

106. Mombasa and Kakamega Counties are the strongholds of the Petitioners herein and are largely considered the Petitioners' vote basket. Postponement of the gubernatorial elections was a strategic ploy that substantially affected voter turnout to the detriment of the Petitioners. The Petitioners assert that due to the postponement of elections, they garnered fewer votes compared to the votes they would have garnered if the gubernatorial elections had not been postponed thereby affecting the outcome of the election.

#### Failure of KIEMS Kits

107. There was deliberate failure of KIEMS kits and the 1<sup>st</sup> Respondent did not use KIEMS kits to identify voters in polling stations within Kakamega and Makeni Counties, partly as a voter suppression strategy, which disproportionately affected the 1<sup>st</sup> Petitioner those being his strongholds.

108. The Petitioners aver that the voter turnout in the two Counties aforesaid was demonstrably below the national average and the turn out in previous elections.

109. The Petitioners further aver that KIEMS kits failure delayed the commencement of voting from the statutory timeline of 6:00AM with voting commencing beyond 11:00AM, disenfranchising many voters who left the polling stations without casting their vote, after waiting for over five hours.

110. Further, the 1<sup>st</sup> Respondent did not give simple, timely and consistent instructions regarding the use of the complementary (manual) system of voter identification.
111. The Petitioners further aver lack of proper communication from the 1<sup>st</sup> Respondent to its presiding officers caused delay in commencement of voting beyond 11:00AM because there was mismatch of KIEMS kits between constituencies and the Presiding Officers of the 1<sup>st</sup> Respondent.
112. The 1<sup>st</sup> Respondent's presiding offices would postpone voting to await communication and action from the 1<sup>st</sup> Respondent's Nairobi Office for dispatch of the KIEMS kits to the rightful constituencies, thereby disenfranchising voters in the affected polling stations.

vi) **E-forensics analysis of the 2022 Kenya Presidential Election**

113. Professor Walter Richard Mebane, a research professor at the Institute for Political Research, who is also the leading expert on detecting electoral fraud conducted an e-forensics analysis of the 2022 Kenya Presidential Election and published a Report dated 21<sup>st</sup> August 2022 in which he concluded *inter alia* that:

- (i) there was electoral fraud; and

(ii) the number of votes that are potentially fraudulent is greater than the margin of votes between the 1<sup>st</sup> Petitioner and the 9<sup>th</sup> Respondent. In other words, the 1<sup>st</sup> Petitioner may have won the election.

114. The aforesaid report dated 21<sup>st</sup> August 2022 is produced in the 2<sup>nd</sup> Petitioner's supporting affidavit to this Petition.

**vii) Offences and ethical breaches committed by the 2<sup>nd</sup> Respondent**

115. In view of the totality of the foregoing facts, the Petitioners contend that the 2<sup>nd</sup> Respondent with the knowledge, connivance and collusion of the 9<sup>th</sup> Respondent has committed and should be found culpable of the following election offences:

(i) As the National Returning Officer of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent is guilty of the following election offences:

116. Making entries which he knew to be false contrary to section 6(a) of the Election Offences Act No. 37 of 2016

On 15<sup>th</sup> August 2022, the 2<sup>nd</sup> Respondent made false entries in Form 34C which he knew were false to declare the 9<sup>th</sup> Respondent the President-elect.

117. Omitting to include results in breach of his official duty contrary to section 6(i) of the Election Offences Act No. 37 of 2016

On 15<sup>th</sup> August 2022, the 2<sup>nd</sup> Respondent omitted to include the results of Forms 34A from polling stations and proceeded to declare a fraudulent result.

118. Wilfully contravening the law to give undue advantage to a presidential candidate contrary to section 6(1) of the Election Offences Act No. 37 of 2016

On 15<sup>th</sup> August 2022, the 2<sup>nd</sup> Respondent wilfully contravened Article 81(e) (ii, iii, iv, v) by, without reason or justification, wilfully refusing to share and circulate the final presidential results with the presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission so as to declare a fraudulent result.

119. Indirectly procuring election materials in connection with the election without the authority of the Commission contrary to section 13(e) of the Election Offences Act No. 37 of 2016

On or about July 2022, the 2<sup>nd</sup> Respondent without discussion with or consensus from the other six (6) Commissioners, illegally and unilaterally procured additional unsecured election materials and electronic devices containing sensitive information through three foreign nationals from Venezuela.

120. Obstructing election officers in the the execution of their lawful duties contrary to section 13(i) of the Election Offences Act No. 37 of 2016

The 2<sup>nd</sup> Respondent obstructed the working of the other six (6) Commissioners by denying them access to the portal as well as the verification process of the physical Forms 34A against those uploaded on the portal.

121. Making a false statement knowing the statement to be false contrary to section 13(j) of the Election Offences Act No. 37 of 2016

On 15<sup>th</sup> August 2022, the 2<sup>nd</sup> Respondent wrongly and wilfully made a false statement stating that the 9th Respondent had garnered 7,176,141 votes, a representation of 50.49% of the votes cast thus making him the President-elect.

122. Publishing and disseminating information with the intention to influence the outcome of the election contrary to section 13(j) of the Election Offences Act No. 37 of 2016

The 2<sup>nd</sup> Respondent published and uploaded an inaccurate Form 34C on the 1<sup>st</sup> Respondent's portal to manipulate and distort the presidential election results to declare an inaccurate and invalid outcome.

123. Intentionally altering the IEBC network and portal contrary to section 17(b) of the Election Offences Act No. 37 of 2016

On or about August 2022, the 2<sup>nd</sup> Respondent altered the IEBC network and portal to disable access by other parties, and presidential candidates' Chief Agents, Observers, Media or even his fellow members of the Commission so as to declare a fraudulent result.

124. Altering information residing in the IEBC portal knowing he is likely to cause wrongful loss or damage to the public contrary to section 17(c) of the Election Offences Act No. 37 of 2016

On or about August 2022, the 2<sup>nd</sup> Respondent intentionally altered electronically directly or indirectly altered the results of the Forms 34A uploaded to the IEBC portal so as to influence the outcome of the presidential election and to declare a fraudulent result.

125. Knowingly inputting, altering and deleting computer data with the intent that the result be considered or acted upon for legal purposes as if it were authentic, regardless of whether or not the data is directly readable and intelligible contrary to section 17(h) of the Election Offences Act No. 37 of 2016

The 2<sup>nd</sup> Respondent tampered with and altered the contents of the Forms 34A that were uploaded on the 1<sup>st</sup> Respondent's portal by officers in the polling stations nationwide with the intention do declare a fraudulent result.

126. Using his office to improperly confer a benefit on a presidential candidate contrary to section 46 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003

The 2<sup>nd</sup> Respondent used his office as the National Returning Officer to usurp the powers, duties and responsibilities of the commissioners and unilaterally and secretly tallied, verified and declared to declare a fraudulent outcome.

127. As a public officer, the 2<sup>nd</sup> Respondent is guilty of the following ethical breaches:
- (i) Failure to carry out his duties in a way that maintains public confidence contrary to section 9(a) of the **Public Officer Ethics Act No. 4 of 2003**.
  - (ii) Failure to treat the public and his fellow public officers with courtesy and respect contrary to section 9(b) of the **Public Officer Ethics Act No. 4 of 2003**
  - (iii) Failure to seek to improve the standards of performance and level of professionalism in his organisation contrary to section 9(c) of the **Public Officer Ethics Act No. 4 of 2003**
  - (iv) Failure to observe the ethical and professional requirements of the Law Society of Kenya contrary to section 9(d) of the **Public Officer Ethics Act No. 4 of 2003**;
  - (v) Failure to discharge any professional responsibilities in a professional manner contrary to section 9(g) of the **Public Officer Ethics Act No. 4 of 2003**

(vi) Failure to carry out his duties in accordance with the law contrary to section 10(1) of the **Public Officer Ethics Act No. 4 of 2003**

(vii) Failure to use his best efforts to avoid being in a position in which his personal interests conflict with his official duties contrary to section 12(1) of the **Public Officer Ethics Act No. 4 of 2003;**

(viii) Acting as an agent for and furthering the interest of a political party contrary to section 16(1) of the Public Officer Ethics Act No. 4 of 2003.

**E. THE QUESTIONS OR ISSUES FOR DETERMINATION BY THE COURT:**

56. The following are the questions or issues for determination as considered by the Petitioners:

(i) Was the presidential election conducted in accordance with and in compliance with **The Constitution;**

(ii) Was the presidential election conducted in accordance with and in compliance with the written law and national legislation;



- (iii) Did the 2<sup>nd</sup> Respondent's non-compliance with **The Constitution** and/or the Law in the conduct of the presidential election affect the result of the presidential election;
- (iv) Did the 2<sup>nd</sup> Respondent's non-compliance with **The Constitution** and/or the law affect the validity of the result of the presidential election?
- (v) Was the 2<sup>nd</sup> Respondent bound by, and bound to observe and make manifest, the national values as set out in Article 10 of **The Constitution**?
- (vi) Did the 2<sup>nd</sup> Respondent in applying and or interpreting **The Constitution** observe and enhance the value of democracy at all relevant times?
- (vii) Did the 2<sup>nd</sup> Respondent in applying and or interpreting **The Constitution** observe and enhance the value of the participation of the people at all relevant times?
- (viii) Did the 2<sup>nd</sup> Respondent in applying and or interpreting **The Constitution** observe and enhance the value of the rule of law at all relevant times?
- (ix) Did the 2<sup>nd</sup> Respondent arrive at the declaration of the result in compliance with Article 81 of **The Constitution**?

- (x) Did the 2<sup>nd</sup> Respondent conduct his part in the administration of the election in an impartial, neutral, efficient, accurate and accountable manner?
- (xi) Did the 2<sup>nd</sup> Respondent follow the constitutionally set procedure as mandated in Article 138 of **The Constitution** at all relevant times?
- (xii) After counting the votes in the polling stations, did the IEBC tally and verify the count as mandatorily required by Article 183(3)(c) of **The Constitution**?
- (xiii) Was the result that was declared on 15<sup>th</sup> August 2022 in compliance with **The Constitution**?
- (xiv) Did the 2<sup>nd</sup> Respondent observe the values and principles of public service set out in Article 232 of **The Constitution**, which applied to him by virtue of Article 232(2(a))?
- (xv) Was the authority assigned to the 2<sup>nd</sup> Respondent as a State Officer exercised in the manner set out in Article 73 of **The Constitution of Kenya**, Chapter Six and constitutionally derived legislation thereunder?
- (xvi) Did the non-compliance, irregularities and improprieties affect the validity of the result of the presidential election?

- (xvii) Was the 9<sup>th</sup> Respondent validly declared as the president elect?
- (xviii) Should the rejected votes be included in the final tally to determine whether a presidential candidate has attained the threshold under Article 138(10) of **The Constitution**?
- (xix) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of the authority and public trust assigned to a State officer under Article 73(1) of **The Constitution**.
- (xx) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 6(a) of the **Election Offences Act No. 37 of 2016**
- (xxi) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of his official duty contrary to section 6(j) of the **Election Offences Act No. 37 of 2016**
- (xxii) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of 6(l) of the **Election Offences Act No. 37 of 2016**
- (xxiii) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in section 13(e) of the **Election Offences Act No. 37 of 2016**

- (xxiv) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 13(i) of the **Election Offences Act No. 37 of 2016**
- (xxv) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 13(j) of the **Elections Act No. 37 of 2016**
- (xxvi) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 13(j) of the **Elections Act No. 37 of 2016**
- (xxvii) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 17(b) of the **Elections Act No. 37 of 2016**
- (xxviii) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 17(c) of the **Elections Act No. 37 of 2016**
- (xxix) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of section 17(h) of the **Elections Act No. 37 of 2016**
- (xxx) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent used his office to improperly confer a benefit on a presidential candidate contrary to section 46 of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**

(xxxi) Whether the Court should make a declaration or finding that the 2<sup>nd</sup> Respondent is in violation of the following ethical breaches and corrupt practices:

- i. Failure to carry out his duties in a way that maintains public confidence contrary to section 9(a) of the **Public Officer Ethics Act No. 4 of 2003**.
- ii. Failure to treat the public and his fellow public officers with courtesy and respect contrary to section 9(b) of the **Public Officer Ethics Act No. 4 of 2003**
- iii. Failure to seek to improve the standards of performance and level of professionalism in his organisation contrary to section 9(c) of the **Public Officer Ethics Act No. 4 of 2003**
- iv. Failure to observe the ethical and professional requirements of the Law Society of Kenya contrary to section 9(d) of the **Public Officer Ethics Act No. 4 of 2003**;
- v. Failure to discharge any professional responsibilities in a professional manner contrary to section 9(g) of the **Public Officer Ethics Act No. 4 of 2003**

- vi. Failure to carry out his duties in accordance with the law contrary to section 10(1) of the **Public Officer Ethics Act No. 4 of 2003**
  
- vii. Failure to use his best efforts to avoid being in a position in which his personal interests conflict with his official duties contrary to section 12(1) of the **Public Officer Ethics Act No. 4 of 2003**;
  
- viii. Acting as an agent for and furthering the interest of a political party contrary to section 16(1) of the Public Officer Ethics Act No. 4 of 2003.

(xxxii) What are the appropriate orders to be made by the Court?

**F. RELIEFS SOUGHT**

- (1) Immediately upon the filing of the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours;
  
- (2) Immediately upon the filing of the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1<sup>st</sup> Respondent in respect of the Presidential Election within 48 hours;

- (3) AN ORDER be and is hereby made for summons to issue to the Director of Criminal Investigations to produce statements, photographs, reports, equipment, laptops, phones, other gadgets and devices and any other materials connected or related to the conduct of the elections and found in possession of the Venezuelan nationals.
- (4) AN ORDER be and is hereby issued for summons to issue to the Director of Criminal Investigations directing him to produce the laptop(s) retrieved and seized from one Koech Geoffrey Kipngosos agent of UDA Political Party and the report of the Forensic Analysis and Examination of the laptop(s) and contents.
- (5) AN ORDER be and is hereby made for scrutiny of the rejected and spoilt votes;
- (6) A DECLARATION be and is hereby issued that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election;
- (7) AN ORDER be and is hereby made for scrutiny and forensic audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;
- (8) AN ORDER be and is hereby made for scrutiny and forensic audit of all equipment, system and technology used by the 1<sup>st</sup> Respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal;

- (9) AN ORDER be and is hereby made consequent upon the nullification of the declaration of the results by the 2<sup>nd</sup> Respondent directing the 1<sup>st</sup> Respondent to tally and verify the count and declare the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners as duly elected as President Elect and Deputy President Elect respectively;
- (10) A DECLARATION be and is hereby made **in the alternative** to (9) above that the 1<sup>st</sup> Respondent as presently constituted, and as presently functioning, is incapable of presiding over and rendering a proper, credible, verifiable and valid presidential election; and the Court do make appropriate orders to uphold The Constitution and defend the sovereign will and power of the people of Kenya.
- (11) A DECLARATION be and is hereby made that the non-compliance with the law, irregularities and improprieties in the Presidential Election were so substantial and significant and that they affected the result thereof.
- (12) A DECLARATION be and is hereby made that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the Presidential Election results; and the genuine results tallied and verified after the scrutiny and forensic audit be and are hereby considered the valid outcome of the Presidential Election.



- (13) A DECLARATION be and is hereby made **in the alternative** to (12) above that the Presidential election held on 09<sup>th</sup> August 2022 was not conducted in accordance with The Constitution and the applicable law rendering the declared result invalid, null and void.
- (14) A DECLARATION be and is hereby made that the 9<sup>th</sup> Respondent did not meet the constitutional threshold of attaining more than half (50% plus 1) of all the votes cast in the impugned presidential election held on 09<sup>th</sup> August 2022.
- (15) A DECLARATION be and is hereby made that the 9<sup>th</sup> Respondent was not validly declared as the President Elect and that the declaration made on 15<sup>th</sup> August 2022 is invalid, null and void ab initio.
- (16) AN ORDER be and is hereby issued quashing the Certificate issued to the 9<sup>th</sup> Respondent and Gazette Notice Number 9773 declaring the 9<sup>th</sup> Respondent as the President Elect.
- (17) AN ORDER be and is hereby made directing the 1<sup>st</sup> Respondent to organize and conduct a fresh Presidential Election in strict conformity with **The Constitution** and the **Elections Act**.
- (18) A DECLARATION be and is hereby made that the decision by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents on 15<sup>th</sup> August 2022 in rejecting the declaration of the 2<sup>nd</sup> Respondent is consistent with **The Constitution** and be upheld.

- (19) A DECLARATION be and is hereby made that the decision by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 9<sup>th</sup> Respondents jointly and severally committed election irregularities.
- (20) A declaration be and is hereby made that the 2<sup>nd</sup> Respondent is unfit to hold public office.
- (21) A further declaration be and is hereby made that the 2<sup>nd</sup> Respondent is in breach of the authority and trust assigned to his office as a State Officer and has brought dishonour to the nation and indignity to the office of Chair of the 1<sup>st</sup> Respondent and undermined public confidence and the integrity bestowed in his office.
- (22) Costs of the Petition; and
- (23) The 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> Respondents to bear costs of this Petition
- (24) Any other and/or further orders that the Court deems just and fit to grant in the circumstances.

**DATED** at NAIROBI this 21<sup>st</sup> day of August 2022.



**PAUL MWANGI & COMPANY**  
**ADVOCATES FOR THE PETITIONERS**

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**TO: THE SUPREME COURT OF KENYA**  
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LODGED in the Registry at Nairobi on the 22<sup>nd</sup> day August of 2022.

.....  
**REGISTRAR**

