THE ALL KENYAN MOOT COURT COMPETITION (AKMCC)
10TH EDITION (2022)

THEME: Electoral Justice and democracy ensuring electoral credibility and adherence to the rule of law

Team Code: Team 1004

REPUBLIC OF MBWAKNI

IN SUPREME COURT OF MBWAKNI

PRESIDENTIAL PETITION NO. 001 OF 2022

IN THE MATTER CONCERNING THE ALLEGED VIOLATION OF THE CONSTITUTIONAL RIGHT TO FREE, FAIR AND REGULAR ELECTIONS BASED ON UNIVERSAL SUFFRAGE

Between

KUTESA HUMAN RIGHTS COMMISSION……1STPETITIONER

Versus

ELECTORAL BOARD COMMISSION……1STRESPONDENT

ATTORNEY GENERAL…… 2ND RESPONDENT

NDOVU KUU…….....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE…… 4TH RESPONDENT

And

OMONI TIMON …….. ……. INTERESTED PARTY

IMARISHA DADA PARTY……. INTERESTED PARTY

NAUWO ELECTION OBSERVER MISSION……. INTERESTED PARTY

MEMORIAL FOR THE PETITIONER

(WORD COUNT: 3996 (Beginning from jurisdiction)

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A. LIST OF ABBREVIATIONS

AG	Attorney General
CS	Cabinet Secretary
EBC	Electoral Board Commission
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Person(s)
IT	Information Technology
UN	United Nations
USD	United States Dollar

B. INDEX OF AUTHORITIES

I) INTERNATIONAL CONVENTIONS AND TREATIES

1. 1945 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
2. 1966 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976, 999 UNTS 171.
3. 1966 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3
4. UN General Assembly, United Nations Convention against Corruption: Resolution adopted by the General Assembly, 21 November 2003, A/RES/58/4.

II) INTERNATIONAL CASES

1. *Buckley v Valeo* [1976] 424 U.S. 1
2. *Edmonton journal Vs Alberta* [1989] 45 CRR 1
3. *McCutcheon v Federal Election Commission* [2014] 572 U.S. 185
4. *Palko v Connecticut* [1937] 302 US 319
5. *R v Oakes* [1986] 1 SCR 103
6. *S. Rangarajan Etc v P. Jagjivan Ram* [1989] 2 SCR 204

III) REGIONAL AGREEMENTS AND TREATIES

1. Nauwo Charter on Human and People's Rights (Adopted 27 June 1981, entry into force 21 October 1986)
2. Protocol to the Nauwo Charter on the Establishment of the

Nauwo Court on Human and Peoples' Rights (Adopted 10 June 1998, entry into force 25 January 2004)

3. Nauwo Charter on Democracy, Elections and Governance (Adopted 30 January 2007, entry into force 15 February 2012)
4. Nauwo Union Convention on Preventing and Combatting Corruption (Adopted 1 July 2003, entry into force 5 August 2006)

IV) REGIONAL CASES

1. *Nana Addo Dankwa AkufoAddo & 3 Others v John Dramani Mahama & 2 Others* [2013] GHASC 5
2. *Nwankwo v The State [1983]* NGR 336
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4. *S v Makwanyane & Another* [1995] ZACC 3

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3. The Supreme Court Rules, L.N. No. 6 of 2020
4. The Elections Act, No. 24 of 2011
5. The Electoral Board Commission Act, No. 9 of 2011
6. The Election Offences Act, No. 37 of 2016

7. Election Campaign Financing Act, No. 42 of 2013
8. Elections (General) Regulations, 2012
9. Data Protection Act, No. 24 of 2019
10. Political Parties Act, No. 11 of 2011
11. National Cohesion and Integration Act, No. 12 of 2008

VI) MBWAKNI DOMESTIC CASES

1. *Anarita Karimi Njeru V republic* [1979] eKLR
2. *Anita karimi Njeru v Attorney General* [1979] eKLR
3. *Apollo Mboya v Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another* [2019] eKLR
4. *Boniface Mwangi Waweru Mbiyu v Mary Njeri & Another* (2005)eKLR
5. *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR
6. *Geoffrey Muthinja Kabiru &2 others V Samuel munga Henry &1756* others [2015] eKLR
7. *Hon Martin Wambora v Speaker of the County Assembly of Embu* [2014] eKLR
8. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR
9. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR
10. *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries*

Commission & 2 others [2017] eKLR

11. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR
12. *Patrick Ouma Anyango & 12 Others v AG & 2 Others* [2005] eKLR
13. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR
14. *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others*[2013] eKLR
15. *Robert Alai v The Hon Attorney General & another* [2017] eKLR
16. *R vs Karisa Chengo* [2017] eKLR
17. *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR

VII) BOOKS

1. Benedek PW and Kettemann DMC, *Freedom of Expression and the Internet* (Council of Europe 2014)
2. Carter K, *Technology, Elections, and Democracy in Africa: Evidence from Kenya* (University of Wisconsin--Madison 2021)
3. Marie-Aude F and Susan M, *Kenyaís Past as Prologue: Voters, Violence and the 2013 General Election* (Twaweza Communications 2015)
4. Watch (Organization) HR and International A, *'Kill Those Criminals': Security Forces Violations in Kenya's August 2017 Elections* (Human Rights Watch 2017)

VIII) JOURNALS

1. Barak A, 'Freedom of Expression and its Limitations' (1990) 8 pg. 4-11
2. Barkan J, 'Electoral Violence in Kenya' (2013) pg. 3-11
3. Mutua M, 'Human Rights and State Despotism in Kenya: Institutional Problems' (1994) 41 pg. 50-56

IX) REPORTS

1. *Election Administration Reports* (Plus Publications, Incorporated 1994)
2. Rights KNC on H, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence : Final Report* (Kenya National Commission on Human Rights 2008)

X) OTHER ONLINE SOURCES

'IEBC - Resources' <https://www.iebc.or.ke/resources/?Publications_/_Reports> accessed 22 February 2022

C. STATEMENT OF JURISDICTION

1. The petition before this court is without doubt, a presidential election petition. The starting point into proceedings of this court is the finding that this court is sufficiently clothed with jurisdiction to determine the petition before it. The applicant submits that under article 163(3) (a) of the constitution, the Supreme Court has an exclusive original jurisdiction to determine disputes relating to the office of the president arising from article 140 of the constitution. This was clarified in **Advisory Opinion No. 2 of 2012, *In the Matter of an Application for Advisory Opinion under Article 163(6) of the Constitution of Kenya***, that it is clear that the Supreme Court's jurisdiction in a Presidential election is both *original* and *exclusive*.

2. The Supreme Court, while sitting during a presidential election petition, its jurisdictions sui generis. The courts sit as a court of first and of last resort. Assumption of jurisdiction by Courts in Mbwakni is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent and that courts cannot, by craftsmanship arrogate to themselves jurisdiction beyond which is provided in law. **Nyarangi JA** in the matter between ***Owners of Motor Vessel 'Lillian S' V Caltex Oil Kenya limited*** *(1989)* where the hourable court said the following regarding jurisdiction: '' ***…… Jurisdiction is everything. Without it, a court has no power to make one more step***''. The issues raised are substantial and correctly fashioned in a manner that correctly invokes the jurisdiction of this court. Matters violation of human rights is a matter of public importance as it goes directly into the conduct of the election.

3. The definition of jurisdiction was discussed at great length before the supreme court in **In R vs Karisa Chengo [2017] eKLR** Further, in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR***, held, that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Though the jurisdiction of the supreme court of Kenya is both original and exclusive, care must be taken not to usurp jurisdiction of the lower's courts on electoral disputes. There exists clear demarcation between the disputes to be handled by the Supreme Court and the dispute to be adjudicated by the lowers courts as well as that of IEBC. "

4. The 2013 Raila case between ***Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others [2013] eKLR*** correctly held that:

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.

5. The petitioner submits that the petition herein before this court is timely framed and is within the auspice of the constitutional dictates on the time frames regarding presidential petition as espoused in article 140(1) of the constitution. The results of the presidential election were declared on 10th August 2021 while the petition was filed on 16th of August, 2021.To wit, the petition falls within the constitutional time frame for presidential election petition.

6. To this end we humbly submit that the supreme court of Mbakini has sufficient jurisdiction to adjudicate over presidential election dispute.

D. ADMISSIBILITY OF THE CASE

10. It is our submission that the matter before this court is admissible and rightly presents contentious issues ripe for determination by the honorable court. In essence the matter herein is justiciable. Contention on the presidential election presents justiciable controversies that equally invokes the jurisdiction of this court. Article 163(3) (a) of the constitution sufficiently anchors this petition. Reliance is placed in the case ***of Hon Martin Wambora v Speaker of the county assembly of Embu (2014).*** Mr. Ndovu Kuu allegations that his right freedom of expression has been curtailed falls within the umbrella of this court's jurisdiction. The petition must be pleaded with utmost precision suffice to give notice to the respondent as to what rights have been violated. Reliance is placed in the case of ***Anarita Karimi Njeru V Republic*** **(1979) eKLR**

11. We submit that the petitioner herein is a juridical person with locus standing before the Supreme Court. Article 140(1)(A) provides that a person may file a petition in the supreme court to challenge the election of the president elect within seven days of declaration of results of presidential election. Article 260 of the constitution further defines 'person' to mean a company, association or a body of persons whether incorporated or unincorporated.

12. The petition herein is filled on behalf of persons whose human rights were violated during the general election, however the violations critically touches on the credibility of the general election and specifically the presidential election in controversy. It is our submissions that the applicant herein deserves to be heard before this honorable court.

13. The High court is the court mandated to adjudge matters human rights under article 23(1) as read together with article 165 of the constitution, **however the supreme**

court of Mbwakni while determining the fairness and credibility of a presidential election, cannot blinds its eye to questions of human rights when rightly presented before it.

14. The case of ***Patrick Ouma Onyango & 12 others v Ag & 2 Others (2005)*** discussed at length the doctrine of justiciability where the court endorsed Lawrence H tribe in his treatise American constitutional law that,

"In order for a claim to be justiciable as an article III matter, it must present real and substantial controversy which unequivocally calls for the rights asserted".

15. It is or submission that violation of human rights in the state of Mbwakni are justiciable claims that warrants the invocation of this court's jurisdiction.

E. STATEMENT OF RELEVANT FACTS

MBWAKNI AS A STATE

16. Mbwakni is a sovereign republic and a constitutional democratic state, with an Executive President and a devolved system of government; with 47 counties. It is situated on the Eastern side of Nauwo Continent, bordering Machozi, Taratibu, Vita and Fanaka in the North, South, East and West respectively. Its capital city is Warazi. The GDP of Mbwakni is approximately 95.5 Billion USD. As per the 2019 census, the total population is approximately 8 Million. Mbwakni is also a diverse multi-ethnic society with 48 tribes. Politicization of ethnicity is the primary means of mobilization of elections.

OCCURRENCE OF EVENTS LEADING TO THE SUIT

17. Mbwakni is a member of United Nations; having ratified the International Bill of Rights; and Nauwo Charter, the Nauwo's Court Protocol, Nauwo Charter on Democracy, Elections and Governance, Regional Trading blocs agreements, and United Nations Convention Against Corruption. Its electoral laws were reformed to try finding solutions to the previous electoral malpractices in 2007 and 2017.
18. In March 2019, Waroro, a Country located 7 time zones from Mbwakni reported a strange respiratory condition that was later christened as Wuhan-19. The 1st case of Wuhan-19 was announced in Mbwakni in August 2019 and stringent measures were imposed to prevent massive spread of the disease.
19. Despite the prevalence of Wuhan-19, the pre-election activities were rendered as usual, including setting a cap on the money the candidates could spend on.
20. Consequently, the EBC chairperson affirmed that the Advisory opinion rendered by the Nauwo Court does not supersede Mbwakni's Constitution, and the

elections would proceed as scheduled. On 25th may, 2021, the EBC chairperson, commissioners and the CS for Health held a press conference announcing the commencement of online voters' registration.

21. The Integrated Election Management (IEMS) and Electronic Voter Identification (EVID) system would be used during the elections day. These systems have been lauded in various countries successfully. However, as the systems relied on connectivity and network accessibility, this raised a major challenge with the EBC considering the underdeveloped parts of the country had not developed network services.
22. Meanwhile, during the campaign period, the Office of the Registrar banned Imarisha Dada Political Party which championed for the rights of women and their inclusion in political representation, claiming the party was a hub for miscreants; hence paving an easier way for the incumbent president during campaigns.
23. Mr Omoni Timon is a presidential candidate for the Mapinduzi Revolution Party. He opposed the ruling regime including dispelling the campaign financing regulations. The odds were expected to be in his favor, and it was likely that he could win the presidential bid.
24. In June 2021, Mr. Ndovu Kuu and Omoni Timon had a media fare which led to Mr. Ndovu Kuu's twitter account ban and subsequently, a mass of riots in Warazi.
25. One week before elections, Mr. Mwaminifu disappeared and later found death after assuring the Republic of Mbwakni that the elections would be conducted in a free, fair and transparent manner.
26. On the eve of elections, the Nauwo Elections Observer Mission were concerned about the military deployment to quell elections violence. However, the observers were forced to stay in quarantine for 14 days.

27. On 6th August, the elections day, a high turnout was noted compared to the previous elections. However, in some polling stations, the IEMS kits failed and the voting process was prolonged. Some voters were seen leaving the stations. Two polling stations were moved from the gazette areas to non-gazette areas resulting to 10% of citizens not able to access the polling stations. Additionally, the aged and the disabled would be intimidated and threatened by the presiding officers to vote for a particular candidate.

28. During tallying, agents were barred from accessing the centers even after protesting. The EBC website was not accessible to the citizen of Mbwakni, and those who could access it noted a turnaround of votes within 3 seconds. The incumbent also got similar number of votes in three quarters of the stations which was later contended by the EBC as coincidental.

29. Mr. Timon after being aggrieved by the results, swore himself in and the Mbogi Media Service which broadcasted the whole inauguration process even after being warned, was later shut down as the Government claimed they had committed a treasonous act.

30. The situation caused tension in Warazi City. Mr. Timon supporters demonstrated across the city. Police officers were deployed to quell the situation by using teargas. Later that evening, the police got Intel about several youths that might have hacked the EBC database. A raid was conducted whereby the officers assaulted Mama Amani leading to Baby Amani succumbing to head injury.

F. ISSUES FOR DETERMINATION

31. The issues for determination are;

a) Whether the presidential election was conducted in accordance with the principles laid down in the Constitution of Mbwakni, and the laws relating to elections.

b) Whether the Republic of Mbwakni violated Mr. Ndovu Kuu's freedom of expression by shutting down his social media pages and as well as Mbogi Media Services' freedom of the media.

c) Whether the Government and its agents had breached their constitutional and international obligations with respect to the protection of human rights.

G. SUMMARY OF ARGUMENTS

32. It is the submission of the Petitioner that:

a) The conduct of 2021 Presidential election violated the principles of a free, fair and transparent elections, and, the whole electoral process was flawed and faced with irregularities, contrary the Constitution of Mbwakni and the related laws.

b) It is the contention of the petitioner that the freedom of expression and that of media enshrined by Mr. Ndovu Kuu and Mbogi's Media Services was absolute and the same ought not to have been limited.

c) The petitioner submits that the electioneering period was marred with malpractices that greatly violated human rights.

H. SUBSTATNTIVE ARGUMENTS

A) THE CONDUCT OF THE PRESIDENTIAL ELECTION WAS INCONSISTENT WITH THE PRINCIPLES LAID DOWN IN THE CONSTITUTION OF MBWAKINI, AND THE LAWS RELATING TO ELECTIONS

1.1 Introduction

33. The reforms of the Electoral Act and the establishment of substantive Acts intended to cure the mischief identified during the previous elections. Additionally, the establishment of the Electoral Board Commission herein (EBC) intended to observe free and fair elections pursuant to the principles laid down in the Elections related laws and the Constitution of Mbwakni. The Court of Appeal in ***Independent Electoral and Boundaries Commission & Another v Maina Kiai & 5 Others***,[1] outlined that

    The elections should be held fairly, and transparent pursuant to articles 10, 81 and 86, and all the elections related legislations and …. Bearing in mind the history of elections in Kenya.[3]

34. As the whole Republic of Mbwakini envisioned for a free and fair presidential election, the basic and fundamental principles were violated; especially Article 81 and 86 of the Constitution which advocated for an accurate, verifiable, secure, simple, accountable and transparent elections.

35. **The petitioner avers that the Respondents, therefore, carried out a series of systematic flaws and irregularities,** undermining the foundation that had been set

[1] *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR

[3] *Ibid* supra note 1

out of a free and fair elections and the sovereign will and power of the people of Mbwakini.

36. The petitioner submits the following arguments regarding the legality of the 2021 elections;

1.2 Substantive specific irregularities and improprieties that occurred during the pre-elections period affecting the electoral process.

37. The electoral process was underscored by the Supreme Court in ***Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate*** that the elections are not an event but a process; a continuum. The Supreme Court in the Advisory Opinion acknowledged that;

> *"The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament."*[2]

Capping the amount the candidates could spend on.

38. **It is therefore the submission of the petitioner that the EBC chairperson was obliged to cap the amount of money candidates could spend on, at least, 12 months to the elections, but the same was done 5 months to the election**; inconsistent with Section 18 of the Elections Financing Act and Regulations.[3] Additionally, the expenditure limit was **prohibitive to a class of citizens who would like to seek political positions**.[4]

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[2] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eKLR

[3] Fact Pattern, para. 11

[4] *Ibid*, para. 21

39. The petitioner places their reliance on the United States Supreme Court decision in ***McCutcheon v Federal Election Commission***,[5] where the Court overruled the decision in ***Buckley v Valeo***[6] regarding capping of money candidates could spend on during elections. The then Chief Justice John G. Roberts argued that **capping the elections expenditure is contrary to the individual's right to participate in elections through political expression and association.**

Banning Imarisha Dada Party

40. **It is the humble submission of the petitioner that banning Imarisha Dada Party was contrary to Article 4, 36, 38 and 91 of the Constitution and section 8 and 21 of the Political Parties Act.** The petitioner avers that Mbwakni is a multi-party democratic state,[7] hence having an express invite to anyone who would like to form a political party. Additionally, the banning infringed the freedom of association[8] and the right to form a political party or join one.[9]
41. Furthermore, Imarisha Dada Party was a successful registered party pursuant to Section 8 of the Political Parties Act, and **that means it had met all the requirements stipulated in Article 91 of the Constitution.** Therefore, the Office of the Registrar had to have satisfactory grounds as depicted in Section 21 of the Political Parties Act in order to ban Imarisha Dada Party. It is noteworthy that Imarisha Dada Party only **aimed at empowering women's participation in the elections consistent with article 27 of the Constitution**, and hence the disbanding was only to pave a clear path to the incumbent President[10].

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5 *McCutcheon v Federal Election Commission* [2014] 572 U.S. 185

6 *Buckley v Valeo* [1976] 424 U.S. 1

7 Constitution of Mbwakni (2010), art. 4

8 *Ibid*, art.36

9 *Ibid*, art. 38

10 Fact pattern, para. 20

42. It is therefore the assertion of the petitioner that the preliminary irregularities laid a foundation for the elections incredibility, contrary to the spirit of the republic of Kenya,[11] the sovereignty of the people,[12] and enhancement of the rule of law.[13]

1.3 Irregularities and inefficiency in the process of relaying and transmitting results.

43. **It is the submission of the petitioner that the transmission was flawed and contrary to the principle of transparency**[14] **and the fundamental right of access to information.**[15] Furthermore, the whole process was non-compliant with Section 39 as directed in ***Maina Kiai*** decision that;

> *"The enactment of the amendment is clearly a mileage on the very principle of accuracy, transparency and accountability of election results enshrined in the Constitution, Free and fair election is the process towards electoral democracy and the highway to a democratic state…*[16]*Therefore, this would undermine the possibility of manipulating elections or results, hence creating a hallmark of a democratic society. (Emphasis added)"*

44. The value of transparency was underscored ***in Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others***,[17] where the Supreme Court accentuated transparency as a critical component of elections. The Court emphasized that the Result Transmission System (RTS) is meant to enhance transparency through electronic transmission of provisional results from polling

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[11] Constitution of Mbwakni (2010), preamble
[12] *Ibid*, art 1
[13] *Ibid*, art 10
[14] Constitution of Mbwakni (2010), art. 10
[15] *Ibid*, art. 35
[16] *Ibid* supra note 1
[17] *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others*[2013] eKLR [20]
Ibid supra note 1

stations, **and the same should be visualized and displayed at tally centers and all other stakeholders**.

44. Contrary to the expectations of the citizens of the Republic of Mbwakni, Omoni Timon and Nauwo Election Observer Mission, the relaying and transmission of the results was done contrary to Section 39 (1C) of the Elections Act and as required by Article 86 of the Constitution. The whole process of transmission was not transparent as the **citizens of Mbwakni were limited from accessing the EBC website** and hence there was no monitoring of the counting and the tallying of the elections. As stated by the Court in ***Maina Kiai Case***,[20] the EBC pursuant to Section 39(1C) should facilitate public information, establish mechanisms for the live streaming of results as announced at polling stations, **and the results so streamed should be for the purposes of public information only, and for a declaration by the Commission.**

45. The confirmation of manipulation of the electoral system through hacking the EBC database acquiring personal details of registered voters is clear enough that the EBC had failed in transparently and accurately transmitting and relaying the results. Additionally, it is mysterious how the incumbent gained over half of the votes in a span of three seconds,[18] and a similar number of votes in three quarters of the total polling station across the country.[19]

46. As stated by then Justice Maraga, "The result of an election is therefore affected when the violations of qualitative factors fundamentally undermine the integrity of the electoral process. That is to say, apart from the figures, **the result of an election is affected when the irregularities and malpractices committed render**

[18] Fact pattern, para. 31

[19] *Ibid*, para. 32

the legitimacy or reliability on the numerical result and the sanctity of the ballot questionable."[20]

1.4 Improper influence, undue influence causing tension and misconduct during the electoral process.

48. The petitioner submits that the elections were marred with intimidation and undue influence during the process of voting. Some of the voters, especially those with disability and the aged, who required assistance were heavily intimidated and coerced to vote for a particular candidate against their will.[21] It is the contention of the petitioner that this contravened the rule of law and the principles of conduct of a free and fair election pursuant to Article 81 of the Constitution, and also section 10 of the Elections Offences Act. Similarly, in ***Rtd. Col. Dr. Kiza Besigye v Yoweri Koguta Museveni and Electoral Commission,***[22] **the Court defined free and fair elections to be where, inter alia, the electoral process is free from intimidation, bribery, violence and coercion.**

1.5 Errors in the voting, counting and announcement of results

49. The petitioner contends that the **election was badly conducted and was marred with irregularities during the voting and counting process**. During the voting process, in some polling stations, the IEMS kits failed to work due to the alleged malfunctioning of the kits and the negligence of the staff to charge the kits.[23] As a result, the voting process took longer, and some voters were seen to leave the polling stations.

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[20] *Ibid,* supra note 19

[21] Fact pattern, para. 29

[22] Presidential Election Petition No. 1 of 2001 Kampala law Reports

[23] *Ibid,* supra note 24

50. This is contrary to the political right to vote that every citizen of Mbwakni envisions.[24] As the Elections Act was amended to collaborate the technology system,[25] the amendment kept a consistent eye to the engagement and protection of the right to vote. The High Court in ***National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others***,[26] rightly observed that the eligibility of elections should not be affected by technical hitches. **If the electronic system fails, there should be a fallback system to avoid the entire election falling into shambles.** Additionally, the systems ought to have been tested and verified.[27]
51. Additionally, the Court held that each and every Citizen is entitled to fully exercise their political rights under Article 38 of the Constitution despite the mechanism that the EBC is using in the electoral process.
52. The Petitioner avers moving polling stations from their gazette areas to non-gazetted areas is contrary to Elections (General) Regulations 2012 Rule 7. The Supreme Court in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 Others***,[28] stated that moving of polling stations from their gazetted areas **articulates a motive of rigging the elections, as this does not only affect the turn out of the voters, but also the credibility of tallying the votes**.
53. Furthermore, it is the contention of the petitioner that failure for the agents to be involved in the tallying process was contrary to the principle of transparency. The petitioner relies on the decision of the Ghanaian Supreme Court Case of ***Nana***

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[24] The Constitution of Mbwakni (2010), art 38

[25] Section 44A

[26] *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR

[27] *Ibid*, supra note 28

[28] *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

Addo Dankwa AkufoAddo & 3 Others v John Dramani Mahama & 2 Others,[29] where the Court stated that **involvement of candidates' agents during elections influences the credibility of the elections and enhances transparency**.

54. On the averments raised by the Petitioner, it is our submission that the voting and tallying process was erred, and the irregularities committed significantly affected the results to the extent that a percentage of voters was left out and the transparency pursuant to Article 10, 81 and 86 of the Constitution was not duly enhanced.

55. The petitioner concludes by concurring with the opinion in ***Evans Odhiambo Kidero v Ferdinand Waititu & 4 Others***[30] **where the Court stated that if it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated.**

[29] *Nana Addo Dankwa Akufo Addo Others Vs. John Dramani Mahama Others* [2013] GHASC 5

[30] *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR

B) THE REPUBLIC OF MBWAKNI VIOLATED MR. NDOVU KUU'S FREEDOM OF EXPRESSION BY SHUTTING DOWN HIS SOCIAL MEDIA PAGES AS WELL AS THAT OF MBOGI'S MEDIA SERVICES' FREEDOM OF THE MEDIA

Mr. Ndovu Kuu

56. **Article 33 of the constitution of Mbwakni strongly protects the right to freedom of expression subject to exceptions under article 33(2).** Article 34 protects the freedom of media. The petitioner humbly submits that the republic of Mbwakni violated the freedom of expression of its citizens by denied access to certain websites. Republic of Mbwakni is a democratic state with a democratically elected leadership. The people of Mbwakni have a democratic right to discuss affairs of their government and leadership because of their right to freedom of expression guaranteed by Article 33 of the constitution. Though the freedom of expression may be limited under article 33(2) of the constitution, **there is no justifiable reasons as to why the government would limit access to certain web pages**. Guidance is sought in the Nigerian case of ***Nwankwo Vs The state***[31] where the court emphasized the import of the right to expression in a democracy. The wording of article 33 of the constitution of Mbwakni is crafted in absolute terms that demands the government to facilitate the enjoyment of this freedoms opposed to violation by limiting the access to certain websites and social media accounts of its citizens.

57. Article 24 of the constitution palaces the burden of proof on the person limiting the freedom of expression to justify such limitations. The limitation to any right whatsoever must be justiciable in an open and democratic society. **The petitioner faults the republic of Mbwakni for not showing any cause and justification of the**

[31] [1983] NGR336

limitation of the right to freedom of expression. This was the position in the case of ***R V Oakes***[32] where the court held ***that the limitations is motivated by a pressing and substantial objective and can demonstrably be justified in an open and democratic society***.it is therefore crystal clear that the republic of Mbwakni deliberately violated Mr Ndovu Kuu right to freedom of expression.

Mbogi's Media Services

58. The petitioner also submits that threatening of **Mbogi's Media Services' violates** the freedom of expression as well as the freedom of the media. **This is in breach of article 9 of the Nauwo charter of human and people's rights on the individual right to receive information**. **That every individual has a right to express his opinion within the** law. We contend that there was no expression of information that warrant the invocation of article 33(2) of the constitution of Mbwakni. Article 19 of the international convention on civil and political rights provides that every individual shall have the right to hold information without interference.
59. The freedom of expression remains a fundamental tenet of democracy. This was thrusted in the case **of Edmonton journal Vs Alberta**[33], where the Supreme Court of Canada (Corey J), underlined the importance of freedom of expression when it states that; ***it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.***
60. In essence, unless the people are allowed to freely air their opinion through the acceptable means without infringing on the rights and the reputations of others,

[32] R v Oakes (1986) 1 SCR 103,1986 canLII 46 at para 69-70
[33] {1989} 45 CRR 1

democracy would never mature. In another case of ***Rangrajam vs. Jigjiram*** it was stated **that in a democratic society it is not necessary that everyone should sing the same song.**

61. The government of Mbwakni cannot sing the same song with Mr Ndovu Kuu and Mr Timon, therefore the government should have been tolerant and let the citizens air their opinion without interference by limiting access to websites and limitations of Mbogi media services.
62. The petitioner respectfully submits that Article 20(2) of the constitution of Mbwakni stresses that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. People have the right to exercise the right to freedom of expression to the greatest extent, subject only, to the limitation of that right under Article 33 (2)[34] or any other provision in the constitution.[35] Enjoyment of human rights and fundamental freedom is the hallmark of peace and co-existence of the nation.

[34] Constitution of Mbwakni (2010), art 34

[35] *Robert Alai v The Hon Attorney General & another* [2017] eKLR

C) THE STATE OF MBWAKNI AND ITS AGENTS BREACHED THEIR CONSTITUTIONAL AND INTERNATIONAL OBLIGATION WITH RESPECT TO PROTECTION OF HUMAN RIGHTS

63. Under article 2(5), (6)[36] of the constitution of Mbwakni general rules of international rules shall form part of the laws of Mbwakni, also any treaty or convention ratified by Mbwakni forms part of the laws of Mbwakni. At the regional level the republic of Mbwakni have ratified the Nauwo charter on human and people's rights, further is has ratified the Nauwo charter on democracy, election and governance (NCDEG).
64. The sum purpose of all these international instruments is the respect and protection of fundamental human right**. The principle of performance of the treaties in good faith further obliges the state to strictly comply with their obligation under the conventions on human rights.** It is well anchored that the republic of Mbwakni subscribe to international human rights and therefore, pledges to protect and uphold human rights.
65. The rights of political freedom, right to life, freedom from inhuman and degrading treatment, due process and equal protection are among the minimal rights that the world has come to demand of any society**. *These rights are implicit in the concept of ordered liberty*** [37]. We humbly submit that the state of Mbwakni breached it constitutional and international obligation to respect and promote human rights. **Pre-election, during and post-election of the republic of Mbwakni was marred with great violation of human rights**. By limiting the access to various websites and social media platforms during elections, the state of Mbwakni violated the right to freedom of medial and the right to speech as enunciated in the constitution of

[36] Constitution of Mbwakni (2010), art 2
[37] *Palko v Connecticut* [1937] 302 US 319

Mbwakni under article 34[38] and 33 respectively. Freedom of expression is a fundamental human right and a pillar of democracy. Article 13 of the Nauwo charter on human and people's rights entrenches that every individual shall be entitled to enjoyment of human rights and freedom recognized and guaranteed in the charter without distinction of any kind.

66. By subscribing to NCDEG, the state of Mbwakni is obliged to promote democracy and proper governance. Article 3(1) of the NCDEG states that parties shall implement the charter in accordance with for human rights and democratic principles.

67. Further article 4(1) commit sates to promote democracy, principles of law and human rights. Given the robust bills of rights under chapter 4 of the constitution of Mbwakni, the state is obliged to ensure respect and promotion of human rights. **The constitution places the right of expression as the central theme of our constitutional order**. Specifically, article 20 (1) entrenches that bill of rights binds all state organs and all persons.

68. The EBC, an independent commission, has the mandate to ensure that the conduct of the election respects the fundamental human rights of the citizens of Mbwakni.it is our submissions that the right to freedom of expression under article 33 of the constitution does not extend to inflammatory statements whose premise is to create hatred among the people. The state of Mbwakni have failed to stop hate speech among the political class.

67. It is the petitioner's submissions that the state of Mbwakni breached its obligation to protect its citizens from extra-judicial killings. **The gruesome murder of Mr.**

[38] Constitution of Mbwakni, art *34*

Mwaminifu and the death of Baby Amani was the hallmark of extrajudicial killings. It exhibits a failed state that doesn't respect the right to life, a fundamental right under article 26 of the constitution. Article 6 of the ICCPR guarantees the right to life due for protection under the law.

68. It is a matter of public notoriety that there was the 2007 post-election violence that turned many of the citizens into IDPs. This court cannot blind its eye to intimidations from the military forces who are used irregularly to influence the conduct of the election.

69. Reliance is placed on ***petition 383 of 2017***[39] where the high court have long held that,

"the effective investigation of extrajudicial killings and enforced disappearance is inseparable and integral part of a state duty to protect the right to life and that where there is a pattern of extra judicial killings, any failure to conduct effective investigations results in and encourages an environment of impunity which promotes further extra judicial killings and systemic violation of human rights."

70. We humbly submit that the use of military forces to cause fear and intimidation among the citizens is against democracy and universally recognized principles of human rights and governance. This goes against the spirit of free and fair election under article 38 and 82 of the constitution.

71. Moreover Article 54 of the constitution provides for the rights of persons living with disabilities, that they have a right to be treated with dignity, respect and to be addressed and be referred in a manner that is not demeaning. In the south African case ***S V makwanyane*** O'Regan J ***pointed out that` without dignity, human life is substantially diminished*** ,The petitioner humbly submits that issuing threats and

[39] Petition 383 of 2017

intimidations to persons with disabilities and the senior members of the society in order for them to vote for certain persons violates their human dignity and their right to freely make their political choices under article 38 of the constitution.

I. PRAYERS

72. In light of the arguments embodied above, it is the petitioner's submission that the Court adjudges that;

a) The conduct of the 2021 presidential election was inconsistent with the Constitution, the Elections Act, the Regulations thereunder, and all other relevant provision of law.

b) The Republic of Mbwakni violated Mr. Ndovu Kuu's freedom of expression by shutting his social media pages and as well as Mbogi Media Services' freedom of media.

c) The Government and its agents breached their constitutional and international obligations with respect to protection of human rights.