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……1ST PETITIONER

Versus

ELECTORAL BOARD COMMISSION……1ST RESPONDENT

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 RESPONDENTS

{**WORD COUNT: 3989 (Beginning from Jurisdiction)**}

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A. LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
CS	Cabinet Secretary
EBC	Electoral Board Commission
DCI	Directorate of Criminal Investigation
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEMS	Integrated Election Management System
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. *McCutcheon v Federal Election Commission* [2014] 572 U.S. 185
3. *R v Oakes* [1986] 1 SCR 103

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. *Free Legal Assistance Group & Others v Zaire* [1995] ACHPR Comm. No. 25/89, 47/90, 56/91, 100/93
2. *In the Matter of A Request By the Pan-African Lawyers Union (PALU) for an Advisory Opinion on the Guarantees for the Effective Protection of the Right to Participate in Government in Africa in the Context of the Covid -19 Pandemic and Crisis* [2021] Advisory Opinion No. 001 of 2020
3. *Islamic Unity Convention v Independent Broadcasting Authority* [2002] (4) SA 294

V) MBWAKNI DOMESTIC LAWS

1. The Constitution of Mbwakni, 2010.
2. The Supreme Court Act, No. 7 of 2011
3. The Supreme Court Rules, L.N. No. 6 of 2020
4. The Elections Act, No. 24 of 2011
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6. The Election Offences Act, No. 37 of 2016
7. Election Campaign Financing Act, No. 42 of 2013
8. Data Protection Act, No. 24 of 2019 9. Political Parties Act, No. 11 of 2011

VI) MBWAKNI DOMESTIC CASES

1. *Alfred Njau & 5 others v City Council of Nairobi[*1983] eKLR
2. *Anarita Karimi Njeru V republic* [1979] eKLR
3. *EG v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR*
4. *Free Legal Assistance Group & Others v Zaire* [1995] ACHPR Comm. No. 25/89, 47/90, 56/91, 100/93
5. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR
6. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*
7. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR
8. *John Githongo & 2 Others v Harun Mwau & 4 Others* [2012] eKLR
9. *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR
10. *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR
11. *Norah Kwamboka suing as legal administrator of the estate of Elijah Mangaa v Sospeter*

Kimutai & another (Civil Suit No. 723 of 2017 *(Unreported)*)

12. *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others* [2018] eKLR
13. *Owners of the Motor Vessel ,Lillian S` v Caltex Oil (Kenya) Ltd* [1989] eKLR
14. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR
15. *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 Others* [2013] eKLR
16. *Republic v The Independent Electoral and Boundaries Commission Ex parte Charles Ondari Chebet* [2013] 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 respondent contends that this Honorable Court does not have jurisdiction to adjudicate over issue B and C canvassed by the petitioner**. It is well recognized in our law that a Court of law shall down its tools in respect of a matter before it, the moment it holds that it lacks jurisdiction as observed by Nyarangi J in ***Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd***.[1] The Respondent, therefore, avers that **this court is a court of last instance** and therefore the Petitioner may not approach it as a court of first instance.

2. In the foregoing, with respect to the violation of Mr. Ndovu Kuu's freedom of expression, the Respondent submits that the High Court has reserved its jurisdiction under Article 165 (3)(b) to determine issues in regards to human rights violations, denial or infringement. Additionally, whether the Government and its agents breached their constitutional and international obligations is a matter to be adjudged by the High Court pursuant to Article 23 of the Constitution. The Respondent, therefore avers that **this Court will only have jurisdiction to determine issues C and D if they will be of appellate nature pursuant to Article 163 (3)(b).** On reliance in the case of ***John Githongo and 2 others v Haron Mwau and 4 others***, where the Court was faced with a contentious question regarding its jurisdiction, the Court concluded the following;

[1] *Owners of the Motor Vessel ,Lillian S` v Caltex Oil (Kenya) Ltd* [1989] eKLR

"The collective effect of these provisions is that the Constitution and Bill of Rights must permeate all proceedings before the court and the High Court, which is imbued with jurisdiction under Article 165, has the ability to deal with any matters of the Constitution and the Bill of Rights that arise before it. I must emphasize that there is only one High Court whose jurisdiction is to give effect to the provisions of the Constitution and in particular the bill of Rights in all cases at all times."[2]

3. The Respondent concludes by relying on ***S.K. Macharia v KCB and 2 others***,[3] where the Court averred that **jurisdiction of Courts flow from the Constitution** and other written law which in the instant case, issues C and D should be adjudged by the High Court and the Supreme Court does not have that jurisdiction.

4. Without prejudice and in the unlikely event that this Honorable Court finds that it has jurisdiction, the respondent submits on the merits of the case below as follows.

D) ADMISIBILITY

5. The Respondents submit that this case is not admissible before this Court. The Respondents rely on Article 163 (3)(b) and on ***Free Legal Assistance Group & Others v Zaire***[4] that **this Honorable Court just like the African Court should not be a Court of first instance but a Court of last resort, after all other channels have been exhausted**. With respect to the government and its agents breaching their

[2] *John Githongo & 2 Others v Harun Mwau & 4 Others* [2012] eKLR

[3] *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012]* eKLR

[4] *Free Legal Assistance Group & Others v Zaire* [1995] ACHPR Comm. No. 25/89, 47/90, 56/91, 100/93

constitutional and international obligations, the matter is not admissible in Court as it should have been adjudged in High Court contrary to Article 23 and 165 (3) of the Constitution. **The matter would have only been admissible if all other channels were exhausted, that is, the petition should have been appellate in nature**. With respect to violation of Ndovu Kuu's freedom of expression, the shutting of his social media pages occurred **during the pre-election period, and all pre-election disputes should be settled before elections**. This was clearly elaborated in ***Republic v The Independent Electoral and Boundaries Commission Ex parte Charles Ondari Chebet***,[5] where the Court took the view that **pre-election disputes should be determined before the elections** due to the limited time frames created for the resolution of such disputes and where this is not done, the aggrieved person had to live with the choices.

6. **Further, the Petitioner does not have the locus standi to instigate the current case as the Petitioner filed this case on behalf of the human rights violations victims, and not majorly the presidential elections dispute which is the only matter that should be adjudged by this Honorable Court**. The petitioner during the aftermath of presidential elections was not interested in the legality of the elections, and hence does not have sufficient interest in the matter that should be adjudicated in this Court. In ***Law Society of Kenya v Commissioner of Lands & Others***,[6] the Court held that;

"Locus Standi signifies a right to be heard. A person should therefore have sufficient interest to sustain his standing to sue in Court of Law."

[5] *Republic v The Independent Electoral and Boundaries Commission Ex parte Charles Ondari Chebet* [2013] eKLR
[6] *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR

7. Further, in the case of ***Alfred Njau & Others v City Council of Nairobi***,[7] the Court also held that;

"The term Locus Standi means a right to appear in Court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings."

8. Therefore, the Respondent avers that it is evident that locus standi is the right to appear and be heard in Court or other proceedings and literally it means 'a place of standing'. **If a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to**. It is further evident that if this Court finds that the Petitioner has no locus standi, then the petitioner cannot be heard and that point alone **may dispose of this suit.**

[7] *Alfred Njau & 5 others v City Council of Nairobi*[1983] eKLR

E. SUMMARY OF RELEVANT FACTS

MBWAKNI AS A STATE

9. 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

10. 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.

11. 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.

12. 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.

13. Consequently, the EBC chairperson affirmed that the Advisory opinion rendered by 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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 gazetted areas to non-gazetted 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.

21. 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.

22. 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.

23. 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

24. 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

25. It is the submission of the respondents that:

a) **The conduct of 2021 Presidential election was consistent with the principles** adhered in a free, fair and transparent elections; during the whole electoral process as depicted in the Constitution of Mbwakni and the related electoral laws.

b) **The Republic of Mbwakini did not violate Mr. Ndovu Kuu's freedom of expression** nor that of Mbogi's Media Services as the freedom of expression as articulated under Article 33 of the Constitution is not absolute, and can be limited.

c) It is the contention of the respondents that the **human rights and freedoms enshrined in the Constitution and the International Bill of Rights were taken into consideration during the elections period**, and the government and its agents acted duly in accordance with their obligations to protect, promote, and respect human rights

H. SUBSTANTIVE ARGUMENTS

A) THE PRESIDENTIAL ELECTION WAS CONDUCTED IN ACCORDANCE WITH THE PRINCIPLES LAID DOWN IN THE CONSTITUTION OF MBWAKNI AND THE LAWS RELATING TO ELECTIONS

1.1 Introduction

26. It is the contention of the respondent that before the 2021 Presidential Elections were conducted, several reforms were made to the electoral related legislations. This was due to the potential challenges faced during the previous elections. The reforms were to make sure that there would be no irregularities in the upcoming general elections. The respondents, especially the Electoral Board Commission embraced the reforms and gave a statement that they would act in accordance with the principles of the Constitution and the relevant legislations.[8] The respondents relying on the Supreme Court observations in ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission***, [9]where the Court commented that, ‘**these changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the Constitution and the electoral jurisprudence that had been developed by courts**‘, submits that, as they assured Kenyans, **the elections were conducted accordingly**.

27. It is therefore the respondents’ case that the **presidential election was conducted in accordance** with the Constitution, the EBC Act, the Elections Act, the Regulations

[8] Fact pattern, para. 17

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

thereunder, and all other relevant provision of law. Further, that **the presidential election process was backed by an elaborate electoral management system** supported by various electoral laws, which included several layers of safeguards to ensure an open, transparent, participatory and accountable system so as to guarantee free and fair elections pursuant to Articles 81 and 86 of the Constitution.

28. In addition, EBC submits that it had put in **place a strategic plan setting out key priorities for strengthening electoral systems and processes in Kenya**. It also had a two year election operation plan as a roadmap towards free, fair and credible 2021 election. [10] The EBC contends that the presidential election was conducted in accordance with the Constitution and the people's sovereign will in Article 1 thereof was duly realized.

29. As an election is a process as stated in ***Advisory Opinion No. 2***,[11] **all the stages and processes were adhered to, and conducted according to the principles laid down in the Constitution and related electoral laws.**

30. The Respondents submit the following arguments dismissing the petitioners' contention that the elections were conducted contrary to the principles laid down in the Constitution and electoral related laws;

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

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

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

31. The Respondents submit that there were no preliminary irregularities or improprieties that subsequently affected the electoral process. It is the contention of the respondents that all the activities conducted during the pre-election period were consistent to the Constitution of Mbwakni and other related laws.

Capping the amount of money candidates could spend on.

32. Regarding the averment that capping the amount of money candidates could spend on, the EBC submits that **it is authorized by Section 18 of the Elections Financing Act and Regulations** to cap the amount the candidates could spend on, and the source of that money.[12] In ***Buckley v Valeo***,[13] the United States Supreme Court held that capping the expenditures and contributions is a **way of curbing corruption, bribery and malpractices during elections**. It is noteworthy that in ***MCCutcheon v Federal Election Commission***,[14] the Supreme Court while overruling the decision in Buckley ruled that there is **need to place a cap on the contributions.** That is the key to free and fair elections.

[12] Elections Financing Act, Sec. 18

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

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

Banning of Imarisha Dada Party.

33. The Respondents regarding the banning of Imarisha Dada Party submit that the Ministry of National Government and Interior Coordination had the authority to **ban any association that may lead to massive breach of peace nationwide**. As the Respondents advocated for peaceful elections, and progressive elections, free from violence, the office of the Registrar ought to have banned the political party.

34. The Respondents place their reliance on ***Eric Gitari v Non-Governmental Organizations Co-ordination Board & 4 Others***,[15] where the High Court stated that the freedom of association can be **limited but at a narrow and specific circumstances**. The respondents therefore avers that breach of peace and national security causing violence can be interpreted as special circumstances, hence the banning of Imarisha Dada Party.

35. It is therefore the averment of the respondents that there was no existence of preliminary irregularities, and as contended, the pre-election activities were conducted consistent with the Constitution of Mbwakni and the related laws.

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

36. The respondents submit before this Honorable Court that the results transmission system relied by the EBC **was effective** and has been lauded by many countries, especially the first-world countries as it does not allow transmission of results with figures more that the number of registered voters at any polling station, hence

[15] *EG v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR

preventing any attempt to manipulate poll results.[16] It is the contention of the Respondents that the **process was 'simple, accurate, verifiable, secure, accountable, transparent, open and prompt'** and that it complied with the Constitution, section 39 1 (C) of the Elections Act and the ***Maina Kiai*** decision.[17]

37. It is the averment of the petitioner that during the tallying of the votes, the EBC system was only accessible to only those using Virtual Private Networks (VPN) and the whole relaying and transmission of the tallied votes was not transparent. The respondents relies on section 31(2)(d) of the Data Protection Act where the **data controllers can enforce security measures and mechanisms envisaged to ensure the protection of data taking into account the rights and legitimate interests of the data concerned and addressing the risks and the safeguards.** Open access to the EBC database would have undraped the data, exposing it to hackers and jades.

38. Additionally, the 1st respondent through a press statement contended that similar votes in three quarters of the total polling stations was purely coincidental and they reflected the will of the voters.[18]

39. The election results dissemination and impartation was transparent, secure and accurate pursuant to Article 81 and 86 of the Constitution, and section 39 of the Elections Act.

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[16] *Election Administration Reports* (Plus Publications, Incorporated 1994). Pg. 6

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

[18] Factual pattern, para. 32

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

40. The 1st and 3rd respondent contend that at no particular time during the electoral process **did they or their agents intimidate or threaten the voters to vote for a particular candidate**. As alleged by the petitioner, the respondents aver that if the presiding officers intimidated and threatened the voters, **they acted on their own will and hence the respondents are not liable.**[19] The respondents relies on ***Norah Kwamboka suing as legal administrator of the estate of Elijah Mangaa v Sospeter Kimutai & Another***,[20] the Court stated that **third party liability exempts the defendant from liability**, and the defendant is only liable for damages up until the point when the third party become the real cause of the loss or damage. Furthermore, in ***Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission & 4 Others***,[21] the Supreme Court stated that the threshold of proof **should in principle be above the balance of probability though not as high as beyond reasonable doubt**. Therefore, the petitioner need to have proved that the respondents or their agents actually intimidated and threatened the voters.

41. Additionally, the **contents of threat and intimidation remains vague**, and does not meet the threshold pursuant to section 10 and 11 of the Elections Offences Act. In ***Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others***,[22] the

[19] Fact Pattern, para. 29

[20] Civil suit 723 of 2017 (*unreported*)

[21] Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others[2013] eKLR

[22] *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others* [2018] eKLR

appellate court ruled that the threshold must be substantively met; that is, must not only affect the voting, but also the final results.

1.5 Errors in the voting, tallying and announcement of Results

42. It is the humble submission of the respondents that the **voting method used was simple, systematic and systemic, accurate verifiable, secure, accountable and transparent** pursuant to Article 81 and 86 of the Constitution and relevant electoral laws. The respondents contend that on 6th August 2021, the Republic of Mbwakni turned out in large numbers compared to the preceding elections, and despite system failure in some parts of the country, the voters had an opportunity to exercise their political vote after enduring long hours on queues.[23] As stated in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another***, ,No election is perfect and technology is not perfect either. A back-up system should be created once technology system fails.'[24]

43. The petitioner and the High Court ruling in ***National Super Alliance (NASA) Kenya v. The Independent Electoral and Boundaries Commission & 2 Others***[24] also averred the significance of a complimentary system. It is therefore the contention of the 1st respondent that the voting was concluded successfully despite challenges faced, **and as there is no evidence contending that a complimentary system was not introduced**

[23] Fact pattern, para 29 [24]
Ibid, supra note 9
[24] *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR

during the technology hitches,[25] **the respondents conjecture that successful completion of the voting process was boosted by a complimentary system**.

44. The respondent avers that barring the polling agents from accessing the tallying centers was did not affect the tallying of the votes, and subsequently the announcement of the results. The polling agents were present during the elections overseeing the conduct of the poll, installation of the ballot boxes all the way to the casting and till they were sealed and collected to the tallying center. Additionally, **debar from the tallying center was to ensure the tallying was conducted peacefully without any violent or non-violent intervention of the agents as it had been evident in the previous elections**.

45. In a nutshell, the respondents urge the Court to find that EBC conducted a free, fair and credible election in which the 3rd respondent garnered 7,166,162 votes and the 1st interested party garnered 1,081,459 votes.[26] The respondents conclude by citing ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 others***, where the Court stated;

> "**If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities**.`[27]

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[25] *Ibid*, supra note 23

[26] Fact pattern, para. 32

[27] *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR

B) THE REPUBLIC OF MBWAKNI DID NOT VIOLATE 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 MEDIA.

46. The respondent submits that **article 33 of the constitution of Mbwakni does not provide an absolute right but is limited under article 33(2).** Mr Ndovu Kuu has not demonstrated how his right of expression have been violated by the state of Mbwakni. The ***Anarita Karimi Njeru V republic*** long held that the petitioner must plead his case with petition and demonstrable ground that is sufficient to give notice to the respondent on which law has been infringed and in what manner.it is our submission there is no evidence to show any violation of the right to freedom of expression.

47. The limitation of access to certain websites does not violate the freedom of expression in totality. There are other means to which the freedom of expression can be enjoyed. Article 33 does not give the freedom to act in whatever manner he/she likes while exercising his freedom of expression. Where there is likelihood of propagation of way or incitement, the government is bound to limit the right to freedom of expression. **During the electioneering period, the government tends to overreach itself for the sake of the peace of the nation**. The government strikes a balance between the individual rights and in this case Mr Ndovu Kuu rights and the rights of the general public.

48. Article 33(3) of the constitution of Mbwakni propounds that; in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. The Mbogi media should therefore have warned themselves before broadcasting the swearing in ceremony of Mr Omoni Timon's such acts are

treasonous and may at times Constitutes ethnic incitement, vilification of others, or incitement to cause harm. The respondent therefore humbly submits **that there was no violation of Mr Ndovu Kuu right of freedom of expression** as there was a constitutionally sound reasons to limit the access to websites and limitations on Mbogi media services.

49. The ***R vs. Oakes*** case sufficiently addresses the point on the need to prove that the limitation is reasonable and justifiable in the following words;

"The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee.[28] The respondent therefore humbly submits that there is a clear justification that the limitation of the access to websites and Mbogi media services was in the best interest of the peace and stability of the nation. That the limitation of the right to freedom of expression is well founded under article 33(2) and 33(3)[29] of the constitution of Mbwakni

[28] *R v Oakes* [1986] 1 SCR 103

[29] Constitution of Mbwakni (2010), art 33

C) THE GOVERNMENT AND ITS AGENTS DID NOT BREACH THEIR CONSTITUTIONAL AND INTERNATIONAL OBLIGATIONS WITH RESPECT TO PROTECTION OF HUMAN RIGHTS

50. 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. This is capture in article 2(5), (6) of the constitution of Mbwakini is undisputable fact that the state of Mbwakini is a member of UN and has ratified various international conventions on human rights. The respondent humbly submits that indeed the state is under and obligation to respect human rights of its citizens, however at time of crisis like electioneering period, the state tends to overstretch itself and at times overstep on its mandate.

51. The rights enshrined in various international instruments and the constitution of Mbwakni are not absolute, they can be limited by the constitution itself. When a constitutional right is infringed, it is important **to determine whether such infringement is justified under article 24 of the constitution** which provides that rights under the bill of rights can only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic based on human dignity equality and freedom taking into account relevant factors including - the nature of the right, the importance of the purpose of limitation, the nature and extent of imitation, the relation between limitation and the purpose and less restrictive means to achieve the purpose. **Louis Henkin** wrote in The Age of Rights that:

"Individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary''

52. The respondent humbly submits that the EBC conducted the election in accordance with the constitution and all applicable electoral laws of the state of Mbwakni. **The conduct of the election is measured cumulatively taking into consideration, respect to human rights, the conduct of election cannot be perfect.**

53. Every person has a right to be heard under article 47 of the constitution. It follows that unless thorough investigations are done to establish the persons who gruesomely killed Mr Mwaminifu, the state would be condemned unheard. This would be a gross violation of the rule of law; a tenet of natural justice. We humbly submit that the state of Mbwakni did not breach its constitutional and international obligations under human rights. On the allegations that uniformed police officers were caught on a CCTV camera, stopping Mr. Mwaminifu car, **no evidence has been tendered to ascertain whether they were indeed police officers or they were criminal gang.**

54. The petitioner submits that the sole purpose of deploying military forces was to quell electoral violence that could, by any chance arise. It was never intended to intimidate the citizens nor to cause any fear but to bring peace and stability geared towards enabling a free and fair election. On the issue whether the government of Mbwakni breached their obligation to safeguard the freedom of the media, the broadcasting Mr Omoni Timon's treasonous act was anchored under article 34(1) as read with article 33(2) of the constitution of Mbwakni. The republic of Mbwakni has a

constitutional means of resolving presidential election dispute under article 140 of the constitution. **Mr Omoni Timon's act of swearing himself as the people's president posed great danger to the peace of the nation as well as causing incitement and division among the people**. That the state of Mbwakni never violated the right of freedom of media.

55. **The petitioner submits that the right to freedom of assembly, demonstration, picketing and petition under article 37 of the constitution of Mbwakni does not extend to violence, destruction of property, harassment of other citizens and breaching of peace of the city of Warazi.** We humbly submit that the right under article 37[30] need to be exercised in peace and with due respect to the rights of other citizens. The state never breached its duty to facilitate the right under article 37 and that the manner in which Mr Omoni Timon's supporters' sough to enjoy the said right was tantamount to the peace of the nation and that the deployment of the police was legally anchored in law.

[30] Constitution of Mbwakni (2010), art 37

I. PRAYERS

56. In light of the averments posed above, it is our humble submission that the court finds that;

a) The presidential election was conducted in accordance with the Constitution, the EBC Act, the Elections Act, the Regulations thereunder, and all other relevant provision of law.

b) The Republic of Mbwakni did not violate Mr. Ndovu Kuu's freedom of expression by shutting his social media pages and as well as Mbogi Media Services' freedom of the media

c) The Government and its agents did not breach Constitutional and international obligations with respect to protection of human rights.