act, the general or plenary powers and responsibility relating to the conduct or supervision of referenda and elections to any elective body or office, vests in the Commission. This then must mean that unless there are clear textual departures in the Constitution, all the powers and

functions of the Commission are vested in the Commission as a collective body and must be exercised by the Commissioners acting collectively.

[221] Put differently, the broad powers vested in the Commission and typified in Section 11A (a) of IEBC Act as ‘formulation of policy and strategy of the Commission and oversight’, ought to be understood as being vested in the collectivity of the Chairperson, and members of the Commission. The Commission must meet, act, and make decisions collectively in discharging these mandates. It would therefore be wrong to interpret the Constitution and statutory scheme regulating the operations of IEBC, as having vested sole authority on the Chairperson, to the exclusion of the Commissioners. Each of the members of the Commission is a constitutional office holder in his/her own right. Therefore, it cannot be constitutionally sound to expect that the Chairperson of the Commission can override, veto, or ignore the other Commissioners when discharging mandates vested in the Commission. In case a responsibility is exclusively vested in the Chairperson, the Constitution expressly and unambiguously provides so. This is evident in the following provisions:

[222] Article 138(3)(c) of the Constitution, provides as follows:

“In a Presidential Election - after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”

[223] Whilst, Article 138(10) provides:

“Within seven days after the Presidential Election, the Chairperson of the Independent Electoral and Boundaries Commission shall –
(a) declare the result of the election; and

(b) deliver a written notification of the result to the Chief Justice and the incumbent President” [Emphasis added].

[224] Also important are the statutory provisions implicated in this dispute. Section 39 (1C) (b) and (d), (1H), and (2) of the Elections Act provide as follows:

“39(1C) For purposes of a Presidential Election, the Commission shall –

(a)...

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

(c) publish the polling result forms on an online Public Portal maintained by the Commission.

...

39 (1H) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

(2) The Chairperson may declare a candidate elected as the President before all the Constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.

(3) The Commission shall announce the final results in the order in which the tallying of the results is completed.”

[225] It is the petitioners' case that the Chairperson, undertook the tallying, verification, and declaration processes to the exclusion of four Commissioners. In effect, their claim is that the Commission did not undertake the processes of tallying, verification, and declaration as a collective body. This is said to be the reason behind the walk-out by the four Commissioners, and their denunciation of the declared result. This brings into sharp focus the question, as to what role is vested in the Commission vis á vis the Chairperson.

[226] Both the Supreme Court and the Court of Appeal have in the past made pronouncements regarding the import of Articles 138(3)(c) and 138(10) of the Constitution.

[227] In the *Maina Kiai Case*, the learned Judges of the Court of Appeal had this to say:

“It is, in our view, fallacious and flies in the face of the clear principles and values of the Constitution to claim that the Chairperson of the appellant can alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process as we have already set out.

Article 138(3)(c) buttresses this argument. It stipulates that;

‘(3) In a Presidential Election—

...

(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.’

Our interpretation of this Article is that the appellant, which is represented at all the polling stations, Constituency and County tallying centres can only declare the result of the presidential vote at the Constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification.”

[228] In *Raila 2017*, this Court opined thus:

“What of Article 138 (3) (c) of the Constitution? It provides that:

‘in a Presidential Election - after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.’

The critical element here is the duty placed upon the Commission to verify the results before declaring them. To ensure that the results declared are the ones recorded at the polling station. NOT to vary, change or alter the results.

The duty to verify in Article 138 is squarely placed upon the Independent Electoral and Boundaries Commission (the 1st respondent herein). This duty runs all the way, from the polling station to the Constituency level and finally, to the National Tallying Centre. There is no disjuncture in the performance of the duty to verify. It is

exercised by the various agents or officers of the 1st respondent, that is to say, the Presiding Officer at a polling station, the Returning Officer at the Constituency level, and the Chair at the National Tallying Centre.”

[229] Subsequently, the Supreme Court in ***Raila Amolo Odinga & Another v. IEBC & Another***; Presidential Petition No. 1 of 2017; [2017] eKLR (***Raila 2017 Clarification Ruling***) observed that:

“With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the Constitution, the Elections Act, and the Judgment of this Court, not to mention the Judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent [IEBC] to verify, accurately tally, and transmit the results of a Presidential Election coupled with the duty of the 2nd respondent [Chairperson of IEBC] to verify, accurately tally, and declare the results of the election of the President.”

[230] We must hasten to clarify that the responsibility of tallying and verifying the results of a Presidential Election at the NTC, vests in the Commission as a collective entity (Article 138 (3) (c)); while that of declaring the result, vests exclusively in the Chairperson, (Article 138 (10)). The collectivity of the Commission must be viewed in the context of its extant roles during the preparation for, and actual conduct of a General Election. In this regard, the Commission may at one time, be the Chairperson and the requisite number of other Commissioners. At another time, it may be the foregoing, and staff of the Commission. Yet at other times, the Commission may comprise of the Chairperson, the requisite number of other Commissioners, staff of the

Commission, and agents of the Commission, including but not limited to, Presiding Officers, and Returning Officers.

[231] What this means is that the Chairperson, the Members of the Commission, and the secretariat (employees) are envisaged to undertake the Article 138(3)(c) mandate. It has to be appreciated that pursuant to the terms of Section 11A (b) of the IEBC Act, the Commission has a full-fledged secretariat headed by the Chief Executive Officer which is responsible for performing “the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission”. This acknowledges the reality that the Commissioners on their own, cannot undertake the huge enterprise of elections administration and management and other mandates vested in the Commission.

[232] Relevant to the present dispute is the fact that while the staff of the Commission, undertake the “day-to-day administrative functions”, they remain under the oversight of the Commission (Chairperson and other Commissioners). Given that the oversight mandate with respect to the tallying and verification is vested in the Commission, the Chairperson cannot exclude any member or members of the Commission from the execution of these twin constitutional and statutory mandates as they are vested in the Commission as a collectivity.

[233] It is important to point out that nowhere in the Constitution, is the Chairperson of IEBC granted special or extraordinary powers with regards to the tallying or verification of results to be exercised by him or her alone without regard to the rest of the Commissioners. Nor does the law give the Chairperson of IEBC a veto over the rest of the Commissioners. In essence, IEBC Chairperson's status in relation to the other Commissioners is as a "first among equals," a *primus inter pares*.

[234] Contrary, to this constitutional position, there were submissions made to the Court which implied that IEBC has an ‘Executive Chairperson’. Such an argument, goes against the constitutional scheme that seeks to build a strong collegiate institution. Consequently, to the extent that Regulation 87 (3) of the Elections (General) Regulations, 2012 purports to vest the power of verifying and tallying Presidential Election results, as received at the NTC, 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.

[235] Given the view that Commissioners ought to exercise oversight over the tallying and verification process, it becomes necessary to interrogate whether the petitioners proved to the requisite standard that the Chairperson of the Commission excluded the four Commissioners from the tallying and verification process.

[236] The petitioners founded their case on press releases by four members of the Commission. These were the 5th to 8th respondents namely Juliana Cherera, the Vice Chairperson, Francis Wanderi, Justus Nyang’aya, and Irene Masit. The four Commissioners lamented that they were excluded from the tallying and verification process of the Presidential Election returns. They filed replying affidavits expounding on this allegation. Likewise, in oral submissions, counsel for the petitioners pointed out that the replying affidavit of the Chairperson supported their argument of exclusion. They submitted that the said Commissioners had been assigned peripheral roles unconnected to the tallying and verification exercise.

[237] A consideration of the evidence before the Court shows that all the four Commissioners, were involved in activities relating to the processing of results. In particular, they did not controvert the evidence that they announced results from several Constituencies upon the conclusion of the tallying and verification of the results. The four Commissioners 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 the NTC. An example is Justus Nyang'aya, who on one occasion stood on the podium to announce to the public, an adjustment that had been occasioned by errors of tabulation.

[238] The events of 15th August, 2022 therefore came as a surprise. As the public waited for the Chairperson of IEBC to declare the final result, sporadic violence broke out at the NTC. 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 result that was soon to be declared by their Chairperson.

[239] The four Commissioners informed the public of their rejection of the yet to be announced result, terming it “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 NTC, 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.

[240] All the petitioners anchored their arguments for the nullification of the 9th August Presidential Election, *inter alia*, on the walk-out from the NTC by the four Commissioners. They contended 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 was the petitioners' argument, therefore, that a dysfunctional Commission could not deliver a credible election.

[241] 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 did not place 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 did not explain why they had 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.

[242] But are we to nullify an election on the basis of a last-minute boardroom rupture (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 made 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 IEBC. It would set a dangerous precedent on the basis of which, the fate of a Presidential Election, would precariously depend on a majority vote of IEBC Commissioners. This we cannot do. Clearly the current dysfunctionality at the

Commission impugns the state of its corporate governance but did not affect the conduct of the election itself.

[243] The other limb of this issue, relates to whether the results from twenty-seven disputed Constituencies were tallied and verified. Whilst the petitioners argued that the results from the subject twenty-seven Constituencies were not tallied and verified, IEBC in its evidence pointed out that the results from these Constituencies were tallied and verified and the only process that was not undertaken was the announcement of the results for these Constituencies. It was not disputed that the results from these Constituencies, were actually included in the final tally declared by the Chairperson.

(ii) Finding and Conclusion

[244] In view of the foregoing, we are satisfied that:

- (a) 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.***
- (b) The mandate of tallying and verification of votes is vested in the Commission as a collectivity, and the Chairperson cannot exclude any member or members of the Commission. However the declaration of results vests exclusively in the Chairperson.***
- (c) The Chairperson does not have executive, special or extraordinary powers with regards to the tallying or verification of results.***

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

[245] The 1st, 2nd, 3rd, 4th and 6th petitioners averred that the 1st respondent did not garner 50% + 1 of the total votes cast and therefore, did not meet the threshold provided for under 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.

[246] The 1st, 2nd, 3rd, 4th, and 6th petitioners' 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. In their opinion, 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, they urged that the voter turnout of 65.4% did not include 235 polling stations where the KIEMS kits had malfunctioned necessitating the 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, it was argued that this number was bound to increase once the number of votes from the areas that used the manual register were included. The petitioners further claimed that a summation of the minimum number of votes cast and untallied manual votes would represent the actual voter turnout.

[247] In challenging the declaration made by the Chairperson of IEBC, the petitioners averred that the final tally published in Form 34C only accounted for

14,326,641 votes cast, including 113,614 rejected ballots. They contended that this tally did not factor in 140,138 votes cast using the manual register. They 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.

[248] Referring to the tallies in Form 34C, the 1st, 2nd, 3rd, 4th and 6th petitioners 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. They then added 140,138 alleged to be untallied votes. This yielded a total of 14,353,165 total valid votes which the said petitioners 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).

[249] IEBC and its Chairperson, in response, disputed the 1st, 2nd, 3rd, 4th, and 6th petitioners' claims. They submitted that the declaration of results is based on the number of people identified as having voted on the KIEMS kits and not the total persons on the Register of Voter's, 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.

[250] According to IEBC and its Chairperson, 14,239,862 voters were identified using the KIEMS kits while 86,889 voters were identified using the printed Register of Voters. 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%).

[251] IEBC and its Chairperson also admitted that the KIEMS kits malfunctioned in 235 polling stations necessitating the use of the printed Register of Voters. In these polling stations, backup KIEMS kits were later deployed for purposes of results transmission.

[252] 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 IEBC and its Chairperson.

[253] On its part, LSK admitted as *amicus curiae*, urged us to include rejected votes in the computation of the constitutional threshold of 50%+1 vote under Article 138(4) (a) of the Constitution. The *amicus curiae* argued the Constitution does not use the words “valid votes” but votes cast as per Articles 138(4) and 86(b); that the phrase “valid votes” is only a creature of Regulations 69(2), 70, 77(1), and 78 of the Elections (General) Regulation, 2012 which contradict the Constitution; and that to disregard rejected votes, which in their view can be interpreted to either mean a protest vote or a demand of an absolute majority, will amount to limitation of the right to vote pursuant to Article 38.

[254] LSK asked that we be persuaded by the provisions in Section 5(3)(f) of the retired Constitution; the CKRC Final Report; Article 158(4) of the Bomas Draft Constitution; Article 149(4) of the Wako Draft; and Article 121 (4) of the

Parliamentary Select Committee Report draft. In that context, they joined the 4th petitioner to submit that we ought to depart from this Court's earlier finding on rejected votes in ***Raila 2013*** and ***Raila 2017*** where we interpreted the words 'votes' to mean 'valid votes' in distinguishing the same from a ballot paper.

(i) Analysis of evidence

[255] 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.

[256] It must be restated that the case made by the 1st, 2nd, 3rd, 4th, and 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 the ***Harun Mwau Case*** referred to as the ultimate yardstick for determining the winner in a Presidential contest.

[257] In ***Raila 2013***, this Court affirmed that rejected ballot papers do not constitute a valid vote cast as to be included in calculating the final tally in favour of a Presidential candidate. We stated as follows:

“[280] The regulations made by IEBC have no provision for “rejected votes”, though they provide for “rejected ballot papers”, “spoilt ballot papers”, and “disputed votes”. It is clear that “spoilt ballot papers” are those which are not placed in the ballot box, but are cancelled and replaced where necessary, by the Presiding Officer at the polling station. This differs from the “rejected ballot papers” which,

although placed in the ballot-box, are subsequently declared invalid, on account of certain factors specified in the election regulations – such as fraud, duplicity of marking, and related shortfalls.

[281] No law and no regulation brings out any distinction between “vote” and “ballot paper”, even though both the governing statute and its regulations have used these terms interchangeably. We have to draw the inference that neither the Legislature, nor IEBC, had attached any significance to the possibility of differing meanings; which leads us to the conclusion that a ballot paper marked and inserted into the ballot-box, has consistently been perceived as a vote; thus, the ballot paper marked and inserted into the ballot-box will be a valid vote or a rejected vote, depending on the elector’s compliance with the applicable standards.

[282] Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate.

[283] In that sense, the rejected vote is void. This leads to the crucial question in Petition No. 3: why should such a vote, or ballot paper which is incapable of conferring upon any candidate a numerical advantage, be made the basis of computing percentage accumulations of votes, so as to ascertain that one or the other candidate attained the

threshold of 50% + 1, – and so such a candidate should be declared the outright winner of the Presidential Election, and there should be no run-off election?”

[258] In answering the above question, the Court held that votes cast for the purpose of ascertaining the constitutional threshold under Article 138(4) of 50% +1 ***“refers only to valid votes cast, and does not include ballot papers, or votes, cast but are later rejected for non-compliance with the terms of the governing law and regulations.”***

[259] Consequently, we are not persuaded by the 4th petitioner and LSK who urged 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.

[260] Similarly, in the same ***Raila 2013***, the Court laid down the parameters of burden and standard of proof for electoral disputes relating to data specific electoral requirements. 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.”

[261] The question that follows, was whether the petitioners challenging the attainment of the 50%+1 constitutional threshold and the computations by the 1st, 2nd, 3rd, 4th, and 6th petitioners in general, met the standard of proof settled by this Court in ***Raila 2013***.

[262] The premise of the petitioners' percentage computation was a press briefing made by the Chairperson of 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 of voter turnout to 64.76% (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.

[263] In our view, the assertion by the petitioners that the percentage of voter turnout was, firstly, predicated on the uncorrected percentage given by the Chairperson of IEBC, was negated by the evidence adduced to prove the correction. Secondly, the petitioners based their 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.

[264] 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.

[265] 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.

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

[267] 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:

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

2

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

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

2

(ii) Findings and Conclusion

[268] 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:

(a) The declared President-elect attained 50%+1 of all the valid votes cast in accordance with Article 138(4) of the Constitution.

(b) In calculating whether a Presidential candidate has attained 50% +1 of votes cast in accordance with Article 138 (4) of the Constitution only valid votes cast can be considered. Rejected

ballot papers, or votes are void and incapable of conferring upon any candidate a numerical advantage.

8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election

[269] The petitioners have provided numerous instances pointing to possible irregularities and illegalities, marked by failures of technology, alleged voter suppression, printing and utilisation of Book 2 of 2, failure of technology, IEBC indiscretions, transposition anomalies, absence of parties' agents, and many others.

[270] The irregularities and illegalities pointed out by the petitioners comprise: fraudulent establishment of parallel Forms 34A; failure of KIEMS kits and late opening of polling stations; interference in the supply and delivery of ballot papers and statutory result declaration forms; postponement of elections in certain units; harassment of Azimio la Umoja One Kenya Coalition party agents; lack of procedures for special voting; reduction of votes for the 1st petitioner and increasing those of the 1st respondent; and, offences and ethical breaches committed by the Chairperson of IEBC contrary to the Election Offences Act and Public Officer Ethics Act No. 4 of 2003. The petitioners took the position that the magnitude of the irregularities and illegalities was so grave to the extent that it affected the outcome of the election.

[271] On fraudulent establishment of parallel Forms 34A, the 1st petitioner contended that IEBC and its Chairperson fraudulently ordered the ballot paper printing firm, Inform Lykos Hellas SA, to print a parallel set of Forms 34A and declined to make an order for requisite Forms 34B when printing other election materials. IEBC stated that the Forms 34B would be self-generated from the

KIEMS kits after close of polling. Upon the 1st petitioner raising concern, IEBC and its Chairperson invited all Presidential Election stakeholders and by consensus it was agreed that IEBC would print Forms 34B and would not use Forms 34A Booklet 2 of 2. The terms of that consensus were published in the Kenya Gazette in Gazette Notice No. 9280 of 2nd August, 2022.

[272] Several results declaration forms were alleged to contain discrepancies as stated in the affidavits of Martha Karua, Dr. Nyangasi Oduwo and Saitabao Kanchory. For instance, they pointed out that the Forms 34A did not have the anti-copy features and IEBC logo at the bottom left corner; that the Forms at the NTC did not show at the foot/tail end as “1 of 2” or “2 of 2”; and that some of the Forms did not have the security features as set out in the tender document or as demonstrated by the service provider during the inspection visit. According to them, in the absence of the physical distinction between the two Forms, it was not possible to ascertain which sets of Forms were used at the polling station putting to question the integrity of the transmission process.

[273] The 1st petitioner accused the Chairperson of several election offences and ethical breaches under Sections 6, 13 and 17 of the Election Offences Act; that the Chairperson made entries in Forms 34A which he knew to be false; omitting to include results; willfully contravening the law to give undue advantage to a Presidential candidate; indirectly procuring election materials without the authority of IEBC; obstructing election officers in the execution of their lawful duties; making a false statement knowing the same to be false; publishing and disseminating information with the intention to influence the outcome of the election; intentionally altering IEBC’s network and portal, altering information residing in IEBC’s portal knowing he was likely to cause wrongful loss or damage to the public; and knowingly inputting, altering and deleting computer data with the intent that the result be considered or acted upon as authentic, regardless of whether or not the data is directly readable and intelligible. They also alleged that

the Chairperson was guilty of using his office to improperly confer a benefit on a Presidential candidate contrary to Section 46 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

[274] According to the 1st petitioner, the Chairperson being a public officer violated Sections 9, 10, 12 and 16 of the Public Officer Ethics Act, for failure to carry out his duties in a way that maintains public confidence; failing to treat the public and his fellow public officers with courtesy and respect; failing to improve the standard of performance and level of professionalism in his organization; failure to observe the ethical and professional requirements of the Law Society of Kenya; and acting as an agent for and furthering the interest of a political party.

[275] The 1st and 3rd petitioners alleged that there was a deliberate failure of the KIEMS kits particularly in Kakamega and Makueni Counties and the late opening of polling stations led to delayed commencement of voting causing many voters to leave polling stations before casting their vote. This suppressed the voter turnout in such polling stations as Kikumini Primary School, Makasa Primary School, Muangeni Primary School, Ngangani Primary School, Mithumoni Primary School, Masamukye Primary School, Makasa Primary polling station, Mugai Primary School, Shirugu Primary School, Kalenda, Malekha Primary School, Malava Town Market, Musungu Primary, Gikundo primary school in Mukurwe-ini West and Nyakenyua Nursery School at Rware Ward, Mugumo-ini Primary School, and Mbari ya Ruga.

[276] It was alleged that there was no uniformity of treatment of voters whose fingers are charred due to tea picking in Mathira and could not be identified by biometric means; that while some were identified through manual register, others were not; and that each situation depended upon the discretion of Presiding Officers.

[277] IEBC and its Chairperson, in their response stated that despite the challenges with a few KIEMS devices in Kakamega, the issue was resolved and the KIEMS devices resumed functionality and ultimately transmitted results. This was confirmed by Oduor Juma Joseph, Returning Officer in charge of Malava Constituency, who added that the failure of KIEMS kits did not affect the voter turnout as alleged. The Chairperson conceded that KIEMS devices malfunctioned in just about 235 polling stations and IEBC was unable to replace them immediately. In those instances, printed registers were used to identify voters. They denied that there was a deliberate failure of KIEMS kits to occasion voter suppression in Kakamega and Makueni Counties; that any time lost as a result of KIEMS failure was compensated by commensurate time extension. It was estimated that the failed kits only constituted about 0.43% of the 46,229 deployed while 99.57% worked without a glitch.

[278] On their part, the 3rd petitioner contended that there was interference in the supply and delivery of ballot papers, Register of Voters, and election result declaration forms. This interference was alleged to have been perpetrated by the 1st respondent through his associate, Moses Wetangula. It was this interference that led to Azimio La Umoja One Kenya Coalition Party press release dated 5th July 2022, condemning those activities. The press release called for investigation and public information on the issue.

[279] On a different note, it was alleged that Azimio La Umoja One Kenya Coalition Party agents were subjected to harassment by IEBC officials and UDA political party members, who would arrest and detain them so as to deny them time and opportunity to distribute letters of appointment and other election material to agents in polling centres in Nyeri, Muranga, Kiambu, Nakuru, Nairobi and Meru Counties. Specifically, this affected the results from polling stations in Gamuriri and Kahara polling centres in Mathira Constituency, Mukurwe-ini Central Ward and Kianyaga Primary School in Mukurwe-ini West Ward in

Mukurwe-ini Constituency, Thika Rescue Centre within Thika Town Constituency and CBD Ward within Starehe Constituency.

[280] The 1st respondent dismissed the 1st petitioner's claims of intimidation insisting that he had not approached the Court with clean hands; that it was their agents and supporters who were engaged in acts of violence, intimidation, undue influence, and other election offences throughout the campaign period and during the tallying and verification of the result at the NTC; and that the 1st petitioner and his team used State resources and involved civil servants and public officers in their campaign. None of the allegations of the 1st petitioner's agents were supported by evidence and other particulars.

[281] IEBC and its Chairperson similarly denied those allegations, and contended that from the named Counties or polling stations, no specific instances or names of the affected agents were furnished; that failure by the 1st petitioner to have agents at the polling stations could not be blamed on IEBC and its Chairperson. In any case, the 1st petitioner's Chief Agent's admission to serious inefficiencies in the appointment and deployment of agents in many polling stations was public knowledge.

[282] On special voting, the 7th petitioner alleged that contrary to Regulation 19 of the Elections (General) Regulations 2012, IEBC failed to put in place procedures for special voting of 500,000 election officials, observers, patients admitted in hospitals, older members of society, members of the defence and security forces on duty and other persons by reason of the special need, who were not able to access polling stations.

[283] IEBC enumerated the various steps it has taken to ensure compliance with Regulation 19 of the Elections (General) Regulations, 2012 and to facilitate voting by special groups. According to them the petitioners did not show which special

group of voters were not allowed to vote. Moreover, they insisted that the figure of 500,000 voters was merely speculative as the petitioners relied on a newspaper article which is of no evidentiary value.

(i) Analysis of the evidence

[284] The question we pose is whether there were illegalities and irregularities of such a magnitude as to affect the final result declared in the Presidential Election of 2022. In other words, for the petitioners to succeed on this issue and thereby overturn the results declared by the Chairperson of IEBC, it is their burden to satisfy the Court, first, that there were irregularities and illegalities; and secondly that the proven irregularities and illegalities were of such overwhelming nature that it was likely to affect the actual result, or the integrity of the Presidential Election of 9th August, 2022.

[285] That is the *ratio decidendi* in the **Harun Mwau Case** where we reiterated the position in **Raila 2017** in the following manner:

“[373] This Court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the Court in Raila 2017. Our view is informed by the conclusion which we have made, as to the applicable law in relation to the 26th October, 2017 election. This may be simply restated: not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election, for a Court of law to nullify the same.”

[286] What therefore constitutes irregularities and illegalities? In *Raila 2017*, the term ‘illegalities’ was defined as ‘**breaches of the substance of specific law**’ and irregularities as the ‘**violation of specific regulations and administrative arrangements**’.

[287] As stated earlier in this Judgment, the burden is on the petitioner to prove his case. For seeking to nullify a Presidential Election on account of breaches and violation of the law or regulations, the petitioners must present “cogent and credible evidence” to prove those grounds. Cogent and credible evidence is the standard of proof, now known in this jurisdiction as the “intermediate standard”. It is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond reasonable doubt.

[288] First, the 1st petitioner’s case is that there was fraudulent establishment of parallel use of Forms 34A in the election through the simultaneous use of book 1 of 2 and 2 of 2; that despite there being a consent that book 2 of 2 would not be used but instead would be placed in a tamper proof paper, it was in fact used. The Registrar’s Report on this question disclosed that while book 2 of 2 were missing in some of the boxes, the results in the provided Forms 34A as transmitted to IEBC’s Portal and captured in the ultimate result declaration Form 34C, did not differ from the actual ballot papers cast and retrieved physically from the ballot boxes. This irregularity has not been proved and must fail.

[289] On the failure of KIEMS kits and late opening of some polling stations and the alleged failure to extend the voting time, IEBC and its Chairperson, affirmed that indeed there were instances of failure of the KIEMS kits in certain polling stations. In those instances, the regulations require voting time to be extended to compensate the lost time. We note, however that the petitioners have not attached

any material evidence or at all in support of their claims, which in any case were rebutted by IEBC's explanation that there were mechanisms in place to deal with the failed kits. Where technology fails, IEBC is empowered to employ complementary mechanism. IEBC's assertion that it did so has not been controverted. As for time lost, IEBC's Returning Officers presented evidence, again uncontroverted, to the effect that, time lost was recovered and compensated by proportionate time extensions.

[290] Was there interference in the supply and delivery of ballot papers, Register of Voters, statutory election result declaration forms? Was there evidence of the involvement of Moses Wetangula in the interference? We find that these were merely, general statements not backed by "cogent and credible" evidence.

[291] With regard to harassment of Azimio La Umoja One Kenya Coalition Party agents, though certain agents swore affidavits stating specific stations and incidences of harassment, no further evidence such as a report to the Police and the exact nature and manner of harassment were disclosed.

[292] Although the Chairperson in his affidavit confirmed that close to 500,000 Kenyans were employed by IEBC in this year's election as staff and officials in polling stations, Constituency and County levels across the country, the petitioners did not show with specificity which election officials out of the 500,000 were not allowed to vote and in what circumstances. Likewise, no specifics of patients in hospitals, older members of society, members of the defence and security forces on duty, who did not vote on account of their situation were supplied. This ground has not met the requisite standard of proof and fails.

[293] Having so found, we note from the response of IEBC that no mechanism has been put in place to allow for special voting as contemplated under Regulation 90 of the Elections (General) Regulations 2012. IEBC did not indicate whether it

had published Notices on the manner and procedure of the conduct of special voting as required by the Regulations. There was specific and a deserving reason to make provision for special voting by the categories of people named in the Regulations who by reason of any special need, including disability, are unable to access a polling station.

[294] By way of comparison, in South Africa, a special vote allows a registered voter who cannot vote at their voting station on election day to apply to vote on a predetermined day before election day. By their law, special votes can only be cast on the dates specified in the election timetable. We observe that there was specific and a deserving reason to make provision for special voting by the categories of people named in Regulation 90, who by reason of any special need, including disability, are unable to access a polling station. We expect IEBC to actualize the intentions expressed in Regulation 90 aforesaid.

[295] Finally, election offences and ethical breaches enumerated against the Chairperson are criminal in nature proof of which must attain a standard beyond reasonable doubt. Section 87 of the Elections Act stipulates how a court may report 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.

(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.”

[296] Once an election offence has been alleged, the evidence in support thereof must be specific, satisfactory, definitive, cogent and certain. It is only when the election court is satisfied that the burden and standard of proof have been satisfied that it can proceed under the above provision. The general allegations do not meet the threshold to warrant the invocation of that Section. By the same token, there is no evidence of violation or breach of any electoral law or Regulations by the Chairperson in the management of the 9th August, 2022 Presidential Election.

(ii) Finding and Conclusion

[297] We conclude on this ground that the irregularities and illegalities cited by the petitioners were not proved to the required standard, or at all.

9. What reliefs and orders can the Court grant /issue?

[298] The petitioners in this cause entertained the prospect of succeeding in their Petitions and made prayers for a wide range of reliefs. However, the Constitution articulates clearly the terms of the Orders that can be granted by this Court on the question of validity of Presidential Election.

[299] 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; ...”

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

“140. Questions as to validity of Presidential Election

- (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.***
[emphasis added].

[301] The Supreme Court (Presidential Election Petition) Rules, 2017 reinforce these constitutional provisions as follows in Rule 22:

“22. Orders of the Court

At the conclusion of the hearing of an election petition, the Court may make an order —

- (a) Dismissing the petition;***

- (b) invalidating the declaration made by the Commission under Article 138(5) of the Constitution;***
- (c) declaring the election of the President-elect to be***
(i) valid; or
(ii) invalid;
- (d) on payment of costs; or***
- (e) as it may deem fit and just in the circumstances.”***

[302] 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 a Presidential Election Petition under Article 140 of the Constitution.

[303] A determination by the Court that the election of the President-elect is invalid leads to an Order of nullification of that election. Consequently, by operation of the Constitution and law it follows that a fresh election must be held within sixty days after that determination.

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

[305] In the strict sense therefore, these are the only Orders that the Court may make under the Constitution. Accordingly, this Court can neither remove the Chairperson of IEBC from office nor declare him unfit to hold public office as prayed for by the 1st and 2nd petitioners. The process of removal of members of constitutional Commissions is spelt out under Article 251 of the Constitution. This

Article stipulates the requisite procedures and processes as well as the proper fora for adjudication of such matters.

[306] In the same vein, a prayer to declare the Chairperson in breach of Article 73 of the Constitution as sought by the 2nd and 3rd petitioners cannot be made in a Presidential Election Petition.

[307] The Attorney General's plea to us to dismiss the Chairperson's allegation that the National Security Advisory Council (NSAC) attempted to subvert the will of the people must meet the same fate as the prayers by the 2nd and 3rd petitioners. The Court is exercising in this consolidated Petition its exclusive original jurisdiction under Article 163 (3) (a) of the Constitution. Consequently, the Court is unable to make any definitive findings or issue any Orders on the matters raised.

[308] The Court can however make recommendations or observations, or structural interdicts besides giving advisory opinion under Article 163(6) of the Constitution. Indeed, since 2013, this Court has issued many recommendations arising from the determination of the past three Presidential Petitions. From this cause, we recommend and observe as follows:

D. RECOMMENDATIONS

(i) IEBC

[309] On the basis of the pleadings and submissions in this consolidated Petition, the Court retains a constitutional obligation to point out the institutional dysfunctionality undermining the optimal functioning of IEBC. It is clear to us that there are legal, policy and institutional reforms that are urgently required to address the glaring shortcomings within IEBC. We therefore recommend as follows:

(a) On corporate governance issues

1. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.
2. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy, and oversight responsibility of the Chairperson and the Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.
3. The roles of the Chairperson, Commissioners, and the Chief Executive Officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above.

(b) On election technology

4. To avoid suspicion from stakeholders, unless where and when it is absolutely necessary, access to the servers supporting the transmission and storage of Forms 34A, 34B and 34C should be restricted to IEBC staff during the election period.
5. IEBC should ensure that the servers supporting the elections and those serving their internal administrative work are distinct and separate. This would then allow the Court, should the need arise, to carry out forensic imaging of the same

without compromising and/or infringing any third-party agreements.

(c) On statutory Forms

6. IEBC may consider simplifying and restructuring the Form 34A and include a column that accounts for stray ballots. In addition, it may consider having only one section for total valid votes. The independent body may also find it prudent to thoroughly train its Returning Officers as to what constitutes valid votes per this Court's decision.
7. IEBC ought to put in place specific mechanisms to allow for special voting as contemplated under Regulation 90 of the Elections (General) Regulations 2012.

(ii) Constitutional Reforms

[310] We are constrained to revisit the recommendation we made in *Raila Amolo Odinga & Another v. IEBC & 2 Others*, SC Petition Presidential Petition No. 1 of 2017; [2017] eKLR regarding the need to extend the constitutional timeline, within which to hear and determine a Presidential Election Petition. At paragraph 403 of the Judgment, this Court underscored the need to extend the fourteen-day limit, for purposes of efficient case management by the Court, and also, to afford the parties sufficient time to ventilate their cases. We hereby make a similar recommendation.

(iii) Conduct of the Proceedings Before the Supreme Court

[311] The Court has been greatly aided by the contributions made by learned counsel appearing for the parties and all *amici curiae* in this consolidated Petition. We are grateful for their very able and well researched submissions, delivered with considerable passion and clarity. Throughout the three days' hearing, counsel maintained decorum in the courtroom as it ought to be. We also express our appreciation to our Judiciary staff who took part in the scrutiny exercise, and our Law Clerks for their research support.

[312] However, before rendering our final disposition, we are constrained to advert to some of the guidelines of conduct that we set out at the commencement of this hearing. More specifically, ground rule 3 stipulated:

“3. The Rules of the Court require parties to conduct themselves with decorum to preserve the dignity of the Court and the proceedings while bearing in mind the provisions of Section 28 of the Supreme Court Act. In this regard, discussing the merits of the case by the parties outside the Court is not permitted. The Court may cite parties in violation of this Rule for contempt.”

[313] Unfortunately, our caution went unheeded: Some counsel and parties have used inappropriate, and insulting language against the Court even before the issuance of our detailed Judgment. It ought to be appreciated by all, that given the ***adversarial*** nature of our legal system, a determination of any matter by a court of law can ***never*** be in favour of both ***sides*** of the contending parties. While a party or its counsel may understandably be aggrieved by a decision of the Court, it does not help or take away such grief by resorting to insults or vitriolic attacks on courts. We reiterate the concern as expressed in ***Attorney-General & 2 Others v. Ndi & 79 Others; Prof. Rosalind Dixon & 79 Others (amicus curiae)***, SC

Petition No. 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) (**BBI Case**)
where we stated at paragraphs 2114 and 2116, as follows:

“...For Counsel to appear before the apex Court then proceed to hurl unnecessary diatribe, insults, and speculations on a pending Judgment amounts to unethical conduct on the part of the advocate concerned. The use of social media to disparage the Court with the intention of lowering the dignity and authority of the Court or influencing the outcome of a case pending before the Court trespasses the bounds of legitimate advocacy and moves to the realm of professional misconduct. This is in line with Section 60(1) of the Advocates Act, Chapter 16 Laws of Kenya; that defines professional misconduct as: “includes disgraceful or dishonourable conduct incompatible with the status of an Advocate.

...

Advocates should familiarise themselves with the Code of Standards of Professional Practice and Ethical Conduct, Gazette Notice No. 5212 and strive to conduct themselves in a manner that preserve and strengthen the dignity, honour and ethics of the profession. Consequently, advocates should restrain from conduct that amounts to indirectly attempting to influence decisions pending before courts. Relevant to the use of social media, we draw the attention of Advocates to Standard of Professional Practice and Ethical Conduct No. 10 that stipulates thus:

‘Inappropriate use of social media, particularly in a manner that undermines the standing and dignity of the legal profession, is professional misconduct. Material and content drawn from social media sites may be taken into account by regulatory authorities in dealing with a charge of professional misconduct.’

This caution should always play in the mind of advocates when tempted to utilize social media to advance their cause”.

[314] While freedom of speech is one of the fundamental principles upon which every democratic society is built, the exercise of these freedoms carries with it duties and responsibilities. Within the same norms which proclaim those freedoms, are also restrictions on the extent of their enjoyment. To the Oath of Office we shall remain faithful and defend the Constitution with a view to upholding the dignity and the respect for the Judiciary and the judicial system of Kenya. We shall dispense justice without any fear. We do this to protect the Institution not only for the present but also for the future: Judges serve their term and leave, but the institution of the Judiciary is there to serve today and for posterity.

E. ON COSTS

[315] As part of their prayers, the 1st, 2nd, 4th, 5th, and 7th petitioners prayed for orders of costs in their respective Petitions before us. On their part, the 1st, 3rd, and 4th respondents in their submissions urged that costs follow the event, and that in awarding the same, this Court should be guided by Section 84 of the Elections Act. Therefore, they urged us to dismiss the consolidated Petition with costs.

[316] In ***Raila 2013***, this Court stated as follows on the issue of costs:

“[308] Each of the parties coming before us has sought orders as to costs. This, of course, is an adversarial system of litigation; and therefore, parties will invariably be asking for costs, at the conclusion of a matter such as this.

[309] Yet we have to take into account certain important considerations, in relation to costs. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

[310] Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel.”

[317] We have considered that the issues raised in the instant Presidential Election Petition impact, not just the parties before us, but the entire nation. Further, we note that some of the Petitions were filed by individuals and organizations who

were not Presidential candidates, but sought the Court's interpretation and determination of issues of national interest. Therefore, we reiterate this Court's position on costs in ***Raila 2013*** and see no reason to depart from it in the matter before us. Consequently, each party shall bear their own costs.

F. FINAL ORDERS

[318] Having found that the Presidential Election was conducted in accordance with the Principles set out in the Constitution, and Election Laws, and that the 1st respondent attained the constitutional threshold set out in Article 138 (4) of the Constitution:

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) *Regulation 87 (3) of the Elections (General) Regulations, 2012 is hereby declared unconstitutional to the extent that it 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.***
- (iv) *This being a matter of national public interest, we order that each party shall bear their costs.***

(v) We direct that sums deposited as security for costs be released to the petitioners.

It is so Ordered.

DATED and DELIVERED at NAIROBI this 26th 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