

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. OF 2017

BETWEEN

H. E. RAILA AMOLO ODINGA.....1ST PETITIONER
H. E. STEPHEN KALONZO MUSYOKA.....2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT**
**THE CHAIRPERSON OF INDEPENDENT
ELECTORAL AND BOUNDARIES
COMMISSION.....2ND RESPONDENT**
H. E. UHURU MUIGAI KENYATTA.....3RD RESPONDENT

2ND AFFIDAVIT OF GODFREY OSOTSI

INFORMATION TECHNOLOGY EXPERT

I, GODFREY OSOTSI of Post Office Box Number 11095-00100 Nairobi do make oath and state as follows: **THAT**

1. I am a Kenyan Citizen, voter and male adult of sound mind, residing and working for gain in the Republic of Kenya and competent to make this affidavit.

2. I am the Secretary general of the Amani National Congress Party and was a duly accredited agent nominated by the National Super Alliance (NASA) for the 8th August 2017 general elections and therefore well versed with the facts and circumstances relating to the Petition.

3. I have the authority of the Chief Executive Officer of NASA, Mr. Norman Magaya to depone to and produce correspondence between the National

Super Alliances [NASA] and the Commission on inter-alia Statements and press releases by NASA on challenges the Coalition wanted addressed by the Commission before during and after the elections.

4. I know of my own knowledge and information that after the disputed elections of 2007, the Independent Review Election Commission (IREC) and the Waki Commission was established to investigate the cause of violence following the disputed elections. The Commission recommended adoption of a secure electronic system of voting, tallying and of election results to avoid errors, discrepancies or mischief in the elections.
5. I know that As a result of the widespread irregularity and malpractices largely attributed to the manual tallying and transmission of election results, the then chairman of the Electoral Commission of Kenya later confessed that he did not know who won the election for reasons attributable largely attributable to the manual system.
6. I know of my own knowledge and information that this sad history was repeated in 2013 culminating in Petition No. 5 of 2013- Hon. Raila Amolo Odinga. V. IEBC & others when the IEBC in spite of requests and demands to provide election materials used in the said elections, declined to do so, with the consequence that the petitioner had to physically collect forms from agents, and by the time of filing the 90 pages affidavit comprising form 34s, a ruling of the supreme court was given, disallowing that crucial evidence. I know that the petition was later thrown out for lack of evidence.
7. The above history led to the agitation for the removal of the then commissioners and the appointment of fresh commissioners led by Mr. Wafula Chebukati.
8. Contemporaneous with the change of guard at the Commission, came a bipartisan drive for reforms in the electoral laws championed by the Joint Parliamentary Select Committee on matters concerning the Independent

Electoral Boundaries Commission which culminated in a report giving birth to the Election Laws Amendment Acts of 2016 and 2017.

9. Accordingly, I am advised by my advocate, which advise I verily believe to be true that Section 17 of the Election Laws (amendment) Act, 2016 established an integrated electronic electoral system [KIEMS] that enables biometric voter registration, electronic voter identification and electronic transmission of results. The section further mandates the commission to develop a policy on the progressive use of technology.
10. I know of my own knowledge and information that each polling station had a unique identifier with a (QR Code) to establish connectivity to the result transmission system. I am advised by my Advocates on record and believe the same to be true that this was intended to create security of the vote in line with the Constitutional principles under Articles 81 and 86 that require that whatever voting method is used, it should be simple, accurate, verifiable and accountable.
11. I also know of my own knowledge and information that this link was going to enable the presiding officer to electronically transmit the presidential election results from 34s as per section 39(1C) of the Elections Act, 2011 from the polling stations to the constituency, and from the constituency to the national tallying center and from there to an online public portal maintained by the Commission for that purpose.
12. I am advised by my Advocates on record and believe the same to be true that a question then arises as to the availability of the presidential form 34A from all the polling stations using the system described above. A system audit ordered by the Court is therefore essential to trace this transmission in terms of which unique code was used for each of the 40,000 plus polling stations, the identity of the IEBC officers who used them to transmit results and the time and the place and identity of the person who used the unique identifier to carry out results transmission.

13. I am advised by my advocate on record which advise I verily believe to be true that under the Election Laws (Amendment) Act, 2016 results transmission, unlike voter identification are exclusively electronic and not manual.
14. I am advised by my Advocates on record and believe the same to be true that under the Elections Act election materials include not only ballot papers and boxes but also all electronic materials including the systems contemplated under Section 17 (1) comprising the Kenya Integrated Electoral Management System [KIEMS] which incorporates the voter registration, voters identification and results transmission system.
15. I am further advised by my Advocates on record and believe the same to be true that In order to establish the number of people who voted, election materials now constitute the voter registration system, the voter ID system and the electronic transmission system of the election result, the ballot boxes and ballot papers which all just be delivered to the supreme Court immediately upon declaration of the Presidential results.
16. I am further advised by my Advocates on record and believe the same to be true that there has been a real or well-founded danger that the Independent Elections and Boundaries Commission did not comply with the law in the transmission of result. There is therefore a strong case for the audit of the systems of the Commission to establish the basis for the declaration without the transmission of form 34 s as required by law and in the prescribed format.
17. I am further advised by my Advocates on record and believe the same to be true that a declaration of an elect of result can only be called when transmission of results in the right manner had reached the national tallying center. I know of my own knowledge and as corroborated in the affidavits of Ole Kina and Osotsi in support of the petition that as at the time of the declaration of the presidential election results, only 29,000 form 34As had

been received and even then their authenticity could not at the time be ascertained. The result could only be called or declared when the Commission had ALL the form 34A s and 34B s.

18. I am advised by my advocate on record which advise I verily believe to be true that the mischief behind the law was to ensure the result given at the polling station level was secured without any addition, subtractions or multiplication, in light with the Court of appeal decision **Civil Appeal no. 105 of 2017: THE IEBC VERSUS MAINA KIAI & OTHERS.** This is the mischief that has now been committed by the Respondent.
19. There is a real founded danger that this failure is due to the fact that the commission was either unable to have full control of its system, or that it ceded this authority to some other authority, contrary to the legal requirement of the IEBC to maintain independence, and the principle of universal suffrage of one man one vote in line with art 38, 81 and 86.
20. I am further advised by my Advocates on record and believe the same to be true that testing and certification of KIEMS in terms of section 44 of the Elections Act was supposed to provide an assurance that all systems listed above would function as required. However, in spite of the clear mandatory requirement for the testing, verification and deployment of technology at least sixty days before a general election, the 1st Respondent only commenced the said test, verification and deployment 2 days to the election and therefore denied the public an opportunity to verify the efficiency and security of the same particularly considering that ETAC had been disbanded. Had this been done, the issues of transmission that arose on polling day would have been avoided.
21. In addition, without prior reasonable notice and barely 2 days to the presidential elections, the 1st Respondent announced over 11000 polling stations that were purportedly out of range for the 3G and 4G network and

which therefore transmitted election results from locations other than gazetted polling stations and/or manually. This action was in our view an unreasonable ambush that compromised our ability to put in place adequate measures to secure transmission of results from the 11000 polling stations hence jeopardizing the security and credibility of approximately 7,700,000 votes from these polling station.

22. It was therefore not a coincidence that the 11,000 polling stations said to have been outside the 3G and 4G network, was the same number of polling stations whose form 34A and B were said to be missing when the Commission declared the results with only 29,000 polling station having been received.
23. I am advised by my Advocates on record and believe the same to be true that the Commission deliberately breached Elections Laws and Regulations by failing to put in place the required or procure appropriate technology and put it in place at least 60 days to the date of the elections as per section 44 (B) (4).
24. I am aware and the NASA Chief Executive has confirmed to me, that he made numerous requests for assurances of the putting in place the necessary technology and to test it well before the election as required under the Elections Act. These were however ignored.
25. I know of my own knowledge and information that the failure to procure technology, put it in place and test it in time within 60 days to election adversely affected the security, efficiency and integrity of the elections and the ability of the Commission to deliver a free, fair, transparent, accountable and secure elections.
26. I know of my own knowledge and information that the Commission's statement that 11,000 polling stations did not have 3G And 4G network,

and that therefore could not deliver electronic transmission of results was misleading and based on gross misrepresentation since in a County like Nairobi results continued to be delivered manually for many polling stations inspite of not being listed among the 11,000 polling stations that did not have network reach. This averment is corroborated by Mr. Godfrey Osostsi in his affidavit of 17th August 2017.

27. I have been advised by my Advocates on record and believe the same to be true that it was also contemplated and assurances given by the 1st and 2nd Respondents that at the time of making a declaration all presidential form 34As would have been received. Indeed all forms received after the day of declaration cannot be authenticated as the final result.
28. I have been advised by my Advocates on record and believe the same to be true that the window that has been given by the Commission allowing form 34Bs (6 days) after the impugned declaration exposed the results from thousands of polling stations to manipulation addition, multiplication and subtraction contrary to art 81, 86 and 39 that mandatorily require that results transmission be efficient and prompt.
29. I have been advised by my Advocates on record and believe the same to be true that in addition to this, even where the law provided for a complementary mechanism unlike for voter registration and identification, results transmission could only be electronic and not manual and not electronic and or manual. (see regulation 69 which upheld complementary mechanism for manual registration). Complementary does not envisage any other than electronic.
30. I know of my own knowledge and information that in the period intervening the enactment of the Election Law (Amendment) Act, No. 24 of 2016, and in particular between November, 2016 to August, 2017, The National Super Alliance [NASA] made several attempts at engagement

with the Commission on a number of issues especially the deployment of technology for the election.

31. I am informed by the NASA Chief Executive NORMAN MAGAYA, which information I verily believe to be true that on the 3rd of November, 2016 the Chief Executive of the CORD Secretariat [now NASA], wrote to the Commission seeking information and clarification on among other things the requirement to develop ICT regulations within 30 days of the Election Laws (Amendment) Act, No. 36 of 2016.
32. I am also informed by 14th of November, 2016 the NASA Chief Executive NORMAN MAGAYA, which information I verily believe to be true that the issue of procurement of the technology required for the elections was also raised but the Commission chair in his letter in response sidetracked the question on the grounds that the role of the Commission and the Secretariat were now distinct on the issue of procurement.
33. I am also aware from information availed to me by the NASA Chief Executive NORMAN MAGAYA, which information I verily believe to be true that on the 20th of February, 2017 Senator James Orengo, the Co chair/convenor of the National Super Alliance [NASA] wrote to the Commission expressing its concern about the state of preparedness of the Commission with regard to the elections. The concerns of the Coalition vide this letter were outlined at **Paragraphs 3, 4, 5, 6 and 7 of the letter.**
34. I am advised by my Advocates on record and believe the same to be true that vide a letter dated 28th of February, 2017 the Commission in response to NASA Coalition letter dated 7th February, 2017, made an assurance at paragraph 16 of its matrix presentation that it would abide with and will be committed to implementation of section 39 of the Elections Act.
35. I am advised by Advocates on record and believe the same to be true vide another letter from the commission to Senator James Orengo dated 15th

March, 2017, at paragraph 17 the Commission stated as follows: **“ICT Issue: we regret that you have chosen to characterize our transparent and open discussions with you on 16 February as a “grim and pessimistic picture” of the challenges the Commission faces especially as it relates to ICT. We wish to emphasize that our information technology is robust. In addition, we are also setting up a new disaster recovery center with state of the art facilities. Allow us to emphasize again that our database is not connected to the database of any other agency.....”**.

36. However, inspite the above assurance the Commission in a letter to the Communications Authority dated 29th June, 2017, the Commission proposed to use a private cloud to supplement its primary and disaster recovery sites. The Communications authority advised against hosting its sensitive data on a private third party cloud that may compromise the security of its systems and data. The Commission recommended that the cloud service is hosted within the Kenyan borders so that any issues arising out of any cyber incident or crime can be handled using Kenyan Laws.
37. I am advised by my Advocates on record and believe the same to be true that the advise from the Communications Authority, was very sound in law but which the Commission ignored.
38. I am further Advised by my Advocates on record and believe the same to be true that in doing so the Commission went against its assurance to the public and NASA coalition about security of its data and systems.
39. I am advised by my Advocates on record and believe the same to be true that vide a letter dated 5th July, 2017 the CEO of the commission Ezra Chiloba wrote to the OT Morpho SAS (France) expressing its approval for a proposal to use the NTT Clud based platform as a risk management measure owing to alleged delays in the arrival of the newly acquired primary and secondary data centre infrastructure. The contract entailed (i)

Four months rental without Oracle database; (ii) Infrastructure set-up and (iii) Technical support.

40. A further as April, 2017 assurance was made by the Commission vide its letter dated 4th April, 2017 in which it stated to the **Rt. Hon. Raila Amolo Odinga** that **“the commission will ensure that the eventual outcome of the election reflects the will of the People of Kenya.....One of the critical aspects of the Kenya Integrated Elections Management System [KIEMS] is results transmission. We have taken care to ensure that the system is able to deliver secure results, avail scanned copies of the results that shall be published on a public web-portal as per the law, and guarantee transparency, accountability and auditability of the results”**.
41. I am advised by my Advocates on record and believe the same to be true that the only way to ensure transparency, accountability and “auditability of the results was if access to the Commissions systems including the public web portal and the Kenya Integrated Election Management System[KIEMS] (which incorporates the voter registration, voter identification and results transmission), for purposes of a systems audit.
42. I am advised by my Advocates on record and believe the same to be true that the Commission through its Advocates firm V.A NYAMODI ADVOCATES filed a Petition 415 of 2016 which was a challenge among other things on the alleged constitutionality of section 39 of the elections Act. This casts aspersion on the commitment the commission had in implementation of section 39 (1) of the Elections Act which call for electronic transmission of results. The Petition filed by the same law firm is hereby attached.
43. I am further advised by Advocates on record and believe the same to be true that in Civil Appeal No. 105 of 2017: IEBC Versus Coalition for Reforms and Democracy, this was an appeal from the High court against

the Judgment of a three Judge bench that stated that the results of the returning officer at the polling station was final, a position affirmed by the Court of appeal. This is a further indication of the Commissions unwillingness for an open transparent, accountable and verifiable election which includes prompt transmission of results in the prescribed form.

44. What is deponed herein is true to the best of my knowledge, information and belief.

SWORN BY THE SAID }
GODFREY OSOTSI }
AT NAIROBI THIS }
..... }
18th DAY OF August, 2017 } **DEPONENT**
 }
 }
BEFORE ME }
 }
 }
COMMISSIONER FOR OATHS }

DRAWN & FILED BY:
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To:

The Supreme Court of Kenya

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3. H.E. UHURU MUGAI KENYATTA
HARAMBEE HOUSE,
HARAMBEE AVENUE
NAIROBI.

Lodged in the Registry at Nairobi on theday of August 2017

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Registrar