REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: W.M. Mutunga, Chief Justice and President of the Supreme Court; P.K. Tunoi; M.K. Ibrahim; J.B. Ojwang; S.C. Wanjala; N.S. Ndungu, SCJJ.)

PETITION NO. 5 OF 2013

-BETWEEN-

RAILA ODINGA .....PETITIONER

-AND-

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
2. AHMED ISSACK HASSAN
3. UHURU KENYATTA
4. WILLIAM SAMOEI RUTO
.....RESPONDENTS

AS CONSOLIDATED WITH PETITION NO. 3 OF 2013

-BETWEEN-

1. MOSES KIARIE KURIA
2.DENIS NJUE ITUMBI
3. FLORENCE JEMATIAH SERGON
.....PETITIONERS

-AND-

1. AHMED ISSACK HASSAN

.....RESPONDENTS
2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

AND AS CONSOLIDATED WITH PETITION NO. 4 OF 2013

-BETWEEN-

1. GLADWELL WATHONI OTIENO
2. ZAHID RAJAN
.....PETITIONERS

-AND-

1. AHMED ISSACK HASSAN
2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
3. UHURU KENYATTA
4. WILLIAM SAMOEI RUTO
.....RESPONDENTS

JUDGMENT

A. THE PRESIDENTIAL ELECTION OF 4TH MARCH, 2013: INTRODUCTION

[1] On the 4th of March, 2013, Kenya held its first General Election since the promulgation of the new Constitution on 27th August 2010. The Constitution was a culmination of the efforts of the Kenyan people to bring about a more progressive governance set-up. Kenyans affirmed the new Constitution as the supreme law of the Republic, which binds all persons and all State organs.

[2] All powers to be exercised in public functions, therefore, must flow from the Constitution. Indeed, judicial authority, under Article 159 (1) of the Constitution, is derived from the people and vests in, and shall be exercised by the courts and tribunals established under this Constitution. Additionally, national values and principles of governance, as set out in Article 10 of the Constitution, underpin the conduct of governance in every respect.

[3] The Independent Electoral and Boundaries Commission (IEBC) was created by Article 88 of the Constitution, for the management of the country's electoral processes. It is conferred with the responsibility for conducting free, fair and transparent elections.

[4] The elections of 4th March, 2013 were the first in Kenya to attempt to use electronic facilitation. The IEBC, at various stages of the election, deployed the following technologies: (i) Biometric Voter Registration (BVR) during voter registration; (ii) Electronic Voter Identification (EVID) on polling day; and (iii) Results Transmission System (RTS) during tallying.

[5] On 19th November, 2012, the IEBC began a voter registration exercise, which culminated in approximately 14 million voters being registered. On 4th March, 2013 voters went to the polls in significant numbers. A record 86% of registered voters were reported to have participated in the General Elections. After the polls officially closed on that day, the IEBC began the process of vote tallying, and the results were then broadcast to the public.

B. DECLARATION OF RESULTS, AND THE ENSUING PETITIONS

[6] On 9th March, 2013, five days after the General Elections were held, the Chairman of the IEBC, Mr. Issack Hassan (second Respondent), announced that Mr. Uhuru Kenyatta had received 6,173,433 votes out of a total of 12,338,667 (50.07% of all the votes cast), while Mr. Raila Odinga (the petitioner) had received 5,340,546 votes (43.31% of the votes cast). Pursuant to Article 138(4) of the Constitution, Mr. Hassan declared Mr. Uhuru Kenyatta, the President-elect.

[7] Subsequent to the announcement, three petitions challenging the results of the Presidential elections were filed at the Supreme Court.

(i) Petition No. 3 of 2013

[8] On 14th March 2013, Petitioners Moses Kiarie Kuria, Denis Njue Itumbi and Flowrence Jematiah Sergon filed a petition against the IEBC as the 1st

respondent, and Mr. Isaack Hassan. The basis of the petition was that *the respondents' decision to include rejected votes in the final tally had a prejudicial effect on the percentage votes won by Mr. Kenyatta.* The petitioners asserted that the second respondent's actions were in contravention of Articles 36(b) and 138(c) of the Constitution, and Rule 77(1) of the Elections (General) Regulations, 2012.

(ii) Petition No. 4 of 2013

[9] The second Petition was filed by Gladwell Wathoni Otieno and Zahid Rajan on 16th March, 2013, against the IEBC as the 1st respondent, Mr. Issack Hassan as the 2nd respondent, Mr. Uhuru Kenyatta as the 3rd respondent and Mr. William Ruto as the 4th respondent. The Petitioners aver that the election was not conducted substantially in accordance with the Constitution, or the Elections Act and the governing Regulations.

[10] In particular, the Petitioners aver that the IEBC failed to establish and maintain an accurate Voter Register that was publicly available, verifiable and credible as required by Articles 38(3), 81(d), 83(2), 86 and 88(4) of the Constitution, sections 3, 4, 5, 6, 7 and 8 of the Elections Act, 2011 and the Elections (Registration of Voters) Regulations, 2012.

[11] The Petitioners, in addition, claim that the true number of registered voters is unknown and, therefore, the IEBC did not have an accurate voters' register. They assert that the 1st and 2nd respondents repeatedly changed the official number of registered voters. The Petitioners further assert that *the absence of a credible Principal Voter Register vitiates the validity of the Presidential elections.*

[12] The Petitioners further assert that the electoral management system adopted by the IEBC was complex and had many shortfalls, contrary to the constitutional requirement that it be a simple, accurate, verifiable, secure, accountable and transparent system. In particular, the Petitioners aver that the IEBC failed to meet the *mandatory legal requirement to electronically transmit election results*. The Petitioners aver that the failure of the electronic system put in place by the IEBC and their failure to electronically transmit election results affected the validity of the Presidential elections.

[13] The Petitioners aver that the 1st and 2nd respondents did not discharge their obligation under the Constitution, because the tallying and verification of the results did not happen at the polling stations; there was no electronic transmission of provisional results; and party agents were excluded from the National Tallying Centre.

[14] The Petitioners further aver that the 1st Respondent *violated the Constitution and the Public Procurement and Disposal Act (Cap. 412C, Laws of Kenya),* by awarding the tender to an unqualified bidder who then supplied devices that did not work properly, or simply failed, on election day.

(iii) Petition No. 5 of 2013

[15] The third Petition was filed by Mr. Raila Odinga on 16th March, 2013 against the IEBC as the 1st Respondent, Mr. Isaack Hassan as the 2nd Respondent, Mr. Uhuru Kenyatta as the 3rd Respondent and Mr. William Ruto as the 4th Respondent. The Petitioner avers that the *electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful.* The Petitioner seeks relief from this Court pursuant to Articles 2, 6, 10, 38, 73, 82, 86, 259, 260 of the

Constitution; the Independent Electoral and Boundaries Commission Act, 2011 (Act No. 9 of 2011); Regulations 59(1), 79 and 82 of the Elections (General) Regulations 2012; the Elections Act, 2011 (Act No. 24 of 2011) and Sections 4 and 25 of the IEBC Act, 2011.

[16] The Petitioner avers that the first and second Respondents did not carry out a valid voter registration, in contravention of Article 83 of the Constitution, and Section 3(2) of the Elections Act, 2011 because their official tally of registered voters changed several times. This resulted in the final total number of registered voters differing materially from what was in the Principal Register.

[17] The Petitioner also avers that the first respondent *failed to carry out a transparent, verifiable, accurate and accountable election as required by Articles 81, 83 and 88 of the Constitution*. The Petitioner asserts that there were several anomalies that occurred in the process of manual tallying, such as: the votes cast in several polling stations exceeding the number of registered voters; differences between results posted and the results released by the first Respondent; the use of unsigned Form 36 to declare the results.

[18] The Petitioner further avers that the electronic systems acquired and adopted by the first Respondent to facilitate the General Election were poorly designed and implemented, and destined to fail. Due to the failure of the system, the first Respondent was unable to transmit the results of the elections, in contravention of Regulation 82 of the Elections (General) Regulations, 2012.

(iv) Consolidation of Petitions

[19] On 25th March 2013, by the directions of the Supreme Court, the three petitions were consolidated. The Court further ordered that the file for Petition No. 5 be deemed to be the pilot file for the recording of all proceedings and for rendering the final decision. The Court gave the following directions with respect to parties in the consolidated petitions: the Petitioner in Petition No. 5 of 2013 to be referred to as the first Petitioner; the Petitioners in Petition No. 4 of 2013 to be jointly referred to as the second Petitioner; the Petitioner in Petition No. 3 of 2013 to be jointly referred to as the third Petitioner; the respondents to remain as in Petition No.5.

C. AGREED ISSUES FOR TRIAL

[20*] Prior to the pre-trial conference, the Court drafted a summary of the issues and served this upon the parties for scrutiny and consideration. This was the basis of agreement on issues for trial, which may be summarized as follows:*

1. *Whether the 3rd and 4th Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013.* [This is the crux of the case].

2. *Whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.*

3. *Whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd Respondent.*

4. *What consequential declarations, orders and reliefs this Court should grant, based on the determination of the Petition.*

D. PRESIDENTIAL ELECTION VOTE-TALLY: ARE "REJECTED VOTES" RELEVANT IN COMPUTING PERCENTAGES?

(i) Background

[21] Petition No. 3 seeks to challenge the decision by the 2nd Respondent to include "rejected votes" in the tallying process when calculating the percentage of votes in favour of each candidate. The Petitioner alleges that this decision was unlawful and had the prejudicial effect of reducing the percentage of votes won by Hon. Uhuru Kenyatta. The Respondents, on their part, aver that the Constitution does not expressly provide that rejected votes should not be counted in the computation of the threshold percentage for a win. Having sought and received divergent legal opinions on the issue, the Respondents now urge the Court to settle the issue, as it is likely to arise in future elections.

[22] The specific questions to be answered in this claim are as follows:

1. Whether in determining that a candidate has met the threshold stipulated in Article 138 (4)(a) of the Constitution, the term "all the votes cast" includes (i) only valid votes, or (ii) both valid and rejected votes.

2. Should a ballot paper that has been rejected under the provisions of Regulation 77 of the Elections (General) Regulations, 2011, and has been categorized as being "void", be capable of being factored in, during the tallying process?

(ii) Petitioners' Case

[23] The Petitioners state that "rejected votes" were erroneously factored into the tallying system by the 2nd Respondent, and that this has had the prejudicial effect of reducing the percentage of votes won by Uhuru Kenyatta, and keeping his tally only slightly above the threshold for a win.

[24] The Petitioners state that, at the commencement of transmission of Presidential election results, the 2nd Respondent excluded rejected votes from the computation of the percentage of the votes cast. They state that the common understanding at this stage, was that the votes cast as envisaged by Article 138 of the Constitution included only ballots that constituted valid votes.

[25] They further assert that in calculating the percentage attributable to each candidate, the Respondents erroneously and unlawfully used a format that included rejected votes as a basis for determining whether a candidate had met the threshold stipulated in Article 138(4)(a) of the Constitution.

[26] They aver that Rule 77 (1) of the Election (General) Regulations, 2012 states that, rejected ballot papers shall be void and shall not be counted. Consequently, the results announced at each polling station as contemplated by Articles 86 (b) and 138 (3) of the Constitution, cannot include rejected votes among the results announced in favour of any candidate. The Petitioners contend that Rule 77 (1) of the Election (General) Regulations, 2012 states that, rejected ballot papers shall be void and shall not be counted. Consequently the results announced at each polling station as contemplated by Articles 86 (b) and 138 (3) of the Constitution, cannot include rejected votes among the results announced in favour of any candidate.

[27] In the submissions, Mr. Regeru, counsel for the Petitioners, based his arguments on several points, which he urged the Court to use as tools of analysis, in reaching a conclusion in the matter: one being the law as stated in the Constitution, Article 259; and Section 109(1)(p) of the Elections Act 2012; another being arguments based on common sense and logic; and another still, the legal opinions filed as evidence; yet another, being the practice of the 1st and 2nd Respondents; and another still, comparative practice in other jurisdictions. They urge that improperly-marked ballots should be rejected and not factored into the counting and tallying of votes. They rely on the case of ***Popular Democratic Movement v. Electoral Commission, Constitutional Case No. 16 of 2011,*** where the Seychelles Constitutional Court (Burhan, J.), being faced with the question whether a rejected vote could be considered a "cast vote", held that:

> *"rejected ballot papers are not to be counted as 'votes', therefore the term 'votes cast' cannot and will not include 'rejected' ballot papers".*

(iii) Responses

[28] Mr. Ngatia, learned counsel for the 3rd Respondent, in oral submissions, founded his client's case on certain facts: transmission of results started on the evening of 4th March 2013; electronic results were transmitted without factoring in the rejected votes, and a stage was reached when the rejected votes on the electronic board had accumulated to the figure of 300,000; so in a real sense, they became "candidate number 3," after the 1st candidate and the 2nd candidate; members of a rival political party then wrote a letter to the Respondent, requesting that rejected votes be factored in the computation of percentages; to factor in the rejected votes would mean that a candidate who had a 53% lead *could* come down to 49%; and such a situation would then occasion a run-off election between the two leading Presidential election

candidates. Mr. Ngatia submitted that, towards the evening of 5th of March, the 1st Respondent announced that, thenceforth, the 2nd Respondent would depart from its previous position and now factor in the rejected votes. He submitted that this announcement was made without giving any other Presidential election candidates an opportunity to be heard; and that all the legal opinions given, vindicated his complaints.

[29] Mr. Ngatia urged that the Constitution, in Article 138, makes reference to "votes that are cast". But from the Elections Act, confusion is apparent; as a *vote* is equated to a *ballot paper*.

[30] Mr. Ngatia submitted that a ballot paper is nothing more than an instrument to convey the choice of a voter; and a vote is the definable and ascertainable ballot paper; once the ballot has been translated into a valid choice, it becomes a vote. He submitted that there cannot be a vote which is invalid, what is invalid is a ballot paper; and, as a vote is a defined choice, a ballot which does not translate into a vote is nothing more than a ballot which is rejected.

[31] Mr. Ngatia submitted that rejected votes should never be the basis for triggering a run-off election.

[32] Mr. Kigen, learned counsel for the 3rd Respondent, also urged that the prospect of a ballot paper acquiring the character of a vote is conditional on it clearly showing the choice and preference of the voter. As long as the document deposited in the ballot box does not clearly show what the intention of the voter is, then it should not be included as a vote and should not be allowed as part of the tallying, in ascertaining winning margins.

[33] Counsel contends that the inclusion of rejected votes *can only* work against a candidate with more votes, and not to the disadvantage of the runner-up.

[34] Mr. Oraro, learned counsel for the Petitioner in Petition No. 5, submitted that Article 138(4) of the Constitution means what it says: there is no qualification to the phrase "votes cast"; thus all votes cast must be included whether valid or rejected, in the computation of the percentage threshold for a win. He argued that if the drafters intended that only a certain category of votes would be considered for purposes of determining whether the winning percentage threshold had been met, nothing would have been easier than to stipulate so.

[35] He remarks a signal by this Court that, it is not tenable to ascribe meanings to constitutional provisions through the sheer craft of interpretation, or by way of endeavours to discern the intentions of Parliament, where the wording of legislation is clear and entails no ambiguity.

[36] Mr. Oraro submitted that the distinction given by Mr. Ngatia on 'vote' and 'ballot paper,' is a distinction without a difference: as what is defined in the Elections Act is a *ballot paper*; ballot paper means paper used to record the choice made by voters and shall include an electronic version of a ballot paper, or its equivalent for the purposes of electronic voting.

[37] Counsel further submitted that the argument by the Petitioners for excluding rejected votes is based upon a Regulation; and so the position urged was that the Constitution should be made to fit the terms of subsidiary legislation: a proposition to be rejected, as regulations cannot be used to interpret a provision of the Constitution which is the supreme law.

[38] Mr. Oraro submitted that Regulation 77 of the Elections (General) Regulations, 2012 does not require the exclusion of rejected votes in the final tally, for the purpose of determining whether a Presidential election candidate has attained the threshold percentage required by Article 138 of the Constitution. For Regulation 77 (e) prescribes when a ballot paper is to be rejected, and is not to be attributable to any of the candidates, nor feature in the aggregate tally for the candidate.

[39] Mr. Oraro submitted that whether a ballot paper has been rejected and void, for purposes of being attributed to any one particular candidate, does not and cannot change the fact that it was a "vote cast".

[40] Learned counsel, Mr. Ndubi for the 2nd petitioner, agreed with the 1st Petitioner's position, and urged that the Constitution of Kenya, 2010 had the clear intention to repeal and replace the Constitution of Kenya, 1969 which has been in force. The former Constitution had provided that "the candidate for President….and who receives a greater number of **valid votes** in the presidential election than any other candidate…" So, to determine the winner in Presidential elections, the reference was to "valid votes"; and this is now replaced with "votes cast" – an expression so broad as to include "rejected votes".

[41] For the Respondents, counsel submitted that the decision to include "rejected votes" in the elections was made in good faith, based on a literal interpretation of Article 138 (4), as read together with Articles 86 (b) and 38 (b) of the Constitution: and these Articles do not provide that rejected votes should not be counted, or considered in the computation of Presidential election vote-percentages, envisaged under Article 138 (4) of the Constitution.

E. THE VOTERS' REGISTER: DID IT AFFECT THE VALIDITY OF THE PRESIDENTIAL ELECTION?

(i) The Petitioners' Case

[42] Lead counsel, Mr. George Oraro, made submissions on the role of technology in relation to voter registration. He submitted that the first Respondent had adopted the "BVR" (Biometric Voter Registration), a computer-based registration solution. This involves biometric technology, which uses computer finger-print scanners and digital cameras to capture the bio-data of an applicant; such personal details of finger-prints and face photo technology are used to verify the authenticity of the voter, and to ensure greater transparency and credibility in the elections.

[43] The Petitioner submitted that the first Respondent had represented to the public that the BVR system would ensure quick and precise voter identification, and this would guarantee a credible election and prevent fraud.

[44] Counsel focused his submissions on anomalies and discrepancies in the number of registered voters occasioned by the use of a plurality of voter registers. He submitted that, as of the 18th December 2012, the total number of registered voters on the provisional Voter Register was 14,333,339. The provisional register was then opened to the public for inspection. This register was completed and confirmed by IEBC by Gazette Notice; and it stood as the Principal Voter Register with a total of 14,352,545 registered voters. However, this number was inconsistent with the figure of 14,352,533 registered voters, by the first Respondent's declaration of Presidential election results on 9th March 2013.

[45] Mr. Oraro submitted that the IEBC tried to explain the discrepancy in numbers by stating that the 14,352,533 were registered voters on the Principal

Register, but had not included 12 special cases from Soy Constituency in Uasin Gishu County, as well as 31,318 persons registered in the non-biometric special register. However, Mr. Oraro stated that this explanation was not valid, as it entailed mathematical inconsistencies: 14,352,533 +12+31,318=14,383,863 – an inconsistency that was further compounded by the figure of 36,236 which the third Respondent's witness said was in the special register. Counsel submitted that the said special register was never made public. Mr. Oraro submitted that the lack of information from IEBC was contrary to Article 10(2) (c) of the Constitution which provides that transparency is one of the national values and principles of governance. Counsel urged that IEBC's failure to publish the information was also contrary to Section 27 (1) of the Independent Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011) which provides that –

> *"The Commission shall publish and publicize all important information within its mandate affecting the nation."*

[46] Learned counsel, Ms. Kethi Kilonzo, for the 2nd Petitioner, entered upon her submission by referring to the difference between the right to a free and fair election, in the terms of Article 38 (2) of the Constitution, and the right to be registered as a voter and to vote, provided for in Article 38 (3). She submitted that the right to vote is not an absolute right but a conditional right, and that one condition attached to this right is the requirement for the voter to be *registered*, before exercising the right to vote.

[47] Counsel submitted that there can be no free and fair elections if there is no credible register. She derived the definition of a register from Section 2 of the **Elections Act, 2011 (No. 24 of 2011)**. By this provision, constituency register means:

> *"the register of voters compiled in respect of each constituency by the Commission."*

Section 2 of the same Act defines the principal register of voters as:

> *"a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."*

[48] Counsel submitted that Section 3 of the Act provides that every citizen will be allowed to exercise their right to vote, subject to Article 138 (3) of the Constitution, if they are registered in the Principal Register of Voters. Based on this provision, learned counsel submitted that there is only one register, the Principal Register of Voters. She further submitted that Section 4 of the Act provides that there shall be a register to be known as the Principal Register of Voters, which shall comprise a polling station register, a ward register, a constituency register, a county Register and the register of voters residing outside Kenya. Outside this Register, counsel urged, the law does not provide for any other register. She submitted that there was no provision in the law for a special non-biometric register. Learned counsel submitted that the use of the special register was a violation of the Constitution and the law. She also stated that the validity of the Presidential election, and the right to equality and to vote, was infringed by the use of this special register.

[49] Further, learned counsel stated that there could be no additions to the Provisional Register as publicized by the IEBC on the 18th December 2012. This is because Section 5 of the Elections Act provides that there can be no registration of voters within 60 days of the first General Election.

[50] Section 6 of the Act provides that after fourteen days from the date of inspection of the register of voters, IEBC is to compile, complete and publish a notice in the Gazette, if an amendment of the register of voters is effected. Counsel submitted that the special register of voters with biometrics should have been prepared before the gazettement process, and published thereafter.

[51] In the Indian case of ***Lakshmi Charansen and Others v A.K.M Hassan Uzzaman and Others,*** 1985 SCC (4) 689 SCALE 384, the Supreme Court considered the question of alterations to electoral rolls. The facts of the case were based on a writ petition filed before the High Court in Calcutta which alleged that the electoral rolls in the state of West Bengal had not been properly revised for the purposes of the general elections. The Supreme Court held that the erroneous inclusion or omission of the names of a few persons may have serious consequences. But if *a considerable number of names* of such persons are either wrongly included in, or excluded from the electoral roll, it will be of great consequence. The Court also held that:

> ***"It is true as submitted on behalf of the Election Commission, a perfect electoral roll is not possible. But at the same time, it must be remembered that the name of any eligible voter should not be omitted from, nor the name of any disqualified person included in the electoral roll, in violation of any constitutional or statutory provisions. The error, when pointed out, has to be removed."***

[52) Learned counsel, Mr. Oraro took up the issue of a registration book known as the "Green Book," used by IEBC; he urged that such a book was not provided for in law. He submitted that there had been a number of anomalies in voter registration, as in the case of Makueni Constituency, with different figures for registered voters for different elective posts: the total number of

registered voters in the Principal Register of Voters is 64,708; for the Presidential seat is 64,708 (as reported by IEBC during declaration of results); for the same position, by Form 36, the figure is 64,525; for the Governor seat, 64,877; for Senator seat, 64,879 and for the National Assembly seat, 64,976.

[53] Counsel urged that the election of the President in Makueni Constituency did not meet the test of verifiability, accuracy, or credibility.

[54] Miss Kilonzo urged that in polling station No.083 in Kieni Constituency, the total number of votes cast was 321, with 310 for the President-elect. Yet the Principal Register published on the website of IEBC on the 24th February 2013, showed only one registered voter in that polling station. The presiding officer did not indicate the number of people who were registered to vote in that polling station; and so a question remained as to whether these results were valid.

[55] Counsel relied on case law to support her submissions. In the Indian case of ***NP Ponnuswami v Returning Officer Nammakal Constituency*** (1952) SCR 218, the Baharul Islam J held in a dissenting judgment [at 529 C] that:

> ***"the basis of a free and fair election is the voters list prepared in accordance with the Representation of People Act of 1950 and the Registration of Voters Rules of 1960. If this is not so done, the electoral rolls will have no sanctity and consequently election will also not inspire the confidence of the people."***

[56] Learned Counsel, Mr. Oraro also invoked the Indian Supreme Court case ***Narendra Madivalapa Kheni v. Manikarao Patil and Others***,

Supreme Court of India Civil Appeal No. 1114 of 1976, where the Court had to deal with alterations made to the electors' roll after the roll became final. The Court found and held that:

> ***"there is a blanket ban in Section 23 (3) on any amendment, transposition or deletion of any [name] or the issuance of any direction for the inclusion of a name in the electoral roll of a constituency [after] the last date for making nominations for an election in that constituency. This prohibition is based on public policy and serves a public purpose. Any violations of such mandatory provision conceived to pre-empt scrambles to thrust into the rolls, after the appointed time, fancied voters by anxious candidates or parties spells invalidity and is in flagrant violation of section 23(3); names have been included in the electoral roll, the bonus of such illegitimate votes shall not accrue, since the vice of voidance must attach to such names. Such void votes cannot help a candidate win the contest."***

(ii) The Responses

[57] The first and second Respondents filed a joint replying affidavit sworn by Ahmed Isaack Hassan on 19th March 2013. At paragraph 7 of the affidavit, the first and second Respondents stated that the first Respondent, in exercise of its mandate under Articles 86 and 88(4) of the Constitution, and Section 4(m) of the Independent Electoral and Boundaries Commission Act, had deployed appropriate technology in the performance of its functions. One of the areas where technology was employed was the registration of voters by use of the Biometric Voter Register (BVR).

[58] At paragraph 12 of this affidavit, it is deponed that the Biometric Voter Registration technology was not meant to replace the legally required manual

system of voter registration, but was meant to provide an additional layer of efficiency and integrity in the electoral processes.

[59] Counsel for IEBC submitted that this organization, with the concurrence of all line-stakeholders, had opted to use the Biometric Voter Registration technology in carrying out the voter registration exercise. It is submitted that in the process of voter registration, the Commission, in accordance with **Article 83 of the Constitution,** put in place appropriate mechanisms to ensure that all persons who presented themselves for registration, were registered as voters. The first Respondent referred to Article 83 (3) of the Constitution as the basis for having *an all-inclusive voter register*.

[60] Article 83 (3) of the Constitution thus provides:

> ***"Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election."***

[61] Upon completion of the voter registration exercise, the Commission developed *the Principal Register of Voters***,** which was used in the March 2013 General Elections. The first Respondent's case sought to rebut three points raised by the Petitioners. The first Respondent responded to the assertion that the voter registration exercise failed the people of Kenya, because the registration process did not uphold the constitutional and statutory requirements, and fell short of the standards set by international best practice, by *compromising the integrity of the voter registration exercise*. The first

Respondent sought to rebut the presumption of the Petitioners, that Biometric Voter Registration was meant to replace the manual registration process.

[62] *What constituted the Principal Register of Voters?* In its submissions, the first Respondent referred the Court to the definition of a *Principal Register of Voters* as provided under **Section 2 of the Elections Act 2011 (No 24 of 2011).** It is defined as follows:

> *"a current register of persons entitled to vote at an election prepared in accordance with section 3 and this includes a register that is compiled electronically".*

[63] It was the first Respondent's submission that a register compiled electronically is just a *component* of the Principal Register of Voters.

[64] This submission was further elaborated by learned counsel for the first Respondent, Mr. Nyamodi who outlined the three components of the Principal Register of Voters, as set out below.

(a) The Biometric Voter Register

[65] Mr. Nyamodi referred to the *affidavit of Dismus Ong'ondi* sworn on 19th March 2013, as part of the evidence submitted in the first and second Respondents' affidavit to Petition Number 5 of 2013, to define the *Biometric Voter Registration System***.** The deponent described himself as the Director, Information and Technology of the first Respondent. He described the BVR as a system that was used to register a voter's ten fingers and capture the face image. The biometrics are captured using this device of registration, comprising a software, a laptop computer, a digital camera and a device to

capture fingerprints. The voter's details as required to be captured in law, were taken, and a record of the voter with biometrics was created. The information captured was used in the compilation of the Principal Register of Voters. This explanation was reiterated in the first and second Respondents' written submissions.

(b) The Special Register

[66] Learned counsel Mr. Nyaoga, for the first Respondent, urged that **Article 54 of the Constitution** articulates the rights of persons with disabilities. It was in respect of this provision, that the special register, besides the biometric register, was developed. Mr. Nyaoga emphasised that persons with disabilities are also protected under **Article 83 (3) of the Constitution**, which prescribes the components of the register of voters. He submitted that such persons are also protected under **Article 81**, which bears the general principles of the electoral system.

[67] Mr. Nyamodi invoked **Article 38(3) of the Constitution**, as an important safeguard for the right to vote. This Article stipulates:

> *"(1)....*
>
> *(2)....*
>
> *(3) Every adult citizen has the right, without unreasonable restrictions .....*
>
> *a) to be registered as a voter;*
>
> *b) to vote by secret ballot in any election or referendum; and*

c) to be a candidate for public office, or office within a political party of which the citizen is a member and if elected, to hold office."

[68] Mr. Nyamodi urged that the first Respondent, by dint of Article 88 of the Constitution, enjoys the unfettered mandate to organise the conduct of elections and referenda in Kenya and, specifically, to conduct the registration of voters; the first Respondent has a free hand in the registration of voters, as provided by Article 88 which states:

"(1) There is established the Independent Electoral and Boundaries Commission.

(2) A person is not eligible for appointment as a member of the Commission if the person—

(a) has, at any time within the preceding five years, held office, or stood for election as—

(i) a member of Parliament or of a county assembly; or

(ii) a member of the governing body of a political party; or

(b) holds any State office.

(3) A member of the Commission shall not hold another public office.

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

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

"(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation".

[69] The first Respondent in its submissions, urged that voter registration is a critical tool for *enforcing universal suffrage*, by ensuring that every individual who is eligible to vote is able to exercise his or her right to vote. It also serves the principle of equal suffrage as it guarantees that every voter will cast his or her ballot in parity with all other voters. Accordingly, the special register was a tool aimed at ensuring that there was no disenfranchisement of citizens who had the right to vote. It was the first Respondent's submission that the special register was also anchored on **Article 27 of the Constitution,** which provides that every person is equal before the law and

has the right to equal protection and equal benefit of the law. It was, therefore, imperative to ensure that the registration process was inclusive, and provided for measures to include all persons.

[70] It was on the basis of such constitutional guidelines, that the first Respondent developed the special register. To this end, the first Respondent invoked the case of ***Georgian Labour Party v. Georgia 9103/04 (2008) ECHR 1888.*** The Court, in this matter, stated thus:

> *"The Court considers that the proper management of electoral rolls is a pre-condition for a free and fair ballot. Permitting all eligible voters to be registered preserves,* ***inter alia,*** *the principles of universality and the equality of the vote, and maintains general confidence in the State administration of electoral processes"*

[71] The special register was meant, according to the first Respondent, to serve a certain category of "special" persons:

> *a) voters with disability: those whose fore-limbs or parts of their fore-limbs were unavailable for the purposes of capturing their biometrics;*
>
> *b) those who, due to the nature of their work, had either their fingerprints scarred or those whose fingerprints had lost impression and could not be captured.*
>
> *(c) the elderly, whose fingerprints, due to the decrease in elasticity of their skin, could not be captured;*

d) twelve persons from Soi Constituency who had been registered using the training codes and who had to be added to this register.

[72] Mr. Nyamodi, submitted that, over and above the biometric and special registers, the *primary data entry point,* which was done by hand, was the *Green Book*, otherwise known as the *Primary Reference Book*. He elaborated that upon the completion of the voter registration exercise, there emerged a need to clean up the register to eliminate persons who had registered more than once, and persons who had not used the requisite documents for registration, namely, a valid passport, or a personal identity card. This clean-up exercise *created the duplicate register and the exceptional register*. The persons in these two registers were not allowed to vote.

[73] Counsel referred the Court to the affidavit of Immaculate Kassait, who elaborated the process of voter registration. The deponent swore the affidavit as the Director, Voter Registration Programme of the First Respondent. The deponent makes the following averments:

a) The Commission used a limited number of BVR kits which necessitated the sharing of these devices between polling stations within the same county.

b) It was a requirement that any person registering as a voter should state their preferred polling station.

c) In the course of registration, some voters were inadvertently assigned the wrong polling stations.

d) To correct these errors, the Principal Register of Voters was opened for inspection and verification to the Public,

pursuant to the provisions of Section 5 of the Elections Act.

e) *The Commission then ordered a complete audit of the Principal Register, as against the Green Book which was the primary entry of data.*

f) *The persons assigned the wrong polling stations were then assigned the correct ones, as indicated in the Green Book, and these transfers factored into the Principal Register of Voters.*

g) *This verification exercise naturally resulted in a variation between the number of registered voters in the provisional register and the Principal Register.*

h) *On 18th February 2013, the Commission held a meeting in which it realised that the provisional register was only about 99.5% accurate, as it did not contain several names that had been captured in the Green Book, which was the primary reference document; for in some instances, the BVR kits had either been damaged or dis-configured and could not relay the data captured in them.*

i) *The Commission, in a bid to ensure that all the persons who had presented themselves for registration were not disenfranchised owing to the failure of the BVR kits, resolved to allow the persons in these special circumstances to vote, upon verification of their data.*

j) *The Commission certified the Principal Register, subject to this resolution. Minutes of the Commission's meeting with respect to this meeting were provided.*

k) *This resolution was communicated to the political party agents by the Commission Liaison Committee.*

l) The use of the Green Book in the affected polling stations resulted in an upward variation in the registered voters at the affected polling stations.

[74] The first Respondent in its submissions, stated that the figure of **14,337,399** registered voters was a provisional figure which did not include the persons without biometrics, duplicates, exceptionals; and data not yet collected from BVR kits around the country. The special register contained a list of 36,236 individuals. There was also a further correction of 30,000 voters who were excluded from the main register due to operator-errors to do with double entry, and 13,237 of these were added to the main register. In Soi, twelve people were excluded from the main register, as they had been added onto the system through a test account, but were later transferred to the main register. The total number of registered voters across the country was, therefore, 14,352,545. In certain polling stations, such as NCC and Ngong, there was voter movement occurring before the polling date, due to operator-error. The total number of registered voters in this register was, therefore, 14,352,284. The variance between the two main operational registers is 261, a margin of error of 0.0018% which, according to the first Respondent, can be considered materially insignificant.

[75] Were alterations made to the Voter Register after the certification of the Register? Mr. Nyamodi submitted that alterations or additions may have been made after the 18th February 2013. He added however that these alterations were made pursuant to the Commission's mandate under Regulation 12 (3) of the Elections (Registration of Voters) Regulations, 2012:

"Regulation 12 (3) states that the Commission may amend the Register of voters after it is certified to the extent necessary to

reflect the result of determination of any claim, or appeal that was pending at the time the register was certified".

[76] According to the 1st Respondent, this Regulation empowers the Commission to amend the register even after the certification, in view of the 100% audit, and the verification process which took place.

[77] Mr. Nyamodi submitted that the Principal Voter Register existed, and was determinable and verifiable. He submitted that the decisions made by the first Respondent to come up with the Voter Register was done so as to ensure that all the persons who had presented themselves to register as voters before the deadline, got an opportunity to vote and exercise their rights under **Articles 38 (2)** and **(3) of the Constitution.**

[78] The case of the 2nd Respondent was advanced by learned counsel Mr. Ahmednassir Abdullahi and Mr. Kamau Karori, who took turns in making submissions. The 2nd respondent urged this Court to exercise *judicial restraint* in the discharge of its mandate, in the sphere of Presidential election disputes. Mr. Abdullahi focused his attention on the broader issues of judicial adjudication in the political and constitutional domains. (These arguments are analysed further on).

[79] The 3rd Respondent asked the Court to note that there were six different elections held on the same day, including that for the office of the President: and that the requirements of registration applied equally to all.

[80] Mr. Ngatia, learned counsel for the 3rd Respondent, submitted that it was a principle guiding the preparation of the Voter Register, that the 1st

Respondent should make every effort to ensure that all qualified citizens of Kenya are able to register as voters, and able to vote during elections and referenda. He specified the relevant provisions of the law: Articles 10(a), 10(b), 38(3)(a), 88(4)(a), 138(3)(a) of the Constitution, which also express the values and principles of democracy and the participation of the people.

[81] The 3rd Respondent maintained that the Independent Electoral and Boundaries Commission had conducted its affairs in a transparent manner, by issuing press statements, and availing on its website notices and information regarding all aspects of the electoral process, including the registration of voters.

[82] The 3rd Respondent asserts that as far as he is aware, the Principal Register of Voters established under Section 4 (1) of the Elections Act, was prepared in full compliance with the provisions of that Act, and the Elections (Registration of Voters) Regulations, 2012.

[83] Winifred Guchu, in her affidavit in support of the 3rd Respondent's response, averred that all stakeholders in the electoral process, including the Petitioner and his party ODM, had participated in, and were fully informed by the first Respondent about the voter registration exercise and the various steps taken to assure the integrity, accuracy, impartiality, efficiency, simplicity and security of voter registration.

[84] She further avers that on the basis of the aforesaid assurance, the Jubilee Coalition and the CORD Coalition used the voter register prepared by the 1st Respondent to conduct nomination of candidates as stipulated in Part III of the Elections Act, 2011.

[85] Of the Petitioner's claim that the 1st Respondent had maintained multiple registers, this Respondent averred that he used only one Voter Register, during the elections held on 4th March 2013, which had copies extracted from the Biometric Voter Registration system.

[86] The 3rd Respondent averred that the 1st Respondent had taken robust steps to involve members of the public, and the Political Parties, in verifying the integrity and accuracy of the Voter Register – including the publication of a notice dated 18th February 2013 informing all stakeholders that the compilation of the Principal Register of Voters had been completed.

[87] Ms. Guchu averred that the 1st Respondent published a notice informing the public that it would hold countrywide public sensitization on the use of the BVR kits on 12th November, 2012 at several venues; and that it would release the data extracted from the Voter Register. This data was set out in various forms to provide voter numbers in all polling stations, and to give statistics of voters without biometrics per constituency, as well as a detailed voter registration analysis, and details with regard to expected daily enrolment for the period between 19th November 2012 and 26th November 2012.

[88] Ms. Guchu avers that all political parties received a copy of the provisional register of voters in the form of a CD-ROM, which she annexes to her affidavit, together with the e-mail communications by the 1st Respondent to political parties. And she deposes that in one of the meetings, all political parties agreed that *in the event of failure of the electronic voter identifying device (EVID), the print-out from the electronic register would be used in the election*. The print-out would be made available at every polling station.

[89] Ms. Guchu adds that in yet another meeting, the political parties complained that some of their supporters had encountered difficulties with the register during the nomination exercise. Their complaints were that some names were missing from the electronic register, while they had registration acknowledgement-slips from the 1st Respondent. The 1st Respondent explained that these were names of people whose biometric details had not been captured, or were captured but subsequently lost. Those details were retained in the manual register.

[90] The 1st Respondent subsequently provided all the political parties with a *complementary list of registered voters* capturing the details of all the voters whose biometrics were missing. The complementary list of this category of voters had a total of 36,236 registered voters. There was no objection from any political party concerning this complementary register.

[91] Ms. Guchu deposes that the allegation in Janet Ong'era's affidavit in support of Petition No. 5 0f 2013, to the effect that the Voter Register was tampered with after the registration period had ended, so as to confer a benefit upon the 3rd Respondent, is not truthful.

[92] The 3rd Respondent, in his affidavit, recounts the occasion of a press briefing at a meeting chaired by the Coalition for Reforms and Democracy's (CORD) Presidential candidate, in which that party urges that IEBC should revert to a *manual voter registration process,* since the electronic system appeared to be unreliable. The 3rd Respondent submits that the Petitioner cannot, in the circumstances, claim the IEBC deliberately set up the electronic system to fail.

[93] The 3rd Respondent seeks to rely on the opinion of the Canadian High Commissioner which indicates that the IEBC had considered preparing a manual voter registration system after the procurement of the BVR system became contentious. He further submits that the Cabinet, supervised by the Petitioner in Petition No. 5 of 2013, had set up a committee to assist the IEBC to procure the BVR system within a short time-frame.

[94] He avers that registration of voters in Kenya is manual, since a person walks to a registration centre to register himself or herself, and such registration is not done electronically.

[95] Counsel for the 3rd Respondent invoked the Ugandan case of ***V.K. Bategana v. E. L. Mushemeza***, Election Petition No. 1 of 1996 (HCU) (unreported), in which *non-compliance* with certain provisions of the Parliamentary Election (Interim Provisions) Statute, 1996 was held *not to affect the results of the election*. The non-compliance in that election included failure to display the Voters' Register, and voting by persons not registered.

[96] Mr. Katwa Kigen, learned counsel for the 4th Respondent, submitted that a "register" cannot be treated as a record cast in stone; it should, instead, be perceived as an instrument used by the 1st Respondent to ascertain the number of registered voters eligible to vote, and it need not be **one** register. He submits that Article 38 of the Constitution entitles every adult citizen to be registered as a voter, and to vote.

[97] Mr. Kigen further submitted that, in accordance with Article 83 (3), of the Constitution, administrative structures set up for purposes of the conduct of elections, should not deny a person the right to vote. He further urges that

Article 138 (3)(a) stipulates that all persons registered as voters are entitled to vote in the elections.

[98] Mr. Kigen submitted that all persons involved in the process of ensuring that implementation of the electoral laws, including IEBC, are required to ensure that an individual who registered to vote and who presents himself or herself to vote on the day of the elections, is given an opportunity to do so.

[99] Mr. Kigen submitted that the Voters' Register is compiled under s. 4 of the Elections Act, whereas the registration and revision process is governed by s. 5 of the same Act. These two provisions are, however, subject to the provisions of the Constitution.

[100] Mr. Kigen submitted that the definition of the Principal Register of Voters under Section 2 of the Elections Act, indicates that the register contemplated is not **one** register, but rather, *several registers*. The 4th Respondent avers that the provisions relating to registration of voters do not indicate that for a person to exercise his or her right to vote, his or her name must be in the "Principal Register."

[101] Further, the 4th Respondent submitted that the register must be current, must facilitate voting by electors, and *includes* a register that is electronically compiled. Mr. Kigen noted that the word "include" infers that it is not one register that is contemplated by section 4 of the Elections Act, which provides that there shall be a Principal Register of Voters that shall "comprise of" a poll register in respect of every polling station, a ward register in respect of every ward, a constituency register in respect of every constituency, a county register in respect of every county, and a register of voters for persons

residing outside Kenya. He avers that there are **five** registers contemplated, and that the argument that there exists only one register, is not founded in law.

[102] The 4th Respondent averred that IEBC discharged its obligations and acted in good faith, to ensure that the elections were transparent, participatory and inclusive, by maintaining an up-to-date website, and engaging in consultations with all political parties, including the Petitioner's party, ODM.

[103] Mr. Kigen invoked the Zambian case of ***Anderson Kambala Mazoka vs Mwanawasa*** Scz/Ep/01/02/03/2002, in which the Court held that every person entitled to vote must be given an opportunity to vote, if he presents himself at the polling station. Counsel submitted that every person registered as a voter is entitled to vote, and that the Petitioners must adduce credible evidence establishing the wrong-doing they allege, with regard to the register and the registration process.

[104] The 4th Respondent submitted that the test applicable is whether a *majority of the voters were prevented from voting* for their preferred candidate, and whether the election was so flawed, or a *dereliction of duty* by the 1st Respondent so seriously affected the result, that *it could no longer be reasonably said to reflect the free choice and will of the majority of the voters*.

F. ELECTRONIC SUPPORT FOR THE ELECTORAL PROCESS: ITS ROLE IN THE VALIDITY OF THE PRESIDENTIAL ELECTION

(i) The Petitioners' Case

[105] The Petitioners' claim is that all the electronic processes adopted by IEBC failed. After the failure, they allege, the Respondent resorted to manual systems, in contravention of the law. The central claim revolves around the *transmission of results*, where both Petitioners claim that *Section 39 of the Elections Act 2011 (No. 24 of 2011)* as read with *Regulation 82 of the Elections (General) Regulations, 2012* create a mandatory obligation for the electronic transmission of results. *Section 39 of the Elections Act* states that:

> ***"(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.***
>
> ***"(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.***
> ***"(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed".***

[106] *Rule 82, Elections (General) Rules, 2012* provides for the obligation to transmit provisional results electronically:

> ***"(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.***
>
> ***"(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73".***

[107] Both Petitioners argue that, without electronic transmission, there can be no basis for verification – since verification involves comparing the provisional results with the final tallies. They contend that the susceptibility of the electoral process, as conducted, to manipulation and corruption was all by design, calculated to ensure the 3rd and 4th Respondents triumphed in the Presidential Election.

[108] On the **BVR,** the 1st Petitioner makes the claim that due to a botched procurement process, *procurement was taken over by Government*. This, he states, led to the loss of independence from the Executive by IEBC. With regard to **EVID** (Electronic Voter Identification), he claims that the procurement of the kits was the result of an illegal procurement process; and this led to the procurement of *faulty kits* that were bound to fail on election day, as indeed they did. He claims that IEBC abandoning EVID at the polling stations, "prevented millions of voters [from having] their votes counted accurately." This, he claims, was in direct derogation of *Regulation 69 of the Elections (General) Regulations, 2012* which states:

> ***" (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) in case of an electronic register, require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the image has been retrieved…"

[109] The 2nd Petitioner contends that the electronic voter registration (BVI) and Identification (EVID) systems comprise of a *foolproof register of voters*; it should automatically subtract from the main register voters who have voted, thus providing a running tally of votes cast. Biometric Registration of Voters has its basis in the ***Elections (Registration of Voters) Regulations, 2012, Regulation 13,*** which provides for the capturing of the biometric data of a voter, such as the palm-print and facial impressions:

" (1) A person who is not already registered as a voter but who wishes to be so registered shall make an application in Form C set out in the Schedule.

"(2) An application under subregulation (1) shall be made to the registration officer for the constituency in which the person wishes to be registered.

"(3) The registration officer shall, for the purpose of registration, collect such biometric data which include palm print and facial impressions of the persons applying for registration, as the Commission may determine."

[110] The second Petitioner states that the BVR system should be centrally integrated [networked], to ensure multiple voting is rendered. She contends that IEBC's approach of downloading piecemeal, portions of the biometric register into laptops, leads to uncertainty as to *what register* was so

downloaded. Without these safeguards, she contends, there was *nothing to stop* double voting.

[111] Through her learned advocate, Ms. Kethi Kilonzo, the second Petitioner states that the electronic transmission of results generated a vote-count that maintained a *consistent, spurious gap between the two leading presidential candidates*. She contends that it is scientifically *impossible* to maintain such a consistent disparity in results that are being randomly relayed. She also states that the "rejected votes" generated were so considerable in numbers as to be inaccurate. She contends that IEBC occasioned undue delays in publicly acknowledging the evident failures in the electronic transmission system. In support of her contentions, she points to the daily Press article by M/s. George Kegoro and Wachira Maina, that basically affirms this position.

[112] Ms. Kilonzo also relies on an Indian case, ***A.C. Jose v Sivan Pillai & Others* 1984 AIR 921,** to support the contention that, where certain requirements are prescribed by an Act, and its Rules, IEBC was not at liberty to derogate from such *Rules*, or exercise any discretion. In the case in question, the Supreme Court of India stated:

> ***"(a) When there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the Conduct of elections [86 H].***
>
> ***"(b) Where there is an Act and there are express Rules made thereunder, it is not open to the Commission to over-ride the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. The Powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of***

superintendence, direction and control as provided by Article 324 [87A-B].

"(c) Where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the conduct of election [87C].

"(d) Where a particular direction by the Commission is submitted to the government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own ... will even if the approval of the Government is not given" [87D].

(ii) The Responses

[113] All Respondents argue that IEBC is not *required* by the *Constitution* or the *law* to establish and conduct an electronic election process as alleged by the Petitioner. The processes of voting, counting and tallying and transmitting of the final results are required and designed by law as *manual processes*, contrary to the allegations of the petitioner. This is supported by *Rule 59 and 60 of the Elections (General) Regulations, 2012*, which state:

'59. ...

(2) A voter shall cast his or her vote by the use of a ballot paper or electronically.

...

"60. Where the Commission intends to conduct an election by electronic means, it shall, not later than three months before such election, publish in the Gazette and publicise through electronic and print media of national circulation and other easily accessible medium guidelines that shall apply in such voting."

[114] The Respondents all contend that IEBC has a discretion under ***Section 44 of the Elections Act,*** to deploy appropriate technology as it deems fit, in the administration and management of elections. Section 44 Provides:

> ***"The Commission may use such technology as it considers appropriate in the electoral process."***

[115] The Respondents urge that *Section 4(m) of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 (No. 9 of 2011),* reiterates this discretion:

> ***"As provided for by Article 88(4) of the Constitution, the Commission is responsible 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 and, in particular, for —***
> ***...***
> ***(m) the use of appropriate technology and approaches in the performance of its functions...."***

[116] Consequently, according to the Respondents, there was no *legitimate expectation* that the Commission should make use of any technology in voting, ballot counting, transmission, tallying and declaration of the results.

[117] The Respondents state that, contrary to the averments of the Petitioners, technology was never envisaged by the 1st Respondent as the sole means of registering voters, of identifying them on voting day, or in the transmission and tallying of results. Electronic Technology is utilized in the elections as *part of other numerous checks and controls* built in the entire electoral process, to ensure that the 1st Respondent fulfils its mandate under

Article 81 of the Constitution, to deliver *free and fair elections*. Technology, they argue, is not a replacement or alternative to the manual voting, counting, tallying and transmission processes, that are expressly required by law. Further, the Respondents contend, the Petitioners also misunderstand the policy and legal framework regarding the use of technology.

[118] The Respondents submit that all the allegations by the Petitioners have not stood the test of scrutiny, in light of the pleadings and evidence produced. The 1st and 2nd Respondents specifically submit that the technologies deployed in the election experienced challenges, but all such challenges were not catastrophic, as alleged, and did not impact negatively on the *outcome of the elections*.

[119] The 1st and 2nd Respondents contend that EVID worked well in a majority of the polling stations, alongside the manual process. Furthermore, they state that RTS, as a check-and-control mechanism, worked considerably well, as, out of a total of 31,025 polling stations, it did transmit results for all six elective stations as follows:

a) 14,232 (45.9%) polling stations sent results for the Presidential election;

b) 7,082 polling stations sent results for the Senators' elections;

c) 6,892 polling stations sent results for the Governors' elections.

d) 9,397 polling stations sent results for the Members of the National Assembly election;

e) 7,968 polling stations sent results for the County Ward Representatives election; and

f) 7,428 polling stations sent results for the Women's County Representatives election.

[120] By the evidence, therefore, the technologies assisted in upholding, rather than vitiating, the will of the Kenyan people. Contrary to the allegation that the failure of the BVR/BVI devices prevented millions of voters from having their votes counted accurately, it is the 1st Respondent's response that the BVI/BVR set-up was *not designed to electronically count votes.*

[121) On the allegation that IEBC abandoned the process of electronic voting, the 1st and 2nd Respondents state that there is evidence, the 1st Respondent reconfigured the server that had been unable to receive results transmitted by the Presiding Officers. However, at the time of restoration of the server, the Presiding Officers had already handed over their tallies and phones to the Returning Officer, in accordance with Regulation 73 (4) of the Elections (General) Regulations, 2012. They also contend that IEBC had engaged the public and the 1st Petitioner's political party and his agents on the emerging challenges. They state that RTS was designed to transmit provisional results, in accordance with Section 39(2) of the Elections Act 2011, but not the final result. They state that the lessons learnt from the several challenges, will provide a basis for strengthening the electoral process further. Although the technologies used experienced certain impediments, it was urged, EVID and RTS had no effect, material or immaterial, on the validity of the Presidential election. Learned counsel Ms. Lucy Kambuni for IEBC, indeed, relies on the same case cited by counsel for the 2nd Petitioner, ***A.C. Jose v Sivan Pillai & Others*** (supra), for the contention that, because of the discretion conferred by the Constitution and the election laws, the IEBC had *plenary powers to decide on its administrative arrangements.*

[122] Senior Counsel Ahmednassir Abdullahi, for the 2nd Respondent, complained that the Petition before the Court was not one that usually arises in the context of Third World countries. He is categorical that this is a 'First World complaint', mainly dwelling on *technological failures*, *possibilities* and *challenges*. He cites two cases from the Supreme Court of the Philippines. ***(GR Number 188456, H. Haary L. Roque, JR and Others -v- Commission on Election, 2009 and G.R No. 194139 Douglas R. Cagas v The Commission on Elections, 2012).*** In both cases, the plaintiffs had based their claims on fears which they had, sparked by potential abuse and breakdown of technology, and the effect of this on the integrity of the electoral system. The Court remarked:

> ***"If the machines failed for whatever reason, the paper ballots would still be there for hand counting, and manual tabulation and transmission of the ER's. Further, that the court would not guarantee as it cannot guarantee the effectiveness of the voting machines and the integrity of the counting and consolidation software embedded in them."***

[123] Counsel for the 3rd Respondent submits that electronic systems failed in the Ghana General Elections of 2012; and also in the United States Presidential election in 2000. Indeed some States such as New Mexico have voted to convert from an electronic system back to the paper system. Counsel therefore applauds our laws, as they *give IEBC a wide latitude to determine whether to use electronic electoral systems*. Thus, the Petitioners cannot claim that the use of technology was the essence of the elections.

[124] Learned counsel for the 4th Respondent, Mr. Katwa Kigen, avers that IEBC in various meetings before the elections of 4th March, 2013 informed all

political parties, including the Petitioner's party and its coalition partners, that since it was deploying BVI for the first time across the whole country, a paper- register fallback was available, to ensure that no voter would be disenfranchised, in the event that technology failed. Such an arrangement is validated by the provision of ***Section 83 of the Elections Act, 2011,*** which deals with situations in which there is *non-compliance with a written law:*

> ***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

[125] Mr. Kigen submitted that the allegation that there was a plot to ensure failure of the electronic system deployed in the Presidential election, was not supported by evidence.

(iii) Analysis

[126] The question of electronic facilitation of the Presidential election is the most technical one, raised by the parties. It is governed by a detailed set of legal provisions and regulations. It raises the vital question: What is the *act of voting* that is the entitlement of every voter, as enshrined in the Constitution?

[127] Counsel for the Petitioners appear to advance the position that the act of voting is the *totality of the electoral process*. Therefore, a weak link in the chain ensures total collapse. They go further and contend that the chain was made up entirely of weak links, and that this eroded the casting of the ballot,

thereby nullifying the electoral process.

[128] Counsel for the Respondents, by contrast, advance the position that the act of voting is a galaxy, whose central sun is the signifying of one's choice by the marking of the ballot paper, and its subsequent deposition into the ballot box. Every other process before and after, revolves around this procedure, and involves only the ascertaining of the voter's choice, and the sustaining of the voter's right to make that choice. Counsel provides cases from the Philippines, that hold that even if there was a failure of all other support processes (in particular electronic ones), the right to vote and to express one's self in universal suffrage is not defeated. Manual procedures must come into operation, to fulfil the electors' expression of choice.

[129] Article 38 (3) of the Constitution provides safeguards for the right to vote in a free and fair election, and the right to be registered as a voter. These two rights give life to every other subsequent procedure, including the constitutional creation of the IEBC, and the procedures to be used in registration, voting, transmission, tallying and verification of the results. To concretize this position, Article 83 states that administrative procedures to be undertaken by IEBC are to facilitate, and not to deny an eligible voter the right to vote. This consideration must therefore be the foundation of all interpretations made to the law by IEBC, and all Courts sitting in appeal from the decisions taken by IEBC.

[130] Is electronic facilitation for the election mandatory, or discretionary? The Indian case of ***A.C. Jose vs Sivan Pillai & Others*** **1984 AIR 921,** cited by both the Petitioners and the IEBC, is a case in point. The Supreme Court of India defined the concept of "plenary power" (administrative

measures in Article 83): *powers available to a body to create operational rules where none existed*. However, where a body of law already regulated the subject, it was not up to the discretion of the public entity to create any additional measures that derogated from the law.

[131] An objective reading of the Regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of 4th March 2013, were not envisaged to be conducted on a purely electronic basis. *Regulation 60 of the Elections (General) Regulations, 2012* illustrates that if the elections are to be facilitated by electronic means only, the relevant guidelines shall be availed to the public. Regulation 59 provides that voting is done by marking the ballot paper, *or* electronically. Thus, the voting system envisioned in Kenya appears to be *manual*. Regulation 82, and Section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only *provisional*. Can there, therefore, be an invalidation of *final* results, because of the non-transmission of *provisional* results?

[132] The Petitioners assert that this is so. Provisional results, for them, are the basis of verification of results. The Respondents, by contrast, assert that this is not so. Verification, for them, means comparing the final results on Form 34 from a polling centre with Form 36 at the National Tallying Centre. Their contention appears to be supported by Article 86(c) of the Constitution, describing the procedure of verification as the *collation and announcement of results by the Returning Officer* (Chair of IEBC), based on results from polling stations.

[133] It is rightly argued by the Respondents, in our opinion, that the Court must be alive to the fact that most polling stations are in the rural areas, where

the primary-school polling stations are dilapidated, and the supply of electricity, to-date, is a distant dream. Yet voters still go to such polling stations to exercise their right to vote, and to discharge their civic duty. Of this fact, the Court will take judicial notice, in deciding whether Presidential elections can be invalidated due to non-compliance with regulations requiring electronic transmission.

G. VOTE TALLYING: DID IT REFLECT VOTERS' CHOICE IN THE PRESIDENTIAL ELECTION?

(i) Petitioners' Case

[134] The crux of the 1st Petitioner's case as expressed in the introduction to his written submissions, is that the 3rd Respondent who was declared President-elect by the 2nd Respondent, did not meet the threshold set out in Article 138(4) of the Constitution. The basis of this assertion by the Petitioner is that, upon an evaluation of the evidential materials in Forms 34 and 36, used in the final tally of the Presidential election results, there were serious anomalies affecting the final results, as declared by the 2nd Respondent.

[135] According to the Petitioners, the tallying exercise was marred by irregularities, as set out in both written and oral submissions as, follows:

i material alteration of primary documents used in the tallying and verification exercise;

ii. mismatch between the Presidential election results tallied and the total number of registered voters in various constituencies and polling stations;

iii *inflation of Presidential election results of certain presidential candidates, particularly the 3rd Respondent;*

iv. *deflation of Presidential election results of certain presidential candidates, particularly the 1st Petitioner;*

v. exclusion of Presidential candidates' agents and accredited observers from the National Tallying Centre;

vi. total failure and inaccuracy of the results-tallying and verification system, occasioned by the departure from the electronic transmission of results to the manual tallying system.

(a) Material alteration of primary documents used in the tallying and verification exercise

[136] The issue of tallying was largely dealt with by way of evidence in the depositions and attachments, as regards both Petition No. 4 and Petition No. 5. In relation to Petition No. 5 of 2013, the issue is covered in the affidavit of Janet Ong'era, sworn on 15th March 2013. At paragraph 48 of this affidavit, the deponent avers that one of the glaring anomalies was the alteration of the statutory documents on the files of many constituencies. This evidence is used by counsel to advance the submission that, based on these alterations, the accuracy of the final tally of the Presidential election results also stood in question.

[137] In Petition No. 5 of 2013, specifically at paragraph 5.9, the Petitioner contended that, the final Presidential election results published by IEBC were materially different from results reflected in the county tally. He gives the example of Nakuru County. In other cases, the deponents averred that there were material alterations between the verbal declaration of results made by

individual Commissioners of the 1st Respondent at the National Tallying Centre, and the final figures issued by the 1st Respondent, especially in the following areas: South Imenti, Igembe South, Lagdera, North Imenti, Central Imenti, Bomet East, and Sigor.

[138] Counsel for the 1st and 2nd Petitioners, submitted that in Makueni Constituency, the number of registered voters differed between the results for the Presidential, Governor, Senator, and Member of National Assembly elections.

(b) Mismatch between the Presidential election results tallied, and the total number of registered voters in various constituencies and polling stations.

[139] The Petitioner, by paragraph 51 of the affidavit of Janet Ong'era, indicates a cluster of 26 polling stations where the number of valid votes cast exceeded the total number of registered voters. In effect, the Petitioner was inviting the Court to hold that the elections in those polling stations were rendered invalid, on account of the said discrepancy.

(c) Inflation of Presidential election results of certain presidential candidates, particularly the 3rd Respondent

[140] The 1st Petitioner submitted that there were instances where the 3rd Respondent's votes were inflated. Mr. Oraro, learned counsel for the 1st Petitioner, drew the Court's attention to a comparison of entries in Form 34 with the corresponding entries in Form 36, for certain polling stations. At pages 23-24 of the Petitioner's written submissions, there is an indication of the polling stations where such variance existed, resulting in a difference of

1,451 votes. According to the Petitioner, the 3rd Respondent's votes were also inflated by 7,215 votes, going by the final national tally published by the 1st Respondent.

[141] The 2nd and 3rd Petitioners also submitted that the results announced for the respective Presidential election candidates at the County level in Nyeri and Bomet, were different from what was announced at the National Tallying Centre. In support of this allegation, the Petitioners relied on a video recording by one Anthony Mathenge in respect of Nyeri County. The audio-visual recording was played in Court during the oral submissions by learned counsel, Ms. Kethi Kilonzo.

(d) Deflation of Presidential election results of certain presidential candidates, particularly the 1st Petitioner

[142] The 1st Petitioner also averred that his votes were deflated by 11,000 votes. Details of the affected polling stations were summarized in the 1st Petitioner's submissions. However, this evidence was introduced at the submission stage, and did not form part of the primary Petition records – a fact which occasioned valid objection from counsel for the respondents.

(e) Exclusion of Presidential election candidates' agents and accredited observers from the National Tallying Centre

[143] Learned counsel for the Petitioners submitted that all the Presidential election candidates' agents were asked to leave the tallying room at the National Tallying Centre. The 1st Petitioner relied on the affidavit of Prof. Lawrence Gumbe, dated 14th March, 2013 to advance this assertion. Further, by the 1st Petitioner's submissions, the fact that the said agents were allowed twenty minutes of verification had no significance, as verification should have

been done using Form 34, and not Form 36 as directed by the 1st Respondent. In the submissions, the 1st Petitioner states that the party agents were ordered out of the National Tallying Centre and taken to an adjacent boardroom. The 1st and 2nd Petitioners in Petition No. 4 of 2013, jointly referred to as the 2nd Petitioner, also submitted that even accredited observers were not allowed into the National Tallying Centre. However, on the basis of the evidence of Janet Ong'era, it was submitted that Mr. Chirchir of URP, and a Ms. Winnie Guchu of TNA were periodically allowed access into the National Tallying Centre, to the exclusion of other agents. The overall submission was that the verification process was contrary to law, as it was carried out unilaterally by the 1st Respondent.

(f) Failure and inaccuracy of results-tallying and verification system, occasioned by the departure from electronic transmission of the results, to manual tallying system

[144] The 1st Petitioner avers that the 1st and 2nd Respondents reverted to a manual tallying system, which was a discredit and an abuse of the electoral system, as it lacked transparency, accuracy and accountability, and had been subject to manipulation by officers of the 1st Respondent.

[145] In the affidavit of Janet Ong'era [at paragraph 36], it is deponed that for purposes of facilitating the process of manual tallying, the political parties' representatives and the IEBC representatives had agreed that they would obtain Form 34 from each Constituency and confirm that: the name of the polling station indicated had been duly gazetted; the form had been signed by the agents and the returning officers; and it had the 1st Respondent's stamp. Selected agents from political parties would then verify the figures in terms of

registered voters, votes cast and rejected votes, and they would thereafter signify their agreement, with or without qualification. An aggrieved party was entitled to raise a complaint with the 1st Respondent.

[146] The 1st Petitioner has also relied on the Independent Review Commission ("IREC") Report which recommended that the defunct Electoral Commission of Kenya (ECK) adopts certain safety features in respect of counting and tallying of votes. The recommended safety feature, according to the Petitioner, is Form 34; but IEBC has, in addition, introduced Form 36.

[147] IREC had also recommended computerized data-entry and tallying at Constituencies, to secure simultaneous transmission of individual polling-station level data, to the National Tallying Centre, as well as the integration of this result-handling system in a progressive election-result announcement.

[148] Another recommendation was to allow sufficient time before the declaration of final results. It was anticipated that all parties concerned would have an opportunity to consider the returns made, and to express objection if need be; and thereafter, results would be announced.

[149] The Petitioners have further submitted that the BVR kit, which the 1st Respondent abandoned, was supposed to provide a running tally of votes cast, to prevent multiple voting. They aver that the 1st and 2nd Respondents did not put in place sufficient measures to ensure the accuracy of vote-count, after the failure of the electronic results-transmission system.

[150] The Petitioners have relied on Article 138 (c) of the Constitution which provides that, after the counting of votes at the polling station, the IEBC shall tally and verify the count, and declare the results. Section 44 of the Elections

Act permitted the 1st Respondent to use *appropriate technology,* as it deemed necessary.

[151] Counsel for Petitioners, Ms. Kethi Kilonzo submitted that the counting and tallying of votes was not open, diligent or responsive, and that Returning Officers, presiding officers and County Returning Officers, were using different numbers of registered voters from that contained in the Principal Register.

(ii) Responses

[152] The 1st and 2nd Respondents maintain that the counting, tallying, transmission and declaration of results was efficient, accurate, accountable, lawful, and a true representation of the will of the people, based on universal suffrage. The statutory violation and irregularities ascribed to the election outcome are denied; and the allegation of excess numbers of votes cast in favour of the 3rd Respondent, is said to be unsubstantiated.

[153] The 1st and 2nd Respondents maintain that, they went well beyond the thresholds of the Elections Act, and Regulation 83 of the Elections (General) Regulations, 2012, and established an elaborate audit process, which included: a two-step audit process to examine returns, and a verification team to counter-check the audit findings. In addition, all Returning Officers were required to personally deliver the Presidential election results at the National Tallying Centre in Nairobi.

[154] The "regional teams" received from the Returning Officer the Form 34s for Presidential election, and Form 36 on both hard and soft copies. The teams

would then run a sanity test to ensure that the number of valid votes cast, and the rejected votes amounted to the total vote cast, and that the total number of votes cast for all candidates equalled the total number of valid votes cast; any errors found were rectified.

[155] After this 1st review, the 1st and 2nd Respondents stated that the Returning Officer was referred to the verification team, which checked the Form 34 and Form 36. This team made changes if necessary, certified that the results were proper, and forwarded a new Form 36 for signature by the Returning Officer and the Verification Team leader. The party agents were then given the Form 36 to counter-check. The Respondent further stated that a Summary, and the Form 36, was forwarded to the Commissioners, who would check them again before announcing the results.

[156] After the announcement by the Commissioners, the Form 36 would be given to a team of two electoral officers who would again verify, and input data from Form 36 into a spread-sheet, for the final Presidential election results.

[157] The 1st and 2nd respondents aver that IEBC maintained the use of the primary manual electoral processes, which were not in any way challenged, and constructively engaged the political parties in the process of voting, counting, transmission, tallying and announcement of results.

[158] The respondents averred that IEBC had held a consultative meeting with the chief political party agents, and agreed with them on modes of verification of Presidential election results brought to the National Tallying Centre by Returning Officers. Subsequently the chief agents of political

parties were, from Wednesday 6th March, 2013 indeed, allowed to enter the tallying room and to observe the tallying of the Presidential election results.

[159] The 1st and 2nd Respondents aver that sometime in the evening of 6th March, 2013 the political party agents inside the tallying room became rowdy, and precipitated altercations with the Commission staff undertaking the tallies, and in some instances, threatened to assault the staff. This situation made it impossible for the Commission to continue undertaking its tallying exercise, prompting the Commission to relocate the political party agents to a boardroom in the auditorium, within the National Tallying Centre. Each of the final tallies (Form 36) were presented to the political party agents at the said boardroom, 20 minutes before the announcement of results to the public. The political parties would then undertake the verification of the Presidential election tallies, before they were announced.

[160] The 1st and 2nd Respondents' aver that the process of tallying as contemplated under the Constitution, the Elections Act and the governing Regulations, is primarily a *manual system*, and not an electronic process.

[161] The Respondents maintain that there are no constitutional or statutory violations, or widespread irregularities and malpractices that occurred; or that the votes were wrongly credited to the 3rd Respondent, or any other candidate. They urge that there is no basis for seeking a nullification of the election outcome, as sought by the Petitioner, and that the 3rd Respondent was lawfully declared President-elect, pursuant to Article 138 (4) of the Constitution.

[162] In their submission, the 1st and 2nd Respondents state that the allegations made as regards the tallying and tabulation, contained in Janet

Ong'era's affidavit, is not factually correct, and disregards the various important elements of the Register. They explain this by stating that the quoted figure of 14,337,399 registered voters was a purely statistical entry, accumulated at the end of the voter registration exercise; that this figure did not include persons whose biometrics could not be captured, or other exceptional cases. Further, the Respondents' advocates faulted the Petitioner for randomly selecting the 3rd and 4th Respondents' strongholds in his data scenario implying irregularity in the electoral process.

[163] The 1st and 2nd Respondents contend that the Petition is premised on a misconception of the Principal Register of Voters, the tallying process, and the legal framework – and would, therefore, not justify the grant of the prayers sought in the Petition.

[164] The 3rd Respondent sought to controvert the deposition of the Petitioner in his affidavit of 14th March, 2013. He states that, contrary to the Petitioner's allegation, the agents were not ejected from the National Tallying Centre, but were relocated to an alternative facility.

[165] He avers that under Article 86(b) of the Constitution, and Regulation 83, the 1st Respondent has a duty to announce final results on the basis of a physical form, Form 34, which had to be delivered to the National Tallying Centre, and no other method, electronic or otherwise, is contemplated under the law.

[166] The 3rd Respondent further states that, the process of voting, recording, tallying and declaration of results was conducted in *substantial compliance* with the electoral laws and the Constitution.

[167] He also submits that, the counting and tallying of votes was to be conducted *manually*, in accordance with the provisions of the law, as electronic tallying of votes is not provided for under the law.

[168] The 4th Respondent also avers that the elections were conducted substantially in accordance with the principles laid down in the Constitution, and all governing law; that there was no breach of law such as to affect the results of the elections; and that the said elections do reflect the will of Kenyans.

H. SOME ISSUES OF FACT: THE COURT'S FINDINGS

(a) Orders made suo motu

[169] On 25th March 2013, the Court ordered the scrutiny of all Forms 34 and Forms 36, which were used in the country's 33,400 polling stations. The purpose of the scrutiny was to better understand the vital details of the electoral process, and to gain impressions on the integrity thereof.

[170] The Court also ordered a re-tallying of the Presidential votes in 22 polling stations, using Forms 34, 36 and the Principal Register, as these stations had featured in the Petitioner's grievance. The purpose of the re-tally was to establish whether the number of votes cast in these stations exceeded the number of registered voters as indicated in the Principal Register.

(b) Data Summary

[171] After the re-tally of the votes cast in the said stations was complete, it was found that 5 polling stations, out of the 22, had discrepancies as to the

number of votes cast as reflected in Form 34 and Form 36. These were: Lomerimeri Primary School, Tiaty Constituency; Nthambiro Primary School, Igembe Central Constituency; Kabuito Primary School, Igembe Central Constituency; Mugumoini Primary School, Chuka Igambang'ombe Constituency; and NCC Social Hall, Lang'ata Constituency.

[172] With respect to the scrutiny of all Forms 34 which were used by the IEBC in tallying the Presidential election votes, from the 33,400 polling stations in the country, only 18,000 polling stations were scrutinized. It was found that Forms 34 were missing in some polling stations such as: Zowerani Primary School, Kilifi North Constituency; Show Ground, Kapenguria Constituency; Nakatiyani Water Point, Loima Constituency; and Mjanaheri Primary School, Magarini Constituency. In addition, the aggregate results of Form 36 voters from 75 constituencies were missing.

[173] Reports showing the above discrepancies were availed to counsel, who were asked to comment on the facts and data reflected therein.

(c) Petitioners' Submissions

[174] The 3rd Petitioner did not expressly comment on the results except to note that the report did not directly address the issue of "rejected votes". The 1st and 2nd Petitioners argued in support of the re-tallied results reflected in the Court's report. The grounds in support in this regard, may be thus summarized:

1. *The report confirmed Petitioners' allegations that the 1st and 2nd Respondents did not verify the Presidential election results as required under the law, and should not have announced the results*

without accounting for all electoral areas. This is particularly so in light of missing Form 34s from 10 polling stations that were highlighted in the report. The result is that neither the Court nor the Petitioners were provided with all Form 34s and so the results from IEBC, are unreliable.

2. *Since it is the Court, on its own motion, which made the order on re-tallying the votes in those 22 polling stations, the results therefrom should now override the results expressly relied on by the 1st Petitioner.*

2. *The Court's report shows that in some instances, the number of registered votes was not reflected in Forms 36. In other instances, there were two Forms 36, attributed to the same constituency and both were counted during the tallying process conducted by the 1st and 2nd Respondents.*

4. *Even after the register of voters was closed, there were instances where voters were still being registered.*

5. *In several polling stations, the number of votes cast exceeded the registered voters as per Forms 34. The results from these polling stations should have been nullified by the 1st and 2nd Respondents in accordance with the law, but they were included in the tallying of results.*

(d) Respondents Submissions

[175] The re-tally results also drew comment from the Respondents herein. The grounds for contest can be summarized as follows:

1. *The re-tally report confirms the Respondents' submissions. The Respondents, through their responses, had filed evidence in Court answering each and every one of the discrepancies highlighted in the Court's report.*

2. *The delivery of Forms 34 to the Court and the Petitioners was done voluntarily and not in response to any request. While there were, admittedly, some missing Forms 34, which were not provided, this was not done in bad faith but was a mere oversight, given the limited time-period the Respondents had to deliver the documents. In any case, all Forms 34 were used to declare the results.*

3. *In instances where there were two Forms 36 provided for the same constituency, these were provided in a good faith, and were not used in the tallying of results. In some instances, the 2nd Respondent made errors on Forms 36 during the counting process, which he then corrected in a second Form 36. Both Forms were submitted, having been duly signed, in order to show where the errors were in the initial Form 36.*

4. *In every instance where there were more votes cast than registered voters, the Green Book, which contains the manual register, was availed to the Court for scrutiny.*

5. *The Court should guard against the possibility of disenfranchising duly registered voters who voted on election day, simply because there was one extra voter on the register.*

6. *Most of the allegations that the number of votes cast exceeded the number of registered voters in certain polling stations, were already addressed in the affidavits annexed to the 3rd Respondent's response.*

7. *The 22 constituencies mentioned by the first Petitioner are spread across the entire country – showing that no advantage was being sought from a particular candidate's stronghold. Therefore, while the IEBC officials may have made some clerical errors, no mischief or advantage can or should be attributed thereto. Thus, to a substantial extent, the voting, counting and tallying of votes was carried out to a high degree of accuracy. This is all that is required to show that the exercise was carried out well.*

I. RELIEFS SOUGHT

[176] The Petitioners entertain the prospect of succeeding in their petitions, and have made prayers for a wide range of reliefs, as follows:

(a) 1st Petitioner

i. *a declaration that the Presidential election held on the 4th of March, 2013 is invalid;*

ii. *a declaration that the 1st and 2nd Respondents were in breach of Articles 10, 81(e), 86 and 88 of the Constitution of Kenya in relation to the Presidential election;*

iii. *a declaration that the 1st Respondent was in breach of Sections 59, 60, 61, 62, 74, 79 and 82 of the Election (General) Regulations, 2012;*

iv. *a declaration that the 1st and 2nd Respondents' were in breach of Article 138(3) (c) of the Constitution of Kenya;*

v. *a declaration that the 2nd Respondent is in breach of Article 75 of the Constitution of Kenya;*

vi. *a declaration that the 1st and 2nd Respondents are guilty of offences under the Elections Act, 2011 (Act No. 24 of 2011);*

vii. *a declaration that the 3rd Respondent did not receive more than half of the votes cast, at the just-concluded Presidential election and was, therefore, not validly elected and declared as President-elect;*

viii. *a declaration that the Petitioner's fundamental rights under Articles 35, 38 and 47 of the Constitution of Kenya were violated during the President elections;*

ix. *an order compelling the 1st and 2nd Respondents to cancel the Certificate of Election to President-elect issued to the 3rd Respondent;*

x. *an order that there be a fresh election for the President of the Republic of Kenya in strict compliance with the Constitution of Kenya, 2010.*

xi. *costs of the Petition.*

(b) 2nd Petitioner

i. a declaration that the absence of a credible Principal Voters Register vitiates the validity of the Presidential elections of 4th March, 2013;

ii. a declaration that the failure to verify the Presidential votes cast at the polling stations vitiates the validity of the Presidential election, thereby rendering it null and void;

iii. a declaration that the proclamation by the 1st and 2nd Respondents, of the 3rd Respondent as President-elect was invalid and, therefore, the Form 38 Certificate issued to the 3rd Respondent is invalid.

iv. costs of the Petition.

(c) 3rd Petitioner

i. a declaration that during the national election held on 4th March, 2013 the percentage of votes received by each candidate in proportion to the total valid votes counted for purposes of Article 138(4) of the Constitution of Kenya was as follows:

(a)	*Uhuru Kenyatta*	*50.51%*
(b)	*Raila Odinga*	*43.70%*
(c)	*Musalia Mudavadi*	*3.96%*
(d)	*Peter Kenneth*	*0.60%*
(e)	*Abduba Dida*	*0.43%*
(f)	*Martha Karua*	*0.36%*
(g)	*James Kiyiapi*	*0.34%*
(h)	*Paul Muite*	*0.10%*

ii. costs of the Petition.

J. GUIDING PRINCIPLES

(i) The Context

[177] This may not be the most complex case, in terms of the relevant facts and the applicable law; but it is of the greatest importance for the following reasons: (i) it is the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution, which was promulgated on 27th October, 2010; (ii) since the promulgation of the Constitution, its "non-majoritarian" elements, such as the

Judiciary and the Independent Commissions, have assumed their special roles; but the "majoritarian" elements, in the form of a popularly elected Legislature and Executive, were still in abeyance; (iii) transition from the little-regulated Executive set-up of the earlier period, to a new one subject to the established constitutional limitations, is a fateful process which the people must effect through the *electoral process*; (iv) the cardinal role of implementation of the principles and terms of the Constitution of Kenya, 2010 rests with the *Executive Branch*, acting through laws emanating from the Legislature, and subject to the restraints of the Constitution itself and the law, as superintended by the Judiciary; and hence the electoral process which now sets the Presidency afoot, in the provision of national leadership, is all-important to the people of Kenya; (v) although the Supreme Court has been in place for about one year-and-a-half, charged with the obligation to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya" [*The Supreme Court Act, 2011 (Act No. 7 of 2011), Section 3(a)],* it is only now that it has the first opportunity to consider the vital question as to the *integrity of a Presidential election,* and, therefore, the scope for the new Constitution to anchor its processes on the operations of a lawful Executive Branch; and (vi), this is the first test of the scope available to this Supreme Court, to administer law and justice in relation to a matter of the expression of the *popular will* – election of the President. This Judgment, therefore, may be viewed as a baseline for the Supreme Court's perception of matters political, as these interplay with the progressive terms of the new Constitution. It is clear that this Judgment, just as it is important to all Kenyans in political terms, is no less important to the Court itself, in terms of the evolution of jurisprudence in the domain of public affairs. It is particularly so, in the light of Section 3(c) of the Supreme Court Act, which vests in this Court the obligation to "*develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.*"

(ii) Proof in Election Petition Cases

[178] Mr. Oraro, Senior Counsel for the 1st Petitioner, cited the English case, ***Morgan and Others v. Simpson and Another*** **[1974] 3 All ER 722** in support of his submission, with regard to the standards applicable in cases of this nature. He cited a passage in that decision:

> ***"...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected..."***

[179] Counsel submitted that the above standard has been adopted in our laws, and is therefore part and parcel of our local jurisprudence. He cites section 83 of the Elections Act, 2011 (No. 24 of 2011) which states*:* ***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of that election.***"

[180] The 1st Petitioner also cited the case of ***Magara v. Nyamweya*** (2010) 4 KLR (EP) in which the Court of Appeal asserted the above principle.

[181] The 1st Respondent through learned counsel Mr. Nyaoga, submitted that

the burden of proof lay on the Petitioner. He advanced the argument that these election petition proceedings, on the basis of the evidence adduced by the Petitioner, were of a "quasi criminal nature". Hence it was his case that the Petitioner alleging these "criminal offences", must prove them. The Respondent urged that the standard should be *higher than the balance of probability,* but lower than "beyond reasonable doubt".

[182] The 2nd Respondent, through learned counsel, Mr. Kamau Karori, while responding to the Petitioner's case that the Voters' Register was manipulated, submitted that the burden of proof in showing the alleged manipulation lay firmly with the Petitioner.

[183] The learned Attorney-General, Prof. Githu Muigai, in execution of his duty as *amicus curiae* lent some insight in this regard. He first distinguished between the burden of proof and the standard of proof, thus: "*burden of proof is concerned with the question, whose duty is it to place evidence before the Court; while standard of proof is concerned with, what weight the Court should place on the material fact that is placed before it".* It was the Attorney-General's submission that, in an election petition, the burden of proof lies on ***both*** parties.

[184] The Attorney-General cited the Nigerian case of ***Abubakar v. Yar'Adua*** [2009] All FWLR (Pt. 457) 1 S.C., in which the Court held that the burden is on the Petitioner, to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election. The same jurisprudence was enunciated in ***Buhari v. Obasanjo*** (2005) CLR 7(k) (SC), also cited by the Attorney-General; the various components of burden of proof were distinguished, in their shifting pattern: the burden is on the petitioner to prove non-compliance with the electoral law; and it then shifts to

the Respondent, or the electoral board, to prove that such non-compliance did not affect the results of the election.

[185] In Nigeria, it is noted from the Attorney-General's submissions, the question of the *evidential threshold* is not in the Constitution, but is specified in the statute, the Elections Act, 2006.

[186] The Attorney-General also relied on a decision of the Indian Supreme Court, ***M. Narayan Rao v. G Venkata Reddy & Another***, 1977 (AIR)(SC) 208 in which the following passage appears:

> ***"The charge of commission of corrupt practice has to be proved and established beyond reasonable doubt like a criminal charge or a quasi-criminal charge but not exactly in the manner of establishment of guilt in the manner of criminal prosecution giving the liberty of the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both parties especially by the election petitioner."***

In Indian jurisprudence the proof required is beyond reasonable doubt, but not to the level of the criminal standard.

[187] That *high standards of proof* are required in cases imputing election malpractice, appears to be the norm, as is also confirmed in the Zambian case, ***Akashambatwa Lewanika & Others v. Fredrick Chiluba*** [1999] 1 LRC 138.

[188] Even as learned counsel elucidated the burden of proof in election cases, Mr. Abdullahi urged the Court to take an additional factor into account,

in the case of a *Presidential election*: the Court should be guided by *restraint* – as the question before it was more *political* than *constitutional-legal*.

[189] Mr. Abdullahi, being guided by the American Supreme Court decision in ***Bush v. Gore,*** 531 U.S. (2000), called for judicial care and restraint in Presidential election disputes.

[190] Mr. Abdullahi proposed that the standard of proof in claims of impropriety or illegality in the conduct of Presidential election, should be set ***higher*** than the criminal-trial requirement of "proof beyond reasonable doubt". Counsel's justification was that judicial intervention ought not, in principle, to be sustained once the electorate had made their choice by casting the vote.

[191] Comparative judicial practice on the burden of proof helps to illuminate this Court's perceptions, in a case which rests, to a significant degree, on ***fact.*** In a Ugandan election case, ***Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission,*** Election Petition No. 1 of 2001, the majority on the Supreme Court Bench held:

> ***"....the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court."***

[192] Similarly in the Canadian case, ***Opitz v. Wrzesnewskyj*** 2012 SCC 55-2012-10-256 it is thus stated in the majority opinion:

> ***"An applicant who seeks to annul an election bears the legal burden of proof throughout....."***

[193] Such a line of judicial thinking is also found in the Nigerian case, ***Buhari v. Obasanjo*** (2005) CLR 7K, in which the Supreme Court stated:

> ***"The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result....There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election."***

The Nigerian Supreme Court further stated:

> ***"He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."***

[194] In another Nigerian case, ***Ibrahim v. Shagari & Others*** (1985) LRC (Const.) 1, the Supreme Court held:

> ***"[T]he Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. Further, the Court***

will take into account the effect if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election…. [T]he duty to satisfy the Court that a particular non-compliance with the provisions of Part II of the Electoral Act….lies on the petitioner."

[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on *burden of proof* in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the *legal burden* rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the *evidential burden* keeps shifting. Ultimately, of course, it falls to the Court to determine whether a *firm* and *unanswered* case has been made.

[196] We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. 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] IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the

people's political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. 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.

[198] To what *standard* must such initial burden be discharged? The practice in this respect varies from one jurisdiction to another. In some countries, it is held that election petitions are litigation much in the nature of *civil proceedings* – and that the standard of proof should be the same as in civil causes. Thus in Mauritius, in ***Jugnauth v. Ringadoo and Others*** [2008] UKPC 50, the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. The following passage occurs in the judgment of the Privy Council:

> ***"....the legislature...deliberately chose to approach the matter as one in which the court should adopt the civil standard of proof. There was no question of the Court applying anything other than the civil standard of proof and in particular, no question of the application of an intermediate standard. It followed that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition. In practice, as a matter of common sense rather than law, the Court was unlikely to be satisfied on the balance of probabilities that there has been bribery without cogent evidence to that effect. In the instant matter***

the Supreme Court was correct to reach its factual conclusions on the balance of probabilities."

[199] In the ***Jugnauth Case***, the Court observed that election petitions are civil in nature, and the proper test should be the *balance of probability*. The same principle was also stated in the Canadian case, ***Opitz*** *(supra).*

[200] In certain jurisdictions, a higher standard of proof has been required, *depending on the specific element in the cause* being proved. Thus, in ***Shri Kirpal Singh v. Shri V.V. Giri*** (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567 the Supreme Court of India stated:

"There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so. Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice."

[201] Some jurisdictions have adopted a standard of proof that goes beyond the balance of probability but falls slightly below proof-beyond-reasonable-doubt. Zambia adopted such a standard in ***Lewanika and Others v. Chiluba*** (1999) 1LRC 138. Five petitioners challenged the election of the respondent as President, on 18th November, 1996 on the ground that he was

not qualified to stand as a candidate, as neither he nor his parents were citizens of Zambia by birth or by descent, as required under Article 34(3), Schedule 2 to the Constitution of Zambia Act, 1991 as amended in 1996. The petitioners also alleged electoral flaws, including bribery and corruption, irregularities and flaws in the electoral system; they sought the nullification of the elections for having been rigged, and being not free and fair. The Court thus held, on standard of proof:

> ***"[W]e wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a*** *standard higher than on a mere balance of probability.* ***It follows, therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority,*** *no less* ***a standard of proof is required. It follows also that the issues raised are required to be established to a*** *fairly high degree of convincing clarity."*

[202] But in another Zambian case, ***Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others*** SCZ/EP/01/02/03/2002, the Supreme Court held that the Court, in determining the standard of proof, should take into account the facts of the particular case:

> ***"We accept that the issue of standard of proof may turn out to be more a matter of words than anything else. There can be*** *no absolute standard of proof.* ***The degree must depend on the subject matter. In the case under consideration, the standard of proof must depend on the allegations pleaded."***

[203] The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the *principles of the Constitution*, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be *above the balance of probability*, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of *data-specific electoral requirements* (such as those specified in Article 38(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.

(iii) The Supreme Court's Jurisdiction in a Presidential-election Petition

[204] The Court's jurisdiction in the consolidated Petitions was not an issue for determination *per se*. That the parties chose to move the Court to determine the validity of the Presidential election was an indication that they had no doubts as to the Court's jurisdiction. However, the gist of some of the prayers in the Petition, and of the submissions made in support, raised a question as to the *nature and extent of the Court's jurisdiction*.

[205] It is clear that the Supreme Court's jurisdiction in a Presidential election is both *original* and *exclusive* – a position well clarified in our Advisory

Opinion No. 2 of 2012, ***In the Matter of an Application for Advisory Opinion under Article 163(6) of the Constitution of Kenya.*** No Court other than the Supreme Court has the jurisdiction to hear and determine disputes relating to an election for the office of President.

[206] This jurisdiction, however, is not boundless in scope: it is circumscribed in *extent* and in *time*. Limited in *extent*, in that it relates only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the *validity or invalidity of a Presidential election*.

[207] The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the Constitution itself.

[208] A petitioner against the declaration of a candidate as President-elect, under Articles 163(3)(a) and 140 of the Constitution as read together with the provisions of the Supreme Court Act, 2011 (Act No. 7 of 2011) and the Supreme Court (Presidential Elections) Rules, 2013, is required to present a *specific, concise* and *focused claim* which does not purport to extend the Supreme Court's jurisdiction beyond the bounds set out in the Constitution. It follows that the Court will only grant *orders specific to the Presidential election*.

[209] The Supreme Court's jurisdiction is also limited in *time-span*. A petition contesting the election of a President does not set off an open-ended course of

litigation without time-frames. The applicable time-frame, within which any challenge to the election must be filed, served, heard and determined, is prescribed under the Constitution. Article 140(1) and (2) of the Constitution provide as follows:

> ***"(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."***

[210] Applying the foregoing provision, and in exercise of powers conferred by Article 163(8) of the Constitution and Section 31 of the Supreme Court Act, 2011 the Court has recently made and published the *Supreme Court (Presidential Election Petition) Rules, 2013*. These Rules constitute the Court's detailed norms for operationalising the terms of Article 140 of the Constitution.

[211] The fourteen-day limit within which the Court must hear and determine a Presidential election petition, starts counting immediately upon filing. By Rule 7, the Petitioner has a period of three days within which to serve the Respondent, after filing. Rule 8 allows the Respondent three days within which to file a response, following the service. Rule 9 provides for a pre-trial conference, nine days from the date of filing the petition. The Court, thus, has three days within which to examine the pleadings, before the pre-trial conference takes place.

[212] It is our perception that an intending Petitioner will utilize the seven-day window given by the Constitution, following the declaration of election-outcome, to prepare the pleadings. Likewise, a Respondent will utilize the three days afforded by the Rules, to lodge a response to the Petitioner's allegations.

[213] The purpose of the pre-trial conference is set out in Rule 10: this is a preparatory forum to lay the ground rules for the *expeditious, fair* and *efficient disposal* of the petition. The pre-trial conference enables the Court, upon hearing the parties and, if need be, on its own motion, to make appropriate orders and give directions for ensuring fair determination of the dispute. By Rule 10(1)(f), the Court is empowered to give preparatory directions touching on the *scheme of evidence*: the filing and service of any further affidavits, or the calling of some particular kind of evidence. The issuance of such directions is attuned to the constitutional imperatives of the forthcoming proceedings: *efficiency, expedition, fairness, finality*. By Rule 11, the Court "*shall within two days of the pre-trial conference commence the hearing of the petition.*"

[214] The requirements of such a disciplined trial-framework fully justifies the unlimited exercise of the *Court's discretion* in making orders that shape the course of the proceedings. Thus, in the instant case, the Court did dismiss two applications, in Rulings made during the pre-trial conference. One of these was for an order of production of certain documents; the other was in respect of a "Notice to Produce" a marked voter register found at the numerous polling stations right across the country. The Court also made an order to exclude from the proceedings a "further affidavit" which had just been filed by the 1st Petitioner; the said affidavit sought to introduce new material well after the filing of the petition.

[215] The reasons for the Court's decision to disallow such new matter are set out in the Ruling, as delivered and signed. The 2nd Respondent had declared the results of the Presidential election on 9th March, 2013. By Article 140 of the Constitution, any intending petitioner had up to ***seven days*** to prepare and file the petition. The 1st Petitioner elected to file his petition on ***16th March, 2013*** and, thenceforth, the fourteen-day period for the hearing and conclusion of the proceedings, started running. Yet, six days later, on ***23rd March, 2013,*** just two days before the pre-trial conference, the 1st Petitioner filed the "further affidavit" in question. It emerged as a fact, that the further affidavit, as the Respondents averred, was attempting to introduce ***new matter*** into the original petition – by way of averments. The merits of this belated move were canvassed at the pre-trial conference on 25th March, 2013; and the Court ruled on this question on 26th March, 2013, excluding the "further affidavit."

[216] The primary justification for the rejection of the "further affidavit" lies in the requirements of the disciplined trial process required under the Constitution. The Court, besides, had taken into account all the relevant circumstances. Were the Court to admit the new evidence, then ends of justice would demand that the Respondents be granted reasonable time to file a response to the "further affidavit". The Respondents urged that they needed the same length of time it had taken the 1st Petitioner to file the "further affidavit," to make a response – six days as from 27th March, 2013. Even had the Court granted only half that time, the main hearing of the Petition would not have started before ***30th March, 2013***: and the Supreme Court would, consequently, have failed to hear and determine the Petition within 14 days as required by the Constitution. Allowing the "further affidavit" would have led to consequences not only subverting the Constitution itself, but most significantly, precipitating a crisis in the operations of the Executive Branch.

[217] The rigid time-frame for the resolution of Presidential-election disputes was not, in our opinion, conceived in vain at the time of the constitution-making process. From the terms of Article 140 of the Constitution, it is clear that *expedition* is of the essence, in determining petitions relating to Presidential elections. As the electoral process had, in this case, led to the declaration of a winner, but one who could not assume office pending the determination of the petition, the protracted holding-on of a President-elect, as well as a retiring President, would, in our opinion, present a state of anticipation and uncertainty which would not serve the public interest. Expedition in the resolution of the dispute was all-important: if the Court affirmed the election of the President-elect, then the transition process would be responsibly accomplished; and if the Court annulled the election, the electorate would pacifically attune itself to the setting for fresh election – to be held within sixty days.

[218] Notwithstanding such considerations of merit, which led the Court to exclude belatedly-introduced papers, counsel argued on the basis of Article 159(2)(d) of the Constitution, which thus provides:

> ***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***
>
> ***...***
>
> ***(d) justice shall be administered without undue regard to procedural technicalities...."***

The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes

of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The *time-lines* for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the Constitution, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the Constitution, for purposes of interpretation, must be read as one whole: and in this regard, the terms of Article 159(2)(d) are not to be held to apply in a manner that ousts the provisions of **Article 140,** as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined.

(iv) Judicial Restraint

[219] Learned counsel, Mr. Ahmednasir Abdullahi has called for the adoption of *restraint* by the Court, in this Presidential-election matter. He urges that the facts and special circumstances of this case require restraint, in the judicial approach.

[220] Counsel proceeded from the following foundation of fact: the Presidential election took place in a context of perfect peace; as many as 86% of the electorate – a high turnout by any standards – did vote; no case of loss of life in the course of the election was reported. So, the will of the electorate, by which the 3rd Respondent was entrusted with the Presidential mandate, ought to be upheld.

[221] In such conditions, Mr. Abdullahi urged, the Court should in principle desist from intervention, but should instead affirm the principle of restraint. Learned counsel submitted that Kenya is at a sensitive stage of establishing

the institutions of democracy and constitutionalism, and that this requires a certain degree of public confidence which, for the judicial process, is a treasure, that can only be nurtured through restraint, where the electoral will has been made known.

[222] Counsel recalled, as a comparative perspective, that judicial restraint had similarly been urged in the American case, ***Bush v. Al Gore*** 531 U.S. (2000), in aid of the argument that even though the Supreme Court has jurisdiction to invalidate a Presidential election by virtue of Article 140 of the Constitution, restraint was paramount. For, the issues involved are essentially *political* in nature. Counsel invoked the following passage in the American case:

> ***"None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people...and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues which the judicial system has been forced to confront."***

[223] To the same effect, learned counsel cited the South African case, ***Minister of Health v. Treatment Action Campaign*** 2002 (5) SA 721 (CC), in which it was thus held:

> **"*Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional***

obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications…. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

[224] It was counsel's argument that, by such restraint, the Court would be contributing to national stability by preserving its "political capital" for those rare occasions when, as history unfolds, it *may* become appropriate to deploy it. And so, for day-to-day situations, the Supreme Court ought to limit the "number of major principled interventions" it can make [see A.M. Bickel in ***Harvard Law Review***, Vol. 75 (1961), pp.40, 75].

[225] In agreement with the foregoing line of reasoning, learned counsel Mr. Ngatia, for the 3rd Respondent, submitted that: "what is before the Court is a political contest"; "for all politicians, their business is to offer themselves for elections; that of IEBC is to conduct elections; that of the people is to decide." Counsel submitted that in an electoral contest such as the instant one, "the Court should have a very limited role."

[226] In this inaugural Supreme Court which is barely two years old, and which is at the centre of the governance processes established under the Constitution of Kenya, 2010, it is the *first time* the Judges are called upon to declare their perception of their role in a fundamentally political-cum-constitutional process. It is particularly significant that the organ which is the subject of dispute is the most crucial agency of the Executive Branch, namely the Presidency. The new Constitution will not be fully operational, without the Presidential office being duly filled, as provided by the Constitution and the ordinary law.

[227] But the Constitution not only represents a special and historic compact among *the people;* it expressly declares all powers of governance to emanate from *the people*, and to be for service to *the people*. **Article 1 of the Constitution** thus provides:

> ***"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
>
> ***"(2) The people may exercise their sovereign power directly or through their democratically elected representatives."***

[228] What is now before the Court is a case in which the people, as makers and main beneficiaries of the Constitution, have employed the prescribed machinery, and cast their votes, in exercise of their political will to elect the leading member of the Executive Branch.

[229] What principle ought to guide this Court in its attempts to resolve the electoral question?

[230] Without as yet deciding the main question in the contest, we express the opinion that, in the special circumstances of this case, an insightful judicial approach is essential. There may be an unlimited number of ways in which such an approach is to guide the Court. But the fundamental one, in our opinion, is *fidelity to the terms of the Constitution,* and of such other law as objectively reflects the *intent and purpose of the Constitution*.

(v) Technology in Kenya's Electoral Process

[231] The main Petition before this Court is founded, significantly, on the contention that the Petitioner was prejudiced by an inconsistent application of

electronic devices and, in particular, by IEBC's abandonment of such technology and resort to the manual electoral procedure. While there is sufficient evidence to guide the Court in this matter, it is apposite to set out relevant principles on the application of *electronic technology* in elections.

[232] Failure of technology is relied upon by the Petitioners, on the footing that it disrupted the transmission of election results, and so, these results ceased to be in keeping with the secure standards required by law. The Petitioners contend that section 39 of the Elections Act, 2011 as read with Regulation 82 of the Elections (General) Regulations, 2012 creates a *mandatory obligation to provide for the electronic transmission of the results*.

[233] We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

[234] In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ong'ondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the *procurement process* – squabbles which occasioned the *failure to assess the integrity of the technologies in good time*. It is, indeed, likely that the

acquisition process was marked by competing interests involving impropriety, or even criminality: and ***we recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.***

[235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to *revert to the manual electoral system*, as was done.

[236] We note from the evidence that the said manual system, though it did serve as a vital fall-back position, has itself a major weakness which IEBC has a public duty to set right. The ultimate safeguard for the voter registration process, namely "the Green Book", has data that is not backed-up, just in case of a fire, or other like calamity. ***We signal this as an urgent item of the agenda of the IEBC, and recommend appropriate redressive action***.

[237] From case law, and from Kenya's electoral history, it is apparent that electronic technology has ***not*** provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only *incremental,* over time. It is not surprising that the applicable law has entrusted a *discretion* to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This *negates the Petitioner's contention* that, in the instant case, *injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology*. It follows that the Petitioner's case, insofar as it

attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

(vi) Institutional Independence, Discharge of Public Responsibility, and Exercise of Discretion

[238] A major element in the Petitioner's case turns on the Constitution's conferment upon IEBC of *institutional independence*, as a basis for the discharge of its public, electoral responsibility. How ought the responsibility to be exercised, and what is the role of *discretion* in this?

[239] The Petitioners impugn the manner in which IEBC conducted the tallying of votes at the National Tallying Centre, and in particular, the fact that the Commission had, at some stage, restricted the operations of political party agents during the tallying. The 1st and 2nd Respondents *admitted* having imposed certain limitations on the said agents, but averred that such action was taken in exercise of essential discretion. These Respondents aver that, sometime in the evening of 5th March, 2013, the political party agents inside the tallying hall became rowdy and quarrelsome, and engaged IEBC staff in paralyzing confrontations. IEBC responded to the mischief by taking the decision to relocate the party agents to a boardroom in the auditorium at the National Tallying Centre, where they were regularly supplied with the forms and documents necessary for the verification of vote-tallies.

[240] Was this a lawful exercise of discretion by IEBC? Did such exercise of discretion vitiate the quality of tallying, and of the electoral process, so as to lead to the conclusion that the electoral process was not lawfully conducted?

[241] The Constitution, by Article 138(3)(c), takes cognizance of the fact that the counting of votes takes place at the polling stations, after which IEBC

tallies, verifies and declares the results. On this basis, it is clear that *IEBC has the mandate* to count, tally and verify the voting results. However, Regulation 85(1)(e) of the Elections (General) Regulations, 2012 allows political party agents to be present at the Tallying Centre.

[242] What is the legal and public standing of the party agents at the National Tallying Centre? In our opinion, it is all about the *public perception*, and *legitimacy*, which are of the essence in a distinctly political process such as a Presidential election. IEBC is expected to operate *transparently,* without retreating from the public forum of visibility, and without disengaging from the stakeholders of the electoral process. However, as there is no sharp definition of the mode of such engagement, IEBC is to be guided by the "*national values and principles of governance*" declared in the Constitution, namely "*good governance, integrity, transparency and accountability"* [Article 10(2)(c)].

[243] Such values, in the context of a large-scale exercise such as the Presidential election, will operate optimally only in conditions of *good order, peace* and *security*; and it is in the first place the responsibility of the machinery of IEBC to ensure that such conditions prevail. *Discretion* is of the essence, in the exercise of such responsibility: and it follows, as the basic evidence of the state of affairs at the National Tallying Centre was not contested, that IEBC, indeed, had *an obligation* to resolve any kind of impasse afflicting the tallying of Presidential-election votes.

[244] This Court has had occasion, in the past, to pronounce itself on the proper functioning of the various independent Commissions and agencies established under the Constitution. The following two passages in the Court's

Ruling, from ***In the Matter of the Interim Independent Electoral Commission***, Sup. Ct. Const. Application No. 2 of 2011, are apposite:

i. ***"[It is] a matter [of] which we take judicial notice, that the real purpose of the 'independence clause' with regard to [the] Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices by other persons, or other institutions of government."***

ii. ***"[While] bearing in mind that the various Commissions and independent offices are required to function free of subjection to 'direction or control by any person or authority', we hold that this expression is to be accorded its ordinary and natural meaning and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit."***

[245] From the principles we have set out, and from the *evidence* on record, we are able to dispose of the issue regarding the *tallying of votes at the National Tallying Centre*. We must come to the conclusion that tallying was indeed conducted in *accordance with the law*, and the relocation of political party agents *did not* undermine the credibility of the tallying, nor provide a basis for annulling the outcome of the Presidential election.

[246] A related claim by the Petitioner is that there were instances in which the vote-tallying operation inflated the 3rd Respondent's votes, while deflating the Petitioner's. What is offered as proof of this assertion is only the

apprehension that the initial electronic vote-transmission had maintained a suspect, steady differential between the two sets of tallies – and that this suggested manipulation and impropriety on the part of IEBC. The Petitioner, besides, sought to introduce belatedly, during the submissions, certain information suggesting mismatches between the contents of Forms 34 and 36 used at the National Tallying Centre. Hardly any matter of significance, at this stage, came before the Court such as would alter the thrust of the overall evidence and the submissions on law; and we must hold that *no challenge to the tallying process* has been made such as to lead to an order of annulment.

(vii) The Voter Register: Accuracy, Credibility, Verifiability – and Implications for Validity of Election

[247] This Court will not, as already stated, make such orders or grant such reliefs as would have the effect of precipitating conflicts between its jurisdiction and that of other Courts. However, as regards elections that run on common voter rolls and common management settings, the Court may inquire into any allegations of voter-registration malpractices, where such are said to *affect the validity of a Presidential election*. Such, indeed, are the allegations by the 1st Petitioner, regarding the credibility of the voter register that was used during the elections of 4th March, 2013.

[248] The 1st and 2nd Petitioners' cases turn on the validity or invalidity of the "Principal Register of Voters." The point was taken up in evidence, and was substantially canvassed in the submissions. What is the "Principal Register of Voters"? In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], and of the evidence adduced in Court, we must conclude that such a register is *not a single document*, but is an amalgam of several parts prepared to cater for divers

groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country's population. The register can also take several forms, as contemplated by **Section 2 of the Elections Act**, which stipulates that such a register *"includes a register compiled electronically."*

[249] The multiplicity of registers is a reality of Kenya's voter registration system which is recognized in *law* and widely acknowledged in *practice*. The register once developed and finalized, is disaggregated and dispersed to various electoral units, to facilitate the process of voting. Such units include the polling stations, the wards, the constituencies, the counties, and even the Diaspora voting centres.

[250] It is plain to the Court that the argument of the Petitioners that the Presidential elections of 4th March, 2013 could only have been based on the BVR element of the Principal Register of Voters, is **not** tenable; nor is it tenable to contend that the BVR Register all by itself, was the Principal Register of Voters.

[251] To guarantee the credibility of the voter register, the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:

> *(a) all those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;*
>
> *(b) all those who turn out to register are actually registered and their particulars accurately captured;*
>
> *(c) the administrative arrangements put in lace to facilitate the registration process are simple, transparent and*

accessible;

(d) the public and political actors are kept informed of the various steps in the register-preparation process;

(e) the resultant register is verifiable.

[252] We are inclined to accept the explanations given by the 1st and 2nd Respondents, of the mode of compilation of the voters' roll. The depositions of the 2nd Respondent and of Immaculate Kassait, and especially when taken alongside the submissions of learned counsel, Mr. Nyamodi, have conveyed a credible account on the manner in which the voters' register used in the 4th March, 2013 Presidential election, was prepared. The *legal burden of showing* that the voters' register as compiled and used, was in any way in breach of the law, or compromised the voters' electoral rights, was not, in our opinion, discharged by the Petitioners.

[253] An intriguing point about the integrity of the voters' register was as regards a "Special Register", which shows different numbers of voters at different times (31,318 at one remove, and 36,236 at another remove). It was deponed in the affidavit of Winifred Guchu, that the "Special Register" had been created to provide for persons whose features could not be captured by the BVR device. Counsel for the 1st Petitioner had urged that the "Special Register" was not only irregular in character, but that it had been used exclusively in the stronghold voting areas of the 3rd Respondent. This serious allegation, which could well taint the credibility of the election, was stoutly contested by learned counsel, M/s. Nyaoga, Nyamodi and Nani for the 1st and 3rd Respondents who relied on the affidavit evidence of Dismus Ong'ondi and Immaculate Kassait.

[254] On the basis of the evidence on record, and of the merits of the submissions by counsel, we find no mystery about the "Special Register", which was indeed used throughout the country, in diverse electoral areas. We also found no proof that the Special Register served any improper cause, in favour of any of the candidates.

[255] It was urged for the 1st Petitioner, that the 1st and 2nd Respondents had compiled the "Green Book" which was not provided for in the law – and that the Green Book undermined both the credibility and the legality of the registration process. In our finding, from the evidence, the "Green Book", though not provided for in law, is a primary document that was used by the 1st Respondent to originate the primary register of voters, which later evolved into a Provisional Register, and then a Final Principal Register. It is not apparent to us that such an original record, the "Green Book," employed by IEBC, required to be provided for by law.

[256] The 1st Petitioner also cited variations in the numbers of registered voters, as a factor of illegality in the conduct of the Presidential election. Learned counsel, Mr. Oraro submitted that at the close of the register on 18th December, 2012 the total number of registered voters was 14,333,339; but that at the time of gazettement, the number was shown as 14,352,455. We have, however, found no major anomalies between the total number of registered voters and the total tally in the declaration of Presidential-election results made by the 2nd Respondent on 9th March, 2013. Although, as we find, there were many irregularities in the data and information-capture during the registration process, these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show

that such irregularities were premeditated and introduced by the 1st Respondent, for the purpose of causing prejudice to any particular candidate.

[257] These findings lead us to the conclusion that the voter registration process was, on the whole, transparent, accurate, and verifiable; and the voter register compiled from this process did serve to facilitate the conduct of free, fair and transparent elections.

(viii) The Question of "Rejected Votes"

[258] From the submissions of counsel, it emerged that "rejected votes" are marked ballot papers that fail to comply with the approved marking format, or in some way infringe the prescribed vote-casting standards. Such votes, at the time of counting, are not tallied to the advantage of any candidate, but are accumulated separately and numbered in the category of "rejected votes".

[259] Yet, by Article 138(4) of the Constitution it is provided:

> *"A candidate shall be declared elected as President if the candidate receives –*
>
> *(a) more than half of* ***all the votes cast*** *in the election; and*
>
> *(b) at least twenty-five per cent of the votes cast in each of more than half of the counties."*

[260] What are "*all the votes cast*"? Do these include even the "rejected votes", which, of course, were **cast**? Or are they limited to the properly-marked ballots which figured in the vote-tally for the individual candidates?

[261] The expression "all the votes cast," presents a problem of interpretation – because the Court has to consider the prevailing position under the earlier instrument, the **Constitution of Kenya, 1969.** The corresponding provision in that Constitution provided as follows [Section 5 (5)(e)]:

> *"the candidate for President who receives a greater number of* ***valid votes cast*** *in the presidential election than any other candidate who, in addition, receives a minimum of twenty-five per cent of the votes cast in at least five of the eight provinces shall be declared to be elected as President".*

[262] Is it intended, in the **Constitution of Kenya, 2010** that the expression "more than half of all the votes cast" should mean, literally, **all the ballot papers** that were marked and cast into the ballot box? Or should it mean only all the valid votes that were cast, and were *counted in favour of one candidate or another?*

[263] This question became contentious because the 3rd Petitioner raised it; but other parties then latched on to it. Counsel for the 3rd Respondent contested all expansive interpretation of the phrase "all the votes cast," on the basis that his client would be the loser, while the Petitioner would gain. It was significant to the 3rd Respondent for the reason, as he believed, that if all the "rejected votes" were included in the computation of vote-tally percentages, then it would raise the 1st Petitioner's percentage-tally towards the 50% mark, and lower his own tally to a figure below 50% – the direct effect being that the Court would have to order a *run-off election* between the two leading candidates. Not surprisingly, a Petitioner in Petition No. 3 of 2013 had moved

the Court not only to exclude the "rejected votes" in the Presidential-election tally, but to go further and, on that basis, *order a re-calculation and re-tally of the votes properly attributable to each of the candidates*. His hopes were that the Court would, in this way, reach a finding that the 3rd Respondent's percentage vote-tally was significantly above 50%. We have *already held,* however, that such a process of re-tallying of votes, re-computing and re-assignment of value, falls beyond the election-contest mandate of this Court, and is excluded by the "rule of remoteness".

[264] The Petitioners in Petition No. 3 of 2013 argued their case on the basis of the **Elections (General) Regulations, 2012** – Regulations 71, 73, 77 and 78. They urged that these Regulations draw a distinction between the words "ballot", and "vote", even though these were sometimes used interchangeably. Counsel urged that the terms "ballot" and "ballot paper" describe the paper containing the names of the candidates in relation to which the voter expresses a preference through the *vote* – so that the "vote" is a ballot paper that has been *marked to show a preference*. On the basis of Regulation 78(2), learned counsel, Mr. Regeru, urged that a "rejected ballot paper" is null and void: and so, all rejected ballots *should not give the basis for determining the winner of an election,* at any stage whatsoever.

[265] The Petitioners in Petition No. 3 of 2013 relied on the terms of the Elections Act, 2011; these define ballot paper as –

> ***"[a] paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for the purposes of voting."***

They submitted that a ballot paper becomes a vote only once it *expresses a preference* for, or against a candidate; and the term "rejected vote" is,

therefore, a misnomer: what the law contemplates is a "rejected ballot paper," and not a "rejected vote"; a ballot paper once rejected, or declared void by law, is incapable of expressing any preference for, or against a candidate. On this account, it was urged, invalid ballot papers cannot be introduced into the percentage-vote tallying process.

[266] Learned counsel for the Petitioners in Petition No. 3 of 2013 introduced the comparative judicial practice in electoral matters, in support of their case. They invoked the Seychelles case, ***Popular Democratic Movement v. Electoral Commission,*** Const. Case No. 16 of 2011 which had come up before the Constitutional Court; and Burhan, J held that:

> ***"rejected ballot papers are not to be counted as 'votes'; and therefore the term 'votes cast' cannot and will not include 'rejected' ballot papers."***

[267] The 1st and 2nd Respondents' answer was that, in using the "rejected votes" in the calculation of threshold-percentages in the Presidential election vote-tally, they had acted in good faith, in particular as the relevant provisions of the Constitution (Articles 86(b) and 138(4)) did not expressly provide that "rejected votes" should not be counted or considered in the computation of percentages as envisaged.

[268] Conceding that there is an uncertainty as to the effect of the expression "all the votes cast" in Article 138(4) of the Constitution, the 1st and 2nd Respondents called upon this Court to provide a *guiding interpretation*.

[269] One line of submissions made in Court is that the expression "all votes cast", as used in Article 138(4) of the Constitution as read together with the

Elections Act, 2011 and the Elections (General) Regulations, 2012 requires a *broad, purposive interpretation* in the context of constitutional principles; and that this will lead to the exclusion of "rejected votes" in the computation of the percentage-vote requirement.

[270] There is a contrasting line of submission by the 4th and 5th Petitioners: that Article 138(4) of the Constitution entails no ambiguity, and that a *literal interpretation* is to be preferred; and the consequence is an inclusion of the "rejected votes" in the computation of the winning percentage-threshold.

[271] Neither the Constitution nor the Elections Act, 2011 defines the term "rejected votes". The Elections (General) Regulations, 2012, while providing for the "spoilt ballot paper" and the "disputed vote", does not define the term "rejected vote": but it sets out the criteria upon which a ballot may be "rejected"; and although a Regulation bears the rubric "rejected ballot papers" in the marginal note, its provisions only indicate the circumstances in which a vote becomes invalid.

[272] The interpretation section of the Elections Act states that 'ballot paper' "means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting". The Elections (General) Regulations, 2012 defines 'rejected ballot paper' as a ballot paper rejected in accordance with Regulations 77 and 78.

[273] Regulation 77 of the Elections (General) Regulations, 2012 which relates to the rejection of ballot papers, thus provides:

> ***"(1) At the counting of votes at an election, any ballot paper –***

(a) which does not bear the security features determined by the Commission;

(b) on which votes are marked, or appears to be marked against the names of, more than one candidate;

(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;

(d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

(e) is unmarked, shall... be void and shall not be counted."

[274] The expression "rejected ballot paper" may be considered alongside "spoilt ballot paper" which is provided for in Regulation 71:

> ***"A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and proving to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt paper shall be immediately cancelled and the counterfoil thereof marked accordingly."***

[275] The law, thus, is clear: the "spoilt ballot paper" will not find its way into a ballot box – and so, it *does not count as a vote*.

[276] Regulation 78 provides for yet another category of votes, known as the "disputed vote". It is thus provided [Reg. 78(2)]:

> ***"The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word 'disputed' but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station."***

[277] The comparative experience shows that different countries refer to votes cast by *different terms*, and assign *differing consequences* to the contrasting categories of votes. In countries such as Ghana, Cyprus and Portugal, the winner in an election is determined only by the *valid votes cast*. Under the Constitution of Seychelles, the broad term "votes cast", just as in Kenya, has been adopted; and it became necessary for the Constitutional Court, in ***Popular Democratic Movement v. Electoral Commission*** (supra) to hold upon a *literal interpretation*, that "votes cast" included both *spoilt votes* and valid votes. Objections were raised, and this matter came before the Court of Appeal, which overturned the decision, and held that the term "votes cast" must be construed to mean only *valid votes cast*. The Court of Appeal remarked that, to count spoilt votes and ascribe to them the quality of valid votes, is improper as it entails converting the "latent vote" of the elector into a "patent vote" – and such an approach would render meaningless the distinction between **spoilt votes** and **valid votes.**

[278] The most striking example of a departure from the foregoing line of reasoning is found in the Constitution of ***Croatia,*** Article 95 of which provides that "the President shall be elected by a majority of all electors who voted", thus in the tallying of votes, invalid votes are taken into account.

[279] By Article 82(d) of the Constitution of Kenya, Parliament is empowered to enact legislation to provide for the conduct of elections and referenda, and for the regulation and efficient supervision of elections. Parliament did enact the **Elections Act, 2011 (Act No. 24 of 2011),** which confers upon IEBC the power to make regulations for the conduct of elections. The Act (Section 109(1)(p)) provides that IEBC may make Regulations to:

> ***"prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid".***

[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?

[284] We can only answer such a logical question by adverting to the Judiciary's mandate as specified in Article 259(1) (d) of the Constitution: *to interpret the Constitution in a manner that "contributes to good governance"*. Beyond that, Article 259 requires an interpretation that:

> ***"(a) promotes [the Constitution's] purposes, values and principles;***

"(b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;

"(c) permits the development of the law……"

The instrument of implementation of the above provisions is the **Supreme Court Act, 2011 (Act No. 7 of 2011),** which thus provides in Section 3:

"The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things –

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth…."

[285] Taking into account the progressive character of the Constitution, and in particular its declared "national values and principles of governance" [Article 10], we hereby render the interpretation that the provision of Article 138(4),

"A candidate shall be declared elected as president if the candidate receives –

(a) more than half of all votes cast in the election; and

(b) at least twenty-five per cent of the votes cast in each of more than half of the counties" –

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. We are, in this regard, guided by a purposive approach, founded on the overall design and intent of the Constitution. We respectfully agree, on this point, with the position taken by the Constitutional Court of Seychelles in ***Popular Democratic Movement v. Electoral Commission*** (see para. 266, *supra*).

(ix) Possible Reliefs: A "Fresh Election?"

[286] The Attorney-General, as ***amicus curiae***, invited the Court to give directions on a line of relief declared by the Constitution, depending on the finding on merits. **Article 138(5)** of the Constitution stipulates that if after the hearing of the Petition, the Court finds no candidate to have been duly elected, "*a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be –*

(a) the candidate, or the candidates, who received the greatest number of votes; and

(b) the candidate, or the candidates, who received the second greatest number of votes."

[287] The expression "a fresh election" appears also in Article 140(3), which thus provides:

> *"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."*

As the phrase "fresh election," as used in Article 140(3), does not tally with its application in Article 138(2) and (3), the ***amicus curiae*** sought the Court's answer to the following question: *"Does the fresh election anticipated by Article 140(3) mean an entirely new Presidential election (including the nomination process), or does [it] mean a similar election as that anticipated under Article 138(5) and (7) – with the same candidates as in the earlier poll?"*

[288] Article 138(4) provides that a candidate shall be declared elected if the candidate receives: (a) more than half of all the votes cast in the election; and (b) at least 25% of the votes cast in each of more than half of the counties. Article 138(5) provides that if no candidate is elected, *a fresh election* shall be held within 30 days following the previous election, and in this later election the candidates shall be: (a) the candidate, or the candidates, who received the greatest number of votes; and (b) the candidate, or the candidates, who received the second greatest number of votes. Article 138 (6) provides that if more than one candidate receives the greatest number of votes, then Article 138(5)(b) shall not apply and the only candidates in the fresh election shall be those contemplated in Article 138(5)(a). Article 138(7) provides that the candidate who receives the most votes in the fresh election shall be declared elected as President.

[289] It is clear that a *fresh election* under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh

election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.

[290] Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138(1) (b) would become applicable, with fresh nominations ensuing.

[291] Barring the foregoing scenario, does the "fresh election" contemplated under Article 140(3) bear the same meaning as the one contemplated under Article 138(5) and (7)? The answer depends on the *nature of the petition that invalidated the original election*. If the petitioner was only ***one*** of the candidates, and who had taken the second position in vote-tally to the President-elect, then the "fresh election" will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates who did not contest the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the "fresh election."

[292] Such, indeed, is the situation in the instant case. It follows that if this Court should invalidate the election of the 3rd and 4th Respondents, only the 1st Petitioner would participate as a contestant in the "fresh election" against the President-elect. And the candidate who receives the most votes in the fresh election would be declared elected as President.

[293] But suppose a successful petition challenging the President-elect were filed by *more than one candidate* who had participated in the original

election. The only candidates in the fresh election, in such a case, in our opinion, would be *the petitioners* as well as the *declared President-elect* whose election had been annulled.

[294] Suppose further, that the election of a declared President-elect is annulled following the petition of a person who was ***not*** a candidate in the original election. In such a case, in our opinion, each of the Presidential-election candidates in the original election would be *entitled* to participate in the "fresh election" – and no fresh nominations would be required.

K. DETERMINATION OF THE PETITIONS

[295] The *evidence* in the consolidated Petition has been laid out in detail, and is the primary basis for disposing of the several prayers. The Court has also considered various *questions of law* and of *general constitutional principle*, upon which the Petitioners rely in their prayers. As such broader foundations to the cases concerned specific prayers, and as the relevant issues were squarely canvassed by counsel, we were able to make our findings, and embody the same at various stages in this Judgment.

[296] But, ultimately, the primary issue is the claim made by the Petitioners in Petitions No. 4 and No. 5; and these resolve into the issue in Petition No. 5, namely: *Must the certificate of election as President-elect, issued to the 3rd Respondent, be cancelled*; and *should an Order be made for a fresh Presidential election to take place in Kenya?*

[297] The evidence laid before the Court has to be considered on the basis of relevant principles of law. From the case law, it is clear that an alleged wrong

in the *electoral process* cannot be rectified on the basis of the conventional yardsticks of *civil* or *criminal law*. In criminal law, proof must be "beyond any reasonable doubt", as the liberties of the subject are at stake and, failing absolute proof, an accused person must be set at liberty. By contrast, in civil law, which is private matter between two individuals, a wrong only needs to be proved on a balance of probability.

[298] An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which has led to this Petition, takes different considerations. The office of President is the focal point of political leadership, and therefore, a critical *constitutional office*. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

[299] As a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office; save that this Court, as the ultimate judicial forum, entrusted under the Supreme Court Act, 2011 (Act No. 7 of 2011) with the obligation to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya" [s.3(a)], must *safeguard the electoral process* and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections.

[300] It follows that this Court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office, if there is any major breach of the electoral law, as provided in the Constitution and the governing law.

[301] We take judicial notice that Kenya, thanks to the relentlessness of the people's democratic struggles, has recently enacted for herself the current Constitution, which assures for every citizen an opportunity for personal security and for self-actualization in a free environment. The Judiciary in general, and this Supreme Court in particular, has a central role in the protection of that Constitution and in the realization of its fruits so these may inure to all within our borders; and in the exercise of that role, we choose to keep our latitude of judicial authority unclogged: so the Supreme Court may be trusted to have a watchful eye over the play of the Constitution in the fullest sense. Even as we think it right that this Court should not be a limiting factor to the enjoyment of free political choices by the people, we hold ourselves ready to address and to resolve any grievances which flow from any breach of the Constitution, and the laws in force under its umbrella.

[302] It is in this context that we have given careful consideration to the special facts of the instant case. We have set out the facts in detail, so these may show us how the grievances arose, and what electoral problem there has been. We moved ***suo motu*** to have a re-tallying of some of the data generated in the Presidential-election proceedings**.**

[303] We came to the conclusion that, by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office.

[304] Did the Petitioner clearly and decisively show the conduct of the election to have been *so devoid of merits*, and *so distorted, as not to reflect*

the expression of the people's electoral intent? It is this *broad test* that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.

[305] We have already considered the foundations of the main grievance: as regards the acquisition of electronic technology for the electoral process; with regard to the partial employment of such technology, before reverting to the manual process; as regards the maintenance of a Voter Register; and in relation to the tallying of votes. Firstly, we have considered the extent to which any breach of the law would have been occasioned in the several areas of operation, and whether such, would disclose reprehensible conduct having the effect of negating the voters' intent.

[306] Secondly, we have considered the evidence which came by way of depositions, and which was vigorously canvassed by the parties. In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not evident,* on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

[307] We will, therefore, *disallow* the Petition, and uphold the Presidential-election results as declared by IEBC on 9th March, 2013.

[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.

[311] We do, however, greatly appreciate the outstanding contribution of all counsel appearing before us in these historic proceedings. We acknowledge them for their ingenuity and enterprise, in urging before us the vital questions of law and evidence.

L. ORDERS

[312] In unanimity on the matters brought before us in these proceedings, we make orders as follows:

1. ***Petition No. 5 of 2013 in the Consolidated Petitions be and is hereby dismissed.***

2. ***Petition No. 4 of 2013 in the Consolidated Petitions be and is hereby dismissed.***

3. ***Petition No. 3 of 2013 in the Consolidated Petitions, and with regard to the prayer for Orders for the re-computation of vote-tally percentages by the 2nd Respondent, is declined, for want of jurisdiction.***

4. ***Each party shall bear their own costs.***

DATED and **ISSUED** at **NAIROBI** this.....day of ....., 2013.

.....	.....
W.M. MUTUNGA	P.K. TUNOI
CHIEF JUSTICE & PRESIDENT SUPREME COURT	JUSTICE OF THE SUPREME COURT
.....	.....
M.K. IBRAHIM	J.B. OJWANG
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT
.....	.....
S.C. WANJALA	N.S. NDUNGU
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

I certify that this is a true
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