

**REPUBLIC OF KENYA**

**IN THE MATTER OF THE OATHS & STATUTORY DECLARATIONS ACT**

**(CAP 15 LAWS OF KENYA)**

**STATEMENT OF COMPLAINT**

I, **JULIUS MELLI**, holder of a Kenyan national identity card number 20101766 of Post office Box number 41595-00100 NAIROBI, do make oath and swear as follows:

1. **THAT** I am an adult of sound mind, a Kenyan citizen and a registered voter in Kuresoi Constituency thus capable of making this statement of complaint
2. **THAT** during the General Elections held on December 27<sup>th</sup>, 2007, I was accredited by the Electoral Commission of Kenya (ECK) as an observer under the auspices of Association of Professional Societies in East Africa (APSEA).
3. **THAT** from about 2.00 pm on Friday December 28<sup>th</sup>, I went to the Electoral Commission of Kenya's National Tallying Centre set up at KICC to observe the tallying and announcement of the results.
4. **THAT** on 29<sup>th</sup> December 2007, I was picked as one of the observers to observe the re-tallying and verification of presidential results of all the 210 constituencies where it was agreed to have two agents each for every presidential candidate and five local observers to verify the results; the findings of which would be put into a report.
5. **THAT** this became necessary after party agents pointed out that results being announced by the ECK were different from those announced at the constituency by Returning Officers.
6. **THAT** at 4.00 p.m on the afternoon of the 29<sup>th</sup>, I personally witnessed the Electoral Commission of Kenya Chairman Samuel Kivuitu yielding to pressure to allow scrutiny from the Orange Democratic Movement (ODM) and Party of National Unity (PNU) for re-tallying of ballots in all the 210 constituencies.
7. **THAT** between 6.00-7.00 p.m on December the 29<sup>th</sup>, I was present on the 2<sup>nd</sup> floor of KICC at the ECK national tallying center and personally observed the Chairman Mr. Samuel Kivuitu receive results that put the gap between Party of National Unity's Mwai Kibaki at 58,000 votes behind Orange Democratic Movement's Raila Odinga, with 14 constituencies undeclared while the tally for the ODM Kenya's candidate Kalonzo Musyoka was 875,918 votes.
8. **THAT** at 8.00 pm on the same day, I and other Kenyan election domestic observers were denied access to the tallying room at KICC. I and the other

observers asked the Commission chairman and Secretary to intervene and it is indeed true that the then Commission Deputy Secretary Mr. Suleiman Chege ordered that the domestic observers be granted access to the tallying hall and be accorded all the help they needed and that indeed I was accorded a cordial reception and our group of domestic observers was conducted on a tour of the ECK offices enthusiastically.

9. **THAT** at 10.37 pm, I witnessed heated arguments between Hon James Orengo for ODM insisting that results for all the 210 constituencies had to be reviewed and Hon Martha Karua for PNU who wanted scrutiny to be limited to only those constituencies which were disputed by either party through verification of whether their results were in the statutory forms 16A.
10. **THAT** I personally recorded the electoral anomalies noted in some of the constituencies which was also noted by all the parties concerned and in all, 44 constituencies were found to have filed results that were announced by the ECK without any primary or original evidence.
11. **THAT** I personally noted a number of anomalies by way of alteration of presidential results by persons other than the Returning Officers in some constituencies, for instance in Ndhiwa the tally for Mwai Kibaki was changed from 85 votes to 86 while that for Raila Odinga was changed from 57,696 to 57,380.
12. **THAT** I personally discussed some of the procedures in the tallying room as well anomalies with various ECK officers and together with Ms Koki Muli of Institute for Education in Democracy (IED) enquired from the ECK Chairman whether all the results declared at that time had the statutory form 16A to which he replied in the affirmative.
13. **THAT** at 10.47 pm on the same day, I observed that all results for the presidential election were in save for 14 constituencies and I noted disparities between provisional results transmitted from the constituencies to the ECK headquarters at KICC. I further observed that results from 52 constituencies had anomalies; either, they had not been signed by the returning officers, they had not been countersigned by party agents, in some cases, only Photostat copies of these forms were available while some of the statutory Forms 16 and 16A lacked the requisite ECK stamp which is a prerequisite for validity.
14. **THAT** I personally enquired from other Observers who told me and which information I believe to be true that they had established that party agents were unable to sign Form 16A and 16 in areas of Central and Eastern provinces because they were not allowed to do so by the ECK Presiding and Returning Officers respectively.

15. **THAT** I observed Returning Officers for Starehe, Kinangop, Kipipiri, Kajiado North, Garsen, Kieni, Juja and Dagoretti and Kuresoi constituencies completing basic constituency polling centres data into ~~Form 16A and~~ Form 16 and 17A at KICC instead of having done it at the constituency tallying centres for transmission to the national elections headquarters which ought to have been completed in the presence of candidates' agents, and the ECK official in charge of the constituency, who is supposed to sign on to them at the constituency.

16. **THAT** further to paragraph 15 above I observed that the results were announced by the ECK for Nithi, Kitui West, Kitui South, Mwala, Kinangop, Ol Kalou, Mukurweini, Gichugu, Lari, Mathioya, Eldoret East, Mosop, Aldai, Baringo East, Baringo Central, Laikipia West, Naivasha, Nakuru, Kuresoi, Kajiado North and Kajiado South constituencies, although party agents' (constituency and presidential) signatures were missing from the Form 16A, Form 16 and Form ~~16~~17A, or the forms were unavailable.

**Comment [LA1]:** Form 16 has no place for agents to sign. The regulations do not mention any agents signing, but talks of the RO giving the candidates/agents copies of the filled Form 17 A.

17. **THAT** at 11.30 pm, I observed that the results for Juja, Maragua, Mombasa, Ol Kalou, Kieni, Mathira, Kajiado North, Nithi, Imenti South and North, Kipipiri, Tetu, Limuru and Kinangop had problems with the data which, if corrected, would have led to a different result or conclusion.

18. **THAT** at 12.15am on December 30<sup>th</sup> I heard Hon. Martha Karua claim that there were serious errors with the results alleging that Raila Odinga was noted to have received 436,000 votes in Chepalungu with a registered figure of 58,888 voters. However, on the constituency's Form 16, 17A, the result announced by ECK indicated that Raila Odinga had garnered 43,600 which was confirmed by ECK Commissioner Riunga Raiji with Hon. Karua insisting that this was the error that had Raila Odinga leading in the earlier tallies.

19. **THAT** shortly thereafter, I observed that agents' signatures were missing on Form 16A for Nithi, Eldoret East, Aldai, Baringo Central, Gwassi, Kisumu Rural, Nyatike and Nyakach which constituted serious anomalies

20. **THAT** at 12.42 a.m on 30<sup>th</sup> December 2007 I personally saw a flood of results arrive from Central, Eastern, Rift Valley and Nairobi provinces in quick succession which were markedly different from the provisional ones transmitted from the constituency to the ECK tallying center by telephone-in Imenti North, an original Form 16A signed and stamped by the Returning Officer showed Kibaki had 78,684 votes while a photocopy of the same constituency was altered showing Mwai Kibaki had garnered 80,000 votes. In Mathira Constituency where Kibaki had 80,024, two parliamentary forms had been tallied. After removing the forms, the results totaled to 77,442. In the same constituency, Raila Odinga's tally was also altered from 562 to 536.

21. **THAT** I also observed other disparities between provisional results phoned in earlier and results relayed to KICC for instance in Kipipiri the tally announced

was 36,094 but the tally on file was 37,315. In Juja constituency it was first announced as 50,000 votes for Mwai Kibaki, then 70,000 and finally 100,000 votes for Mwai Kibaki. In Dagoretti, presidential votes announced for Mwai Kibaki were 38,968 while the actual result on file by the Returning Officer was 53,729. There were also discrepancies in Kieni and Maragua constituencies.

22. **THAT** I observed that the presidential files for Kieni and Ol Kalou did not include original documents and instead had photocopied documents, which could have been tampered with while Makadara, Imenti South and Igembe South, had no documents at all. Other anomalies I witnessed were; Makadara- no Form 16A, Kaloleni-Form 16 A missing, Likoni-provisional results not physically brought to the ECK but announced all the same, Ganze- ECK announced results of less than 4,808 for ODM than shown on 16A, Malindi- no documentation at all, Mathira-valid votes cast were less than those announced by 3,900. Further, I noticed that the Presidential ballot was substantially higher than the parliamentary/civic ballot for Imenti South, Imenti North, Juja, Maragua, Nithi, Nyatike, Kisumu Rural, Kajiado North, Molo, Nakuru, Londiani, Eldoret. I also saw that in Nithi constituency, figures were raised twice from 66,390 to 78,000 over the telephone and to 95,000 which was announced by ECK
23. **THAT** I personally met the Returning Officer for Starehe constituency who informed me in the presence of the ECK Deputy Secretary Mr. Suleiman Chege that some people had caused chaos wanting to disrupt the electoral process, he then called for police reinforcement and announced the winner after having recounted the vote twice due to an anomaly in one of the stations which had been rectified. He however did not allow me to examine the file for the constituency.
24. **THAT** further, I observed that the file for Mathira Constituency had 34 unsigned Forms 16A, and one of the forms had a double entry and that two parliamentary result forms were in the presidential file. The total presidential tally recorded was 77,442 votes for Mwai Kibaki against 80,024 announced for him by the ECK.
25. **THAT** I immediately informed the ECK legal officer Jemimah Keli of these discrepancies but she took away the file and handed it to the ECK head of research known to me by the name of [Joshua Laichena](#) for storage. Further, Ms. Jemimah Keli informed me that rechecking numbers would be a drawback on the pace of work and that focus of the scrutiny would be limited to whether or not there were Forms 16 and 16A, but would not involve calculations on checking for consistency in the figures arguing that she had not slept for many days.
26. **THAT** further, I witnessed another problem come up when Maragua Constituency reported a 115% voter turnout which meant that the ECK would automatically have disqualified the result as per the new election regulations (ECK REGULATIONS 2007) created to guard against rigging. Instead, I saw that the solution arrived at was to readjust the figure and I heard the ECK chairman Mr. Kivuitu instruct the Commissioner in charge of the area and the Returning

Officer to look at the file and observed that the figure was readjusted to reflect a turnout of 85% which was unsupported by the relevant forms 16A or 16, and I then witnessed the new result being announced.

27. **THAT** shortly afterwards, I observed that Kipipiri results which had been reported to the ECK by telephone giving 36,470 votes to Mwai Kibaki was announced by ECK whereby 37,315 votes were announced as the result. The final tally on file which I saw indicates 37,279 votes for Mwai Kibaki.
28. **THAT** at 2.00 a.m on December 30<sup>th</sup>, I observed that only two constituencies Kibwezi and Emuhaya had not filed their results, in the case of Kibwezi, I heard that the Returning Officer had reportedly been threatened and in spite of assurance of transport by helicopter and additional paramilitary police escort, he still declined to announce while I also heard that Emuhaya was bogged down by logistical problems.
29. **THAT** at 3.30 am I observed that fatigue and irritation set in and I started noticing general irritation and resistance from ECK officials. I asked for the Nithi Constituency file, but the Returning Officer grabbed it and held it close to his chest. I saw the Returning Officer for Nithi go outside carrying all his documents with him wherever he went. I was also denied access to the Starehe constituency file. Whenever I asked any of the ECK Commissioners to intervene, they defended their staff, saying they had not completed work on the files.
30. **THAT** I observed that when the results for Kajiado North came in, Mwai Kibaki was 200 votes ahead of Raila Odinga nationally. I then saw the results for Molo Constituency come in where Mwai Kibaki had 50,145 votes called in at completion of counting but personally saw the ECK announce a figure of 75,261 as the official submission. Upon observing this anomaly, I requested the Commission the opportunity to verify information on file which was denied on the ground that the result had not been announced.
31. **THAT** at 4.15 a.m on the same day, I saw the results for three of the 12 constituencies that had yet to file returns. I was allowed to compute figures for Garsen, Tukana and Malava but not allowed to see the figures for Starehe, Emuhaya, Kisauni and Mandera Central.
32. **THAT** I am informed by my Advocate which information I believe that the aforesaid matters contravene fundamental principles proclaimed in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Constitution of Kenya, the National Assembly and Presidential Elections Act, the Election Offences Act and the Penal Code and that there is sufficient interest to see the aforementioned matters investigated and prosecuted.

- 33. THAT** I believe that various persons including the Chairman of the ECK, Commissioners and staff of ECK committed various offences related to elections, violations of the penal code, subversion of the constitution as well as the Public Officer Ethics Act.
- 34. THAT** based on the belief that the proposed accused persons had committed various criminal offences, I swore an affidavit the basis of which formed a complaint that was lodged for investigation at Kilimani Police Station addressed to the Commissioner of Police through the Officer Commanding Kilimani Police Station on 9<sup>th</sup> January 2008 containing a list of offences attributed to the intended accused. (a copy of the complaint dated 9<sup>th</sup> January 2008 is attached and marked ‘**KPTJ/1**’.)
- 35. THAT** further, on 9<sup>th</sup> February 2008, on the basis of the same affidavit referred to in paragraph 34 above, I heard that a criminal complaint was presented to the Attorney General Office (attached and marked **KPTJ/2**)
- 36. THAT** I am informed which information I believe that the Attorney General replied to this letter vide a letter referenced AG/CR/2014/2856 (attached and marked **KPTJ/3**) advising the prudence of waiting for the outcome of the Independent Review Committee (IREC) and alluded to a number of reasons among them, that the Committee could identify areas for further criminal investigations against the ECK and that the police were at the time busy with expeditious investigation of cases of crime related to the post election violence; which advice I am informed was complied with.
- 37. THAT** I heard that on 13<sup>th</sup> October 2008, Ms Gladwell Otieno followed up on the earlier complaint and wrote to the Attorney General (attached and marked **KPTJ/4**) informing his office that after careful perusal of the IREC report, it was her considered view that none of the issues raised vide the letters of 9<sup>th</sup> January 2008 (annexure **KPTJ/2**) and 15<sup>th</sup> February 2008 (annexure **KPTJ/3**) respectively to Kilimani Police Station and to the Attorney General had been touched on by the Committee and accordingly, I was informed that Ms Gladwell Otieno underscored that these correspondence disclosed a series of criminal offences which she believed were committed by various people including the Chairman, Vice Chairman, Commissioners, Returning Officers and staff of the ECK in the processing, management and control of the 2007 General Elections.
- 38. THAT** I heard that the letter dated 13<sup>th</sup> October 2008 by Gladwell Otieno (annexure **KPTJ/4**) did not elicit any response prompting the dispatch of a subsequent reminder to the Attorney General by Ms. Gladwell Otieno dated 30<sup>th</sup> October 2008 (attached and marked **KPTJ/5**).
- 39. THAT** it has come to my knowledge that the Honourable Attorney General has belatedly responded to Ms. Gladwell Otieno’s persistence by writing to the Commissioner of Police vide a letter dated 12<sup>th</sup> November 2008 and referenced

AG/CR/2014/2856 ostensibly directing the Commissioner of Police to investigate the matters raised herein and submit a report to the Attorney General for the appropriate direction (attached and marked **KPTJ/6**)

40. **THAT** it is my humble and honest belief that the Honourable Attorney General as the Principal Legal Advisor to the Government of the Republic of Kenya in all matters legal was privy to all the decisions made by the Electoral Commission of Kenya leading to the chain of events that are not only a matter of record but also in public domain which is further supported by his presence during the twilight swearing in of President Kibaki on the basis of flawed and inaccurate presidential election results on 30<sup>th</sup> December 2007 and thus he is incapable of prosecuting the matter or instituting criminal proceedings against the proposed accused persons.
41. **THAT** from the foregoing I sincerely believe that the Attorney General is not interested in having the matters aforesaid either expeditiously investigated and / or prosecuted in spite of being furnished with evidence sufficient to warrant the prosecution or at the very least investigation of all the Respondents. I am therefore advised by Counsel which advice I verily believe to be true that under the principle of equality before the law, the Attorney General is under a constitutional obligation to protect the rule of law by investigating and prosecuting without discrimination all those persons who disregard the law.
42. **THAT** about eleven (11) months since the matter was brought to the attention of the police and the Honourable Attorney General, it is my sincere and honest belief that these two offices have had more than sufficient time to finalize investigations and institute criminal proceedings against the Respondents.
43. **THAT** it is my firm belief that letting the enumerated violations go unpunished will erode public confidence regarding due process of law and in addition bolster the culture of impunity in Kenya if members of the public feel that the rule of law can be put to ridicule by public officers who violate the law without any consequences. I am informed by my Advocate on record which information I verily believe that the Honourable Attorney General is under an obligation to protect the rule of law from ridicule.
44. **THAT** as a Kenyan citizen and a registered voter, I have sufficient interest to see the aforementioned matters investigated and prosecuted under the principal of equality before the law; Article 7 of the Universal Declaration of Human Rights stipulates that all are equal before the law and are entitled without any discrimination to equal protection of the law and Article 14 (1) of the International Covenant on Civil and Political Rights provides that all persons shall be treated equally before all courts and tribunals.

45. **THAT** the information deponed to herein is true to the best of my knowledge,  
information and belief.

Sworn at Nairobi by the said )  
**Julius Melli** this )  
day of 2008 )

**BEFORE ME** )

**COMMISSIONER** )  
**FOR OATHS** )

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**SIGNED BY THE CHIEF MAGISTRATE**

