REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E757/2025

OKIYA OMTATAH OKOITI VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

JUDGMENT

BEFORE HON. MR. JUSTICE GREGORY MUTAI

Introduction

1. This judgment disposes of Petition No. E757 of 2025, filed on 19th November 2025 by Okiya Omtatah Okoiti, and Petition No. E753 of 2025, filed on 17th November 2025 by Stephen Kalonzo Musyoka, Rigathi Gachagua, Fred Matiang'i, Eugene Wamalwa, Franklin Mithika Linturi and Justin Muturi, as principals of the United Opposition Coalition. Both petitions seek to impugn the constitutionality of Section 39 of the Elections Act, 2011; Regulation 83 of the Elections (General) Regulations, 2012; and the institution and practice of the National Tallying Centre as presently operated by the 1st Respondent, the Independent Electoral and Boundaries Commission (hereafter "the IEBC").

2. Although framed with different emphases, both Petitions rest on a common constitutional proposition that Articles 86(b) and (c) and 138(2) and (3)(c) of the Constitution of Kenya, 2010, vest finality in the results of a presidential election as declared by the Returning Officer, and that any process at the county or national level that purports to "confirm", "verify", "re-tally" or otherwise revisit those results, as opposed to merely aggregating them, is inconsistent with the Constitution. Petition E753 of 2025 raises, in addition, discrete claims regarding ballot reconciliation, the gazettement timelines for polling stations and the voters' register, and an alleged violation of the equality guarantee in Article 27 of the Constitution of Kenya, 2010.

3. By consent of the parties recorded at the case-management stage, and pursuant to Article 165(4) of the Constitution of Kenya, 2010 and Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Mutunga Rules"), the two Petitions raising substantially the same constitutional questions and directed against overlapping respondents were consolidated, with Petition No. E757 of 2025 as the lead file. The Court admitted Katiba Institute as an Interested Party because of its established standing in public-interest litigation in electoral and constitutional matters in Kenya.

4. The Petition was opposed through the Replying Affidavit of the 1st and 2nd Respondents, sworn by Mr Erastus Edung Ethekon, the chairperson of the 1st Respondent, on 11th March 2026; the Replying Affidavit of Mr Samuel Njoroge, CBS, the Clerk of the National Assembly, deponed to on

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3rd February 2026; the Replying Affidavit of Mr Jeremiah Nyegenye, CBS, the Clerk of the Senate and the Secretary of the Parliamentary Service Commissions, deponed to on 26th March 2026; and the Grounds of Opposition of the 5th Respondent, dated 10th December 2025.

The Petitioners' Case

5. The 1st Petitioner contends that Article 138(3)(c) of the Constitution of Kenya, 2010, properly construed together with Articles 86(b) and (c) of the Constitution of Kenya, 2010, renders the Constituency Returning Officer's declaration of results final for that constituency. He submits that the role reserved for the 2nd Respondent under Article 138(10) of the Constitution of Kenya, 2010, is purely ministerial and arithmetical and does not extend to "tallying and verifying" in any sense that permits re-examination of the count.

6. On this basis, the Petitioners seek declarations that:

a) A declaration that the establishment and operation of the National Tallying Centre for the purpose of tallying, verifying, or in any way re-tallying presidential election results after their announcement by the respective Constituency Returning Officers is unconstitutional, null and void, as contravening Article 86(b) and (c), read together with Article 138(2) and (3)(c) of the Constitution of Kenya,2010 which establish the constituency as the primary and final locus for the tallying, verification and declaration of presidential election results, whose outcomes are final and binding for the purposes of collation by the Chairperson of the Independent Electoral and Boundaries Commission under Article 138(10);

b) A declaration that Section 39 of the Elections Act, 2011, is unconstitutional to the extent that it purports to supersede Article 86(b) and (c), read with Article 138(2) and (3)(c) of the Constitution, by introducing multiple layers of verification of results already declared by the constituency returning officer, thereby subjecting the results to further verification at other levels;

c)A declaration that the County Returning Officer does not possess the authority to alter, re-tally, or further verify results declared at the constituency level, but may only collate and declare the results;

d)A declaration that the Chairperson of the Independent Electoral and Boundaries Commission does not possess the authority to alter, re-tally, or further verify results declared at the constituency level, but is only authorised to collate and declare the results in accordance with Article 138(10) of the Constitution;

e) A declaration that the online publication of election results on the IEBC portal, as required under Section 39(1C) and (1G) of the Elections Act, does not satisfy the constitutional requirement of accessibility of election results to all citizens under Article 35 of the Constitution, and that such results should also be made accessible through public notice boards or other accessible means at the constituency level, including the media;

f) An Order that the results as announced at each constituency shall be immediately published in the public domain upon declaration, and that the media, political parties, and any other interested parties shall be free to disseminate these results as and when they are announced, in accordance with the right to access information under Article 35 of the Constitution;

g) A declaration that Regulation 83(2) of the Elections (General) Regulations, 2012 is unconstitutional to the extent that it purports to vest in the IEBC Chairperson the power to tally and verify results received at the national tallying centre;

h) A declaration that the IEBC Chairperson, in performing duties under Article 138(10) of the Constitution, is limited to the ministerial task of collating the results as announced at the constituency level, without altering or re-verifying the results;

i) A declaration that the IEBC Chairperson only has authority to collate constituency results and declare the winner, and not the power to re-tally or verify polling station results and announce the outcome;

j) A declaration that, even if the task of collating results involves other members of the IEBC, the task remains the same; a simple collation and confirmation of the arithmetic to determine whether the winning candidate meets the threshold under Article 138(4) of the Constitution, which mandates that a candidate must obtain more than 50% of the votes cast nationwide and at least 25% of the

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votes in at least 24 counties.
k) An Order quashing
(i) Section 39 of the Elections Act, 2011;
(ii) Section 39(1C) and (1G) of the Elections Act, 2011;
(iii) Regulation 83(2) of the Elections (General) Regulations (Legal Notice 128 of 2012);
(l)An Order awarding costs of the Petition to the Petitioner
7. The Petitioners in Petition E753 of 2025 adopted the 1st Petitioner's position on the finality of constituency-level declarations. They advanced three additional and distinct strands of claim. First, that the 1st Respondent's failure to mandate a documented reconciliation of issued, used, spoilt and unaccounted-for ballots at each polling station prior to transmission of results violates the "accurate" and "verifiable" standard in Article 86(b) of the Constitution of Kenya,2010. Secondly, that polling-station locations ought to be gazetted at least six months, and the final voters' register at least three months, before a general election, citing a pattern of late publication in the 2013, 2017 and 2022 election cycles said to have infringed Articles 10 and 47 of the Constitution of Kenya,2010. Thirdly, subjecting only the presidential results to a national-level "re-verification" process at the National Tallying Centre is an arbitrary differentiation without rational justification, contrary to the right to equality enshrined under Article 27 of the Constitution of Kenya, 2010.
8. The Petitioners in Petition E753 of 2025 seek declaratory relief materially overlapping with that sought in Petition E757 of 2025 on the constitutionality of Section 39 of the Constitution of Kenya, 2010 and Regulation 83(2), together with an order in the nature of mandamus compelling the 1st Respondent to design and gazette a ballot-reconciliation framework and specific minimum gazettement timelines, and a declaration that the differentiated treatment of presidential results violates Article 27 of the Constitution of Kenya,2010.
The Responses
9. In the Replying Affidavit sworn on 11th March 2026 by its Chairperson, the 1st Respondent denied that the National Tallying Centre engages in any unlawful "parallel verification." The deponent characterized the 1st Respondent's role at the National Tallying Centre as one of confirmation only; namely, confirming that the declared winner had met the Article 138(4) of the Constitution of Kenya threshold of more than 50% of the votes cast nationally and at least 25% of the votes cast in more than half of the counties without altering the constituency-level figures. He deposed that this position was conclusively settled by the Court of Appeal in Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR) and the Supreme Court in Odinga & 16 others v Ruto & 10 others [2022] KESC 54 and 56 (KLR), and that the doctrine of stare decisis bars re-litigation of the same constitutional question. The 1st and 2nd Respondents denied the allegations of unaccounted-for or "ghost" polling stations as unparticularized and unsupported by evidence, and prayed for dismissal of the Petition with costs.
10. The 3rd Respondent filed a Replying Affidavit deposed to on 3rd February 2026 which advances a justiciability strategy centred on the existence of a live legislative process. It averred that the Elections (Amendment) (No. 2) Bill, 2024 was before the Departmental Committee on Justice and Legal Affairs, had already undergone public participation in December 2024 and April 2025, and that Clause 22 of the Bill proposes to repeal and replace Section 39 so as to render polling-station results final. He deposed that this is substantially the outcome the Petitioners herein seek. He further deposed that the 1st Petitioner, as a sitting Senator, had two unexhausted constitutional avenues open to him: a petition to Parliament under Article 119(1) of the Constitution of Kenya, 2010 or a Private Member's Bill under Senate Standing Order 130(1). He invoked the doctrines of exhaustion and constitutional avoidance, citing Geoffrey Muthinja v Samuel Muguna Henry [2015] eKLR, Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR and Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR, and judicial restraint pending an ongoing legislative process, citing Commission for the Implementation of the Constitution v Parliament of Kenya & another [2013] eKLR. Consequently, the 3rd Respondent sought the dismissal, or alternatively, a stay, pending conclusion of the legislative

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process.
11. The 4th Respondent filed a Replying Affidavit dated 26th March 2026, deponed to by Mr Jeremiah Nyegenye in his capacity as the Clerk of the 4th Respondent. The Senate took a materially different posture from the other Respondents. It set out the mechanics of Section 39, i.e., the roles of constituency and county returning officers, the National Tallying Centre, and the discrepancy-resolution rule in Section 39(1E). The affidavit relied on Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR) and IEBC v Kiai (supra) for the proposition that constituency-level results are final, that the 1st Respondent has no power to verify, confirm, alter or vary results already declared, and that the 2nd Respondent's function under Article 138(10) of the Constitution of Kenya, 2010 is confined to arithmetic collation. It concluded, in substance, that the courts have already affirmed the finality proposition advanced by the Petitioners. It departed from the Petitioners' case only regarding the Article 35 of the Constitution of Kenya, 2010 claim, arguing that no nexus had been shown between online-only publication and any constitutional breach and characterized several of the Petitioners' prayers as "prescriptory" matters more properly addressed by Parliament under Article 119(2) of the Constitution of Kenya, 2010.
12. The 5th Respondent filed Grounds of Opposition dated 10th December 2025 which are narrower and largely procedural. It pleaded that no cause of action was disclosed against the 5th Respondent individually, who is joined only in the constitutional capacity contemplated by Article 156 of the Constitution of Kenya,2010; that the dispute was unripe, being anchored in speculative harm tied to a hypothetical future election cycle rather than a live controversy; that the same issue is res judicata by virtue of the decision in IEBC v Kiai (supra); that the reliefs sought would draw the Court into micromanaging the 1st Respondents internal architecture contrary to the separation of powers doctrine applicable under Articles 88, 94 and 95 of the Constitution of Kenya, 2010 and that the Petitions fall short of the pleading-precision threshold in Anarita Karimi Njeru v Republic (1979) KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR.
13. Directions on consolidation of Petition E753 of 2025 and Petition E757 of 2025, with the latter being the lead file, were issued during the case-management conference based on the substantial and overlapping constitutional questions raised, the number of parties, and the public importance of the subject matter. The Court subsequently directed the parties to file pleadings, if they hadn't already done so, and submissions sequentially. The Petition proceeded by way of affidavit evidence and written submissions, with brief oral highlights, pursuant to Rule 20 of the Mutunga Rules.
14. The Interested Party's application to be added as an Interested Party to the Petition was unopposed and was allowed at the case-management stage upon the court being satisfied that it met the threshold for joinder as articulated in Law Society of Kenya v Centre for Human Rights and Democracy & 12 others [2014] eKLR, on account of the fact that it has demonstrable interest in the integrity of electoral dispute resolution, distinct from, but related to, the interests of the named parties, and standing to bring relevant material and perspective to the Court's attention without unfairly prejudicing any party.
15. During the hearing of the Petition and highlighting of the Submissions, counsel for the 1st and 2nd Respondents and counsel for the 4th Respondent were invited by the Court to address, specifically, the apparent tension between the position taken in the 4th Respondent's Replying Affidavit which had conceded the core of the Petitioners' finality proposition and the position subsequently advanced in the 4th Respondent's written submissions, which defended the constitutionality of Section 39 of the Elections Act and Regulation 83(2) of the Elections(General Regulations), 2012 without qualification.
16. Counsel for the 4th Respondent's response was that the written submissions were not intended to resile from the affidavit's acceptance that the 1st Respondent cannot alter, confirm or vary constituency-declared figures, but were directed at a narrower and, in counsel's submission, distinct question of whether the statutory language empowering the Commission to "tally and verify" results received at tallying centres is, in itself, unconstitutional. The Court notes this clarification and will

address it in the analysis below.
17. No party sought to cross-examine any deponent, as the factual matrix was not seriously in dispute; the controversy is essentially one of constitutional interpretation. The matter was accordingly disposed of on the basis of the Petitions, the affidavits, and the written and oral submissions.
The Submissions of the Parties
18. The Parties filed written submissions substantially elaborating their Position as pleaded in the Petitions and the Responses thereto. The Court is cognizant of the significance of the Petition and, consistent with the obligation of fairness and correctness in proceedings before the Court, sets out the Parties' submissions below.
The Submissions of the Petitioners
19. The Petitioners submitted that Articles 86(b) and (c) and 138(2) and (3)(c) of the Constitution of Kenya,2010 read purposively and in light of Article 259(1) of the Constitution of Kenya,2010, admit of only one construction: that the count conducted and the results announced at the polling station and certified at the constituency are final, and that any process styled "tallying" or "verification" at a level above the constituency is, in substance, a second and unconstitutional review of a decision the Constitution has already made final.
20. They submitted that the word "verify" in Article 138(3)(c) of the Constitution of Kenya,2010 must be read narrowly and restrictively, as a term qualified and limited by the immediately preceding constitutional requirement that results be "openly and accurately collated and promptly announced" under Article 86(c) of the Constitution of Kenya,2010; to read "verify" expansively, they submit, is to permit the exception (national-level review) to circumvent the rule of constituency finality. They relied heavily on the Court of Appeal's language in IEBC v Kiai & 5 others [2017] KECA 477 that a power to "confirm, vary or adjust" results "donates an illegitimate power" to the 1st Respondent, and submitted that Section 39(1C)(b) of the Elections Act and Regulation 83(2) do precisely what the Court of Appeal was against in its decision in IEBC v Kiai & 5 others [2017] KECA 477 (KLR) by using the words "tally and verify" and "confirmation" respectively. It was submitted that, on their ordinary and grammatical meaning, the words contemplate a check capable of yielding a different outcome from the one already declared; for if verification could never, in principle, alter anything, the Legislature would not have needed to legislate for it at all. They submitted, in the alternative, that if the Court is not persuaded to strike down the impugned provisions outright, it should, at minimum declare that "verify" and "confirm" are confined to a purely arithmetic function performed on undisputed figures, with no discretion whatsoever as to which figures to treat as correct.
21. The Petitioners submitted that the decision in Odinga & 16 others v Ruto & 10 others [2022] KESC 54/56 does not settle, still less foreclose, the question raised in the Petitions before the court for three reasons; First, that case was a presidential election petition under Article 140 of the Constitution of Kenya, 2010 in which the question before the Supreme Court was whether irregularities in the 2022 verification exercise were of a kind and scale sufficient to invalidate the election as held; which to them was a question of fact and degree decided on the evidentiary record of that election and not an abstract, prospective constitutional challenge to the vires of Section 39 or Regulation 83(2) as presented in the Present Petition.
22. The Petitioners submitted that the Supreme Court's observations on the legality of tallying and verification were incidental to that fact-specific inquiry rather than a considered ruling on the constitutionality of the enabling provisions. Secondly, they submit that the decision in Odinga & 16 others v Ruto & 10 others [2022] KESC 54/56 did not purport to overrule, distinguish, or even cite Maina Kiai v IEBC or IEBC v Kiai, and that in the absence of an express departure this Court should not infer one, particularly where the effect of inferring one would be to erode a constituency-finality principle as affirmed by the Supreme Court. Thirdly, they submit that the intra-Commission dissent recorded in the Odinga v Ruto decision, where several commissioners publicly disowned the verification exercise as opaque, is itself evidence that the "tally and verify" function as currently practised is neither transparent nor safely bounded, and is a reason for this Court to restrict rather

than endorse it.
23. On the res judicata claim, the Petitioners maintained, and the 4th Respondent's own Replying Affidavit conceded, that the decision in Maina Kiai remains good law and directly answers the question in their favour.
24. The Petitioners submitted that Article 35(3) of the Constitution of Kenya, 2010 imposes a standalone and affirmative obligation on the State to publish and publicize important information affecting the nation, and that election results are the paradigm case of such information. They submitted that reliance on an online portal alone, under Section 39(1C)(c) and (1G) of the Act, is constitutionally inadequate given documented disparities in internet penetration and connectivity across counties, and that a citizen's Article 35 right cannot be made contingent on possession of a smartphone or a data bundle. They submitted that supplementary publication at constituency tallying centres by way of physical notice boards, and dissemination through radio and other media with wider rural reach, is not merely desirable but constitutionally required.
25. The Petitioners submitted that the word "accurate" in Article 86(b) of the Constitution of Kenya, 2010 necessarily implies a duty to reconcile, at each polling station and before transmission, the numbers of ballot papers issued, used, spoilt, rejected and unused, since a results figure cannot be certified as accurate if the underlying ballot accounting has not itself been verified; they cite media and observer reports of unreconciled ballot figures in the 2013, 2017 and 2022 general elections as evidence of a recurring administrative gap rather than a one-off failure.
26. On gazettement, they submitted that Article 10 of the Constitution of Kenya, 2010 on national value of public participation and Article 47 of the Constitution of Kenya, 2010 on the right to fair administrative action are undermined where polling-station locations and the final voters' register are published too close to polling day for candidates, agents and voters to meaningfully verify or object to them, and that the six-month and three-month periods they propose are not arbitrary but are drawn from comparable practice in other Commonwealth electoral commissions.
27. The Petitioners further submitted that the existence of a constitutionally unique threshold for the presidential election does not, by itself, justify subjecting that position alone to a national confirmation exercise capable of revisiting results, when the same transparency objective could be achieved for the presidential election, as it is for every other elective position, by simple, non-discretionary arithmetic aggregation without a further "confirmation" layer. They submit that the differentiation is accordingly not between different objects of verification, as the Respondents contend, but between different degrees of finality afforded to voters depending on which office they are voting for, and that this is precisely the kind of differentiation Article 27 of the Constitution of Kenya guards against.
28. Having set out the précis of the Petitioners' submissions, the court then turns to the Respondents' submissions.
Submissions of the Respondents
29. Counsel for the 1st and 2nd Respondents submitted that the text of Article 138(3)(c) of the Constitution of Kenya, 2010, charges the 1st Respondent with the responsibility to "tally and verify the count and declare the result" after counting at the polling stations, and that these words cannot sensibly be read as superfluous.
30. They submitted that the decision in Odinga & 16 others v Ruto & 10 others [2022] KESC 54 and 56 (KLR) is dispositive. The Supreme Court there expressly considered whether the 1st Respondent "carried out the verification, tallying, and declaration of results in accordance with Article 138(3)(c) and (10) of the Constitution of Kenya,2010" and answered in the affirmative, while nullifying Regulation 87(3) of the Elections (General) Regulations only to the extent that it purported to vest the tallying and verification mandate in the 2nd Respondent alone, to the exclusion of the 1st Respondent as a collective body.
31. Their position is that these authoritative and more recent findings by the Supreme Court on Article 138(3)(c) and (10) of the Constitution of Kenya,2010, are binding on all other courts under Article 163(7) of the Constitution of Kenya, 2010, and put the constitutionality of a bounded national-

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level tally-and-verify function beyond further debate.
32. The 3rd Respondent’s submissions restated its exhaustion and constitutional-avoidance case, and additionally invited the Court, if not persuaded to dismiss the matter altogether, to exercise restraint by declining any order that would pre-empt the pending Elections (Amendment) (No. 2) Bill, 2024, on the ground that a live and advanced legislative process addressing precisely the mischief complained of, counsels judicial deference, reiterating the principle in Commission for the Implementation of the Constitution v Parliament of Kenya & another [2013] eKLR already pleaded in its Replying Affidavit.
33. The 4th Respondent's Written Submissions, filed on 30th June 2026, depart materially from the position taken in the 4th Respondent's own Replying Affidavit. The 4th Respondent's Written Submissions marked a significant recalibration from the 4th Respondent's own Replying Affidavit. Four issues were therein framed for determination: (a) whether Section 39 of the Elections Act and Regulation 83(2) are constitutional; (b) whether the issues raised were previously determined in Maina Kiai (supra) and IEBC v Kiai (supra); (c) whether the Petitioners exhausted available remedies; and (d) whether the Petitioners met the legal threshold for the grant of the orders sought.
34. On the first issue, the submissions invoked the presumption of constitutionality as outlined in Kangwony v Independent Electoral and Boundaries Commission & another [2018] KEHC 10134 (KLR), wherein Hambardda Dawakhana v Union of India Air (1960) AIR 554 was cited and explained and submitted that Article 138(3)(c)of the Constitution of Kenya,2010 constitutionalizes the 1st Respondent’s "tally and verify" function, such that Section 39(1C)(b) of the Elections Act which mirrors that language cannot be ultra vires the very provision it implements. On the second issue, and somewhat in tension with the 4th Respondent's own affidavit, the submissions made reference to the decision in IEBC v Kiai as authority that the 1st Respondent is required to tally and verify results at the constituency and national tallying centres, provided it does not alter, confirm, cancel or vary the figures certified by constituency returning officers. This is a formulation the Court considers, on analysis below, to be reconcilable with, rather than contradictory of, the earlier affidavit once the distinction between verification and alteration is kept firmly in view. On exhaustion, the 4th Respondent's submissions on Article 35 of the Constitution of Kenya,2010 are that the online-publication grievance is "prescriptory" and better addressed through an Article 119(2) Petition to Parliament, citing Okoiti & 15 others v Attorney General & 7 others [2022] KEHC 3209 (KLR) for the proposition that courts do not exist to resolve academic or hypothetical disputes divorced from a live controversy. On the fourth issue, the submissions contended that the Petitioners have pleaded conclusions rather than demonstrated, with precision, the nexus between the impugned provisions and any constitutional violation, invoking Anarita Karimi Njeru (supra) and Communications Commission of Kenya (supra).
35. The 5th Respondent’s submissions expounded on the ripeness and exhaustion objections pleaded, adding that a declaration in the terms sought, quashing Section 39 of the Elections Act in its entirety, would leave a legislative vacuum in the machinery for declaring presidential results, an outcome disproportionate to any constitutional infirmity shown, and inconsistent with the remedial principle that courts should, where possible, sever or read down offending provisions rather than strike down an entire statutory scheme. Reliance was placed on Council of County Governors v Attorney General & another [2017] eKLR in support of the said proposition.
Issues for Determination
36. Having considered the pleadings, the affidavits and the submissions filed in the Petition herein, the following issues are for determination:
i. Whether Section 39 of the Elections Act, 2011, and Regulation 83 of the Elections (General) Regulations, 2012, are unconstitutional;
ii. Whether the issues raised are res judicata;
iii. Whether the Petitioners' claims relating to online publication of results (Article 35), ballot reconciliation, and gazettement timelines are premature or ought to be pursued through the legislative mechanisms in Article 119 of the Constitution rather than by constitutional petition;

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iv. Whether the differentiated treatment of presidential election results, as compared with results for other elective positions, violates Article 27 of the Constitution;
v. Whether the Petitioners have pleaded and proved their case to the threshold required in constitutional litigation;
vi. If Section 39 and Regulation 83(2) are constitutional, what institutional safeguards, if any, are necessary to keep the Commission's tally-and-verify function within constitutional bounds ahead of the 2027 General Election;
vii. What reliefs, if any, ought to be granted, and what should be the order as to costs.
Analysis and Determination
37. Before the rival constructions of Articles 86 and 138 of the Constitution of Kenya,2010 and Section 39 of the Elections Act are examined, it is necessary to set out the operative text of each of the provisions in full, so that the construction the Court adopts can be checked directly against the words actually enacted, and not merely against the provisions as paraphrased by the parties.
38. Article 86 of the Constitution of Kenya,2010 provides:
“At every election, the Commission shall ensure that—
(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”
39. Article 138 of the Constitution, so far as is relevant, provides:
(2) If two or more candidates for President are nominated, an election shall be held in each constituency.
(3) In a presidential election—
(a) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;
(b) the poll shall be taken by secret ballot on the day specified in Article 101(1), at the time, in the places and in the manner prescribed under an Act of Parliament; and
(c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.
(4) A candidate shall be declared elected as President if the candidate receives—
(a) more than half of all the votes cast in the election; and
(b) at least twenty-five per cent of the votes cast in each of more than half of the counties. …
(10) Within seven days after the presidential election, the chairperson of the Commission shall—
(a) declare the result of the election; and
(b) deliver a written notification of the result to the Chief Justice and to the incumbent President.”
40. Section 39 of the Elections Act, 2011, so far as is relevant, provides: (1)The Commission shall determine, declare and publish the results of an election immediately after close of polling.
(1A)The Commission shall appoint constituency returning officers to be responsible for—
(a)tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;
(b)collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and
(c)submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.
(1B)The Commission shall appoint county returning officers to be responsible for tallying,

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announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.
(1C)For purposes of a presidential election, the Commission shall —
(a)electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;
(b)tally and verify the results received at the constituency tallying centre and the national tallying centre; and
(c)publish the polling result forms on an online public portal maintained by the Commission.
(1D)The Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.
(1E)Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.
(1F)Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying centre, respectively.
(1G)The Commission shall, to facilitate public information, establish a mechanism for the live-streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only and shall not be the basis for a declaration by the Commission.
(1H)The Chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.
(2)The Chairperson may declare a candidate elected as the President before all the constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.
(3)The Commission shall announce the final results in the order in which the tallying of the results is completed."
41. Regulation 83(2) of the Elections (General) Regulations, 2012 provides: "The Chairperson of the Commission shall tally and verify the results received at the national tallying centre."
42. The Court has had a chance to review the issues in the Petition. Articles 86 and 138 of the Constitution are not in tension and do not need reconciliation. Article 86(b) and (c) govern the count and its announcement at the polling station and constituency level, and that outcome is final and closed to alteration by any organ of the Commission acting at a higher level. On the other hand, Article 138(3)(c) imposes a separate and additional duty exercised by the 1st Respondent collectively, not the 2nd Respondent alone, to tally and verify those already-final figures at the National Tallying Centre, solely for the purpose of aggregating them nationally and confirming whether the Article 138(4) threshold is met. Article 138(10) then vests in the Chairperson alone the distinct, exclusive and strictly ministerial act of declaring the result once that collective exercise is complete. Section 39 and Regulation 83(2), so construed, faithfully implement this scheme and are constitutional; they would cease to be so only if "tally", "verify" or "confirm" were read to permit any alteration of a constituency figure.
43. This Court is cognizant that the 2027 General Election will be conducted under whatever construction this Court now places on Article 138(3)(c) and (10) of the Constitution of Kenya,2010, Section 39 of the Elections Act, and Regulation 83 of the Elections (General) Regulations. The Court is conscious that imprecision in its judgment would seed the election Petitions in the upcoming elections. Therefore, the analysis of the issues is more granular than the issues, taken individually, might otherwise require.
44. Legislation enjoys a presumption of constitutionality. The Court's duty is to juxtapose the impugned provision against the constitutional text and determine consistency, neither approving nor condemning the underlying policy. See Kangwony v Independent Electoral and Boundaries Commission & another [2018] KEHC 10134 (KLR) citing Hambardda Dawakhana v Union of India

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Air (1960) AIR 554 That presumption operates alongside, and is qualified by, the interpretive directive in Article 259(1) of the Constitution of Kenya,2010 that the Constitution be read to promote its purposes, values and principles, advance the rule of law and the Bill of Rights, permit the development of the law, and contribute to good governance and by the rule of harmony affirmed in Waibara v Kibeh & another [2020] KEHC 2834 (KLR) applying the decision in Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997 wherein court held that;

“I think it is now well established that the principles which govern Construction of Statutes also apply to the Construction of Constitutional provisions. And so the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters…

In my opinion, constitutional provisions should be given liberal construction, unfettered by technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import of its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico-cultural issues so as to extend the benefit of the same to the maximum possible.

In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those in whom the rights have been conferred by the Constitution…

The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now also accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution.”

45. The Constitution of Kenya,2010 is an integrated whole. No provision is to be read so as to invalidate another. Electoral laws, on the other hand, carry an election-specific value: Article 86 of the Constitution of Kenya,2010 requires that whatever system is used be "simple, accurate, verifiable, secure, accountable and transparent." A construction of Section 39 that maximizes verifiability and accountability without sacrificing the finality and security that the Petitioners rightly prize is therefore not merely permissible but constitutionally preferred over one that sacrifices either value for the other.

Whether Section 39 of the Elections Act, 2011, and Regulation 83 of the Elections (General) Regulations, 2012, are unconstitutional.

46. Much of the difficulty in this matter stems from the use and application of the words "tally," "verify," "collate" and "confirm" as interchangeable synonyms for a single, undifferentiated act of re-checking results. This court departs from that position. Read as a whole, Section 39 uses each term to denote a discrete step in a sequential chain, and the constitutionality of the National Tallying Centre turns on keeping that sequence intact:

(i) Count — the physical counting of ballots at the polling station immediately after the close of polling, conducted by the presiding officer in the presence of candidates' agents and observers (Article 86(b); Section 39(1) and (1A)). This single, non-repeatable act generates the primary data in Form 34A for the presidential election.

(ii) Announce and declare at the constituency level; the constituency returning officer's public, on-the-spot announcement of the polling-station results and issuance of a constituency-level certificate (Form 34B), which is final for a respective constituency and reviewable only by an Order of Court under Article 86(c) of the Constitution of Kenya,2010 and Section 39(1A)(b) of the Elections Act.

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(iii) Transmit — the electronic transmission and physical delivery of the tabulated results from the polling station to the constituency and national tallying centres (Section 39(1C)(a)). Transmission is a logistical, not evaluative, step: it moves data; it does not test it.
(iv) Tally — the arithmetic aggregation of the (already final) constituency figures into county and then national totals (Section 39(1C)(b); Regulation 83(2)). This is a mechanical, manual operation performed on numbers that are closed to alteration.
(v) Verify — the Commission verifies, compares and checks that the aggregated national figures (a) correspond, form for form, to what was declared and certified at the constituency level, and (b) meet the threshold of Article 138(4) of the Constitution of Kenya,2010 and Section 39 (1C)(b) and 1D. This is confirmatory and comparative, not corrective.
(vi) Resolve discrepancies — where the electronically transmitted and the physically delivered results disagree, Section 39(1E) does not hand the 1st Respondent a discretion to choose whichever figure it prefers; it lays down a fixed rule that "the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail."
The polling-station record is thus the irreducible point of truth, even in resolving a transmission discrepancy. This is a textual reinforcement, internal to Section 39 itself, of the very finality principle the Petitioners invoke to attack the section. Section 39(1F) reinforces the same position. Failure to transmit or publish results electronically does not invalidate the result already announced and declared at the polling station and constituency tallying centre. The electronic and online architecture of the National Tallying Centre is thus evidentiary scaffolding around the polling-station record, not a substitute source of truth.
(vii) Declare — the 2nd Respondent’s exclusive, non-delegable act under Article 138(10) of the Constitution of Kenya,2010 of announcing the result and notifying the Chief Justice and the incumbent President, undertaken only after the collective tally-and-verify exercise in (iv) and (v) is complete.
47. Once this sequence is disaggregated, the Petitioners' central claim that "verification" is a euphemism for a second, opaque count capable of overturning the voters' will as expressed and finally declared at the constituency is shown to rest on a conflation of steps (ii),(iv) and (v). Properly confined, "tally and verify" operates only on data that is already final; it cannot, without breaching Section 39(1E) itself, prefer any figure over the one "tallied, verified and declared at the respective polling station”. The constitutional vice would arise only if the 1st Respondent purported to use the tallying centre to substitute a different figure for the one certified at the constituency. This exercise is what the decision in Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR) was against and which Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) did not sanction.
48. The decision in Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR), affirmed by the Court of Appeal in Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR), bears on the question before the court and must be read together rather than in isolation. These decisions held that the declaration and issuance of a certificate by a constituency returning officer renders the results certified for that constituency final, challengeable only in an election petition before a court of competent jurisdiction; and that the 1st Respondent, whether through the 2nd Respondent or otherwise, has no power to confirm, alter, vary or cancel those figures at the county or national tallying centre. The Court of Appeal was emphatic that any suggestion of a power in the 2nd Respondent alone to correct, vary or adjust transmitted results "donates an illegitimate power" and would introduce precisely the opacity and arbitrariness the Constitution seeks to avoid.
49. The Supreme Court’s decision in Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) squarely addressed the question, framed by the Court as "whether the 1st Respondent carried out the verification, tallying, and declaration of results in accordance with Article 138(3)(c) and (10) of the Constitution of Kenya,2010". This is the identical constitutional provision relied upon by the Petitioners in this matter.

50. The Court held that verification, tallying and declaration were carried out as contemplated by Article 138 of the Constitution of Kenya,2010, and further held that the mandate to tally and verify results received at the National Tallying Centre vests in the 1st Respondent as a collective body, not in the 2nd Respondent alone; it accordingly declared Regulation 87(3) of the Elections (General) Regulations, 2012 a nullity only to the extent that it purported to exclude other commissioners from that collective exercise. The power to declare the result, by contrast, was confirmed to vest exclusively in the 2nd Respondent under Article 138(10) of the Constitution of Kenya, 2010.
51. The Court notes, as relevant background rather than as a finding it is bound to adopt, the friction recorded in that judgment between the Chairperson and four dissenting commissioners over the transparency of the 2022 verification exercise which the Supreme Court treated as a governance concern falling short of a ground for nullification, but which this Court treats as a cautionary signal about how the tally-and-verify function must be operationalized.
52. Read together, both the decisions in Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR) and Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) are not in conflict; they answer different, complementary questions. The first decision establishes that the count and the certified figures declared by the Constituency Returning Officer are final and immune from alteration, confirmation or variation by any organ of the 1st Respondent acting at a higher level. The finality attaches to the returning officer's arithmetic at the Constituency level, not to the Commission's overall duty. The latter decision establishes that, notwithstanding that finality, Article 138(3)(c) of the Constitution of Kenya,2010 imposes upon the 1st Respondent a further, distinct and collective duty to tally (aggregate) and verify, i.e. to confirm compliance with the Article 138(4) of the Constitution of Kenya,2010 threshold of the certified constituency figures at the National Tallying Centre, without making any adjustments or changes to them. The "tally and verify" function is accordingly not an unconstitutional intrusion upon constituency finality; it is the constitutionally mandated mechanism by which 290 final, discrete constituency results are lawfully aggregated into a single national outcome and tested against the requisite threshold.
53.It follows that Section 39(1C)(b) of the Elections Act, 2011, which requires the 1st Respondent to "tally and verify the results received at the constituency tallying centre and the national tallying centre," is in tandem with Article 138(3)(c) of the Constitution of Kenya, 2010 and is constitutional. Regulation 83(2), on the other hand, is likewise constitutional, provided that "confirmation" is construed, consistently with Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR), Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR), and the textual scheme identified in paragraph 52 herein above, to mean confirmation that the aggregated figures, exactly as certified by the respective returning officers, satisfy Article 138(4) threshold, and not as conferring any power to add, subtract, multiply, divide, cancel or otherwise revise any individual constituency figure. So construed, there is no repugnancy between Regulation 83(2) and Articles 86 and 138(2) of the Constitution of Kenya, 2010.
54. The Court declines the invitation to invalidate Section 39 or Regulation 83(2) in their entirety. An interpretation that preserves constitutionality while eliminating the risk of misuse is preferable to invalidation, consistent with the severability and reading-down approach applied by the High Court to a comparably structured statutory scheme in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties) [2020] KEHC 8772 (KLR), where offending applications of an otherwise valid statutory framework were excised without dismantling the framework itself.
55. The minimum institutional safeguards without which the "tally and verify" function cannot be regarded as remaining within the bounds of Article 138(3)(c)of the Constitution of Kenya,2010 as construed in this judgment flows directly from paragraph 46 of this decision and from the collective-decision-making principle espoused in the decision of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) as follows, and are given effect

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in the orders in the judgment herein:
(i) Documentary primacy.
At every stage of tallying and verification, the constituency-level Forms (34A/34B or their successors) as certified and publicly displayed at the constituency tallying centre constitute the sole reference point against which aggregated figures are checked; no other document, database entry, or electronically transmitted figure may be treated as superior to it, consistently with Section 39(1E) of the Elections Act.
(ii) Collective and recorded decision-making.
Consistently with Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) every step of verification at the National Tallying Centre must be undertaken by the 1st Respondent as a body, with the participation of, and access to the underlying data by, all commissioners; any commissioner's dissent or reservation as to the accuracy of the verification exercise must be recorded contemporaneously and forms part of the official record of the election.
(iii) Party agent and observer access.
Candidates' agents and accredited observers are entitled to be present at, and to have real-time access to the same data available to, the 1st Respondent during the national tallying and verification exercise, so that verification is conducted in the open rather than behind closed doors.
(iv) Contemporaneous, itemized documentation of any discrepancy.
Where a discrepancy of the kind contemplated by Section 39(1E) of the Elections Act arises between transmitted and physically delivered results, the 1st Respondent must contemporaneously document, for each affected polling station or constituency, the nature of the discrepancy, the resolution reached, and the basis on which the polling-station record was applied; this record must be made publicly available no later than the declaration of the final result.
(v) No ex post facto variation.
Once a constituency result has been factored into the national tally, it cannot thereafter be varied except pursuant to an order of a court of competent jurisdiction in an election petition; any correction of a purely clerical or transposition error must be logged, reasoned, and disclosed, not made silently.
56. These safeguards do not enlarge the 1st Respondent’s mandate. They operationalize the limits already inherent in the constitutional text as construed in this judgment, and are the practical means by which the Commission can demonstrate, in real time and to the country, that its national-level function has remained tallying and verification as opposed to re-adjudication.
57. A cautionary illustration of what these safeguards are designed to prevent is furnished by Malawi's experience in Chilima & Anor. v Mutharika & Anor. (Constitutional Reference 1 of 2019) [2020] MWHC 2 (3 February 2020). The High Court of Malawi, sitting as the Constitutional Court, on 3rd February 2020, affirmed on appeal by the Malawi Supreme Court of Appeal, in which the nullification of the entire 2019 presidential election followed directly from the absence of safeguards of the kind set out above. The Electoral Commission's tally sheets were found to have been altered with correction fluid, duplicate and unsigned forms were accepted without explanation, and no contemporaneous record existed to show how or why figures had changed between the polling station and the declared national result. The Court held that these irregularities were so widespread and systematic that the result could no longer be trusted as a reflection of the votes cast, and ordered a fresh election within 150 days.
58. Reference to Malawi is not for any proposition of law this Court is bound to follow, but as a sobering illustration, from a neighbouring constitutional democracy, of the real consequence of allowing a national tallying process to operate without documentary primacy, collective accountability, and contemporaneous disclosure.
Whether the issues raised in the Petition are res judicata
59. On the question of res judicata, the Court is in agreement with the Petitioners that the doctrine requires similarity of the identity of parties, subject matter and cause of action. See Kenya

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Commercial Bank Ltd & another v Muiri Coffee Estate Ltd & 3 others [2016] KESC 6 (KLR). The Supreme Court has endorsed this formulation as the applicable statement of the doctrine in John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR). Res judicata is, however, not technically satisfied here, since neither Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] KEHC 8646 (KLR) nor Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) involved the present parties or the present pleadings verbatim.
60. The more precise characterization, and the one this Court adopts, is that the constitutional question at the heart of both Petitions has already been authoritatively settled by binding decisions, most decisively by the Supreme Court in Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) whose interpretation of Article 138(3)(c) and (10) of the Constitution of Kenya, 2010 binds this Court under Article 163(7) of the Constitution of Kenya, 2010 and the doctrine of stare decisis.
61. The 4th Respondent's written submissions are, on this narrow but important point, correct, notwithstanding the tension with its own Replying Affidavit noted in this decision hereinabove; that tension dissipates on the 4th Respondent's affidavit's concession that no power to alter or confirm constituency figures and the submissions' defence of Section 39 (a constitutional duty to tally and verify) are addressed to two different aspects in steps (ii) and (v) in paragraph 46 above, respectively, of the same settled doctrine, not to inconsistent propositions.
62. As further comparative support for the conclusion reached on Issue (ii) above, and not as a freestanding issue in its own right, Kenya is not alone among African constitutional democracies in having to reconcile the transparency and finality of polling-station-level counting with the practical necessity of a national aggregation and confirmation exercise, and comparative practice from jurisdictions with cognate two-round or threshold-based presidential electoral architecture is instructive.
63. Ghana's judgment in the 2013 presidential election petition, In Re: Presidential Election Petition; Akufo-Addo and Others v Mahama and Another (Civil Motion No J8/31/2013) [2013] GHASC 144 (22 January 2013) is instructive by analogy in the present petition. The Supreme Court of Ghana, by a narrow majority, declined to annul the declared result notwithstanding proven irregularities at a number of polling stations, holding that a Petitioner seeking to displace a declared result bears a correspondingly heavy burden of proving that irregularities in the collation process were of a kind and scale capable of altering the outcome. This holding resolved an evidentiary question already before an election court: the sufficiency of proof needed to overturn a declared result, not a facial, pre-emptive challenge to the constitutionality of a national collation mechanism of the kind advanced by the Petitioners in the instant matter. Its relevance here lies in the underlying policy it endorses, that the polling-station document is the primary and authoritative source of the result, and that the proper forum for correcting collation errors is an election petition testing the primary documents against the collated national figure, not in any direct holding on the vires of a national tallying mechanism.
64. A more recent illustration from Ghana concerns not the evidentiary threshold for overturning a declared result, but the sequencing of collation and declaration. The same question is raised by Article 138(10)(2) of the Constitution of Kenya, 2010, which permits the 2nd Respondent to declare a winner before all constituencies have transmitted their results only where satisfied that the outstanding results cannot affect the outcome. In rulings delivered in December 2024 and January 2025 arising from disputes over Ghana's December 2024 general election, the High Court held, in relation to the Tema Central and Techiman South constituencies among others, that the Electoral Commission could not lawfully declare a winner while a significant number of polling-station results 31 outstanding in one constituency and 147 in another remained uncollated, rejecting the Commission's argument that its mandate had become functus officio upon an incomplete declaration, and ordering collation of the outstanding results before any final declaration was made.
65. The ruling reinforces, from a different jurisdiction and constitutional structure, the principle

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already embedded in Section 39(2) and (3) of the Elections Act and Article 138(10)(2) of the Constitution of Kenya 2010 that the power to declare a result before collation is complete is a narrow, evidence-based exception requiring the 1st Respondent to be satisfied that the outcome cannot be affected by outstanding returns, and not a general licence to declare on a partial count.
66. Nigeria's 2023 presidential election petitions are instructive from a different angle, bearing directly on Article 35 of the Constitution of Kenya,2010. In the consolidated appeals in the Supreme Court's judgment of 26th October 2023 affirming the Presidential Election Petition and Court's dismissal of the petitions of Peter Obi and Atiku Abubakar against the declaration of Bola Ahmed Tinubu, the Court held that incomplete or delayed upload of results to the Independent National Electoral Commission's electronic result-viewing portal ("IReV") which is the Nigerian version of Kenya's online public portal under Section 39(1C)(c) of the Elections Act did not, without more, invalidate an election whose paper-based collation process had otherwise been properly conducted, since electronic transmission was a transparency and verification aid to, and not a substitute for or precondition of, the statutory paper-based collation process.
67. The Court is mindful that this holding attracted considerable criticism in Nigeria, on the ground that it diluted the real-time transmission safeguard Parliament had specifically legislated for in the Electoral Act, 2022 precisely to address a history of collation-stage manipulation; it is cited here not as an uncontested authority but as confirmation that even a jurisdiction which legislated for mandatory electronic transmission has had to grapple with, and has resolved, the same question this Court shall answer in this decision that online or electronic publication is a transparency aid to, and not the exclusive guarantor of, access to results.
68. The Supreme Court of Nigeria in Uzodinma & All Progressives Congress v Ihedioha, Peoples Democratic Party & Independent National Electoral Commission (Supreme Court of Nigeria, 14th January 2020) where its Independent National Electoral Commission had excluded the results of 388 polling units from the collation of the 2019 Imo State governorship election held that those results had been unlawfully excluded and ordered that they be added to the declared tally, and on that basis set aside the return of the previously declared winner and directed that a certificate of return issue to the candidate who, by the Court's recalculation, then held the majority of lawful votes. The decision attracted sustained domestic criticism, principally on the ground that the evidentiary basis for the recalculation was thin and that the Court had, in substance, redeclared an election result four places down the original count.
69. The decision in Uzodinma & All Progressives Congress v Ihedioha, Peoples Democratic Party & Independent National Electoral Commission (Supreme Court of Nigeria, 14th January 2020) is not an endorsement of judicial recalculation on contested evidence, but in this Court's view and sound proposition, it also illustrates that the correction of an unlawful exclusion of polling-unit results from the national tally is a matter for an election court applying an evidentiary standard, and not a power the 1st Respondent may exercise unilaterally at the collation stage. Precisely the division of labour between the Commission and the election court that the decisions in Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] [2017] KEHC 8646 (KLR) and Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) establish in Kenya, and a caution, from another jurisdiction, of what can go wrong when that division of labour is not rigorously observed.
70. Under the Electoral Act, 73 of 1998, in South Africa, the count takes place at the voting station, or, for national and provincial elections, at a counting centre under Part 3 of the Act, with candidates' agents entitled to object to the acceptance or rejection of any ballot and to demand a recount before the result at that level is finalized. This structure, similar to Article 86(b) and (c) of the Constitution of Kenya, 2010, situates the primary check in an open, party-witnessed process at the point of counting. This practice illustrates, under the Electoral Act, the narrower point that even a system built on station-level finality contemplates a bounded, agent-witnessed objection-and-recount mechanism before declaring a final result consistent with Section 39 of the Elections Act.
71. Zambia's framework, under the Electoral Process Act, 2016 and Articles 101 and 103 of the

Constitution of Zambia (as amended in 2016), similarly channels constituency-level returns into a national tallying centre operated by the Electoral Commission of Zambia, with the final presidential result declared nationally. As in Ghana, Zambian courts have insisted on a correspondingly rigorous evidentiary threshold before a petitioner may impugn a declared result. More recently, the petition filed before the Constitutional Court of Zambia in August 2026, challenging the declared result of the 13th August 2026 presidential election and alleging discrepancies between polling-station figures and figures announced at constituency tallying centres in a number of constituencies, illustrates the practical risk the Petitioners in the instant Petition seek to guard against: that a national tallying process, if not tightly bounded and transparently documented, can become a site of disputed variance between station-level and centre-level figures. That pending Zambian dispute is cited here not as authority but as comparative confirmation that the safeguard Kenyan law already provides, namely the rule in Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] KEHC 8646 (KLR) and Section 39(1E) of the Elections Act that the constituency count is final and cannot be varied at the centre, is a sound and necessary one.

72. The comparative practices of the countries outlined hereinabove depict a shared structural choice. Each jurisdiction treats the primary, station-level record as authoritative over any subsequent national-level process, confines the declaration of a result to circumstances where the outcome is not put in doubt by outstanding or excluded returns, and channels grievances about the integrity of that later process into evidence-based election petitions rather than facial invalidation of the process itself. That is consistent with, and lends comparative reinforcement to, the construction of Section 39 of the Elections Act.

Whether the Petitioners' claims relating to online publication of results (Article 35), ballot reconciliation, and gazettement timelines are premature or ought to be pursued through the legislative mechanisms in Article 119 of the Constitution of Kenya.

73. The Petitioners' claim that online-only publication under Section 39(1C) and (1G) fails to satisfy the provisions of Article 35 of the Constitution of Kenya, 2010 is not, in the Court's assessment, adequately particularized. No evidence is tendered of any citizen or class of citizens actually denied access to results by reason of the online-only format, nor is any nexus demonstrated, as required by Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR) and Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR) between the impugned provision and an actual or imminent infringement.

74. The online or electronic publication channel is ordinarily an addition to, not a substitute for, publication and display at the constituency tallying centre already mandated elsewhere in Section 39 of the Elections Act; the Petitioners have not shown that the latter has in practice been withdrawn or rendered inaccessible. The Court accepts the submission, advanced by the 3rd, 4th and 5th Respondents, that the specific prescriptions sought (publication on public notice boards, particular dissemination channels) are properly a matter for legislative or regulatory elaboration under Article 119(2) of the Constitution of Kenya,2010 and the Petitions to Parliament (Procedure) Act, 2012, rather than judicial mandate.

75. The doctrine of constitutional avoidance, applied in Kenya Association of Stockbrokers and Investment Banks v Attorney-General & another [2015] eKLR (citing Communications Commission of Kenya, supra), counsels against this Court deciding, in the abstract and prescriptively, precisely how access to results should be operationalized.

76. The same reasoning applies, with greater force, to the ballot-reconciliation and gazettement-timeline claims raised in Petition E753 of 2025. These are, in substance, calls for the 1st Respondent to adopt specific administrative and procedural safeguards in a reconciliation framework, including minimum gazettement periods, which fall squarely within the technical and administrative competence Article 88(5) confers upon the 1st Respondent, subject to Parliament's oversight.

77. This Court notes that the Elections (Amendment) (No. 2) Bill, 2024 is already before the National Assembly's Departmental Committee on Justice and Legal Affairs and, on the uncontroverted evidence of the 3rd Respondent, has undergone public participation addressing cognate concerns.

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Judicial restraint in the face of an active and advanced legislative process addressing the same mischief is well established. See Commission for the Implementation of the Constitution v Parliament of Kenya & another; Ethics and Anti-Corruption Commission & another (Interested Parties); Katiba Kenya & another (Amicus Curiae) [2013] KEHC 6313 (KLR). The Petitioners can address this issue before Parliament under Article 119, or by fresh petition, if the legislative process stalls unreasonably or fails to address the concerns raised. The Court accordingly declines to grant the Order of mandamus.

Whether the differentiated treatment of presidential election results, as compared with results for other elective positions, violates Article 27 of the Constitution of Kenya,2010

78. Article 27(4) of the Constitution of Kenya 2010 prohibits the State from discriminating directly or indirectly against any person on the grounds listed therein or on other analogous grounds; it does not prohibit all differentiation, only differentiation that is arbitrary or lacks a rational connection to a legitimate purpose.

79. Article 138(4) of the Constitution of Kenya 2010, on the other hand, imposes upon the presidential election a bespoke, dual numerical threshold: more than fifty per cent of all votes cast nationally, and at least twenty-five per cent of the votes cast in more than half of the counties. This threshold is unique to the election of the President alone. No other elective position is subject to an analogous dual, geographically-distributed threshold; each is decided by a simple plurality within its own electoral unit.

80. A national aggregation and confirmation exercise is accordingly not an arbitrary extra burden imposed on presidential candidates or voters; it is the necessary and rational corollary of a constitutionally unique eligibility threshold that, by definition, cannot be verified at any level below the national one. No county-level or constituency-level vantage point can assess compliance with a nationwide 50%-plus-one and 24-county threshold. Differential treatment grounded in a real and constitutionally-mandated difference in the object being verified, and not in any listed or analogous ground of discrimination, does not offend Article 27. Therefore, this ground fails.

Whether the Petitioners have pleaded and proved their case to the threshold required in constitutional litigation

81. Measured against Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR) and Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR), the Court finds the Petitioners' pleadings adequate, and indeed commendably precise, on the central question of the constitutionality of Section 39 and Regulation 83(2) as they relate to the finality of constituency results. The specific Articles said to be violated, and the manner of the alleged violation, are clearly and consistently pleaded across both Petitions. The pleading threshold is not met, however, in respect of the Article 35, ballot-reconciliation, gazettement-timeline and Article 27 claims, for the reasons given hereinabove: these claims proceed largely by way of general assertion and invocation of constitutional provisions without the requisite nexus to a demonstrated or imminent violation.

82. Finally, having made the above determination, this Court would recommend that the legislature and the political class apply the thought experiment the famed American legal philosopher, John Rawls, created in his magnum opus, “A Theory of Justice”; by applying the veil of ignorance, in which none of the players knows who will benefit from the proposed rules and regulations, design neutral election laws that serve the greater interest of the Kenyan people, rather than the narrow, temporal, and variable goals of the political class.

Final Orders

83. For the reasons set out above, the Court makes the following orders:

(a). A DECLARATION is issued that Section 39(1C)(b) of the Elections Act, 2011, and Regulation 83(2) of the Elections (General) Regulations, 2012, are constitutional;

(b). A DECLARATION is issued that the results of a presidential election declared and certified by a Constituency Returning Officer in relation to a Constituency are final and may only be challenged before an election court; and that neither the Commission, its Chairperson, nor any Returning Officer has power to alter, cancel, confirm-away, or otherwise vary those certified figures at any

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stage of tallying at the county or national tallying centre, save pursuant to an order of a court of competent jurisdiction;
(c). A DECLARATION is issued that the mandate to tally and verify results received at the National Tallying Centre under Section 39(1C)(b) of the Elections Act and Regulation 83(2) of the Elections (General) Regulations vests in the 1st Respondent as a collective body and not in the 2nd Respondent alone;
(d). A DECLARATION is issued that, in the event of any discrepancy between electronically transmitted and physically delivered results under Section 39(1E) of the Elections Act, the result that is an accurate record of what was tallied, verified and declared at the respective polling station shall prevail;
(e). The prayers seeking to quash Section 39, Section 39(1C) and (1G), and Regulation 83(2) of the Elections (General) Regulations in their entirety are DECLINED;
(f). The prayers relating to Article 35 of the Constitution of Kenya, 2010 and the manner of publication of results, the ballot-reconciliation framework, and the gazettement timelines pleaded in Petition No. E753 of 2025 are declined for want of a demonstrated constitutional violation;
(g). The claim that Sections 39(1C) and (1G) of the Elections Act and the National Tallying Centre's role occasion unjustified differentiation contrary to Article 27 of the Constitution of Kenya,2010 is DISMISSED;
(h). The 3rd Respondent to have regard to the construction of Section 39 of the Elections Act adopted in this judgment, in particular the documentary-primacy and collective-decision-making principles set out herein, in finalizing the Elections (Amendment) (No. 2) Bill, 2024 or any other legislation ahead of the 2027 General Election.
(i). Given the public-interest character of this Petition, each party shall bear its own costs.
84. It is so ordered.
Dated and signed at Nairobi this 22nd day of September 2026.

SIGNED BY:
HON. MR. JUSTICE GREGORY MUTAI



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
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