



REPUBLIC OF KENYA

Report and Recommendation

of the

**Tribunal Appointed Pursuant to Article 251 of the
Constitution of Kenya, 2010**

to

**Consider the Petition for Removal of Juliana
Whonge Cherera, Francis Mathenge Wanderi, Irene
Cherop Masit and Justus Abonyo Nyang'aya from
Office as members of the Independent Electoral and
Boundaries Commission**

Presented to:

His Excellency

**Hon. William Samoei Ruto, PhD., C.G.H.,
President of the Republic of Kenya and Commander-in-Chief of
the Kenya Defence Forces**

February, 2023

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REPORT

AND

RECOMMENDATION

ON

**THE PETITION FOR THE REMOVAL OF JULIANA WHONGE CHERERA,
FRANCIS MATHENGE WANDERI, IRENE CHEROP MASIT AND JUSTUS
ABONYO NYANG'AYA FROM OFFICE AS MEMBERS OF THE INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION**

BY

**THE TRIBUNAL APPOINTED PURSUANT TO ARTICLE 251 OF THE
CONSTITUTION OF KENYA, 2010**



REPUBLIC OF KENYA

**THE TRIBUNAL APPOINTED PURSUANT TO ARTICLE 251 OF THE
CONSTITUTION OF KENYA, 2010 TO CONSIDER THE PETITION FOR
REMOVAL OF JULIANA WHONGE CHERERA, FRANCIS MATHENGE
WANDERI, IRENE CHEROP MASIT AND JUSTUS ABONYO NYANG'AYA FROM
OFFICE AS MEMBERS OF THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION**

Chairperson:

Hon. Justice Aggrey Otsyula Muchelule, Judge of the Court of Appeal

Vice Chairperson

Caroline Kamende Daudi

Members:

Linda Gakii Kiome, Mathew Nyaramba Nyabena and Col. (Rtd.) Saeed Khamis Saeed

Joint Secretaries

Kibet Kirui Emmanuel and Irene Tunta Nchoe

Lead Counsel

Peter Munge Murage, MBS

Assisting Counsel

Zamzam Abdi Abib

Presented to:

His Excellency

Hon. William Samoei Ruto, PhD, C.G.H.,

**President of the Republic of Kenya and Commander-in-Chief of the Kenya Defence
Forces**

February 2023

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TABLE OF ABBREVIATIONS AND ACRONYMS

BCP	-	Business Continuity Plan
CEO	-	Chief Executive Officer
DRP	-	Disaster Recovery Plan
ERMF	-	Election Results Management Framework
HC	-	High Court
ICT	-	Information, Communication and Technology
IEBC	-	Independent Electoral and Boundaries Commission
KEPP	-	Kenya Eminent Panel for Peace
NCIC	-	National Cohesion and Integration Commission
NSAC	-	National Security Advisory Committee
NTC	-	National Tallying Center
SOP	-	Standard Operating Procedure
UDA	-	United Democratic Alliance

Letter of Transmittal



REPUBLIC OF KENYA

**THE TRIBUNAL APPOINTED PURSUANT TO ARTICLE 251 OF THE
CONSTITUTION OF KENYA, 2010 TO CONSIDER THE PETITION FOR
REMOVAL OF JULIANA WHONGE CHERERA, FRANCIS MATHENGE
WANDERI, IRENE CHEROP MASIT AND JUSTUS ABONYO NYANG'AYA FROM
OFFICE AS MEMBERS OF THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION**

KENYA

Telephone:

**KICC Building
Ground Floor
NAIROBI.**

27th February 2023

**His Excellency,
Hon. William Samoei Ruto, PhD, C.G.H.,
President of the Republic of Kenya
and Commander-in-Chief of the Kenya Defence Forces
State House,
NAIROBI.**

Your Excellency,

**RE: REPORT AND RECOMMENDATION OF THE TRIBUNAL APPOINTED TO
CONSIDER THE PETITION FOR REMOVAL OF JULIANA WHONGE
CHERERA, FRANCIS MATHENGE WANDERI, IRENE CHEROP MASIT
AND JUSTUS ABONYO NYANG'AYA FROM OFFICE AS MEMBERS OF
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

By Gazette Notice No. 14890 dated 2nd December 2022, and in exercise of the powers conferred on Your Excellency by Article 251 of the Constitution of Kenya, you appointed a Tribunal to investigate and to consider the Petition for removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya, from office as Commissioners of the Independent Electoral and Boundaries Commission.

Your Excellency appointed Hon. Justice Aggrey Otsyula Muchelule as the Chairperson; Carolyn Kamende Daudi, Linda Gakii Kiome, Mathew Nyaramba Nyabena and Col. (Rtd.) Saeed Khamis Saeed as Members; Kibet Kirui Emmanuel and Irene Tunta Nchoe as Joint Secretaries; Peter Munge Murage, MBS as Lead Counsel; and Zamzam Abdi Abib as Assisting Counsel; of the Tribunal.

The Tribunal was mandated, by the Gazette Notice No. 14890, to consider and to inquire into the allegations in the Petition transmitted to Your Excellency by the National Assembly, for removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and

Justus Abonyo Nyang'aya from office as members of the Independent Electoral and Boundaries Commission pursuant to Article 251 of the Constitution on account of serious violation of the Constitution and other relevant laws, gross misconduct and incompetence.

In the discharge of its functions, the Tribunal was required to:

- (a) Prepare and submit a report and its recommendations thereon expeditiously; and
- (b) Exercise all the powers conferred upon it by law for the proper execution of its mandate.

During the Status Conference held on 9th December 2022, the Tribunal communicated that Your Excellency had acknowledged receipt of Letters of Resignation by three of the four Commissioners of the Independent Electoral and Boundaries Commission, namely Justus Abonyo Nyang'aya, Juliana Whonge Cherera and Francis Mathenge Wanderi, dated 2nd, 5th and 8th December 2022 respectively. Accordingly, only Commissioner Irene Cherop Masit opted to face the Tribunal.

In accordance with Article 251 of the Constitution of Kenya, we have carried out and concluded the investigations. We have considered and inquired into the allegations as outlined in the Petition transmitted to Your Excellency by the National Assembly, for the removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya from office as members of the Commission. The findings derived from the investigations have satisfied the Tribunal that Ground Nos. (1 & 2) have been proved to the standard required to recommend, which we hereby do, that the remaining Commissioner Irene Cherop Masit be removed from office.

Now, therefore, it is our pleasant duty and great honour, Your Excellency, to present to you our Report and Recommendation and thank you most sincerely for your considered trust and confidence in us, by bestowing on us this responsibility.

Yours sincerely,

.....
Hon. Justice Aggrey Otsyula Muchelule
(Chairperson)

.....
Carolyn Kamende Daudi
(Vice Chairperson)

.....
Linda Gakii Kiome
(Member)

.....
Mathew Nyaramba Nyabena
(Member)

.....
Col. (Rtd.) Saeed Khamis Saeed
(Member)

ACKNOWLEDGEMENTS

We wish to state at the beginning that the preparation and publication of this Report and Recommendation is the result of a combined effort and industry. We wish to register our profound gratitude to the various stakeholders that took part in this exercise, as follows.

We wish to register our sincere gratitude to His Excellency Hon. William Samoei Ruto, PhD, C.G.H., President of the Republic of Kenya and Commander-in-Chief of the Kenya Defence Forces, for appointing us to this Tribunal tasked to consider the Petition for the removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya from office as members of Independent Electoral and Boundaries Commission, and to inquire into the allegations set out in the said Petition.

We acknowledge and appreciate the Joint Secretaries of the Tribunal, Mr. Kibet Kirui Emmanuel and Ms. Irene Tunta Nchoe, the Lead Counsel, Mr. Peter Murage Munge, MBS and Assisting Counsel, Ms. Zamzam Abdi Abib. We appreciate the cooperation of Commissioner Irene Cherop Masit and her Counsel Mr. Donald B. Kipkorir for his invaluable input in assisting the Tribunal to discharge its mandate. They compellingly put in remarkable commitment to the cause by offering excellent presentations, submissions, extensive research and authorities in support of their respective positions.

We acknowledge the immense input in the coordination of the support that was necessary to complete this assignment. Our acknowledgement goes to the rest of the Secretariat of the Tribunal that was part of the entire process, and in particular Mr. Moses Kipkoge, Ms. Karen Muthee, Mr. Gherson Anjichi, Ms. Lucille Obel, Ms. Judy Nyakio Muriithi, Mr. Nthatu Ntoogo, Mr. Enock Kiptoo, Mr. Muriuki Muriungi and Ms. Wangeci Akedi. We also acknowledge Mr. Paul Mugambi Makunyi, Ms. Juliet Murimi and Mr. Oliver Kipchumba for their exemplary technical resource support to the Tribunal.

To the Petitioners, Witnesses, the media and other support staff such as our security guards and drivers, we remain thankful for your various contributions throughout this process. We owe many thanks to everyone else who participated, for the efficient way in which you variously supported the business of the Tribunal to the completion of the exercise, that culminated in this Report and Recommendation.

To the entire fraternity of the Kenya Institute of Curriculum Development and the Government Printers (GP) which placed at our disposal all the necessary physical and other facilities, we thank you.

Most important, we thank the Almighty God for the good health and energy throughout the exercise, for without His abundant Grace this Report and Recommendation would not have been possible.

CHAPTER 1: BACKGROUND

1. The Independent Electoral and Boundaries Commission (the IEBC; the Commission) has had a chequered history. By a press statement issued on 16th April 2018, three Commissioners, namely Consolata Nkatha Bucha Maina, Margaret Wanjala Mwachanya and Paul Kibiwott Kurgat declared that they had resigned as members of the IEBC. Five months later, on 18th October 2018, another Commissioner Roselyn Kwamboka Akombe resigned as a member of the IEBC. As a result, a total of four vacancies in the Commission were declared by the President vide Gazette Notice No. 3522 dated 14th April 2021. For three years, the IEBC operated with the Chairperson and two Commissioners only.
2. A selection panel for the appointment of new Commissioners of the IEBC was constituted vide Gazette Notice No. 4004 dated 26th April 2021, and took Oath of Office on 29th April 2021 before the Acting Chief Justice, the Hon. Justice Philomena Mbete Mwilu. The panel selected and forwarded to the President a list of eight (8) names of qualified candidates for the positions of members of the Commission. The President picked Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya (the four Commissioners) from the list and forwarded their names to the National Assembly for approval. The National Assembly approved all the names as received and submitted them to the President for appointment.
3. On 31st August 2021, a Constitutional Petition No. E345 of 2021 was filed impugning the composition of the Commission on the strength of the names of the four Commissioners forwarded by the National Assembly to the President for appointment, citing non-compliance with the principle of two-thirds gender rule under Article 27 of the Constitution. The Petition also challenged the eligibility of Irene Cherop Masit because she had stood for an election for the position of Women Representative in Elgeyo-Marakwet County in the 2017 General Elections. It was alleged that her approval and appointment were in contravention of Article 88(2)(a) of the Constitution which bars a person from appointment as a member of the Commission if the person has, at any time within the preceding five years, held office of the governing body of a political party or stood for an election. While agreeing that Irene Masit was not eligible for appointment as a Commissioner of the IEBC, Mr. J dismissed the Petition on 30th June 2022 citing, *inter alia*, public interest, ongoing preparations for the forthcoming 2022 General Elections, hence, there was no time to constitute another selection panel to undertake a new recruitment; prevention of a constitutional crisis if elections were not conducted by a fully constituted Commission; and that there would be only one woman remaining as a Commissioner if Masit was removed from office, thereby, eroding the gains made on the two-thirds gender rule.
4. The four Commissioners were appointed as members of the IEBC **Vide Gazette Notice No. 9082** dated 1st September 2021. They were subsequently sworn in on 2nd September 2021 to serve for a period of six years thereby filling the vacancies created following the previous resignations and, as a result, making the Commission fully constituted. The swearing in set the stage for the IEBC to fully prepare for the 9th August 2022 General Elections, and put to rest the question of quorum.
5. On August 9, 2022 Kenya held its general election under the Constitution of Kenya and soon thereafter on August 15, 2022, the chairperson of the IEBC declared William Samoei Ruto, the Presidential Candidate for the United Democratic Alliance Party, the President-elect with 7,176,141 votes (50.49% of presidential votes cast) and Raila Amollo Odinga as the runner's up with 6,942,930 votes (48.85% of presidential votes cast).

6. Aggrieved by the results Raila Odinga and Martha Karua, who were the presidential and deputy presidential candidates, respectively, of the Azimio La Umoja Coalition party filed Presidential Election Petition No. E005 of 2022, challenging the declared result of that presidential election. Alongside, were other petitions that also challenged the result of the presidential election.
7. On 5th September 2022, the Supreme Court delivered its Judgement dismissing all the petitions and resultantly declaring the election of the President-elect to be valid under article 140(3) of the Constitution.
8. On diverse dates between 9th September 2022 and 19th November 2022, the Clerk of the National Assembly received four Petitions for the removal of the four Commissioners from office pursuant to Article 251 of the Constitution. The first Petition by Mr. Geoffrey Langat dated 9th September 2022 cited serious violation of the Constitution and other relevant laws; gross misconduct in the performance of their functions; and incompetence as the grounds for their removal. Mr. Langat stated in the Petition that the conduct of the four Commissioners violated Articles 3(2) and 81(e)(v); and Sections 26 and 30 of the Independent Electoral and Boundaries Commission Act, 2011. He prayed that the National Assembly takes the necessary steps to remove the four Commissioners from office under Article 251(3) of the Constitution.
9. The second Petition dated 13th October 2022 was submitted by Zachariah M. Matayo, on behalf of the Republican Liberty Party. It stated that the four Commissioners had seriously violated the Constitution and other relevant laws; had been involved in gross misconduct in the performance of their duties; and that they were grossly incompetent. Further, it stated that the four Commissioners fell short of the provisions of Articles 73(1)(a), 73(2), 75 and 232 of the Constitution; and Section 9 of the Leadership and Integrity Act, 2012. He urged the National Assembly to consider the Petition pursuant to Article 251(3) of the Constitution so that the four Commissioners can take personal responsibility for the consequences reasonably arising from their actions or omissions in the discharge of their duties.
10. The third Petition by Rev. Dennis Ndwiga Nthumbi dated 2nd November 2022 sought the removal of the four Commissioners from office for serious violation of the Constitution and the laws, gross misconduct and incompetence. The Petitioner cited violation of Articles 10, 73(2)(b) and (c), 75, 138, 232, 249; and Sections 9, 26 and 30 of the Independent Electoral and Boundaries Commission Act, 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act, 2012; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act, 2003. He urged the National Assembly to find that his Petition disclosed sufficient grounds for the removal of the four Commissioners from office, and transmit the Petition to the President for further action.
11. The last Petition was by Owuor Steve Gerry dated 19th November 2022 wherein he stated that the four Commissioners violated Articles 3(2); 10(2); 81(e)(iii), (iv) and (v); and 88(2) of the Constitution owing to their conduct during the period leading up to the declaration Presidential Election Result in the 2022 General Elections. Thus, he called upon the National Assembly to urgently consider the Petition, transmit it to the President for the appointment of a tribunal to investigate the conduct of the four Commissioners for the violations set out in the Petition.
12. On 15th November 2022, the Speaker of the National Assembly presented the four Petitions to the House, which Petitions stood committed to the Departmental Committee on Justice and Legal Affairs for consideration. Upon consideration, the Committee was required to report to the House, within fourteen (14) days as per the National Assembly

Standing Order 230(3) and (4), on whether the Petitions satisfied the grounds for removal of any or all of the four Commissioners in accordance with Article 251 of the Constitution.

13. The Committee notified the Petitioners, Respondents and the public of the date, time and place of the proceedings and invited the Petitioners and the Respondents to attend the hearing at the designated venue. The Departmental Committee on Justice and Legal Affairs commenced hearings of the four Petitions on 24th November 2022. The Petitioners participated but the four Commissioners withdrew from the proceedings. Nonetheless, the Committee carried on with the proceedings and upon conclusion, it reported to the National Assembly on 1st December 2022 that the Petitions disclosed sufficient grounds for the removal from office of the four Commissioners and recommended to the House that His Excellency the President, Hon. William Samoei Ruto, PhD, C.G.H., appoints a tribunal in accordance with Article 251(5) of the Constitution to investigate the matter expeditiously, report on the findings and make a binding recommendation to the President.
14. Accordingly, the National Assembly transmitted to His Excellency the President, Hon. William Samoei Ruto, PhD, C.G.H., a Petition for the removal of the four Commissioners from office as members of the IEBC pursuant to Article 251 of the Constitution. The resolution of the National Assembly and the Petition for removal transmitted to the President was premised on the finding of the National Assembly that the constitutional grounds for removal of a member of a Constitutional Commission had been met. Upon receipt, His Excellency the President suspended with immediate effect the four Commissioners from office and subsequently appointed, by Gazette Notice No. 14890 dated 2nd December 2022, this Tribunal to investigate the allegations in the Petition.

1.1. Appointment and Mandate of the Tribunal

15. This Tribunal was appointed by His Excellency the President pursuant to Article 251 (4) of the Constitution through Gazette Notice no. 14890 of 2nd December 2022 to investigate and to consider the Petition for removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya, from office as Commissioners of the Independent Electoral and Boundaries Commission.
16. His Excellency the President appointed Hon. Justice Aggrey Otsyula Muchelule as the Chairperson; Carolyne Kamende Daudi, Linda Gakii Kiome, Mathew Nyaramba Nyabena and Col. (Rtd.) Saeed Khamis Saeed as Members; Kibet Kirui Emmanuel and Irene Tunta Nchoe as Joint Secretaries; Peter Munge Murage, MBS as Lead Counsel; and Zamzam Abdi Abib as Assisting Counsel; of the Tribunal.
17. The Tribunal was mandated, to consider and inquire into the allegations in the Petition transmitted to the President, by the National Assembly, for removal of Juliana Whonge Cherera, Francis Mathenge Wanderi, Irene Cherop Masit and Justus Abonyo Nyang'aya from office as members of the Independent Electoral and Boundaries Commission pursuant to Article 251 of the Constitution on account of serious violation of the Constitution and other relevant laws, gross misconduct and incompetence.
18. In the discharge of its functions, the Tribunal was required to: - **(a)** prepare and submit a report and its recommendations thereon expeditiously; and **(b)** exercise all the powers conferred upon it by law for the proper execution of its mandate.

1.2. The Tribunal's work plan

19. Following the gazettelement of the Tribunal, The Chairperson, Members, the Lead Counsel, the Assisting Counsel and the Joint Secretaries of the Tribunal took Oath of Office before the Hon. Justice Martha Karambu Koome, the Chief Justice and the President of the Supreme Court of the Republic of Kenya, on 2nd December 2022.
20. Thereafter, the Tribunal held its first meeting presided over by the Chairperson, Hon. Justice Aggrey Otsyula Muchelule, Judge of the Court of Appeal. Members elected Carolyne Kamende Daudi as the Vice Chairperson of the Tribunal.
21. In exercise of its mandate as set out in the Gazette Notice No. 14890 dated 2nd December 2022 and pursuant to Article 251 of the Constitution, the Tribunal proceeded to prepare and publish the Tribunal (Practice and Procedure) Rules, 2022 vide Gazette Notice No. 15196 dated 5th December 2022, in the Kenya Gazette Vol. CXXIV-No. 264 of 6th December 2022. There was no challenge to the practice and procedure rules.
22. The Tribunal published a Notice of Status Conference in the daily newspapers on 6th December 2022, inviting the Petitioners, Commissioners and members of the public to the status conference, and further indicating the time and venue of the conference being the Kenya Institute of Curriculum Development.
23. A Status Conference was held on 9th December 2022 and the Tribunal, upon hearing the Lead Counsel and Commissioner Irene Masit through her appointed Counsel Mr. Kipkorir gave the following directions: -
 - (a) The Chairman indicated that the Tribunal had received communication from the appointing authority of an acknowledgement of the letters of resignations of three Commissioners, namely Juliana Whonge Cherera, Francis Mathenge Wanderi and Justus Abonyo Nyang'aya.
 - (b) The Tribunal gave directions that both parties to file and serve their documents within 7 days thereafter.
 - (c) The physical hearing to commence on 20th December 2022 at the Kenya Institute of Curriculum Development at 9.00 am.
24. On the same day, an oral preliminary objection was raised by Counsel for Commissioner Irene Masit to the effect that the Tribunal lacked Jurisdiction following the resignation of the three Commissioners, and that the Petitions were *res judicata*, following the Supreme Court Judgment on the presidential election petition, among other grounds.
25. Following the arguments from both Counsel, the Tribunal retreated to consider the objection and delivered a Ruling shortly thereafter dismissing the objection and restated their directions for filing and service of the documents. A copy of the Ruling is annexed to this report as 'Appendix No-1.'
26. On 20th December 2022, the Tribunal sought to confirm compliance of filing and service of documents from the Commissioner and the Lead Counsel. The Lead Counsel confirmed that he had filed and served his documents upon the Counsel for the Commissioner. On his part, Counsel for the Commissioner stated that he would not be filing any evidence in response. Counsel Kipkorir, for the Commissioner further indicated that his Client was not bound to file any evidence and that he was not going to file any documents.
27. The Tribunal began the Hearing on 20th December 2022 where it took evidence from **Rev. Dennis Ndwiga, Geoffrey Lang'at, Zachariah Matayo, Steve Gerry, Anthony**

Kamau, Simon Miller and Hussein Marjan. On 22nd December 2022, the Tribunal adjourned the hearings to 23rd January 2023.

28. On 23rd January 2023, before the commencement of the hearing, the Tribunal was called upon to rule on an application for joinder by the Azimio Coalition Party through their Counsel, Mr. Danstan Omari. The Application was dismissed. (‘Appendix 2’). The Tribunal proceeded to take evidence from **John Pile, Prof. Abdi Yakub, Boya Molu and Wafula Chebukati.**
29. All the witnesses were examined in chief by the Lead Counsel and cross-examined by Counsel for the Commissioner. After calling 11 witnesses, the Lead Counsel closed his case. Counsel for the Commissioner also closed his case after he confirmed that the Commissioner would not calling any evidence in rebuttal. On 24th January 2023, the Tribunal adjourned the hearing and directed parties to file their submissions and set a date for highlighting of submissions on 20th February 2023.
30. The Lead Counsel and Counsel for the Commissioner highlighted their submissions on 20th February 2023 and immediately thereafter, the Tribunal adjourned to write its report and recommendation.

CHAPTER 2: JURISDICTION

31. The jurisdiction of this Tribunal is provided under the provisions of Article 251 of the Constitution, and is limited to the removal from Office of a member of an independent commission on account of serious violation of this Constitution or any other law including a contravention of Chapter Six; gross misconduct, whether in the performance of the member's or office holder's functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy.
32. The procedure for removal begins with presentation of a petition by a person desiring the removal of a member of a commission or of a holder of an independent office on any of the grounds specified above to the National Assembly setting out the alleged facts constituting that ground.
33. The Tribunal is appointed consequent to a recommendation by the National Assembly to President that the petition discloses sufficient grounds for the removal of a Commissioner.
34. A question was raised on the competence of the Tribunal in view of the Supreme Court judgement in the Presidential Election Petition No. E005 of 2022. We delivered ourselves on the issue. We reiterate that the Supreme Court was proceeding under Article 140 to determine the validity of the election of the President. In its nine issues it considered, none was in relation to an inquiry into the removal from office of any of the Commissioners of the IEBC. It is our considered opinion that the inquiry at hand is not Res Judicata.
35. We have taken note that in Constitutional Petition E345 of 2022, *G'Oganyo v Independent Electoral Commission Selection Panel & 2 Others; Independent Electoral and Boundaries Commission & 6 Others (Interested Parties)* the issue of eligibility of Commissioner Irene Masit was determined. This Tribunal is subordinate to the High Court. It has no jurisdiction to sit on appeal over the matter.
36. The remit of the Tribunal is to investigate the matter expeditiously, report on the facts and make a binding recommendation to the President. Given that the Tribunal is clothed with the express power to investigate, it is our view that this is a quasi-judicial body with inquisitorial powers. In the case of **Petition No. 16 'B' of 2016 Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR** the Supreme Court, at paragraphs 104- 106 held:

"104. In addressing the above issue, we note that Article 168(7)(a) of the Constitution provides that the Tribunal shall be responsible for the regulation of its proceedings, subject to any legislation contemplated in Article 168(10). Article 168(10) also provides that Parliament shall enact legislation to provide the procedure of a Tribunal appointed to investigate the conduct of a Judge. Parliament has indeed enacted the Judicial Service Act and its Second Schedule which provides the procedure that governs the conduct of a Tribunal appointed under Article 168(5) of the Constitution.

105. Section 11 of the Second Schedule provides that "the counsel assisting the Tribunal will present evidence relating to the conduct of the subject and any matter relevant to the investigation." Further, Section 17 provides that, "evidence before the Tribunal may be presented in the form of memorandum, affidavit or other documentation."

106. *It is thus clear that neither the Constitution nor the Judicial Service Act specify the method of investigation to be employed by the Tribunal in gathering evidence before or during its proceedings. The Tribunal is however required to comply with the rules of natural justice such that the Judge who is the subject of investigation is entitled to cross-examine all the witnesses brought forth and bring evidence in rebuttal of allegations made against him.*”

37. The Tribunal had in mind the above decision when it prepared and published its Practice and Procedure Rules recognizing at **Rule 14** that while it would not be bound by the strict rules of evidence, its proceedings would be guided by the rules of natural justice.

2.1. Burden of Proof

38. It is a well-established principle in law, concretized under **Section 107 (1) of the Evidence Act** that he who alleges must prove. In the context of this Tribunal, the Lead Counsel bears the legal burden of proving the allegations levelled against the Commissioner to the required standard. It is only upon sufficiently discharging this legal burden to the required threshold that the evidential burden then shifts to the Commissioner to disprove the said allegations.

39. In the **Mbalu Mutava Case [supra]** this is what the Supreme Court stated at **para. 33**:

“We now turn to consider the burden of proof. It is the duty of the Assisting Counsel to marshal all the evidence necessary to establish the allegations against the Judge to the required standard. In simple terms the Assisting Counsel bears the legal burden of proof. Counsel for the Judge submitted that the Judge had no responsibility to prove any fact(s). While this is generally correct, where the Assisting Counsel has provided sufficient evidence, the Judge may be required in law to discharge the evidential burden on matters which are peculiarly within his knowledge.”

“This Tribunal is not strictly bound by the rules of evidence but we draw guidance from general principles codified in the Evidence Act (Chapter 80 of the Laws of Kenya). Section 107(2) thereof provides that when a person asserts the existence of any fact, the burden of proof lies on that person. It further follows that the evidential burden is on the party who would fail if no evidence at all was given. It is our view that where the Assisting Counsel has discharged the legal burden of proof, the Judge should discharge the evidential burden on matters within his knowledge.”

2.2. Standard of Proof

40. This matter is *sui generis*. The standard of proof applicable in the proceedings of this Tribunal is neither that applicable in criminal law, that is beyond reasonable doubt, nor that in civil cases, which is on a balance of probability.

41. The Supreme Court in the **Mbalu Mutava case [supra]** was clear that:

... In that context, we need to state that once a standard of proof has been agreed upon, the evidence on record whether circumstantial or direct must be tested against that accepted standard. Therefore, contrary to the Petitioner’s submissions, circumstantial evidence would not require a different standard of proof, but such evidence must meet certain recognized principles before a verdict of guilt is reached.

204. ... Since both parties agree on the applicable standard of proof, the evidence on record must then be tested against that standard. In this case, the inference should not go beyond reasonable doubt but should be higher than a balance of probabilities. In essence, it is not enough that an alleged fact is far more likely to have happened but there should be a level of certainty or real possibility that it must have happened.

42. Similarly, the High Court in **Republic v The Tribunal of Inquiry to Investigate the Conduct of Puisne Judge Tom Mbaluto & 5 Others ex parte Tom Mbaluto [2013] eKLR**, concurred with the position that the standard of proof ought to be higher than on balance of probabilities but not beyond reasonable doubt stating:

‘...in Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR, the Tribunal accepted the position that the correct standard of proof is between proof beyond reasonable doubt and the balance of probabilities. On my part I concur with the position that the standard of proof ought to be higher than on balance of probabilities but not beyond reasonable doubt. As long as that standard is applied, it does not matter by whatever name it is called...’

43. In Seychelles, a **Report of the Tribunal Set Up Under Article 134 (2) of the Constitution of the Republic of Seychelles to Inquire into the Inability of Judge Durai Karunakaran to Perform the Functions of the Office of Judge on Grounds of Misbehaviour August 2017 (Complaints Against a Puisne Judge of the Supreme Court of Seychelles by the Honourable Chief Justice to the Constitutional Appointments Authority)** stated at page 46 thus:

“Given the nature of proceedings before us and that a finding could result in a Judge being removed from office it is important that the standard of proof is such that it ensures that the findings are based on a reasonably high standard of proof. In our view this standard must certainly be higher than the ordinary standard of proof in civil cases. The standard must be higher than on a balance of probability. On the other hand, we are of the view that it need not reach the standard set in criminal cases as indeed this is not a criminal proceeding. Nevertheless, it must be such that the Tribunal is satisfied that the allegations against the Judge must be proved to have been committed.”

44. This Tribunal is bound and guided by these decisions.

CHAPTER 3: ALLEGATIONS AND SUMMARY OF EVIDENCE

45. Mr. Geoffrey Langat lodged a Petition dated 9th September 2022 at the National Assembly seeking the removal of the four Commissioners on account of violations Articles 251(1) (a), (b) and (c) of the Constitution.
46. Mr. Zachariah M Matayo, on behalf of the Republican Liberty Party, lodged a Petition dated 13th October 2022 before the National Assembly stating that the four Commissioners had seriously violated the Constitution and other relevant laws, were involved in gross misconduct in the performance of their duties and that they are grossly incompetent.
47. Rev. Dennis Ndwiga Nthumbi filed a Petition by dated 2nd November 2022 seeking the removal of the four Commissioners from office for serious violation of the Constitution and the laws, gross misconduct and incompetence.
48. Mr. Owuor Steve Gerry filed a Petition dated 19th November 2022 before the National Assembly stating that the four Commissioners violated Articles 3(2); 10(2); 81(e)(iii), (iv) and (v); and 88(2) of the Constitution owing to their conduct during the period leading up to the declaration Presidential Election Results in the 2022 General Elections.
49. In the above Petitions, the following were the allegations raised against the Commissioners:

3.1. Serious Violation of the Constitution and the Law

Particulars of the Allegation

- a) Demonstrating partiality and biased conduct in agreeing to the proposal to alter the results of the presidential elections in favour of one candidate or in the alternative to force a run-off contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- b) Agreeing to the incentives and giving in to the proposal by National Security Advisory Committee (NSAC) to alter the results of the presidential election contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- c) Disowning the results of the 2022 presidential elections which the Commissioner had participated in the verification and tallying contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- d) Accepting the proposal to alter the results of the election to subvert the will of the people of Kenya contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- e) Issuing press statements with close resemblance with the press statement by Azimio La Umoja One Kenya Presidential Candidate contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act

2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.

- f) Failing to follow the well set-out guidelines for the verification, tallying and announcement of the presidential elections contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- g) Being ineligible/unqualified/unsuitable to be appointed as Commissioner of the IEBC within the meaning of article 88(2) a of the Constitution by virtue of having vied for an elective seat (Woman Representative seat in Elgeyo Marakwet County) in the 2017 General Elections.

3.2. Gross Misconduct

Particulars of the Allegation

- a) Concurring to support the unlawful attempt to alter the results of the presidential elections in favour of one candidate or in the alternative to force a run-off.
- b) Acting in liaison with one faction of presidential elections by issuing similarly worded press statements, agreeing to alter results to favour one candidate, being visited by representatives of one of the presidential candidates.
- c) Refusing to follow the well set-out guidelines for the verification, tallying and announcement of the presidential elections.
- d) Filing pleadings, submissions and affidavits in support of petitions at the Supreme Court challenging the 2022 presidential elections and calling for nullification of the presidential election results in which they oversaw and participated in.
- e) Staging a dramatic revolt and walkout at the eleventh hour of the tallying and verification process of an election they participated in, supervised and oversaw.
- f) Issuing a press statement to make declarations on the 2022 presidential elections at Serena Hotel, outside the duly gazetted National Tallying Centre at Bomas.
- g) Individually and collectively acting as an agent of the Azimio La Umoja-One Kenya Coalition Party and its associates within the Commission.

3.3. Incompetence

Particulars of the Allegation

- a) Accepting the proposal to alter the results of the election in favour of one candidate or in the alternative to force a run-off.
- b) Failing to follow the well set-out guidelines for the verification, tallying and announcement of the presidential elections.
- c) Filing pleadings, submissions and affidavits in support of petitions at the Supreme Court challenging the 2022 presidential elections and calling for nullification of the presidential election results in which they oversaw and participated in.
- d) Reckoning that the presidential election results as announced were opaque and invalid for failure by the IEBC Chairman to include rejected votes in the computation of the 50% plus one threshold yet the Supreme Court had previously determined that rejected votes do not count in such computation as they are invalid votes. That this

was an indication of the inability of the Commissioner to comprehend or appreciate her constitutional and statutory duties, thus demonstrating her incompetence.

- e) Disowning the results of the presidential election and alleging that the aggregate of the percentages of votes garnered by all the presidential candidates exceeded 100% of the total votes and thus being a mathematical absurdity, yet this was not the case.
- f) Convening and attending a meeting purportedly to discuss and appoint Counsel to represent the Commission in the presidential election petitions.
- g) Appointing Counsel or a law firm to represent the Commission in the presidential election petitions without authority, and consequently usurping a function of the Chief Executive Officer of the Commission, and act that is against all known public procurement laws.
- h) Ineligibility/being unqualified to be a member of the IEBC on the part of Commissioner Irene Masit having not completed five years since she stood for an elective seat (Woman Representative seat in Elgeyo Marakwet County) in the 2017 General Elections, and with the High Court of Kenya having declared her as ineligible to be a Commissioner in Constitutional Petition E345 of 2022, *G'Oganyo v Independent Electoral Commission Selection Panel & 2 Others; Independent Electoral and Boundaries Commission & 6 Others (Interested Parties)*.

3.4. Summary of Evidence

3.4.1. TW1- REV. DENNIS NDWIGA NTHUMBI

- 50. TW1 was Rev. Dennis Ndwiga Nthumbi, who testified that he was an expert in security having specialized in corporate solutions, counter-terrorism and aspects of security affecting the fragility of nations. The witness relied on his sworn statement dated the 5th December 2022. TW1 gave a chronological order of events at the NTC. He stated that he was present at the NTC as of the 10th August 2022 to the 15th August 2022 as invited by media houses to give his perspective on governance throughout election processes at the NTC. It was his testimony that Commissioner Irene Commissioner Irene Masit was present at the NTC and participated in the electoral process and occasionally announced the results. He testified that on the 15th August 2022, security at the NTC had been modulated in that the security checks were not in place. It was his testimony that later on, when violence broke out at the NTC, the split screen scenario appeared at the television at the NTC. It was further testified that Mr. Chebukati came to the podium with two other Commissioners while the rest of the Commissioners were not present. From the video clip, TW1 confirmed that Commissioner Irene Masit was part of the press statement that appeared on the split screen.
- 51. During cross examination, Counsel for the Commissioner sought to challenge the credibility of the witness. TW1 testified that he did not have a degree in either theology or security studies. That however, he had certifications in military science with a work experience of 15years from various organizations. That currently, he owned a security company. The witness denied that he was politically associated with United Democratic Alliance Party. He qualified that his role in the media was that of a political analyst. It was further qualified that as a security expert, he was accustomed to minimal sleep. In re-examination, TW1 reiterated his allegations as against Commissioner Irene Masit.

3.4.2. TW2 - GEOFFREY LANGAT

- 52. TW2 was Mr. Geoffrey Langat, an advocate of the High Court of Kenya. He relied on his witness statement dated the 5th December 2022. He testified that he presented his

petition before the National Assembly to which Commissioner Irene Masit did not respond. He testified that as a voter who had participated in the general election, he was keenly following up on the verification process through media stations. It was his testimony that while awaiting the final results by Mr. Chebukati, the split screen appeared showing three (3) Commissioners at the NTC and Commissioner Irene Masit and 3 other Commissioners at the Nairobi Serena Hotel. That it was at this point that the presser was done at the hotel stating that the threshold for declaration of results, had not been achieved. It was further testified that party leader of Azimio La Umoja Party also issued a press statement similar to that which was given at Nairobi Serena Hotel.

53. TW2 further testified that after the declaration of the final results by Mr. Chebukati, the results were challenged by the Azimio La Umoja party wherein Commissioner Irene Masit supported the petition. It was his testimony that the presser by Commissioner Irene Masit and 3 others was calculated to achieve a state of anarchy. During the cross examination, Counsel for the Commissioner raised issues as to whether the Petition was in compliance with the law. His answer was in the affirmative.
54. TW2 testified that the four Commissioners were working in cahoots given the chronology of events on the 15th August 2022. That he observed from the media that there were attempts to hinder Mr. Chebukati from declaring results so that the serena presser could be read first. Further, on 16th August 2022, the two pressers by the four Commissioners, including Commissioner Irene Masit and Azimio party were done five minutes apart. During re-examination, he reiterated that allegations implicated Commissioner Irene Masit.

3.4.3. TW3 - ZACHARIAH MATAYO

55. Mr. Zachariah Matayo testified as TW3. He testified that he was the national chairperson of the Republican Liberty Party. He relied on his witness statement dated the 6th December 2022. It was his evidence in chief that he had authority to testify on behalf of the political party, and that his party had candidates that participated in the general elections of 2022. It was his testimony that the Commissioners violated the law by leaving the NTC and proceedings to a non-gazetted area with the intension of causing incitement. He stated that the statement by the Commissioners at Nairobi Serena was a statement issued by all the four Commissioners including Commissioner Irene Masit. He testified that the presser at the Nairobi Serena Hotel surprised him since the four Commissioners had participated in the verification process. The utterances by the Commissioners had been taken seriously by members of the public.
56. During cross examination, TW3 denied that he had abandoned the prayers he sought in the petition to the National Assembly. He stated that the source of some of his evidence came from the media while the rest was what he had personally observed as an agent of his party at the NTC that he had not abandoned the prayers sought in his petition as presented before the National Assembly. He testified that the source of some of the allegations made in his petition were from the media, while others he observed as a party agent at the NTC. Asked questions regarding the form of his petition, his evidence was that the National Assembly Standing Orders did not permit him to attach any evidence. He stated that Commissioner Irene Masit violated the Constitution by leaving the NTC and proceeded to make serious statements with an intention to divide the nation; that as a Commissioner of the IEBC, she was a state officer who was not allowed to issue such statements. He further testified that the nation was left with conflicting information as announced by Mr. Chebukati and disputed by the four Commissioners. Such conflicting information was capable of causing war in Kenya.

57. He further testified that the four Commissioners could have board room disagreements, however, the same were to be settled in the boardroom and not in public domain. He was surprised that the four Commissioners in the press statement, could say that they were willing to follow the law, yet their statement was geared towards inciting Kenyans. He reaffirmed that the four Commissioners misled the public through the pressers issued on 15th and 16th August 2022. It was his evidence that the true results of the elections were those announced by Mr. Chebukati and this had been confirmed by the Supreme Court.
58. In Re-examination, he stated that the presser by the four Commissioners at the Nairobi Serena Hotel caused confusion amongst Kenyans as to which announcement to believe as Mr. Chebukati was entitled to declare the result. He testified that the action by the four Commissioners to move out of the gazettes area was done intentionally with ill-motive.

3.4.4. TW4 - OWUOR STEVE GERRY

59. He adopted his witness statement dated 7th December 2022. He testified that he was an advocate of the High Court of Kenya. That the basis of his complaint was on the acts of impunity as stated in his petition. His evidence was that his petition was not challenged before the National Assembly. He testified that the allegations in the presser were false as the four Commissioners had taken part in the electoral process. According to him, the actions by Commissioner Irene Masit amounted to a dramatic revolt against the results. He said that Commissioner Irene Masit was incompetent because she and the other Commissioners had stated that Mr. Chebukati was wrong in not taking into account the number of spoilt votes. He went ahead to testify that from inception, Commissioner Irene Masit's appointment was unconstitutional on account of ineligibility having stood for election in the 2017 General Elections. As regards the issue of violation of the Constitution, he said that the four Commissioners wanted to interfere with the result to avoid the achievement of the 50% + 1 threshold.
60. During cross examination, it was his case that as per the National Assembly Standing Orders, the petition did not have to be supported by an affidavit.

3.4.5. TW5 - ANTHONY CHEGE

61. Mr. Anthony Chege (TW5) was the General Manager of the Nairobi Serena Hotel. His evidence was that on 15th August 2022, one Edwin Ogwe had booked the Nairobi Serena Hotel gardens for a press conference. He paid Kshs. 60,000/- for two press conferences. Subsequent to that four people who he was able to identify as IEBC Commissioners, who included Commissioner Irene Masit addressed the press conference from the hotel gardens. When shown the video clip of the press conference, he confirmed that it was the presser done at their Hotel by the four Commissioners who included Commissioner Irene Masit. He said that he did not know Mr. Edwin Ogwe before this day.

3.4.6. TW6 - SIMON MILLER

62. Mr. Simon Miller (TW6) was the Accommodations Manager at the Yaya Apartments and Hotel. His evidence was that Mr. Edwin Ogwe, was the hotel's known client. He made bookings for unnamed VIPs for the period running between 15th August to 19th August 2022. Ordinarily the hotel required its client to provide their identification details. These particular visitors did not provide such details and that their registration into the hotel was done through the identity of their security detail. The visitors occupied room numbers 21, 23 and 27. Reference was made to the CCTV footage in which TW6 was able to identify that Commissioner Irene Masit was the lady seen in the footage

entering the hotel through the basement. Further reference was made to the visitors' records and vehicle movement logs which established that there were several visitors who came to apartments Nos. 21 and 23. They included Hon. Raphael Tuju.

63. During cross examination, Counsel for the Commissioner complained that the CCTV evidence had been illegally obtained and therefore ought not to have been admitted.

3.4.7. TW7 - HUSSEIN MARJAN HUSSEIN

64. Mr. Marjan Hussein Marjan (TW7) is the Commission Secretary and the CEO of the IEBC. He gave sworn testimony on 22nd December 2022. In his Witness Statement dated 13th December 2022 he indicated that he was responsible for the management of the Secretariat.
65. He stated that the Commission had put in place sufficient internal governance instruments to ensure transparency and accountability and that there were policies which had been approved by the Commission to help it address certain situations in the run up to the General Election. He further said that various committees had been formed to handle various matters for example results management committee, security and welfare committee.
66. He testified that he was present at the NTC when the skirmishes arose. Further he stated that he saw from the screens at the NTC that the four Commissioners including Commissioner Irene Masit were giving a press statement at the Nairobi Serena Hotel. Mr. Marjan went on to state that it was wrong for the Commissioners to make public statements on the results declared by the Chairperson despite having worked together to the last point and they had not indicated that anything may have gone wrong.
67. He confirmed further that he was not involved in the tallying and verification of the presidential election results but was designated as a co-chair of the results management at the NTC. Mr. Marjan stated that he worked closely with the four Commissioners who were saying that the results were opaque.
68. During Re-Examination he further stated that they had worked well up to the last point on the date of declaration and that whenever any clarification was found necessary, they would sit together to address it. He confirmed that immediately after the voting day, the results started trickling in and after the verification for every constituency, the Commissioners would announce the results after they have been validated. He said that Commissioner Irene Masit was amongst those who announced the results.
69. On the press statement by the four Commissioners at the Nairobi Serena Hotel, Mr. Marjan stated that he was surprised that the statement would have been made as they were preparing to announce the final Presidential Election result. He stated that when he presented the results to the Commissioners, they were all present in the boardroom and were discussing the results.
70. Mr. Marjan explained that the Chairperson asked all the Commissioners to comment on the results. When he was asked to, he said that he was the Secretary and could not comment on the discussion as it was their responsibility. He explained that by the time he went in, he was told that the NSAC had already met the Commissioners. He only presented the results as printed. He testified that what was being discussed there was the issue of numbers, the difference and the suggestion to moderate results to give the losing contenders a second chance.
71. Mr. Marjan explained that as soon as the verification was through, he printed the results to be declared by the Chairperson and took them to the Boardroom where he found all

the Commissioners seated, and he gave all the Commissioners copies of the excel sheet indicating what the results were.

72. Thereafter, the Chairperson requested the Commissioners to accompany him to the NTC to declare the result. Commissioners Prof. Abdi Guliye and Boya Molu and himself accompanied the Chairperson to the NTC, leaving the four Commissioners in the boardroom.

3.4.8. TW8 - JOHN PILE LENANYANGERA

73. Mr. John Pile Lenanyangera (TW8) is the Chief Security Officer for both the Yaya Hotel and the Shopping Centre. His evidence was that all security guards report to him and that all vehicles that come to the premises have their records kept by the facility. It was his case that the hotel had kept the details for 15th August 2022. He stated that he was the one who had ushered Commissioner Irene Masit that day. He was shown the CCTV footage in which he was able to identify himself while ushering in the Commissioner.
74. During cross examination, the witness confirmed that Commissioner Irene Masit came into the hotel at around 8.20pm and that he had personally took her to the reception area of the hotel. He did not know in which of the three apartments the Commissioner resided.

3.4.9. TW9 - PROF. ABDI YAKUB GULIYE

75. Prof. Abdi Yakub Guliye is an immediate former Commissioner of the IEBC. He testified on 23rd January 2023 relying on his Witness Statement dated 13th December 2022. He stated that upon appointment of new Commissioners on 2nd September 2021, the committees of the Commission were expanded and re-designations were done to oversee certain functions. He stated that Commissioner Irene Masit was designated to chair the Legal and Public Affairs Committee.
76. Prof. Yakub explained the operational procedure of the Commission at the NTC. He stated that since the 2022 General Election was a special event or activity, the Chairperson of the IEBC allocated different tasks to the Commissioners through Committees to ensure a smooth running of the process at the NTC. One or two Commissioners gave leadership to the Committees and the staff working under them, and wherever an issue arose, the Committees reported such issues to the commissioners.
77. He further testified that during the 2022 general elections there were no issues except for the ordinary challenges that were happening on the floor in terms of the verification process in respect of which the Commission occasionally retreated into the holding room to deal with them as they were emerged. It was his testimony that the operation was seamless to the end.
78. TW9 stated that Hon. Raphael Tuju, Senator Amos Wako and Advocate Kyalo Mbobu visited the Commissioners at around 3.00 am on 15th August 2022 with a request that the Commissioners should slow down the process of tallying and verification of the presidential elections results. It was his testimony that the above visitors told the Commissioners that they had seven days within which to tally, verify and declare the results and as such they should not fast track the process. It was the evidence in chief of TW9 that the visitors asked the Commissioners to look at the bigger picture, as the Commission did not operate in a vacuum and therefore, they should ensure that the country is held together. It was his testimony that all the seven Commissioners were present in the said meeting.

79. Prof. Yakub testified that Commissioner Irene Masit agreed with the remarks of the visitors on moderating results to the extent that the Commission announced a particular candidate for purposes of ensuring that the country was held together as suggested by the visitors during the 3am meeting. However, he clarified that at that particular point, he did not know who the winning candidate was. He stated that his remark when he was given an opportunity by the Chairperson to respond to the sentiments of the visitors was that he did not know the outcome of the election at that point, and that any such discussion was not welcome because the Commissioners swore an oath of office to uphold the Constitution, which defined how a winner in a Presidential contest was to be declared. He stated that after the discussions, the visitors left immediately.
80. It was TW9's evidence that at around 9.00 am in the morning of 15th August 2022, the In-Charge of Security at the Bomas of Kenya went to the Commissioners' holding room and informed him that there was a team from the NSAC that had arrived to meet the Chairperson. They included Mr. Kennedy Kiara (Principal Administrative Secretary at the Office of the President), Mr. Kennedy Ogeto (Solicitor General), Mr. Hillary Mutyambai (Inspector General of Police) and Lieutenant General Francis Omondi (Vice Chief of Defence Forces).
81. He testified that these visitors wanted to see the Chairperson, who in response said that he was going to meet the delegation in the presence of the Commissioners at 2.00 pm. The Chairperson called for the meeting of all the Commissioners at 2.00 pm in the boardroom of the CEO (TW7) at Bomas of Kenya.
82. He stated that the team was led by Mr. Kihara, who introduced the others. It was his testimony that after introduction, Mr. Kihara explained the reason for their visitation. He began by saying that they were visiting on behalf of the main committee of NSAC, and stressed that the committee was purposely chosen to comprise representation from various offices. Prof. Yakub testified that Mr. Kihara told the Commissioners that if the Commission declared the results in favour of William Ruto, the country was going to burn. He testified further that Mr. Kihara said that should Kenyans begin to fight each other and blood is shed, then the blood of those dead Kenyans would be in their hands.
83. Prof. Yakub testified that as that point of the meeting, he did not know what the results were, and that final computations and printing of the results were being done by the CEO of the Commission. He testified that the NSAC team suggested an alternative to the effect that in the event that the Commissioners did not announce Hon. Raila Odinga as the winner, then the message was that the Commission should ensure there was a run-off.
84. Prof. Yakub stated further that NSAC delegation told the Commissioners that since they were emissaries, they needed an assurance or a feedback to take back to the committee. It was his testimony that the Chairperson, Mr. Wafula Chebukati, gave all the Commissioners an opportunity to react to the sentiments of the visitors in their presence. He testified on his part, the chairman reminded both the NSAC team and the Commissioners that the Commission had a constitutional mandate to fulfil and that in declaring the results, the commission will be guided by the Constitution and any relevant laws. It was TW9's further testimony was that Commissioner Irene Masit stated that the Commission needed to seriously consider the advice that was given by the NSAC team. According to TW9, Commissioners Irene Masit, Francis Wanderi, Juliana Cherera and Justus Nyang'aya supported the sentiments of the visitors. Professor Guliye testified that the Chairperson concluded that by saying that he was going to uphold the Constitution and the NSAC team left.

85. Prof. Yakub testified that the CEO who had gone to make printings of the final results then walked into the Boardroom where all the Commissioners were seated with a bundle of papers and handed over a copy of the results to each of the Commissioners. In the final results, William Ruto was the winner. He testified that a debate ensued that the results were not to the expectation of the four Commissioners who had taken a position that the visiting NSAC emissaries had suggested. These Commissioners included Commissioner Irene Masit.
86. TW9 testified that after TW7 walked into the boardroom carrying the final results, a debate ensued. He testified that having seen the final results and having seen that the margin of the results was close with about 233,211 votes difference between the winner and the runner-up, the four Commissioners including Commissioner Irene Masit protested that the results should be changed by the Commission in light of the advice by the representatives of NSAC. He stated that particularly, Commissioners Irene Masit and Francis Wanderi were of the view that the results should be pushed towards a re-run by moving the winning numbers of 233,211 to rejected votes because it was a close difference, in their view.
87. Prof. Yakub testified that the proposal to force a re-run by Commissioner Masit was intended to create a win-win situation in the sense that there would be another opportunity for the two front runners to square it out and that the country would be stable in the event that the clear winner is announced, the contrary of which there would be chaos.
88. Professor Guliye testified that on his part he declined to be a party to any scheme to sabotage the will of the people while the Chairperson said that he would declare the results as verified. He testified that that was the same position taken by Mr. Boya Molu. His testimony was that it was at this juncture that the Chairperson of the commission invited all the Commissioners to accompany him to the podium to declare the final results. He stated that the Chairperson, Commissioner Boya Molu and the CEO Mr. Marjan left the Boardroom to the NTC to declare the results and that the four Commissioners did not go with them.
89. Prof. Yakub testified that they went to the holding room in the NTC and invited the four agents of Presidential candidates to give them the summary data, the summary county statistics and the final results as contained in the Form 34C.
90. Lastly, Prof. Guliye testified that all the agents of the presidential candidates, save for the chief agent of Azimio coalition, signed Form 34C and the Chairperson proceeded to the auditorium to declare the results.

3.4.10. TW10 - MR. BOYA MOLU

91. Boya Molu was until 18th January 2023 a member of the IEBC. He testified on 23rd January 2023. His Witness Statement is dated 13th December 2022. He testified that Commissioner Irene Masit was appointed together with Commissioner Francis Wanderi to deal with security and welfare at the NTC.
92. He further stated that during the declaration of the final results of the presidential elections, Commissioner Irene Masit was not present at the NTC but was part of the team of Commissioners at the Nairobi Serena Hotel. He testified that there was no agreement in the Commission that during the declaration of the final presidential election results, some Commissioners would be at the NTC while others at the Nairobi Serena Hotel.

93. Mr. Boya testified that the Commission had met the NSAC team earlier in the office of the CEO of Bomas of Kenya. He stated that the NSAC asked the Commission to ensure that the announcement of the leading presidential candidate could not happen. He testified that the NSAC delegation stated that the announcement would jeopardize the stability of the country if it happened. As such, he stated, the NSAC asked the Commission to ‘force’ a run-off or declare the Azimio presidential candidate as the winner.
94. Mr. Boya testified that every Commissioner was given a chance to comment to that request by the NSAC team. He stated that Commissioner Irene Masit was part of the four Commissioners who supported the NSAC position, and that the Chairperson, Commissioner Guliye and himself disagreed with NSAC. He stated that shortly thereafter, the CEO of the Commission came in with the results and gave each Commissioner a copy.
95. He testified that a debate then ensued where the four Commissioners, including Commissioner Irene Masit, said that the Commission needed to moderate the results in line with NSAC demands. He further testified that the Chairperson of the Commission said that the Commission could not sit to discuss subversion of the will of the people, a position that Commissioner Guliye and himself agreed with.
96. He testified that there was no provision in the Elections Regulations or the Elections Act, 2011 that permitted the Commissioners to moderate results before the final declaration. Mr. Boya testified that the role of the Commission was simply to midwife and ensure that the will of the people is put into a statistical format and announce. He stated that the role was not to moderate or to vet or to make any decision on it, and that the decision belonged to the voters, which they had made on 9th August 2022.
97. In Cross Examination, Mr. Boya confirmed that although the NSAC team came in the morning, the meeting between the Commission and the team took place at 2.00 pm for about an hour. He stated that at the time of the meeting, the results were not out but the CEO of the Commission was doing the final tabulation and printing. He added that he did not know what results the NSAC team was asking the Commission to moderate since the Commissioners did not have the final results at that time. He testified that since the results had been on the public portal for six days from 9th to 16th August 2022 with 99.8% transmission success, any Kenyan or anybody in the world could have added the numbers and would know the results. He said that it was possible that the NSAC knew the results by the time they were asking the commission to moderate the results.

3.4.11. TW11 - MR. WAFULA CHEBUKATI

98. Wafula Chebukati (TW11) testified on 24th January 2023 by adopting his Witness Statement dated 13th December 2022. He stated that up to 15th August 2022, the Commissioners worked together as one team. He stated further that he had a good relationship with Commissioner Irene Masit. He testified that he ran an open-door policy as the Chairperson and any Commissioner with an issue including Commissioner Irene Masit could access his office if there was any issue.
99. He testified that the role of the presidential Returning Officer included declaration of the final presidential election result. The law does not contemplate more than one presidential election result because that would be a recipe for chaos.
100. He stated that the Commissioners worked day and night for the five days, and that he never went home to sleep but only to refresh, change and get back to the NTC. He said that most of the Commissioners were mostly at the NTC. He testified that at around on

15th August, 2022 at 0300hrs he received communication that some gentlemen wanted to see him. He allowed the gentlemen to walk in. They included Raphael Tuju, Amos Wako and Kyalo Mbobu. The gentlemen introduced the purpose of the visit to be that they wanted to discuss about the tallying and the ongoing process. He stated that he told the gentlemen that if that was the case, he would ask the Commissioners to join them in the meeting because it is a matter that would involve the whole Commission.

101. He further stated that the reason he did not discuss with them the purpose of their visit was that the election operation was not the Chairperson's operation alone. It is the Commission that would make any decision as to matters that relate to the entire election. He testified that in all matters that affect elections, he always took the liberty to invite Commissioners where there were issues to discuss and that was what he adopted before and throughout period at the NTC.
102. He stated that at that time the Commissioners were on the floor of the auditorium participating in the tallying and verification. He confirmed that the other Commissioners including Commissioner Irene Masit joined them in the meeting. He stated that the first one to speak was Senator Amos Wako who said that as the former Attorney General, he managed elections. He testified further that Mr. Wako said the Commission should not operate in a vacuum, and that it should look at the bigger picture for the Country and that the Commission can moderate result to achieve stability of the country.
103. He stated that Hon. Tuju spoke next and said that it was necessary that the Commission moderates the results in favor of *Baba* (Raila Odinga) and that any contrary declaration of results would plunge the country into chaos. He proceeded to state that in the alternative, if it was not possible to moderate the results in that manner then, the Commissioners should ensure that there is a run-off. Mr. Tuju concluded by saying that should his request be granted, it would be adequately rewarded.
104. After the guests spoke, Mr. Chebukati stated that he invited the Commissioners to speak and he spoke last. He stated that Commissioner Irene Masit alongside the other three said that the Commission should consider those statements from Senator Wako and Hon. Raphael Tuju very seriously. While responding to Tuju, Mr. Chebukati confirmed that with regard to the monetary incentive, he was categorical that he was adequately remunerated and he did not want anything from anyone. Commissioners Prof. Guliye and Molu supported this view. He stated when he spoke, he told them that the Commission will do what the law requires them to do. The team left shortly thereafter. He stated that the Commission did not have further discussions on the matter.
105. The witness stated that he had no idea how moderation would be done because the elections reflect the will of the people. That once Form 34A is announced at the polling station and transmitted to the public portal, it could not be changed. He added that if they knew the transparent system the Commission had put in place, they would not have made the visit because the results were already in the public portal and any attempt to change them would result into other problems. He confirmed that as at 3.00 am, the Commission had not gotten the final results but most of the verification and tallying had been done and the he did not know who was the winner at that point.
106. Mr. Chebukati further testified that on the morning of 15th August 2022, he received a call at around 8.00 or 9.00 a.m. from the then Head of Public Service, Mr. Joseph Kinyua that a team from National Security Advisory Committee (NSAC) would be coming to see him to discuss about assumption of office of President-elect. He stated

that the Commission had decided to meet at 2.00 pm to look at the final result. He agreed to meet the NSAC at the same time. The Commissioners met at 2.00 pm and invited the NSAC team.

107. He stated that Mr. Kennedy Kihara introduced the team of four: Mr. Kennedy Ogeto - Solicitor General; Mr. Hillary Mutyambai - Inspector General of police; and Lt. Gen. Francis Omondi Ogolla - the Vice Chief of the Defense Forces. He stated that the composition of the team was deliberately selected on behalf of the entire NSAC considering the magnitude of the message to be delivered to the Commission.
108. The message as relayed by Mr. Kihara was that if Wafula Chebukati declared William Ruto as the president-elect, *'the country is going to burn'*. He proceeded to indicate that skirmishes between the Kikuyu and Luo communities had already started *'in several slums including Kibera and Mathare'* on the basis of alleged *'betrayal by the Kikuyus'*. Mr. Kihara cautioned that if the Commission declared William Ruto as the president-elect and chaos erupted, *'then the blood of the dead Kenyans'* will be on the hands of the Commissioners.
109. The second limb of the message from the NSAC was that if the Commission was unable to announce Hon. Raila Odinga as the outright winner, the Commission was to ensure that there is a runoff. Mr. Kihara told the Commissioners that he needed feedback to take to the NSAC.
110. Mr. Chebukati testified that he then invited the Commissioners to share their views. The four Commissioners who included Commissioner Irene Masit said that the message by the NSAC delegation warranted serious consideration and that they supported the communication *'before taking a decision as to the results to be announced'*. Commissioner Abdi Guliye remarked that the Commission has a constitutional mandate and that in declaring the results it would be guided by the applicable law. Commissioner Boya Molu stated that he supported the declaration of verified results. He stated that he took an oath of office and fidelity to the Constitution. The NSAC delegation left.
111. After the NSAC team left, the CEO walked in the boardroom and handed one copy of Form 34C and a summary of the Form 34C to each of the Commissioners. According to the results, Hon. William Samoei Ruto had won the presidential election. The four Commissioners protested and insisted that the results should be changed in light of the message from NSAC delegation. Commissioners Irene Masit and Francis Wanderi were of the view that the results should be pushed towards a re-run which would in their view be a *'win-win'* situation. The position taken by the four Commissioners appeared to have been pre-arranged towards altering the results.
112. Mr. Chebukati stated that he would not sit and discuss subversion of the will of the people, and that he would announce and declare the results as verified by the Commission. At that point he asked the Commissioners to accompany him to the podium of the auditorium to declare the final results. He was accompanied by Commissioners Boya Molu, Abdi Guliye and the CEO Mr. Marjan Hussein Marjan. The four Commissioners were left behind in the boardroom.
113. He testified that he proceeded to share the Form 34C with the agents of the presidential candidates who signed save for Mr. Saitabao Ole Kanchory, the Chief Agent for Azimio la Umoja One Kenya Coalition. Thereafter, they proceeded to the podium in the company of Commissioners Boya Molu, Abdi Guliye and the CEO Mr. Marjan Hussein Marjan and took their seats. Suddenly, their security was overrun and they were attacked by a group of people. Because of the chaos, they retreated back to the

holding room. In the holding room saw on television the four other Commissioners giving a press statement from the Nairobi Serena Hotel alleging that that the results he was about to prepare were opaque. He stated that the press statement by the four Commissioner were not sanctioned by the Commission. The video recording of the press statement by the four were played and he identified the same.

114. He stated that as a consequence of the skirmishes, he sustained injuries as well as the two Commissioners and the CEO.
115. On Cross examination, he stated that the press statement issued by the four Commissioners was a breach of their oath of office.
116. He further stated that prior to the events of 15th August, 2022 and thereafter he had no complaint against Commissioner Irene Masit and had previously nominated her to be a member of various Committees of the Commission.
117. He stated that he had published the Form 34C as required under the law. He also conceded that due to the urgency of some meetings, minutes were not kept.

3.5. Summary of the Submission

3.5.1. Summary of The Lead Counsel's Written Submissions

118. The Lead Counsel filed his written submissions on 26th January 2023 in support of the reliefs sought in the Petition. He began by outlining a brief history of the Petitions before going on to give a summary of all the allegations as contained in the Petitions.
119. It was his submission that Commissioner Irene Masit neither filed any affidavit or documents nor called any witnesses to rebut the allegations levelled against her and as such, the evidence on record was uncontroverted.
120. Lead Counsel focused his submissions on the effect of failure by the Commissioner to file a response to the Petition and the allegations and failure to file any evidence, burden of proof, standard of proof and an analysis of grounds for removal of Commissioner Irene Masit under article 251 of the constitution.
121. The Lead Counsel submitted that failure by the Commissioner to adduce any evidence meant that the evidence presented against her was uncontroverted and unchallenged and he urged the Court to consider the decisions in *John Wainaina Kagwe -vs- Hussein Dairy Ltd [2013] eKLR* and *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited-vs- City Council of Nairobi [2019] eKLR*.
122. On the issue of burden of proof, the Lead Counsel submitted that he bore the initial legal burden of proving the allegations levelled against the Commissioner to the required standard, but once that had been done, the evidential burden then shifted to the Commissioner to disprove the said allegations. In this regard, he cited *The Final Report of the Tribunal Investigating the Conduct of Justice Mutava*, the case of *Muya -vs Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya (Petition 4 of 2020) [2022] KESC 16 (KLR) (Civ) (19 May 2022)* and *Kioko v Clerk, Nairobi City County Assembly & 11 others (Civil Appeal E425 of 2021) [2022] KECA 405 (KLR) (4 March 2022) (Judgment)*.
123. On standard of proof, Counsel submitted that the standard applicable to this case was between beyond reasonable doubt and balance of probability. Reliance was placed on the **Report and Recommendation into the Conduct of The Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR (Tribunal Referral Net 1 of 2012 and**

Joseph Mbalu Mutava -vs- Tribunal appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR (Petition 15 "B" of 2016).

124. Turning to the analysis of grounds for removal of Commissioner Irene Masit under Article 251 (1) of the Constitution, the Lead Counsel submitted that three grounds had been proved satisfactorily. These were: serious violation of the Constitution or other laws, gross misconduct, and incompetence.
125. It was the Lead Counsel's submission that the actions of the Commissioner of being in favour of the request by members of the NSAC to moderate the results to declare another candidate as the winner or in the alternative force a run-off were an attempt to subvert the will of the people. It was his contention that the Commissioner breached the general principles of the electoral system, one of them being the principle of neutrality as her actions proved that she was not acting independently as envisaged under the Constitution.
126. Another issue that the Lead Counsel focused on was that of gross misconduct. He submitted that the evidence before the Tribunal clearly showed that the actions of the Commissioner of disowning the 2022 presidential election results that she was part of without giving any reasons for that amounted to gross misconduct. He invited the Tribunal to refer to the definition of gross misconduct in the Supreme Court case of *Muya -vs- Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya [2022] KESC 1 6 (KLR)*. Further, it was his submission that this conduct eroded public confidence in the office she held and was tantamount to gross misconduct.
127. Lead Counsel also submitted that sufficient grounds to prove incompetence had been adduced since Commissioner Irene Masit presented herself for appointment as Commissioner to the Commission having contested for election in 2017 within five (5) years preceding her appointment as a Commissioner for IEBC. This limb was buttressed by reference to the judgment in **G'Oganyo -vs- Independent Electoral Commission Selection Panel & 2 ot hers; Independent Electoral and Boundaries Commission & 6 others (Interested Parties) (Constitutional Petition E345 of 2022) [2022] KEHC 10184 (KLR) (Constitutional and Human Rights) (30 June 2022) (Judgment)**. It was also his submission that her conduct demonstrated lack of judgment and diligence in the discharge of her duties.
128. In rebutting the submissions filed by Counsel for Commissioner Irene Masit, Lead Counsel filed further submissions in which he reiterated the mandate of the Tribunal under Article 251 of the Constitution and proffered that the Tribunal was an inquisitorial body charged with investigating the allegations against the Commissioner. He submitted that, contrary to what had been said by Counsel for the Commissioner, the issues in the Petition were not res judicata. He relied on the cases of *Joseph Mbalu Mutava -vs- Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR*.
129. In closing, the Lead Counsel invited the Tribunal to hold and find that the allegations against Commissioner Irene Masit were uncontroverted and they had been proven to the required threshold as set out in the authorities he alluded to. He thus urged this Tribunal to recommend to His Excellency the President for her removal as a Commissioner of the Independent Electoral and Boundaries Commission.

3.5.1. Summary of Commissioner's Written Submissions

130. Counsel for the commissioner, Mr. Donald Kipkorir, filed his written submissions dated the 14th February 2023. Counsel submitted on nine (9) salient issues. He submitted that the issue of jurisdiction can be addressed by the Tribunal at any point of the proceedings. It was the submission of Counsel that the Tribunal could not use pleadings that were not presented before the National Assembly. That the Supreme Court has original and exclusive jurisdiction to hear and determine presidential elections which it did vide **Presidential Petition No. E005 of 2022, Raila Odinga & others -v- William Ruto & others**. Counsel submitted that the Tribunal would be re-opening the issues already determined by the Supreme Court. He urged the Tribunal to find that the issues before it was *res judicata*.
131. On the allegations of serious violation of the constitution and gross misconduct, Counsel referred to definition and interpretation in the case of the Supreme Court of Nigeria, **Hon. Muyiwa Inakoju & 17 others -v- Hon. Abraham Adeolu Adekele & 3 others**.
132. As regards incompetence, this Tribunal was referred to the case of Missouri Supreme Court in **Re Honourable Floyd R. Baber**.
133. Counsel submitted that the evidence against Commissioner Irene Masit was hearsay and thus lacks probative value to these proceedings. He made reference to the cases of: **Archibold, criminal pleading, Evidence & Practice, 2000; Kinyatti -v- Republic Nairobi Criminal Appeal No. 60 of 1983 [1964] eKLR; Kenya Small Scale Farmers Forum -v- Cabinet Secretary, Ministry of Education & others Nairobi HC Petition No. 399 of 2015; Chadalavada Suba Rao -v- Kasu Brahmananda Reddy & others AIR 1967 AP 155; Karuna Deka -v- State of Assam Case No. CRL.A.261/2014; Nairobi Civil Appeal No. 188 of 2017, Monica Wangu Wamwere -v- The Attorney General; and Nairobi Criminal Appeal No. 4 & 131 of 2020 Ian Gakoi Maina & others -v- Republic**.
134. Counsel submitted that all electronic evidence tendered was without a certificate as per the law and that it should be disregarded. He referred the tribunal to the case of: **Garissa HC Criminal Case No. 3 of 2013, Republic -v- Ibrahim Bille Jelle; Mombasa HC Criminal Case No. 6 of 2008, Republic -v- Barisa Wayu Mataguda**.
135. On the issue of burden of proof, Mr. Donald Kipkorir argued that the impeachment of the Commissioner was a criminal proceeding whose burden of proof is beyond reasonable doubt. He referred to the cases of **Woolmington -v- DPP [1935] AC1; Kajiado Criminal Appeal no. 42 of 2019, Gordon Omondi Ochieng -v- Republic and Nairobi HC Petition No. 392 of 2013, Kiambu County Tenants Welfare Association -v- The Attorney General**.
136. Mr. Donald Kipkorir submitted that the Tribunal members are active members or in the employment of the ruling party thus need to disqualify themselves on the basis of actual or perceived bias. We were referred to the cases of **South Africa High Court Case No. CCD 30/2018 P the State -v- Jacob G. Zuma & Another; South African Constitutional Court Case No. CCT 16/98 President of the Republic of South Africa & others -v- South African Rugby Football Union & others; Supreme Court of India Mineral Development Ltd -v- The State of Bihar; and Nairobi HC JR Misc. Appl. No. 36 of 2016, Republic -v- National Police Service Commission**.
137. In conclusion, Counsel for the Commissioner argued that Mr. Chebukati and Mr. Marjan are tainted witnesses on the basis that the courts have found them to be running

the IEBC in exclusion of other Commissioners. Reference was made to the cases of **Nairobi ELR Petition No. E170 of 2022, Ruth K. Kulundu -v- CEO, IEBC & others and Nairobi ELR Petition No. 617 of 2019, Ezra Chiloba -v- Wafula Wanyonyi Chebukati & 3 others.**

138. We have considered the written submissions of both Counsel against the evidence that was tendered by the eleven (11) witnesses.

CHAPTER 4: ANALYSIS, EVALUATION OF EVIDENCE AND FINDING

139. Kenya's democratic history is paved with closely contested elections with violent excesses (1997, 2002, 2007-2008). In view of persistent social-political tensions, election violence has terrorized and destabilized the populations of Kenya.
140. Particularly in 2007, election violence was triggered by ethnic animosity fueled by disputed presidential election results based on the perception that the then Electoral Commission had been compromised and therefore manipulated the results. The 2007-8 violence acted as a catalyst for the reforms agenda as agreed upon in the Kenya National Dialogue and Reconciliation Accord of February 2008.
141. Subsequent thereafter, key areas were identified for reforms principally being the election management. These reforms were pioneered by establishment of an independent electoral management body (IEBC) with Commissioners enjoying security of tenure and establishment of an independent judiciary with a Supreme Court mandated with Jurisdiction to hear and determine presidential election disputes.
142. Resultantly, the anchor of a peaceful election is a transparent electoral process and results management that would collectively inspire a democratic recognition of the outcome of the polls and validate a peaceful change in power. Any lapse in the results management process, such as the incidents at the NTC on 15th August 2022, is a potential of flaring trouble and is a stimulant to contentions and frustrations that may very well lead this Country along the path witnessed in 2007-2008 elections or even worse.
143. The yield of the gradual constitutional election reforms is the public confidence and trust in institutions and constitutional processes such as the supreme court, or indeed any other court, to hear and determine an election dispute and such as this Tribunal, to look into the conduct of Commissioners that are suspected to have acted against the constitution and the law. For increased objectivity, this Tribunal must therefore discharge its mandate mindful of the progressive constitutional reform agenda on the electoral system in Kenya, and to safeguard this Country from the incidentals and complexities of a competitive electoral process.
144. The Supreme Court of Kenya has extensively dealt with the question of Independence of constitutional commissions in a number of cases. For instance, it observed at **para. 59** in **In the Matter of Interim Independent Electoral Commission [2011] eKLR (Constitutional Application 2 of 2011)** thus,

"It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role

effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.

145. This Tribunal is cognizant of the entrenched independence of the IEBC and its commissioners. Article 250(6) guarantees a Commissioner security of tenure to ensure that Commissioners carry out their duties without fear or favour, impartially and professionally. In Civil Appeal **Justice Kalpana H. Rawal v Judicial Service Commission and 3 others 2016 eKLR** the Court of Appeal held that security of tenure is only violated if an individual is removed from a position without sufficient cause and due process as provided by law.”
146. Under Article 249(1), such independence is intended to protect the sovereignty of the people to secure the observance of democratic values and principles and to promote constitutionalism. Under Article 249(2), the commission is required to be independent and not subject to direction and control of any person or authority.
147. On the strength of the above principles, therefore, a member of a commission is constitutionally shielded by Article 250(9) from any liability with respect to anything done in good faith in the performance of a function of office. Nevertheless, Article 251(1) is categorically prescriptive on the grounds of removal of a member of a commission from office only for: -
 - a) *serious violation of this Constitution or any other law, including a contravention of Chapter Six;*
 - b) *gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;*
 - c) ...;
 - d) *incompetence; or*
 - e) ...
148. The Preamble to the constitution provides inter alia that; *“Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this constitution;”*
149. Article 1(1) of the constitution provides that *“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution”*.
150. Article 1(2) of the constitution provides that; *“The people may exercise their sovereign power either directly or through their democratically elected representatives.”*
151. The national values and principles of governance are the foundation of the Republic of Kenya as declared at Article 4(2) of the Constitution. They are set out in Article 10 to include *patriotism, national unity, ... the rule of law, democracy and participation of the people; good governance, integrity, transparency and accountability; ...”*.
152. These values and principles are binding on all State officers and public officers every time they apply or interpret the Constitution or other law, and whenever these officers make or implement public decisions.
153. Article 260 of the Constitution describes a State office to mean, and to include, an office occupied by a member of a Commission. Correspondingly, a State officer means a person holding a State office. Article 73(1) of the Constitution declares that *“authority assigned to a State officer (like a Commissioner) ... is a public trust to be exercised in a manner that is consistent with the purposes and objects of this*

Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office; and vests in the State officer the responsibility to serve the people, rather than the power to rule them.”

154. Further, Article 73(2) of the Constitution sets out in no uncertain terms the guiding principles of leadership and integrity to include “*selection on the basis of personal integrity, competence and suitability; objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by ... favouritism, other improper motives or corrupt practices; selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties; and the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions; and discipline and commitment in service to the people.*”
155. Pursuant to Article 75 of the Constitution, a State officer is required “*to behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds.*” A person who contravenes the foregoing provision is amenable to the applicable disciplinary procedure for the relevant office, which procedure may lead to dismissal or removal from office.
156. Article 81(e) lays out the principles of an electoral system, which are restated under Section 25 of the Independence Electoral and Boundaries Commission Act, 2011 that “*in fulfilling its mandate, the Commission shall, in accordance with the Constitution, observe the following principles... (e) free and fair elections, which are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted independently; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner; (f) ... (g) ethical conduct; (h) fairness...*”.
157. The Constitution also states the values and principles of public service in Article 232. These “*values and principles of public service include high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; ..accountability for administrative acts; transparency and provision to the public of timely, accurate information; ..fair competition and merit as the basis of appointments and promotions.*”
158. It is in the context of the above provisions of the constitution and the law that we now proceed to consider the grounds raised in the four petitions.

Serious Violations of the Constitution and the Law

159. The allegation of serious violations of the principles set out in the Constitution, electoral laws and regulations was a common thread in all the Petitions before parliament as well as the statements sworn by the Lead Counsel’s witnesses in support of the removal of the Commissioner from office.
160. Counsel Kipkorir for the Commissioner referred the Tribunal to **Hon. Muiyiwa Inakoju & 17 Others Vs. Hon. Abraham Adeoulu Adeleke & 3 others** page 550 of the Commissioner’s bundle of authorities, where the supreme Court stated as follows;

(iv) “The following in my view constitute grave violation or breach of the constitution, interference with the constitutional function of the legislature and the judiciary by an exhibition of an overt and constitutional executive power.

161. It was the Lead Counsel’s submission that the Commissioner flouted the governing principles set out in Articles 1, 2, 4, 10, 73 (2) (b), 75, 232 and 249 of the Constitution, the Elections Act and other governing Regulations. The Tribunal, having apprised itself of all the Petitions, distilled the specific allegations as follows—
- a) Attempts to subvert the will of the people in agreeing to the incentives and giving in to the proposal by National Security Advisory Committee (NSAC) to alter the results of the presidential election contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
 - b) Demonstrating partiality and biased conduct in agreeing to the proposal to alter the results of the presidential election in favor of one candidate or in the alternative to force a run-off contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
 - c) Failing to follow the well set-out guidelines for the verification, tallying and announcement of the presidential election contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
 - d) On the first allegation, it was the Lead Counsel’s case that the actions of the Commissioner were tantamount to an attempt to subvert the will of the people. During the hearing, TW11, Mr. Wafula Chebukati (the then Chairperson of the IEBC) stated that on the morning of 15th August 2022, while conducting his official duties at the NTC, he was visited by Hon. Raphael Tuju, Senator Amos Wako and Advocate Kyalo Mbobu. He had insisted to the delegation that he would only agree to meet them in the presence of all the other members of the Commission who all joined him.
 - e) During the meeting, the delegation indicated that the Commissioners should not operate in a vacuum and should see the bigger picture on the stability of the nation. Further, they stated that it was important that the results be *moderated in favor of baba* and that any contrary determination of the results would “*plunge the country into chaos*”. They suggested that, in the alternative, where it was impossible to declare Raila Odinga as President-elect, then the Commission should force a run-off and should this request be granted it would be adequately rewarded. TW11 testified that the Commissioner agreed with this proposition.
162. Thereafter, members of the National Security Advisory Committee (NSAC) Kennedy Kihara (then Attorney General), Kennedy Ogeto (then Solicitor General), Hillary Mutyambai (then Inspector General of Police), and Lieutenant General Francis Omondi Ogolla (Vice Chief of Defence Forces) visited the Commissioners at the NTC. The delegation stated that if William Ruto was declared president elect, the country would burn and indicated that already there were skirmishes between Kikuyu and Luo communities and if chaos erupted, blood would be on the hands of the Commissioners.
163. These assertions were echoed by the TW7, TW9 and TW10 the Chief Executive Officer of the Commission, Marjan Hussein Marjan, then Commissioners Professor Abdi Yakub Guliye and Boya Molu respectively, who all appeared before the Tribunal and confirmed that the dispute that led to the fractions in the commission was only

occasioned by one issue. That, the Commissioner agreed with National Security Advisory Committee (NSAC) to have the results of the General Election altered to “*give the other side a second chance*”.

164. All the above-mentioned evidence remained uncontroverted. It was subjected to cross examination by the Learned Counsel for Commissioner Irene Masit. The evidence according to us remained unshaken and we accept it. Consequently, we make a finding that the Commission was visited by the two delegations and their mission was as stated by the Witnesses. We make a further finding that the Commissioner agreed with the request by the delegation that they needed to interfere with the result by either declaring *Baba* as the winner or in the alternative they be moderated to allow for a re-run. They threatened that if that was not done the country would be plunged into chaos.
165. The Constitution of Kenya, 2010 is founded upon the immutable principle of the sovereign will of the people as enshrined in Article 1. The fact that, it is the people, and they alone, in whom all power resides and they exercise such power, either directly, or through their democratically elected representatives. Therefore, each election ought to comply with the constitutional principles to ensure that all the elected representatives represent the people’s will and are hence accountable to them.
166. From the foregoing, we find that the Commissioner’s actions of being in favor of the request to moderate or force a run off were proven by the Lead Counsel to the required standard and the Commissioner was in breach of Articles 81(e) and 38(2) of the Constitution of Kenya, 2010 which provide for a ***free, fair, transparent and credible*** election. These actions were a clear, blatant and willful attempt at usurping the sovereign will of the people.
167. The other allegation was that the Commissioner demonstrated partiality and biased conduct in the presidential election. Article 81 of the Constitution provides for the general principles for the electoral system. One of those principles is neutrality. Further, Article 249(2)(b) of the Constitution requires the Commission to be independent and not subject to direction or control of any person or authority. In agreeing to go by the requests made by the two delegations, it was evident that the Commissioner failed to be neutral and subjected herself to the direction and control of the members of NSAC and the three other visitors. She exhibited partiality.
168. During the examination in chief of TW1, Dennis Ndwiga Nthumbi and TW3, Zachariah Matayo they both testified to the effect that they were present at the NTC from 10th to 15th August 2022 and observed that the process of tallying, verification and announcement was moving on smoothly and that all the Commissioners of the IEBC were working together with clerks coordinating the verification. Such was also the evidence of TW7, TW9, TW10 and TW11. It was clear from the presser at Nairobi Serena Hotel on 15th August 2022 that the four commissioners agreed that the election had been managed efficiently and credibly up to the declaration of the final result. It was their position that the result that was about to be announced by the Chairman of IEBC was opaque.
169. These actions together with the Commissioner moving out of the gazetted NTC at a time when the Presidential Returning Officer was about to declare the results, and proceeding to make a parallel announcement at Serena Hotel was a blatant violation of the Section 6 of the Election Offences Act which provides as follows;

A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who— (k) colludes with any political party or candidate for purposes of giving an undue advantage to the

political party or candidate; (l) wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations;

170. In addition, it is our finding that by rejecting the results that the Commissioner was part of, she called into question the credibility of the entire election without placing before the Country any information or document showing that the elections were either compromised or that the result would have in any way differed from that declared by the Chairperson of IEBC.
171. In addition to the above, footage and accommodation register presented by TW6 Mr. Simon Miller, the General Manager of Yaya Towers and Hotel shows that the Commissioner was residing at the hotel from 15th August, 2022 to 19th August, 2022. One of the cars that appeared in the register was KCL 133U which TW7 the CEO of the Commission, Marjan Hussein Marjan confirmed during the hearing belonged to the Commissioner and had been allocated to her by IEBC.
172. TW6 further presented in his evidence that during the Commissioner's stay at the said hotel, a number of senior officials from the Azimio La Umoja-One Kenya Coalition had access and frequented the hotel as shown in the logs. One of them was Honourable Raphael Tuju who as captured earlier on, was part of a delegation that had gone to meet members of the IEBC in an effort to persuade them to moderate results in favor of Raila Odinga or in the alternative force a run-off. This is further evidence of partiality and undue influence on the part of the Commissioner.
173. Section 73 of the Constitution states that authority assigned to a Public Officer is a public trust to be exercised in a manner that demonstrates respect for the people, brings honor to the nation and dignity to the office and promotes public confidence in the integrity of the office. We find that, from the foregoing, the conduct of the Commissioner was a breach of the trust bestowed upon her by the people of Kenya and demeaned the office she was holding.
174. Further, Article 75 of the Constitution provides that '*a State Officer shall behave in a manner that avoids—*
 - a) *Any conflict between personal interests and public or official duties;*
 - b) *Compromising any public or official interest in favor of a personal interest; or*
 - c) *Demeaning the office that the officer holds*'.
175. Therefore, the position that the Commissioner held was a position of trust to safeguard the freedom of the citizens of Kenya to exercise their political rights as envisaged under Article 38 of the Constitution. That trust was breached by her conduct.
176. During the Examination in Chief of TW9 Yakub Abdi Guliye and TW11 then IEBC Chairperson, they both stated that after the National Security Advisory Council (NSAC) team had left, the IEBC CEO TW7 walked into the board room with the final results and handed a copy to each Commissioner. A debate ensued when Commissioners Francis Wanderi and Irene Masit suggested that in light of the NSAC delegation's communication, the results be changed to force a re-run which in their view would be a 'win-win' situation. TW9 further stated that when he enquired how that would be done, Commissioner Juliana Cherera stated that the margin was not too big and could be manipulated by moving the 233,211 votes from Hon. William Ruto to the rejected ballots category. TW7 confirmed this position. Under Article 3 of the constitution, every person as an obligation to respect, uphold and defend the

constitution and any attempt to establish a government otherwise than in compliance with the constitution is unlawful. We find that the Commissioner was in breach of the Article.

177. In the ultimate, we find that Commissioner Irene Masit was in serious violation of the constitution and the law to wit; Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act, 2003.

Gross Misconduct

178. **Black’s Law Dictionary, 10th Ed.** defines ‘gross misconduct’ as ‘a dereliction of duty, unlawful, dishonest or improper behaviour’. Professor Yash Pal Ghai in his book, **Kenya’s Constitution: An Instrument of Change**, defined ‘gross misconduct’ to mean ‘generally atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking.’
179. The above definition is in line with what was stated in the case of **Hon. Muiwa Inakoju & 17 Others Vs. Hon. Abraham Adeoulu Adeleke & 3 others** cited to the Tribunal by Learned Counsel for Commissioner Irene Masit, Mr. Kipkorir. In the case, the Nigerian Supreme Court also stated as follows;

“(v) The following in my view, are some acts which in the opinion of the house of assembly, could constitute gross misconduct; (a) refusal to perform constitutional function, corruption, abuse of office, sexual harassment. “

180. The Supreme Court of Kenya in the case of **Muya -v- Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya [2022] KESC 16** stated that:

‘177. This court did not define the phrase ‘gross misconduct’ in Joseph Mbalu Mutava -v- Tribunal appointed to investigate the conduct of justice Joseph Mbalu Mutava, Judge of the High Court of Kenya (supra) case. And it is true, from the use of the word ‘gross’ that there are different degrees of misconduct. Some may undermine public confidence in the administration of justice generally, without having to reach the conclusion that an individual judge is incapable of performing the duties of his or her office. Others may be so grave with the potential of undermining public confidence in the ability of the judge to perform the duties of office or in the administration of justice generally, warranting the discharge from performing judicial functions.

181. Clearly, all the words used to describe ‘gross’ express some extreme negative conduct; a degree (sic) of the misconduct of such a serious, outrageous and flagrant nature that would warrant removal of a judge from office, those that would render an individual judge unfit or incapable of performing the duties of his or her office. That is how serious it ought to be...’

181. **Article 251 of the Constitution of Kenya** provides that gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise as a ground for removal of a member of a Commission other than an ex officio member), or the holder of an independent office.
182. In the case of **R v Borron (1820) 3 B & Ald 432**, where the conduct of a magistrate was being investigated, Lord Chief Justice Abbott elaborated on the fault element of the offence, clearly distinguishing errors and poor judgment from “corrupt motive”:

“...the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment”.

183. In **R -v- Chapman [2015] EWCA**, it was stated that the offence contains a threshold of seriousness in that the public office holder neglected their duty, or misconducted themselves, to such a degree as to amount to an abuse of the public’s trust in the office holder.
184. The allegations by the petitioners were that in contravention of the provisions of **Articles 10, 73 (1) (2) (b) (c), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act; and Sections 8, 9, 10, 11, 16, 24 of the Leadership and Integrity Act; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act**, the Commissioner acted in gross misconduct by:
- a) Concurring to support the unlawful attempt to alter the results of the Presidential Election in favour of one candidate or in the alternative to force a run off.
 - b) Refusing to follow the well set-out guidelines for the verification and tallying announcement of the Presidential Election.
 - c) Departing from the gazetted national tallying centre (NTC) for the Nairobi Serena Hotel to conduct a press conference in the presence of national media houses.
 - d) Disputing the outcome of the final Presidential Election results that were yet to be announced by the Chairman, Mr. Chebukati, by referring to them as opaque with mathematical errors.
 - e) Acting in liaison with one faction of the Presidential Election, the Commissioners committed gross violation of the constitution and the law.
 - f) Swearing affidavits in support of petitions challenging the presidential elections.
 - g) Failing to promote public confidence in the integrity of the office of Commissioner thus demeaning the said office.
 - h) Failing to adhere to the guiding principles of leadership and integrity.
 - i) Failing to adhere to the values and principles of the public service.
 - j) Failing to act in the best interest of the people of Kenya.
185. The Lead Counsel submitted that the ground of gross misconduct was in three aspects: that the Commissioner was in breach of chapter 6 of the Constitution; she colluded with a candidate from one faction; and disowned the 2022 Presidential Election results.
186. From the evidence adduced during the hearing, it was the testimony of **TW11 Mr. Wafula Chebukati** that Bomas of Kenya was gazetted as the national tallying centre for purposes of the Presidential Election. It was his testimony that the verification of results was done as per the gazetted result pathway. Mr. Chebukati told the Tribunal that in order to enhance transparency in the result pathway, at the floor of the auditorium at the NTC, the Commission had set up desks to carry out tallying and verification. According to him, each desk had an IEBC official, party agents and Commissioner Irene Masit had access to the floor of the auditorium throughout the process. It was his testimony that to enhance the transparency of the result pathway, the

commission opened a portal where verified results were deposited throughout the process. This portal was accessible by any member of the public. This evidence of Mr. Chebukati was corroborated by **TW9, Prof. Abdi Guliye** and **TW10, Boya Molu**, in that each set of verified results were deposited in the portal and that each Commissioner had the opportunity to announce the results, periodically, except for **TW9**.

187. In the preceding paragraphs, we have alluded to the visit by the two delegations and the discussions that proceeded.
188. It was the testimony of **TW5, Anthony Chege - General Manager, Nairobi Serena Hotel**, that the presser was held at the Nairobi Serena Hotel. He confirmed that the hotel receives both walk-in clients and pre-booking, which reservations had to be done a day in advance. He testified that the garden area of the Hotel was booked on 15th August, 2022 by one Mr. Edwin Ogwe. **Mr. Chege** confirmed that the grounds from which the presser was issued were indeed at the Serena Hotel. He further confirmed that the podium used to issue the presser was the property of the Hotel, and that Commissioner Masit was part of the four Commissioners who issued a press statement.
189. According to the evidence of **TW3, Zachariah M. Matayo**, the presser issued by the four Commissioners on 15th August 2022 at the Nairobi Serena Hotel read as follows:

“As you can see, we are part of the Commissioners in the IEBC. We have conducted the 2022 general election and we have ensured that we have improved the standards and we have ensured that we have consistently communicated what is happening. We have partnered with all stakeholders and we say it for a fact that as the Commission, we have done a good job but some things need to be put out there.

As you can see the four of us, we are here not at Bomas of Kenya where the results are going to be announced because of the opaque nature of how this phase has been handled. We therefore cannot take ownership on the results that is going to be announced. However, we have an open door that people can go to court and because of the same we urge Kenyans to be peaceful because the rule of the law is going to prevail. Thank you.”

190. **TW3** further narrated the contents of the presser issued by the four Commissioners on 16th August 2022 where they stated:

“STATEMENT BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

We the undersigned commissioners of the Independent Electoral and Boundaries Commission (IEBC), took an oath of office to defend the constitution and the law in discharge of our duties independently. We have remained faithful to our oath of office and shall continue to do so.

We collectively and unanimously make the following statement pursuant to the media briefing we held yesterday evening on August 15 2022 at the Serena Hotel Nairobi where we promised to issue a comprehensive statement with regard to the results of the August 9, 2022 presidential election declared and announced by Mr. Wafula Chebukati in his capacity as Chairperson.

In the Serena media briefing, we stated that we would NOT take ownership of the results of the August 15, 2022 presidential election declared and announced by Mr Chebukati.

In this regard, our reasons to decline to take ownership of the results so declared and announced by Mr. Chebukati are as follows;

1. THAT the aggregation of the percentages of the results scored by the four presidential candidates who were on the ballot as declared by Mr. Chebukati presented to us a mathematical absurdity that defies logic. TAKE NOTICE that Mr. Chebukati's aggregation was as follows;

RAILA ODINGA—48.85%

WILLIAM RUTO—50.49%

WAIHIGA MWAURE—0.23%

WAJAKOYA GEORGE—0.44%

TOTAL 100.01%

0.1% translates to approximately 142,000 votes, which would make a significant difference in the final result.

We therefore declined to take ownership of the said results because the aggregation resulted in a total exceeding the 100 percentage which cast doubt on the accuracy of the source of the figures tallied, and when we demanded that we verify our record, Mr. Chebukati declined, overruled us and insisted on declaring and announcing the said figures.

2. THAT contrary to the Constitution and legislation, the results declared and announced DID NOT indicate the total number of registered voters, the total number of votes cast or the number of rejected votes, if any. In this regard, the results announced by Mr. Chebukati lack a critical ingredient namely the total number of valid votes cast to support the percentages scored by the four candidates. Unless demonstrated otherwise, we all know that a percentage is

essentially a fraction of a whole number. Hence, if, for example, the 7.176 million valid votes cast in favour of the winning candidate as declared and announced by Chebukati translate to 50.49%, then it was 50.49% of what? Further TAKE NOTICE that Mr. Chebukati claimed that Raila Odinga attained 25% of votes in 34 counties while William Ruto attained 25% in 39 counties—the question is; which figures in

the 34 and 39 counties respectively constituted the independent variables to warrant Mr. Chebukati's conclusion of 25% in 34 counties and 25% in 39 counties for Raila and Ruto respectively? In the absence of a credible and verifiable explanation, we concluded that the process that went into the generation of FORM 34C which Chebukati used to declare results of the presidential election was opaque and incapable of earning our ownership and confidence.

3. Guided by the authority of the Maina Kiai case (Petition No.106 of 2016 as upheld by the Court of Appeal in Civil Appeal No.105 of 2017 and affirmed by the Supreme Court of Kenya) we state categorically that the results of the presidential election held on August 9, 2022 declared and announced by Mr Wafula Chebukati on August 15, 2022 belong to Mr Chebukati himself and do not represent a declaration and announcement by the Independent Electoral

Boundaries Commission. The Commission has to process the results before they are declared and announced by the Chairperson. For the avoidance of doubt, let me quote the Maina Kiai Case

“we reiterate, as we conclude that there is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the chairperson of the appellant”. The emphasis is that The Commission chairperson has conducted the election as though he is the National Returning Officer, a non-existent role, and his role in declaring results that were not approved at plenary by all 7 commissioners renders the results unconstitutional to the extent that this are Chebukati’s results as opposed to those of the IEBC. In keeping with Article 138(2) of the Constitution, there is no national presidential election in Kenya but rather the presidential election is held in each constituency.

4. THAT contrary to the Constitution and legislation, by the time Mr. Chebukati declared and announced final results, results from certain constituencies had not been announced.

DATED AT NAIROBI this 16 DAY OF AUGUST 2022

JULIANA W. CHERERA VICE CHAIR AND COMMISSIONER

FRANCIS WANDERI COMMISSIONER

JUSTUS ABONYO COMMISSIONER

IRENE MASIT COMMISSIONER”.

191. Section 6 (1) of the Elections Offences Act, 2016 provides *inter alia*:

Offences by members and staff of the Commission

6. A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who—

(1) wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations;

192. It is common ground that Commissioner Irene Masit was appointed as a Commissioner on 2nd September 2021, by H.E President (retired) Uhuru Kenyatta. Upon her assumption of office, she took an oath of office to uphold the Constitution of Kenya and the laws thereof. On 1st July 2022, IEBC gazetted Bomas of Kenya as the NTC for the purpose of the 2022 general elections. The same gazette notice declared the IEBC chairman, Mr. Wafula Chebukati as the presidential returning officer. In order to ensure that the 2022 general elections would be conducted in a free and fair manner, IEBC vide gazette notice no. 9540 dated 8th August 2022, provided the election results pathway.

193. The elections results pathway entailed *inter alia*:

“Where the constitutional threshold is achieved the Chairperson of the Commission announces results from each County, declares the results of the Presidential election and delivers a written notification of the result to the Chief Justice and to the incumbent President within seven (7) days of the declaration. Where the constitutional threshold is not achieved a fresh election shall be held within thirty (30) days after the previous election and in that fresh election the only candidates shall be;

- a) **The candidate, or the candidates who received the greatest number of votes and**
- b) **The candidate, or the candidates, who received the second greatest number of votes.**

RESULT PATH AT THE NATIONAL TALLYING CENTER

The Presidential Returning Officer (Commission Chairperson):

- 1. Receives Form 34As and 34B from the Constituency Returning Officer.**
- 2. Verifies; (i) the electronically transmitted Form 34As against the delivered Form 34As. (ii) Collated result in Form 34B received from the Constituency Returning Officer against Form 34As from all the polling stations in the Constituency.**
- 3. Records errors/variances discovered in Form 34B and generate an Error Collation Report.**
- 4. Completes the handing over/ taking over section of Form 34B with the Constituency Returning Officer.**
- 5. Announces the received results from each Constituency.**
- 6. Tallies and completes Form 34C.**
- 7. Verifies the collated results in Form 34C against each polling station result Form 34As.**
- 8. Prints the Election Result Form 34C.**
- 9. Announces the results for each of the Presidential candidate for each county.**
- 10. Fills his name, signs, dates and stamps the Form 34C.**
- 11. Invites the chief agents to append their signatures in Form 34C.**
- 12. Determines that the candidate has achieved the Constitutional threshold of;**
 - i) More than half of all votes cast in the election; and**
 - ii) At least 25 percent of the votes cast in each of more than half of the Counties.**
- 13. Publicly declares the President Elect Results of the declaration Form 34C.**
- 14. Presents a copy of the Election Result Form 34C to the chief agents.**
- 15. Declares the result of the Election using Form 34C.**
- 16. Fills and issues a Certificate to the President Elect prescribed in Form 34D.”**

194. Section 25 of the Elections Act, 2011 provides that:

In fulfilling its mandate, the Commission shall, in accordance with the Constitution, observe the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38 of the Constitution.**
- (b) free and fair elections, which are— (i) by secret ballot; (ii) free from violence, intimidation, improper influence or corruption; (iii) conducted independently; (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner;**
- (c) ...;**
- (d) ethical conduct; and**
- (e) fairness;**
- (f) ...”**

195. **Section 26 of the said Act provides that “except as provided in the Constitution, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders”.**
196. From the evidence on record and the testimony of the Lead Counsel’s witnesses, it is clear that Commissioner Irene Masit:
- a)* Is a public officer bound by the provisions of the Constitution of Kenya, 2010, and all laws of Kenya;
 - b)* Participated in the verification and tallying of the Presidential Election results at the NTC as a Commissioner of IEBC;
 - c)* Was present in the boardroom when the delegations of NSAC and “Elders” visited all the Commissioners and made comments to the effect that their message of moderating results or in the alternative forcing a run-off should be considered;
 - d)* Was part of the four Commissioners that left the designated NTC to Nairobi Serena Hotel on 15th August, 2022, before the declaration of the final Presidential Election results;
 - e)* Took part in and associated herself with the contents of the two press conferences issued on 15th and 16th August, 2022 by the four Commissioners at Nairobi Serena Hotel;
197. From the analysis of evidence on record, it is our finding that Commissioner Irene Masit’s actions of 15th August 2022 of agreeing to the proposal by the two delegations to moderate the result of the Presidential Election to enable a re-run with the promise that there would be a reward if this was done amounts to gross misconduct on her part.
198. Secondly, the actions by the Commissioners to proceed to Serena to issue the presser to disown the result that she had participated in tallying and verifying were intended to undermine and erode public trust in the commission and to the result. In our considered view, these actions amounted to gross misconduct.

199. The Commissioner was duty bound to conduct free and fair elections, elections that are free from any intimidation, improper influence or corruption. The said elections were to be conducted independently, transparently and administered in an impartial, neutral, efficient, accurate and accountable manner. The actions by Commissioner Irene Masit clearly show that she was amenable to improper influence and that she could not be trusted to be an impartial and neutral arbiter. Once again, she was guilty of gross misconduct.

Incompetence

200. Before we consider this issue, we note from the petitions, evidence and submissions of Counsel that we have been invited to consider whether Commissioner Irene Masit contravened Article 88 of the Constitution and whether she was eligible to be appointed as a Commissioner. It has been argued that Commissioner Irene Masit was from the inception of her appointment ineligible and disqualified from holding office because she had contested for elections in the 2017 General Elections and five years had not lapsed at the time she was subsequently appointed on 21st September 2021, which was in violation of the Constitution.

201. As we deal with this issue, we are reminded of our mandate under Article 251 of the Constitution and the Gazette Notice No. 14890 appointing this Tribunal. In our respectful view, our mandate is limited to whether or not the Commissioner should continue serving as a member of the IEBC. The Constitution has not given this Tribunal the mandate to deal with issues touching on eligibility, recruitment and appointment of the Commissioner.

202. The proper forum to determine such issues is the High Court. Indeed, the High Court has dealt with this matter in **Constitutional Petition No E345 of 2022 G'Oganyo v Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Parties) (Constitutional Petition E345 of 2022) [2022] KEHC 10184 (KLR) (Constitutional and Human Rights) (30 June 2022) (Judgment)** and determined the issue of her eligibility for appointment as a Commissioner. Accordingly, we refuse the invitation to deal with the matter because this is not the proper forum for its determination, and that the matter has separately been dealt with by the High Court.

203. Turning to the allegation of incompetence, we note that the term incompetence has not been defined in our Constitution. The Supreme Court of Missouri defined the term incompetence *In re Barber* 847 S.W. 2d 800 [Mo. 1993] by considering the dictionary meaning in the **Black's Law Dictionary, 6th Ed. 1990 at page 765** which defined incompetence as the *"lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation"*.

204. The position in the *In re Barber case* was adopted by the ELRC (Rika, J) in **Shinyada v Judicial Service Commission (Petition E106 of 2020) [2021] KEE LRC 5 (KLR) (26 November 2021) (Judgment)** where the learned Judge stated:

"142. It was observed In re Barber, that there were no prior decisions from the Courts, contemplating imposition of judicial discipline, solely on the basis of incompetence. This observation is not dissimilar to the present position in Kenya. The Missouri Court held that "intelligence, ability and diligence are minimum qualifications, expected of every Judge." Lack of these qualities constitutes incompetence. The Constitution of Kenya recognizes these qualities right from appointment of Judges, under Article 166 of the Constitution [prerequisites], to their removal under Article 168 [grounds for removal]. Incompetence is one of the

grounds warranting removal of a Judge from office. This ground is separate from gross misconduct or misbehaviour. The principles on judicial competence and conduct, applicable to Judges, extend to Magistrates. Regulation 12 [3] [d] of the Judicial Code of Conduct and Ethics, stipulates that Judicial Officers, shall perform their duties in an efficient and competent manner. Competence is an indispensable quality, required in discharge of judicial service.

143. The Court *In re Baber*, adopted definition of incompetence from other decisions such as *State ex rel. Hardie v. Coleman*, 155 So. 129, 133 [Fla. 1934] [Supreme Court Florida], which held incompetence to include “any physical, moral or intellectual quality, the lack of which incapacitates one to perform the duties of his office.” The Supreme Court of Alabama found it, in *State ex rel. Brickell v. Martin*, 180 Ala. 458, 61 So. 491, 494 [1913], to comprise “mere incapacity for the performance of official duties.” In Oregon, the Supreme Court, in the *Matter of Field*, 281 Or.623, 576 P. 2d. 348, 354 [banc. 1978], held incompetence means “general incompetent performance of judicial duties, evidenced by lack of the knowledge and judgment necessary, for the proper administration of justice in our Courts.” Lastly, *In re Barber*, consideration was given to the dictionary meaning of incompetence, which is, “lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation,” *Black’s Law Dictionary* 765 [6th ed. 1990].

145. *In re Baber*, it was held further, that when incompetence is alleged against a Judicial Officer, it is the role of the Court [or the Administrative Body] seized of the disciplinary hearing, “to determine whether the conduct at issue, established that the Respondent lacks the requisite ability, knowledge, judgment or diligence, to consistently and capably discharge the duties of the office he or she holds.”

146. Incompetence, even assuming the petitioner conducted proceedings in *Kisii C.M.C.C No. 88 of 2007* in the abysmal manner assigned to her conduct of the proceedings by the Respondent, would not, in the respectful view of this Court, validly be established by that single conduct of proceedings.

147. It must be shown that the Judicial Officer has demonstrated lack of judgment, knowledge, diligence and ability, to consistently and ably discharge the duties of his or her office. Incompetence cannot be read from one Civil Application dealt with by a Judicial Officer.

148. *In re Baber*, there was a substantial number of Attorneys and fellow Judges, who gave evidence relating to the conduct of Judge Baber, in judicial work, over a period of time. Reputation and opinion testimony was adduced. Incompetence of a Judicial Officer is to be assessed from cumulative evidence. It is demonstrated by a pattern of inappropriate conduct over a period of time, as held, *In re Conduct of Jordan*, 290 Or. 669,624 P. 2d. 1074 and 1076 [banc 1981]

149. In finding Judge Baber incompetent, the Court ruled that it did not reach the conclusion based on any one incident or charge, “but rather on a recurrent pattern of mistaken rulings, over a period of years.” It is important to note that the petitioner was charged with judicial incompetence, not misconduct. *In re Baber*, misconduct was defined as “transgression, dereliction, unlawful or wrongful behaviour, or impropriety that is wilful in character.” It was observed that Courts had in the past, used the term ‘misconduct,’ as a convenient collective term for several constitutional standards for removal that connote wrongdoing. Incompetence was held to denote “inherent incapacity that need not be coupled

with wilful wrongdoing. When unaccompanied by wrongful behaviour, incompetency does not constitute misconduct.’’...

205. As stated in the above case, incompetence is demonstrated by the lack of ability, knowledge, judgment or diligence to consistently discharge the duties of the office one holds. Further, incompetence is to be demonstrated by a pattern of inappropriate conduct over a period of time. Therefore, incompetence cannot be based on one incident but a series of events that demonstrate lack of ability and qualification to discharge the duties of the office.
206. Generally, the petitioners averred in their petitions that the failure to follow the set-out guidelines for the verification, tallying and announcement of the presidential elections; agreeing to the proposal to alter the results of the presidential elections in favour of one candidate or in the alternative to force a run off; and swearing affidavits in support of petitions challenging the presidential election results demonstrated incompetence on the part of the four Commissioners. The petitioners raise an allegation of incompetence only from the events of 15th August 2022 and thereafter.
207. From the evidence of Wafula Chebukati (TW11), he confirmed that apart from swearing affidavits against the Commission at the Supreme Court, he had no problem with the Commissioner. He stated that he had worked very well with her. He further confirmed that the entry of the Commissioner to the IEBC was a relief to him as being a lawyer he was able to hand to her the running of the Legal Committee of the Commission.
208. He further confirmed that he nominated her to be the Chair of the Leadership and Integrity Committee, member of the Electoral Code of Conduct, member of the Panel for the recruitment of the CEO of the Commission, member of the Dispute Resolution Committee and member of the Logistics and Welfare at the NTC. Wafula Chebukati confirmed that in terms of Commission operations he worked very well with the Commissioner up to 15th August 2022 and that he had no complaint against her ability to discharge her duties.
209. From the evidence of TW11, it is clear that the Commissioner was involved in key committees of the Commission and discharged her mandate to the satisfaction of the TW11. The only complaint by TW11 is with regard to the events of 15th August 2022 with regard to agreeing to interfere with the presidential election results, the Nairobi Serena Hotel press statement denouncing the presidential election results which they participated in tallying and verification and the subsequent filing of affidavits against the Commission at the Supreme Court. As stated, we have already found that such conduct amounted to serious violation of the Constitution and gross misconduct.
210. In the circumstances, we find that a single incident of dereliction of duty, and given the standard of proof that was placed on the Lead Counsel is not sufficient to make us return the verdict that the allegation of incompetence has been established. In the circumstances, we decline to find and hold that the actions of the Commissioner amounted to her *lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation*’ as a Commissioner.
211. Having considered the allegations against the Commissioner and on the basis of the evidence tendered before the Tribunal, the Constitution and the applicable law, this Tribunal makes the following findings;
 - a) On allegation Number One; that Commissioner Irene Masit was in serious violation of the constitution and the law to wit; Articles 10, 73 (2) (b), 75, 232,

249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.

- b) On allegation Number Two; that the actions of Commissioner Irene Masit amounted to gross misconduct contrary to Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003.
- c) On allegation Number three; that the actions of the Commissioner do not amount to incompetence.

CHAPTER 5 – RECOMMENDATION

212. Having considered all the evidence tendered, the Tribunal finds that the allegations on serious violation of the constitution and the law contrary to **Articles 10, 73 (2) (b), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act 2011; Sections 7, 8, 9, 10, 11, 16 and 24 of the Leadership and Integrity Act 2011; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act 2003** and the allegations on gross misconduct contrary to **Articles 10, 73 (1) (2) (b) (c), 75, 232, 249 of the Constitution of Kenya 2010; Sections 9, 26 and 30 of the IEBC Act; and Sections 8, 9, 10, 11, 16, 24 of the Leadership and Integrity Act; and Sections 8, 9, 10, 12, 16 and 17 of the Public Officer Ethics Act**, against Commissioner Irene Masit have been proved to the required standard.
213. **NOW THEREFORE**, this Tribunal recommends to Your Excellency, the President of the Republic of Kenya and Commander in Chief of the Defence Forces, pursuant to the mandate assigned vide Gazette Notice No. 14890 of 2nd December 2022, and further in accordance and in compliance with **Article 251(1) and (6)** that Commissioner Irene Cherop Masit **be removed from office** as a member of the Independent Electoral and Boundaries Commission.

DATED at NAIROBI this27th..... day ofFebruary.....**2023**.

.....
Hon. Justice Aggrey Otsyula Muchelule
(Chairperson)

.....
Carolyn Kamende Daudi
(Vice Chairperson)

.....
Linda Gakii Kiome
(Member)

.....
Mathew Nyaramba Nyabena
(Member)

.....
Col. (Rtd.) Saeed Khamis Saeed
(Member)

Resources and Other Materials

Constitution

Constitution of Kenya, 2010

Statutes

Independent Electoral and Boundaries Commission Act, 2011.

Leadership and Integrity Act, 2012.

Public Officers Ethics Act, 2003.

Public Finance Management Act, 2012.

Public Procurement and Asset Disposal Act, 2015.

Elections Act, 2011.

Election Offences Act, 2016.

Rules

Gazette Notice No. 14890 Tribunal (Practice and Procedure) Rules, 2022.

Case Law

Nornael Okello G'oganyo v Independent Electoral Commission Selection Panel & 2 Others; Independent Electoral and Boundaries Commission & 6 Others (Interested Parties) [2022] eKLR (Constitutional Petition No. E345 of 2021).

In the Matter of Interim Independent Electoral Commission [2011] eKLR.

Petition No. 16 'B' of 2016 Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR.

Republic v The Tribunal of Inquiry to Investigate the Conduct of Puisne Judge Tom Mbaluto & 5 Others ex parte Tom Mbaluto [2013] eKLR.

Justice Kalpana H. Rawal v Judicial Service Commission and 3 others 2016 eKLR.

Shinyada v Judicial Service Commission (Petition E106 of 2020) [2021] KEE LRC 5 (KLR) (26 November 2021) (Judgment).

Reports

Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR.

Report and Recommendation into the Conduct of Hon. Mr. Justice Joseph Mbalu Mutava Judge of the High Court of Kenya 2016.

Report of The Tribunal Set Up Under Article 134 (2) of the Constitution of the Republic of Seychelles to Inquire into the Inability of Judge Durai Karunakaran to Perform the Functions of the Office of Judge on Grounds of Misbehaviour August 2017.

Others

National Assembly Standing Orders, 6th Edition.

Black's Law Dictionary, 8th Edition.

Appendices

- Appendix “A”: Petition by Geoffrey Langat dated 9th September 2022
- Appendix “B”: Petition by Owuor Steve Gerry dated 19th September 2022
- Appendix “C”: Petition by Zachariah M. Matayo on behalf of the Republican Liberty Party dated 13th October 2022
- Appendix “D”: Petition by Rev. Dennis Ndwiga Nthumbi dated 2nd November 2022
- Appendix “E”: Conveyance of Petitions by the Speaker to the National Assembly
- Appendix “F”: Gazette Notice No. 14890 dated 2nd December 2022 appointing the Chairperson and the Members of the Tribunal, Lead Counsel, Assisting Counsel and Joint Secretaries of the Tribunal
- Appendix “G”: Letter of Resignation of Justus Abonyo Nyang’aya dated 2nd December 2022
- Appendix “H”: Letter of Resignation of Juliana Whonge Cherera dated 5th December 2022
- Appendix “I”: Gazette Notice No. 15196 dated 5th December 2022 publishing the Practice and Procedure Rules of the Tribunal
- Appendix “J”: Letter of Resignation of Francis Mathenge Wanderi dated 2nd December 2022
- Appendix “K”: Directions of the Tribunal dated 15th December 2022
- Appendix “L”: Ruling of the Tribunal dated 19th December 2022
- Appendix “M”: List of Witnesses
- Appendix “N”: List of Exhibits
- Appendix “O”: (Any other relevant appendix)