

THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. E005 OF 2022

THE SUPREME COURT OF KENYA
NAIROBI REGISTRY
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RAILA ODINGA.....1ST PETITIONER
MARTHA WANGARI KARUA.....2ND PETITIONER

- VERSUS -

INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....1ST RESPONDENT
WANYONYI WAFULA CHEBUKATI.....2ND RESPONDENT
BOYA MOLU.....3RD RESPONDENT
PROF. ABDI YAKUB GULIYE.....4TH RESPONDENT
JULIANA WHONGE CHERERA.....5TH RESPONDENT
JUSTUS NYANGAYA.....6TH RESPONDENT
FRANCIS WANDERI.....7TH RESPONDENT
IRENE MASIT.....8TH RESPONDENT
WILLIAM SAMOEI RUTO.....9TH RESPONDENT

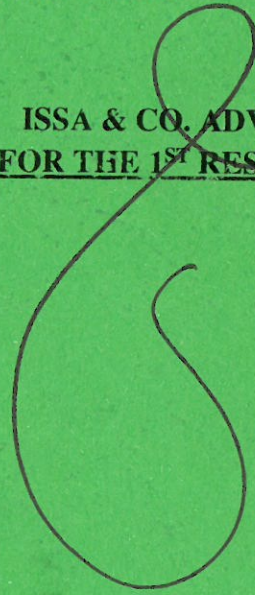
1ST RESPONDENT'S RESPONSE TO THE PETITION

DATED at NAIROBI this 26TH of AUGUST 2022.

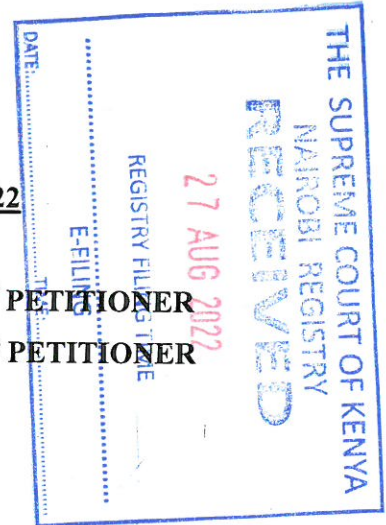
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REPUBLIC OF KENYA
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PRESIDENTIAL ELECTION PETITION NO 005 OF 2022



RAILA ODINGA.....1ST PETITIONER
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AND

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
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1ST RESPONDENT'S RESPONSE TO THE PETITION

1. The 1st Respondent is established under Article 88(1) of the Constitution.
2. This is the 1st Respondent's Response to the **Presidential Election Petition No. 005 of 2022**. The 1st Respondent states that the Responses given herein are restated verbatim in respect of the corresponding allegations or averments made in Presidential Election Petitions Nos. 001, 002, 003, 004, 006, 007, 008 and 009 of 2022. - 20
3. The 1st Respondent's Response is given under the authority of the majority of its members and is supported by the Supporting Affidavit of the 5th Respondent and individual Affidavits of the 5th, 6th, 7th and 8th Respondents herein.

4. Paragraph 1 to 9 of the Petition are admitted to the extent that the said paragraphs describe the Parties to the Petition and restate the mandate of the 1st Respondent.
5. The 1st Respondent restates the establishment and mandate of the Independent Electoral and Commission as stated in paragraph 3 of the Petition as to discharge functions set out under Article 88 of the Constitution and relevant election laws in accordance with its authority as an independent constitutional commission as provided for under Articles 248 and 249 of the Constitution.
6. The 1st Respondent further states and qualifies that paragraph 4 of the Petition does not in any way derogate from the mandate and powers of the Commission under as set out under Articles 88, 248 and 249 of the Constitution and relevant election laws. - 10
7. The 1st Respondent does not oppose paragraph 7 of the Petition to the extent that it restates the disputed results of the presidential elections held on 9th August 2022 as announced by the 2nd Respondent.
8. In response to paragraphs 8 to 16 of the Petition, the 1st Respondent states as follows:
 - a. That it has full awareness of the sovereignty of the people of Kenya and supremacy of the Constitution and the standards of the electoral system and constitutional protection of the democratic system quoted in the preamble to paragraph 8 of the Petition.
 - b. That the 1st Respondent is fully aware of the findings and declarations contained in the Judgment of this Honourable Court in the Presidential Election Petition No. 1 of 2017: Raila Amollo Odinga and Another vs the Independent Electoral and Boundaries Commission and 2 Other (2017) eKLR as stated in paragraph 8 of the Petition and their consequential implications to the necessary improvements to the management of elections in Kenya. - 20
 - c. The 1st Respondent notes the judicial caution exercised by this Honourable Court in its decision in Raila Odinga and Another vs the IEBC and 2 Others

(2017) eKLR not to find personal culpability by any Member of the 1st Respondent as stated in paragraph 9 of the Petition.

- d. In response to the sweeping averment made in paragraph 10 of the Petition, the 1st Respondent states that the majority of the Commissioners and staff fully understand their roles; and that the Commission is composed of able and patriotically minded professionals with full understanding of the dictates of the Constitution and the underlying values of the Kenya's democratic system.
- e. The 1st Respondent further states that the sweeping averment in paragraph 11 of the Petition does not represent the accurate position of the Commission to the extent that it implies a concerted criminal intent by all members of the Commission and its staff. The 1st Respondent further states that the Commission fully understands that the purpose for its independence is to protect the sovereignty of the Kenyan people as stated under Article 249 of the Constitution. - 10
- f. The 1st Respondent does not contest the statements made in paragraph 12 and 13 of the Petition.
- g. In response to the averments made in Paragraph 14, 15 and 16, the 1st Respondent notes that the 2nd Respondent has on several occasions failed to foster consultation, full participation, attempt at reaching consensus on decisions of the highest consequence to the discharge of its mandate. - 20
- h. This failure has resulted in division, suspicion and even dysfunction which is necessary in the discharge of the mandate of a corporate entity. The 1st Respondent further states that voting on critical elements of the Commission's work should only be taken as a last resort when opportunities for building consensus have been explored and exhausted.
- i. The 1st Respondent further states that, at any rate, full participation of all Commissioners in all aspects of the Commission's work, and by staff in their

areas of responsibility is an inescapable element of corporate integrity and accountability, and a requirement of the Constitution.

9. The 1st Respondent does not oppose the quotation *in Raila Odinga and Another vs the IEBC and Another (2017) eKLR* as restated in paragraph 17 of the Petition.
10. The restatement of Article 88 of the Constitution in paragraph 18 of the Petition is not opposed.
11. The 1st Respondent states that this Honourable Court should take notice that the quotation in paragraph 19 of the Petition relates to Article 86 of the Constitution and not Article 88 as stated.
12. The 1st Respondent does not oppose the statement of the law contained in the quotation from the Presidential Election Petition No. 1 of 2017 as restated in paragraph 20 of the Petition. - 10
13. The 1st Respondent concurs with the restatement of the National Values and Principles under Article 10 as restated in paragraph 21 of the Petition.
14. In response to Paragraph 21 of the Petition the 1st Respondent confirms that the independence, accountability, and transparency of the 1st Respondent was grievously impaired by the lack of consultation, unilateralism, selectiveness and outright insubordination of the Commission by the 2nd Respondent.
15. Whereas the 1st Respondent does not impute a partisan motive on the 2nd Respondent, it confirms that the conduct of the 2nd Respondent was clearly not consistent with the purposes of or in the best interest of the 1st Respondent or intended to protect the sovereignty of the Kenyan people as contemplated under Article 81 and 249 of the Constitution by ensuring a free, fair, credible and transparent electoral process. - 20
16. In response to paragraph 22 and 23, the 1st Respondent confirms that the disunity, lack of consultation and unilateralism by the 2nd Respondent and part of the Commissioners

impaired the ability of the 1st Respondent to discharge its mandate in the manner contemplated by the Constitution.

17. The 1st Respondent does not oppose the restatement of Article 138 of the Constitution in paragraph 24 of the Petition.
18. In response to paragraph 25 of the Petition, the 1st Respondent states that in spite of the painstaking effort by the polling officials and Returning Officers, the last stages of the tallying were brought into question by manner in which the final stages of tallying and was undertaken.
19. In further response to paragraph 25 and in confirmation of the averment in paragraph 26, the majority of the members of the Commission took exception to the lack of transparency, accountability and clear process in the manner in which the verification and tallying of results was undertaken. - 10
20. Paragraph 27 of the Petition is not opposed to the extent that it restates Article 138(10) (a) of the Constitution.
21. In response to paragraph 28 of the Petition, the 1st Respondent states that the tallying and verification at the Bomas of Kenya was not conclusive as it was unilaterally halted by the 2nd Respondent without consultation or notice to the other members of the 1st Respondent.
22. In response to paragraph 29, the 1st Respondent states that the result declared by the 2nd Respondent was based on an inconclusive and unaccountable process under the unilateral control of the 2nd Respondent and a scheme to exclude a majority of the members of the 1st Respondent or staff not seen as complicit. - 20
23. The 1st Respondent states that the contentions made in paragraphs 30, 31, 32, 33, and 34 are subject to proof.
24. In response to paragraph 35 of the Petition, the 1st Respondent states that the process of the tallying, verification and announcement of the result is provided under Article 81,

86 and 138 of the Constitution and other relevant principles set out in the Constitution.

The 1st Respondent further states as follows:

- a. The principles set out in the Constitution are justiciable and capable of enforcement.
- b. In relation to the management of elections non-compliance with the principles set out in the Constitution is fatal to consequential result of such election.
- c. Non-compliance by the 2nd Respondent substantially contravenes the accountability framework established by the Constitution.
- d. The accountability framework for the management of election results is based on the special historical context of presidential elections and transitions in Kenya.

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RESPONSE TO THE GROUNDS IN SUPPORT OF THE ARGUMENTS RELIED ON IN THE PETITION

A. Alleged violation and/or lack of an electoral system and process that is conducted by an independent body; transparent and administered in an impartial neutral, efficient, accurate and accountable manner.

25. In response to the grounds in support of the Petition, the 1st Respondent states and clarifies, in relation to the process of tallying, collation, verification, and declaration of election results, the following preliminary points:

- a. The Constitution, the Elections Act and Regulations provide a comprehensive process for the conduct of elections including management of results.
- b. Article 88(5) of the Constitution states that the “Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.”
- c. The Constitution, under Articles 81,86 and 138 thereof, provides for the principles for the counting, tallying, collation, verification, announcement and publication of presidential election results.
- d. Under Article 81 of the Constitution, the electoral system must be transparent and accountable.

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- e. Article 86 of the Constitution provides the constitutional standards for voting, counting, tabulation and announcement of election results. These reinforce the standards set out under Article 81 of the Constitution.
- f. Article 138 of the Constitution outlines the constitutional process for the conduct of the presidential election as follows: the election shall be conducted in each Constituency; and the Commission shall tally, verify the count and declare the result.
- g. The statutory framework for the management of results is provided under Sections 39 and 44 (on integration of technology) of the Elections Act, and the Elections (General) Regulations (Regulations 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87).
- h. The statutory and regulatory framework compliments and does not derogate from the constitutional principles set out under Articles 81, 86 and 138 of the Constitution.

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B. Constitutional and Statutory Process for the Management of election Results

26. Further provisions in relation to the management of election results are provided under Section 39 of the Elections Act. These include that:

(1A) The Commission shall appoint constituency returning officers to be responsible for—

- (i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly.
- (ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and
- (iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

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(1C) For purposes of a presidential election the Commission shall —

- (a) ...
- (b) tally and verify the results received at the national tallying centre; and

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(c) publish the polling result forms on an online public portal maintained by the Commission.

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

The effect of the 2016 Amendments to the Elections Act

27. The amendments, for the first time, placed a mandatory obligation on the IEBC to electronically transmit *tabulated presidential results* from the polling stations to the constituency tallying centre and national tallying centre; and to electronically place the *Result Declaration Forms scanned as an image to a public portal*.

28. The further effect of the 2016 Amendments was also to remove the treatment of electronically transmitted results as provisional which was the effect of the drafting of Section 39 before the 2016 Amendments. - 10

29. This provision as amended in 2016 aligns with the challenges noted in the *Report of the Independent Commission on the 2007 General Elections* (the Kreigler Report) and the *Report of the Joint Parliamentary Committee of the Senate on the 2013 General Elections 2013*.

30. *The statutory framework provides the accountability framework for the management of elections results contemplated under Articles 86 of the Constitution. Section 39 contemplates the verification channels for result transmission as follows:*

- a. *Electronic transmission of tabulated results through the KIEMS Result Transmission System.*
 - b. *Electronic transmission of scanned images of the Result Declaration Forms.*
 - c. *Physical transmission and tabulation of Results to the Constituency Tallying Centre.*
 - d. *Constituency based secure Result Transmission Module to enable the Returning Officer to enter verified data in the KIEMS system and electronic transmission.*
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- e. Verification by the Commission (to oversee the process) and Announcement of the Results by the Chairperson under Article*

C. The Role of the Chairperson as Returning Officer for the Presidential Elections

31. The 1st Respondent states that the role of the Chairperson as the Returning Officer for the Presidential Elections is unconstitutional and leads to usurpation of the essential functions of the 1st Respondent. In support of this contention, the 1st Respondent states as follows:

- a. The Commission established under Article 88 of the Constitution is a corporate body and exercises its functions as such.
- b. Placing the Chairperson as a Returning Officer for the Presidential Election places the Chairperson at an exclusive and unaccountable level by effectively creating an office with doubtful constitutional foundation. - 10
- c. Under Article 138(2) of the Constitution, the Presidential Election is conducted in each constituency. The Commission appoints Returning Officers within a specific regulatory framework to conduct elections and make returns to the Commission for the results declared in each constituency.
- d. Administratively, it is not possible for the Chairperson as a person acting in his sole capacity as a Returning Officer to physically tally and verify results declared in over 46,000 polling stations and 290 constituencies by over 400,000 officials at the polling stations and the constituencies. - 20
- e. Because of the administrative impossibility, the Chairperson unilaterally appointed officials to undertake verification at the National Tallying Centre. Unlike Returning Officers, these officials are not gazetted to handle election result management, and are unaccountable except to the unilateral direction of the Chairperson.
- f. This made the result management process to lack the required accountability and transparency and also made it vulnerable to indeterminacy except as to what the Chairperson says is the result of the presidential election.
- g. The process derogates and undermines the constitutional principles set out under Article 81, 86 and 138 of the Constitution. - 30
- h. The process has had the effect of undermining rather than promoting compliance with the interpretation of this Honourable Court in the Presidential Petition No.

to be the property of the 1st Respondent and intended to be used for the purposes of the 2022 General Elections. The position was confirmed by the 2nd Respondent.

39. As was custom with all critical decisions touching on the elections, the 2nd Respondent took unilateral steps to assign officers to the Airport to facilitate release of the Venezuelan citizens.
40. The 2nd Respondent effectively owned up to the work of the Venezuelan citizens and engaged the Department of Criminal Investigation in a prolonged public spat before resorting to cut the embarrassment.
41. The 1st Respondent confirms that the Venezuelans were not invited by the Commission and had no official or legitimate business in relation to the elections. -10
42. It was brought to the attention of the 1st Respondent through the media that the Venezuelans who purported to be working on behalf of the Commission were working in the agency and instructions of their host one Mr. Mohamed Abdulahi Abdi.
43. The 1st Respondent confirms that the said Mr. Mohamed Abdulahi Abdi was apparently a former Officer of the Commission and has since left the Commission and works as an Agent of the United Democratic Alliance Party.
44. The 1st Respondent further states that the said Abdi or the Venezuelans were not working for the Commission in relation to the 2022 General Elections. Their involvement is therefore questionable.
45. The 1st Respondent states that the investigation of any involvement of the said Abdi and the Venezuelans in the elections and the consequence thereof is the subject of investigations. -20
46. These allegations and the position taken by the 2nd Respondent brings into light the vulnerability of the elections.

47. This allegation, if true, made the election and the electoral system vulnerable to foreign interference and undermines the mandatory mandate of the 1st Respondent to protect its independence and the sovereignty of the Kenyan people as provided under Articles 248 and 249 of the Constitution.

Interference with the ability of the 5th, 6th, 7th and 9th Respondent to discharge their functions

48. Since the appointment of the 5th, 6th, 7th and 8th Respondents herein, the 2nd Respondent, in concert with the members of the Commission who had been appointed earlier, have effectively excluded them from meaningful participation in the critical elements of the elections including, but not limited to, the procurement of election materials, appointment of election officials and the appointment of Returning Officers.

49. The 2nd Respondent has acted unilaterally or through selective engagement of those he considers like-minded.

50. The 2nd Respondent is obviously inclined towards undermining rather than promoting compliance with the Constitution, election laws and the decisions of this Honourable Court and other Courts on critical elements of the election legal framework.

51. On the contrary, the 2nd Respondent has resorted to selective compliance intended to undermine the full import of the Constitutional framework on elections and election management. In some cases, the 2nd Respondent has unilaterally supported litigation aimed at preventing full compliance with election laws.

52. The 2nd Respondent has resorted to propaganda and personal attacks and bad faith intended to undermine the authority and reputation of the 5th, 6th, 7th, and 8th Respondents.

53. The decisions taken by the 2nd Respondent are thus unreasonable, irrational and meant to serve personal interests instead of advancing the independence of the Commission and the sovereignty of the Kenyan people as provided for under Articles 248 and 249 of the Constitution.

Summary of Breaches of the Constitution and the Law

54. The 1st Respondent notes the following breaches of the Constitution, the Law and its internal procedures particularly by the 2nd Respondent and persons acting in concert with him:

- a. Failure to conduct the corporate business of the Commission as provided under Article 88, 248 and 249 of the Constitution.
- b. Failure to meet the standards of transparency, accountability and independence of the 1st Respondent or safeguard the sovereignty of the Kenyan people as provided under Articles 81, 86 and 248 and 249 of the constitution
- c. Failure to provide framework for the management of presidential election results as provided under Article 86 of the Constitution. -10
- d. Failure to transmit tabulated electronic result for the Presidential Elections as provided under Section 39 of the Elections Act.
- e. Providing late and inconsistent directions on critical elements of the elections management including issuance of ballots, electronic transmission of results, complimentary mechanism for identification of voters without meaningful, timely and adequate participation of stakeholders.
- f. Unilateral decision making of critical elements of the electoral process by the 2nd Respondent which undermined the necessary independence of the 1st Respondent in the discharge of its functions.
- g. Compromising the electoral process and the sovereignty of the Kenyan people in total disregard of the Constitution through real and perceived conduct of the 2nd Respondent in engaging in the investigation of the foreigners with ostensible interest to subvert the electoral process. -20
- h. Failure to publish clear procedures for the conduct of the verification and tallying of presidential election results contrary to Article 138(10) of the Constitution.
- i. Making declaration of the presidential election results based on inconclusive and indeterminate results and at any rate unverified results.
- j. Failure to publish the report of the turnout to the media contrary to clear Guidelines adopted by the Commission and the media in pursuance of Article 35 of the Constitution. -30
- k. Failure to secure the electronic infrastructure from attack through involvement of persons not directly appointed or contracted by the 1st Respondent.

1. Unilateral action by the 2nd Respondent through unconstitutional allocating to himself unconstitutional powers of Returning Officer in clear derogation of Article 138 of the Constitution.

Reliefs Sought

In light of its Response to the Petition and the Affidavits in support, the 1st Respondent prays that this Honourable Court issues the following Orders:

- A. An order for the scrutiny and forensic audit of all systems, technology, servers, databases, technology security, firewalls and access controls and the Website Portal used by the Commission in the Presidential Elections. Such audit should include: the role and access rights of all officers including contractors; the KIEMS Turnout Reporting Logs; KIEMS Result Transmission Logs for the polling station; KIEMS Result Transmission Logs for the Constituency Tallying; and the KIEMS Result Transmission Logs for the National Tallying Centre. - 10
- B. An order that the Result announced by the 2nd Respondent on 15th August 2022 is unverifiable and therefore invalid.
- C. An order consequent to the grant of order B above, compelling the 1st Respondent to develop, publish, and lay before this Honourable Court comprehensive administrative procedures and protocols for the management of the Presidential Elections.
- D. An order of this Court barring the 2nd Respondent or any person from victimising and or spreading propaganda or in any way interfering with the ability of the 5th, 6th, 7th and 8th Respondents to discharge their constitutional and statutory mandate as members of the Commission. - 20
- E. Such other orders as this honourable Court deems fit to make.

DATED at NAIROBI this 26th day of August 2022.

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