



## LEGAL COMPLIANCE TO THE SUPREME COURT JUDGMENT IN PREPARATION FOR THE 26 OCTOBER 2017 FRESH PRESIDENTIAL ELECTION

| NO. | SUPREME COURT OBSERVATIONS PARAGRAPH  | PROVISION OF LAW FLOUTED   | ACTION TAKEN BY THE COMMISSION  |
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| 1.  | <p><b>Paragraph 272</b><br/>Failure to electronically transmit results from the polling stations to the national tallying center.</p> <p><b>Paragraph 269</b><br/>Failure to provide alternative means of electronic transmission in areas with weak or lacking network coverage.</p> <p><b>Paragraph 275</b><br/>Presiding Officers ought to have moved to areas with network coverage to enable electronic transmission</p> | <p><b>SECTION 39(1C) (a) OF THE ELECTIONS ACT, 2011</b></p> <p>For purposes of a presidential election the Commission shall — (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center</p> | <ul style="list-style-type: none"> <li>i. The Results Transmission System (RTS) has been modified to transmit and display text results as ‘Provisional’ results in compliance with Supreme Court Ruling.</li> <li>ii. The System has been adjusted to have mandatory transmission of both the text and image result from the Polling Stations to the RTS Servers. Display of provisional results will show polling stations where results are streaming from.</li> <li>iii. To boost network coverage, Safaricom SIM Cards will be made available on all KIEMS Kits to ensure maximum 3G network.</li> <li>iv. The Commission has put in place the following complimentary mechanism for RTS:<br/><br/>In case the Results Transmission fails at the polling station, the Presiding Officer (PO), accompanied by agents, will be required to: <ul style="list-style-type: none"> <li>▪ Move to the nearest point from the polling station that has good network and transmit accordingly;</li> <li>▪ If there is still no network, proceed to the Constituency Tallying Centre and transmit from the Constituency Tallying Centre.</li> </ul> </li> </ul> <p>Where KIEMS Kit fails completely:</p> <ul style="list-style-type: none"> <li>▪ The PO shall inform the Returning Officer (RO) of the failure of the Kit and asks for replacement of the KIEMS.</li> <li>▪ In the event that KIEMS Kit cannot be repaired or replaced, the PO shall document the incident in the Polling Station Diary(PSD) which shall be</li> </ul> |

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|     | of results.  |  | <p>signed by all the agents.</p> <ul style="list-style-type: none"> <li>▪ The PO the proceeds to deliver the hard copy Form 34A and PSD to the RO.</li> <li>▪ The Commission shall publicize. Through electronic or print media of national circulation, or any other accessible medium, to the public of the failure of transmission from that polling station.</li> </ul> <p>Transmission for this purpose means the act of transferring data (text and image) from a point where there is 3G/4G network to the RTS Servers.</p>  |
| 2.  | <p><b>Paragraph 292</b><br/>Failure to ensure that the figures keyed into the KIEMS correspond with the scanned images of the Forms 34A.</p> <p><b>Paragraph 275</b><br/>Failure by the National Returning Officer to check the aggregated tallies in Forms 34B against the scanned Forms 34A.</p> <p><b>Paragraph 290</b><br/>Failure by the Constituency Returning Officers and the National</p> | <p><b>ARTICLE 138(3)(C) OF THE CONSTITUTION</b><br/>In a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.</p> <p><b>REGULATION 87(3) ELECTIONS (GENERAL) (AMENDMENT) REGULATIONS, 2017</b><br/>Upon receipt of Form 34A from the constituency returning officers under sub regulation (1), the Chairperson of the Commission shall - (a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying center.</p> <p><b>REGULATION 87(1)(b) ELECTIONS (GENERAL) (AMENDMENT)</b></p> | <p>The Commission has revised the Results Path to be in line with Article 138 (3) C of the Constitution and will gazette the same with highlights on the following:</p> <ol style="list-style-type: none"> <li>i. Submission of Form 34As together with 34Bs by the RO to the National Tallying Centre</li> <li>ii. National Returning Officer to verify physical submitted 34Bs against physically submitted 34A</li> <li>iii. National Returning Officer to generate Form 34C after verification from 34B and 34A</li> <li>iv. National Returning Officer upon verification will record any errors noted on Form 34B and publicize the information.</li> </ol> <p>All Returning officers have been trained to ensure that they fill in the hand-over section of the form 34B and physically deliver the Form at the National Tallying Center where the National Returning Officer will in addition sign the take-over section</p> |

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|     | Returning Officer to fill in the hand-over sections and take-over sections of the Forms 34B.  | <p><b>REGULATIONS, 2017</b></p> <p>The constituency returning officer shall, as soon as practicable deliver to the National tallying Centre all the Form 34B from the respective polling stations and the summary collation forms.</p>   |   |
| 3,  | <p><b>Paragraph 300</b></p> <p>1.Failure by the Commission and the National Returning Officer to verify results before declaration as per Paragraph 292</p> <p>2.Declaration of the election of the president, before receipt of all the results from Forms 34A from all the 40,883 polling stations.</p> <p>3.Declaration of the said results solely, on the basis of Forms 34B, some of which were of dubious</p> | <p><b>ARTICLE 86(a) OF THE CONSTITUTION</b></p> <p>At every election, the Independent Electoral and Boundaries Commission shall ensure that-whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.</p> <p><b>ARTICLE 138(3)(C) OF THE CONSTITUTION</b></p> <p>In a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.</p> | <p>The Commission will fully comply with Regulation 87(3) of the Election (General regulations) and has revised the Results processing path at the National Tallying Centre as follows:</p> <p><b>The Presidential Returning Officer (Chairperson):</b></p> <ul style="list-style-type: none"> <li>▪ Verifies the electronically collated results in form 34B against each electronic polling station result forms 34A.</li> <li>▪ Verifies the electronically transmitted forms 34A against the physically delivered forms 34A.</li> <li>▪ If a form 34A was not transmitted, the physically received form is used.</li> <li>▪ Completes the handing over taking over section of form 34B by each RO and the chairperson.</li> <li>▪ Announces results as received physically from each RO.</li> <li>▪ Verifies physical submitted 34Bs against physically submitted 34As.</li> <li>▪ Records errors/variances discovered in Form 34B in the National Tallying Center notebook.</li> <li>▪ Tallies by recording election results from all forms 34B of the presidential election as received from all the constituencies to form 34C.</li> <li>▪ Verifies the collated results in form 34C against each polling station result forms 34A.</li> </ul> |

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|     | authenticity.  |  | <ul style="list-style-type: none"> <li>▪ Invites the chief agents to verify and confirm the results in form 34C.</li> <li>▪ Announces the results of the declaration form 34C.</li> <li>▪ Indicates his/her name, signs, dates and stamps the form 34C.</li> <li>▪ Invites the chief agents to append their signatures to form 34C.</li> <li>▪ Prints the form 34C generated</li> <li>▪ Avails the form 34C to the chief agents.</li> <li>▪ Declares the Presidential Election Results using form 34C.</li> <li>▪ Fills and issues the form 34D certificate to the person declared elected.</li> </ul>   |
| 4.  | <p><b>Paragraph 298</b><br/>Failure to put in place a complimentary mechanism, for results transmission, that is in sync with Article 86 of the Constitution.</p> <p><b>Paragraph 299</b><br/>Failure to observe the mandatory provisions of Article 86 of the Constitution requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner.</p> | <p><b>ARTICLE 86 OF THE CONSTITUTION</b></p> <p>At every election, the Independent Electoral and Boundaries Commission shall ensure that:-</p> <p>(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;</p> <p>(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;</p> <p>(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and</p> <p>(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.</p> | <ol style="list-style-type: none"> <li>i. Pursuant to Section 44 of the Elections Act the Commission will continue to deploy the technology used for electronic voter identification and electronic results transmission.</li> <li>ii. The Complimentary mechanism developed for results transmission in case results transmission fails refers as No.1 above.</li> <li>iii. In order to ensure that the elections are conducted in a simple, accurate, verifiable, secure, accountable and transparent manner, the Commission has ensured that: <ul style="list-style-type: none"> <li>▪ All Agents at the Polling Station will verify the results before they are transmitted.</li> <li>▪ All Agents will be given copies of the form 34 A; one copy posted on the ballot box and another in a public place at the polling station.</li> <li>▪ All Forms will be made available on the Commission’s web-portal.</li> <li>▪ All poll officials will be required to provide unfettered access to the media especially for live coverage of announcement of results from all constituencies.</li> <li>▪ The security of the system has been tested and certifications to prove</li> </ul> </li> </ol> |

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|     |  | <p><b>SECTION 44(A) OF THE ELECTIONS ACT, 2011</b></p> <p>Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.</p> | <p>the same will be made available for scrutiny.</p> <ul style="list-style-type: none"> <li>▪ Modification of system to provide for a new application securely accessible only by the authorized returning officers using a password to be provided directly by the National Returning Officer that will allow the Returning Officers to upload the official Forms 34B filled, verified and signed by the Returning Officer directly to the Results Transmission System.</li> <li>▪ Clear handover signatures of results from the Presiding Officer to the Returning Officer and from the Returning Officer to the National Returning Officer.</li> <li>▪ Introduction of revised Presiding Officers and Returning Officers Guides/Checklists to ensure thorough understanding of election processes.</li> <li>▪ Enhanced Training of Poll officials</li> </ul>             |
| 5.  | <p><b>Paragraph 357</b><br/>Failure of the National Returning Officer to make available the Form 34 C to the Agents.</p> <p>Deployment of prescribed forms that either lacked or had</p> | <p><b>REGULATION 87(3) ELECTIONS (GENERAL) (AMENDMENT) REGULATIONS, 2017</b></p> <p>Upon receipt of Form 34A from the constituency returning officers under sub regulation (1), the Chairperson of the Commission shall - sign and date the forms and make available a copy to any candidate or the national chief agent present.</p> <p><b>ARTICLE 86(a) OF THE CONSTITUTION</b></p> <p>At every election, the Independent</p>  | <ul style="list-style-type: none"> <li>i. Form 34C to be maintained as provided under Schedule to the Elections Act as governed by Regulation 87(3), (b) of the Elections (General) regulations and standardized with all security features.</li> <li>ii. Content of 34C to include all the polling stations</li> <li>iii. The National Returning Officer will:- <ul style="list-style-type: none"> <li>▪ Personally sign all the 291 Forms received from the Constituency Returning Officer.</li> <li>▪ Invite the chief agents to append their signatures to form 34C.</li> <li>▪ Avail copies of Form34C to the Chief Agent.</li> </ul> </li> </ul> <p>The Commission has put the following measure to ensure security features are on all Forms:</p> <ul style="list-style-type: none"> <li>▪ Ensure that Form 34 B and 34C bear the logo, serial number and</li> </ul> |

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|     | <p>different security features was highlighted as a glaring irregularity.</p> <p><b>Paragraphs 258</b><br/>Reconfiguration of Form 34C to exclude a tally for Forms 34A(What powers did the Commission invoke to reconfigure the forms)</p> | <p>Electoral and Boundaries Commission shall ensure that-whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.</p> <p>Regulation 87(3) b of the Election General Regulations provides for Form 34 C.</p>   | <p>necessary security features on all pages.</p> <ul style="list-style-type: none"> <li>▪ To mitigate against spoiling original forms when scanning and printing all ROs to be provided with additional A3s for print testing clearly marked “Test-Form” to enable test before final printing of the original form.</li> <li>▪ Contractual review to provide for an increase of grammage of Form 34A on quality of the carbon copies coupled with enhanced training for poll officials on how to fill forms properly.</li> </ul> <p>iv. All Election Officials trained on to ensure standardization of all procedures including handling of results forms.</p> |
| 6.  | <p><b>Paragraph 278</b><br/>Failure to make available, to the Petitioners during the Petition, certified copies of the certificates of Penetration Tests conducted on the IEBC Election Technology System.</p>                              | <p><b>REGULATION 10 (1) OF THE ELECTIONS (TECHNOLOGY) REGULATIONS 2017</b></p> <p>After the conduct of the necessary testing, the Commission shall prepare a report to certify that the election technology meets the user requirements and specifications developed under regulation 4, and that it is accessible.</p> | <p>The Commission shall ensure that timely end-to-end testing of the modified technology is undertaken before deployment for the election process.</p> <p>Testing of the RTS and EVI, Stress Testing, Load balancing, Penetration test and Functional tests will be conducted and certified by Independent certifying bodies and reports made available to the agents, media and observers.</p> <p>The Commission will also undertake an audit of the technology to guarantee data integrity and ensure that the technology functions effectively and that the internal controls of the technology are effective.</p>  |

