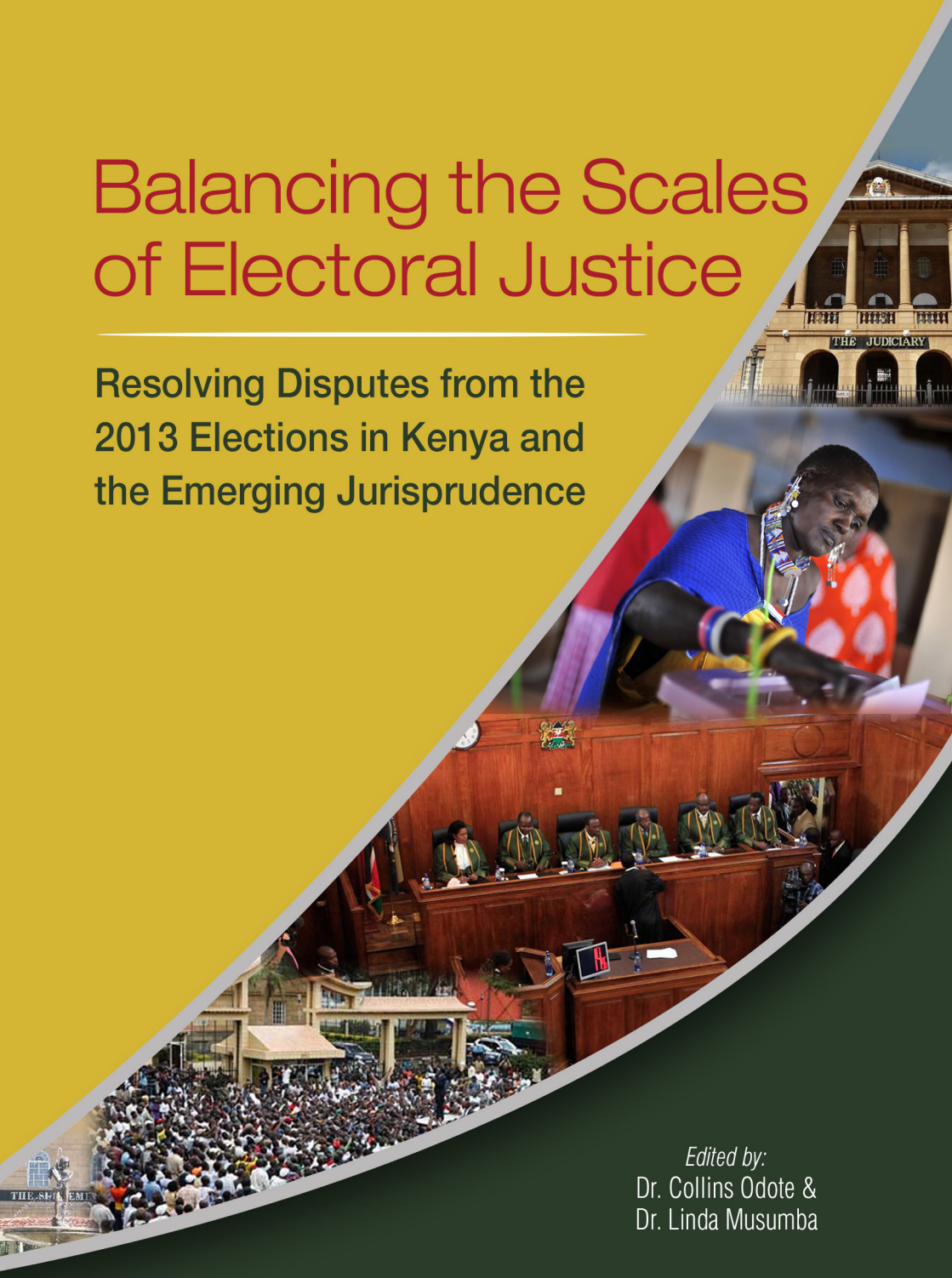
Balancing the Scales of Electoral Justice

Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence



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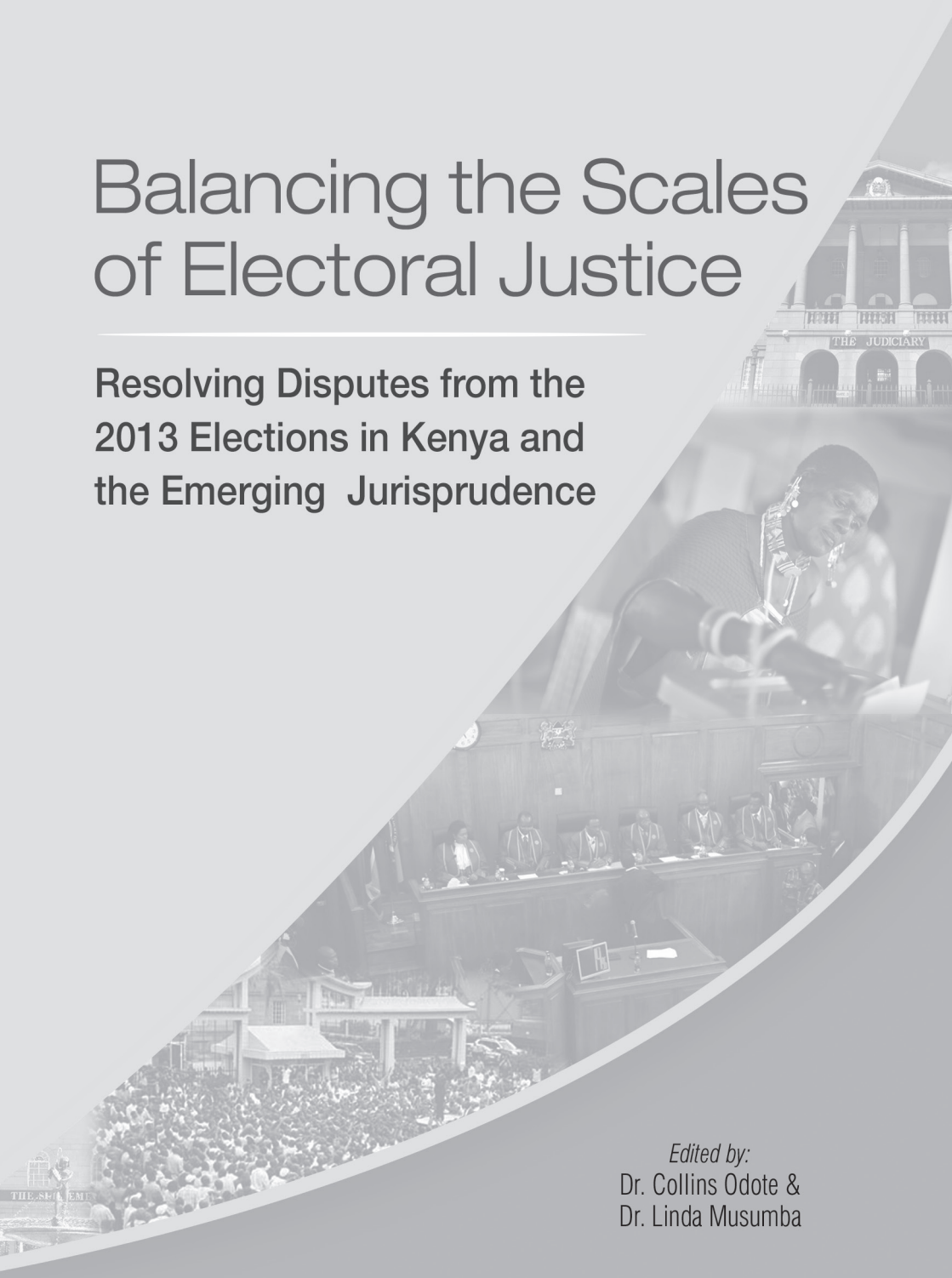

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Dr. Linda Musumba

Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence

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Edited by Dr. Collins Odote and Dr. Linda Musumba

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Foreword

While elections are the hallmark of every democratic society, Kenya's history with elections has been anything but satisfactory. The use of the words "free" and "fair" have been variously contested. As opposed to being a tool for peacefully selecting the country's leadership, it has brought another layer of disputation in Kenya. The lowest moment of these sad developments were the 2007 elections.

The adoption of the Constitution of Kenya, 2010 aimed to change our approach to governance and views about democracy. Elections under the Constitution are expected to be free, peaceful and credible. Delivering on this Constitutional requirement is the responsibility of several institutions. All Kenyans too have a role to play. In the scheme of implementation, the Judiciary plays a part both at the tail end of the process as well as through occasional interventions throughout the electoral cycle. It, however, has the principal responsibility of addressing disputes that arise from elections.

As we approached the 2013 general elections, the Judiciary was alive to the confidence crisis that the institution faced in the eyes of the Kenyan people as it pertained to electoral disputes. The 2010 Constitution and the Judiciary Transformation Framework provided us with a framework for ushering in necessary electoral reforms, reclaiming public confidence. As part of that process, I established the Judiciary Working Committee on Election Preparations to spearhead the arrangements necessary to ensure that the Judiciary was better prepared for the expected disputes following the 2013 elections. In the end, the Judiciary listened to and decided several cases before the elections and 188 election petitions. In addition, several appeals were heard by the Court of Appeal and determined. The Supreme Court also disposed of the petitions relating to the Presidential election and several appeals from the Court of Appeal.

This Publication is useful as it delves into the performance of the Judiciary in dealing with the election petitions from the 2013 elections. It is thorough

in its analysis and focuses on key themes critical to assessing election dispute resolution mechanisms in Kenya. By combining papers from members of the Judiciary, academicians and practitioners, it enables rigorous analysis of the emerging jurisprudence. The myriad of perspectives allow for a full appreciation of the manner in which the Judiciary dealt with the different issues before them, summarizes key lessons from the decisions, identifies areas of concern, and illustrates future improvements required. As a Judiciary this will also help us continue reflecting on our performance and promote a coherent and indigenous jurisprudence in the electoral field.

I thank the learned authors for their contributions. Through them, the story of the Kenyan Judiciary is being told in an objective, scholarly, and in-depth manner without sweeping any issue under the carpet. This is one model of the collaborations between the Bench and academia that forms part of my vision for a new Judiciary that is confident with its decisions, but open to learning.

I challenge more authors to continue writing on electoral jurisprudence and many other areas of legal determination by the Judiciary. Such critique of our judgments and conduct is good not just for the Judiciary, but also for the development of the law in Kenya.

This publication is the result of dedication and collaborative teamwork between the Judiciary Training Institute and the International Development Law Organization, thanks to the support of DANIDA. I also thank the editors, Dr. Collins Odote and Dr. Linda Musumba, for ensuring high quality of the publication. I commend this book to everybody who has a role to play regarding elections and electoral dispute resolution, which includes the Kenyan electorate.

Dr. Willy Mutunga
D.Jur, SC, E.G. H
Chief Justice and President of the Supreme Court of Kenya

Judiciary Training Institute

The Judiciary Training Institute (JTI) is the organ of the Kenyan Judiciary which is responsible for meeting the training, research and capacity development needs of Judiciary staff. JTI performs this mandate in part through various training programs and seminars, public lectures, research, and other forms of discourses targeting all cadres of Judiciary staff, and, where appropriate, members of the academy, other organs of state and the public at large. As the Judiciary's institute of higher learning, the JTI is leading the Judiciary, in line with Judiciary Transformation Framework, in facilitating the growth of jurisprudence and judicial practice as the lifeblood of the institution. The JTI is the judicial think tank: an institute of global excellence and the nerve centre of rich intellectual exchange. It interfaces between the Judiciary and contemporary developments in society, on the one hand, and learning interaction between the Judiciary and other agencies, on the other. The JTI provides the intellectual anchor in making Kenya's courts the hearth and home of a robust and functional jurisprudence that meets the aspirations of Kenyans.

International Development Law Organization

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law. IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy. IDLO has its headquarters in Rome, a Branch Office in The Hague, liaison offices for the United Nations in New York and Geneva, and country offices in Afghanistan, Honduras, Indonesia, Kenya, Kyrgyzstan, Liberia, Mali, Mongolia, Myanmar, Somalia, South Sudan and Tajikistan.

Biographical Notes

DR. COLLINS ODOTE, EDITOR

Dr. Odote holds PhD in Law from the University of Nairobi, where he currently teaches at the institution's Center for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi and at the School of Law. He has research interests in governance, elections, property theory, natural resource management and extractives. He also chairs the Board of a Nairobi based non-governmental organization, The Institute for Law and Environmental Governance. Dr. Odote has consulted for key stakeholders in the electoral process, including civil society, government, IEBC, Registrar of Political Parties and the Judiciary, The Donor Group on Elections, and The UN. He has also worked with Civil Society, serving as a Programme Manager for a German political Foundation for over eight years with a focus on governance, regional integration, constitutional reform and Political Party Strengthening. In the run up to the 2013 elections he was a long-term advisor for the National Democratic Institute, where he focused on political party cooperation and the electoral process. He has recently engaged with the Judiciary Committee on Elections as a legal advisor.

DR. LINDA MUSUMBA, EDITOR

Dr. Musumba was the founding Dean of Kenyatta University School of Law (KUSOL) following attainment of her Doctorate studies in Law (PhD) at the University of Birmingham, UK, in the area of Constitutional Law. She attained her qualifications for the Degree of Master of Laws (LLM) from the University of Warwick, UK, having obtained her undergraduate Law Degree (LL.B) from the University of Nairobi, School of Law. Dr. Musumba continues to be a Senior Lecturer in the Department of Public Law at KUSOL with her teaching areas being Constitutional Law and East African Regional Law. She serves on the boards of two legal based institutions namely Katiba Institute and Kituo Cha Sheria that focus on legal research and advocacy as well as

legal aid respectively. Dr. Musumba also serves on the board of Transparency International, Kenya Chapter whose agenda is mainly research, education and advocacy against corruption. In the attainment of all her qualifications and recognitions, Dr. Musumba credits the mentorship she received from eminent and admirable scholars and practitioners she encountered from her undergraduate days.

With respect to her participation in this Book Project, Dr. Musumba had the following to say: "When I was first contacted to participate in this Project, I thought, what a timely initiative this is for a key institution such as the Judiciary to undertake an enquiry into such an important issue that will no doubt inform relevant stakeholders in a subsequent process. When I found out who the other authors were and my co-editor, I was even more enthused about participating because this Book puts together the thoughts of distinguished minds in the legal field with much knowledge and experience. In my view, preparations for the 2017 General Elections will be on a surer footing because of the array of information in this Book."

HON. JUSTICE DAVID KENANI MARAGA

Justice David Kenani Maraga is a holder of LLB (Hons) and an LLM from the University of Nairobi, where he is an occasional guest lecturer. He is currently the Presiding Judge of the Court of Appeal at Kisumu. Justice Maraga is also the Chairman of the Judiciary Committee on Elections. This is a standing Committee charged with the task of overseeing the hearing by the Judiciary of election petitions within the time frame set in the Constitution. The Committee, with others stakeholders in the electoral process, is now engaged in electoral law reforms to facilitate a seamless disposal of election petitions which may arise from the 2017 general elections. Justice Maraga is also a facilitator of the Law Society Continuous Legal Education (CLE) Seminars.

Before being appointed a Judge of the High Court of Kenya in October 2003 and elevated to the Court of Appeal in December 2011, he had been in active private practice for 25 years covering criminal and civil litigations as well as conveyance. He is now the Presiding Judge of the Court of Appeal at Kisumu Station, which covers the whole of the former Nyanza and Western Provinces as well as North Rift. Previously he has served as a member of the Public Affairs and Religious Liberty Department of the Seventh-day Adventist Church (East African Union), a member of the Constitutional Review Task Force of the

Seventh-day Adventist Church East Africa Union, Chairman and Secretary of Rift Valley Law Society, and as a member of the Board of Governors of Njoro Girls High School and Lanet Secondary School.

HON. JUSTICE DAVID AMILCAR SHIKOMERA MAJANJA

The Honourable Mr. Justice David Amilcar Shikomera Majanja (b. 1973) was appointed judge of the High Court of Kenya on 23rd August 2011. He took his oath of office on 2nd September 2011. He read law at the University of Nairobi where he graduated with a Bachelor of Laws (LLB) degree in 1996. He also holds a Master of Laws (LLM) degree in International Trade and Investment Law in Africa from the University of Pretoria. He was called to the bar in in 1998 and prior to his appointment as a judge, he was in private practice. He was also Assisting Counsel for the Commission of Inquiry Investigating the 2007 Post Election Violence ("the Waki Commission"). Justice Majanja is currently the Resident Judge, Homa Bay, a member of the Rules Committee and the Vice Chairman of the Judicial Committee on Elections.

PROF. H. KWASI PREMPEH

H. Kwasi Prempeh is a constitutional and comparative law scholar and legal policy and governance consultant based in Accra, Ghana, where he is also founding executive director of *Justice Watch,* a think-tank dedicated to promoting just laws and policies and just enforcement and administration of law. From 2003 to 2015, he served on the faculty of the Seton Hall University School of Law (New Jersey, USA), receiving tenure as a full professor in 2008. Professor Prempeh was also a visiting professor at the Accra-based GIMPA Law School in 2010-11 and has co-taught the "Constitution Building in Africa" course at the Central European University, Budapest, Hungary, since 2014. Between 2013 and 2014, he served as constitutional adviser to the UN Special Envoy to Yemen, assisting the Yemeni National Dialogue Conference and the Constitution Drafting Commission to design and draft a new federal constitution. Prior to academia, he served as director of legal policy and governance at the Ghana Center for Democratic Development and, before that, practiced law in Washington, D.C., as an associate with O'Melveny & Myers LLP and Cleary, Gottlieb, Steen and Hamilton, both leading U.S.-based international law firms.

Professor Prempeh has consulted on a wide range of rule of law and governance

issues for various national bodies, international civil society organizations, and multilateral development agencies. He is also the author of numerous articles, book chapters, and monographs on diverse aspects of constitutional development and democratic governance in Ghana and Africa generally. Professor Prempeh obtained his Juris Doctorate degree from *Yale University Law School,* where he served as a teaching fellow and on the editorial board of Yale Law Journal. He also holds a Master of Business Administration degree and a Bachelor of Science (Management) degree from Baylor University (Texas, USA) and the University of Ghana respectively.

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Patricia is a Professor of Law and Dean at the School of Law, University of Nairobi. She holds a Juridical Sciences Doctorate from Stanford University having previously studied law at the University of Nairobi; Warwick; and the University of Zimbabwe. She a Senior Counsel and has been engaged in research and teaching for 27 years at various Universities around the world – Nairobi, Kansas, Stellenbosch, Zimbabwe.

Patricia has published widely and her publications include: 'The Land Question and Voting Patterns in Kenya', in Kimani Njogu & P. Wafula Wekesa, Kenya's 2013 General Election: Stakes, Practices and Outcomes, Twaweza Publications (2015) pp. 34-47 'Trouble in Eden: How and Why Unresolved Land Issues Landed "Peaceful Kenya" in Trouble in 2008', *Forum for Development Studies,* Oslo, Norway, Volume 1, 2008 (January, 2009) (With Kithure Kindiki) pp. 167-193; and 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', *East African Journal of Peace & Human Rights*, Journal of the Human Rights and Peace Centre (HURIPEC), Faculty of Law, Makerere University, Volume 14 Issue 1(2008) (With Nkatha Kabira) pp. 1-43.

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Francis Aywa is a lawyer and governance consultant. He has an LL.B. Degree from the University of Nairobi and an MBA from Strathmore University. He has over 19 years' experience as a chief executive, manager, mentor, trainer and leader. His electoral experience began at the Institute for Education in Democracy (IED), where he worked as Programme Officer in the Electoral Process Programme. He served as a Commissioner on the Independent

Review Commission that investigated Kenya's 2007 general election and has written on various aspects of elections in Kenya.

WAIKWA WANYOIKE

Waikwa Wanyoike is the Executive Director of Katiba Institute, an organization based in Nairobi Kenya, which works to promote constitutionalism and the rule of law in Kenya. He practices constitutional law as a public interest litigator and appears regularly at the High Court, Court of Appeal and the Supreme Court of Kenya on groundbreaking constitutional matters. Waikwa has advised government and non-governmental agencies on constitutional implementation and policy reforms. Previously, Waikwa practiced law in Toronto, Canada with an emphasis on criminal, immigration and refugee law, human rights and constitutional law. Waikwa holds a J.D. from Queen's University in Canada. He previously studied at Kenyatta University and York University (Canada). He is an advocate of the High Court of Kenya and admitted and licensed as Barrister and Solicitor by the Law Society of Upper Canada.

ELISHA Z. ONGOYA

Elisha Z. Ongoya is the Dean of the Kabarak University School of Law. His specialty in teaching is in the broad subject areas of public law, including Election Law. He holds a master's degree with a specialization in Law, Governance and Democracy from the University of Nairobi. He is also an advocate of the High Court of Kenya practicing as such under the firm of Ongoya & Wambola Advocates. He has litigated electoral disputes before the Supreme Court, the Court of Appeal, the High Court as well as the Independent Electoral and Boundaries Commission nomination disputes resolution committee. He has written on the subject of electoral law and has consulted for the judiciary and various international and local non-governmental organizations on the subject of election law and electoral processes. He has also given numerous mass media interviews and commentaries on electoral processes in Kenya.

WANJIKU MUKABI KABIRA

Wanjiku Mukabi Kabira is an Associate Professor of Literature and Director, African Women Studies Centre (AWSC), University of Nairobi, Kenya.

She holds a PhD from University of Nairobi, and an MA (Literature) from Madison, University of Wisconsin, USA. Professor Kabira was a commissioner in the Constitution of Kenya Review Commission and Vice-Chair. She has led many organisations including: Kenya Oral Literature Association (KOLA), African Women in Research and Development (AAWARD), Women Political Alliance-Kenya (WPA-K) and Collaborative Centre for Gender and Development (CCGD). Professor Kabira has published widely in the fields of literature and women/gender studies. Her publications include: "Time for Harvest: Women and Constitution Making in Kenya", "Women's Experiences as Sources of Public and Legitimate Knowledge: Constitution Making in Kenya", "The Historical Journey of Women's Leadership in Kenya", "Celebrating Women's Resistance", "The Road to Empowerment", "A Letter to Mariama Ba", Reclaiming my Dreams: Oral Narratives of Wanjira wa Rukenya", "The Oral Artist", "Contesting Social Death". She has been a leader in women's movement for many years where she has consistently and passionately advocated for gender equality and equity in Kenya and the region. Professor Kabira has mentored many women who have gone on to play critical roles in women's empowerment and advancement. Her involvement with women issues inspired her to spearhead the establishment of the African Women Studies Centre in 2009.

MUTHOMI THIANKOLU

Muthomi Thiankolu is a Partner at Muthomi & Karanja Advocates; a Lecturer at the University of Nairobi School of Law; and a Member of the Retirement Benefits Tribunal. He has previously served as a Lecturer at the Kenyatta University School of Law; a Partner at Mohammed Muigai Advocates; and a Council Member at the Meru University College of Science and Technology. Muthomi's research and practice interests are in civil and commercial litigation; constitutional and administrative law; public procurement regulation; international economic law; and electoral disputes.

Muthomi is an experienced litigator and legal consultant. He has appeared before many Kenyan courts and tribunals, including the Supreme Court. He has also appeared at the East African Court of Justice. Muthomi was involved in the precedent-setting case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (Civil Application No. 5 of 2014 and Petition No. 2b of 2014), in which the Supreme Court of the Republic of Kenya held, for the first time, that it had jurisdiction to hear appeals from decisions of the Court of

Appeal in electoral disputes. Muthomi has also handled many other landmark cases in the areas of constitutional law; administrative law; judicial review and public procurement regulation. Muthomi holds an LLM in International Economic Law (with distinction) from the University of Warwick and an LLB (Hons.) from the University of Nairobi.

HEIDI EVELYN

Heidi Evelyn is a Legal Consultant in Nairobi, Kenya currently specializing in legal writing and research. She has completed projects for Kenya's Commission for the Implementation of the Constitution and formerly worked for one of the country's leading law firms. Heidi has a keen interest in Kenya's new constitution, especially matters relating to the administration of justice and equality rights. Previously, she was an Advocate for workers' rights and a long time Tribunal Counsel for the Workplace Safety and Insurance Appeals Tribunal in Toronto, Canada, where she practiced administrative, labour and workplace safety and insurance law. Heidi holds a Bachelor of Commerce from the University of British Columbia and a Juris Doctor from Queen's University. She is a member of the Law Society of Upper Canada and a candidate for the Law Society of Kenya's Roll of Advocates.

List of Acronyms

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
AfriCOG	Africa Centre for Open Governance
All E.R	All England Reports
AU	African Union
BVR	Biometric Voter Registration
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CIPEV	Commission of Inquiry into Post-Election Violence
CJPC	Catholic Justice and Peace
CKRC	Constitution of Kenya Review Commission
CNN	Cable News Network
CMS	Case Management System
COG	Commonwealth Observer Group
COK	Constitution of Kenya, 2010
CORD	Coalition for Reforms and Democracy
DPAC	Directorate of Public Affairs and Communication
ECK	Electoral Commission of Kenya
EDR	Electoral Dispute Resolution
ELOG	Elections Observation Group
EMBs	Election Management Bodies
eKLR	eKenya Law Reports
EP	Election Petition
EU	European Union
EOM	Election Observation Mission

EVID	Electronic Voter Identification
FAQs	Frequently Asked Questions
FEMNET	African Women's Development and Communication Network
FIDA-Kenya	Federation of Women Lawyers in Kenya
FPTP	First-Past-the-Post
GIZ	German Development Cooperation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information Communication Technology
IDEA	Institute for Democracy and Electoral Assistance
IDLO	International Development Law Organization
IEBC	Independent Electoral and Boundaries Commission
IED	Institute for Education in Democracy
IIBRC	Independent Electoral and Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IREC	Independent Review Commission on the General Elections
IRI	International Republican Institute
IPPG	Inter Parties Parliamentary Group
IWPR	Institute for War and Peace Reporting
JWCEP	Judicial Working Committee on Election Preparations
JCE	Judiciary Committee on Elections
JSC	Judicial Service Commission
JTF	Judiciary's Transformation Framework
JTI	Judiciary Training Institute
KANU	Kenya African National Union
KEWOPA	Kenya Women Parliamentarians Association
KLR	Kenya Law Reports
KPU	Kenya People's Union
KRA	Key Result Area
LSK	Law Society of Kenya

MMPR	Mixed Member Proportional Representation
NARC	National Rainbow Coalition
NCAJ	National Council on the Administration of Justice
NCC	National Constitutional Conference (NCC)
NCCK	National Council of Churches of Kenya
NCLR	National Council for Law Reporting
NDI	National Democratic Institute
NEEDS	Network for Enhanced Electoral and Democratic Support
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organizations
ODPP	Office of the Director of Public Prosecutions
ODM	Orange Democratic Movement
O'H&H	O'Malley & Hard castle's Election Cases
PPDT	Political Parties Disputes Tribunal
PR	Proportional Representation System
PSC	Parliamentary Select Committee
SIDA	Swedish International Development Agency
TLR	Times Law Reports
TNA	The National Alliance
TOTs	Trainers of Trainers
TRS	Two-round system
UDF	United Democratic Forum
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCT	UN Country Team
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
URP	United Republican Party
US	United States of America
WLR	Weekly Law Reports
WOWESOK	Widows and Orphans Welfare Society of Kenya

Introduction

This Book documents the emerging electoral jurisprudence and electoral dispute resolution mechanisms under the new regime prescribed in the Constitution of Kenya, 2010 (CoK). The Chapters herein are informed by various aspects that came to play during the settlement of electoral disputes that arose following the 2013 General Elections. The ultimate goal is to establish the progress made in creating progressive jurisprudence and the building of responsive dispute resolution mechanisms that inspire confidence among citizens. Such insight will be used to draw lessons for the various stakeholders in elections including; the Judiciary, the Independent Electoral and Boundaries Commission, Political Parties, the aspirants for various electoral positions and the electorate.

Elections provide a platform for citizens to participate in government indirectly through their elected representatives. The Universal Declaration on Human Rights, which captures fundamental values shared by all members of the international community,[1] provides that elections should be periodic, genuine, by universal and equal suffrage and be held through secret ballot or by equivalent free voting procedures.[2] Elections conducted in adherence to the above prerequisites provide a strong foundation for democracy to thrive.[3] They grant legitimacy to those that rise to power, as these represent a government by the people. It is then incumbent on the representatives of the people to ensure that the government that is then formed is a government for the people. In Ghana, Mauritius and South Africa, successful elections have enhanced prospects for greater economic and political development.[4]

1 E Z Ongoya and W E Otieno, *A Handbook on Kenya's Electoral Laws and System* (2010) 1.

2 Article 21(1) and 21 (3) of the Universal Declaration of Human Rights.

3 National Democratic Institute for International Affairs (NDI), Africa Center for Strategic Studies (ACSS), International Foundation for Electoral Systems (IFES), Netherlands Institute for Multiparty Democracy (NIMD), Open Society Initiative for West Africa (OSIWA), and United Nations Development Programme (UNDP), *Colloquium on African Elections: Best Practices and Cross-Sectoral Collaboration,* (2009) 3.

4 National Democratic Institute for International Affairs (NDI), Africa Center for Strategic Studies (ACSS), International Foundation for Electoral Systems (IFES), Netherlands Institute for Multiparty Democracy (NIMD), Open Society Initiative for West Africa (OSIWA), and United Nations Development Programme (UNDP), *Colloquium on African Elections: Best Practices and Cross-Sectoral Collaboration,* (2009) 1.

The inverse is also true. In countries where elections have been marred with irregularities resulting in disputes, the aftermath has been detrimental to the welfare of the people. Many lives have been lost, many have been displaced and property destroyed.[5] The importance of elections in Kenya is captured by the Constitution of Kenya, 2010 which makes it the basis of exercising and eventual delegation of sovereignty to, amongst others, those directly elected by the People.

There have been periodic general elections since Kenya gained independence; in 1963, 1969, 1974, 1979, 1983, 1988, 1992, 1997, 2002, 2007 and 2013.[6] The 1963 elections were held under a multi-party system with President Jomo Kenyatta being elected the first president of the Republic of Kenya. He was re- elected in 1969 and 1974 under a *de facto* one party system. President Kenyatta was succeeded by President Daniel Toroitich Arap Moi who was elected unopposed in 1978[7] under a *de facto* one party system. He was re-elected unopposed in 1983 and 1988[8] under a *de jure* one party system. The multiparty system was reintroduced in 1991 and subsequent elections have been held under this regime.[9] While the majority of the periodic elections were held in secret ballot, the 1988 elections utilized the '*mlolongo*', queue voting system.[10] Incidences of violence have been reported on several occasions following elections even prior to 2007 as seen in the 1992 and 1997 elections.[11]

On 27th December 2007 Kenyans went to the polls for the 4th time following the re-introduction of multi-party politics. That election was closely contested

5 According to a report by International Crisis Group titled *Kenya in Crisis,* Africa Report No. 137 (2008) and a report by UKAID: Elections in Kenya in 2007, following the 2007 elections in Kenya, violence erupted in various parts of the country. At the end over 1000 people lost their lives and hundreds of thousands were displaced from their homes. A report by the African Union Election Observer Mission to the 31st July 2013 Harmonised Elections in the Republic of Zimbabwe and a report by the International Crisis Group titled *Zimbabwe's Election:* Mugabe's Last Stand, Africa Briefing No. 95 (2013) violence erupted in the country following the 2008 elections. The International Coalition for the Responsibility to Protect, http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe, at, 6 February 2016, reported that human rights violations including torture, mutilations and rape were perpetrated.

6 K Kanyinga, *Kenya Democracy and Political Participation* (2014).

7 Commonwealth Observer Group, *Kenya General Election: 4 March 2013: Report of the Commonwealth Observer Group* (2013) 3.

8 Commonwealth Observer Group, *Kenya General Election: 4 March 2013: Report of the Commonwealth Observer Group* (2013) 3.

9 K Kanyinga, *Kenya Democracy and Political Participation* (2014).

10 C M Peter and F Kopsieker (eds), *Political Succession in East Africa: in Search for a Limited Leadership* (2006) 30.

11 Human Rights Watch, *Divide and Rule- State Sponsored Ethnic Violence in Kenya* (1993); E Kanyongolo & J Lunn, *Kenya Post-election Political Violence (1998);* C M Peter and F Kopsieker (eds), *Political Succession In East Africa: In Search for a Limited Leadership* (2006) 33.

and competitive. As opposed to being a democratic process where winners would emerge and losers prepare for a future election, the declaration of the Presidential results on 30th December 2007 was followed by violence in several parts of the country. The violence went on for close to two months. It took the intervention of the international community and mediation by a panel of Eminent African Personalities led by former United Nations Secretary General, Koffi Annan, to broker a settlement. 2007, the Electoral Commission of Kenya (ECK), conducted General Elections as mandated by the Constitution, then in place.

The 2007 elections were organized against heated campaigns that had started with the 2005 defeat of a Constitutional referendum in 2005. That loss by President Kibaki against a combined opposition force led by Honorable Raila Odinga set the stage for high stake electoral contest in 2007. Violence broke out in various parts of the country soon after the announcement of Honorable Mwai Kibaki as the President elect[12] by the Chairman of the ECK, the late Samuel Kivuitu.[13] The violence continued for many weeks resulting in massive loss of life, displacement, loss and destruction of property.[14]

In a bid to end the violence, Dr Kofi Anan, former Secretary General of the United Nations, was appointed to and mediated between the two key protagonists, Mr. Mwai Kibaki and Mr. Raila Odinga.[15] The end result of the mediation talks was the signing of the Kenya National Accord and Reconciliation Agreement between the two key Principals.[16] That agreement led to the amendment to the Constitution to create the position of a Prime Minister and eventual formation of a coalition Government with Mwai Kibaki as President and Raila Odinga as Prime Minister. So as to get to the root of the election debacle and set the stage for reforms to the framework and processes for conduct of election, the Independent Review Committee (IREC), also known as the *Kriegler Commission*, was appointed.[17] The IREC

12 J Gettleman, 'Kenyan Accused by Rights Court is Leading Vote, *'The New York Times,* (New York) 5 March 2013.

13 S Bengali, 'How Kenya's election was rigged', MC Clatchy Newspaper, (Washington DC) 31 January 2008.

14 ABC News, 'Deadly Rioting Over Kenyan Elections Results. Kenya Police Battle Opposition Supporters after Mwai Kibaki Re-elected', ABC News(Nairobi) 31 December 2007; *Associated Press,* 'Kenya Death Toll Rises to 103', Associated Press, (Nairobi) 31 December 2007; J Gettleman, 'Disputed Vote Plunges Kenya Into Bloodshed', *New York Times* (New York) 31 December 2007; International Crisis Group, Kenya's 2013 Elections (2013); Report of the Commonwealth Observer Group, Kenya General Elections 4 March 2012 (2013); Transparency International Kenya, Kriegler Commission Report: An Audit of its Implementation.

15 Transparency International, *Kriegler Commission Report: An Audit of Its Implementation.*

16 The Agreement committed the two principals to enacting the National Accord and Reconciliation Act No. 4 of 2008.

17 The Commission was appointed under the Commission of Inquiry Act Cap 102 and its formation formally gazetted through Gazette Notice No. 1983 of 2008.

analyzed the structure, composition and management of the electoral body that conducted the elections, the ECK, and the manner in which it carried out its mandate. IREC comprised six members who were headed by retired South African Judge, Johann Kriegler.[18]

The Kriegler Commission[19] arrived at various findings, three of which went to the very core of the electoral dispute resolution mechanisms that were in place at the time. Firstly, the disputing parties had no immediate means to address perceived flaws in election results that they could single out during the election process. They had to wait until the results were formally announced. Secondly, the only available recourse for anyone contesting the election results was the corridors of justice. Courts took months or even years to resolve the petitions that were filed. For instance following the 1997 General Election, 27 election petitions were filed. These petitions dragged on until late 1998 with at least 5 remaining unconcluded until late 1999. In 2002, 25 petitions were filed, 12 of which were struck out. 3 were concluded in 2007[20] while 10 others remained unresolved as Kenyans voted in 2007.[21]

Thirdly, citizens lacked faith in the courts. They cast doubt as to the ability of the newly appointed Judges, whom President Mwai Kibaki had appointed a few days before the elections, to solve disputes fairly. Subsequently, the events following the disputed 2007 elections resulted in calls for an overhaul of the electoral system that was in place, a review of the electoral laws and reforms in the Judiciary. These were seen as important steps to ensure that subsequent elections would be free, fair and accountable. The 2007 elections have been the subject of numerous academic writings with the inescapable conclusion that they led to reversal of Kenyans democratic developments and credentials.[22] Both the analysis by scholars and findings of the Kreigler Commission pointed to the need for and made recommendations on far reaching Constitutional and legal reforms to govern the conduct of future elections.

The results of the foregoing was the disbandment of the ECK and its replacement with an Interim Independent Electoral Commission and Interim

18 Through Gazette Notice No. 1983 of 2008, the President appointed the following IREC Commissioners; Judge Johann Kriegler (Chairman), Prof. Marangu M'Matere, Francis Angila, Catherine Mumma, Lucy Kambuni and Horacio Boneo.

19 Government of Kenya, *Report of the Independent Review Commission,* (2009).

20 Magarini Legislator Harrison Kombe's election petition was among those concluded in 2007. His election was nullified and a by-election held. However he won back his seat.

21 K Kanyinga, *Kenya Democracy and Political Participation* (2014).

22 See for example the series of articles in K. Kanyinga and D Okello(eds), *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (2010).

Independent Boundaries Commission to spearhead electoral reforms. This included establishing a professional secretariat to conduct future elections, creation of a new voters' register, proposals on boundaries delimitation, introduction of technology in the conduct of elections and legal and reforms. The reform efforts also culminated in the promulgation of a new Constitution, the Constitution of Kenya, 2010.

The Promise of the Constitution of Kenya, 2010

The Constitution endowed all sovereign power on the people of Kenya,[23] which power could be exercised either directly or through democratically elected representatives.[24] In addition to the Constitution, the Elections Act, 2011, The Independent Electoral and Boundaries Commission Act, 2011 and the Political Parties Act, 2011 were all enacted so as to provide a reformed legal and administrative environment for the conduct of elections. This is the background against which the 2013 elections were conducted. Those elections were unique in various aspects. About 14,352,545 Kenyans registered as voters[25] while 12,330,028 voted, representing 85.91% voter turnout, the highest ever recorded.[26] This huge voter turnout marked the first time that Kenyans were exercising their sovereign rights to elect their representatives under the Constitution of Kenya, 2010. Secondly it was the first general election to be held following the disputed 2007 General Elections. There was a lot of anxiety as many feared a reoccurrence of the events of 2007. Finally, it was a litmus test for the efficacy of the changes that were brought about by the Constitution.

The Constitution introduced four key reforms relevant to the electoral process. Firstly, it clearly provides principles that govern elections.[27] All elections are to be free and fair,[28] free from violence[29] and administered in an impartial, neutral, efficient, accurate and accountable manner.[30] Through this, while all past elections had been judged against the standard of whether they were free

23 Article 1(1) Constitution of Kenya, 2010.

24 Article 1(2) Constitution of Kenya.

25 IEBC *Voters' register statistics per county* available at, http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/press-releases-statements/10, at 8 February 2016.

26 Institute International Institute for Democracy and Electoral Assistance, *Voter turnout data for Kenya,* http://www.idea.int/vt/countryview.cfm?CountryCode=KE, at 8 February 2016.

27 Article 81, Constitution of Kenya, 2010.

28 Article 81(e), Constitution of Kenya, 2010.

29 Article 81 (e) (ii), Constitution of Kenya, 2010.

30 Article 81 (e) (v), Constitution of Kenya, 2010.

and fair or not, the Constitutional provisions now clarified what free and fair would comprise of in the Kenyan context.

Secondly, it introduced the devolved system of governance.[31] As such, the electorate during the 2013 General Election cast votes for six positions; President,[32] County Governor,[33] Senator,[34] Women Representative,[35] Member of the National Assembly[36] and Member of the County Assembly.[37] These was unlike the previous elections when one was required to vote only for President, Member of Parliament and Councilor. In addition to the increase in elective positions, devolution would also be fully implemented only after the 2013 elections.

Thirdly, the new Constitution addressed the shortcomings of the electoral management body that had been identified by the Kriegler Commission.[38] It established a new independent electoral body, the Independent Electoral and Boundaries Commission (IEBC)[39] that is only subject to the Constitution.[40] The IEBC is established under Article 88 of the Constitution which also prescribes the criteria for appointment of the commissioners. It also provides for the independence of the Commission in the management and conduct of elections, a critical prerequisite for the legitimacy of the elections and the elected government.[41]

Unlike the ECK, the IEBC was not limited only to the conduct of elections, but its mandate also included the peaceful settlement of electoral disputes.

31 Chapter Eleven of the Constitution of Kenya, 2010 establishes the devolved system of government and its structure.

32 Article 136 of the Constitution of Kenya 2010, provides that the president shall be elected in a national election that is carried out in adherence of the Constitution and any Act of Parliament regulating presidential elections on the same day as a general election of Members of Parliament.

33 Article 180 (1) of the Constitution of Kenya 2010, provides that the county governor shall be elected on the same day as a general election of Members of Parliament.

34 Article 98(1) (a) of the Constitution of Kenya 2010, provides that Senate consists of forty seven members each elected by the registered voters of the counties.

35 Article 97(1) (b) of the Constitution of Kenya 2010, provides that membership of the National Assembly consists of forty seven women, each elected by the registered voters of the counties.

36 Article 101(1) of the Constitution of Kenya 2010, provides that a general election of members of parliament shall be held on the second Tuesday in August every fifth year.

37 Article 177(1) (a) provides that membership of the county assembly includes members elected by the registered voters of the wards on the same day as a general election of Members of Parliament.

38 International Crisis Group, Kenya's 2013 Elections (2013).

39 The mandate the Interim Independent Electoral Commission, the interim electoral management body that conducted the August 2010 referendum came to an end three months after the promulgation of the new Constitution as was provided under Article 41 and 41A of the former Constitution.

40 Article 88(1), Article 88(5) and Article 248(2) (c) of the Constitution of Kenya, 2010.

41 E Z Ongoya and W E Otieno, *A Handbook on Kenya's Electoral Laws and System* (2010) 1.

The disputes included those relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.[42] These disputes were to be settled within seven days.[43] Electoral dispute settlement mechanisms were the fourth area of reform. These mechanisms were categorized into two. The first category handled pre-election disputes. These included courts,[44] the IEBC[45] and the Political Parties Disputes Tribunal (PPDT).[46] The second category heard and determined post election disputes; which was left exclusively to the courts.

According to the Constitution, the Supreme Court has exclusive original jurisdiction to hear and determine disputes regarding elections to the office of president.[47] The High Court hears election petitions concerning election to the offices of County Governor,[48] Senator[49] and Member of the National Assembly.[50] On the other hand any petition on the election of a Member of a County Assembly shall be heard and determined by the Resident Magistrates' Courts as designated by the Chief Justice.[51]

Besides having the exclusive jurisdiction in matters arising from the conduct of the elections and the declaration of results, the Courts and especially the High Court have an appellate mandate in disputes from the quasi-judicial bodies. For instance, there is a right to appeal the decision of the Political Parties Dispute Tribunal[52] to the High Court on matters of law and fact, and to the Court of Appeal and the Supreme Court on matters of law.[53] In the case of the Electoral Code of Conduct[54], the IEBC has the mandate to oversee its implementation. The IEBC sets up the Electoral Code of Conduct

42 Article 88(4) (e) of the Constitution of Kenya, 2010.

43 Section 74(2) of the Elections Act 2012 [2011].

44 International Centre for Policy and Conflict and 5 others v The Honorable Attorney General and 4 others of 2013. The case concerned the suitability of Honorable Uhuru Kenyatta and his deputy on grounds on integrity.

45 The IEBC Dispute Resolution Committee decided over 2000 disputes revolving around party lists and more than 200 decisions touching on internal political parties' nominations, such as Mathew Adams Karauri v TNA. See Independence Electoral and Boundaries Commission, Dispute Resolution Committee Case Digest (2013).

46 Till November 2013, the Tribunal had heard 60 cases. Example, Eugene Wamalwa and 2 others v John K. Munyes and 2 Others, Complaint Number 1 of 2011. This was the very first case before the tribunal. See L Awuor and W E Otieno, Case Digest of the Decisions of the Political Parties Dispute Tribunal (2013).

47 Article 163(3)(a) of the Constitution of Kenya, 2010.

48 Section 75(1) of the Elections Act, 2011.

49 Article 105(1)(a) of the Constitution of Kenya, 2010.

50 Article 105(1) (a) of the Constitution of Kenya, 2010.

51 Section 75(1A) of the Elections Act, 2011.

52 Which was established under Section 39 of the Political Parties Act to determine disputes arising from political parties.

53 Sections 41(2) of the Political Parties Act, 2011.

54 The Electoral Code of Conduct is the Second Schedule to the Elections Act, 2011; it was developed in fulfillment of Article 84 of the Constitution of Kenya, 2010.

Enforcement Committee in accordance with Regulation 15 of the Electoral Code of Conduct as appended to the Elections Act, 2011. In case of any breach where a fine is imposed, it is required to be registered with the High Court.[55] The reforms to the legal framework, therefore sought to address the shortcomings in the previous processes for dispute resolution in election matters.

Based on Kenya's unhappy history with respect to election-based disputes and the tendency for the electorate to resort to violence both before[56] and after the elections, fast track mechanisms were put in place to prioritize the hearing and final determination of the 2013 election petitions.[57] This decision was informed by the long periods it took to settle election petitions that were filed after the previous general elections.[58] It was in response to the need to meet the strict Constitutional and statutory timelines that required that all election petitions be concluded within one year of the conduct of the General Elections. In May 2012, the Chief Justice established the Judicial Working Committee on Elections Preparations (JWCEP) to strengthen and improve the capacity of the Judiciary through equipping judicial officers with the knowledge and skills pivotal to the expeditious resolution of election petitions in a people focused manner. The JWCEP was to come up with a programme for the Judiciary to increase the number of judicial officers and staff to deal with electoral matters and also to suggest the manner in which the Judiciary could collaborate with other stakeholders in ensuring effective settlement of electoral disputes.[59] The formation of JWCEP was informed by the experience of the Judiciary in 2007 and the need to ensure that it was better prepared to handle the 2013 elections and had the confidence of the public in its ability and processes.

Following the declaration of the election results in 2013, Kenyans did not resort to violence on this occasion but instead waited for the Judiciary to determine the disputes. Public confidence in the Judiciary had increased following the

55 Regulation 8 of the Electoral Code of Conduct.

56 In 1992, clashes broke out as early as October 1991 in areas on the border of Rift Valley, Nyanza, and Western and continued in December 1992 after the elections. See Human Rights Watch, *Divide and Rule- State Sponsored Ethnic Violence in Kenya* (1993) 19.

57 Report of the Commonwealth Observer Group, Kenya General Elections 4 March 2012 (2013).

58 For instance following the 1997 General Election, 27 election petitions were filed. These petitions dragged on until late 1998 with at least 5 remaining unconcluded until late 1999. In 2002, 25 petitions were filed, 12 of which were struck out, and 3 were concluded in 2007 while 10 others remained unresolved as Kenyans voted in 2007.

59 Judicial Working Committee on Election Preparation, 'Post Election Report March- September 2013', (2013).

implementation of some of the reforms proposed in the Kriegler Report, and the institutional reforms that were ushered in by the new Constitution. Domestic and international observer groups praised the judiciary for the preparations and manner in handled the 2013 election petitions. The EU Observer Mission in its report on the 2013 elections summarized the assessment of the Judiciary's performance in the electoral process thus:

> The reforms implemented over the past two years to make Kenyan courts more independent were absolutely key to the major success of the 2013 Kenyan elections – the peaceful resolution of electoral disputes. Renewed trust in the Kenyan courts meant that Raila Odinga's challenge to the presidential election results was directed to the Supreme Court. The electoral petitions put these reforms into practice, showing that the Judiciary has made a strong and genuine effort to become a truly independent institution of justice. The number of petitions filed is an indication that the Judiciary have gone a long way to regaining public confidence since the days of previous elections, where they suffered a total lack of confidence in their independence.[60]

Ultimately, from the 2013 General Elections, a total of 188 petitions were filed.[61] Three petitions were filed at the Supreme Court regarding the Presidential results. Eventually they were consolidated into one and heard amidst a lot of public attention with the full trial being aired live on local and international media. This put the Judiciary in the spotlight throughout the 14-day constitutional timeline it took to hear and decide the petition. As indicated in this publication all the cases filed have been disposed of by the Magistrate's Courts, High Court and Court of Appeal. Only a few remain outstanding at the Supreme Court at the time of the writing.

History of the Judiciary Before 2013

The recent experience of elections in Kenya as narrated above can be contrasted with that of the post-independence period in order to demonstrate the progress that has clearly been made over the years, as well as to highlight the lingering similarities. In the past, the Judiciary in Kenya was viewed as corrupt, slow in hearing and determining cases[62], and a puppet of the State,

60 EU EOM, *European Union Election Observation Mission to Kenya, General Election 2013 Final Report* (2013), at http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf at February 2, 2016.

61 70 against members of the National Assembly, 13 against members of Senate, 24 against County Governors, 9 against Women Representative, 67 against County Assembly and 5 against Speakers of County Assemblies.

62 International Crisis Group, *Kenya's 2013 Elections* (2013).

especially the ruling party. The Executive constantly acted in total disregard of the decisions of courts. For instance in the 1974 election petition of *Raphael S K Mbondo v L D Galgalo & Paul Joseph Ngei*,[63] popularly known as the *Ngei case*, the election court found Mr. Ngei guilty of an electoral offence and he was barred from contesting for the Parliamentary seat for a period of five years. However, the then President, Jomo Kenyatta ordered the amendment of his constitutional powers of mercy or clemency to allow him to pardon election offenders.[64] Thus Mr Ngei immediately received presidential pardon and was reinstated in the race. Such acts reflected the non-authoritative nature of the Judiciary then, which was clearly dominated by the Executive. Although the 1969 Constitution comprised checks and balances to public power, it was amended time and again to centralize power to the Presidency. The result was the weakening of all other organs of the government and especially the Judiciary.[65]

The relationship between the Judiciary and the Executive ceased being one of tolerance but one of subordination and corruption.[66] In 1998 following claims of incompetency, inefficiency and corruption in the Judiciary, the then Chief Justice, Zacchaeus Chesoni, appointed a six man committee to investigate the claims.[67] The Committee headed by Retired Appellate Judge Richard Kwach established that the perception of corruption in the Judiciary had been validated by practices of the judges of the courts from the most superior to the lowest levels.

The Courts of yester years also relied heavily on technicalities to throw out cases. For instance in the case of *Kenneth S.N. Matiba v Attorney General*[68] the applicant, a presidential aspirant challenged his detention without trial. The High Court dismissed his application on grounds that the application did not cite the provisions of the Constitution contravened. In another case

63 *Raphael S K Mbondo v L D Galgalo& Paul Joseph Ngei* Election Petition No. 16 of 1974.

64 Paralegal Support Network, The Paralegal's Handbook 25. Available at, http://www.icj-kenya.org/dmdocuments/books/Paralegal_Handbook.pdf, at 8 February 2016.

65 See Justice J.B. Ojwang' Ruling in Joseph Kimani Gathungu v the Attorney General & 5 others (2010) eKLR at Page 16.

66 W. Wahiu,' Independence and Accountability of the Judiciary in Kenya' in F.W.Jjuuko (eds) *The independence of the Judiciary and the Rule of Law* (2001) 107.

67 International Commission of Jurists Kenya, Strengthening Judicial Reforms in Kenya Volume IV Performance indicators: Public Perceptions of the Court Divisions, Children's Court and the Anti - Corruption Court. See, http://pdf.usaid.gov/pdf_docs/Pnacw007.pdf, at 8 February 2016.

68 *Kenneth S.N. Matiba v Attorney General* Miscellaneous Application No.666 of 1990.

Kenneth Stanley Matiba vs. Daniel Arap Moi[69] the Court of Appeal dismissed the election petition filed by the petitioner contesting the 1992 presidential election on grounds that the petition was signed by his wife and that it had not been personally served on the respondent who was the then President. Clearly, there were efforts to frustrate Mr. Matiba's presidential bid. Consequently, the Judiciary became one of the most criticized arms of Government by the public in Kenya. As regards the Judiciary, in its report titled 'The Peoples' Choice: The Report of the Constitution of Kenya Review Commission,' the Constitution of Kenya Review Commission 2002 noted that, *"the Judiciary rivals politicians and the police for the most criticized sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers there is concern about competence and lack of independence."*[70]

All these factors led to loss of confidence in the judiciary as it was evidently not an independent dispute settlement body. It was for these reasons that the Judiciary was one of the key sectors targeted for reforms under the Constitution, 2010. Article 160 of the Constitution guarantees the independence of the Judiciary stating that in exercising their judicial authority, judges are only subject to the Constitution and the law and shall not be subject to the control or direction of any person or authority.[71] Judges are appointed through a transparent and public process. The Chief Justice, the Deputy Chief and the Judges are appointed by the President in accordance with the recommendation of the Judicial Service Commission (JSC).[72] The Chief Justice and the Deputy Chief Justice are appointed subject to approval by the National Assembly through an exercise of public vetting. [73] The removal of Judges is governed by Article 168 which elaborately provides for the procedure to be followed for removal. Of key importance to the said removal process is the emphasis on the role of the JSC and the need for the appointment of a tribunal. The tribunal enquires into the matter expeditiously and reports on the facts before making binding recommendations to the President as to whether a removal is warranted.[74]

To further bolster the confidence of the public in the Judiciary as an institution, the Judges and Magistrates Vetting Board was established in accordance

69 *Kenneth Stanley Matiba vs. Daniel Arap Moi* Court of Appeal Election Petition No.27 of 1993.

70 Judges and Magistrates Vetting Board, 'Interim Report September 2011-February 2013' (2013).

71 Article 160(1) of the Constitution of Kenya, 2010.

72 Article 166 (1) (a) of the Constitution of Kenya 2010.

73 Article 166(1)(a) of the Constitution of Kenya, 2010.

74 Article 168(5),(6),(7),(8),(9),(10) of the Constitution of Kenya 2010.

with Section 23 of the Sixth Schedule of the Constitution[75] to determine the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10[76] and 159[77] of the Constitution.[78]

Assessing Dispute Resolution in 2013

In light of the foregoing, this publication assesses the workings of the electoral dispute resolution mechanisms as they were deployed following the 2013 General Elections and connected issues. While the book appreciated that dispute resolution involves other agencies, notably the IEBC, PPDT and Political Parties Internal mechanisms, the publication focusses largely on dispute resolution by the Judiciary. The various Chapters of the Book explain and expound three fundamental issues: Firstly, what was the process available for resolution of electoral disputes during the 2013 General Elections by the Judiciary? Secondly, what were the key principles, norms and standards expected to be applied during the resolution of the said disputes; and lastly, who were the key actors involved in the operation and execution of the various roles prescribed by the Judiciary's electoral dispute resolution mechanism and what was their conduct? The Book provides recommendations that are useful in future electoral disputes resolution processes. The three fundamental issues mentioned have been addressed extensively in the ten chapters that form the content of this Book, which is authored by distinguished legal minds.

Chapter One authored by Hon. Justice David Majanja, examines the internal efforts by the Judiciary in ensuring an efficient and effective electoral process in Kenya. The Chapter particularly focuses on the Judicial Working Committee on Elections Preparations (JWCEP) established in preparation for the 2013 General Election. What was the rationale for its formation? What was its composition? How were its operations? What challenges did it encounter and finally, what lessons can be carried into the future from the experiences of the inaugural JWCEP? The Chapter seeks to answer these questions by an in-

75 The Vetting of Judges and Magistrates Act of 2011 was enacted 'to provide for the vetting of judges and magistrates pursuant to Section 23 of the Sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board and for connected purposes.'

76 This provides for the national values including rule of law, equity, social justice, equality, human rights, integrity, transparency and accountability.

77 This Article provides the guiding principles of Justice; justice should be done to all irrespective of status, it should not be delayed and it should be administered without undue regard to procedural technicalities.

78 Section 23(1) of the Sixth Schedule of the Constitution of Kenya, 2010.

depth interrogation of the workings and outputs of the Committee and views of stakeholders.

In **Chapter Two**, Francis Ang'ila critically analyzes the decision in the *Raila Odinga* case in light of the legal standards for presidential elections in Kenya. How did the Supreme Court of Kenya apply the legal standards for the presidential election dispute in Kenya? What is the rationale for the existing presidential election dispute resolution mechanism? This Chapter also interrogates the legal reasoning in the *Raila Odinga* case. Based on the ensuing analysis, the author argues that while the case settled some jurisprudential issues relating to the conduct of Presidential elections in Kenya, it is faulty on some areas. The author is particularly critical of the Court's treatment of standards of the conduct of elections, pointing out that in the case of the Register for elections, for example, the decision of the Court has the implications of excusing IEBC from adhering with highest international standards as enshrined in the Country's Constitution. The author concludes by arguing that there will be need for a reconsideration of some aspects of the case in future so as to ensure that a delicate balance is struck between the restraint not to invalidate presidential election petitions and the imperative to ensure that those elections only stand if they adhere to the constitutional principles and standards of free and fair elections.

Chapter Three, co-authored by Heidi Evelyn and Waikwa Nyoike, examines the constitutional threshold for elections in Kenya. It interrogates such issues as what the consequence of Section 83 of the Elections Act are? The Section provides that *'No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.'* Does it undermine the election principles under the 2010 Constitution? The Chapter examines the jurisprudential approach to the issue with a critique of the *Raila Odinga* case and in subsequent decisions. It argues that Section 83 of the Elections Act and the decision of the Courts following the 2013 elections have departed from the realisation of the Constitutional promise of free and fair elections. They state in their chapter that:

> The Raila Odinga Case decision, however, is replete with references to the jurisprudence of other jurisdictions and silent on the constitutional principles concerning elections. Therefore, it is the position of the authors

that Section 83 of the Elections Act has distracted the courts from the development of a true constitutional threshold for valid elections. Moreover, Kenya's post-2010 electoral jurisprudence thus far has actually undermined the constitutional standards laid down for testing the validity of elections and established a legal test entirely contrary to the aims of the 2010 Constitution.

In **Chapter Four**, Muthomi Thiankolu discusses the appellate jurisdiction in election disputes. At the onset, the author briefly discusses the right to appeal against the decisions of election courts in the Pre- 2010 era and the Post- 2010 era. The question posed is whether the transformative intent of the Constitution with regards to the handling of election petitions appears illusive? Based on a review of appeals from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court, the author argues that even though amendments were made to the Elections Act in 2013 to provide for appeals in election matters, the manner in which that right has been applied by the courts does not improve on the pre-2010 jurisprudence. The author is, particularly critical of the Supreme Court's admission of jurisdiction in election cases on Appeal from the Court of Appeal, arguing that the court does not have a general appellate jurisdiction over decisions from the Court of Appeal in election matters. Despite this, the court has used the two tests of either matters involving interpretation of the Constitution, or those of a substantial public interest to admit numerous cases on appeal. This has been done, the paper argues through relaxation of the test to be applied in using the criteria. As a consequence, Muthomi asserts that " The Supreme Court, however, has '*gluttonously*' exercised appellate jurisdiction in electoral disputes, apparently on the erroneous supposition that such disputes generally meet the jurisdictional thresholds set out in the 2010 constitution." The author also faults the Supreme Court on the threshold to be applied in determining whether the appellate courts have jurisdiction on matters of fact, pointing out that the Supreme Court equivocates on this issue developing a contradictory jurisprudence in the process. The author concludes that the approach of focusing on technicalities denies the country the expectations from the 2010 Constitution. Further he asserts that the legislative provisions that restrict courts from addressing issue of facts on appeal are unconstitutional. He concludes that the *Munya* jurisprudence from the Supreme Court is bad law and should be overturned in a future case before the Supreme Court.

Chapter Five, authored by Professor Kwasi Prempeh, is a comparative discussion of election petitions across the world. It situates the analysis of

the Supreme Court decision in the *Raia Odinga* case in that perspective. The author starts by pointing out the inherent challenges that the judiciary faces when they are called upon to decide what are essentially political disputes, through election petitions. He traces the concerns with courts dealing with election petitions to the warning by Lord Chief Justice Alexander Cockburn of England, who in 1868 argued that giving judges jurisdiction over essentially political disputes would compromise the independence of the judiciary and bring their image into public disrepute. Since then, though and despite this warning the judiciary across the world has emerged as a final arbiter in electoral contests whenever disputes arise. Having established that the global trend is to settle election related disputes through judicial means, the Chapter seeks to draw comparisons between election petitions cutting across various jurisdictions. What are the common concerns, principles and rules in both the substantial and procedural laws governing election disputes? What are the disparities if any? How does Kenya's current legal framework for litigating and resolving election petitions compare with other jurisdictions? What are the implications of Kenya's emerging jurisprudence on election petitions on electoral justice, and the future conduct and credibility of elections in Kenya's politically volatile environment? Professor Prempeh concludes that in Kenya's experience with election petitions compares with many other countries across the world. He argues that the law as designed is extremely strict and those strictness are borne largely by the Petitioners especially in Presidential disputes. This explains why the amount of criticism that the Kenyan judiciary has received on its election dispute mechanisms are mainly as a result of the handling of the *Raila Odinga* case. The author concludes by faulting the current legal framework for resolving election disputes for conferring advantage on the Party that wins an election, but avers that this shortcoming cannot be blamed on the judiciary alone. He makes recommendations to ensure that election disputes in Presidential petitions are dealt with in a much more satisfactory manner in future.

Chapter Six address key gender issues in Kenya's electoral politics with a specific focus on the 'unrealized Constitutional promise'. The authors, Professors Wanjiku Mukabi Kabira and Patricia Kameri Mbote, look at the realization of the promise of gender equality and non-discrimination in electoral politics. The authors contextualize the issue within history, identify critical milestones, and canvass Constitutional provisions addressing gender equality with particular attention paid to women's representation in elective

politics. The authors trace the struggle for women's representation in elective politics and hail the adoption of the Constitution of Kenya, 2010 as providing a ray of hope for equity in the involvement of women in politics and elective leadership. They argue that despite the transformative provisions on gender in the Constitution, the results of the 2013 elections was still unable to ensure that the requirement of not more than two thirds of either gender are in elective positions was not realized. For some positions like Governors and Senators, no women were directly elected. While the numbers of women in political leadership positions increased during the 2013 elections, the increase is largely attributable to affirmative action provisions in the Constitution.

The authors, based on a gender analysis, discuss the process of the 2013 elections from nominations, campaign to the voting process to make the case that despite c onstitutional developments, political contests in Kenyan are still male dominated. On dispute resolution, they assert that the Judiciary has had very few occasions to deal with gender issues arising out of electoral contests and in those few instances, the quality of emerging jurisprudence in weak. They conclude by making a case for more robust treatment by the judiciary of gender in electoral disputes, starting from supporting full implementation of the two-thirds gender principle that the Supreme Court ruled on but whose deadline for realization has since elapsed.

In **Chapter Seven**, Elisha Z Ongoya, analyzes an issue that is at the heart of litigating election petitions in Kenya; evidence, which connotes proof. At the beginning, the author identifies various concerns around the rules, principles and practice of evidence law as have been applied by courts exercising jurisdiction over election disputes in Kenya. This is followed by a scrutiny of the rules, their underlying philosophy and the manner in which courts have applied them. In concluding, the author while noting the tremendous changes in the normative contents of the Constitution, statute and rules of procedure regarding evidence in election petitions, opines that the Courts have applied these in a contradictory and unsatisfactory manner. He also addresses an issue that is often overlooked, which is the preparations that candidates require to make even before elections are completed, in collecting evidence as anticipation of possible election petitions.

Scrutiny is an integral aspect of any democratic electoral process intended to demonstrate openness in the entire process.

In **Chapter Eight**, Hon. Justice David K. Maraga examines the question of scrutiny of contested material in electoral disputes with specific focus on the Kenyan judicial perspective. The author discusses scrutiny in the entire electoral process; what does it entail?; when and on what basis can an order for scrutiny be granted?; how is the exercise of scrutiny to be carried out?; and the application of the result of the exercise. Indeed the Supreme Court's order for scrutiny of select contested election material during the *Raila Odinga* case is prominently featured in this Chapter. The author makes the case, that while focus is normally on court ordered scrutiny, for free and fair elections, there requires to be more detailed frameworks for and adoption of the concept of scrutiny throughout the electoral chain. In his view, the electoral management body should avail parties the opportunity to scrutinize the process in detail and raise any objections they have then. Issues like voter registers should be dealt with way before elections and any disputes relating to them dealt with by the Judiciary before Election Day. He concludes that despite the reluctance by the Judiciary to order for scrutiny, it is an important aspect of the electoral dispute resolution mechanism and needs to be utilized in appropriate cases.

Chapter Nine discusses the jurisprudence emerging from the *Raila Odinga* case on the issue of *amicus curiae*. The author, Dr. Collins Odote, argues for a shift in the treatment of amicus away from representation of private partisan interests to a policy tool for ventilating larger societal and public interest matters. At the end, the author concludes that the use of *amicus curiae* requires a careful balance in the context of election petitions, which although partisan and private in their nature, raise wider constitutional and public interest issues. He interrogates the jurisprudence emerging from the Courts on admission of *amicus curiae* and based on discussion of comparative jurisprudence opines that there have been developments across the world which have departed the concept from its traditional position of a disinterested by-stander. Kenyan courts should, consequently, adapt the accordingly and adopt a position of admitting amicus but placing conditions on such admission to govern the limits of their participation once admitted.

Chapter Ten is authored by Dr. Linda Musumba. The Chapter examines the quality of lawyering as demonstrated by the advocates representing the various parties to the Presidential election petition, the *Raila Odinga* case. The Chapter interrogates the concept of lawyering and in particular, what the components of good lawyering are. Key questions include how the advocates

in the *Raila Odinga* case delivered on their duties to their respective clients in the midst of the pressure, public scrutiny and limited time characterizing the petition. The Chapter also provides a modest comparative analysis with the lawyering evident in other equally high profile cases prosecuted under more or less similar circumstances though not necessarily election petitions. These include two United States of America cases namely Bush vs. Gore case and the O.J Simpson case, and most recently the South African murder trial against *Oscar Pistorius*.

Notably, a key aim for the publication of this Book is the provision of scope and opportunity for the key players in the impending 2017 General Elections to learn lessons from the preceding 2013 electoral experience. This pertains particularly to the stable mediation of post elections disputes in a manner that avoids an unnecessary repeat of the post-election conflict and violence reminiscent of some of the previous general elections. The Book does not purport to have covered every possible angle or perspective possible as regards the 2013 electoral dispute resolution mechanism and related issues. In fact, it commences a conversation that can be extended by the various agencies and actors in the elections arena in Kenya, and indeed abroad, towards making elections processes a safe and tolerable experience for respective populations.

I

Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections

Hon. Justice David Majanja*

Abstract

Free, fair and peaceful elections are a sine qua non for democracy and good governance. Kenya's history of electoral processes since the multiparty era have depicted highly contested, 'do or die' processes. While coming at the tail end of the electoral management process, dispute resolution plays a critical part in ensuring free and fair elections. As an independent arm of government, the judiciary bears a primary role in ensuring that election petitions are fairly and expeditiously resolved.

Determined to play its role in ensuring a smooth electoral process, and against the backdrop of a haunting past, Kenya's Judiciary established an in-house committee, the Judiciary Working Committee on Elections Preparations (JWCEP) on May 10 2012, in the run up to the first elections under the country's 2010 Constitution. The Committee had the mandate of advising the Judiciary on measures for efficient electoral dispute resolution (EDR), training judicial officers and support staff on effective electoral dispute management, monitoring and evaluating EDR in the courts, liaising with stakeholders and advising the Judiciary on public engagement.

* The author acknowledges the assistance of Ms. Petronella Mukaindo and Ms. Lucianna Thuo in preparing this paper.

This Chapter examines the Judiciary's internal efforts at facilitating an efficient and effective electoral process. In particular, it retraces the rationale for the formation of the JWCEP in the run up to the March 2013 General Elections, its composition and mode of operation and appurtenant challenges. It also provides a record of vital insights and lessons for operation of similar bodies in future.

1.0 Introduction

1.1 Setting the Context

The repeal of section 2A of the Independence Constitution in 1992, a decade after its introduction, ushered in a plurality of divergent views and political clamour for a more democratic space.[1] This progressive development, however, did not immediately translate to an expanded democratic space. It took two subsequent electoral cycles for the tangible benefits of this plurality to be practically felt. In 2002, the opposition was elected into government effectively bringing an end to the monopoly of a single ruling party in Kenyan politics that had lasted decades. The multiparty era also brought about a spirited agitation by non-state actors for good governance and decentralisation of power that had hitherto been concentrated in the Executive. This formed fodder for subsequent heated push for constitutional reforms.

Prior to the 2007 elections, the Judiciary laboured under a crisis of confidence for various reasons. First, due to various previous constitutional amendments that amassed power to a powerful presidency, the President had complete discretion to appoint judges. Second, judges did not enjoy security of tenure.[2] Third, EDR was not concluded timeously, with the result that election petitions would in some cases outlive the tenure of the incumbent whose election was challenged. Lack of proper case management had seen cases drag on for ages.[3] Moreover, no presidential election petition had ever been determined on merit, with each petition eventually being dismissed on technicalities, such as improper service. Even though Haroun Mwau had filed a case against Honourable Moi, which went to trial it was still determined on the technical issue of the size of foolscaps used to capture signatures of supports by a presidential candidate. Undue regard to procedural technicalities dealt a fatal blow to justice in election petitions.

1 It was however not until 1997 that a subsequent constitutional amendment added section 1A which stated expressly that Kenya is a multiparty state. The new section 1A introduced by the Constitution of Kenya (Amendment) Act 1997 (No. 9 of 1997) 2 stipulated that, "The Republic of Kenya shall be a multi-party democratic state".

2 See the Constitution of Kenya (Amendment) Act No. 4 of 1988.

The 2007/2008 post-election violence that followed the disputed 2007 presidential elections underlined the urgency for comprehensive constitutional reforms. The National Accord Reconciliation Agreement signed on 28th February 2008 led by former United Nations Secretary General, Dr Kofi Annan as chair of the Panel of Eminent African Personalities brokered a settlement, the Kenya National Dialogue and Reconciliation Accord, which resulted in a coalition government and a common commitment for urgent constitutional reform. Agenda item IV of the agreement emphasized on constitutional, legal and institutional reforms. Governance and electoral reforms was a critical component of this. The Constitution of Kenya (Amendment) Act of 2008 would see the disbandment of the Electoral Commission of Kenya (ECK) through repeal of section 41 of the Constitution and in its place establishment of the Interim Independent Electoral Commission (IIEC).[4] An interim Independent of Boundaries Review Commission also concomitantly established would oversee the delimitation of electoral boundaries in the country.

The Commission of Inquiry appointed by then President Kibaki to inquire into all the aspects of the general election held on 27 December 2007 (the Independent Review Commission (IREC) or 'Kriegler Commission' as it was popularly known) had, in its terms of reference, the mandate to, "analyse the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation." It was also tasked with recommending "electoral reform including constitutional, legislative, operational and institutional aspects, as well as the accountability mechanisms for Electoral Commission of Kenya Commissioners and staff."[5] IREC reported wide public outcry about the powers of the Presidency and the weaknesses of the 'winner-take-all system' of elections.[6] Constitutional change was inevitable, to redress the balance of power between the various organs of government and address

3 See for instance, a report on the civic elections suit emanating from the disputed 1997 General Elections, Kiarathe Ward in Murang'a county that was still ongoing, close to two decades after the election(M Mwangi, 'Standard, Friday, 15 November 2013 'Court yet to determine 1997 civic poll petition' at, http://www.standardmedia.co.ke/article/2000097714/court-yet-to-determine-1997-civic-poll-petition, at 10 January, 2016. See also Alice Wahome v James Maina Kamau & 2 Others Election Petition 3 of 2008 relating to the 2007 elections in Kandara constituency which had not been concluded by the 2013 elections.

4 The Constitution of Kenya (Amendment) Act, No 10 of 2008. The Act commenced operations on 29 December 2008.

5 See Gazette Notice Nos 1982 and 1983 dated 14 March 2008, Kenya Gazette Vol. CX-No. 23.

6 IREC, 'Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007.

malpractices attributed to gaps or specific provisions of the Constitution and other election-related laws. The ethnic violence that followed the 1992, 1997 and 2007 elections has been attributed to bad governance, lack of strong institutions or failure to respect those institutions, which resulted in Kenya becoming what has been described elsewhere as an autocratic State.[7] One of the characteristics of an autocratic State is lack of citizen participation in governance.[8] By the 2007 elections, a history of marginalization, coupled with the near media blackout during the announcement of the presidential election results heightened suspicions of election rigging that were already rampant.[9]

One of the key recommendations of IREC was that the then existing rules and regulations on the procedures of election petitions be repealed and replaced with new ones that would ensure that petitions are heard in a just and timely manner.[10] The IREC also recommended the establishment of a special Electoral Dispute Resolution Court to handle matters falling outside the jurisdiction of the electoral commission and any post-election disputes, including election petitions.[11]

The perception that Government institutions including the Judiciary were not independent of the Executive and lacked integrity fuelled the violence that erupted following the 2007 polls. According to the Commission of Inquiry into Post-Election Violence (CIPEV) ('the Waki Commission'), the fact that public sector institutions were seen as biased and unlikely to follow the rules increased the tendency to violence among members of the public.[12] This was a clear message that there was a perception of partiality and lack of confidence in the Kenyan Judiciary by a significant section of the public. So dented was the image of the Judiciary that in his speech to the nation barely a hundred days after assuming office in 2011, the new Chief Justice described the state of affairs thus, 'We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its

7 PA Opondo 'Ethnic politics and post-election violence of 2007/8 in Kenya' (2014) 6 *African Journal of History and Culture* 59, 60.

8 Odhiambo-Mbai, C (2003) 'The rise and fall of the autocratic state in Kenya' cited in Opondo, as above.

9 See GM Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws' in GM Musila (ed) *Handbook on Election Disputes in Kenya* (2013) 12.

10 IREC, "Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007", 153.

11 As above.

12 CIPEV, Report of the Commission of Inquiry into Post-Election Violence, (2008), 28-29.

public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail."[13]

According to the Waki Commission, "nothing short of comprehensive constitutional reforms [would] restore the desired confidence and trust in the judiciary".[14] No wonder therefore, as part of the change in the governance framework, an overhaul of the electoral system and its management was top on the list of key constitutional reforms.[15]

1.2 Constitutional Imperatives

On 4th August 2010, the efforts at constitution making finally bore fruit leading to the adoption of the country's current Constitution, marking a new renewal, the second rebirth for the hitherto wounded nation. The Constitution of Kenya 2010 introduced key reforms in governance and electoral system. It affirmed that the presidential term would be limited to a maximum two terms [16] and reformed the rules for one to be elected as a President.[17] As regards EDR, the Constitution introduced mandatory time limits within which election petitions were to be concluded by courts of first instance: The Supreme Court was bound to hear and determine a presidential election within fourteen days of filing of petition[18] while the High court would determine parliamentary elections within six months. The law also gave jurisdiction to Magistrates Courts to hear and determine the question of validity of election of a candidate to the office of member of County Assembly. Equally, the Resident Magistrates Courts were required to determine the election disputes within six months. [19] The Elections Act was also amended to require that appeals be disposed of within 6 months of filing.[20] These changes were all in tandem with earlier recommendations of IREC.[21] The requirement to dispose of election petitions within the prescribed timelines brought pressure to bear upon the Judiciary to

13 Hon the Chief Justice Dr Willy Mutunga, 'Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days (19th October, 2011). Available at, http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/, at 15 December 2015.

14 CIPEV, above n 12, 461.

15 The Constitution of Kenya Review Commission (CKRC) had in fact earlier on formed an independent body to advise it on constitutional reforms regarding the Kenya Judiciary. The Advisory body's report of May 2002 contains significant recommendations on the independence of the Judiciary.

16 Article 142(2) Constitution of Kenya.

17 Article 137 and 128, Constitution of Kenya.

18 Article 140(2) Constitution of Kenya.

19 Article 105 Constitution and Section 75 (1) and (2) Elections Act, 2011.

20 See s 85 A of the Elections Act, 2011 as amended by Statute Law (Miscellaneous Amendments) (No. 2) Act No. 47 of 2012.

21 Above, note 10.

deliver electoral justice satisfactorily within the prescribed constitutional and statutory timelines.

Furthermore, as a first, judicial independence was now explicitly secured under Chapter Ten of the Constitution.[22] This was a significant win. No longer was the judicial arm to be whimsically subjected to Executive control and perceived as the lesser, 'third' arm of government; it was a co-equal arm of government to the executive and legislature. A fund for the Judiciary was also established, paving room for financial independence.[23] There was now in place principles of electoral system[24] and for the first time, Kenya could boast of national values and principles of governance enshrined under Article 10 of the Constitution. There was further emphasis on constitutional supremacy.[25] The vesting of sovereignty in the people also demanded a radical shift from the old ways of doing things. Like other arms and state organs, Article 159 of the Constitution established fundamental principles governing exercise of judicial authority. Of significance was the provision that judicial authority was derived from the people.[26] This demanded a shift in focus to *mwananchi*-based justice. People-focused delivery of justice meant and included access to and expeditious delivery of justice. According to the principles, the judiciary was to discharge justice expeditiously to all without delay or undue regard to technicalities. It was also tasked with protecting and promoting the purpose and principles of the Constitution.[27] All these factors formed the milieu that provided the much-needed impetus for judicial reforms.

There were more radical changes introduced by the Constitution of Kenya, 2010. All judicial officers holding office at the time of the promulgation of the Constitution were to be vetted to determine their suitability to remain in office.[28] The Constitution further required that the then incumbent Chief Justice vacates office within six months of the promulgation of the Constitution,[29] and either choose to retire from the Judiciary[30] or continue to serve as a Court of Appeal Judge, subject to the vetting process.[31]

22 Article 160 Constitution.

23 Article 173 Constitution. However, at the time of writing, the legislation for the regulation pursuant to Article 173(5) was yet to be enacted.

24 Article 81 Constitution.

25 Article 2 Constitution.

26 Similar to Article 1 of the Constitution that underlines the sovereignty of the people.

27 See Article 159(2) of the Constitution on the principles to guide the exercise of judicial authority.

28 Schedule 6 of the Constitution, Section 23.

29 Above, Section 24(1).

30 Above, Section 24(1) (a).

31 Above, Section 24(1) (b).

Alongside the Constitution making efforts, there had all along been parallel reform efforts targeting the judicial sector. Various committees and commissions had been established in a bid to reform the judiciary. These picked up in earnest in the 1990s with the establishment in 1992 of the *Committee on the Terms and Conditions of Service of the Judiciary* ('the Kotut committee) followed by the Committee on the Administration of Justice ('the Kwach Committee') and several others. Their mission was similar, that of bringing the judicial institution on track as the custodian of justice.

1.3 Judicial Transformation Framework

It was perhaps the Judiciary's Transformation Framework (2012-2016) or 'JTF' that provided the much needed foundation for institutional renewal. This blue print packaged a four-year strategy for judicial transformation in line with the newly enshrined constitutional principles. It was envisaged that through the JTF, the judiciary would be repositioned to an engine of societal transformation that responds to the needs of Kenya's diverse society.[32] The JTF was anchored on four pillars whose ultimate goal was the tagline, "equitable access to and expeditious delivery of justice." The four pillars are; people-focused delivery of justice, transformational leadership, organizational culture and professional staff, adequate financial resources and physical infrastructure and harnessing technology as an enabler of justice. Under each of these pillars were specific key result areas, totalling ten in number. JWCEP was firmly rooted on the first pillar, that is, people focused delivery of justice. The JTF would form and inform the roadmap for judicial transformation.

The 2013 General Elections was historic and unprecedented. It was unique in several respects; it was the first election under the new Constitution and electoral laws; it was the first to incorporate elective affirmative action seats and the first to include diaspora votes. Six elective positions were up for grabs, as opposed to the earlier three posts.[33] There were 1,881 elective posts to be filled through the polls at both the national and county levels of government, from the presidency to membership of the County Assembly.[34] The elections

32 Judiciary Transformation Framework (2012-2016) p 10. For more information on the background and rationale to the Judiciary Transformation Framework see, 7-12 copy available at http://www.judiciary.go.ke/portal/portal/assets/downloads/reports/Judiciary's%20Tranformation%20Framework-fv.pdf.

33 In addition to the presidential, parliamentary and civic candidates earlier voted for, voters now also had the Senate representative, woman representative from the 47 counties and the gubernatorial positions to fill in.

34 This number excludes the nominated and special seats in the Houses. There were 290 elected Members of National Assembly, each representing single member constituencies, 1,450 County Assembly Ward Representatives representing the number of wards (the number would differ per county depending on the number of wards and the nominees needed to ensure adherence to two thirds gender rule gender.

presented great prospects[35] as well as potential risks, and a sense of foreboding considering the country's history.

The above factors all directly or indirectly necessitated the birth of the JWCEP within the Judiciary. To successfully put in place and run an effective electoral dispute management, the Judiciary had to work outwards beginning with itself. It had to be 'fit for the purpose'. The much needed architecture was now in place. There was also renewed hope and the Judiciary's vision codified in a judicial transformation framework. The Judiciary had to devise a mechanism that would ensure the imminent dispute resolution process in the aftermath of the 2013 General elections met constitutional and legal muster; a strategy that resonated with the aspirations of the *mwananchi* and squarely aligned with the judicial transformation framework and basically, a mechanism that restored faith and confidence in a previously 'condemned' institution. In the words of the JTF, the Judiciary had to, "reengineer and reposition itself with philosophical clarity, jurisprudential authority, managerial competence and unquestionable integrity."[36] The manner in which the Judiciary handled electoral disputes emanating from the first elections under the Constitution presented a litmus test as to whether the transformation was real or in name only.

2.0 Judiciary Working Committee

2.1 Establishment

The establishment of the JWCEP (the Committee) by the Chief Justice, Dr Willy Mutunga on 10 May 2012 was opportune. With less than a year to go before the first elections slated for 4 March 2013,[37] the Committee had little time to waste. It had to quickly set its house in order, prep itself to prepare

balance, see Article 177 of the Constitution on membership to county assembly); furthermore, each county assembly has a speaker elected from persons who are non-members of the county assembly(Art 178 of the Constitution). Moreover, each of the 47 counties was to elect a governor at the general election, a woman representative to the National Assembly as well as a senator to the Senate.

35 FIDA, 'Key Gains and Challenges, A Gender Audit of Kenya's 2013 Election Process' (2013) ,4.

36 Above, n32, 9.

37 The High Court in *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] eKLR had determined that the date of the first elections under the Constitution would take place, "within sixty days from the date on which the National Coalition is dissolved…in accordance with section 6(b) of the National Accord and Reconciliation Act, 2008; or (b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by Legal Notice No. 1 of 2008 as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within sixty days of 15th January 2013". The court of Appeal (*Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others* [2012] eKLR) upheld the election date of 4 March 2014 subsequently set by the Independent Electoral and Boundaries Commission.

judges, magistrates and other relevant officers in time for the historic elections barely months away. According to initial projections, the Judiciary anticipated about 500 election petitions.[38]

2.2 Composition

The JWCEP comprised eight judges and magistrates drawn from the Supreme Court, Court of Appeal, High Court and Magistrates Courts. The members of the Committee were Supreme Court judges, Justice Mr Mohammed Ibrahim and Justice (Prof) Smokin Wanjala, Justice Mr David Maraga and Justice Mr Paul Kihara Kariuki of the Court of Appeal, Justice Hellen Omondi and Justice Mr David Majanja of the High Court. The magistracy was also represented by Hon Roselyn Oganyo, then Senior Principal Magistrate and Hon Lillian Arika, Principal Magistrate. The Committee also incorporated Justice Mbogholi Msagha, the then Principal Judge of the High Court. The composition ensured cross-representation of the various courts in the judicial hierarchy.

The Committee's work was supported by a secretariat drawn from young professionals who assisted the Committee in its legal research and administrative work. The technical experts were supported by development partners,[39] while the Judiciary also seconded a few of its staff to the Secretariat.[40] A Chief Executive Officer drawn from the Committee's membership headed the Secretariat.

Being an in-house Judiciary Committee, there was no challenge in securing office space and furniture at the Judiciary,[41] from where the Secretariat would operate from and the Committee sittings held. This arrangement not only saved on costs of securing office space but also saved on time that would otherwise be expended on procuring an office space.

38 However, as it turned out, only 188 petitions were filed (24 cases filed against the election of Governors, 13 against Senators, 70 against Members of the National Assembly, 9 against County Women Representatives, 67 against County Assembly Representatives and five against County Assembly Speakers).

39 In particular, the International Development Law Organization (IDLO), Danish International Development Agency (DANIDA) and the United States Agency for International Development (USAID).

40 About 17 technical experts comprising legal researchers, research interns, administration interns and consultants undertaking short term assignments. Staff from the judiciary attached to the Secretariat included the head of secretariat, clerical/ logistics/finance officer, events coordinator, administration/ operations officer and office manager. For a breakdown of the staffing levels, see Judiciary Working Committee on Election Preparations, 'Evaluation of the performance of the Judiciary and the Judiciary Working Committee on Election Preparations in managing the electoral dispute resolution process' (May 2014) p 31.

41 The JWCEP offices were located in one of the rooms on the first floor of Milimani Law Courts, Nairobi.

2.3 Mandate of the JWCEP

The overall purpose of the Committee was *"the strengthening and improvement of the Judiciary's capacity to resolve election petitions in a 'people-focused and expeditious justice' manner". Its mission was to, "design and execute a Judiciary programme to build the capacity of judicial officers and staff on electoral matters, and suggest ways of working with other stakeholders."*[42]

So as to realise the above overarching goal, the Committee was tasked with five specific activities: (1) to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes; (2) to develop and implement, in conjunction with the Judiciary Training Institute (JTI), a training programme for the efficient and effective management of election disputes for judicial officers and support staff; (3) to develop and design a system for monitoring and evaluating the management and administration of election-related disputes in court, (4) to liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences; and (5) to advise the Judiciary on the information that needed to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

In executing its mandate, JWCEP developed a four-pronged strategy as discussed below:

2.3.1 Development of Legal and Administrative Framework

The first task was to devise legal, regulatory and administrative arrangements necessary for effective and efficient resolution of electoral disputes. As advised by the IREC and CIPEV, revision of the legal framework was crucial to the success of the electoral dispute resolution process. It was imperative for the Committee to scrutinize and assess the legal gaps and advise on ways to sealing these gaps for effective resolution of electoral disputes.

According to the Fifth Schedule of the Constitution, election-related laws were to be enacted within a year from the effective date. Thus, by the time

42 See http://www.judiciary.go.ke/portal/blog/post/history---the-judiciary-working-committee-on-election-preparations at 12 December 2015.

43 This included legislation on elections under Article 82, electoral disputes under Article 87, legislation on Independent Electoral and Boundaries Commission under Article 88 and legislation on political parties under Article 92.

of birth of the Committee, the relevant legislative framework was already in place.[44] However, the existing legal framework was inadequate and needed to be supplemented by rules and regulations to aid its operationalization. The JWCEP facilitated the enactment of vital amendments to Elections Act, 2011,[45] development of Elections (Parliamentary and County Elections) Petition Rules 2013[46] to replace the National Assembly and Presidential Election Petition Rules, 1993[47] and development of the Supreme Court (Presidential Election Petition) Rules.[48]

The Rules were drafted with the assistance of legislative drafters, following several stakeholder forums, drawing participation from legal practitioners, civil society organizations, the Independent Electoral and Boundaries Commission (IEBC), academia and judicial staff.

The amendments proposed to the Elections Act, 2011 by the Committee gave jurisdiction to the Magistrates Courts to entertain electoral disputes arising from county assembly petitions, thus expanding the capacity of the Judiciary to dispose of election petitions timeously. The petition rules were made known to the judicial officers and the lawyers through trainings and stakeholder engagements. The said rules eschewed technicalities in favour of substantive justice and prescribed the time limits for specific stages of the petitions and this in turn inculcated a sense of responsibility and discipline on the part of advocates to focus on merits. This yielded predictability and flow of proceedings.

The Committee's achievements on this aspect of its mandate was impressive, bearing in mind that it was hard pressed for time. The already tight schedules before the March 2013 elections were further complicated by the fact that the term of the National Assembly was to expire in January 2013.[49] If the Committee was to successfully table legislative recommendations, it had to do so way before then.

44 The Elections Act, 2011(No 24 of 2011) which commenced operation on 2 December 2011, the Electoral and Boundaries Commission Act, 2011 (No. 9 of 2011) and the Political Parties Act, 2011 (No. 11 of 2011).

45 These were adopted vide Statute Law Miscellaneous Amendment Act, No. 47 of 2012.

46 Published in the Kenya Gazette on 15 March 2013 vide Legal Notice No 54 of 2013.

47 Legal Notice 14 of 1993.

48 Legal Notice 15 of 2013.

49 While the Constitution did not provide for dissolution of Parliament, the expiry of the term of the 10th Parliament was to be on the 5th Anniversary of the day it first sat which was designated by Legal Notice No. 1 of 2008 as 15 January 2008 (See *John Harun Mwau & 3 others V Attorney General & 2 others* [2012] eKLR).

On the administrative aspect, the JWCEP recommended and facilitated the gazettement of an *ad hoc* bench comprising 99 judges and magistrates to constitute the election court that would hear petitions filed to challenge various Parliamentary and County positions. These would hear cases on a daily basis. The election petition rules required that, as far as possible, election petitions be heard on a daily basis, with minimal adjournments, to ensure expeditious disposal.[50] This was not going to be easy given the lean number of judges and judicial officers. A total of 38 judges (from a total of then 53) and 61 magistrates handled the petitions, constituting over 60 per cent of all the judicial officers in the country.[51] This meant that the redeployment of judicial officers came at a heavy cost for other cases. The arrangement saw the reorganisation of cause lists and the stalling of cases in certain courts as priority was given to election petitions. Exclusive focus on election petitions by the *ad hoc* bench was intended to avoid distractions created by routine court work and enable them concentrate on election petitions. The move would also serve to liberate the *ad hoc* bench from the challenges that 'familiarity' with their routine stations might bring. The administrative rules requiring judges to be transferred to different locations to hear election petitions responded to the local sensitivity of the petitions.[52] The *ad hoc* bench was not bound to hear other matters apart from election petitions.[53]

The administrative move of temporarily moving some members of the *ad hoc* bench to far-flung stations for such length of time, however brought with it both logistical and financial repercussions - the transferred bench together with the staff (secretaries, clerks, drivers and legal researchers) would require accommodation and living allowances for the period, something that the Committee advised the Judiciary's administration to consider. Facilities for the storage and recount and scrutiny of ballots by Deputy Registrars had also to be factored in. Owing to financial and capacity constraints, it became apparent that it was not feasible to transfer all selected judges and magistrates to other stations except in stations where there was a large number of petitions.

Furthermore, to prepare all the court stations for the increased workload that would be occasioned by the petitions, all affected court stations were required

50 Rule 22, Parliamentary and County Election Petition Rules.

51 See JWCEP, 'Evaluation of the performance of the Judiciary and the Judiciary Working Committee on Election Preparations in managing the electoral dispute resolution process' (May 2014) p 43(hereafter "Evaluation report").

52 As above.

53 Despite this leeway, some judicial officers were able to still handle the other cases parallel to the electoral dispute resolution process.

to rationalise their diaries to accommodate the EDR process. There were other sacrifices too; the Chief Justice cancelled annual leave for all judicial officers for the period between March and October 2013 to allow for an accelerated uninterrupted process.[54]

In spite of its well-meaning intentions, prioritisation of election petitions elicited mixed reactions. For some, the move was discriminatory and favoured the rich, (the perception that those who vie are the wealthy politicians and by prioritising election petitions, the Judiciary was effectively discriminating against the poor who had other ongoing cases and the remandees who continued to wallow in the cells). Others saw it as a necessary measure given the constrained number of judicial officers *vis-à-vis* the strict constitutional timelines. The Judiciary tried to mitigate this situation through rolling out of a rapid case management for criminal cases through a Judicial Service Week after the closure of the EDR process and by explaining to the public the rationale behind the 'prioritisation' of resolution of electoral disputes. During the Service Week, carried out in October 2014, select High Court judges were assigned to hear and determine pending criminal cases for a two-week period in order to reduce backlog.

The Committee made other administrative recommendations. In addition to pre-trial conferencing which had been introduced by the election petition rules to assist in case management,[55] the Committee drafted a pre-trial checklist which compiled into one document all the documents the parties were required to file and their respective timelines. The checklist simplified the filing process and made it easier for the court staff to ensure that the timelines were observed.

Further, the Committee had anticipated the use of a case management system (CMS) to monitor the progress of the petitions across the country. The CMS was developed in collaboration with the ICT Directorate in the Judiciary. ICT officers were expected to scan and upload all the documents filed by the parties to ensure that cases would not be delayed if physical copies of the files could not be traced. The CMS was advantageous because it could hold large volumes of scanned documents. All progress in the cases was also to be

54 See Memo from the Chief Justice to all court staff, 16 January 2013; Appendix 1, Judiciary Pre-Election Report, (September 2012-February 2013), 22. The report is available on, http://www.judiciary.go.ke/portal/assets/files/Reports/Judiciary%20Pre-Election%20Report%2027th%20feb.pdf, at 9 January, 2016.

55 Rule 9 of the Presidential Election Petition Rules; Rule 17 of the Parliamentary and County Petition Rules.

updated so that the Committee could, at the touch of a button, find out the progress of any case in any court station in the country. It had been anticipated that the information generated by the system would assist the Committee to identify any delays in the EDR process and provide the necessary support for a smooth EDR process. Forty-five ICT officers were trained on the CMS and dispatched to various stations where election petitions were being heard.

However, the CMS did not function as anticipated. Firstly, the system was staffed by ICT officers who did not have a legal background. This made it difficult for them to productively run the process. Secondly, judicial officers were not trained on the use of the CMS, and therefore could not employ it to manage their cases. Thirdly, the ICT officers were not integrated into the EDR process; the administrative structure was such that the officers reported to the ICT head office in Nairobi, rather than the Committee. Furthermore, the Committee's access to the information was limited as it was channelled to the ICT department. The lesson learnt from these shortcomings is the need to integrate the ICT staff to support judicial staff in future use of the CMS. Nonetheless, the CMS is not a wasted investment as it can be harnessed for future EDR processes.

Following the failure of the CMS, the Committee developed an alternative reporting tool whereby Deputy Registrars and Executive Officers sent data on the status of cases to the Committee daily. The legal researchers attached to the electoral court stations also played a key role in providing prompt updates on case progress and by sharing through email (both to the Committee and among themselves), soft copies of delivered decisions in real time, upon approval by their respective Judges. The members of the Secretariat were assigned court stations to monitor the progress of cases and collect rulings and judgments. This information was then collated, a synopsis prepared and sent out to the media, through the Directorate of Public Affairs and Communication (DPAC), for dissemination to the public at the end of each week.[56] To promote consistency in decision-making, the Committee would also share the rulings and judgments with the judges, magistrates and legal researchers handling petitions through email. Moreover, the secretariat worked closely with the National Council for Law Reporting and legal researchers in the field to ensure the timely receipt and dissemination of

56 One of the summaries of election cases prepared by the Committee is available on, kenyalaw.org/kenyalawblog/synopsis-of-select-election-related-cases-20122013/, accessed 14 December 2015.

electoral decisions.[57] The timely dissemination of decisions to the public and the press limited the opportunity for misreporting.

2.3.2 Training

This being the first time that the electoral regime under the current Constitution was being tested through dispute resolution, it was important for the Select Bench (the judges and magistrates appointed to handle electoral disputes) to be well prepared for the arduous task.[58] This is regardless of their previous experience in past electoral cycles. The training would give judicial officers and staff an opportunity to familiarize themselves with the applicable laws, as well as orient them to the rigors of the electoral dispute resolution process.

The Kriegler Commission had expressed concern over the limited training undertaken by judicial officers during their tenure and the effect this had on effective dispute resolution:

> Many commonwealth countries, such as Kenya, adhere to the quaint fiction that judges are generalists who can grasp any matter, however esoteric, provided it is competently argued. In the case of electoral disputes, this attitude needs to be re-examined. The principles and practice have developed exponentially over the last two decades and a substantial body of international learning has been produced. All of this bears on dispute resolution and ideally requires specialized judicial attention. Because electoral disputes usually demand rapid resolution, and do not allow time for extensive legal research by the adjudicating tribunal, familiarity with electoral law and practice is therefore a highly desirable attribute of such a tribunal.[59]

In order to effectively discharge this mandate, the JWCEP, in conjunction with Judiciary Training Institute (a body within the Judiciary charged with professional development of judicial officers and staff) developed a training programme for judges, judicial officers and staff. The methodology adopted by JWCEP was to engage training consultants who developed a training

57 This is through the updates on the Kenya Law website (www.kenyalaw.org) and through the Kenya Law email alert system comprising several thousand subscribers.

58 The Judiciary Working Committee on Election Preparations, Post-Election Report (March-September 2013), p19 ("Post-election report"). The report is available on, http://www.judiciary.go.ke/portal/assets/files/JWCEP%20UPDATES/REPORT%20-Judiciary%20Working%20Committee%20on%20Election%20Preparations%20Post%20-Election%20Report%202013%20March%20-%20September.pdf, available at 9 January, 2016.

59 Above, n10, 141-142.

curriculum. In order to cover as many targets within minimal time and to increase the long-term training capacity of the Judiciary, a pool of 'experts', trainers of trainers (TOTs) were trained to disseminate the curriculum through training of all magistrates and legal researchers and select court staff. Using the TOTs methodology, 35 judges and magistrates were trained on the content as well as relevant dissemination techniques including training methodology, current practices in effective training, various training techniques such as role-play, brainstorming and group work as well as adult learning techniques.[60] These trainers were thereafter deployed to train magistrates and legal researchers on EDR. For efficacy and proper management of resources, the trainings were carried out in five regions around the country with the participants being trained in the regions closest to their stations.

To learn from practical experiences from countries with similar electoral legislation, the Committee invited judges from Uganda and consultants from the Philippines, whose experiences in EDR enriched the training and discussions with judicial officers. Uganda in particular was selected for benchmarking because their electoral legislation also required that electoral disputes be heard and determined within 6 months, both at the High Court[61] and at the Court of Appeal.[62] The perspectives of the Ugandan judges from both the High Court and the Court of Appeal provided guidance in case management, which was crucial to ensuring compliance with the constitutional timelines.

Training of the judicial officers and staff led to the uniform management of election petitions and hence increased the perception of fairness and impartiality by the Judiciary. The fact that the Judiciary was undertaking preparation through training of its staff, by itself, instilled public confidence in its capacity and ability to handle electoral disputes.

The trainings were crucial to not only enlighten judicial officers and staff on the new electoral regime, but also provided useful forums for sharing ideas on how the EDR process can be smoothly facilitated. Under the aegis of the DPAC, judicial officers were also trained on how to engage with the public and the media throughout the EDR process. This was considered necessary because the wider public, and not just the parties to the litigation, is often

60 The Judiciary Working Committee on Election Preparations Pre-Election Report 22.

61 Section 63(9) of the Parliamentary Elections Act, 2005(No 17 0f 2005).

62 As above, s 66(2).

interested in the outcome of an electoral dispute. Public engagement and media relations were therefore found to be worthy components of the training curriculum.

In acknowledging the fact that judicial officers could not effectively dispose of electoral disputes without effective administrative support, the Committee also trained Court of Appeal staff, Deputy Registrars and Executive Officers. Executive Officers and Deputy Registrars are particularly crucial to the EDR process because they are tasked with carrying out scrutiny, tallying and recount of votes and ballots, under the court's supervision, where the results of an election are impugned. They are therefore responsible for receiving ballot material, conducting scrutiny and recount and thereafter preparing a report that assists the court to reach a determination as to the validity of the election.

The training of Court of Appeal staff was necessary to ensure that the overall objective of timeous electoral dispute resolution would not be subject to bottlenecks in the appellate courts.

2.3.3 Monitoring and Evaluation of EDR Process

The third mandate of the Committee was important for various reasons. Firstly, previous experience had shown that there was no follow up on the progress of election petitions from the time they were filed to the time judgement was delivered. Secondly, the judges who handled election petitions had no forum to share experiences and request assistance to address any challenges faced when handling election petitions. This was of concern since very few judges had handled election matters either in practice or during their career on the bench.[63] Thirdly, due to the high stakes nature of elections, litigants often employ every delay tactic at their disposal to prevent the case from being heard to conclusion, or at least being heard expeditiously.[64] For this reason, some cases outlived the tenure of the office whose election was impugned.[65]

Fourthly, being a hotly contested and publicised affair, the security of judicial officers hearing petitions was also at stake. In 2013 for instance, there were five attacks on High Court judges and a threatening letter sent to the Chief Justice.

63 Above, n60, 29.

64 See for example *Ibrahim Ahmed v Simon Mbugua & 2 Others* Nairobi High Court Election Petition 41 of 2008 which was handled by 3 judges before it was finally concluded. Some of the reasons for the delay included threats made to the presiding judge and a request for recusal of another on grounds of lack of credibility.

65 See Alice Wahome v James Maina Kamau & 2 Others Election Petition 3 of 2008 relating to the 2007 elections in Kandara constituency which had not been concluded by the 2013 elections.

Though these were a cause for concern, the Chief Justice quickly allayed the public's fears of lack of independence during the EDR process and heightened security for judicial officers selected to hear election petitions.[66]

The above status of affairs called for constant support for judges and judicial officers during the EDR process. As part of delivering on this mandate, the Committee organised debrief sessions after the petitions, conducted an evaluation at the end of the process and kept in touch with members of the bench through its Secretariat to provide any support required during hearing of petitions.

2.3.4 Stakeholder Engagement

Stakeholder engagement is one of the three Key Result Areas (KRAs) under the first pillar of the JTF on people-focused delivery of justice.[67] Engagement with stakeholders and the wider public was, consequently, seen as a core component in the judicial transformation programme. The JTF recognized that for the Judiciary to achieve its ultimate objective of access to and expeditious delivery of justice to all, it could not successfully do so in splendid isolation. The other actors in the justice chain had to perform their corresponding and complementary roles, for the responsibility to maintain a just society was not the sole responsibility of the Judiciary.[68] Thus, even though the Judiciary comes in at the tail end of the EDR process, it cannot play its role effectively if other actors are not facilitated to play their role.[69] For example, if the IEBC and the Political Parties Disputes Tribunal are not strengthened, disputes that ought to be resolved at these fora spill over to the Judiciary, putting a strain on judicial resources and time and further affecting other judicial activities.

Stakeholder engagement was also symbiotic. There was, for instance, limited capacity for the Committee to exhaustively and efficiently carry out its terms of reference single-handedly without the support of stakeholders, given its limited financial and even time resources. It was therefore vital, for the Committee to seek out and tap into partners with the necessary resources

66 Press release by the Chief Justice, 20 February 2013 available on, reportingkenya.net/#article/2592, accessed 13 December 2015.

67 The other two KRAs under the first pillar are Access to and expeditious delivery of justice and People-Centeredness and Public Engagement (See JTF, above n32, 13-20).

68 See Key Result Area No. 3 of JTF, above n32.

69 The Judiciary Working Committee on Election Preparations, *Laying the Ground for Electoral Justice: Interim Report of the Judiciary Working Committee on Election Preparations* (Quarterly Report) (2012) 7.

to complement those of the Committee. The JWCEP thus placed a heavy premium on liaising and coordinating with stakeholders to ensure efficient, effective and timely resolution of election-related disputes. The Committee provided a platform for stakeholders to engage, in a 'less formal/tense' atmosphere, with the Judiciary. This was an improvement to the past where stakeholders "would only engage with the Judiciary through the Chief Justice's office, which sometimes was not responsive".[70]

JWCEP had to ensure the participation of the widest possible range of stakeholders to ensure buy-in on the outcomes of its work including laws, regulations and administrative arrangements. This was key to a successful process. Those consulted in the process included judicial officers and staff, the National Council on the Administration of Justice (NCAJ), the National Council for Law Reporting (NCLR), the IEBC, the Registrar of Political Parties, the Law Society of Kenya, the Director of Public Prosecutions, Office of the Attorney General, Kenya Law Reform Commission, various local and international civil society organizations, regional election observer groups and political parties.[71]

Moreover, in order to improve public understanding of the EDR process, the Committee deliberately engaged stakeholders in the process of preparing amendments to electoral law and the rules governing the conduct of election petitions. The Evaluation Report on JWCEP, observed that:

> Due to the wide consultations facilitated by JWCEP, most of the stakeholders interviewed observed that the amendments and the petitions rules were one of the key factors that led to the successful disposal of election petitions within the time set. The consultative process enabled the stakeholders understand the rules and apply them during the petitions.[72]

The modalities of stakeholder engagement initially appeared daunting, given that the Judiciary is required to always appear non-partisan. What length and how deep could the Committee acceptably go into the engagements without compromising on its perceived independence? The Committee, composed of purely judges and magistrates, was thus wary of its limitations in

70 Above, 28.

71 For a more extensive discussion of the role played by each stakeholder that the Committee worked closely with, see chapter 3 of the Judiciary Post-Election Report (n 58 above).

72 The two experts hired by the JWCEP to evaluate its work were Dr Monica Kerrets-Makau and Mr Tom Mogeni. See Evaluation report, n 51 above, 28.

its stakeholder and public engagement roles and grappled with the question of how to actively engage with stakeholders without losing the perception of non-partisanship, a *sine quo non* to public confidence building in the Judiciary. To resolve this quandary, the Committee actively engaged with various stakeholders, public bodies and independent commissions in the pre-election period. However, in the period immediately preceding the elections and after, the Committee gradually retreated from stakeholder engagement to preserve its independence as the election court began to take up its constitutional mandate.[73] Furthermore, the Judiciary was sensitive to existing mistrust between political parties. As such, it engaged with the public and stakeholders in forums open to all at which it emphasised its independence and preparedness to execute its electoral dispute resolution role. It was also expected that in the daily course of their respective business, the stakeholders would, by their own initiative infiltrate and push the Committee's agenda.

Through these engagements, JWCEP gained for the judicial institution the much needed and timely core values of transparency and responsiveness, which increased public confidence generally on the preparedness of the Judiciary to handle petitions.

In addition to their participation in validation of electoral rules, stakeholders were also an integral part of the training component of the Committee's mandate. Not only did various stakeholders provide financial support for various training sessions, but they provided resource persons and participated in the training sessions as well.[74]

Even before the training sessions were conducted, stakeholders were invited to and graciously participated in the preparation and validation of the training manuals and other material that was used at the training sessions. Participants also received publications on electoral law to serve as reference material during the EDR process.

As indicated previously, the CMS was also developed in collaboration with stakeholders. One of the development partners[75], donated modems and laptops to facilitate the data capture and transmission process.[76]

73 Judiciary Post-Election Report, n 58 above, 31.

74 Chapter 2 of the Post-Election Report elaborates on the training support given by each stakeholder to the JWCEP training programme.

75 The German Development Agency (GIZ).

76 Post-Election Report, above n 58, 20.

In general, the linkage between the Committee and the relevant stakeholders was a major factor that significantly contributed towards the implementation of the Committee's activities and successful achievement of its objectives.

2.3.5 Public Engagement

The fifth mandate of the Committee was to advise the Judiciary on the information that needed to be developed and disseminated to the public regarding the avenues open to it to pursue electoral disputes as well as the approaches that will be employed.

Public participation is one of the national values and principles recognised under Article 10 of the Constitution. The principle also accords with the sovereignty of the people enshrined in Article 1 of the Constitution and Article 159 makes it clear that judicial authority is derived from the people. Public participation is rendered illusory where the public lacks the requisite information to facilitate effective participation. Furthermore, public engagement is a core result area under the JTF transformation pillars. All this meant that the public remained an indispensable constituency in the Committee's work.

Engagement with the public was mainly done through the media and various public fora. In an unprecedented departure from the past, the Chief Justice, judges and magistrates appeared on televisions and radio shows across the country to assure the public of the preparedness of the Judiciary to handle election petitions in the run-up to the elections.

Moreover, having realized the importance of getting accurate information disseminated to the public timeously throughout the EDR process, the Committee hosted news editors to a breakfast meeting to raise public awareness on the preparation activities of the Committee in October 2012. This was intended to increase public confidence in the working of the Judiciary and its preparedness to diligently discharge its constitutional mandate in relation to electoral disputes. The forum also provided a platform to discuss responsible reporting during elections.

In November 2012, the Committee took part in a media roundtable conference hosted by ICJ-Kenya and Inter-News Agency to provide a platform to news agencies that run regional and vernacular radio stations to engage with

the Judiciary on its state of preparedness for the elections.[77] The media remained a very useful ally in public engagement, especially given the limited opportunities that judicial officers have to regularly engage with the public on their work. In addition to media houses being facilitated to cover proceedings in the courts during the hearing of the cases, JWCEP facilitated weekly updates to media houses, through the DPAC, on the number of cases filed according to the electoral seat that they related to, those dismissed or heard to completion and the number pending determination until the last dispute was resolved. These updates were also posted on the Judiciary's website.[78]

Since neither the Constitution nor the electoral rules limit *locus standi* for election petitions, the Committee sought to avail information on EDR to everyone in a language that was easily understood. The Committee therefore prepared and published, through the Office of the Chief Registrar, a fact sheet on frequently asked questions concerning electoral dispute resolution. The pamphlet simplified electoral law and the procedures for EDR to empower ordinary citizens to file claims or otherwise engage with the procedures as and when an electoral dispute arose. These questions were also published in two national newspapers just before the elections to ensure wide circulation.

Public confidence was increased following dissemination to the public of the information concerning various stages of the Judiciary's preparedness, as well as the proactive efforts made by the Judiciary to imprint a positive image, one different from that of the year 2007/2008. The fact that information from the Judiciary was made accessible to lawyers and litigants was sufficient evidence that Committee delivered on its mandate of advising the Judiciary on the information that needed to be developed and disseminated to the public.

3.0 Challenges and Lessons

The evaluation process provided the Committee with an opportunity to review its work and adopt areas for improvement of future EDR processes. Due to the crucial role played by the Committee, the Chief Justice established the Judiciary Committee on Elections (JCE) in August 2015, as successor to JWCEP to continue the important work of ensuring that the Judiciary is prepared to meet the challenges of delivering a robust, fair and efficient

77 Pre-Election report (above n 60) 44.

78 For samples of the synopses, see *The Judiciary State of the Judiciary and the Administration of Justice Annual Report* (2012-2013) 43-44.

electoral dispute resolution program in subsequent elections. This Section identifies some of the challenges the JCE will have to overcome in preparing the Judiciary for future EDR processes. It highlights the mechanisms put in place by the Committee, which are already sustainable, and proposes ways in which other loopholes identified can be sealed to ensure effective EDR.

First, the proposed amendments to the Elections Act, 2011, the Election Petition Rules and administrative arrangements put in place are long term in their nature and are sustainable over the long term. However, there is need to revise the laws and rules to address several of the challenges witnessed in 2013 and for which the Committee based on stakeholder inputs has already developed proposals. Some of the areas covered include that even though the 2011 Elections Act and Election Petition Rules provide for county election petitions, the Constitution does not expressly provide for county election petitions in the same manner as parliamentary and presidential election petitions.[79] Other issues that arose during this cycle that will require clarification by way of amendment of the Elections Act and the attendant rules are the issue of interlocutory appeals (whether a party could appeal piece-meal on a preliminary rulings) and the question of stay pending appeal where an election had been nullified and the dissatisfied party subsequently exercises the right of appeal. The election court suggested that it would be more helpful to concretize this issue in to law.[80]

Additionally, Section 96 of the Elections Act, which gives the Rules Committee the power to make rules of practice and procedure does not expressly bestow power to make rules regarding proceedings in the Magistrates' Courts. This ought to be addressed to avoid legal challenges as to the validity of the election petition rules in relation to petitions in the Magistrates' Courts.[81]

To finance the work of the Committee, JWCEP had budgeted for Kshs 600 million (or US$6 million), as illustrated by Annex I at the end of this chapter. However, the Committee was not fully funded because by the time it was established, the proposed budget could not be factored into the Judiciary budget. To bridge the deficit, the Committee had to rely on the financial

79 Arts 105 & 140.

80 In Ferdinand *Ndung'u Waititu v Independent Electoral & Boundaries Commission*, Court of Appeal Application No. 137 of 2013, the Court of Appeal ruled that: "Under rule 35 of the Elections Petition Rules, no appeal lies to this Court from an interlocutory order, ruling or direction by an Election Court".

81 E Ongoya,'The Legal Framework on Resolution of Election Disputes in Kenya' in *GM Musila (ed) Handbook on Election Disputes in Kenya* (2013) 96 147.

assistance of development partners and civil society organizations. However, even with the intervention of these stakeholders, use of the government financial management system hampered the speedy release of funds to the Committee, which hampered the Committee's planning and activities. In order to circumvent the delay in disbursement of funds to the Committee, permission was granted for the Committee to open a bank account for ease of transactions. This however did not solve the liquidity problem as no funds were released during the lifetime of the Committee.

The JCE will have to look into ways of directly accessing money for its activities in the future to avoid delays in achieving its mandate.

The challenges with the CMS have been addressed earlier in this paper. The need to invest in a case management system cannot be overemphasized. The coordination of such a programme needs to be supported by appropriate technology particularly where it is expected that the future elections will be more competitive hence give rise to more disputes.

The appellate jurisdiction in election petitions is also an area where work is still required. Article 105 of the Constitution, which grants the High Court jurisdiction to determine election petitions in respect of Members of Parliament does not provide for a right of appeal to the appellate court. The right of appeal was introduced by the amendments spearheaded by JWCEP at section 85A of the Elections Act, 2011. The Act did not provide for further appeals to the Supreme Court. It was thus not contemplated that there would be further appeals to the Supreme Court. However, in several cases,[82] the Supreme Court asserted jurisdiction to hear appeals from the Court of Appeal in election petitions. The assumption of jurisdiction by the Supreme Court in ordinary election petition caused uncertainty in the time taken to deal with election petitions, as the law does not provide a time limit within which such petitions must be disposed. The lack of express provision on the period for resolution of such appeals by the apex court effectively tends to defeat the essence and the mischief that sought to be cured by the framers of the Constitution in imposing specific timelines in EDR for the courts below.

At the time of conclusion of this Chapter, some election petitions were still

82 *Hon. Lemanken Aramat v Harun Meitamei Lempaka*, SC Petition No. 5 of 2014, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,* S.C. Petition No. 2B of 2014 [2014] eKLR and *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission and Two Others*, Sup. Ct. Petition No. 9 of 2014.

pending at the Supreme Court, less than two years to the 2017 General elections.

In relation to disputes arising out of the delimitation of electoral units under Article 89 of the Constitution, there is also need for administrative rules providing for timelines for appeals from the decision of the High Court under Article 89 (10). Article 89 envisages resolution of such disputes within three months; however, in the last electoral cycle, the decision of the Court of Appeal setting aside the decision of the High Court to rename two electoral areas[83] was delivered ten months after the decision of the High Court and after the conduct of the elections to which those electoral units related. This cannot have been the situation envisaged by the drafters of the Constitution.[84] It does not accord with the mandate of timely resolution of election-related disputes.

As discussed earlier in the paper, during the six-month period when petitions were being heard, it became apparent, particularly in the High Court that the resolution of other cases suffered because of concentration of resources towards the hearing and finalization of election petitions. In order to deal with this, the Judiciary took the step of introducing the concept of a Service Week, which saw judges assigned to deal with criminal cases. This however, was a stop-gap measure. In the future, planning must take into account the nature of the election cycle in order to allocate resources in good time to avoid diminishing access to justice in other areas during the time election petitions are being heard.

4.0 Conclusion

The Judiciary set out to transform the public's perception on its ability to be an impartial arbiter of electoral disputes. Having been unveiled less than a year to the elections, the Committee had the arduous task of preparing the Judiciary for an unprecedented EDR process, with limited technical expertise as well as limited administrative and financial support.

Despite the various challenges faced in achieving the mandate given to it under the five terms of reference, the work of the Committee has generally been

83 Ongoya, above n 81, 108.

84 R v IEBC ex parte *Eliot Lidubwi Kihusa & Others* JR Misc Application 94 of 2012.

reviewed favourably, both domestically and by election observer missions. In the words of the European Union Election Observation Mission, "the Kenyan Judiciary has made a strong and genuine effort to become a truly independent institution of justice".[85]

As the JCE takes over the mantle, it is important that preparatory activities begin early to ensure that mechanisms for effective and efficient dispute resolution are in place well in advance of the elections. This is especially so in relation to law reform, as it was noted in 2013 that the amendments did not allow sufficient time for the resolution of pre-election disputes.[86] It remains to be seen how the hurdles experienced in the 2013 elections will be overcome to ensure an effective dispute resolution mechanism for the 2017 elections.

Given what the Committee was able to achieve, with limited resources and time, it is clear that with proper planning and capacity building, the work of the Committee will be even more enduring and will set Kenya firmly on the rock of expeditious and effective EDR.

85 EU, Election Observation Mission to Kenya General Elections 2013, 8. Available at, http://www.eueom.eu/files/dmfile/eu-eom-pakistan-2013-final-report_en.pdf, at 2 February, 2016.

86 As above, 7.

ANNEX I

PROJECTED JUDICIARY WORKING COMMITTEE ON ELECTION PREPARATIONS BUDGET 2012-2014

Key Result	Total (Kshs)
Legal, regulatory and administrative arrangements	302,331,000
Training of judicial officers and staff	79,264,500
Public awareness and stakeholder engagement	42,919,200
Monitoring and evaluation/ case management	108,108,600
JWCEP Secretariat (Management and administration)	55,303,975
TOTAL	**587,927,275**

ANNEX II

OUTCOME OF ELECTION PETITIONS 2013

No.	POSITION	PETITIONS FILED	JUDGMENTS			PETITIONS WITHDRAWN	PETITIONS STRUCK OUT
			Total Judgments Delivered Per Seat	*Judgments Where Petitions Allowed*	*Judgments Where Petitions Dismissed*		
1.	Governor	24	22	3	19	0	2
2.	Senator	13	7	2	5	2	4
3.	Member of National Assembly	70	54	9	45	5	11
4.	Women Representative	9	3	0	3	1	5
5.	County Assembly Representative	67	51	9	42	7	8
6.	Speaker of County	5	2	1	1	2	1
	TOTAL	**188**	**139**	**24**	**115**	**17**	**31**
			139				

NOTES:

1. *'Judgments delivered' refers to judgments delivered on merits.*
2. *'Petitions struck out' refers to petitions struck out on technical grounds.*

II

A Critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya

Francis Ang'ila Aywa

Abstract

The presidency is still indisputably the zenith of political power, the highest constitutional office in the land and a highly prized political office in Kenya. As the first presidential election petition after the problematic 2007 General Election; the first to be determined by the Supreme Court; the second in the history of the country to be heard on its merits;[1] *and the first to be heard by a radically restructured Judiciary, the cause célèbre status of Raila Odinga v IEBC in Kenya's history is not hard to fathom. It was subsequently robustly criticized by a section of Kenya's legal fraternity*[2] *and other commentators.*[3] *It also was the source of some negative press*[4] *for the Judiciary for a while, including reduced confidence ratings in public opinion polls. However, a number of interrelated questions linger. First, does the legal reasoning in this case represent reliable*

1 *Mwau vs Moi* Election Petition No. 22 of 1993 (2008)1KLR(EP) was the first, and only one for a long time.

2 W. Maina. "Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test" The East African, http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html, at 8 February 2016; G. Kegoro 'Why the Low-Key Conclusion of a Very High Profile Election Dispute?' AfricanCultureDirect, http://africanculturedirect.blogspot.co.ke/2013/04/why-low-key-conclusion-of-very-high.html at 8 February 2016.

3 M. Wanyeki, 'Supreme Court Spoke out of Both Sides of its Mouth', The East African, (Nairobi) http://www.theeastafrican.co.ke/OpEd/comment/Supreme-Court-spoke-out-of-both-sides-of-its-mouth/-/434750/1753630/-/b55ivbz/-/index.html at 9 February 2016; N. Cheeseman, G. Lynch and J. Willis, 'Democracy and Its Discontents: Understanding Kenya's 2013 Elections' *Journal of Eastern African Studies*, 2014Vol. 8, No. 1, 2 –24,

4 'Jurists Fault Supreme Court Ruling on Presidential Petition' Standard Digital, http://www.standardmedia.co.ke/article/2000092900/jurists-fault-supreme-court-ruling-on-presidential-petition, at 8 February 2016.

jurisprudence on presidential election disputes? If so, what are its enduring elements? If not, what future judicial or legislative intervention is necessary to clarify or improve the legal standards for presidential election disputes? This Chapter analyses the application of the legal standards for presidential election disputes in Kenya by the Supreme Court, a new feature of the Judiciary established by the Constitution of Kenya, 2010 and the apex of the Country's electoral dispute resolution machinery. Its aim is to determine whether such application is fair and clear for future presidential elections. In doing so, it summarizes Kenya's experience with presidential election disputes and petitions; describes the rationale underlying the existing presidential election dispute resolution mechanism and the norms for genuine elections; analyses the legal reasoning in Raila Odinga v IEBC; and proposes more appropriate legal tests for future presidential elections in Kenya.

1. Introduction

Even though much else is usually at stake in Kenyan General Elections,[5] the presidential election is still the cherry on the cake. Even being Governor, for which there is some growing recognition in terms of political significance and prestige, would at best come second or third. This is largely the case for the period after the resumption of plural party politics in 1991, since the period between 1969 and 1991 was marked by the suppression of political competition at this level, through legislative and other means.[6] As a result, with the exception of the immediate post-independence period, and the 2002 presidential election, presidential election disputes have followed all General Elections in multiparty Kenya.[7]

Between 1963 and 1991, both Jomo Kenyatta and Daniel arap Moi were Presidents at a time of relatively non-competitive politics in Kenya. Jomo Kenyatta became President with the creation of the Republic in 1964 after

5 Before 2010, any General Election consisted of presidential, parliamentary and civic elections. Following the Constitution of Kenya, 2010, Kenyan General Elections will now consist of presidential, parliamentary, gubernatorial and county assembly elections.

6 Although the Kenya People's Union (KPU) was a notable opposition in the brief period between 1966 and 1969, it was proscribed in 1969 leading to a long period of de facto one party rule. The Constitution was amended in 1982 to make Kenya a *de jure* one party state, resulting in the outlawing of plural politics up to their resumption (through another constitutional amendment) in 1991. In the single party era, whether de facto or de jure, opposition to the incumbent's candidature was anathema and there were therefore no presidential contests as such.

7 Election petitions were filed to challenge the 1992, 1997, and 2013 presidential elections. Uhuru Kenyatta (KANU) conceded defeat in 2002, while the 2007 presidential contest resulted in violent protests based on Raila Odinga (ODM) declared lack of confidence in the Judiciary at the time as his reason for not pursuing a judicial settlement of the dispute.

serving as Prime Minister from 1963. He died in office in 1978, after going through the 1969 and 1974 elections unopposed. Moi succeeded him in 1978 and went through the 1979, 1983 and 1988 elections unopposed. The resumption of plural politics and constitutional imposition of term limits in 1991 meant that, thereafter, he could only contest the 1992 and 1997 presidential elections. He won both, in part due to a disorganized opposition,[8] but also due to diverse acts of electoral malpractice.[9] Predictably, each of these presidential elections was disputed in court, and thus began Kenya's experience with presidential election petitions.[10] Notably, however, *Raila Odinga v IEBC* (hereafter Raila Odinga case) was the second presidential election petition in the country's history to be heard on its merits. Before it, there was only *Mwau vs Moi*[11], the rest having been dismissed on technicalities, chiefly the strict requirement in those days for personal service of the court papers – which was nigh impossible, because of the virtually impenetrable security around Moi!

The relative primacy of the Kenyan presidential electoral contest is also explained by one other vestige of Kenya's governance history and political economy: the President traditionally wielded immense powers, particularly between 1963 and 2010. In Kenya's ethnicized politics, the presidency was at the apex of the patron-client nature of state relations that included the power to influence the allocation of resources and other state largesse to supportive political constituencies.[12] It is likely that the Constitution of Kenya 2010, despite its diffusion of power to other organs of state, checks and balances [13] has done little to change the perception of patronage in this high office.

8 C. Odhiambo-Mbai, 'The Rise and fall of the Autocratic State in Kenya' in Walter Oyugi, et al (Eds) The *Politics of Transition in Kenya: From KANU to NARC* (2003) 51, 79.

9 International Republican Institute Kenya*: The December 29, 1992 General Elections*, (1993) 8-57; Institute for Education in Democracy, Catholic Justice & Peace Commission and National Council of Churches of Kenya Report On the 1997 *General Elections in Kenya: 29-30 December* (1998) 27-125.

10 *Imanyara v Moi & 12 Others* Election Petition No. 4 of 1993 (2008)1KLR(EP), 472-482; Orengo v Moi & 12 Others Election Petition No. 8 of 1993 (2008)1KLR(EP), 715-735; Mwau v Moi Election Petition No. 22 of 1993 (2008)1KLR(EP), 691-699; *Matiba v Moi & 2 Others (2008)* 1KLR(EP), 525;

11 Election Petition No. 22 of 1993 (2008) 1KLR (EP), 691-699.

12 See, K. Kanyinga, "Hobbling along to Pay-offs: The Kenya Grand Coalition Government" (paper presented at the workshop on Political Inclusion in Africa, American University, Washington DC, 24-25 April 2009) 10-15; S. Lando, *Class Formation and Inequality in Kenya.* (2009)1-2; P. Asingo, "The Political Economy of Transition in Kenya" in W. Oyugi, et al *The Politics of Transition in Kenya: From KANU to NARC (2003)15-50; and J. Klopp Electoral Despotism in Kenya: Land, Patronage and Resistance in the Multi-party Context* (2001 Ph.D. Thesis), 33-38.

13 At least in law, the presidency post-2010 is not what it used to be: the President's significant appointments are subject to parliamentary vetting; 47 governors now exercise executive authority and control significant resources in the counties; the courts have power to reverse (and have since severally reversed) the decisions of the President.

Against this backdrop, the March 2013 General Election was an opportunity to do things differently and take Kenya on a decidedly democratic trajectory.[14] Not only was it an opportunity to demonstrate improved capacity to run elections in the post-2007 era, it was the first under the, 2010 Constitution. As with many of the presidential elections in previous periods, the contestants shaped the electoral politics and campaign themes. The reverse was equally true: the electoral politics and campaign themes had also shaped the contestants. For instance, while the economy and reforms[15] were germane to the campaigns, the charges then pending against candidate Uhuru Kenyatta and his running mate William Ruto at the International Criminal Court (ICC) at The Hague came to play a large part in their successful mobilization of political support.[16] Such was the backdrop against which the 2103 General Election (including the presidential election) was held. In the end, the Independent Electoral and Boundaries Commission (IEBC) pronounced the results of the presidential election, and declared Hon. Kenyatta elected as President (Table 1). The ensuing dispute, and the Supreme Court's decision on it, is the focus of this chapter.

Table 1: 2013 Presidential Election Results

Candidate	Party	Total Votes	% of Votes Cast	% of Valid Votes
Uhuru Kenyatta	The National Alliance	6,173,433	50.07%	50.51%
Raila Odinga	Orange Democratic Movement	5,340,546	43.31%	43.70%
Musalia Mudavadi	United Democratic Forum	483,981	3.93%	3.96%
Peter Kenneth	Kenya National Congress	72,786	0.59%	0.60%
Mohammed Abduba Dida	Alliance for Real Change	52,848	0.43%	0.43%
Martha Karua	National Rainbow Coalition-Kenya	43,881	0.36%	0.36%

14 International Crisis Group, *Kenya's 2013 Elections.* Africa Report No. 197 17 January 2013 (Nairobi/Brussels, 7 January 2013) 1-28.

15 The manifesto of Raila Odinga's Coalition for Reforms & Democracy (CORD) had a ten-point programme focusing on jobs; food security; security; people-led government; poverty and cost of living; social equality; infrastructure and land; quality education; healthcare; and one indivisible nation. CORD, Manifesto 2013: Unleashing Kenya's Potential (2013). Uhuru Kenyatta's Jubilee Alliance manifesto had three pillars of unity; economy; and openness – as well as 7 pledges (transformational leadership; a safe Kenya; empowering our youth; a food secure Kenya; social justice; a healthy Kenya; and water and electricity for all). The National Alliance et al *Transforming Kenya: Securing Kenya's Prosperity 2013-2017* (2013).

16 International Crisis Group, *Kenya After the Elections.* Africa Briefing No. 94 (Nairobi/Brussels, 15 May 2013) 8-9.

Candidate	Party	Total Votes	% of Votes Cast	% of Valid Votes
James ole Kiyiapi	Restore and Build Kenya	40,998	0.33%	0.34%
Paul Muite	Safina Party	12,580	0.10%	0.10%
Votes Cast			12,330,028	100.00%
Valid votes			12,221,053	99.12%
Rejected votes			108,975	0.88%

Looking at the table above, the final tally of votes shows Hon. Kenyatta winning with over 50 per cent of the votes cast. From the IEBC data, he also garnered over 25 per cent of the votes cast in more than half of the 47 counties. The final share of rejected votes, which occasioned one of the petitions filed against the result, are much too low to upset things but were significantly high at the commencement of the tallying exercise. Notably, though, they are fourth in proportion to the rest of candidates and would have influenced the threshold for election as President in a much closer election.

Subsequently, three petitions were filed in the Supreme Court of Kenya against the result of the election. The first petition, brought by Moses Kuria, Dennis Itumbi and Florence Sergon, sought to determine what constituted a rejected vote, and whether rejected votes should have been counted when determining the total number of votes cast.[17] The second, filed by Gladwell Otieno and Zahid Rajan, sought to invalidate the results of the election based on the fact that there were numerous irregularities in voter registration, electronic voter identification and tallying.[18] The third petition, brought by Hon. Odinga, sought to invalidate the results of the Presidential election, alleging massive electoral fraud and malpractices.[19]

On 30th March 2013, the Supreme Court unanimously decided that Hon. Kenyatta was validly elected and that the presidential election was conducted in compliance with the Constitution.[20] The Judges promised to release a

17 Petition No. 3 of 2013 (filed on 14th March, 2013). All the petitioners were identified as second Petitioner in the consolidated petition.

18 Petition No. 4 of 2013 (filed on 16th March, 2013). Both petitioners were identified as the third Petitioner in the consolidated petition.

19 Petition No. 5 of 2013 (filed on 16th March, 2013). The petitioner was identified as the 1st Petitioner in the consolidated petition.

20 "Uhuru's poll win upheld as Raila accepts Supreme Court ruling" *Business Daily*. Available at http://www.businessdailyafrica.com/Uhuru-poll-win-upheld-as-Raila-accepts-Supreme-Court-ruling/-/539546/1734908/-/8q7vacz/-/index.html.

detailed judgment in two weeks. This, in itself, generated some disquiet,[21] even though it was understandable given the strict timelines for determining the case, and the fact that the Supreme Court was having its first experience with this kind of case. The detailed judgment, with reasons, was eventually delivered on 16th April 2013. This judgment has been the criticized[22] and praised in almost equal measure, and thereby acquired a cause *célèbre* status in Kenyan case law. One critic, Wachira Maina, had this to say about the decision:

> First, there is the Court's reliance on extremely backward Nigerian authorities urged on it by the Attorney General, Prof Githu Muigai, acting as *amicus curiae*. Second, there is its tolerant and uncritical acceptance of the IEBC's explanations about the ever-fluid totals in multiple voters' registers and what this means in practice. Third, there is the question of tallying and especially, what the Court's own tallies show but is not properly reflected in the judgment. Fourth, there is the Court's use of subsidiary legislation to limit the meaning of "votes cast," an unambiguous phrase in the Constitution. Finally, there is evidential foreclosure that the Court imposes on itself by taking judicial notice of technology failures instead of treating IEBC as spurious, as urged by petitioners.[23]

Against this backdrop, this Chapter critically assesses this decision and the Court's reasoning on the crucial issues for determination. In this critique, it is concerned with the quality of the legal standards for presidential elections in Kenya by the Supreme Court. The aim of the Chapter is to determine whether such application is fair and clear for future presidential elections. In doing so, it summarizes Kenya's experience with presidential election disputes and petitions; describes the rationale underlying the existing presidential election dispute resolution mechanism and the norms for genuine elections; analyses the legal reasoning in *Raila Odinga* case; and proposes more appropriate legal tests for future presidential elections in Kenya. This is done in three inter-connected steps in the sections below. First, it sets out the issues that were to be determined in the case. Following this, it re-visits the legal principles and standards for genuine presidential elections. Thirdly, it analyzes the Court's

21 G. Kegoro 'Why the Low-Key Conclusion of a Very High Profile Election Dispute?' *AfricanCultureDirect*, http://africanculturedirect.blogspot.co.ke/2013/04/why-low-key-conclusion-of-very-high.html, at 8 February 2016.

22 See, for example, W. Maina. "Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test" *The East African,* http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html, at 8 February 2016; G. Kegoro 'Why the Low-Key Conclusion of a Very High Profile Election Dispute?' *AfricanCultureDirect,* http://africanculturedirect.blogspot.co.ke/2013/04/why-low-key-conclusion-of-very-high.html, at 8 February 2016.

23 W. Maina, above.

reasoning on key issues in the petitions vis-à-vis the principles and standards. Ultimately, it makes conclusions based on the foregoing and recommends remedial measures.

2. The Issues and Court's Judgment in the *Raila Odinga Case*

The case now known as *Raila Odinga* case, in fact, the result of consolidating the three election petitions brought to the Supreme Court by various parties against more or less the same respondents. In the consolidated petition, IEBC, Ahmed Issack Hassan, Uhuru Kenyatta, and William Ruto were the First, Second, Third and Fourth Respondents respectively.

The gravamen of the petition by Mr. Kuria, Mr. Itumbi and Ms. Sergon was that the IEBC Chairman's decision to include rejected votes in the final tally had a prejudicial effect on the percentage votes won by Hon. Kenyatta. They claimed that Mr. Hassan's actions were in contravention of Articles 136(a)[24] and 138(3) (c)[25] of the Constitution, and Rule 77(1)[26] of the Elections (General) Regulations, 2012.

Ms. Otieno and Mr. Rajan argued that the presidential election was not conducted substantially in accordance with the Constitution, or the Elections Act and the governing Regulations. In particular, six averments were made. The first was that the IEBC failed to establish and maintain an accurate voter register that was publicly available, verifiable and credible as required by Articles 38(3),[27] 81(d),[28] 83(2),[29] 86 and 88(4)[30] of the Constitution, Sections

24 Erroneously cited in the judgment. The correction by the Court on 30 April 2013 cited 136(a), which is still erroneous.

25 "after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result."

26 77. (1) At the counting of votes at an election, any ballot paper— (a) which does not bear the security features determined by the Commission; (b) on which votes are marked, or appears to be marked against the names of, more than one candidate; (c) on which anything is written or so marked as to be uncertain for whom the vote has been cast; (d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or (e) is unmarked, shall, subject to sub regulation (2), be void and shall not be counted.

27 (3) Every adult citizen has the right, without unreasonable restrictions— (a) to be registered as a voter; (b) to vote by secret ballot in any election or referendum; and (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

28 (d) universal suffrage based on the aspiration for fair representation and equality of vote

29 (2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

30 (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for— (a) the continuous registration of citizens as voters; (b) the regular revision of the voters' roll; et seq.

3,[31] 4,[32] 5,[33] 6,[34] 7[35] and 8[36] of the Elections Act, 2011 and the Elections (Registration of Voters) Regulations, 2012. Secondly, they averred that the true number of registered voters was unknown and, therefore, the IEBC did not have an accurate voters' register, since it and Mr. Hassan repeatedly changed the official number of registered voters. The third averment was to the effect that the absence of a credible Principal Voter Register vitiated the validity of the Presidential elections.

Fourthly, they also argued that the electoral management system adopted by the IEBC was complex and had many shortfalls, contrary to the constitutional requirement that it be a simple, accurate, verifiable, secure, accountable and transparent system;[37] failed to meet the mandatory legal requirement to electronically transmit election results;[38] and that the failure of the electronic system put in place by the IEBC and their failure to electronically transmit election results affected the validity of the presidential elections. The fifth was that IEBC and its Chairman did not discharge their obligation under the Constitution, because the tallying and verification of the results did not happen at the polling stations, there was no electronic transmission of provisional results, and party agents were excluded from the National Tallying Centre. Finally, Otieno and Rajan argued that IEBC violated the Constitution and the Public Procurement and Disposal Act,[39] by awarding the tender to

31 3. (1) An adult citizen shall exercise the right to vote specified in Article 38 (3) of the Constitution in accordance with this Act.

32 4. (1) There shall be a register to be known as the Principal Register of Voters which shall comprise of— (a) a poll register in respect of every polling station; (b) a ward register in respect of every ward; (c) a constituency register in respect of every constituency; (d) a county register in respect of every county; and (e) a register of voters residing outside Kenya. (2) The Commission shall compile and maintain the Principal Register of Voters referred to in subsection (1). (3) The Principal Register of Voters shall contain such information as shall be prescribed by the Commission.

33 5. (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except— (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election;… (b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or (c) in any other case, between the date of the declaration of the vacancy of the seat concerned and the date of such election.

34 6. (1) The Commission shall cause the Principal Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate…

35 7. (1) Where a voter wishes to transfer the voter's registration to an electoral area other than the one the voter is registered in, the voter shall notify the Commission, in the prescribed manner, of the intention to transfer the registration to the preferred electoral area not less than ninety days preceding an election. (2) Upon receipt of the notification referred to in subsection (1), the Commission shall transfer the voter's registration particulars to the register of the preferred constituency not later than sixty days preceding the election.

36 8. (1) The Commission shall maintain an updated Principal Register of Voters…

37 Constitution of Kenya, 2010 article 81.

38 Elections Act, No. 24 of 2011, section 82.

39 Cap. 412C, Laws of Kenya.

purchase the electronic devices used in the election to an unqualified bidder who then supplied devices that did not work properly, or simply failed, on election day.

The primary basis of the petition by Hon. Odinga was that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful. In support of this, he made three averments. The first was that the IEBC and its Chairman did not carry out a valid voter registration, as required by Article 83 of the Constitution, and Section 3(2) of the Elections Act, 2011 because their official tally of registered voters changed several times, which in turn resulted in the final total number of registered voters differing materially from what was in the Principal Register. Secondly, he argued that the IEBC failed to carry out a transparent, verifiable, accurate and accountable election as required by Articles 81, 83 and 88 of the Constitution, because there were several anomalies that occurred in the process of manual tallying, such as the votes cast in several polling stations exceeding the number of registered voters; differences between results posted and the results released by IEBC; and the use of unsigned Form 36s to declare the results. Lastly, he claimed that the electronic systems acquired and adopted by IEBC to facilitate the General Election were poorly designed and implemented, and destined to fail. Due to such failure, IEBC was unable to transmit the results of the elections, in contravention of Regulation 82[40] of the Elections (General) Regulations, 2012.

In the pre-trial proceedings, four issues were agreed for trial.[41] The first was whether the third and fourth Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the presidential election held on March 4, 2013 (the crux of the case). Secondly, the Court was to determine whether the presidential election held on March 4, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law. The third issue for determination was whether the rejected votes ought to have been included in determining the final tally of votes in favor of each of the

40 82. (1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

(2) The results submitted under sub regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73.

41 *Raila Odinga & 5 Others v IEBC & 3 Others* Election Petition No. 5 of 2013 (Supreme Court of Kenya), 6.

presidential election candidates by the second Respondent. Finally, the Court was to grant such consequential declarations, orders and reliefs the Court, based on the determination of the petition (consequential on the preceding three issues).

Following is a précis of the Court's findings on the three core issues in the case. Regarding the issue whether Hon. Kenyatta and Hon. Ruto were validly elected and declared as President-elect and Deputy President-elect respectively in the presidential election held on 4 March 2013, the Court found in the affirmative. The reasoning of the Court, as discerned from the judgment, was based on several reasons and factors. The first was its overall approach to the petition in which it interpreted its role as a limited one. Put differently, the Court saw the presidential election as a political process, which should not be seen to usurp the role of the electorate. Further, the Court held that the voter registration process was, overall, transparent, accurate, and verifiable; and the voter register compiled from this process did serve to facilitate the conduct of free, fair and transparent elections.

On the question of whether the presidential election was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law, the Court held that this was largely the case.[42] In addition to the other findings in the first question, the Court held that technology (which had admittedly failed in various instances) had nevertheless not been intended to replace the traditional manual process.[43]

On the question of whether rejected votes could be included in determining the final tally of votes in favor of each of the presidential election candidates, the Court held that they could not.[44] This was based on the Court's reading of the Constitution from a purposive approach that found no merit in including "void ballots", which did not confer a benefit on any candidate, in the final determination of the electoral threshold for the presidential election.

In view of the foregoing, the Court consequently disallowed the petition and upheld the Presidential- election results as declared by the IEBC on 9 March 2013. In its orders, it dismissed Petitions Nos. 4 and 5 for lack of merit and

42 *Raila Odinga & 5 Others v IEBC & 3 Others* Election Petition No. 5 of 2013 (Supreme Court of Kenya), 55.

43 Above, 43-44.

44 Above, 47-51.

declined Petition No. 3 for want of jurisdiction to recalculate figures after the invalidation of rejected votes. What principles and standards should have guided the Court in reaching its decision?

3. The Legal Principles and Standards for Genuine Presidential Elections in Kenya

It is important, in critiquing the findings of any court, to first examine the law(s) it was applying. However, such examination needs to take into account both legal principles and legal standards established by the law(s). It is important to define these up-front because both words tend to be used interchangeably even though they mean different things.

With regard to any process, principles can be defined as the "criteria for an acceptable process".[45] Standards, on the other hand, are concerned with the "minimum acceptable level of a desirable outcome".[46] Turning to the subject of elections, legal principles lay down the criteria for what can be referred to as a "free and fair" or "genuine" election. Standards in turn enable us to determine the minimum acceptable level of desirable outcomes in the process. Stated conversely, standards help us determine just how much "imperfection" an electoral process should tolerate in order to "substantially" comply with the law.

On the subject of proof, for example, which will come later, the burden of proof is a legal principle that helps lawyers to appropriately ascribe responsibility for proving facts in a legal dispute. The standard of proof, on the other hand, refers to the weight of evidence necessary for a court to determine that the issue asserted has been proved.

What are the legal principles and standards governing elections in Kenya? Given the hierarchy of laws in our legal system, the correct starting point to answer this question is the Constitution of Kenya. It not only establishes elective offices, including the office of President, but also lays down legal principles that govern elections. Article 2 of the Constitution states that it is "the supreme law of the Republic and binds all persons and all State organs at both levels of government". Any law that is inconsistent with the

45 United Nations County Team, *Toolkit: A Human Rights Based Approach, hrbaportal.org/wp-content/files/1265751171vnhrbafinaltoolkit.doc, at December 10, 2015.*

46 In this sense, they are analogous to benchmarks. Cf. UNCT (2009) above, 11.

Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.[47] State authority is to be exercised only as authorized under the Constitution.[48] Perhaps in response to the politics surrounding its development and eventual promulgation, the Constitution also declares that its validity or legality is not subject to challenge by or before any court or other State organ. By dint of the Constitution, however, the general rules of international law as well as treaty or convention ratified by Kenya shall form part of the law of Kenya. This last provision means that the legal principles of elections in Kenya are to be understood against the backdrop of its international legal obligations, to which we now turn.

In international law, the basic legal instruments governing elections are the 1948 Universal Declaration of Human Rights (UDHR)[49], the 1966 International Covenant on Civil and Political Rights (ICCPR)[50], the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[51], and the 1952 Convention on the Political Rights of Women.[52] In the African context, the 1981 African Charter on Human and Peoples' Rights (ACHPR), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the 2007 African Charter on Democracy, Elections

47 Constitution of Kenya, 2010 article 2(4).

48 Above, article 2(2).

49 Articles 20 provides: 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association; while article 21 provides: 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

50 Articles 19 states as follows: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. Article 21 provides recognition for the right to peaceful assembly, while article 22 is on the right to freedom of association with others. Finally, article 25 is concerned with the right to take part in the conduct of public affairs, directly or through freely chosen representatives.

51 Article 7 is concerned with eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

52 Articles 1provides that women shall be entitled to vote in all elections on equal terms with men, without any discrimination. Article 2 is to the effect that Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination. Finally, article 3 states: Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

and Governance (ACDEG) are also notable.[53] All of these international and regional instruments contain principles as well as treaty standards for genuine elections.

Article 25 of the ICCPR, in particular, is now widely recognized as laying down the following critical elements for periodic and genuine elections (also referred to as the global norm of participation):[54] (a) *Periodic*, meaning there must be a defined time frame within which elections are held; (b) *Genuine*, in the sense that the political rights of freedom of association, freedom of assembly and freedom of speech are respected and promoted; (c) The *right to stand* (or run) for elections (and the opportunity to do so) is guaranteed; (d) *Universal suffrage*, meaning every citizen without discrimination has a right to participate; (e) Voting in elections on the basis of the *right to vote*, which entails the rights of access to the polling station, to receive ballot materials, to mark the ballot paper in a polling booth, and to deposit the ballot paper in the ballot box; (f) *Equal suffrage*, or "one person, one vote" (each vote carrying, more or less the same weight); (g) Secret vote, in an environment in which a voter can make her or his own choice, without undue influence or intimidation from any other person; and (h) *Free expression of the will of the voters*, which implies the lack of coercion, intimidation and fraud.[55]

Flowing from these international obligations, Article 81 of the Constitution specifically provides some general principles in regard to the conduct of elections in Kenya. Briefly, they revolve around the following legal requirements: freedom of citizens to exercise their political rights, which relates to the genuineness principle; (b) gender balance (not more than two-thirds of either gender), which reinforces the right to stand; (c) fair representation of persons with disabilities, which reinforces the right to stand; (d) universal suffrage (fair representation and equality of vote), which buttresses the right to vote and equal suffrage; and (e) free and fair elections (based on secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparently conducted; and administered in an impartial, neutral, efficient, accurate and accountable manner), which supports the secret vote and free expression of the will of

53 Articles 17-26 require the strengthening of electoral institutions, guarantee access to AU observer missions, and outlaw unconstitutional changes of government (e.g. coups d'état).

54 With elements (d) and (e) in focus.

55 Network for Enhanced Electoral and Democratic Support / European Commission *Compendium of International Standards for Elections*, (2007), 7-13.

56 (d) and (e) being the significant requirements at issue in the case.

voters requirement.[56]

Article 86 of the Constitution lays down additional principles to safeguard free and fair elections. It requires IEBC to ensure that (i) the system of voting is simple, accurate, verifiable, secure, accountable and transparent; (ii) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (iii) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (iv) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials. The Constitution also structures the electoral system to the peculiarities of Kenya. With regard to the presidential contest, article 138 requires the winner to garner more than half of the votes cast in the election overall, and at least 25 per cent of the votes cast in each of more than half of the counties.

Articles 1 (sovereignty of the people), 2 (supremacy of the Constitution), 10 (national values and principles), 27 (equality and freedom from discrimination), 35 (access to information), 36 (freedom of association), 38 (political rights), 47 (fair administrative action), 54 (persons with disabilities), 73 (responsibilities of leadership), 81 (general principles of the electoral system), 82 (legislation on elections), (83 (registration as a voter), 86 (voting), 88 (IEBC), 136 (election of the President), 138 (procedure at presidential election), 140 (questions as to validity of the presidential election), 159 (judicial authority), 163 (Supreme Court), 259 (construing the Constitution), and 260 (interpretation)were relied on in the case.

The provisions of Kenya's other written laws, such as the Elections Act, the Independent Electoral and Boundaries Commission Act, 2011[57] and regulations made thereunder, elucidate supportive principles and set standards for electoral administration. Its provisions with regard to the right to vote; the registration of voters; procedure for presidential elections; and election petitions are similarly germane to this Chapter.[58]

Overall, the principles most at issue (and the related standards) in this case

57 Act No. 9 of 2011.

58 Sections 3, 4, 5, 6, 7 and 8 of the Elections Act, 2011; sections. 4 and 25 of the IEBC Act, 2011; sections. 31 of the Supreme Court Act, 2011; regulation 12(3) and 13 of the Elections (Registration of Voters) Regulations, 2012; regulations 59, 60, 61, 62, 74, 79 and 82 of the Elections (General) Regulations, 2012; and rules 7, 9 and 10 of the Supreme Court (Presidential Election Petition) Rules, 2013 were of particular importance in this case.

59 This encompasses the concerns around the validity of the Principal Register of Voters, given the varying statistics, and the IEBC's reliance on the Green Book on the pretext that it was intended to secure the right to vote.

were the right to vote[59]; and the free expression of the will of the voters (or free and fair elections, from the standpoint of the Constitution).[60] Ultimately, from the viewpoint of the principles and standards, the two questions at the core of the case can then be re-phrased as follows: (a) Did the IEBC administer the 2013 presidential election in Kenya on the basis of a credible voters' register? and (b) did the IEBC count and tally the results of the presidential election in an accurate an accountable manner?

In order to answer these two questions, we turn to the principles and standards for voter registration and results management. As the Constitution of Kenya, 2010; the Elections Act, 2011; and the Independent Electoral and Boundaries Commission Act, 2011 incorporate both the principles and standards, examining IEBC's performance (and the Court's findings on it) against Kenyan law is at the core of the determination if IEBC complied with the standards and principles.

At the core of petitions by both the Hon. Odinga was the assertion that IEBC did not conduct the presidential election in accordance with the law and that the register on the basis on which it ran the election was not credible. Voter registration is very complex and one of the most expensive activities within the framework of elections. The international standard for voter registration is that the register must be *comprehensive, inclusive, accurate and up to date, and the process must be fully transparent*.[61] The ultimate responsibility for the accuracy of the voters' register reposes with the election management body, in this case IEBC. As it establishes the eligibility of individuals to vote, its quality ultimately determines the right to vote. Its accuracy and transparency are vital to the prevention of fraud in elections.

All three Petitioners questioned the fairness of the count, albeit on different grounds. A fair, honest and transparent vote count is the cornerstone of democratic elections.[62] This requires that votes be counted, tabulated and consolidated in the presence of the representatives of parties and candidates

60 This encompasses the errors (either of omission or commission) regarding the vote tallies; the status of rejected votes; and the results transmission system.

61 International Institute for Democracy & Electoral Assistance *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections*, (2002) 45.

62 Above, 77. According to the UN Human Rights Committee "[t]here should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes". Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

and election observers, and that the entire process by which a winner is determined be devoid of fraud and be fully and completely open to public scrutiny.[63] To establish and maintain public confidence in the electoral process, vote counting systems and procedures should incorporate the fundamental principles of vote counting in a democratic election (transparency, security, professionalism, accuracy, secrecy, timeliness, accountability, and equity).[64] Ms. Otieno and Mr. Rajan, as well as Mr. Odinga, questioned the fairness overall. Mr. Kuria, Mr. Itumbi and Ms. Sergon questioned its accuracy, given the inclusion of rejected votes. In the next section, this Chapter critically analyzes the decision of the Supreme Court, based on the foregoing principles and standards.

4. A Critical Analysis of the Raila Odinga v IEBC Decision

Election processes, like many other processes in life, are not expected to be perfect. The idea of a legal threshold for determining whether a presidential election (or any election for that matter) should be upheld therefore flows from a basic fact of life, regarding the difficulty of achieving perfection, which also applies to elections. However, it is important to determine a minimum standard of performance below which, with sufficient evidence, the courts should invalidate an election. This determination involves two levels of analysis. The first, based on the two key questions in the preceding section, involves reviewing the actions of IEBC against the principles and standards to establish the facts of the conduct complained of by the Petitioners. The second, more nuanced, involves making a decision based on what the facts revealed. Put differently, two questions need to be answered. The first is whether the facts prove or support the assertion that IEBC fell short of its obligations. The second is whether the misconduct by IEBC was on a scale or level that should result in the annulment of the election. In critically analyzing *Raila Odinga* case, we look at the Court's reasoning to answer these two questions. Note must be taken, however, of the fact that the Court disallowed Mr. Odinga's

63 International Institute for Democracy & Electoral Assistance, op cit, 77.

64 P. Green, 'The Politics of the Future: The Internet and Democracy in Australia' (Paper presented to the Australian Political Science Association's Politics of the Future seminar at the Australian National University on 5 October 2000), 2; H. Catt et al, Electoral Management Design (2014), 285-312.

65 *Raila Odinga & 5 Others v IEBC and 3 Others* Petition No. 5 of 2013 (Supreme Court of Kenya), 78.

further affidavit early in the course of hearing the petition[65] and rejected evidence provided by his counsel in the submissions of the Petitioners rather than in the primary petition records.[66]

With regard to the first question, the Court dealt with a number of broad themes that can be teased out. The first was a general look at the pre-election processes and overall preparation for the election. The Court established that the processes were generally without incident, save for the challenges in the biometric voter registration (BVR). With respect to the BVR challenges, it held that the challenges witnessed were nevertheless ameliorated by the use of the Green Book. It also considered the challenges with the electronic voter identification devices (EVIDs) as not going to the root of the election since facilitation of the electoral process was not meant to be exclusively aided by technology. The Court's reasoning on the EVIDs is reliable jurisprudence, in our opinion, given the fact that there are multiple other guarantees for ensuring voters do not vote more than once.[67] Its jurisprudence on the key output of the registration process, the Principal Voters Register, is not quite so, in our view, for the reasons we go into below.

The Court's approach to the voter registration question began on a positive note but did not clarify IEBC's legal obligations as far as this process is concerned. The Court observed as follows:

> This Court will not, as already stated, make such orders or grant such reliefs as would have the effect of precipitating conflicts between its jurisdiction and that of other Courts. However, as regards elections that run on common voter rolls and common management settings, the Court may inquire into any allegations of voter-registration malpractices, where such are said to *affect the validity of a Presidential election*.[68]

The Court then proceeded to make the following finding:

> In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], and of the evidence adduced

66 This was based on the strict trial procedures the Court reckoned would enable speedy determination of the petitions without prejudicing parties. It nevertheless leaves open the question whether the evidence, were it allowed, would have met the standard of proof required to overturn the presidential election. Above, 90. Cf. G. M. Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws' in Law Society of Kenya, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (2013), 11 for an excoriation of what he calls a "rather conservative position" by the Court.

67 These include marking with indelible ink; and marking on the register. See regulation 69 of the Elections (General) Regulations, 2012.

68 *Raila Odinga & 5 Others v IEBC & 3 Others*, Petition No. 5 of 2013 (Supreme Court of Kenya), 90.

> in Court, we must conclude that such a register is *not a single document*, but is an amalgam of several parts prepared to cater for diverse *groups of electors*. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country's population. The register can also take several forms, as contemplated by **Section 2 of the Elections Act**, which stipulates that such a register "*includes a register compiled electronically*."[69]

This finding is problematic for two reasons. First, it fails to internalize the reason why a credible register is a fundamental part of the electoral process. Without a credible register, for example, how does one establish whether there has been undue inflation of votes in any candidate's strongholds? How, from an audit perspective, do those who want to verify the final vote count determine if the turnout in particular electoral units are within reasonable limits? At the core of electoral principles and standards for the transparency and accuracy of the count is the fact that there should not be more votes cast than the number of people registered to vote in a particular polling station. Further, if this pattern is discerned on a large scale, it will raise credible questions on the validity of the overall result.

Kenya's electoral law envisages a situation where an election is held on the basis of an ascertainable number of registered voters, not a moving target.[70] It is for this reason that registration of voters and revision of the register is frozen at the following points in the electoral cycle. In the case of a general election, of which the presidential election in this case was part, there should have been no revision within sixty days preceding 4 March 2013 – that is to say between 4 January 2013 and 4 March 2013.[71] Revisions were only allowed between the time when the register was opened for inspection and 4 January 2014. Once revised and certified, complete with a Gazette Notice to that effect, the register should have remained undisturbed, with all electoral players knowing the status of the roll. In the case of a by-election, the law provides that there should be no registration or revision of the rolls between the date of the declaration of the vacancy of the seat concerned and the date of such by-election.[72] In any other case, a similar bar operates, between the date of the declaration of

69 *Raila Odinga v IEBC,* SCC Petition No. 5 of 2013, 91.

70 Elections Act, 2011 section 5.

71 Ibid, 2011 section 5(1)(a).

72 Ibid, section 5(1) (b).

73 Ibid, section 5(1) (c).

the vacancy of the seat concerned and the date of such election.[73] The Court should not have been easily persuaded by the Respondents' counsel that the revision powers of the IEBC were not constrained by the bar in section 5(1)(c) of the Elections Act.

The second problem with the Court's finding on the register concerns its determination that section 2 of the Elections Act allowed an interpretation where the Principal Register of Voters consisted of the BVR Register, Special Register and Green Book. Admittedly, the Green Book is the originating point for the registration process, and should rightly be seen as the "primary reference book" for establishing the audit trail for the registration process. However, a technologically aided process should have culminated in the compilation of a Principal Register consisting only of the BVR Register and the Special Register.[74]

Here is why. Once the IEBC decided to expend public funds on technology that it informed electoral role players and the general public would prevent registration fraud, amongst others, it created a legitimate expectation amongst them that there lay safety in the electronic register. On the explanation by IEBC and the Second Respondent that the Green Book was vital in ensuring the right to vote, such right to vote was in fact guaranteed through the inspection process – any voter who did not take advantage of this process should have been understood to have acquiesced in their disenfranchisement.[75] The Court seems to have misunderstood the true import of section 2 of the Elections Act, which was to include electronic registers in the definition of the Principal Voters Register. It also seems to have accepted the Respondents' wisdom that the best way to reconcile technological failure with the right to vote was for the Green Book to act as both a primary reference and a part of the Principal Register. In so doing, it handed the election management body a blank cheque in regard to the quality of future voter registration processes, including the credibility of future registers, and established the lowest nadir for the adoption

74 Or the computer printout that used to be generated from the former Object and Mark Recognition (OMR) process in use by the defunct Electoral Commission of Kenya (ECK).

75 The only exception to this strict interpretation of the right to vote would be if it can be shown that such disenfranchisement resulted from acts committed by election officials after the register was revised and certified, which in itself borders on criminality.

76 In managerial terms, adopting a new technology and then sticking to the legacy systems that preceded it is sure way for the new technology to fail.

of technology.[76] Yet it is clear that it is not technology that failed, but the people running it.[77] On this issue, the fact that Kenya is still in the early days of building a credible system of managing elections after the 2007 debacle, and its history of registration-related fraud, required an interpretation that would reinforce the duty of IEBC to run effective registration processes in future and establish credible registers. The events following the 2007 General Election had their genesis in many years of elections with doubtful outcomes. Against this background, the Supreme Court should be careful not to engender a state of affairs, arising from its jurisprudence, where electoral authorities aim for lower than the best standards in the administration and management of elections.

The second key theme on which the Court was required to pronounce itself was the fairness of the count. The main issues here are the failure of the Results Transmission System (RTS), the credibility of the overall count, the exclusion of some agents from a section of the National Tallying Centre and the inclusion of rejected votes in computations. In regard to the failure of the RTS, the Court found, in our opinion rightly, that its failure did not prejudice the electoral process unduly. The design of the electoral process was based on the transmission of fairly quick provisional results, which would ultimately be verified by statutory forms completed and signed at critical points in the polling process. Form 34[78] was to be completed by the Presiding Officers at the Polling Station, while Form 36[79] was supposed to be completed by the Returning Officer at the Constituency Tallying Centre. Both statutory forms were thereafter supposed to be physically delivered by the respective Returning Officers, together with all the election materials used in the election, to the National Tallying Centre at which the IEBC would verify the information therein and pronounce final results. While, in an effective system, provisional results should not vary from final results by a wide margin, final results are not settled by technology.

If the statutory forms were to aid the verification, and affirm the credibility

77 If the procurement process had not been riddled by in-fighting; the equipment tested before use; its users properly trained; and cleared of bugs and other major flaws, Kenya's experience with this new technology would likely have been a success. See C. Juma, 'Technology Trips Over Democracy in Kenya', http://belfercenter.hks.harvard.edu/publication/22819/technology_trips_over_democracy_in_kenya.html, at 11 February 2016; N. Cheeseman, "How to Make Technology Work in Elections', Daily Nation, http://www.nation.co.ke/oped/Opinion/How-to-make-electoral-technology-work/-/440808/1759420/-/ib7oncz/-/index.html, at 11 February 2016.

78 This form was the declaration of presidential election results in each polling station.

79 This form was the declaration of presidential election results in each constituency.

of the overall count, they revealed some weaknesses instead. A scrutiny of all Forms 34 and 36 in all the 33,400 polling stations and a re-tallying of votes in 22 polling stations cited in Hon. Odinga's petition, was ordered by the Court. It found a number of discrepancies, some that raised questions on the quality of the registration process. Five polling stations, out of the 22, had discrepancies as to the number of votes cast as reflected in Form 34 and Form 36. In some instances, IEBC did not supply Forms 34 for the verification exercise, leaving open the question as to the veracity of the results on the affected polling stations. In some constituencies, varying totals emerged from the re-computation, with some effects on the respective candidates' overall tallies. Notably, only 18,000 polling stations out of 33.400 (approximately 34 per cent) were scrutinized and the aggregate results of Form 36 voters from 75 constituencies were missing. For instance, there was no explanation provided by IEBC and its Chairman on how Polling Station No. 083 in Kieni Constituency had 321 votes cast against a registration total of one voter! Suffice it to state that this lack of verification in some instances did raise some questions on the quality of the count. Mr. Odinga, Ms. Otieno and Mr. Rajan, who should have leaned on this aspect of the process to prove its overall effect on the credibility of the process, were either stymied by procedural difficulties or did not see that this was in fact the strongest part of their claims. In the end, the Court found that even if the figures revealed some discrepancies, their overall effect on the credibility of the final result had not been proven. This finding, given the facts available to the Court, is hard to differ with.

On the exclusion of some agents from a section of the National Tallying Centre the Court found that such exclusion was justified given the circumstances obtaining in the National Tallying Centre at the time. In any event, the Court found that they were not allowed initial access to the theatre of operations but could still see the goings-on from a distance. This finding is sound, given the facts regarding the altercation in the Tallying Centre at the time and the powers of the election management body to keep order (including by excluding people from parts of the electoral process if they become unruly).[80] However, it raises unnecessary transparency issues and IEBC would be well-advised in future to consider how to ensure as much transparency as possible. This leaves us with the inclusion of rejected votes, to which we now turn.

The inclusion of rejected votes, the sole reason for the petition by Mr. Kuria,

80 See regulations 62(3) and 63 of the Elections (General) Regulations, 2012 (keeping order at a polling station); these same powers can be extended to tallying centers in our opinion.

Mr. Itumbi and Ms. Sergon, would probably not have featured in this election save for either of two things, or both. First, when the Constitution of Kenya, 2010 was drafted, it not only required the super-majority[81] previously required of the winning candidate in the presidential contest but varied and added two more criteria. Previously, the winning presidential candidate would have required to garner "a greater number of *valid votes cast* in the presidential election than any other candidate for President" and, in addition, receive "a minimum of twenty-five per cent of the *valid votes cast* in at least five of the eight provinces".[82] The Constitution of Kenya, 2010 now requires the winner to obtain "more than half of all the votes cast in the election" and "at least twenty-five per cent of the votes cast in each of more than half of the counties".[83] The difference was in the fact that (1) whereas the previous super-majority was based on valid votes cast, the new super-majority would be based on the votes cast; and (2) the winner would also have to garner over fifty percent of the votes rather than just a majority. For this reason, it was argued that the new provision was designed to move Kenya's presidential elections more towards what is known in the family of electoral systems as a two-round system (TRS)[84] – and to encourage contestants to appeal to a broader section of the country.

It is noteworthy that the petition by Kuria and his fellow Petitioners was actually triggered long before the final results were announced. When the IEBC originally began streaming the provisional results of the presidential election on the night of the election, it did not include the rejected votes in the computation of the relative percentages of the candidates. With time, due to what IEBC later put down to a computer error, the number of rejected votes was significantly high (300,000) with less than 50 per cent of the polling stations reporting. In the words of counsel for Kuria, Itumbi and Sergon, the rejected votes became the "third candidate". In the end, after the error had been corrected, the number of rejected votes went down overall but was still were fourth overall. The Coalition for Reforms and Democracy (CORD) agents and some observers then pointed out to IEBC the fact that a plain reading

81 Not only a simple majority of the votes but also over 25 per cent in at least five of the former eight provinces.

82 Constitution of the Republic of Kenya (2009) Repealed, section 5(3) (f).

83 The Constitution of Kenya, 2010, article 138(4). This changed the threshold from a majority of the former provinces to a majority of the counties.

84 In a classical two round system, such as the one obtaining in France, virtually no candidate wins in the first round. The two candidates with the highest votes then proceed to a second round, which determines the winner. See A. Reynolds, B. Reilly and A. Ellis *Electoral System Design: The New International IDEA Handbook* (2008), 50-53.

of article. 138(4) did not use the valid votes as the basis of the computation and insisted that IEBC henceforth uses the votes cast (that is, including the rejected votes) as the basis. IEBC acceded to this, without consulting all the candidates' agents, and thereafter recomputed the percentages on this basis. By the time Kuria, Itumbi and Sergon filed their petition, the final results showed that Hon. Kenyatta had won anyway, but they still argued that this formula had "a prejudicial effect" on Hon. Kenyatta's percentage votes. They also probably anticipated that in the event of a thorough scrutiny, and a likely reduction of valid votes for Hon. Kenyatta, he would benefit from excluding the rejected votes from the overall computation. In these circumstances, Hon. Odinga would doubtlessly gain from the inclusion of rejected votes.

Counsel for Hon. Kenyatta also argued that the IEBC had changed the formula without consulting the other candidates, including his client. In his opinion, the sole intention for doing this was to occasion a run-off, since it was possible that a candidate with a lead of 53% could come down to 49% and thereby fail to meet the threshold for election. Substantially, counsel was taking issue with IEBC's transparency in managing the tallying and announcement of results. In the end, it seems that this speculative but plausible argument did influence the Court's opinion.

Persuaded by the case of *Popular Democratic Movement v. Electoral Commission*,[85] in interpreting Article 78 and paragraph 3 of Schedule 4 of the Constitution of Seychelles, and arguments to the effect that Regulation 77 (1) of the Election (General) Regulations, 2012 states that, rejected ballot papers shall be void and shall not be counted, the Court held that only valid votes should have been used in the computation. In the case above, the Seychelles Constitutional Court (Burhan, J.), faced with the question whether a rejected vote could be considered a "cast vote", held that "rejected ballot papers are not to be counted as 'votes', therefore the term 'votes cast' cannot and will not include 'rejected' ballot papers".

In the words of the Court in the Kenyan case, a "broad, purposive interpretation in the context of constitutional principles" would lead to the exclusion of "rejected votes" in the computation of the percentage-vote requirement.

This decision is problematic for several reasons. First, the Court was unduly

85 (2011) SLR 354

influenced by what were likely irrelevant considerations as to the basis for Hon. Odinga's protest and IEBC's use of the disputed formula. In determining whether rejected votes should be included in the computation, regard should have been had only to the law. Article 138(4) of the Constitution leaves little to interpretation, especially when looked at against the context that it was drafted to replace the repealed Constitution's article 5(3)(f). The reliance on Regulation 77[86] of the Election (General) Regulations, 2012 is also faulty, since that Regulation merely invalidates the counting of any rejected votes in favor of any candidate – this is different from saying they are not part of the definition of votes cast. Additionally, taking guidance from subsidiary legislation to define a constitutional requirement upsets the hierarchy of laws, which provide that the Constitution is supreme. Ultimately, if we go back to basics, it is a truism in the study and scientific analysis of elections that votes cast eventually get separated during the counting process into valid and rejected votes; therefore, votes cast include the selfsame rejected votes.

However, there seems to have been another inexplicable influence playing on the mind of the learned judges. Despite all the arguments around definitions, and the attempt to distinguish "spoilt votes" from "rejected votes" this definitional matrix eventually confused the Court. Witness the Court paraphrasing the Court of Appeal in the Seychelles case, complete with added emphasis:

> Under the Constitution of Seychelles, the broad term "votes cast", just as in Kenya, has been adopted; and it became necessary for the Constitutional Court, in **Popular Democratic Movement v. Electoral Commission** (supra) to hold upon a *literal interpretation*, that "votes cast" included both *spoilt votes* and valid votes. Objections were raised, and this matter came before the Court of Appeal,[87] which overturned the decision, and held that the term "votes cast" must be construed to mean only *valid votes cast*. The Court of Appeal remarked that, to count spoilt votes and ascribe to them the quality of valid votes, is improper as it entails converting the "latent vote" of the elector into a "patent vote" – and such an approach would render meaningless the distinction between **spoilt votes** and **valid votes**.

Clearly, both the Seychelles Court of Appeal[88] and the Kenyan Supreme Court, ended up equating "spoilt" with "rejected" votes. Otherwise, how does

86 This regulation provides that rejected ballot papers shall "be void and shall not be counted."

87 *Popular Democratic Movement v Electoral Commission* SCA NO 49 of 2011.

88 And Burhan J, who dissented in the Constitutional Court.

one explain a matter that begins life as a dispute on the meaning and import of "rejected" votes being determined on the meaning and import of "spoilt" votes? In the study of elections and election administration, there is a world of difference between the two. Surprisingly, they still end up getting mixed up, and not only by these two courts. Even the Wikipedia[89] summary of the results of the Kenyan presidential election of 2013, available online at the time of writing this Chapter, replaces the rejected votes with spoilt votes. Never mind that "spoilt votes" are never included in the tabulation of any election results. In the final part of this analysis, we turn to the decisions the Court made as a result of its findings.

Prior to making its decisions, quite some space is dedicated in the Court's judgment to the twin questions of the burden of proof and standard of proof in election disputes. The issue of burden of proof has long been settled both in criminal and civil matters,[90] including matters of their own kind such as election petitions,[91] and should probably not have pre-occupied the Court. A clear clarification on the distinction between the two was proffered by the Honorable Attorney General, as follows:

Burden of proof is concerned with the question, whose duty is it to place evidence before the Court; while standard of proof is concerned with, what weight the Court should place on the material fact that is placed before it.[92]

It is trite law that whoever asserts must prove. However, in an election petition, as in any other matter, the evidential burden shifts once the person asserting discharges their legal burden. Once the petitioner shows that a certain state of affairs existed that gave rise to a reasonable conclusion that the election was not conducted in accordance with the law (legal burden), it is upon the respondents to show that there are exculpatory circumstances (evidential burden). For instance, they can demonstrate that the deficiencies complained of were of limited effect or that they were largely in compliance with the law.

89 'Kenyan Presidential Election, 2013' Wikipedia, https://en.wikipedia.org/wiki/Kenyan_presidential_election,_2013, at 4 February 2016.

90 *Woolmington v DPP* (1935) AC 1 481 –482 (Viscount Sankey). This statement was affirmed in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J). See also, D. Heydon, Cross on Evidence (2012), 7085; G. Williams, The Proof of Guilt (1963), 184 –5.

91 It is the prosecution that asserts in a criminal case; the plaintiff in a civil case; and the petitioner in an election petition – all of them bear the burden of proof, even though the evidential burden may shift.

92 *Raila Odinga & 5 Others v IEBC & 3 Others,* Petition No. 5 of 2013 (Supreme Court). 67.

A widely cited authority on this subject is the English case of *Morgan v Simpson*.[93] In that case, a total vote of 23,691 votes were cast. 82 ballot papers were validly rejected. Another 44 were also rejected because they had not been stamped with the official mark as required by the law. The polling clerks at the polling stations were at fault for this omission. If the 44 ballot papers had not been rejected, but had been counted, the petitioner, a candidate at the election would have won by a majority of seven votes over the respondent. In consequence of the rejection of the 44 ballot papers, the respondent had a majority of 11 and so was declared to be the successful candidate. The petitioner sought an Order that the election be declared invalid because it had not been conducted substantially in accordance with the law as to elections; alternatively, that even if it had been so conducted, the omissions of the polling clerks had affected the result. The High Court refused to make the Order, but an appeal to the Court of Appeal, the High Court judgment was reversed.

Section 37(1) of the Representation of the People Act, which was germane to this case, is analogous to Kenya's section 83 of the Elections Act, 2011 which reads:

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.

Based on a comprehensive review of British elections over the years, Lord Denning came to three conclusions. The first is that if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, *irrespective of whether the result was affected, or not*. In his view, this was the case in the Hackney case,[94] where two out of 19 polling stations were closed all day, and 5,000 out of 41,000 voters (approximately 12 per cent) were unable to vote. Secondly, if the election was so conducted that it was substantially in accordance with the law on elections, it is not vitiated by a breach of the rules or a mistake at the polls – *provided that it did not affect the result of the election*. That is shown by the *Islington* case[95] where 14 ballot papers were issued after 8 p.m. The election was upheld

93 (1975) 1 QB, 151, (1974) 3 All ER, 722, (1974) 3 WLR, 517.

94 *Hackney Case, Gill vs Reed & Holmes* (1874) 2 O' M & H 77, 31 LT, 69.

95 *Islington West Division Case, Medhurst vs Lough and Gasquest* (1901) 17 TLR, 210.

because the successful candidate won by a majority of 19 votes. Thus, if the 14 votes were deducted from his votes he would still have won by 5 votes. Finally, even if the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – *and it did affect the result* – then the election is vitiated. That is shown by *Gunn v Sharpe,*[96] where the mistake in not stamping 102 ballot papers did affect the result. Here by adding the unstamped and uncounted ballot papers, the respondent would have been one out of three persons elected at a local government election. The failure to stamp 102 ballot papers out of 6,453 affected the outcome of the election and it was therefore nullified.

He therefore concluded:

> Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 papers did affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid.[97]

A comparable provision is section 146(1) of the Nigerian Electoral Act, 2006 which states:

> An election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election (i) was conducted substantially in accordance with the principles of this Act *and* (ii) that the non compliance did not affect substantially the result of the election."

However, this provision would have to be interpreted slightly differently from Kenya's section 83 of the Elections Act, 2011 and Section 37(1) of the Representation of the People Act. This is because it is conjunctive in nature – both substantial compliance and an adverse effect are required to overturn an election. It is in this regard that decisions such as the one in *Buhari v Obasanjo* must be seen. In that case, Belgore JSC (as he then was) made the following statement with regard to an identical provision in the 2002 Electoral Act.

> "It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election."[98]

96 (1974) 2 All E.R. 1058.

97 *Morgan v Simpson* (1975) 1 QB, 151, (1974) 3 All ER, 722, (1974) 3 WLR, 517.

98 (2005) 50 WRN 1, 176.

On the standard of proof, after reviewing a number of authorities, the Kenyan Supreme Court pronounced itself on the matter. It stated that the upshot of those authorities was that "this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights". It went on to state:

> The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.[99]

In real terms, this delimitation is easier said than done. In fact, one writer has argued that these technical, not scientific, terms mean that "the application of the tests varies enormously and is much more subjective than lawyers and legal theory care to admit".[100] With the case of *Wetangula v Kombo*[101] in mind, it probably should be possible to postulate that as long as the matters averred are civil in nature, the standard should be on a balance of probabilities. On the other hand, if criminal conduct is averred, then the standard should be beyond reasonable doubt. This would be one way of handling the challenge of how to deal with election court findings of guilt for election offences.

Lastly, the Court also appears to have been influenced by the submissions of legal counsel for the IEBC who urged the Court to be guided by "restraint". In support, Mr. Ahmednasir Abdullahi cited the case of *Bush v Gore*,[102] and implored the Court to be sensitive to the fact that the case was more political than constitutional-legal. To drive his point home, he argued that the standard of proof should probably be higher than beyond reasonable doubt. The Court found merit in this approach, though it christened what it eventually based its decision on as an insightful judicial approach, and stated that it would ultimately be guided by whether a *firm and unanswered* case has

99 *Raila Odinga & 5 Others v IEBC & 3 Others* (Supreme Court of Kenya). This pronouncement by the court affirmed prior jurisprudence by the High Court and Court of Appeal in *Onalo v Ludeki & 2 Others* (No. 3) [2003] 3 KLR (EP) 614; *Wekesa v Ongera& Another* (No. 2) [2008] 2; KLR (EP) 66 at p. 79; Muliro v Mysonye & Another [2008] 2 KLR (EP) 52; *Ng'ang'a & Another v Owiti & Another* (No. 2) [2008] 1 KLR (EP) 799; and *Joho v Nyange & Another* (No. 4) [2008] 3 KLR (EP) 500 at 501.

100 K. Laster, *Law as Culture* (2001), 206.

101 Petition No. 12 of 2014 (Supreme Court of Kenya).

102 531 U.S. 98 (2000).

been made. Further, in the judgment, this was re-stated broadly as whether the Petitioner clearly and decisively showed the conduct of the election to have been so *devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent*. In our opinion, an approach that appeared to look beyond whether the numbers added up ended up actually being constrained by this fact. The jurisprudence on the standard of proof will therefore remain notoriously complex and ambiguous.[103]

5. Conclusions and Recommendations

The upshot of the foregoing analysis is that principles matter. However, when it comes to proving fidelity to principles, standards will be the determinant. This is why in the *Hackney* case, the court invalidated the election even though a proportionally smaller percentage of people had been disenfranchised. There are times when courts need to draw the line in terms of fidelity to the process. Most times, though, an adverse effect on the results seems to be the most persuasive factor. In the Kenyan case, *Raila Odinga* seems to settle some jurisprudential questions while leaving others open to argument. This section summarizes these issues and attempts to provide some direction for clearer jurisprudence going forward.

The *Raila Odinga* case will remain a reference point for a number of years given the fact that it was a Supreme Court decision, a decision of the highest court in the land. From the standpoint of *stare decisis,*[104] lower courts have to abide by it – unless they can distinguish their cases from it on the basis of the facts. Only a subsequent Supreme Court decision, on a case with similar facts can change its jurisprudence. It is not clear to what extent this concern was at the back of the judges' minds as they thought through the decision but it should have been. Already, there are reasons to believe that some of its propositions are difficult to follow. Some of these challenges, evident in a number of Court of Appeal cases, have given rise to what is now referred to by some as a "jurisprudential war"[105] between the Court of Appeal and the Supreme Court. This is not healthy for advancing the Country's electoral jurisprudence and democratizing its electoral practice.

103 H. Prakken, 'A Logical Analysis of Budens of Proof' in H. Kaptein, H. Prakken & B. Verheij (eds.) *Legal Evidence and Proof: Statistics, Stories, Logic*, (2009) 223.

104 This is the policy of courts to abide by or adhere to principles established by decisions in earlier cases.

105 'Outcome of Raila's Petition against Uhuru's Election at the Heart of New Row, say Lawyers', *Daily Nation*, http://mobile.nation.co.ke/news/Outcome-of-Raila-petition-against-Uhuru-election/-/1950946/2390758/-/format/xhtml/-/11ohw4r/-/index.html, at 11February 2016.

Significantly, the Court did come close to enunciating clearer principles for invalidating elections, but fell short due to a somewhat imprecise standard of proof. The findings on the place of technology (such as EVIDs and the Results Transmission System); and the fact that the principle in article 159(2) (d) has limits are a case in point. Nevertheless, these are relatively low weight issues. Future presidential petitions will provide other opportunities for further clarification. Given the fact that the High Court and Court of Appeal seem ready to overturn elections when faced with more or less the same issues, such as bribery, they will also provide the opportunity to answer the question whether there is a different standard for presidential election petitions or whether there is one standard for all elections. While either a "judicial restraint" or "insightful judicial approach" is a welcome consideration, courts would do well to remember Lord Denning's pronouncement in Morgan v Simpson that "an election petition is a serious – and expensive – matter and is not lightly to be set aside". The correct approach would be one that balances the need to let the voters' decision stand with a readiness to intervene judicially if there is evidence that the people's will has been subverted through electoral fraud or other means. A number of specific matters come to mind.

Regarding fidelity to electoral law and improvement of standards, it should be recalled that the sordid events following the 2007 General Election were the culmination of many years of electoral misconduct, which the Constitution and subsequent electoral laws tried to respond to following the Kriegler Commission's report. The Supreme Court, and the rest of the Country's courts, have a key role to play in interpreting electoral law and standards progressively. While decisions to annul elections are to be taken with care, the courts could take a more active role in elucidating the standards of performance expected of the election management body on key aspects of the electoral process. With this in mind, a re-visit of the reasoning around the credibility of the register is inescapable. IEBC's role in compiling a credible register is clear in law and should be clarified better. Decisions flowing from such a clarification should nevertheless be based on the gravity of the discrepancies complained of.

Secondly, for the time-bound procedure that it is, presidential election petitions will now turn on data verification. With this in mind, it should be possible as part of the pretrial proceedings in any presidential election petition for the Court to require the IEBC to provide all the statutory materials on the basis of which it pronounced the final result for all the constituencies at issue. All these forms are usually availed by the Returning Officers at the

National Tallying Centre for scrutiny and verification before the final results are announced and there is no reason, other than administrative inefficacy that the courts should not countenance, not to produce them on demand. If a number of forms in respect of which the projections raise sufficient doubts about the accuracy of the counting and tallying are unavailable, it means that it will be unclear who won.

Since perception is reality in elections[106] there is little difference in the minds of ordinary people between an election in which it is unclear who won and an election in which the winner was patently defrauded. We make this argument because of the realization that the failure to provide information on a timely basis likely affected the ability of Raila Odinga to prosecute his petition effectively: information was not available when it was required, yet the Court had as of necessity to enforce a strict trial procedure that resulted in the rejection of his further affidavit and some of the new material availed through the submissions. However, that refusal will make even better sense in an environment in which provision of any relevant material in the possession of IEBC (such as the declarations of results) will be made available to all parties in future petitions as an integral part of the discovery process at the commencement of the trial.

While a stronger judicial stance to availability of records is expected to influence the conduct of IEBC for the better, it should also influence the conduct of electoral players. Elections are conducted in broad daylight and the polling station results declared quite early in the process. For a process that ultimately is so difficult to overturn, it beggars belief that political parties do not seem prepared to put in place adequate measures to ensure they have copies of statutory forms for all the polling stations in which they have agents. The law requires the results at the polling station, once declared, to be affixed in a public place. It should be possible to take a photo of the same and send it to a central monitoring centre managed by each political party with a serious stake in the election. Availability of data on the both the demand (candidates and political parties) and supply side (IEBC) is the only way to end electoral

106 Voters' trust in elections comes from a combination of the mechanisms and procedures we use to record and tally votes, and their confidence in election officials' competence and honesty. Electronic voting systems pose considerable risks to both the perception and reality of trustworthy elections. D. Evans and N. Paul, 'Election Security: Perception and Reality' *IEEE Security & Privacy* (2004), 1. See also, H. Bruce 'In Politics, Perception is Reality: Exploring the Backlash Rhetorics of Anti-Affirmative Action' *Jac Online Journal* 23.1 (2003, 109; and M. J. W. Wilson 'Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012' 63 Cath. U. I. Review (2014) 953, 954.

fraud in our elections and move Kenya towards an electoral democracy.

The question of rejected votes and their status in determining the threshold for elections needs to be settled in either of two ways. It is possible that a subsequent Supreme Court decision, based on clearer arguments, could depart from the interpretational errors in the *Raila Odinga Case*. The problem with this is that it would continue the uncertain state in which the Court left this element of electoral law. Greater certainty in the law, now that judicial pronouncements cannot always be predicted, would be a better route to follow. With this in mind, an amendment to Article 138(4) to align with Section 5(3)(f) of the repealed Constitution would settle the issue once and for all relating to whether to include all votes cast or only valid votes cast.

Finally, one other matter that arises obliquely[107] from the *Raila Odinga Case* that the Supreme Court will need to approach differently, with some restraint, is the question of its jurisdiction in other petitions arising from the lower courts. As designed, the Supreme Court was not intended to be the country's highest appellate court on all electoral matters. It would do well for the Supreme Court to only entertain appeals from the Court of Appeal that raise weighty constitutional issues on matters of great public importance. This way, it can also minimize unhelpful "jurisprudential wars" with the lower courts, preserve its hallowed status and allow for sufficient case management time to deliver quality jurisprudence that advances the country's case law.

107 This is the subject of another paper on the turf wars between the Supreme Court and lower courts, and we do not wish discuss it at length. We only mention it since the tensions between the Supreme Court and other courts appear to be stemming from its own fealty to some of the findings it made in Raila Odinga v IEBC.

III

A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act

Heidi Evelyn & Waikwa Wanyoike

Abstract

For the 2013 general election, the promulgation of the 2010 Constitution should have been the dawn of a new era of elections in Kenya. Soon after Uhuru Kenyatta was declared the winner, Raila Odinga, his main challenger, along with other Kenyans, initiated a court challenge to the election results. The new Supreme Court of Kenya had exclusive jurisdiction to determine the election dispute under the election framework set out in the 2010 Constitution and the opportunity to define the legal requirements that an election must meet. Unfortunately, this opportunity was squandered due to the Supreme Court's lack of meaningful analysis and application of Articles 81 and 86 of the 2010 Constitution, which set out guidelines for valid elections in Kenya. Instead the Court unquestioningly adopted Section 83 of the Elections Act as the test for validity of an election.

This Chapter analyzes Section 83 of the Elections Act and considers whether its threshold test for valid elections is applicable in the post-2010 constitutional context. Considering the historical motivation for electoral reform and the detailed provisions on elections contained in the 2010 Constitution, an early sketch of the new constitutional threshold is provided. This preliminary minimum standard must be further developed by the courts in future election

cases and will necessarily evolve over time. By critiquing The Raila Odinga Case and other cases resulting from the 2013 general election, an alternative approach to adjudicating election disputes is highlighted. Lastly, options to correct the jurisprudential confusion left in the wake of the case law concerning the 2013 general election are considered. In any event, the argument is made that the legal profession must be more vigilant in ensuring the statutory and common laws of Kenya are not interpreted or utilized in a manner that undermines the spirit or minimizes the transformative nature of the 2010 constitution.

1.0 Introduction

In the new legal landscape created by the dawn of the new *Constitution of Kenya*[1] in 2010, what is the constitutional threshold for valid elections in Kenya? Interestingly, much of the electoral case law and corresponding academic commentary thus far has sidestepped this very important question. This missing rhetoric is even more conspicuous when one considers that electoral reform was one of the strong impetuses of agitation for a new national constitution in the first place. The threshold question is not merely an academic or theoretical query, but an important and practical inquiry given that the first nation-wide election under the *2010 Constitution* has already occurred and the second is rapidly approaching.

Because the *2010 Constitution* addresses elections in unusual detail, it was widely expected to radically affect the way elections and any consequential election challenges were conducted in Kenya.[2] In 2013, the country prepared for the first elections to be held under the 2010 Constitution with a new devolved structure incorporating county governments, new constituencies and the implementation of election technology, all constitutionally mandated. A few days after the election, it was announced that the winner of the presidential race, by an extremely small margin, was Uhuru Kenyatta.[3] Shortly thereafter, three presidential election petitions were filed with the Supreme Court, the court with exclusive jurisdiction, to pronounce on the validity of the presidential election. These petitions, one challenging the

1 *Constitution of Kenya 2010* (Kenya) [hereinafter *2010 Constitution*].

2 A Hersi and F Otieno, 'Elections After Reforms: The Promise Of Institutionalism in Kenya's 2013 General Elections', in F Otieno (ed), New Constitution, *Same Old Challenges: Reflections on Kenya's 2013 General Elections* (2015) 10, 11.

3 Independent Electoral and Boundaries Commission, Election of the President and Deputy President (Press Release, 9 March 2013), http://iebc.or.ke/index.php/2015-01-15-11-10-24/press-releases-statements/item/notice-of-election-of-president-and-deputy-president, at 28 October 2015.

numerical vote tallying on behalf of Kenyatta and two challenging the election outcome on behalf of challenger, Raila, were amalgamated and heard together by the Supreme Court in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others*.[4]

The Supreme Court's decision in The *Raila Odinga Case* appears to have adopted Section 83 of the *Elections Act*[5] as the test for validity of an election. Yet, a more thorough analysis of Section 83 and its history reveals that it is not an election validity test of general scope, but rather a tool for dealing with minor deficiencies or technicalities in the conduct of elections. While Section 83 does mention the *2010 Constitution*, it is alarming that it does not require that the constitutional principles set out in Chapter 7 be met. By adopting Section 83 as the legal standard for elections, the Supreme Court preferred an approximation of a British legal test over the elaborate constitutional guidelines and principles concerning what constitutes a free and fair election. The erroneous result is that compliance with Section 83 and the necessary ability to prove that the election outcome was affected is a more apt indicator of the validity of an election than whether the election was conducted in a constitutional manner.

Nevertheless, where an issue arises as to the constitutionality of an election, the *2010 Constitution* itself is the logical starting point. The difficulty that accompanies the birth of a constitution, however, is that in its infancy there are very few legal guides to help jurists interpret its meaning. Advocates and judges alike must consider such "non-legal" guides as legislative intent and historical context in order to give meaning to constitutional principles that may affect a country's common law for generations to come. Accordingly, the local context in which a constitution was adopted becomes a navigation tool more valuable than any pre-*2010 Constitution* common law or foreign legal traditions.

The Raila Odinga Case decision, however, is replete with references to the jurisprudence of other jurisdictions and silent on the constitutional principles concerning elections. Therefore, it is the position of the authors that Section 83 of the *Elections Act* has distracted the courts from the development of a true constitutional threshold for valid elections. Moreover, Kenya's post-2010

4 *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* (2013) eKLR (Petition No. 5 of 2013 at the Supreme Court of Kenya) para. 8-19 [hereinafter The Raila Odinga Case].

5 *Elections Act 2011* (Kenya) [hereinafter Elections Act].

electoral jurisprudence thus far has actually undermined the constitutional standards laid down for testing the validity of elections and established a legal test entirely contrary to the aims of the *2010 Constitution*.

In search of the constitutional election standard, this chapter starts its analysis with the meaning and scope of Section 83 of the Elections Act. After considering the historical motivation for widespread demand for electoral reform and the applicable provisions of the *2010 Constitution*, an early sketch of the new constitutional threshold is provided. This preliminary minimum standard must be elaborated on as further electoral case law elucidates fact scenarios to aid in drawing the boundaries between a valid election and one that must be vitiated. Continuing to consider the absence of this discussion in the jurisprudence, the chapter then embarks on a critique of the seminal post-2010 election case, *The Raila Odinga Case*. It then analyses how two subsequent election decisions explored the constitutional election standard penumbra in the face of Section 83. Finally, the Chapter concludes by canvassing possible options to correct the jurisprudential confusion left in the wake of the case law concerning the 2013 General Election.

2.0 The Origins of Section 83 of the Elections Act

Section 83 is contained in the *Elections Act* that was passed in 2011, purportedly to incorporate the changes to the law governing elections reflected in the 2010 Constitution, which had just been promulgated the year before. Section 83 of the Elections Act states that:

> No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down ***in the Constitution and*** in that written law or that the non-compliance did not affect the result of the election.[6] [emphasis added]

Neither the independence *Constitution*[7] nor the 1969 *Constitution*[8] addressed the standard that an election had to meet to be considered valid. These earlier constitutions left it to the courts and Parliament to develop the necessary standards for evaluating the validity of elections. For example, Section 44 of the *1969 Constitution*, which dealt with elections, provides that:

6 *Elections Act* Section 83.

7 *Constitution of Kenya 1963* (Kenya) [Repealed].

8 *Constitution of Kenya 1969*, Rev. 2009 (Kenya) [Repealed] [hereinafter 1969 Constitution].

> 44. (4) Parliament may make provision with respect to -
>
> (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
>
> (b) the powers, practice and procedure of the High Court in relation to the application.[9]

Acting under the authority of Section 44 of the 1969 Constitution, Parliament enacted the *National Assembly and Presidential Elections Act*[10] regarding the standard to be applied by the courts to determine whether an election was valid. Section 28 of that Act stated:

> No election shall be declared to be void by reason of a noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election.[11]

Interestingly, Section 83 of the Elections Act is very similar to what was Section 28 of the *National Assembly and Presidential Elections Act*. Only four words were added to this pre-2010 provision which are "in the constitution and…" Does this simple addition truly address all the new legal requirements concerning elections contained in the 2010 Constitution so as to justify Section 83 as the go-to provision to determine the validity of an election in the post *2010 Constitution* period? It is important to first examine the history of this section before answering this question.

Section 83 of the Elections Act and its predecessor Section 28 of the *National Assembly and Presidential Elections Act* are based on a provision of Britain's Ballot Act of 1872,[12] a statute which brought important reforms to the British electoral system. Accordingly, as the British common law tradition was exported throughout the British Empire, the wording of this section has been reflected in many commonwealth jurisdictions and its interpretation is the subject of case law throughout the former colonies of the United Kingdom.[13]

Section 13 of the *Ballot Act* stated that:

> No election shall be declared invalid by reason of a non-compliance with

9 *Elections Act 2011* Section 44 [Repealed].

10 *National Assembly and Presidential Elections Act* 1969, Rev. 2009 (Kenya) [Repealed] [hereinafter *National Assembly and Presidential Elections Act*].

11 *National Assembly and Presidential Elections Act* Section 28.

12 *Ballot Act* 1872 (UK) [hereinafter the *Ballot Act*].

> the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.[14]

This Section makes a clear distinction between schedules to the *Ballot Act* and the body of the Act. As expected, the body of the Act itself sets out the overarching method and rules for conducting the election such as the use of secret ballot and what cannot be used to invalidate an election.[15] The schedules, on the other hand, discuss procedural guidelines in more detail including specifications such as how to determine the election date and hours,[16] where and how to set up polling stations[17] and the forms to be used in the various stages of the election process.[18]

The wording of Section 13 emphasizes the predominant importance of the provisions of the Act or the overarching method and rules that are to be abided by and only allows a breach of the Schedules to the Act to be used as a reason to invalidate the election if the election was not conducted in accordance with the Act itself.[19] In other words, the broader theme of electoral reform that the Act was attempting to establish is more important than procedural deficiencies or technicalities. While this Section reaffirms the idea that the courts should not change the outcome of an election, it only preserves this very general principle where there has been compliance with the broader purpose of the Act itself. Therefore, it is the authors' view that this section on which Section 83 of Kenya's *Election Act* is based was aimed at minor procedural infractions and how they should not be used to invalidate an election.

It is also instructive to see how English case law has treated the provision on which Section 83 of the *Elections Act* is based. The leading case, which would

13 For example, see Nigerian case: *Abubakar v. Yar'Adua* (2009) All FWLR (Pt. 457) 1 S.C.; Ugandan case: *Rtd. Col. Dr. Kizza Besigye* v *Electoral Commission,Yoweri Kaguta Museveni* (Election Petition No.1 of 2006) (2007) UGSC 24; Indian Case: *Vashist Narain Sharma* v *Dev Chandra And Others* (1954) 1954 AIR 513, 1955 SCR 509; and Antiguan and Barbudan case: *Quin-Leandro* v. *Jonas, Maginley* v. *Fernandez* and *Spencer* v. *Simon* (HCVAP Nos. 2010/018, 2010/019 and 2010/020) (2010), http://www.eccourts.org/wp-content/files_mf/jacquiquinnlenadrovdeanjonaselectionpetitionsfinal69.pdf.

14 *Ballot Act* Section 13.

15 *Ballot Act* Sections 2 and 13 respectively.

16 *Ballot Act* Schedule 1 Section 2.

17 *Ballot Act* Sections 3 and 15-17.

18 *Ballot Act* Schedule 2.

19 See also Katiba Institute, *Submissions of Katiba Institute – Petition No.4 of 2013* [Never Filed] (2013) Kenyan Asian Forum, http://www.kenyanasianforum.org/site/submission-on-behalf-of-the-katiba-institute-as-amicus-curiae-to-the-supreme-court-of-kenya/?fb_source=pubv1, at 11 November 2015.

later influence electoral jurisprudence in most common law jurisdictions, is *Morgan and others v Simpson and another*.[20] The provision addressed in *Morgan v Simpson* was Sub-section 37(1) of the *Representation of the People Act*,[21] which states:

> No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.[22]

Again, this provision is very similar to Section 83. In *Morgan v Simpson*, the main point of contention concerned the rejected ballots. On inspection of the rejected ballots, it was discovered that many were rejected where the polling officers had failed to stamp an official mark on each ballot paper. This omission was reflected in 44 instances in 18 polling stations. When the matter came up for determination, the Divisional Court of the Queen's Bench Division held that the election was conducted substantially in accordance with the law because, the mistakes notwithstanding, the results were not affected. However, the Court of Appeal nullified the decision of the Divisional Court concluding that "although the election was conducted substantially in accordance with the law, nevertheless, the mistake in not stamping 44 ballot papers did affect the results. So the election is vitiated. The election of Mr Simpson must be declared invalid."[23]

The facts in *Morgan v. Simpson* reaffirm that this often-quoted case is about an election that was challenged due to a technicality. It follows that any legal rule resulting from this decision concerns what to do where such a minor infraction of election rules is alleged. It is also interesting to note that according to the direct quote from *Morgan v. Simpson*, the wording of the British sections was held to mean that an election could be invalidated where the technicality satisfied only one of the conditions, either the election was not in substantial compliance with the law or the election results were affected. Both conditions

20 *Morgan and others v Simpson and another* (1974) 3 All ER 722 [hereinafter *Morgan v Simpson*].

21 *Representation of the People Act 1949* (United Kingdom) [hereinafter *Representation of the People Act*].

22 *Representation of the People Act Section 37* subsection (1).

23 *Morgan v Simpson*.

were not fulfilled and it was held that they both need not be fulfilled in order to invalidate an election.

3.0 What Does Section 83 of the Elections Act Mean?

Turning back to Section 28 of the repealed *National Assembly and Presidential Elections Act*, the predecessor to Section 83 of the Elections Act, it is fair to state that a plain reading suggests that it applied to where there was a technical deficiency, but not a substantive one. A plain reading of legislation is where the words are taken at face value.[24] This approach is generally preferred as the first step in determining the meaning of a section. Usually, other methods of statutory interpretation are only necessary where the plain meaning results in ambiguity or absurdity. Section 28 therefore should only have applied where an elections statute was not complied with or breached. As a result, the election results should have been valid if an elections statute was breached yet the election was still run substantially in accordance with the elections statute. Additionally, an election result would stand where the failure to comply with the elections statute did not affect the election outcome. Put another way, under Section 28, an election would not be voided for a mere technicality if it was run substantially in compliance with the elections statute or the technicality did not affect the election's outcome.

However, what is a technicality? A technicality can be defined as "a small detail in a rule, law, etc., and especially one that forces an unwanted or unexpected result"[25]. The word technicality seems to be the most apt word to describe a situation where it can be said that an election breached legislation but it was still substantially in compliance with that same legislation. A technicality occurs where one specific requirement was not met; however, overall the election was conducted properly. Perhaps a good example of a technicality in the Kenyan context would relate to the opening and closing time of the polling station. Clause 66 of the *Elections General Regulations*[26] states that the voting time on an election day is between six o'clock in the morning to five o'clock in the evening. If the polling station, due to an administrative hitch, opens at seven o'clock in the morning and still closes at five o'clock in the

24 Legal Information Institute, *Lex Legal Encyclopaedia entry for Statutory Interpretation* Legal Information Institute, https://www.law.cornell.edu/wex/statutory_construction, at 26 October 2015.

25 Merriam-Webster Online Dictionary *Entry for Technicality* Miriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/technicality, at 2 October 2015.

26 Elections General Regulations 2012 (Kenya).

evening, the law is breached. Yet, where there is no evidence that opening the polling station late prevented people from voting, it would be reasonable to hold that the delay in opening the polling station was a technicality.

By adding the four additional words that were inserted into the present Section 83 of the *Elections Act* in order to comply with the *2010 Constitution*, the plain language meaning becomes 'an election cannot be voided for a mere technicality if it was substantially in compliance with the Constitution and the elections statute or the technicality did not affect the election's outcome'. By virtue of the fact that Section 83 mentions the election being in substantial compliance with the Constitution and the written law, it would follow that the Constitution is not included in the written law because the drafters felt the need to identify it separately. Therefore, if one is proposing that an election was not compliant with or breached the *2010 Constitution* (as were the petitioners in *The Raila Odinga Case*), Section 83 does not have any bearing on the matter because it only applies where an election breaches the written law or statute regarding elections. Ironically, due to the way Section 83 of the *Elections Act* was drafted, the 2010 Constitution, with its elaborate provisions on elections, is excluded from the "written law". Moreover, the section that was amended to take the *2010 Constitution* into account, does not apply to situations where it is alleged that an election was in breach of the *2010 Constitution*.

Because the legal test articulated in Section 83 of the *Elections Act* does not apply to constitutional contraventions, one must return to the *2010 Constitution* to determine the required constitutional standard for a valid election in Kenya. Yet, to fully understand the electoral provisions of the *2010 Constitution*, one must first appreciate the history of elections in Kenya.

4.0 The History of Elections in Kenya

One of the key areas that Kenyans were keen to see transformed through a new constitution was the electoral system or the way elections are conducted.[27] In many ways, it was the manipulation of the electoral system that began Kenya's legacy of bad governance where civil rights were often curtailed. In the years after independence, Kenya's first President Jomo Kenyatta worked to diminish and eventually obliterate the opposition parties. Kenyatta and his ruling

27 Constitution of Kenya Review Commission (CKRC), *The Final Report of the Constitution of Kenya Review Commission* (2005) 173 [hereinafter *Final Report of CKRC*].

party, the Kenya African National Union (KANU), "could no longer tolerate opposition politics and therefore, enticed and cajoled the only opposition party – the Kenya African Democratic Union (KADU) to disband in 1964 and join KANU".[28] Similarly in 1966, when Jaramogi Oginga Odinga together with a number of social democrats formed the Kenya People's Union (KPU), Kenyatta not only banned the political party, but also targeted the individuals behind it for persecution.[29]

Following the death of Jomo Kenyatta in 1978, his Vice-President, Daniel Toroitich Arap Moi, became president. By and large, President Moi continued to manipulate the electoral system to ensure political control of the country. For example, in 1988 Moi abolished voting by secret ballot and replaced it with the mlolongo system.[30] A *mlolongo* is a line up in Kiswahili and hence this voting system required that voters line up behind their preferred candidates or agents. *Mlolongo* was conceptualized largely to help identify those voters that were anti-Moi.[31] At the time, the provincial administration and Kenya Police were effectively in charge of managing elections. With *mlolongo*, they were able to identify voters who did not support the President's preferred candidates. These dissenters were often victimized.[32] Still, because Moi was unwilling to accept defeat, there were ubiquitous reports of the candidate with the shortest line being declared the winner.[33]

28 A. E Omukada, 'The Ruling Party in Competitive Elections: The Dialectics of Incumbency in Kenya' in L Chweya (ed), *Electoral Politics in Kenya* (2002) 76, 79.

29 A. E Omukada, 'The Ruling Party in Competitive Elections: The Dialectics of Incumbency in Kenya' in L Chweya (ed), *Electoral Politics in Kenya* (2002) 76, 79.

30 See W Mugo, 'How "Mlolongo" System Doomed Polls', *The Standard*, (Nairobi) 20 November 2013. Available online at, http://www.standardmedia.co.ke/kenyaat50/article/2000098159/how-the-mlolongo-system-doomed-polls, at 7 October 2015.

31 See W Mugo, 'How "Mlolongo" System Doomed Polls', *The Standard*, (Nairobi) 20 November 2013. Available online at, http://www.standardmedia.co.ke/kenyaat50/article/2000098159/how-the-mlolongo-system-doomed-polls, at 7 October 2015.

32 F A Aywa, 'Kenya', in AfriMap and Open Society Initiative of Eastern Africa, *Election Management Bodies in East Africa* (2015) 67, 73. The participation of public officials would, for example, prompt the inclusion of a provision prohibiting their participation in 1997 in the *National Assembly and Presidential Elections Act* – See Section 17B which statesthat "No public officer shall— (a) engage in the activities of any political party or act as an agent of any such party; or (b) publicly indicate support for or opposition against any party or candidate participating in an election under this Act or under the Local Government Act. (2) A public officer who contravenes any of the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or to both".

33 See W Mugo, 'How "Mlolongo" System Doomed Polls', *The Standard*, (Nairobi) 20 November 2013. Available online at, http://www.standardmedia.co.ke/kenyaat50/article/2000098159/how-the-mlolongo-system-doomed-polls, at 7 October 2015.

Throughout the 1980's, Kenyans started calling for elaborate political and electoral reforms and this outcry was amplified after the introduction of the mlolongo system. By 1990, the demand for political and electoral reforms had grown so strong that Moi and KANU were forced to bow to public pressure to allow Kenya to become a multiparty democracy the following year.[34] Unfortunately, the multiparty policy proved to be a token gesture without any bona fide electoral reform and consequently Moi still exerted great control over the management of elections. Accordingly, the campaign for electoral reform was increasingly heightened by civil society and the political opposition and formed part of a broader crusade for overarching constitutional reform. Their 1997 mantra "no reforms no elections"[35] meant there was a real possibility that the upcoming election would be seen to lack credibility. As a result, Moi began to negotiate with the opposition, eventually agreeing on a minimum electoral reform package to be implemented before the election date.[36] The critical component of these reforms - dubbed the Inter Parties Parliamentary Group (IPPG) reforms - was to appoint an independent electoral commission where the opposition would participate in proposing possible commissioners.[37]

Even with these minor electoral reforms, the opposition was not able to defeat Moi in the 1997 elections. Frustrated by the loss, the opposition teamed up with civil society (which had refused to endorse the IPPG process) to demand comprehensive constitutional reforms. In response to this continued public pressure, Moi constituted the Constitution of Kenya Review Commission (CKRC) in 2000.[38] The CKRC process highlighted the need for electoral reform and indeed, one of the Commission's specific mandates was to "examine and recommend improvements in the electoral system".[39] As such, the requirements and principles reflected in Articles 81 and 86 of the *2010*

34 See R M Press, 'Kenya's Moi Bows to Calls For Multiparty Elections' (1991) *The Christian Science Monitor Online*, http://www.csmonitor.com/1991/1204/04041.html, at 8 November 2015.

35 See W Mutunga, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (1999) 171, 320.

36 See W Mutunga, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (1999) 201.

37 See W Mutunga, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (1999) 201.

38 See W Mutunga, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (1999) 201.

39 *See Constitution of Kenya Review Act* 2008, Rev. 2009 s 17; *Final Report of CKRC*.

Constitution were added to the CKRC draft Constitution.[40] Yet, it was the Proposed 2005 Constitution (often referred to as the Wako Draft), which was rejected in the October 2005 referendum that further refined the current electoral standards and principles contained in the *2010 Constitution*.[41]

The importance of a credible electoral system became crystal clear in the aftermath of the 2007 general elections. There were numerous electoral malpractices committed during the general elections of 2007 and worse, very little transparency to the process.[42] The Commission of Inquiry on Post-Election Violence (CIPEV), while not blaming the violence fully on the mismanagement of the election, did recognize that it served as a trigger. With respect to the violence in Mombasa, the CIPEV found:

> From the various witnesses, we were able to establish that the trigger for the chaos that rocked the region was the declaration of President Mwai Kibaki as the winner coupled with the suspicious manner in which the Electoral Commission handled the situation.[43]

It was, however, the Independent Review Commission on the General Elections held in Kenya on the 27 December 2007 (IREC), appointed to independently review the 2007 elections, which exposed the chaos of Kenya's electoral

40 For example, see Constitution of Kenya Review Commission (CKRC), *National Constitutional Conference Draft Constitution (Bomas Draft)* (2004), Clause 104. It provided that:

104. At every election, the Electoral and Boundaries Commission shall ensure that –

(a) the voting procedure is simple;

(b) where a ballot box is used, it is transparent;

(c) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at the polling station;

(d) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer;

(e) special arrangements are made to accord members of the Kenya Defense Forces, the Kenya Police and Administration Police, staff of Kenya's diplomatic missions, citizens outside Kenya, prisoners, election officials and patients in hospitals the opportunity to vote; and

(f) appropriate structures and mechanisms to eliminate all forms of electoral malpractice are put in place, including the safe keeping of all election materials. Given that these are footnotes, these points need not appear as a list as take from source. It can be modified so as to push the sentences to follow each other so that it occupies less space.

41 For example, see Parliament of Kenya, *Draft Constitution of Kenya (Wako Draft)* (2005), Clause 107. This clause provided for principles of the electoral system which included:

107(e) fair elections which are –

(i) free from violence, intimidation, improper influence and corruption;

(ii) conducted by an independent body; and

(iii) administered in an impartial, neutral, transparent, accurate, efficient and accountable manner.

42 For a detailed discussion on electoral malpractices during the 2007 elections, see K. Njogu (ed), *Defining Moments: Reflections on Citizenship, Violence and the 2007 Elections in Kenya,* (2011).

43 See Commission of Inquiry on Post Election Violence (CIPEV), *The Final Report* (2008) 224, http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf, at 30 September 2015.

system and its management. The IREC found that the Electoral Commission of Kenya (ECK) had been incompetent, lax and at times out rightly negligent in its management of the presidential and some parliamentary elections.[44] It also found that the:

> [M]anner of appointment of commissioners and the structure, composition and management system of the ECK … [were] materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it."[45]

IREC found that "(i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results [were] so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible".[46] The Commission concluded that the constitutional, institutional and legal framework for elections in Kenya was so weak that it required an overhaul to enable it to address the "culture of electoral lawlessness."[47]

Throughout the initial phases of constitution making in the 1990s and 2000s, Kenyans had identified electoral process and conduct of elections as a key issue that ought to be addressed in a new constitution by providing for safeguards that encouraged free and fair elections. The findings of both the CIPEV and the IREC bolstered the public's belief that abuse of process was rampant in the elections and reaffirmed the need to entrench elaborate electoral standards in a new constitution.

5.0 The Election Provisions of the 2010 Constitution

Out of Kenya's history of electoral injustices was born Chapter 7 of the *2010 Constitution*, which contains elaborate provisions on elections. It features two explicit provisions that lay out the principles with which the electoral system must comply as well as the minimum acceptable norms for the voting process. Specifically, Article 81 sets out the guiding principles for elections:

General principles for the electoral system

44 Independent Review Commission (IREC), *Report of the Independent Review Commission on the General Elections held in Kenya on the 27 December 2007, Nairobi* (2008) [hereinafter Report of the IREC; also known as the Kreigler Report].

45 *Report of the IREC* 10.

46 *Report of the IREC* 10.

47 *Report of the IREC* 22.

81. The electoral system shall comply with the following principles-

a) Freedom of citizens to exercise their political rights under Article 38;
b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;
c) Fair representation of persons with disabilities;
d) Universal suffrage based on the aspiration for fair representation and equality of vote; and
e) Free and fair elections, which are-
    i. By secret ballot;
    ii. Free from violence, intimidation, improper influence or corruption;
    iii. Transparent; and
    iv. Administered in an impartial, neutral, efficient, accurate and accountable manner

Article 81 is based upon international standards for democratic elections including the right to free expression of political will, the right to self-determination, the inalienable right to vote, the right to run for office and the right to genuine elections conducted without any undue influence over voters. Alongside these political rights, two clauses in Article 81 refer to the promotion of groups that have traditionally been marginalised by ensuring steps are taken toward gender equality and inclusion of persons with disabilities in the political process. Specifically, these principles can be found in international legal instruments to which Kenya is a party such as the *International Covenant on Civil and Political Rights,*[48] the *Declaration of Principles for International Elections Observers and Code of Conduct for International Elections Observers*[49] *and the African Charter on Democracy, Elections and Governance.*[50]

The *ICCPR* requires all state parties to undertake to enact laws to recognize the rights set out therein.[51] Affirming this commitment, Article 2 of the *2010 Constitution* not only incorporates the general rules of international law into

48 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, UNGA res 2200A (XXI), entered into force 23 March 1976 [hereinafter ICCPR).

49 *Declaration of Principles for International Elections Observers and Code of Conduct for International Elections Observers and Code of Conduct for International Elections Observers*, offered for organizational endorsement July 2005, UN (New York), commemorated 27 October 2005.

50 *African Charter on Democracy, Elections and Governance,* adopted 30 January 2007, 8th Ordinary Session of the Assembly, has not yet been ratified.

51 See *ICCPR* Article 2(2).

the body of Kenyan law, all international legal instruments that have been ratified by Kenya form part of the *2010 Constitution.*[52]

It is important to note that the *2010 Constitution* makes repeated use of general principles that direct the implementation of specific constitutional frameworks. The enumerated general principles are key concepts to consider when interpreting any constitutional provision.[53] Because the *2010 Constitution* itself identifies these general principles and states that the document should "promote its purposes, values and principles",[54] they become the preeminent instruments of constitutional interpretation. In fact, the general principles pertaining to the electoral system serve as another check on the state's power regarding elections. As Lumumba and Franceschi observe, this limitation on state power stems directly from the values and concerns of the people of Kenya:

> … [E]lections and electoral processes in any country require a strong legal framework. Article 81 lays down normative constitutional safeguards for an electoral system, which the people of Kenya can trust. It captures the essence of all structural safeguards upon which the electoral system are to be built and implemented. The principles are specific to the electoral process and stem from some of Kenya's national values and principles of governance among them the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalised, good governance, integrity, transparency and accountability.[55]

Article 10 of the *2010 Constitution* sets out the values and principles of governance which may form an additional level of scrutiny for constitutionality, yet it is the principles pertinent to the elections process that form the legal test as to whether an election is constitutional. This legal test will be further explored below.

In addition, Article 86 charges the Independent Electoral and Boundaries Commission (IEBC) with ensuring that voting takes place in accordance with specific guidelines:

52 See *2010 Constitution*, Articles 2(5) and (6).

53 N Hedling, 'Chapter 2: Principles and Cross-Cutting Themes' in M Böckenförde, N Hedling and W Wahiu (eds), A Practical Guide to Constitution Building (2001) 45,49.

54 *See 2010 Constitution*, Article 259(1)(a).

55 PLO Lumumba and L Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (2014) 315 [hereinafter *An Introductory Commentary*].

Voting

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that-

a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
d) appropriate structures and mechanisms to eliminate electoral malpractice put in place, including the safekeeping of election materials.

These guidelines for voting go beyond denoting general principles and specifically charge a government body with fulfilling certain requirements. Nevertheless, they are still based on international legal instruments by which Kenya is bound.[56]

6.0 What is the 2010 Constitutional Threshold for Valid Elections in Kenya?

Articles 81 and 86 are central to resolving electoral disputes because they provide a constitutional threshold for an election. They accomplish this by setting out the compulsory minimum standards for a valid election and by demarcating the limits of state power in the election period. The word threshold is used purposefully because these constitutional principles are minimum standards. Article 81 states that the electoral system "must comply" with the election principles and Article 86 states that the IEBC "shall ensure" that the voting process is carried out according to that provision. In addition, given the importance of constitutional principles generally in capturing the purpose of the 2010 Constitution and aiding in its interpretation, an action that contravenes a constitutional principle should at first brush be considered unconstitutional, excepting only where multiple constitutional principles must be balanced against one another. Finally, the 2010 Constitution provides that the general rules of international law and Kenya's ratified international legal instruments are binding in Kenya.[57] It follows that these electoral principles and the resulting constitutional standard must be complied with in

56 *ICCPR; Declaration of Principles for International Elections Observers and Code of Conduct for International Elections Observers; and African Charter on Democracy, Elections and Governance*.

57 See *2010 Constitution*, Article 2(5) and (6).

the most complete sense. These articles could not be more clear as to what the paramount considerations should be when the courts are asked to review the process or results of an election in Kenya.

While the exact meaning of these constitutional principles is not defined in a strict sense, the overarching ideals are clear. Yet, the constitutional standard for elections articulated here is not by any means final. As with any statute, the meaning of Articles 81 and 86 will continue to evolve as post-2010 Constitution election jurisprudence considers various facets of the constitutional threshold for elections. In the cases to come, the Kenyan experience will continue to shape the legal test in this on-going interpretation process. It is the Kenyan courts that will embellish the threshold test for elections in Kenya based on the electoral principles spelt out in the *2010 Constitution* as perceived through the Kenyan experience. In this way, Kenya's history of elections will be central to interpreting Articles 81 and 86. As a result, the legal electoral landscape in Kenya has changed and any election held after the promulgation of the *2010 Constitution* must meet this new constitutional threshold. For certainty, no subsidiary legislation can alter or modify this legal test because the 2010 Constitution is the supreme law in Kenya and any attempt to do so would be unconstitutional.[58] Moreover, any pre-2010 or foreign electoral jurisprudence can only be utilised in the legal analysis of an election when viewed through this new constitutional lens.

As the Chief Justice of Kenya, Willy Mutunga has stated, the *Supreme Court Act*[59] requires that Kenya's highest court decide legal and constitutional matters with due regard to the history, culture and circumstances of the people of Kenya.[60] The Chief Justice stresses the importance of these non-legal factors as crucial to interpreting any portion of the *2010 Constitution*, including those provisions relating to elections:

> The emphasis on free and fair elections, through an electoral system that is simple, accurate, verifiable, secure, accountable and transparent, in Articles 81(e) and 86 of the Constitution, has a rich Kenyan historical, economic, social, political, and cultural context. Article 86(b), for example,

58 *2010 Constitution*, Article 2(4).
59 *Supreme Court Act 2011* (Kenya) [hereinafter *Supreme Court Act*].
60 *Supreme Court Act* Section 3(d).

> provides that the votes cast are to be counted, tabulated, and results announced promptly by the presiding officer at each polling station. This is because our electoral history is rife with malpractices that occur during the transportation of ballot boxes from polling stations to constituency counting-centres. It is therefore no coincidence that many of the petitions filed in the High Court, before the promulgation of the 2010 Constitution, gave lurid details of the stuffing of ballot boxes, or discarding of them en route to the constituency counting-centre. At the constituency counting-centre itself, votes disappeared when lights, either by design, negligence, or power-outage, went off. Our elections were therefore not free, fair and peaceful (see Charles Hornsby, *Kenya: A History Since Independence* (I.B. *Tauris, 2013*)).

Another example of our Constitution's emphasis on the integrity of elections is found in Article 81(e)(ii), which enshrines an electoral system that is free from violence, intimidation, improper influence or corruption. Again our history is replete with examples that would make the Eatandswill election in Charles Dickens' *The Pickwick Papers* (*1836*) look like child's play. Kenya's current Constitution reserves no place to the economic, social, cultural and political manifestations associated with our dim electoral past.[61]

Nevertheless, the first step in interpreting constitutional election principles is to look at the text setting out these principles. Articles 81 and 86 address the manner in which elections should be carried out in surprising detail. These provisions stress inclusiveness, fairness, transparency, accountability, the deterrence of corruption and a respect for the electoral process. Many of these principles are found in Article 10 of the 2010 Constitution, which sets out the national values and principles of governance, which guide all state actions. Articles 81 and 86, however, are pointed in how these principles apply to the electoral process. The resulting minimum standard reveals the importance that the *2010 Constitution* places on the election process itself.

Due to a history of election rigging, Kenyans are naturally sceptical of election results. If Kenyans are to accept the outcome of an election, they must feel that the process was conducted in accordance with strict rules. Accordingly, Article 86 sets out specific rules to be followed at every polling station. The detailed criterion outlined in Article 86 is meant to provide indicators as to whether an

61 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR (Supreme Court of Kenya Petition 2B of 2014) para. 235 to 237 [hereinafter *Munya v Mwenda*].

election is constitutional and consequently that the results can be relied upon to create public confidence that the election was free and fair. As stated in the Report of the IREC (also known as the Kriegler Report), which examined the electoral process after the aftermath of the 2007 general election, a validated process means that people don't need to rely purely on the trustworthiness of electoral officials which has proven all too easy to manipulate in the past:

> Integrity in systems or processes such as electoral management refers to systemic safeguards, which aim at reducing the need for personal integrity. It might even be argued that systemic integrity is what separates acceptable management, and therefore safety, from disaster.[62]

As already noted, the *1969 Constitution* did not address the electoral process and yet the *2010 Constitution* stresses process in no uncertain terms. A fair process is important in itself regardless of electoral results. The concept of process being important in and of itself is found in many legal contexts. Legal process is often used to promote fairness and serve as a check on state power. It can be an important criterion when a court is evaluating the actions of a state actor.

In order to ensure that government powers are exercised fairly over individuals, government agencies are bound to abide by the administrative law concept of procedural fairness and their decisions are subject to varying degrees of review. Procedural fairness is concerned with the procedures used by a government agency rather than any outcome reached.[63] A new hearing or decision-making process may be ordered where an individual was not accorded sufficient procedural fairness in the circumstances, such as the rights of reply and disclosure. In other words, the actual process (and resulting decision) can be invalidated solely because of a lack of integrity in the hearing process or the way in which a decision was reached.[64] The process of adjudicating a person's case, no matter the subject matter, is valued so highly that if a decision was arrived at in a manner incongruent with the laws of procedural fairness, the decision is quashed and a new process must begin afresh.

Similarly, in the criminal law context, the law in most commonwealth countries

62 Report of the IREC 115.

63 R Macdonald, 'Judicial Review and Procedural Fairness in Administrative Law :I ' (1980) 25 *McGill Law Journal*, 520, 537.

64 *An Introductory Commentary* 321. However, note that the quote taken from *Morgan v Simpson*, actually supports this proposition although it is said to refute it in this passage.

will prevent evidence that was obtained improperly from being introduced at trial even if the evidence proves a person's guilt. If a court cannot prove guilt without improperly obtained evidence, the accused person will be let go. Such drastic measures are taken to protect the integrity of the investigation and trial process. In each of these contexts, the concept of fairness is being protected to encourage government actors to abide by the appropriate legal standard. There are penalties for the state where it cannot show that this standard was upheld. The same should be true with elections. Once an election is challenged, the government, through the IEBC should show that the election met the constitutional threshold; otherwise, the election will be declared invalid.

To summarize this discussion, while one may not be able to prescribe a succinct and strict legal test in these early days of the *2010 Constitution*, there are clear beacons that point to a constitutional threshold for valid elections. As discussed above, general principles are often used in constitutions to provide an interpretation guideline to apply to future circumstances and indeed the development of legal tests. Articles 81 and 86 serve this purpose. The mandatory language used in these articles makes it clear that these constitutional provisions must be complied with wholeheartedly and that these principles create a minimum standard or threshold. While these principles will continue to be interpreted in the context of the Kenyan experience as the post-2010 Constitution election jurisprudence develops, it is apparent that the proper administration of the election process is key. It is also evident that international standards as well as Kenya's election history informed the principles contained in Articles 81 and 86. Therefore, the constitutional election threshold requires that the electoral process be respected and conducted in accordance with the constitutional principles of a free and fair election, one that is impartial, inclusive, transparent, accountable, free of undue influence and deters corruption and malpractice.

7.0 How the Supreme Court of Kenya Got the Constitutional Threshold for Valid Elections Wrong in the 2013 Presidential Election Case[65]

Having discussed a preliminary constitutional threshold for a valid election in the previous section, the question that follows is did the Supreme Court

65 *The Raila Odinga Case.*

apply it in its decision in *The Raila Odinga Case?* As discussed above, the *2010 Constitution* requires that the electoral process be respected and carried out according to the principles of a free and fair election that is impartial, inclusive, transparent, accountable, free of undue influence and deters corruption and malpractice. Did the 2013 presidential election case reflect this minimum standard? Unfortunately, the Supreme Court failed to utilize the elections threshold articulated in the *2010 Constitution* and clouded the issue on a number of fronts. The Supreme Court instead appropriated an ambiguous election standard originating outside of the 2010 Constitution, seemingly from Section 83 of the *Elections Act*, rather than analyzing the applicable constitutional provisions in Chapter 7. In doing so, the Court did not recognize the importance placed on the electoral process itself, used comparative jurisprudence inappropriately and confused the applicable burden and standard of proof.

It is worth commenting that the Supreme Court highlighted the importance of this decision as "the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution"[66] and referenced its role as superintendent of the *2010 Constitution*.[67] In fact, Kenyan Supreme Court Justice Jackton Ojwang has commented that:

> [b]y its unique character, by its far-reaching political significance, and by the institution-creating moment at which it occurred, this case provided a singular opportunity for the apex court to establish a juridical threshold, in the consolidation of democratic governance, regulated by law.[68]

Ironically, the Supreme Court missed the 'opportunity' because it did not perform its own in-depth analysis of Articles 81 and 86 in order to establish the new threshold for valid elections under the *2010 Constitution*. As constitutional superintendents, all Kenyan courts must concern themselves with whether an election is constitutional as per the very yardstick provided. While the decision mentions the words "constitutional principles" in numerous places, there is no analysis of what these principles specifically are and more pointedly, what they mean in an effort to enunciate a clear legal test for the constitutionality of an election. In fact, another so-called principle is invoked, that of protecting the voters' electoral rights, which, ironically, cannot

66 *The Raila Odinga Case* para. 177.

67 *The Raila Odinga Case* para. 177.

68 J B Ojwang, 'Electoral Justice in Kenya: Resolving Disputes in a New Democratic Dispensation' in K Njogu and P W Wekesa (eds), *Kenya's 2013 General Election: Stakes, Practices and Outcomes* (2016) 308, 318.

be realized if, the election was not free and fair in the first place. The starting point must always be the applicable articles of the 2010 Constitution itself. Without this analysis, the Court does not address how the 2010 Constitution affects the use of the Section 83 test. It is unclear whether the Supreme Court Justices even put their minds to these pertinent issues.

In *The Raila Odinga Case*, the first petitioner proposed that the test for a valid election set out in the UK case of *Morgan v Simpson* formed part of Kenyan law:

> if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected… [and] … submitted that the above standard has been adopted in our laws, and is therefore part and parcel of our local [Kenyan] jurisprudence.[69]

Undoubtedly, the haste with which the Petitioner invoked this standard and the speed with which the Court was willing to adopt it, precluded an opportunity for a thorough re-examination of the appropriateness of the legal test, which had been introduced to Kenya via the common law, to the new legal framework created by the *2010 Constitution*. Interestingly, the Supreme Court does not explicitly rely on Section 83 of the *Elections Act*, but instead mixes the standard for a valid election with the required standard of proof. The Court finds that where it is alleged that the electoral law has been complied with, the Petitioner must not only show non-compliance but also that this non-compliance affected the validity of the elections. It is difficult to know what the Court means by "validity of the elections" here; though indication as to how this term is understood by the Court is provided in the conclusion of the decision:

> [i]n summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not evident*, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.[70]

69 *The Raila Odinga Case* para. 179.

70 *The Raila Odinga Case* para. 306.

This paragraph provides some clarity, as the Supreme Court has evidently based its decision on first, whether there was a profound non-compliance with the law that gravely breached a candidate's ability to participate in the election, and second, whether the non-compliance affected the outcome of the election. This test is reaffirmed in the Supreme Court's later decisions addressing electoral disputes where reference is also made to the results of the election.[71] Thus, the threshold for invalidity is raised to where the effect on the results becomes the ultimate test when the Court asks itself "[d]id the Petitioner clearly and decisively show the conduct of the election to have been *so devoid of merits,* and *so distorted, as not to reflect the expression of the people's electoral intent?* It is this broad test that should guide us in this kind of case".[72] In other words, the Supreme Court has continued to use the common law approach that was used in Kenya prior to 2010. However, the Court actually made the test more stringent by requiring proof of the non-conformity along with proof that it affected the results of the election. It also raised the bar for the petitioner's case to meet by using terms such as "devoid of merit" and "so distorted" rather than irregularity.

In short, Section 83 has now been transformed from a rule applying to technicalities to one requiring a petitioner to provide proof of an irregularity that so distorts an election that the result is affected. Consequently, the Supreme Court's interpretation of Section 83 is unconstitutional because it fails to appreciate the *2010 Constitution's* requirements for elections, which the section was redrafted to incorporate. Even if the *2010 Constitution* is taken to be part of the electoral law, a violation only counts where the results are affected. Such a reading of Section 83 vitiates everything that the *2010 Constitution* tries to accomplish, because it does not take into consideration the emphasis placed on a fair and proper process and allows the end to justify the means. The effect on the election result becomes the focus rather than the election process itself. Yet, the focus on the actual effect on the results is deceptive because if the process is flawed, in most situations, the actual effect on the results is unknown. For example, if ballot boxes are not secure or the tallying process is not wholly impartial, it cannot be known how the results were affected. *Morgan v Simpson* featured a fact scenario where the effects on the results were easily quantifiable; however, that is rarely the case.

71 See for example Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others (2014) eKLR (Petition No. 4 of 2014 at the Supreme Court of Kenya) para. 126 [hereinafter *Obado v Oyugi*].

72 *The Raila Odinga Case* para. 304.

In addition, the way in which the Supreme Court's decision utilises comparative jurisprudence is troubling for many reasons. Because the *2010 Constitution* involved a long public participation process and was designed to remedy the past election challenges that Kenya had faced as a nation, it is very important to use comparative jurisprudence cautiously. The history, culture and values of a country necessarily inform a country's election jurisprudence and foreign case law cannot be adopted without careful analysis as to whether it is sufficiently similar to be of use. The Supreme Court in *The Raila Odinga Case* adopted the general common law approach that all acts are presumed to be done rightly and regularly.[73] Applying this presumption ignores Kenya's electoral history where malpractice has been rampant and is therefore inappropriate to use in the circumstances. It also flies in the face of Article 86, which creates an obligation on the IEBC to demonstrate the election complied with the standards set out therein. In addition, just because other jurisdictions employed one standard of proof in an election case, it does not necessarily follow that the same standard is applicable to a Kenyan election case. The appropriate standard of proof is not to be chosen from the options used in other jurisdictions[74] but rather must be determined within the local legal and historical context.

Finally, the Court's use of Section 83 makes it an insurmountable task to challenge a declared winner of an election and effectively insulates someone who may have benefited from a deficient (and unconstitutional) electoral process against a court challenge. Recall that the evidence concerning the votes cast is in the control of the IEBC. In fact, the seemingly elevated standard of proof that the Supreme Court requires also shields the IEBC from having to explain itself or disclose all the voting data and electoral process details which also goes against the *2010 Constitution's* clear purpose of making the election verifiable and all electoral officials accountable. It is important to view the courts as the *2010 Constitution* does, not as an unwelcome usurper of the electorate's power, but as a purposeful safeguard against fixing elections which has tainted a large part of Kenya's history as a democracy.[75] In reality, there

73 *The Raila Odinga Case* para. 196.

74 *The Raila Odinga Case* paras. 198-202.

75 W Maina, 'Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test', *The East African* (Nairobi), 20 April 2013, http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html, at 30 September 2015; See also, J Harrington and A Manji, 'Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013' (2015) *Journal of Eastern African Studies* 175, 180 [hereinafter Restoring Leviathan?].

should not be any restraint in the Court's investigation and pronouncement on electoral deficiencies.

What's more, the importance placed on a fair, transparent, accountable and inclusive process in the *2010 Constitution* greatly affects what the appropriate standard of proof might be. As a direct result of Kenya's history of election related violence, the people and the *2010 Constitution* greatly value a fair election process in order to promote peace. In this context, where there are deficiencies in the election process, it may not matter whether they occurred due to a party's intention or were just an unintended by-product of negligence. Accordingly, the authors disagree with the Supreme Court that any degree of *mens rea* must be proven.[76] Furthermore, if the Court is simply making a factual determination as to whether a fair process was employed in the election, the civil standard of proof, as opposed to the elevated one the Court alluded to in *The Raila Odinga Case*[77], should be sufficient.

Along the same line of reasoning, once the appearance of an impropriety in the electoral process is identified, the burden of proof must shift from the petitioner to the respondent, especially to the electoral management body, the IEBC, to show that in fact the process was fair. The provisions of the 2010 Constitution support this shift of burden to the extent that phrases such as verifiable, transparent and secure are objective criteria for evaluating the election. Sub-article 86(d) further supports this argument to the extent that it requires that "appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including safekeeping of electoral materials". It is unrealistic, perhaps even illogical, that private individuals would be expected to prove these criteria were not satisfied, especially when using an elevated standard of proof. Logic would have it that once a person questioning the validity of the elections, establishes a prima facie case that impeaches the election's validity, it is incumbent on the IEBC to at least establish that the requirements of article 86(d) were satisfied. Finally, the history of the *2010 Constitution* making belies a strong intention to ensure that the electoral management body had significant constitutional obligations to manage elections in a manner that inspired public confidence in the process and the outcome.

76 See the Court's comments in *The Raila Odinga Case* para. 256, where it states that "no credible evidence was adduced to show that such voter registration process irregularities were premeditated and introduced by the 1st Respondent, for the purpose of causing prejudice to any particular candidate".

77 *The Raila Odinga Case* para. 203.

The authors of this Chapter entirely disagree with the Supreme Court's interpretation of Section 83 of the *Elections Act*, but more importantly, there is disagreement over whether this section forms the basis for the test ascertaining if an election is constitutional or valid generally. Essentially, the problem is that the courts have been asking themselves the wrong question. The fact that the advocates in *The Raila Odinga Case* decision never adequately addressed what the appropriate legal test for the validity of an election should be in light of the 2010 Constitution may make it more difficult for the Court, but it does not excuse the Court from requesting the parties' input on the applicable test or engaging in its own analysis. Therefore, the real disappointment of this decision is this lack of rigorous constitutional analysis that is necessary to achieve the transformative objectives of the *2010 Constitution*.

8.0 How Have Other Post-2010 Constitution Election Cases Been Decided in Kenya?

There are two critical decisions that were appealed all the way to the Supreme Court which demonstrate how the misinterpretation of Section 83 of the Elections Act employed in *The Raila Odinga Case* has resulted in jurisprudence that is highly inimical to the aims of the *2010 Constitution*. These decisions relate to the election petitions brought in the gubernatorial contests in Meru and Migori counties. Unlike *The Raila Odinga Case*, which started and ended at the Supreme Court, these two decisions travelled up the judicial ladder. It is important to note that each level of court applied - or as the Supreme Court stated in reversing the decision of the Court of Appeal in both cases, misapplied – the legal interpretation, standards and tests developed in The *Raila Odinga Case*. In a nutshell, they illustrate how the Supreme Court decision in the 2013 presidential election petition has established an electoral jurisprudence that undermines the constitutional principles on elections.

8.1 Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others[78]

The challenge to the election of Peter Gatirau Munya as Governor of Meru was brought by a citizen, Dickson Mwenda Kithinji (Mwenda). Mwenda alleged among other things that "the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence,

78 *Munya v Mwenda.*

discrepancy in the results announced, and contraventions of the regulations governing elections."[79] Munya and the IEBC, on the other hand, argued that the election was free and fair and any non-compliance with the law that may have occurred was insignificant and did not have a material effect on the election outcome.[80] The High Court dismissed the petition by applying the test for validity used in *The Raila Odinga Case* that "where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections."[81]

Justice Makau, who heard the case, concluded:

> In the instant petition, the irregularities that the petitioner was able to establish following scrutiny and recount are not of such a nature that this court can come to a finding that they were so material as to affect the outcome of the results. … I find that the results of the scrutiny did not support the petitioner's assertion of massive irregularities that would lead to court to reach a finding that the results obtained from the said election ought to be nullified.[82]

The High Court analysis on how to resolve an electoral dispute and its conclusion above shows that the application of *The Raila Odinga* Case by lower courts has reduced the role of the courts in electoral disputes to a mechanical determination of who recorded the most votes. The net effect of *The Raila Odinga* Case decision was to discourage consideration of Kenya's historical impetus for electoral reforms and the constitutional electoral standards provided in Articles 81 and 86. Effectively, the courts resolved electoral disputes on the question of whether one can prove he or she scored more votes than one's opponent irrespective of whether the constitutional standards regarding the electoral process or the requirements of free and fair elections were followed.

The reasons the Court of Appeal gave in overturning the High Court decision in *Munya v Mwenda* are instructive. The Court of Appeal was between a rock and a hard place. On one hand were the constitutional principles emphasizing

79 *Munya v Mwenda* para. 2.

80 *Munya v Mwenda* para. 2.

81 *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others* (2013) eKLR (Election Petition No. 1 of 2013, Meru High Court).

82 *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others* (2013) eKLR (Election Petition No. 1 of 2013, Meru High Court).

the integrity of the electoral process over results and on the other was *The Raila Odinga Case* decision effectively stating that the results are the indicator for deciding whether a court should invalidate an election. This tension is especially apparent when one looks at the reasons why the Supreme Court overturned the Court of Appeal's decision in this case, elucidated below. If the Court of Appeal did understand the nuanced reading that should be accorded to Section 83, it did not express it, perhaps for good reason since its decision would have been seen to run afoul of Article 163(7) of the *2010 Constitution,* which requires lower courts to follow the law as set out by the Supreme Court. In the authors' view, however, the Court of Appeal had the right instinct on how electoral disputes should be resolved by first looking at whether there was compliance with the constitutional principles before embarking on the analysis of a statutory provision that speaks to invalidating electoral outcomes under very exceptional circumstances.

In the end, the Court of Appeal recited the law as set out in *The Raila Odinga Case*, but in effect did not apply it as per its findings:

> In ascertaining the qualitative aspects of the Meru gubernatorial elections, this Court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The Court has to consider whether the errors and irregularities identified sufficiently challenge the entire tallying process and lead to a legal conclusion that the tallying was not transparent, free and fair. It is not just a question of who got more votes than the other. The votes must be verifiable by the paper trail left behind.[83]

Ironically, the Court of Appeal seems to have borrowed this wording on the role of an electoral dispute resolution court from a judgment delivered by Musinga J (as he then was) regarding an electoral dispute relating to a parliamentary contest in 2008, *Manson Nyamweya v James Magara & 2 Others*.[84] Instead of limiting its review to the tallying of votes, the Court of Appeal in that case noted that:

> [I]t cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair

83 *Dickson Mwenda Kithinji v. Peter Gatirau Munya and Ors,* (2014) eKLR (Civil Appeal No. 38 of 2013 – Court of Appeal in Nyeri) para. 211.

84 *Manson Nyamweya v. James Magara & 2 Others* (2009) eKLR; The "mathematical puzzle" phrase is borrowed from a famous Ugandan case *Winnie Babihuga v. Masiko Winnie Komuhangi & Others*, HCT-00-CV-EP-0004-2001.

> election and that no party was prejudiced by an act or omission of an election official.[85]

In finding that the validity of an election was dependent both on the results and the election process, the Court of Appeal held that while the election was conducted substantially in accordance with constitutional standards, it should be nullified on the basis that it violated Articles 81(e)(iv) and (v) and Article 86 of the *2010 Constitution*.[86] In addition, the Court of Appeal found that the results were not accurate, verifiable and accountable and that the tallying process was not efficient and accurate.[87] This approach takes into account the issue that results cannot be taken at face value if a proper election process was not followed and is a standard that much more closely approximates the requirements of the *2010 Constitution*.

The *Munya v Mwenda* decision shows the enormity of the confusion and internal contradictions that the Supreme Court has created, even for itself, in electoral jurisprudence. Consider its finding that:

> [216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations there under, constitute the substantive and procedural law for the conduct of elections.[88]

The immediate and logical conclusion from this quote is that if the election is not conducted substantially[89] in accordance with constitutional principles in Articles 81 and 86, then the election is vitiated. However, in reversing the Court of Appeal, the Supreme Court states:

> In the instant case, we are of the opinion that the learned Judges of Appeal duly appreciated the legal effect of irregularities upon an election, though they erred in the manner in which they applied the test to the *dispute before them*. While the appellate Court took note of errors of entry and transposition of results in Forms 35 and 36, as shown on the record, they

85 *Dickson Mwenda Kithinji v. Peter Gatirau Munya and Ors*, (2014) eKLR (Civil Appeal No. 38 of 2013 – Court of Appeal in Nyeri) para. 211.

86 *Dickson Mwenda Kithinji v. Peter Gatirau Munya and Ors*, (2014) eKLR (Civil Appeal No. 38 of 2013 – Court of Appeal in Nyeri) para. 212.

87 *Dickson Mwenda Kithinji v. Peter Gatirau Munya and Ors*, (2014) eKLR (Civil Appeal No. 38 of 2013 – Court of Appeal in Nyeri) paras. 212 and 216.

88 *Munya v Mwenda* paras. 212 & 216.

89 The term "substantially" is not used in the 2010 Constitution, in reference to the requirements contained in Articles 81 or 86.

did not ask themselves the vital question. Instead, the question they posed for themselves (at paragraph 203) was:

"Should this Court shut its eyes to the identified errors and irregularities?"

Yet the question the learned Judges ought to have asked themselves was:

"Did these errors/discrepancies affect the result and/or the integrity of the election? If so, in what particulars?"[90]

The Supreme Court presumably posed the question as a means of imposing Section 83 of the *Elections Act* into the determination of whether the election was valid. Importantly, the *2010 Constitution* has no provision that provides for any circumstances where the requirements set out in Articles 81 and 86 are to be excused. In fact, as aforementioned, the mandatory language used in these provisions suggests just the opposite. By reading Section 83 as applicable to a situation where Article 81 and 86 requirements have not been met, the Court is effectively indicating that a statutory provision can amend or modify a constitutional provision. By requiring a litigant to show how any errors or discrepancies, even those relating to violations of Article 81 and 86 requirements, affected the results, the Supreme Court determined that violations of the 2010 Constitution alone cannot vitiate an election.

8.2 Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others[91]

While *Munya v Mwenda* was the first case to show, even without concise articulation, that there was something substantially wrong with the test set out in *The Raila Odinga Case, Obado v Oyugi* clearly articulated an alternative test that should be used to invalidate an election. The Court of Appeal accomplished this by starting with the supremacy of the *2010 Constitution,* requiring that elections be invalidated if there is a breach of the constitutional provisions relating to elections and then contextualizing the Morgan v. Simpson decision to show how the test applied in that case differed from Section 83. But most importantly, the Court of Appeal showed how the facts in *Morgan v Simpson* revealed that the case was not concerned with the non-compliance of an important electoral principle but with a technicality. The Court of Appeal's decision in *Obado v Oyugi* is also important because it started to unpack the content of the various phrases used in Articles 81 and

90 *Munya v Mwenda* para. 221.

91 *Obado v Oyugi*.

86 of the 2010 Constitution, something the Supreme Court failed to do in The *Raila Odinga Case*. It is the authors' opinion that the Court of Appeal decision in *Obado v Oyugi* provides the best example of electoral jurisprudence that should guide the resolution of electoral disputes after the introduction of the 2010 Constitution.

The situation in *Obado v Oyugi* replicates that in *Munya v Mwenda*. For example, one of the findings of the High Court related to the tallying of votes. The High Court found that tallying was not done accurately though conducted with openness with the net effect being that "in some instances the results for the candidates were interchanged and in others the candidates were given more than they had garnered. In others they were given less".[92]

In addition, there were numerous other findings that the Court of Appeal found problematic and difficult to reconcile with the requirements of the *2010 Constitution*. The Court of Appeal found that the doctrine of constitutional supremacy required that all constitutional obligations be complied with, failing which there is a violation of the *2010 Constitution*. In other words, the 2010 Constitution sets out the minimum threshold criteria for a valid election. The Court of Appeal concluded that "[i]t follows that if constitutional principles have not been complied with in an election the Court is under a duty to void it without [anything] more."[93] Equally important, the Court of Appeal held that an election outcome can be voided at a second level by application of Section 83 of the Elections Act. On this point, the Court stated:

> Where breaches of the law relating to elections, even though they may appear trivial, have affected the result that by itself is enough to compel the election court to declare the election void. The rules, regulations and technical requirements in election law have been designed to safeguard the purity of the election process and the courts have a duty to enforce all the requirements in the law. The failure to comply with procedural steps aimed at determining entitlement will directly affect the result of election leading to it being vitiated.[94]

But when the matter came before the Supreme Court, the highest court did not accept any of the Court of Appeal's findings. First, the Supreme Court

92 *Edward Akongo Oyugi v IEBC & 2 Others* (2013) eKLR (Petition No. 3 of 2013, Kisii High Court).

93 *Edward Akongo Oyugi v IEBC & 2 Others* (2013) eKLR (Petition No. 3 of 2013, Kisii High Court) 40.

94 *Edward Akongo Oyugi v IEBC & 2 Others* (2013) eKLR (Petition No. 3 of 2013, Kisii High Court). 42-43.

stated that the Court of Appeal had not resolved the dispute based on the applicable test, which was "to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election."[95] Second, the Supreme Court noted that the Court of Appeal merely cited its decision in *The Raila Odinga Case* and faulted the lower court for not applying the legal test for assessing the validity of an election it had developed in that case and therefore contravening Sub-article 163(7) of the *2010 Constitution*.

Third, the most disturbing finding of the Supreme Court was in regard to the applicability of the provision relating to the supremacy of the *2010 Constitution*. The Court of Appeal effectively, and rightly, found that a statutory provision, Section 83, could not be used to alter the requirement that an election be conducted in compliance with the *2010 Constitution* and if it was not, it was void without any further inquiry needed. However, the Supreme Court stated that not even the principle of the supremacy of the *2010 Constitution* could be used to sidestep the requirement of Sub-article 163(7), which provides that all decisions of the Supreme Court are binding on lower Courts. Unfortunately, this pronouncement relied on the Supreme Court's superior status without explaining why its legal test was to be preferred over that of the Court of Appeal.

There is a consistent thread in how the Supreme Court resolved the disputes in *The Raila Odinga Case*, *Munya v Mwenda* and *Obado v Oyugi* and many other electoral cases that came before it. The Supreme Court started with Section 83 and stated (or misstated) that this section was the primary law and the ultimate reference point for the courts in resolving electoral disputes. In doing so, it ended up with a convoluted test that diminished the utility of the constitutional provisions on elections, wrongly assessed the scope of application of Section 83, and finally and perhaps most importantly, made a mockery of the history of electoral reforms in Kenya.

9.0 Fixing the Jurisprudential Mess Created by Section 83 of the Elections Act

As demonstrated above, there are various problems with Section 83 of the *Elections Act* and the jurisprudence that has been developed around

95 *Obado v Oyugi* para. 126.

it. Three key concerns are: first, it is largely irrelevant; second, it is out rightly unconstitutional; and third, its interpretation and the common law jurisprudence that has emerged from its interpretation is also unconstitutional. Understanding these concerns helps illuminate possible solutions that may be developed to address the resulting problematic jurisprudence.

Section 83 is largely irrelevant because, as observed above, it was intended and can only be used to address technicalities. As evident from *Morgan v Simpson*, the relevant section from which Section 83 derives was addressed in the context of a technicality or the failure to stamp the ballots before voting. While technicalities to which Section 83 applies may occur such as concerns complying with certain inconsequential requirements in elections regulations, for the most part, they are few and far between. This is especially true given that, unlike many jurisdictions, provisions on electoral process, content and management is already elaborately provided for in the *2010 Constitution*. An irrelevant law should not continue to be relied on blindly. If advocates and judges alike are vigilant and perform due diligence to ensure that the most applicable law in the post-2010 constitutional era is applied to the circumstances, the recurring use of an irrelevant law will be prevented.

Section 83, may, in its present form be unconstitutional. There are a number of grounds for its unconstitutionality. The foremost reason is that to the extent that Section 83 suggests it is possible to excuse an election irregularity, which violates the constitutional principles pertaining to elections without providing clear and objective criteria, it is unconstitutional because it allows a statutory provision to amend or modify a constitutional provision. Being Kenya's supreme law, the *2010 Constitution* prescribes specific methods for amendment. In addition, Section 83 may also fail the constitutionality test on the basis of vagueness. Section 83 is a convoluted provision that is open to numerous possible interpretations or even no intelligible interpretation at all. A law is void for vagueness when the law is not adequately accessible such that a person is unable to know what the legal rule entails. A law will also be void for vagueness when it is not formulated with sufficient precision as to allow what is prohibited or acceptable under the law.[96] In the end, law reformers targeting Section 83 have to ask the critical question, given the elaborate electoral scheme in the *2010 Constitution*, what is lost if Section 83 is struck from the electoral laws entirely? It would seem hardly anything.

96 See a discussion on vagueness of a law in *Case of The Sunday Times v The United Kingdom* (1979) 2EHRR 245.

Third, the jurisprudence developed on the basis of Section 83 which now guides the determination of when an election is considered invalid is, in the authors' view, unconstitutional. This jurisprudence, which the Supreme Court insists must be followed by all lower courts in resolving electoral disputes, is perhaps best summarized in *Obado v Oyugi*, which states "that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and the results of the election are unaffected."[97] As argued above, this test does not conform to the *2010 Constitution* because it goes against the principle of supremacy of the constitution. It is also inimical to the purposive approach to statutory interpretation required by Article 259 as it fails to take into account the historical and other contextual factors that the *2010 Constitution* insists should be considered in its interpretation.

There is a clear basis to question the unconstitutionality of an interpretation of a law even if one does not question the constitutionality of the statute that gave rise to such an interpretation. Sub-article 2(4) requires that all law that contravenes the 2010 Constitution is void, including "judge-made law" such as the Supreme Court's interpretation of Section 83 of the Elections Act that has become the operative test for voiding elections in Kenya. Elsewhere in commonwealth countries with constitutional provisions that approximate Article 2(4), voiding any law that is in contravention of a national constitution, courts have interpreted the voidable law to include common law or "judge-made law."[98]

Beyond the patent need to expunge the unconstitutional test used by the Supreme Court to determine the validity of an election, there is a duty on the courts to develop a strong and helpful election jurisprudence that will aid in defining the constitutional principles and standards laid out in Chapter 7 of the *2010 Constitution*. Given the present state of the post-2010 electoral common law in Kenya and that all courts except the Supreme Court are bound to follow the precedents set by that Court,[99] it is really up to Kenya's highest court to take up this challenge at least initially. The best way to jump this process may be to strike down Section 83 for its unconstitutionality so that the

97 *Obado v Oyugi* para. 139.

98 For the discussion that common law must conform to a nation's constitution, see *Du Plessis v De Klerk* (1996) CCT 8/95 (South African Constitutional Court) and *Hill v. Church of Scientology* (1995) 126 D.L.R. (4th) 129 (Supreme Court of Canada).

99 See *2010 Constitution*, Article 163(7).

courts are forced to articulate a new threshold test for the validity of elections. Yet, even without this step being taken, the tools to redefine this threshold standard are readily available in the *2010 Constitution*. The legal profession must also play its role in ensuring that requisite effort is put into meaningfully interpreting the novel provisions of the *2010 Constitution*. It is incumbent upon advocates and judges to actively shepherd in the new constitutional era and finally fulfil the promise of transformative electoral reform in Kenya. While the cases already decided are protected by the legal principle of res judicata which states that once decided, a matter cannot be re-litigated, there is no reason that Kenya's electoral common law cannot continue to evolve. Moreover, it would be ideal for the Supreme Court to take the opportunity to develop this jurisprudence prior to election time when legal analysis and decision-making may be more prone to the influence of political interests.

10.0 Conclusion

Having shown that Section 83 of the Elections Act has distracted the courts from the development of a true constitutional threshold for valid elections, this chapter has sought to jumpstart the discussion of what this threshold should be. By understanding that the Section 83 test was designed to direct the handling of technicalities and recalling Kenya's history of election rigging, the emphasis on the principles laid out in Articles 81 and 86 of the *2010 Constitution* is restored. As a starting point, it may be said that the constitutional election threshold requires that the electoral process be respected and conducted in accordance with the constitutional principles of a free and fair election. All aspects of the election process must be impartial, inclusive, transparent, accountable, free of undue influence, and deterring of corruption and malpractice. This chapter also reviewed how The *Raila Odinga Case* decision applied Section 83 without considering the constitutional principles concerning elections and how the lower courts, bound by Sub-article 163(7) of the *2010 Constitution*, have followed suit. For the most part, the interpretation given to Section 83 in *The Raila Odinga Case* has been used by all courts in deciding electoral disputes. The chapter concluded with a discussion of the many options for instigating a correction to the jurisprudential quagmire that been created.

The Supreme Court's erroneous interpretation of Section 83 of the Elections Act has poisoned the process of developing an electoral jurisprudence as progressive as the *2010 Constitution.* It is actually getting in the way of the

courts fleshing out the constitutional standard contained in Articles 81 and 86. While there is no such thing as a perfect election and the courts cannot only validate elections where no imperfections are traced, due prominence must be given to the minimum electoral standards set out in the *2010 Constitution*.

Whichever method of correction is chosen, there is a great need to encourage the evolution of Kenya's electoral jurisprudence. To interpret the election provisions in the *2010 Constitution*, the courts will have to look at the history of the country that inspired a new constitution and specifically the motivation behind it. This historical and purposive approach to interpretation will start the jurisprudential dialogue needed to address the confusion caused by Section 83. Certainly, over time, the courts must attach meaning to the various constitutional requirements to be followed in an election and explain what level of compliance is expected against each requirement to make an election valid. It is likely that only minor infractions that do not compromise the principles on elections and do not undermine the public confidence in the integrity of the elections will be excusable. Such analysis will, undoubtedly, revise the current legal test based on Section 83, which effectively excuses significant constitutional infractions where one is unable to demonstrate with clear evidence that the infractions affected the final outcome.

Section 83 of the *Elections Act* was accepted by all parties to *The Raila Odinga Case*, legal commentators and for the most part, the judiciary, as the test for validity of an election without a thorough analysis of what Section 83 means, let alone how and whether it applies in a post-2010 constitutional legal context. This blind acceptance of Section 83 is a disappointment at best. The legal profession must be vigilant in ensuring that legislative provisions and seemingly established legal principles are interpreted in a constitutionally consistent manner.

As alluded to above, there is still much work to be done in developing sound electoral jurisprudence in Kenya. Nevertheless, it is undeniable that the dawn of a new constitution is an exciting time in a nation and these challenges should not be shied away from but rather embraced as fully as the participatory process employed to produce the 2010 Constitution itself. Working to create a level playing field for elections can only benefit all Kenyans. If the path to power is increasingly marked by fairness, it is more likely that state power will be exercised in such a manner as well.

IV

Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court; The Court of Appeal and the Supreme Court

Muthomi Thiankolu

Abstract

This Chapter examines the nature and scope of the appellate jurisdiction of the High Court, the Court of Appeal and Supreme Court of the Republic of Kenya in electoral disputes, and the applicable standards of review. It examines the difficulties and controversies that arise from (i) the provisions of sections 75 (4) and 85A of the Elections Act, 2011; and (ii) decisions of the Supreme Court to the effect that the Court of Appeal, and presumably the High Court when sitting as an appellate court, has no jurisdiction to review decisions on 'matters of fact' in electoral disputes. The chapter argues that the Supreme Court has no appellate jurisdiction in electoral disputes, and questions the "normative derivatives…" approach invoked by the Supreme Court to assert jurisdiction over such disputes. The finding of the chapter is that the transformative dream of the 2010 constitution remains elusive with regard to the handling of appeals from the decisions of election courts. In particular, the legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts, especially with regard to timelines and the twin issues of (i) the right of appeal; and (ii) the jurisdiction of appellate courts. The chapter recommends (i) a review of sections 75 (4) and 85A of the Elections Act, 2011 (especially the constitutionality of their limitation of the jurisdiction of first appellate courts to matters of law only); (ii) a de novo review of decisions of election courts; and (iii) the overruling of

the Supreme Court's decisions in Munya 1, Munya 2 and subsequent electoral disputes.

1.0 Introduction

The evolution of Kenyan electoral laws has been marked by controversy and reluctance to entertain appeals against the decisions of election courts. For many years, there was no right of appeal from such decisions.[1] The oft-cited rationale was that the Court of Appeal was only "a creature of statute"[2] (sic) with *"such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."*[3] The Kenyan parliament amended the law in 1997 ("the 1997 amendments") and allowed, for the first time, persons aggrieved by decisions of an election court to appeal to the Court of Appeal.[4]

The 1997 amendments required litigants to lodge an appeal within 30 days of the decision of the election court. The new right of appeal extended to decisions on matters fact and decisions on *matters of law*. It also extended to both *final* and *interlocutory* decisions.[5] The Court of Appeal, however, often adopted a technical and legalistic interpretation of the 1997 amendments—making the right of appeal illusory to most litigants. In particular, the Court of Appeal controversially insisted on strict compliance with the 30-day appeal window even where legal, procedural, bureaucratic or administrative constraints precluded an appellant from lodging an appeal within 30 days.[6]

Kenya adopted a new constitution in 2010. The main factors behind the adoption of the 2010 constitution included[7] (i) a compelling need to reform

1 *Moi v Mwau* [2008] 2 KLR (EP) 90; [1997] eKLR.

2 *Moi v Mwau*, 93; Matiba v Moi [2008] 1 KLR (EP) 525, 535.

3 Per section 64 (1) of the Constitution of Kenya, 1969. The wording of section 64 (1) of the 1969 constitution was identical to the wording of colonial legislation establishing the defunct Court of Appeal for Eastern Africa. The rationale for the relevant colonial laws was to give each British colony the discretion to decide, as a matter of its own internal policy, through legislation, cases that could be appealed to the regional appellate court. For further insights, see *Anarita Karimi Njeru v The Republic* (No. 2) [1976-80] 1 KLR 1283.

4 Section 23 of the *National Assembly and Presidential Elections Act* (now repealed), as amended by Acts Nos. 9 and 10 of 1997. The 1997 amendments were part of a package of constitutional and legal reforms adopted to quell incessant (and sometimes violent) demands by the country's political opposition (and civil society organizations) for minimum constitutional and legal reforms ahead of that year's general election.

5 Although there is no express legal bar against interlocutory appeals against the decisions of an election court, the Court of Appeal has recently held that it has no jurisdiction to entertain such appeals, and that a person aggrieved by such a decision must await the final decision of the election court before lodging the appeal. For further insights, see *Benjamin Ogunyo Andama v Benjamin Andola Adayi & 2 Others* [2013] eKLR; *Cornel Rasanga Amoth v William Odhiambo Oduol & 2 Others* [2013] eKLR; *Ferdinand Ndung'u Waititu v Independent Electoral and Boundaries Commission*, IEBC & 8 Others [2013] eKLR.

6 *Maitha v Said & Another* [2008] 2 KLR (EP) 337. As we shall see in the ensuing parts of this chapter, this problem has persisted even in the post-2010 constitutional era.

7 Independent Review Commission, Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (2008) 142-143.

the country's electoral dispute management system; (ii) diminished public confidence in the judiciary as an honest arbiter of political disputes; (iii) refusal by the aggrieved side to refer the disputed 2007 presidential election to the courts; and the 2007-2008 post-election violence. The 2010 constitution, aptly described as *'transformative'* by Kenyan courts[8] and scholars,[9] emphasized the need for an electoral system that is *impartial, neutral, efficient, simple, accurate, verifiable, secure, accountable* and *transparent*.[10] The 2010 constitution also emphasized the timely resolution of electoral disputes,[11] without undue regard to procedural technicalities.[12]

Although the right to appeal from the decisions of an election court had remained a controversial matter before and after the 1997 amendments, Kenya began the post-2010 era with an uncertainty on the appellability of such decisions. The author of this chapter described the uncertainty as follows: [13]

> Following recent developments in the law, it is unclear whether an aggrieved litigant can appeal from the decision of an election court. The *Elections Act*, 2011 is silent on this issue. The wording of the 2010 constitution on this issue is not very helpful either. Article 164 (3) of the Constitution provides that the Court of Appeal shall have jurisdiction to hear appeals from (a) the High Court; and (b) any other court or tribunal "*as prescribed by an Act of Parliament*." The Court of Appeal has previously consistently held that it can only entertain appeals where the appellant can show an express provision of an Act of Parliament conferring jurisdiction on the Court.[14] A person who moves the Court of Appeal in an electoral dispute must therefore confront past jurisprudence to the effect that the Court has no jurisdiction in the absence of an express statutory provision allowing it to entertain appeals from the election court. The constitution complicates matters further by stating that election petitions must be determined within six months.[15] Even if the Court of Appeal were to have jurisdiction in election matters, it is arguable that such jurisdiction would lapse after the expiry of six months following the date of filing of the election petition in the High Court.

8 Speaker of the Senate & Another v Attorney General & 4 Others [2013] eKLR.

9 Godfrey Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws' in Godfrey Musila (Ed), *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (Law Society of Kenya 2013), 2.

10 Articles 81 (e) and 86 (a).

11 Articles 87 (1) and 105 (2) and (3) of the 2010 Constitution.

12 Article 159 (2) (d), as read with section 80 (1) (d) of the Elections Act, 2011.

13 For further insights, see Muthomi Thiankolu, Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions, in Godfrey Musila, 57.

14 Moi v Mwau [2008] 2 KLR (EP) 90.

15 Article 105 (2) of the Constitution of Kenya, 2010. See also section 75 (2) of the *Elections Act,* 2011.

The Statute Law (*Miscellaneous Amendments*) (No. 2) Act, 2012 ("**the 2013 amendments**") reintroduced the right of appeal from the decisions of election courts.[16] The 2013 amendments inserted the following clauses into section 74 of the Elections Act, 2011:

> (1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.
>
> (4) An appeal under subsection (1A) shall lie to the High Court **on matters of law only** and shall be—
>
> (a) filed within thirty days of the decision of the Magistrate's Court; and
>
> (b) heard and determined within six months from the date of filing of the appeal.
>
> The 2013 amendments also introduced the following clause with regard to appeals from the decisions of the High Court sitting as an election court:
>
> 85A Appeals to the Court of Appeal
>
> An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on **matters of law only** and shall be—
>
> (a) filed within thirty days of the decision of the High Court; and
>
> (b) heard and determined within six months of the filing of the appeal.

As will become clearer in the ensuing parts of this chapter, the transformative dream of the 2010 constitution remains elusive with regard to the handling of appeals from the decisions of election courts. The legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts, especially with regard to the twin issues of (i) the right of appeal; and (ii) the jurisdiction of appellate courts. The latter issue has acquired a new nuance in the post-2010 constitutional era, revolving around appropriate standard of review. The relevant decisions with regard to these twin issues have often, almost invariably, revolved around the 2013 amendments' restriction of the jurisdiction of first appellate courts to "*matters of law only*."[17]

16 Act No. 47 of 2012. The amendments commenced on 4th January 2013, eight weeks prior to the 2013 general election.

17 Sections 75 (4) and 85A of the *Elections Act,* 2011.

The Supreme Court has made multiple decisions to the effect that article 87 (1) of the 2010 constitution (as read with the 2013 amendments) precludes the Court of Appeal from entertaining appeals on matters of fact in electoral disputes (sic).[18] Although these decisions appear sound based on a plain reading of the 2013 amendments,[19] they have stirred significant controversy and criticism among judges, legal practitioners and various commentators.[20] There are at least two perspectives to the controversies. First, it is difficult to reconcile some of the Supreme Court judgments with the Kenyan political experience, especially the country's high incidence of electoral offences and malpractices. Secondly, it is doubtful whether some of the Supreme Court's decisions in electoral disputes are consistent the transformative dream of the 2010 constitution, especially to the extent that they tend to uphold apparently flawed elections. In particular, although the Supreme Court has reversed many apparently sound Court of Appeal decisions in electoral disputes, it has hardly shed any light on the 2010 constitution's requirements for an electoral system that is *impartial, neutral, efficient, simple, accurate, verifiable, secure, accountable* and *transparent*.[21]

This chapter examines the nature and scope of the appellate jurisdiction of the High Court, the Court of Appeal and Supreme Court of the Republic of Kenya in electoral disputes, and the applicable standards of review. It examines the difficulties and controversies that arise from the 2013 amendments and decisions of the Supreme Court to the effect that the Court of Appeal, and presumably the High Court when sitting as an appellate court, has no jurisdiction to review decisions on *'matters of fact'* in electoral disputes. This chapter seeks to provide useful relevant information and insights for interrogating the controversies. To achieve this, the chapter adopts a contextual and historical analysis of the relevant laws, decisions and controversies.

18 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR; Frederick Otieno Outa v Jared Odoyo Okelo & 4 Others [2014] eKLR; Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others [2014] eKLR; Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR.

19 Sections 75 (4) and 85A of the Elections Act, 2011. The explanation oft-given by the Supreme Court for limiting the jurisdiction of the Court of Appeal to "matters of law only" is that article 87 (1) of the Constitution requires the timely resolution of electoral disputes, and that the 2013 amendments seek to ensure the achievement of this objective. This explanation is not persuasive, especially considering that the Court of Appeal had determined the relevant cases within the six-months period set out in section 85A of the Elections Act, 2011.

20 James Otieno-Odek, Transmutation of Kenya Superior Court Jurisdiction: From Pyramidal to Hour-Glass Jurisdictional System (Law Society of Kenya Annual Conference, Mombasa, August 2014); Ahmednasir Abdullahi, The Limits of Prescriptive Reforms: The Struggle and Challenges of Judicial Reforms in Kenya, 2002 to 2010 (Annual Judges Conference, Mombasa, August 2015); George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014), http://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html, at 07 February 2016.

21 Articles 81 (e) and 86 (a).

Part 1 of this chapter sets out the background, history and context of the main issues. Part 2 sets out the conceptual framework and the policy rationales that underlie standards of review and appellate jurisdiction in general. Part 3 examines the applicable standards of review and the appellate jurisdiction of the High Court; the Court of Appeal and the Supreme Court of the Republic of Kenya in ordinary cases. The rationale for this part is that it is difficult to have a good understanding of these courts' appellate jurisdiction in electoral disputes, or the appropriate standards of review for electoral disputes, without a good understanding of the courts' appellate jurisdiction in ordinary cases and the applicable standards of review. The issues of (i) the appellate jurisdiction of the High Court, the Court of Appeal and the Supreme Court in electoral disputes; and (ii) the appropriate standards of review for electoral disputes arise mainly from the classification of electoral disputes as special or, to use the lawyer's parlance, *sui generis*.[22] Part 4 examines the appellate jurisdiction of the High Court; the Court of Appeal and the Supreme Court in electoral disputes, and the applicable standards of review. In particular, Part 4 examines the dangers and shortcomings inherent in (i) restricting the jurisdiction of first appellate courts to "*matters of law only*";[23] and (ii) recent Supreme Court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others*[24] and subsequent electoral disputes. Part 5 sets out the finding and conclusion.

2.0 Conceptual Framework

2.1 Standards of Review

The phrase "*standard of review*" refers to the *depth or intensity* with which a trial court's rulings of fact, law or discretion are subject to reconsideration by an appellate court.[25] The purpose of standards of review is to allocate decision-making responsibility among various courts in a hierarchical judicial system.[26] Various factors—historical, political, social, economic, political etc.—may influence the allocation in any one particular country. Put differently, the

22 The prevailing judicial position in Kenya is that electoral disputes are neither civil nor criminal; that they lie in between these two broad categories. For further insights, see Joho v Nyange & Another [2008] 3 KLR (EP) 500; and *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others* [2015] eKLR.

23 Sections 75 (4) and 85A of the *Elections Act*, 2011.

24 Civil Application No. 5 of 2014; Petition No. 2b of 2014.

25 Dickson Philips Jnr, *The Appellate Review Function: Scope of Review* (1984) 47 (2) Law and Contemporary Problems 1.

26 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review 1, 4.

allocation of decision-making responsibility among a particular country's appellate courts need not be similar or identical to the allocation in another country. Broad similarities exist, however, among countries with similar legal systems.

Different standards of review apply to different types of cases, ranging generally between the two extremes of *no review* to *full review*. The former extreme refers to the situation where there is no right of review (i.e. 'right of appeal').[27] Different countries practise varying levels of deference between the two extremes, depending generally on whether the decision appealed from relates to *matters of law, matters of fact or the exercise of discretion*. A standard of review that emphasizes deference to trial-level decision-makers places primary responsibility for resolving disputes in trial courts, and *vice versa*.[28]

2.2 De novo & Deferential Standards of Review

Generally, there are two standards of review, *de novo* and *deferential*. The Black's Law Dictionary defines the phrase *de novo review* in the following terms:

> Appeal de novo. An appeal in which the appellate court uses the trial court's record but reviews the evidence and law <u>without deference</u> to the trial court's rulings. —also termed *de novo* review; *de novo* judicial review.[29]

The phrase *de novo* review, therefore, refers to a judicial approach in which the appellate court *does not accord any deference to the trial court's findings of law or fact*.[30] The *de novo* standard of review has its origins in the English common law (initially as a tool of political control by the King).[31]

The main question that arises from recent Supreme Court judgments, which forms the broad theme of this chapter, is whether the Kenyan Court of Appeal (and presumably the High Court) should adopt a *de novo* or a *deferential* standard of review in the exercise of its appellate jurisdiction in electoral disputes. The subsidiary question that ensues is whether a uniform standard

27 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review 5.

28 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review.

29 Bryan A. Garner (Ed), *Black's Law Dictionary* (9th Edn, West Publishing 2009) 112. Underlining supplied for emphasis.

30 Per Richard Posner in *United States v Boyd* 55 F.3d 239, 242 (7th Cir. 1995). Quoted in Dickson Philips Jnr, 2.

31 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review, 13. According to Sward, the rationale for its continued existence in modern times lies in the need to promote competence, fairness and efficiency within the judiciary.

of review—*de novo* or *deferential*—applies or should apply to all cases that come up before the Court of Appeal and other first appellate courts.

2.3 The Policy Functions and Objectives of Appellate Jurisdiction

A lawyer's natural starting point for a discussion on standards of review and the jurisdiction of appellate courts is the country's constitution and the relevant judicature laws. A more holistic discussion, however, requires more than a mere technical or legalistic analysis of the constitution and relevant laws. In particular, a holistic discussion must include an examination of the policy objectives underlying standards of review, the jurisdiction of appellate courts, the constitution and the relevant judicature laws. The rationale for such a holistic approach is that laws are tools of social engineering, designed to achieve particular social, economic or political goals. Moreover, a holistic understanding of the policy objectives underlying standards of review, the jurisdiction of appellate courts, the constitution and the relevant judicature laws would enable appellate courts to keep fidelity to their true mandate. Such an understanding might also obviate the controversies alluded to in part 1 of this chapter.

Certain preliminary questions, therefore, are important if a legal discussion on standards of review and the jurisdiction of appellate courts in electoral disputes is to be useful. What is the policy behind Kenya's hierarchical judicial system? Are appellate judges presumptively better law-declarers, dispute arbiters or decision makers compared to trial judges?[32] What are the roles of the various courts in Kenya's hierarchical judicial system? What exactly are the particular roles or functions of first and further appellate courts in the hierarchy? What factors influenced the allocation of decision-making responsibilities among the High Court, the Court of Appeal and the Supreme Court under the 2010 constitution? What considerations *(political, historical, social, economic etc.)* should influence the allocation of decision-making responsibilities among the High Court, the Court of Appeal and the Supreme Court in electoral disputes? What is the policy rationale for the allocation of decision-making responsibilities embodied in the 2013 amendments? Should case backlogs or human resource constraints be relevant considerations in the allocation of decision-making responsibilities among the High Court, the Court of Appeal and the Supreme Court of the Republic of Kenya?

32 In 2008, the author of this chapter represented the respondent to an electoral dispute before an irritable trial judge who often told disaffected counsel, "there are *some five wise men up there, if you wish, you can go make your case before them*," in reference to Court of Appeal judges.

There are two general policy functions/objectives of appellate jurisdiction, which we believe underlie Kenya's hierarchical judicial system. These are (i) the correction of error; and (ii) the declaration of legal principle(s).

Kenya's hierarchical judicial structure is based, in the first place, on the presumption *(or is it reality?)* of human fallibility. Even with all their bona fides; learning; eminence; and experience, judges, too, make mistakes. Sometimes, they make serious, fundamental mistakes. Such mistakes (whether of law or fact) ought to be corrected, especially where they have unfairly tilted the scales of justice.[33] Put differently, the corrective function exists to ensure that justice is done to the litigants.[34] The correction of error (or declaration that no correction is required), therefore, is an important function/objective of appellate review and jurisdiction.[35]

Although all appellate courts in a hierarchical judicial structure may invoke the corrective function, the role of the apex court in a multi-tier appellate system (such as Kenya's) is to effect broad system-wide corrective action as opposed to the correction of individual mistakes in lower courts.[36] Put differently, the apex court in a multi-tier appellate system (such as Kenya's) should not assume jurisdiction over a case merely for the purpose of correcting an injustice or ordinary errors.[37] The following dictum from the Supreme Court of the Republic of Kenya amplifies the point:

> In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.[38]

33 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review, 25.

34 Ellen Sward, however, also questions (at 10) the popular view of dispute resolution as a function of appellate courts. According to her, dispute resolution is incidental or ancillary to the functions of error correction and the declaration of legal principle.

35 Dickson Philips Jnr, *The Appellate Review Function: Scope of Review* (1984) 47 (2) Law and Contemporary Problems 2.

36 Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy (2002) 116 Harvard Law Review 19, 27.

37 Isaac M'Inanga Kiebia v Isaya Theuri M'Lintari & Another [2015] eKLR.

38 Ngoge v Kaparo & 5 Others [2011-2012] 1 Supreme Court Digest 113, 119. Applied in Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 104.

The corrective function of appellate review is not meant to reprimand or denigrate lower courts.[39] It is not meant to glorify the higher courts either. Ellen Sward aptly warns against the idea of any presumptive omniscience or infallibility of appellate courts, and argues that the competence of appellate judges is the weakest rationale for appellate review:[40]

> it might be tempting to assert that the appellate courts are more competent to declare the law because they are better courts with better judges. There are, of course, fewer appellate than trial judges, and that might make it likely that appellate judges as a group have stronger credentials than trial judges. Nevertheless, there is a wide range of quality and experience at all levels, and any given trial judge may be more qualified to declare the law than any given appellate judge. Nor does experience necessarily make appellate judges better law-declarers than trial judges

There is no basis, therefore, for the perceived rivalry and superiority wars witnessed among Kenyan courts in recent times,[41] especially with regard to appellate jurisdiction, standards of review and the resolution of electoral disputes.[42]

Appellate courts discharge the second function of appellate review, i.e. the *declaration of legal principle*, by (i) creation; (ii) clarification; (iii) extension; or (iv) overruling of existing legal principles.[43] Appellate judges must discharge this function in a disciplined and cautious manner, for they would otherwise strip the law of the important characteristics of predictability and stability. The declaratory function of appellate review serves a broader purpose than resolving the particular dispute before the appellate court. In particular, it has as its focus the broad systemic integrity of the legal system as opposed to resolution of the specific dispute before the appellate court.

The overruling element of the declaratory function is a counterpoise to the requirements of predictability and stability of the law. It helps appellate

39 During the early days of this author's career at the bar, he often heard counsel discuss an incident in which the Court of Appeal had directed that its judgment be personally served on a High Court Judge, allegedly to 'teach' her how to write proper judgments. The author of this chapter has not been able to verify the veracity of the allegations.

40 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review, 14.

41 George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014), http://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html, at 07 February 2016.

42 George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014), http://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html, at 07 February 2016.

43 Dickson Philips Jnr, The Appellate Review Function: Scope of Review (1984) 47 (2) Law and Contemporary Problems 2.

courts to factor social change in the interpretation of the law[44] and, more importantly, to avoid the situation where strict adherence to *precedent* would result in manifestly absurd or unjust outcomes. Kenyan appellate courts, however, have traditionally been reluctant to invoke the overruling element of their declaratory function in electoral disputes—even in situations where strict adherence to *precedent* was apt to result in absurd, unjust or controversial outcomes.[45] Put differently, Kenyan appellate courts have a knack for rigidly sticking to controversial and discredited case law in electoral disputes.[46]

2.4 The Law-Fact Dichotomy

The question of allocation of fact-finding responsibility between trial and appellate courts is an old and vexed one. It is also not unique to Kenya. Initially, a *de novo review of both fact and law* applied both at common law and in equity.[47] By the 18th century, however, the standard of review at common law had evolved to complete deference to the jury (read *'the trial court'*) on matters of fact and *de novo review* on matters of law.[48]

As stated, the debate on the distinction between *"law"* and *"fact"* has preoccupied lawyers and scholars for a long time. The Supreme Court of Kenya has recently made strong pronouncements (discussed below) and reversed most decisions of the Court of Appeal in electoral disputes because of the presumed separability of *"law"* and *"fact."*[49]

Francis Bohlen has explained the distinction between "*law*" and *"fact"* as follows:

44 Generally, the development of the law tends to lag behind social change, necessitating either statutory reform by parliament or modifications of existing interpretations by the courts.

45 The historical examples are legion, and include decisions like Kibaki v Moi (No. 2) [2008] 2 KLR (EP) 308; Kibaki v Moi (No. 3) [2008] 2 KLR (EP) 352; and Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR. For recent relevant decisions, see the decisions in *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR; E*vans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR.

46 The examples of this inflexibility are too many to be exhaustively discussed or cited in this chapter. They include decisions like *Kibaki v Moi* (No. 2) [2008] 2 KLR (EP) 308; *Kibaki v Moi* (No. 3) [2008] 2 KLR (EP) 352; *Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others* [2005] eKLR; *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others* [2014] eKLR; *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR; *Suleiman Said Shahbal v the Independent Electoral & Boundaries Commission & 3 Others* (Civil Appeal No. 42 of 2013). For further insights, see Muthomi Thiankol, 57.

47 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review, 12.

48 Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review , 18. The standard of review in equity cases remained *de novo* for both law and fact.

49 See the decisions in Munya 2; *Frederick Otieno Outa v Jared Odoyo Okelo & 4 Others* [2014] eKLR; Z*acharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR; and *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR.

> The primary and popular meaning of the word "fact" is something which has happened or existed, including not only the physical facts of the case but also more abstract matters, such as the state of mind… "Law" primarily means a body of principles and rules which are capable of being predicated in advance and which are so predicated, awaiting proof of the facts necessary for their application.[50]

In *Bracegirdle v Oxley*,[51] a case of dangerous driving, Denning J. (later Lord Denning) explained the distinction between law and fact in the following terms:

> The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question, there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts, which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under s. 11 of the Road Traffic Act, 1930, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, but that is the case here. In my opinion, the conclusion drawn by these justices from the primary facts was not one that could reasonably be drawn from them.[52]

Generally, the prevailing view and practice in the common law world is that fact-finding is a responsibility of the trial court. In the case of Kenya, however, there is no firm legal or philosophical foundation for this view and practice. In particular, and as discussed elsewhere in this chapter, Kenyan appellate courts have traditionally reversed a trial court's decisions on *matters of fact* where such decisions are absurd or unsupported by the evidence on record.[53] In particular, the Kenyan constitutional and statutory frameworks strongly point towards a *de novo review* of all decisions, whether of law or fact.

50 Francis H Bohlen, *Mixed Questions of Law and Fact* (1924) 72 University of Pennsylvania Law Review, 111.

51 [1947] KB 349.

52 [1947] KB 349, 358.

53 *M'Iriungu v R* [1983] KLR 455.

The idea that fact-finding is a responsibility of the trial court proceeds on the assumption that it is possible, in any one given case, to separate *matters of law from matters of fact.* The presumed separability of *"law"* and *"fact"* (just as the contentious presumed separability of law and morality), however, is in most cases too tenuous, abstract or unrealistic.[54] In particular, it tends to blur the natural interplay between the two phenomena, as the law does not operate in a vacuum. The following rules of thumb[55] should come in very handy in any discourse on the interplay between law and fact: First, a lawyer (in our case, a judge) should know the law applicable to his case, or where to find that law. Secondly, a lawyer (in our case, a judge) must always remember that a question of law never arises in the absence of a question of fact. Thirdly, a lawyer (in our case, a judge) must remember that the general answer to every legal question is that *'it depends,'* on the law and the facts. Fourthly, a lawyer (in our case, a judge) must always remember the first three rules. The idea behind these rules of thumb is simple. A question of law does not, and cannot, arise in a vacuum. Put differently, a question of law cannot, and does not, arise purely in the abstract. A legal question can only arise in a particular real or presumed factual context. Accordingly, judges ought to be careful in construing statutes that purport to limit the jurisdiction of first appellate courts to *matters of law only*. A liberal construction of such statutes would strip the right of appeal of any practical meaning, especially where the trial court arrives at absurd findings of fact or draws absurd inferences from the facts of a case.

3.0 Standards of Review and Appellate Jurisdiction in Ordinary Cases

3.1 The High Court

Article 165 of the 2010 constitution gives the High Court a very broad jurisdiction. The relevant clauses for purposes of this chapter read as follows:

> (3) subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters…
>
> (e) any other jurisdiction, original or appellate, conferred on it by legislation.

54 Francis H Bohlen, *Mixed Questions of Law and Fact* (1924) 72 University of Pennsylvania Law Review, 111.

55 Attributed to the late Prof. HWO Okoth-Ogendo, in his jurisprudence lectures at the University of Nairobi School of Law.

The appellate jurisdiction of the High Court in ordinary civil and criminal cases, therefore, largely depends on statute. The most important statutes in this regard are the Civil *Procedure Act*[56] (for civil cases) and the Criminal Procedure Code[57] (for criminal cases).

3.1.1 The Prevailing Law and Practice (Civil Cases)

Generally, the High Court has appellate jurisdiction over the judgments of subordinate courts on both *matters of law* and *matters of fact*.[58] The applicable standard of review in such appeals depends on whether the High Court is sitting as a first or second appellate court. Generally, the *de novo standard* of review applies where the High Court sits as a first appellate court. In practice, however, the High Court accords significant deference to trial courts' decisions on matters of fact where such decisions are based on the credibility of witnesses.

3.1.2 The Prevailing Law and Practice (Criminal Cases)

Most criminal trials in Kenya are conducted before magistrates' courts. Article 50 (2) (q) of the 2010 constitution gives the accused person, if convicted, the right to appeal to, or apply for review by, a higher court as prescribed by law. It follows, therefore, that the High Court has a general appellate jurisdiction in criminal cases. The appellate jurisdiction of the High Court in ordinary criminal cases extends to both matters of law and matters of fact.[59] Generally, the *de novo standard* of review applies to such appeals:

The first appellate court [i.e. the High Court] must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial courts' findings and conclusions.[60]

Although the *de novo standard* of review applies to criminal appeals to the High Court, significant deference is accorded to trial courts' decisions on

56 Chapter 21 of the Laws of Kenya.

57 Chapter 75 of the Laws of Kenya.

58 Section 65 (1) (b) of the *Civil Procedure Act*.

59 Section 347 (2) of the *Criminal Procedure Code.*

60 *Ngui v Republic* [1984] KLR 729. See also Okeno v R [1972] EA 32; *Pandya v R* [1957] EA 336; and *Kipngetich v Republic* [1985] KLR 392.

matters of fact when such decisions are based on the credibility of witnesses.[61] The rationale is that the trial court, unlike the appellate court, will have had the benefit of seeing and hearing the witnesses and assessing their demeanor and trustworthiness.[62]

3.2 The Court of Appeal

Article 164 (3) of the 2010 constitution establishes the jurisdiction of the Court of Appeal in the following terms:

> (3) The Court of Appeal has jurisdiction to hear appeals from—
>
> (a) the High Court; and
>
> (b) any other court or tribunal as prescribed by an Act of Parliament.

Article 164 (3) of the 2010 constitution is a significant departure from section 64 (1) of the 1969 constitution. Whereas the 2010 constitution confers on the Court of *Appeal a general appellate jurisdiction* to hear appeals from the High Court, the 1969 constitution stated that the jurisdiction of the Court of Appeal would be *"as conferred on it by law."*[63] Put differently, unlike the 2010 constitution, the 1969 constitution did not confer a general appellate jurisdiction on the Court of Appeal. Instead, the 1969 constitution only allowed parliament to confer jurisdiction on the Court of Appeal through ordinary statutes, and to delimit the scope of that jurisdiction.

The 2010 constitution *does not* prescribe any standard of review. Accordingly, it is arguable that any attempt to prescribe such a standard, especially a *deferential* one, would be an unnecessary (perhaps even unlawful) fetter on the jurisdiction of the Court of Appeal. In particular, Article 164 (3) of the 2010 constitution *does not expressly limit or envision limitations* on the appellate jurisdiction of the Court of Appeal. The constitutional foundation of recent Supreme Court pronouncements on the jurisdiction of the Court of Appeal and the applicable standard of review in electoral disputes, especially

61 *Oyier v Republic* [1985] KLR 353.

62 Section 347 (2) of the *Criminal Procedure Code*.

63 Judges invariably interpreted section 64 (1) of the 1969 constitution to mean that the Court of Appeal did not have a general appellate or supervisory jurisdiction, and that a person seeking to invoke the appellate jurisdiction of the Court of Appeal had to point to a law giving the court jurisdiction to hear an appeal. For further insights, *Anarita Karimi Njeru v The Republic* (No. 2) [1976-80] 1 KLR 1283; and *Munene v The Republic* (No. 2) [1978] KLR 105; *Premchard Nathu & Co Ltd & 4 Others v Kariuki* [1990] KLR 523; and *Moi v Mwau* [2008] 2 KLR (EP) 90.

on the vexed question of the dichotomy between law and fact, therefore, is questionable.[64]

Generally, the statutory foundation for the jurisdiction of the Court of Appeal is set out in the *Appellate Jurisdiction Act*[65] and the Court of Appeal Rules, 2010 ("the Rules"). The Appellate Jurisdiction Act (section 3) only paraphrases the provisions of Section 64 (1) of the 1969 constitution.[66] It should be read, therefore, with such alterations, adaptations, qualifications and exceptions as might be necessary to bring it into accord with the 2010 constitution.[67]

Just like the 2010 constitution, the *Appellate Jurisdiction Act does not expressly establish a standard of review*. Section 3 (2) of the Appellate Jurisdiction Act, however, says that the Court of Appeal shall have, in addition to its appellate jurisdiction, '*the power, authority and jurisdiction vested in the High Court.*' The plausible interpretation of Section 3 (2) of the *Appellate Jurisdiction Act* is that the Court of Appeal has all the powers, authority and jurisdiction of a trial and first appellate court—which arguably points to a *de novo standard* of review. The Court's powers under Rules to (i) re-apprise evidence; (ii) draw inferences of fact; (iii) take additional evidence; and (iv) confirm, reverse or vary the decision of the High Court also point to a *de novo standard of review*.[68]

3.2.1 The Prevailing Law and Practice (Civil Cases)

The established general law and practice is that the Court of Appeal conducts a *de novo review* of the High Court's decisions on matters of law. The rationale lies in the doctrine of precedent, in which higher courts are deemed better placed to declare the law.[69]

Although the Court of Appeal generally conducts a *de novo review* of the High Court's decisions, it usually accords a significant degree of deference to (i) the High Court's decisions on fact where such decisions are based on the

64 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR; *Frederick Otieno Outa v Jared Odoyo Okelo & 4 Others* [2014] eKLR; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR; *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR.

65 Chapter 9 of the Laws of Kenya.

66 On the historical reasons for this, see *Anarita Karimi Njeru v The Republic* (No. 2) [1976-80] 1 KLR 1283.

67 As decreed at paragraph 7 of the Sixth Schedule to the 2010 Constitution.

68 See Rules 29-31 of the Court of Appeal Rules, 2010.

69 There may be several policy and theoretical rationales for allocating law declaration responsibilities to higher courts, notably those of competence, fairness and efficiency. For further insights, see Ellen E Sward, *Appellate Review of Judicial Fact-Finding* (1992) 3 Kansas Law Review 1, 4.

credibility of witnesses; and (ii) the exercise of discretion.[70] This approach is long established and deeply entrenched. The Court of Appeal, therefore, will only interfere with the High Court's decisions on fact based on the credibility of witnesses and the exercise of discretion in very exceptional cases.[71] In particular, the Court of Appeal will only interfere with the High Court's decision on these matters where the decision is manifestly wrong, incompatible with the evidence on record, irrational or perverse in principle.[72]

The justifications commonly given for a *deferential* review of the High Court's decisions of fact based on the credibility of witnesses and the exercise of discretion include[73] (i) a recognition of the inherent inexactness of fact finding; (ii) the advantages enjoyed by the trial judge (compared to the appellate judges) in seeing and hearing the witnesses and assessing their demeanor; and (iii) the need to avoid an unnecessarily paternalistic approach to the exercise of appellate jurisdiction (is this judicial comity or professional courtesy?). Although these justifications have an easy pragmatic and logical appeal, however, *they have no firm constitutional or statutory foundation*. As stated, the applicable constitutional and legal frameworks strongly point to a *de novo standard* of review in all cases.

It is unclear whether the a *de novo* or *deferential* standard of review applies to the High Court's decisions on fact or the exercise of discretion in cases that do not entail a trial in the traditional sense. The number of such cases has increased significantly in recent years, especially after the promulgation of the 2010 constitution. Indeed, most cases at the judicial review and constitutional divisions of the High Court proceed by way of examination of documents as opposed to the examination of witnesses (or a trial in the traditional sense).

Many of the rationales commonly given for a *deferential* review of decisions on fact and the exercise of discretion would not hold for High Court decisions in most judicial review cases and constitutional references. In particular, since the determination of these cases largely turns on the examination of documents, as opposed to the examination of witnesses, there is no policy

70 Akerlin & Another v R; De Mare & Others [1959] EACA 476; Llanga v Manyoka [1961] EA 705; Tolley v Tolley [1976-80] 1 KLR 549; Tayab v Kinanu [1983] KLR 114; Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 359, Republic v Oyier [1985] KLR 353; Hahn v Singh [1985] KLR 716; Ogol v Muriithi [1985] KLR 359; Hahn v Singh (1985) KLR 716; Ogol v Muriithi [1985] KLR 359; Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others (Civil Appeal No. 38 of 2013; [2013] eKLR.

71 See Rules 29-31 of the Court of Appeal Rules, 2010.

72 See Rules 29-31 of the Court of Appeal Rules, 2010.

73 See Rules 29-31 of the Court of Appeal Rules, 2010.

or logical justification for seeing the High Court as better placed to make the correct decision on fact or exercise of discretion. Accordingly, the Court of Appeal should conduct a *de novo review* the High Court's decisions in these cases.

3.2.2 The Prevailing Law and Practice (Criminal Cases)

The jurisdiction of the Court of Appeal in criminal cases depends partly on the forum of the initial trial. Under section 361 of the Criminal Procedure Code,[74] a person convicted by the High Court in the exercise of its appellate jurisdiction may lodge a second appeal to the Court of Appeal on matters of law.[75] A person convicted on a trial by the High Court and sentenced to *death or imprisonment for a term exceeding twelve months* or *a fine exceeding two thousand shillings* may appeal to the Court of Appeal against the conviction *on grounds of law or fact or mixed law and fact*.[76]

The Criminal Procedure Code does not expressly establish a standard of review for criminal cases. The appellability of decisions on both law and fact and the jurisdictional provisions set out in Rules 29 to 31 of the Court of Appeal Rules, however, strongly point to *a de novo standard* of review.

The *de novo standard* of review applies in criminal appeals from decisions of the High Court acting as a trial court, on both fact and law.[77] The rationale for the *de novo review* of such decisions is that the Court of Appeal would be sitting as a first appellate court, which would entitle it to reappraise the evidence and come to its own independent conclusion.[78] There is *no right to review* (hence no need to consider the applicable standard) on matters of fact in second appeals.[79]

74 Chapter 75 of the Laws of Kenya.

75 Section 361 of the Criminal Procedure Code.

76 Section 379 (1) of the *Criminal Procedure Code*. Section 379 provides for other situations in which an appeal may lie, with leave, in cases that do not meet this threshold.

77 Wathiaka & Another v Republic [2008] KLR 1, 3.

78 On the powers (or is it duty?) of a first appellate court to conduct a *de novo review* of the decision of a trial court, see *Pandya v R* [1957] EA 336; *Rawala v R* [1957] EA 570; *Okeno v Republic* [1972] EA 32; G*abriel Njoroge v Republic* [1982-88] 1 KAR 1134; *Muthoko & Another v Republic* [2008] KLR 296; and *Wathiaka & Another v Republic* [2008] KLR 1. Although a first appellate court has the general power to conduct de novo review of a trial court's decisions on both law and fact, the established practice s that the first appellate court must bear in mind that the trial court had the benefit of seeing and hearing the witnesses, and make allowance for this.

79 *Sasi v Republic* [2009] KLR 353.

Although the *de novo standard* is the general approach with regard to decisions of the High Court when acting as a trial court, a significant degree of deference applies to decisions on sentencing.[80] Generally, the Court of Appeal will only interfere with such decisions where it is clear that (i) the trial court acted on a wrong principle; (ii) overlooked some material factor; or (iii) the sentence is manifestly excessive in view of the circumstances of the case.[81]

The authorities do not clearly explain why a deferential approach applies to the High Court's decisions as to sentence. This approach, however, is consistent with statutory limitations on the right to appeal against sentence.[82]

3.3 The Supreme Court

Article 163 (4) and (5) of the 2010 constitution establish the jurisdiction of the Supreme Court in the following terms:

> (4) Appeals shall lie from the Court of Appeal to the Supreme Court—
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
>
> (5) A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

As is evident from the foregoing, the Supreme Court does not have a general appellate jurisdiction over decisions of the Court of Appeal.[83] This means the Court of Appeal is the court of final resort with regard to all cases except those set out in article 163 (4) of the 2010 constitution.[84] Appeals to the Supreme Court must revolve around either (i) the interpretation or application of the constitution; or (ii) a matter of substantial general public interest.

80 Ogola s/o Owoura [1954] EACA 270; Republic v Benjamin Ogweno Koyier [1976-80] 1 KLR 912; Njenga v Republic [1976-80] 1 KLR 1607; Omuse v Republic [2009] KLR 214.

81 On the powers (or is it duty?) of a first appellate court to conduct a *de novo review* of the decision of a trial court, see *Pandya v R* [1957] EA 336; *Rawala v R* [1957] EA 570; *Okeno v Republic* [1972] EA 32; *Gabriel Njoroge v Republic* [1982-88] 1 KAR 1134; *Muthoko & Another v Republic* [2008] KLR 296; and *Wathiaka & Another v Republic* [2008] KLR 1. Although a first appellate court has the general power to conduct de novo review of a trial court's decisions on both law and fact, the established practice s that the first appellate court must bear in mind that the trial court had the benefit of seeing and hearing the witnesses, and make allowance for this.

82 See especially sections 361 (1) (a) and 379 (1) (b) of the *Criminal Procedure Code*.

83 *Daniel Kimani Njihia v Francis Mwangi Kimani & Another* [2015] eKLR.

84 The category under article 163 (4) (a) is clear and straightforward. Accordingly, we have not discussed it in this section.

A party who appeals to the Supreme Court on the ground that his case involves the interpretation or application of the constitution must demonstrate that the particular constitutional provision(s) was the subject of litigation in the lower courts.[85] Further, such an appellant must be faulting the Court of Appeal's interpretation or application of the relevant provision of the constitution.[86] This threshold will not be met where the constitutional issue was merely peripheral or collateral to the main issue before the Court of Appeal.[87] The Supreme Court, however, has been ambivalent on the strictness of this requirement:

> where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.[88]

The just quoted dictum appears to contradict earlier decisions requiring a party who seeks to move the Supreme Court to clearly demonstrate that the decision of the Court of Appeal had turned on the interpretation or application of the constitution. The just quoted dictum is also arguably *ultra vires* the provisions of article 163 (2) of the 2010 constitution, which precludes a two-judge bench of the Supreme Court from overruling the established precedents of the Court. The hitherto established case law was to the following effect:

> In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.[89]

85 Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 104.

86 Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 104.

87 Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 104.

88 Per Ojwang and Wanjala SCJJ in *Munya 1*, at para 69.

89 Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 109. For a similar earlier six-judge bench decision of the Supreme Court to the same effect, see In Re the Matter of the Interim Independent Electoral Commission [2011-2012] 1 Supreme Court Digest 124, 138.

The Supreme Court has recently issued the following five-point guide on the threshold for invoking its jurisdiction where it is alleged that the appeal revolves around a matter of substantial general public interest:[90]

i. for an intended appeal to be certified as one involving a "matter of general public importance," the intending appellant is to satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant is to demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
iii. such question or questions of law is/are to have arisen in the Court or Courts below, and must have been the subject of judicial determination;
iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior Courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution.

As stated, the idea underlying the above jurisdictional rules is that the Supreme Court is a special court reserved for only cases of jurisprudential moment and substantial public interest.[91] The Supreme Court, however, has *'gluttonously'* exercised appellate jurisdiction[92] in electoral disputes, apparently on the erroneous supposition that such disputes generally meet the jurisdictional thresholds set out in the 2010 constitution. Part 4 of this Chapter examines the dangers and shortcomings inherent in the Supreme Court's approach to appellate jurisdiction in electoral disputes.

90 Isaac M'Inanga Kiebia v Isaya Theuri M'Lintari & Another [2015] eKLR, para 23.

91 Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board [2011-2012] 1 Supreme Court Digest 104.

92 Ahmednasir Abdullahi, The Limits of Prescriptive Reforms: The Struggle and Challenges of Judicial Reforms in Kenya, 2002 to 2010 (Annual Judges Conference, Mombasa, August 2015).

4.0 Standards of Review and Appellate Jurisdiction in Electoral Disputes

4.1 The High Court

As stated, the 2013 amendments empower the High Court to entertain appeals from decisions of the magistrates' courts in county electoral disputes. According to the 2013 amendments, the appellate jurisdiction of the High Court in electoral disputes is limited to *"matters of law only."*[93] Rule 34 (10) of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*,[94] however appears to extend the appellate jurisdiction of the High Court in electoral disputes beyond that envisioned by the 2013 amendments:

> The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.

Although there is no authority on the point, the logical import of Supreme Court decisions to the effect that the Court of Appeal has no jurisdiction to review High Court decisions on *'matters of fact'* in electoral disputes is that the High Court has no jurisdiction to review subordinate courts' decisions on 'matters of fact' in electoral disputes. This proposition is based on the textual similarity between the relevant parts of sections 75 (4) and 85A of the *Elections Act, 2011*. Accordingly, this chapter does not delve into decisions of the High Court on its appellate jurisdiction in electoral disputes.[95]

4.2 The Court of Appeal

As stated, the 2013 amendments limited the jurisdiction of the Court of Appeal in electoral matters to *"matters of law only."*[96] The scope of the jurisdiction of the Court of Appeal under the 2013 amendments was the subject of significant controversy in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* ("***Munya 2***").[97] One of the appellant's main complaints was that the Court

93 Section 75 (4) of the Elections Act, 2011.

94 Legal Notice No. 54 of 2013.

95 For relevant High Court decisions, see Williamkinyanyi Onyango v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR; Isaac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 others [2014] eKLR; and Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2014] eKLR.

96 Section 85A of the Elections Act, 2011.

97 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Petition No. 2b of 2014; [2014] eKLR.

of Appeal had entertained an appeal on matters of fact contrary to the 2013 amendments.[98] The 1st Respondent—who was the petitioner in the trial court and a voter in the disputed election—contested the appellant's interpretation of the 2013 amendments' limitation of the jurisdiction of the Court of Appeal to *"matters on law only,"*[99] on the ground that the law does not operate in vacuum.[100]

The Supreme Court reviewed several foreign cases as a means for delimiting the scope of the jurisdiction of the Court of Appeal under the 2013 amendments. In particular, the Supreme Court reviewed the decisions in Canada *(Director of Investigation and Research) v Southam Inc.;*[101] *Canadian National Ry. Co. v Bell Telephone Co. of Canada;*[102] *Bracegirdle v Oxley;*[103] *Meenakshi Mills, Madurai v The Commissioner of Income Tax, Madras;*[104] *Magmoed v Janse Van Rensburg and Others;*[105] and *Republic v Malabanan.*[106] The Supreme Court eventually reversed the decision of the Court of Appeal in *Munya 2* on the ground (mainly) that the latter court had erred in entertaining an appeal on *matters of fact* when its jurisdiction was limited to m*atters of law.* The relevant parts of the Judgment read as follows:

> [80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:
>
> a. **the technical element:** involving the interpretation of a constitutional or statutory provision;
>
> b. **the practical element:** involving the application of the Constitution and the law to a set of facts or evidence on record;
>
> c. **the evidentiary element:** involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.
>
> [81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:

98 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Petition No. 2b of 2014; [2014] eKLR para 13.

99 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Petition No. 2b of 2014; [2014] eKLR para 43-44.

100 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Petition No. 2b of 2014; [2014] eKLR, para 43-44.

101 Canada (Director of Investigation and Research) v Southam Inc. [1997] 1 SCR 748.

102 Canadian National Ry. Co. v Bell Telephone Co. of Canada [1939] SCR 308.

103 Bracegirdle v Oxley [1947] KB 349.

104 Meenakshi Mills, Madurai v The Commissioner of Income Tax, Madras [1957] AIR 49.

105 Magmoed v Janse Van Rensburg and Others 1993 (1) SA 777.

106 http://sc.judiciary.gov.ph/jurisprudence/2012/november2012/181664.pdf, at 14 February 2016.

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence…

[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted...

The Supreme Court's decisions in *Munya 2* and subsequent electoral disputes, as embodied in the above dictum, have several fundamental weaknesses. First, the description of the foreign cases as *"comparative"* is misleading. First, as stated, none of the foreign cases involved an electoral dispute. Secondly, even if it were assumed that the decisions in the foreign cases were relevant to the construction of Kenyan electoral laws, the political experiences of the relevant foreign countries, especially with regard to electoral malpractices, are very different from Kenya's. The countries from which these foreign cases were drawn, namely Canada, England, South Africa and India, do not have a comparable incidence of electoral violence, voter bribery, rigging and other problems frequently associated with electoral processes in Kenya. To put it differently, the political experiences of the countries from which the Supreme Court drew the above foreign cases are so different from Kenya's as to be incapable of being described as *"comparative."* Thirdly, the Supreme Court's decisions in *Munya 2* and subsequent electoral disputes conceal the

nature and decisive considerations on which the decisions in the foreign cases turned.[107] To illustrate, the Supreme Court selectively quoted Lord Denning's dictum and suppressed the ultimate unanimous decision of the English court in *Bracegirdle v Oxley,*[108] which reversed the decision of the trial court on a conclusion of fact in spite of a jurisdictional restriction to *matters of law*.[109] in the English case, the respondent drove a heavily-laden 6-ton lorry at a speed of 40-45 miles per hour when the maximum speed allowed for the particular type of lorry was 20 miles per hour. He overtook another lorry on a right-hand bend without giving any signal of his intention to pass. The trial court dismissed a charge of dangerous driving on the ground that the speed was not, in fact, dangerous to the public who were on the road or to the public who might reasonably have been expected to be on the road. The appellate court reversed this decision notwithstanding the restriction of its jurisdiction to *matters of law.* The rationale given by Humphreys J for interfering with the trial judge's conclusions of fact when the right of appeal was limited to *matters of law* is quite telling:[110]

> for a very great number of years, whenever justices have found facts from which only one conclusion can be drawn by reasonable persons honestly applying their minds to the question, and have refused to draw that only conclusion, this court has invariably upset the decision of the justices in the appropriate manner.

The approach in *Bracegirdle v Oxley*,[111] and in particular the approach reflected in the dictum of Humphreys J quoted above, has been applied in Kenya for a long time. It was first applied in Kenya in *M'Iriungu v R*.[112] The decision in Munya 2 clearly indicates that the Supreme Court was aware of this.[113] The Supreme Court, however, suppressed and eschewed this aspect of the decisions in *Bracegirdle v Oxley*[114] and *M'Iriungu v R*[115] even though

107 The Supreme Court invoked some of the foreign cases suo moto, presumably from its own independent research, at the judgment stage, without giving the litigants or their counsel the opportunity to comment on them.

108 Bracegirdle v Oxley [1947] KB 349.

109 The Supreme Court first invoked the English case in *Munya 2*, and subsequently affirmed the approach in (inter alia) F*rederick Otieno Outa v Jared Odoyo Okelo & 4 Others* [2014] eKLR; *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR; *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR.

110 *Bracegirdle v Oxley* [1947] KB 349, 357.

111 *Bracegirdle v Oxley* [1947] KB 349.

112 M'*Iriungu v R* [1983] KLR 455, 466.

113 *Munya 2*, para 79.

114 [1947] KB 349.

115 M'Iriungu v R [1983] KLR 455, 466.

it was especially relevant in Munya 2. The Court of Appeal in *Munya 2* was entitled, under the rule in *Bracegirdle v Oxley* and *M'Iriungu v R*, to reverse trial court's decision to the extent that the trial court had failed to draw the appropriate conclusion from facts. In particular, the trial court had failed to draw the appropriate conclusion from the following testimony:[116]

> He [i.e. the returning officer] is not allowed to duplicate results of one stream and replace it for another…if agents were excluded that was an irregularity…if [a] candidate's agent is absent the presiding officer should do nothing (sic)…I won't be concerned if I receive [a] Form 35 which is not signed by any single agent. I won't be concerned if I received a form signed by a few agents. The returning officer is not allowed to increase or decrease candidates votes. If he increases or decreases candidates votes that would be an irregularity. I do not know whether that [i.e. increasing or decreasing candidates' votes] would put IEBC into questionable integrity…I see the Form 35 for Forest Camp…I confirm it has corrections which are not countersigned. I would not be concerned. I cannot tell whether candidates would be concerned with altered votes. I do not know whether voters would be concerned. That won't impact on integrity of the electoral process. I would not be worried by failure to have any single agent signing the form in spite of the alterations…I see Form 35 for Nkubu Primary School…There is an error in Form 36 in entry of stream 1 twice and omitting stream 3…as the returning officer I would not be concerned or bothered by such error…I do not know whether voters would be concerned with such errors…In Form 36 there was an error in duplicating stream 1. That would not impeach on the integrity of the electoral process. The Form for Nkubu has alterations… there is no countersigning. [The] TNA candidate did not run in stream 1 and stream 2 and 3...I have not attached any document to show the vehicle was hired by IEBC.[117]

The Court of Appeal reversed the trial's decision in *Munya 2* because (*inter alia*) the trial court had failed to evaluate the testimony of the returning officer as quoted above, and its legal implications on the validity of the election:[118]

> We are convinced and we find and hold that the trial Judge erred and failed to discharge his legal duty to independently evaluate the evidence on record. We have failed to detect independent analysis and reasoning

116 By the returning officer for Imenti South Constituency, whose results were hotly contested in *Munya 2*.

117 Excerpt from the trial court's record in M*unya 2*.

118 *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others* (Civil Appeal No. 38 of 2013) [2014] eKLR, paras 202 and 212.

> by the trial Judge on the critical issues which form the crux of this appeal. In addition, we have analyzed the judgment and note that the trial judge erred in not considering and drawing inferences and conclusions on the tallying irregularities and errors disclosed in the testimony of DW 10. The weight accorded to the testimony of DW10 is not evident on the record. There is no evaluation of the testimony of DW 10 and its impact on the constitutional principles in Articles 81 and 86 of the Constitution and the relevant electoral laws. We find that the trial Judge erred in arriving at general conclusions which are not supported by the specific testimony of DW10 and the errors disclosed by the scrutiny and recount report…We are convinced that the trial Judge misdirected himself and erred in law in not considering the totality of the evidence on record and evaluating the legal effect of the errors and irregularities disclosed in arriving at his decision.

The Supreme Court overturned the decision of the Court of Appeal in *Munya 2* without interrogating the effect of the above testimony, as the Court of Appeal had done, on the validity of the election. By so doing, the Supreme Court effectively accorded too much deference to the trial court, thereby stripping the right of appeal of any practical meaning. The correct approach, in view of the peculiar facts of *Munya 2* as described above, would have been to reverse the decision of the trial court, as the Court of Appeal had done, notwithstanding the jurisdictional restriction of *"matters of law only."*[119]

In *Canada (Director of Investigation and Research) v Southam Inc.*,[120] another foreign decision invoked by the Supreme Court of Kenya in subsequent electoral disputes, the Supreme Court of Canada explained the distinction between *law* and *fact* in the following terms:

> Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. The distinction between questions of law and questions of mixed law and fact will sometimes be difficult to make.[121]

In the just quoted case, the Canadian Supreme Court emphasized deference to the decisions of *specialised tribunals* on matters of fact. The decisive consideration in this case was that the impugned decision had been made by a specialised tribunal. The Supreme Court of Canada explained the rationale

119 Section 85A of the *Elections Act*, 2011.

120 Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748.

121 Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748, 750.

for a deferential standard of review of the factual decisions of specialized tribunals as follows:

> Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the Competition Act than is the Tribunal, the natural inference is that the purpose of the Act is better served by appellate deference to the Tribunal's decisions …Expertise, which in this case overlaps with the purpose of the statute that the Tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review.[122]

Again, the Supreme Court of Kenya selectively quoted from *Canada (Director of Investigation and Research) v Southam Inc.*[123] and suppressed the real and decisive consideration on which that decision turned, namely the specialised nature of the tribunal whose decision had come for review.[124] Since the High Court is not a specialised court on the handling of electoral disputes, it is difficult to appreciate the relevance of the Canadian decision.

The fourth major weakness of the Supreme Court's decision in *Munya 2* and subsequent electoral disputes is that it is equivocal on whether the Court of Appeal has jurisdiction on matters of fact. Indeed, a keen reader is unable to understand why the Supreme Court reversed the decision of the Court of Appeal in *Munya 2* in view of the following holding:

> [92] It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating evidence is not a mechanical one; and we agree...that in considering "matters of law", an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of Appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the inquiry-scope of the appellate Judges, as they determine whether an election was held in conformity with the principles of the Constitution.

The Supreme Court's decisions in *Munya 2* and subsequent electoral disputes pose many legal and practical challenges. First, they are arguably inconsistent with the broad jurisdiction of the Court of Appeal under the 2010 constitution.

122 Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748, 750-751.

123 Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748.

124 *Munya 2*, para 67-68.

Secondly, the Supreme Court's decisions in *Munya 2* and subsequent electoral disputes accord too much deference to the High Court as a trial court to the extent that the ultimate decision is irreconcilable with the evidence on record. According deference to a trial court in such circumstances makes a mockery of and strips the right of appeal of any practical meaning. Thirdly, according too much deference to the trial court has the potential to undermine the achievement of the very *"highest standards of knowledge, technical competence, and probity"*[125] that the Supreme Court seems to espouse (at least rhetorically). Fourthly, the Supreme Court has created precedents that arguably apply not only to electoral disputes but also to all other cases in which the right of appeal and appellate review are limited to *matters of law*. The problem here is that different cases may involve very different legal or policy considerations. Indeed, the foreign cases invoked by the Supreme Court of Kenya in and subsequent electoral disputes transcend many different spheres, ranging from (*inter alia*) (i) competition law and policy;[126] to (ii) the building of railway stations;[127] (iii) road traffic offences;[128] (iv) income tax;[129] (v) civil unrest;[130] and (vi) the construction of a commercial contract.[131] It is difficult to imagine that a single standard of review, or similar legal or policy considerations, apply to all these very different cases.[132] It is also difficult to imagine that a single or similar approach to jurisdiction applies to all the different types of cases that come up at the Court of Appeal whenever the right of appeal is limited to *matters of law*. Put differently, different policy or historical considerations might require a different treatment of certain types of cases notwithstanding the textual similarity of statutes limiting appellate jurisdiction to matters of law. In particular, the Court of Appeal should consider not only the statutory limitation of its jurisdiction to *matters of law* but also the need to (i) avoid the perception that Kenyan courts are not honest arbiters of electoral disputes; and (ii) end the culture of having undue regard to legal and procedural technicalities in the determination of such disputes.

125 *Munya 2*, para 82.

126 Canada (Director of Investigation and Research) v Southam Inc. [1997] 1 SCR 748.

127 *Canadian National Ry. Co. v Bell Telephone Co. of Canada* [1939] SCR 308.

128 *Bracegirdle v Oxley* [1947] KB 349.

129 *Meenakshi Mills, Madurai v The Commissioner of Income Tax*, Madras [1957] AIR 49.

130 *Magmoed v Janse Van Rensburg & Others* 1993 (1) SA 777.

131 *Republic v Malabanan*, http://sc.judiciary.gov.ph/jurisprudence/2012/november2012/181664.pdf, at 11 February 2016.

132 The Supreme Court of Kenya did not invoke a single election petition decision on the issue of the distinction between law and fact in *Munya 2* and subsequent electoral disputes cases.

4.3 The Supreme Court

Initially, the common assumption was that the jurisdiction of the Supreme Court to hear electoral disputes was confined to presidential elections.[133] Put differently, it was commonly assumed that that litigation in respect of all other electoral disputes ended at the Court of Appeal.[134] Indeed, many electoral disputes ended at the Court of Appeal on account of this assumption. This assumption is fortified by at least four factors. First, the 2013 amendments, which *expressly* conferred appellate jurisdiction on the High Court and the Court of Appeal in electoral disputes, did not confer any such jurisdiction on the Supreme Court. The silence of the 2013 amendments on the appellate jurisdiction of the Supreme Court in electoral disputes suggests a decision by the lawmaker not to confer such jurisdiction on the Supreme Court. Secondly, human resource constraints, and in particular the small maximum number of seven judges of the Supreme Court, fortifies the assumption. The drafters of the 2010 constitution could not reasonably have intended or expected a bench of seven judges to hear and determine the multiplicity of appeals—perhaps running into hundreds—that could potentially arise with regard to more than 1,450 county assembly, 47 gubernatorial, 67 senatorial and 349 national assembly elections.[135] Thirdly, a plain reading of the text of the 2010 constitution does not support the existence of such a jurisdiction. Indeed, and as discussed elsewhere in this chapter, the Supreme Court's own judgments indicate that the drafters of the 2010 constitution did not envision it as a final appellate court but as a special court to deal with special issues. Lastly, the Supreme Court had, as at the date of the 2013 general election, consistently held that it was a special court reserved for only cases of jurisprudential moment and substantial public interest.[136]

The question of whether the Supreme Court has jurisdiction to entertain appeals in electoral disputes first arose in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (***"Munya 1"***).[137] The appellant appealed against

133 George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014), http://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html, at 07 February 2016.

134 George Kegoro, Who's Smarter Now? Questions Linger as Supreme Court Halts Appeal Rulings Daily Nation (Nairobi, 19 July 2014), http://mobile.nation.co.ke/news/Whos-smarter-now-Questions-as-Supreme-court-halts-Appeal/-/1950946/2390742/-/format/xhtml/-/gnxjh7z/-/index.html, at 07 February 2016.

135 Articles 97 (1) and 98 (1) of the 2010 constitution.

136 Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy (2002) 116 Harvard Law Review 19, 27.

137 Civil Application No. 5 of 2014; [2014] eKLR.

the decision of the Court of Appeal to nullify his election as the governor of the Meru County of the Republic of Kenya, on the grounds (*inter alia*) that the Court of Appeal had (i) exceeded its jurisdiction by entertaining an appeal on *matters of fact* contrary to the 2013 amendments; (ii) misinterpreted the provisions of the *Elections Act*, 2011 and the rules made thereunder on scrutiny and recount of votes; (iii) reopened, misinterpreted and distorted the evidence given at the trial court; (iv) erroneously shifted the burden of proof to him; and (v) infringed his under various articles of the 2010 constitution.[138]

The 1st Respondent, who was the petitioner in the trial court and a voter in the disputed election, filed a preliminary objection contesting the jurisdiction of the Supreme Court to hear the appeal in *Munya 1*. The 1st Respondent contended (inter alia) that (i) the Supreme Court did not have jurisdiction to entertain appeals from the decisions of the Court of Appeal in electoral matters; (ii) the appeal did not meet the jurisdictional requirements set out in article 163 (4) of the 2010 constitution and the prevailing case law; (iii) entertaining the appeal would open a floodgate of similar appeals; (iv) the appeal related to the interpretation and construction of an ordinary Act of Parliament and subsidiary legislation thereunder; and (v) the Court of Appeal had not interpreted, applied or expressed an opinion on any of the multiple constitutional provisions cited by the appellant.[139]

Eventually, the Supreme Court ruled that it had jurisdiction to hear the appeal. The Supreme Court gave the rationale for its jurisdiction in the following terms:[140]

> [69] The import of the Court's statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application…
>
> [77] While we agree…that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in *Articles 81 and 86 of the Constitution*, and that in interpreting them, a Court of law cannot disengage from the Constitution.

138 Civil Application No. 5 of 2014; [2014] eKLR, para 22-33.

139 Civil Application No. 5 of 2014; [2014] eKLR, para 34-46.

140 Civil Application No. 5 of 2014; [2014] eKLR, para 77-78.

> [78] Applying these principles to the matter at hand, we hold that this appeal, indeed, falls within the ambit of Article 163(4) (a) of the Constitution.

The Supreme Court subsequently admitted several other appeals against decisions of the Court of Appeal in electoral disputes pursuant to the above dictum.[141] The above dictum, however, has multiple shortcomings. First, it is a radical, unjustifiable and, arguably, undisciplined departure from precedent. In particular, the decision in *Ngoge v Kaparo & 5* Others[142] does not permit litigants who fail to identify specific constitutional provisions as having formed the gist of the cause at the Court of Appeal to move the Supreme Court on the ground that the Court of Appeal's reasoning and the conclusions which led to the determination of the issue, put in context, could properly be said to have taken a trajectory of constitutional interpretation or application.[143] Secondly, and more significantly, the approach embodied in the above dictum could easily transform the Supreme Court from a special court reserved for cases of jurisprudential moment and substantial public interest[144] to an ordinary appellate court. Thirdly, such a transformation would vitiate not only the letter but also the spirit and intention of the drafters of the 2010 constitution. Fourthly, all Kenyan laws, including all statutes and subsidiary legislation, are *"normative derivatives"* of the principles embodied in the constitution. Taking the reasoning embodied in the above dictum to its logical conclusion would mean that the Supreme Court has jurisdiction to hear appeals from all decisions of the Court of Appeal. The research for this Chapter did not find any supreme court, from anywhere in the world, with a jurisdiction to hear appeals from all decisions of the court of appeal. The Supreme Court of the United States, for instance, only has *"such appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."*[145] Fifthly, the approach embodied in the above dictum has the potential to open a flood gate of appeals. Further, and as stated, the Supreme Court cannot, with its limited maximum number of seven judges, handle all the appeals that could potentially arise from 1,450 county assembly,

141 Frederick Otieno Outa v Jared Odoyo Okelo & 4 Others [2014] eKLR; Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others [2014] eKLR; Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR; Mary Wambui Munene v Peter Gichuki King'ara & 2 Others [2014] eKLR; and Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR.

142 [2011-2012] 1 Supreme Court Digest 113.

143 See the decision in *Munya 1*, at para 69.

144 Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy (2002) 116 Harvard Law Review 19, 27.

145 Section 2 of Article III of the Constitution of the United States of America.

47 gubernatorial, 67 senatorial and 349 national assembly elections.[146] Even if a bench of 7 judges could handle all the appeals that could potentially arise from all these elections, it would fail to achieve the important constitutional imperative of timely resolution of electoral disputes.[147]

Due perhaps to criticism, or its own realization of error, the Supreme Court has made decisions that appear to depart from the *Munya 1* approach to the question of its jurisdiction in electoral disputes. In particular, the Supreme Court has, subsequent to *Munya 1*, ruled that it has no jurisdiction to entertain appeals in electoral disputes where the main complaint relates to award of costs;[148] extension of time;[149] and other matters that turn on the exercise of discretion.[150] While these piecemeal and apparently reluctant efforts are commendable, the appropriate step would be to overrule the *"normative derivatives…"* approach embodied in *Munya 1* altogether. Overruling the *"normative derivatives…"* approach embodied in *Munya 1*. The problem here is that it is difficult to discern the rationale for the Supreme Court's exercise of appellate jurisdiction in *Munya 1* and subsequent electoral disputes. In particular, and as stated, pushing the *"normative derivatives…"* approach to its logical conclusion would mean that the Supreme Court has appellate jurisdiction not only in electoral disputes but also all in other cases decided by the court of Appeal. Indeed, divisions of opinion have emerged in the Supreme Court on the soundness of the "normative derivatives…" approach to jurisdiction as set out in *Munya 1*:

> Whereas I largely concur with the majority that indeed this Court has jurisdiction to determine this appeal, I wish distinguish my reasoning in addressing the important argument…[by counsel] contesting the holding [in *Munya 1*] that "the Elections Act, 2011 and the regulations thereunder are *normative constitutional derivatives."*…I, however, find it imperative to emphasize that all laws legislated by Parliament operate on the same scale, with none being superior to the other and none assuming a sub-constitutional status giving it a superior status. The Elections Act therefore cannot be said to have a higher standing or constitutional relationship, than

146 Articles 97 (1) and 98 (1) of the 2010 constitution.

147 Articles 87 (1) and 105 (2) and (3) of the 2010 constitution.

148 Ledama Ole Kina v Samuel Kuntai Tunai & 9 Others [2015] eKLR.

149 Basil Criticos v Independent Electoral and Boundaries Commission & 2 Others [2015] eKLR.

150 Ledama Ole Kina v Samuel Kuntai Tunai & 9 Others [2015] eKLR; Basil Criticos v Independent Electoral and Boundaries Commission & 2 Others [2015] eKLR; and Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR. See also Daniel Kimani Njihia v Francis Mwangi Kimani & Another [2015] eKLR.

other statute enacted by the Legislature…[counsel's] fear in the seeming sub-constitutionalisation of the Elections Act, 2011 and the regulations thereunder cannot be termed as unfounded.[151]

5.0 Finding and Conclusion

The transformative dream of the 2010 Constitution remains elusive with regard to the handling of appeals from the decisions of election courts. In particular, the legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts, especially with regard to the twin issues of (i) timelines; (ii) the right of appeal; and (iii) the jurisdiction of appellate courts. This is especially true with regard to the decisions in *(inter alia) Munya 2;*[152] *Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others;*[153] *Mary Wambui Munene v Peter Gichuki King'ara & 2 others;*[154] *Lemanken Aramat v Harun Meitamei Lempaka & 2 others;*[155] *Hassan Nyanje Charo v Khatib Mwashetani & 3 others;*[156] *and Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others.*[157]

Although there had been no court decision on the issue as at the time of this chapter, the 2013 amendments are arguably unconstitutional in two respects. First, the restriction of the jurisdiction of first appellate courts to *"matters of law only"* is an unreasonable limitation on the constitutional rights to (i) a fair trial; and (ii) access to justice.[158] The 2013 amendments are especially prejudicial where a trial court's errors on matters of fact have influenced the outcome of an electoral dispute. Secondly, it is difficult to reconcile the 2013 amendments with the text of the 2010 constitution, since the latter has no jurisdictional restrictions based on the distinction as between *matters of fact and matters of law.*[159]

151 Per Njoki Ndung'u JSC in Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR, paras 202-205.

152 See para 116-177 of the decision in *Munya 2* and the authorities cited therein.

153 Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others Petition No. 21 of 2014; [2014] eKLR.

154 Mary Wambui Munene v Peter Gichuki King'ara & 2 others Petition No. 7 of 2014; [2014] eKLR.

155 Lemanken Aramat v Harun Meitamei Lempaka & 2 others Petition No. 5 of 2014; [2014] eKLR.

156 Hassan Nyanje Charo v Khatib Mwashetani & 3 others Civil Application No. 23 of 2014; [2014] eKLR.

157 Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others Petitions Nos. 18 and 20 of 2014; [2014] eKLR.

158 Articles 48 and 50 of the 2010 Constitution.

159 Article 164 (3) of the 2010 constitution empowers gives the Court of Appeal a general jurisdiction to hear appeals from the High Court, but empowers Parliament to delimit the appellate jurisdiction of the Court of Appeal with regard to decisions of "*any other court or tribunal.*"

The determination of some electoral disputes will occasionally turn on the interpretation or application of the Constitution. Although a plain reading of article 163 (4) of the 2010 Constitution might suggest that the Supreme Court has appellate jurisdiction over such disputes, a holistic reading of the 2010 Constitution negates the existence of any such jurisdiction. In particular, the (i) human resource constraint of seven judges; (ii) the possible floodgate of appeals; (iii) the constitutional imperative of timely resolution of electoral disputes; and (iv) the silence of the Elections Act, 2011 on the matter are inconsistent with the Supreme Court's exercise of appellate jurisdiction in electoral disputes. To put it differently, and briefly, the Constitution and laws of Kenya do not confer appellate jurisdiction on the Supreme Court in electoral disputes.

In view of the foregoing, this chapter recommends (i) a review of sections 75 (4) and 85A of the *Elections Act*, 2011 (especially the constitutionality of their limitation of the jurisdiction of first appellate courts to matters of law only); (ii) a *de novo review* of decisions of election courts, especially by the first appellate court; and (iii) the overruling of the Supreme Court's decisions in *Munya 1*, and subsequent electoral disputes.

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The judge is not of course like an oracle bellowing out divined prescriptions from its deep recesses. He is simply a product of his society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people…*the judge should continually try to deepen his insight by immersing himself in the history and the changing conditions of his community and in the thought and the vision of the philosophers and the poets.*[160]

160 Ben O Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (St. Martin's Press, 1977) 139.

V

Comparative Perspectives on Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence

H. Kwasi Prempeh

Abstract

The presidential election petition and other court challenges that ensued from Kenya's 2013 general elections form part of a contemporary global trend of disputed electoral contests that are settled judicially. The judicialization of elections, which are an inherently partisan contest with obvious political outcomes and implications, poses a special challenge for courts everywhere. In consequence, national law and courts in many democracies have commonly treated and approached election petitions as sui generis. The common concerns, principles, and policies raised by the special character of election petitions have, in turn, influenced and led to a general comparative convergence in the nature and content of the procedural and substantive rules and related judicial doctrine that inform and govern the litigation, adjudication and resolution of election petitions. To what extent and in what ways does Kenya's current legal framework for litigating and resolving election petitions fit the comparative picture? What are the implications of Kenya's emerging jurisprudence on election petitions for electoral justice and the future conduct and credibility of elections in Kenya's politically volatile- environment? These are the questions that are addressed in this chapter. The chapter concludes with some lessons and recommendations for improving the legal framework for election adjudication in Kenya.

1.0 Introduction: The Judicialization of Elections

The incidence of disputed national presidential and legislative elections that are thrown into bitter litigation and ultimately decided by courts has grown steadily in recent years. *Bush v. Gore*,[1] the controversial 5-4 decision of the United States (US) Supreme Court that effectively decided the "battle royale" over the US 2000 presidential elections, is the best-known example of this recent worldwide trend. The comparative list of judicially settled election contests has grown considerably longer in the last decade and a half, with courts called upon to decide disputed national "chief executive" elections in Uganda,[2] Ukraine,[3] Taiwan,[4] Nigeria,[5] Sierra Leone,[6] Italy,[7] Mexico,[8] Ghana,[9] and Indonesia,[10] among others. For the first time since the first quarter of the last century, the election of a Member of the British Parliament was invalidated by a court in 2010.[11] Kenya's 2013 General Elections, much anticipated in light of the bloody aftermath of the disputed 2007 elections,[12] produced *The Raila Odinga Case* and several parliamentary and county election petitions, putting to the test the country's newly transformed judiciary and the legal framework and machinery for handling and resolving election disputes put in place or inspired by the 2010 Constitution.

The growing judicialization of elections, especially outside the long-established democracies, is one of the fruits of the "third wave of democratization".[13] It

1 *Bush v. Gore* 531 U.S. 98 (2000).

2 *Besigye v Electoral Commission & Another (2007) UGSC 24; Besigye Kiiza v Museveni Yoweri Kaguta & Another* (2001) UGSC 3.

3 See, e.g., *Yushchenko v Central Election Commission*, Decision of the Ukrainian Constitutional Court of Dec. 3, 2004. For the English translation, see http://www2.pravda.com.ua/en/archive/2004/december/3/5.shtml, at 4 September 2015.

4 See C Hogg, 'Taiwan Court to Rule On Election', BBC News Online, 4 Nov., 2004,, http://news.bbc.co.uk/2/hi/asia-pacific/3978921.stm, at 4 September 2015.

5 Buhari v. Obasanjo (2005) 13 NWLR 1; *Buhari v. Independent Electoral Commission & 4 Others* (SC 51/2008).

6 *Sierra Leone People's Party v. National Electoral Commission & Another* (SC 4/2012)

7 *See Italian Court Rules Prodi Election Winner, Guardian Unlimited*, Apr. 19, 2006, http://www.theguardian.com/world/2006/apr/19/italy, at 7 September 2015.

8 See Mexico Court Rejects Fraud Claim, BBC News Online, Aug. 29, 2006, http://news.bbc.co.uk/2/hi/americas/5293796.stm, at 12 September 2015.

9 *Nana Akufo-Addo & 2 Others v. John Dramani Mahama & 2 Others,* (2013) SC Writ J1/6/2013.

10 J Cochrane, *Indonesia Court Rejects Election Challenge, Clearing Way for Joko Presidency,* New York Times, Aug. 21, 2014, http://www.nytimes.com/2014/08/22/world/asia/indonesian-court-rejects-election-challenge-clearing-way-for-joko-presidency.html?_r=0, at 20 September 2015.

11 *Watkins v. Woolas,* [2010] EWHC 2702 (QB) (Election court); reported as R (on application of Woolas) v Election Court [2010] EWHC 3169.

12 See generally Republic of Kenya, Report of the Independent Review Commission on the General Elections Held in Kenya on 27th December 2007 (2008) 36.

13 See generally S P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991).

also reflects the fact that, the rise of competitive multiparty politics in post-authoritarian democracies has been accompanied by the emergence of independent and assertive courts.[14] The object of this chapter, however, is not to attempt to proffer another explanation or theory to explain this phenomenon of the global judicialization of elections and of politics generally. Scholars like Ran Hirschl and others have explored that question sufficiently.[15] This chapter addresses a more practical question: What general body of legal principles, policies, and rules (procedural as well as substantive) informs or governs the litigation, adjudication, and resolution of election petitions? This question is examined, first, through a broad, albeit unavoidably selective, comparative lens and, then, in relation to the emerging, post-2010 Kenyan experience. The discussion is framed around the idea, embraced across national jurisdictions, that the election petition is, as a cause of action, sui generis. This essentially universal acknowledgement of the special character of the election petition has, in turn, produced a certain convergence in the comparative statutory and judicial treatment of election petitions, resulting in broadly similar procedural and substantive rules for adjudicating and resolving such disputes from jurisdiction to jurisdiction. Kenya's emerging experience fits this comparative picture. The Chapter concludes with some lessons and recommendations for improving the legal framework for election adjudication in Kenya.

2.0 The *Sui generis* Character of Election Petitions

A comparative survey of election petition cases with a view to discovering a "common law" governing election petitions would appear, initially, to be a fruitless exercise. Not only are election petitions inherently fact-specific, national differences, in both political and legal systems, also adds a layer of uniqueness to election petitions when compared across jurisdictions. Nonetheless, from both a judicial and an analytical standpoint, election petitions in competitive democracies generally implicate roughly the same policy concerns and present common challenges, making such cases, as a class, different in kind and significance from the cases that dominate judicial dockets

14 See, e.g., C N Tate and T Vallinder (eds), The Global Expansion of Judicial Power (1995); *R Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004); R Siedler et al (eds), *The Judicialization of Politics in Latin America* (2005); M Shapiro and A S Sweet, *On Law, Politics, and Judicialization* (2002); D W Jackson, M C Tolley, and M L Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (2010); R L Ellett, *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* (2008).

15 R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

everywhere. Judicial references to election petitions as matters sui generis—or words to that effect—are, thus, fairly common across jurisdictions.[16]

The usual sense in which the *sui generis* designation is meant or understood is that, as a cause of action, the election petition has a *protean* quality to it; it defies easy classification as a civil or a criminal case, or, for that matter, as any other conventional type of case. On appearance, an election petition looks every bit like any other civil case—an adversarial legal proceeding initiated and prosecuted by a private or non-state party against another party seeking remedies of a non-criminal (even if punitive) character. In form and procedure, too, election petitions are in fact very much like civil proceedings. In practice, however, things are not so straightforward. Election petitions often contain a mix of claims, some of which allege "criminal" offenses (for example, fraud, bribery) that may invite penal, if collateral, sanctions or consequences.[17] The fact that the election whose results the petitioner seeks to invalidate as being in violation of law is typically the act of a public body, which body is often a named respondent in the suit, also gives an election petition proceeding an administrative law posture. Moreover, in terms of the judge's role, an election judge has been described by an English court as occupying "an intermediate position" between a civil court judge, who must try an adversarial dispute between the parties, and a "coroner", whose function is primarily "inquisitorial".[18] This combination of the adversarial and the inquisitorial means that an election judge must be more "interventionist" and "ask a lot more questions than would be the norm in civil cases."[19]

An election petition is, however, special in more than a typological or classificatory sense. It is also inherently *political*. In fact, before the inception of the election petition, disputes over which candidate was the rightful winner of an election were resolved by and within legislatures, the legislatures themselves having previously wrestled from kings the right to judge the qualifications of their members. Courts gained a role in the electoral process only after parliaments proved incapable of settling disputed elections impartially or decisively and, consequently, ceded that role wholly or partially to the judiciary.[20] Without that express invitation by frustrated or ineffective

16 See, e.g., Collins Obih v. Mbakwe (1984) 1 SCNLR 192, 330 (Nigeria) (holding that election petitions are "special proceedings" divorced or separated from ordinary civil proceedings).

17 See, e.g., Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

18 Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

19 Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

20 See L Massicotte, A Blais and A Yoshinaka, Establishing the Rules of the Game: Election Laws in Democracies (2004).

legislatures, judges would not have inserted themselves into the electoral process. As an English High Court hearing an election petition recounted recently, "when in 1868, it was proposed that election disputes should be referred [from parliament] to courts, the then Lord Chief Justice, Sir Alexander Cockburn (ironically the country's leading expert in electoral law), wrote a stern letter of protest to the Lord Chancellor."[21] Chief Justice Cockburn was concerned that the proposed move would tarnish the judiciary by dragging judges needlessly into partisan political battles and, in the process, undermine the independence of the judiciary. Even today, there are democracies, among them Belgium, Denmark, Italy, Germany, and the Netherlands, that preserve a role for the legislature in the settlement of disputed elections.[22] In Germany, for example, certification of results (and thus settlement of disputed election results) is entrusted to the Bundestag, with the possibility of an appeal to the federal Constitutional Court, while in others, such as Italy, the legislature, after prior judicial review, is, at least formally, the ultimate decision-making body that determines the validity of the elections.[23] Even in the US, it is the House of Representatives that has the constitutional authority to determine the presidential election if the nationwide, state-by-state ballot is inconclusive.[24]

Despite the political origins of the election petition, the modern trend is indeed toward a judicialization of election dispute settlement. But turning election disputes over to courts does not, in and of itself, alter the inherently political character and context of such disputes. Stripped of its legal cloak, an election petition is but a partisan fight between two rival contenders for an elective political office; a political fight that has spilled over into the courtroom. Making it more political still is the fact that, beyond the rival parties, the "real party in interest" in this binary struggle for power are the voters. It is the voters' preferences, expressed through their votes, that the court is supposed to respect and uphold, above all else; yet voters as a class are not themselves directly present or named parties in the litigation, although in many jurisdictions individual voters may bring suit in their own capacity. As the Supreme Court of South Australia observed in a recent case, when the court sits to determine the validity of an election it is "not concerned with the ordinary rights of the parties as litigants."[25] Rather, it sits as "part of the

21 Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.) para 19.

22 International IDEA, Electoral Justice Handbook (2010) 70.

23 International IDEA, Electoral Justice Handbook (2010) 70.

24 Constitution of the United States of America, Amendment XII.

25 Featherston v Tully (2002) 83 SASR 302.

electoral machinery" with special jurisdiction to "determine questions that once were determined by the legislature itself."[26] The election petition thus draws the judiciary into the "political thicket" in the most overt and direct manner possible. This "judicialization of pure politics"[27] in turn puts judges on trial, as it tests their independence and heightens the risk of a *politicization of the judiciary*. Partly in response to this feeling and pressure of being on trial, normally camera-shy courts have lately been willing to make an exception for high-profile election petitions by agreeing to have the proceedings televised live, as have happened recently in Kenya, Ghana, and the UK.[28] This development recognizes that, from a political standpoint, the election petition is indeed quite unlike any other case.

Election petitions are also distinguishable by their inherent claim to *priority* on account of their exceptionally time-sensitive character. Not only can the business of government not wait while litigation proceeds as to who lawfully must occupy an elective office, the office at issue in an election petition is itself typically term-limited and, therefore, time-bound. Prolonged litigation over succession to the office will create uncertainty in the processes of government and may even diminish the effective tenure of the eventual winner. Public anxiety and tensions also tend to remain high while an election dispute remains unresolved. Moreover, the longer an election petition remains in the courts, the greater the risk that facts on the ground might shift politically in a way that tests, or raises public doubt as to, the ability of the judiciary to render a fair and impartial verdict. In short, with election disputes time is of the essence--and in a politically urgent and exceptional sort of way.

An election petition is further complicated by the fact that, unlike most cases, it does not arise out of a discrete event or transaction but covers multiple aspects of a multi-stage, interlinked *process* that stretches over a period of time. The various moving parts of the electoral cycle are time bound and feed into one another sequentially. Errors, omissions, or violations that occur in one stage but are not timely detected or corrected must, therefore, get rolled into the next stage. Often the grievance that gives rise to the petition is not felt until the entire process has ran its course and the rival contestant has been

26 Featherston v Tully (2002) 83 SASR 302.

27 R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 Fordham Law Review 721 (2006).

28 Alistair Carmichael Court Hearing Over Re-Election to be Broadcast by STV, The Guardian, Sept. 1, 2015; http://www.theguardian.com/uk-news/2015/sep/01/alistair-carmichael-court-hearing-re-election-broadcast-stv

declared winner. In that regard, the allegations in the election petition are oftentimes "untimely" in terms of the particular stage of the electoral cycle to which they relate.

Lastly, the election petition, though in the form of a legal dispute, often leans heavily and decisively on multiple "non-legal" *policy* considerations for its resolution.[29] The political and partisan character of the underlying dispute, the supremacy of the voters' will, the time-sensitivity and urgency of the matter, the cost of an election re-run, the need for finality, and the importance of ensuring continuity in office and government; all of these policy considerations must be weighed in the balance, along with the imperative to do justice between the parties, in the judicial resolution of the petition.

3.0 Comparative Election Petition Adjudication Process and Law: Governing Policies, Principles, and Standards

The significance of recognizing an election petition as *sui generis* lies in the implication that, as a cause of action, it is entitled to a special and different legislative and judicial treatment than is commonly accorded other cases. Indeed, the comparative evidence shows that, across legal systems and national jurisdictions, election petitions are, as a category, treated specially and differently from other cases, both legislatively and judicially—and usually in the same way and for roughly the same reasons from one jurisdiction to the other. This is most clearly manifested in the procedural and substantive rules, principles, and standards, together with the overall judicial philosophy, that govern and inform the adjudication and resolution of election petitions. These are examined in turn next.

3.1 Procedural Rules

States that use a judicial election dispute resolution system often recognize the special character of election petitions by enacting special procedural rules to govern their litigation and adjudication. These procedural rules, which may be found either in a national constitution or in special legislation (or both), typically cover issues like standing to sue, allocation of jurisdiction, statute of limitations, and in some cases, the time-limit for adjudication and decision

29 Leung Chun Ying v Ho Chun Yan Albert (2013) 16 HKCFAR 735, para 44 (noting that election petitions have "considerations other than legal ones").

in election petition cases. The policies underlining these process-related rules are principally a need for quick resolution and electoral finality in order to promote other higher-order policy goals, notably stability, continuity, and timely transition in office and government.[30] For example, instead of leaving election contests to make their way through the normal stepwise judicial system like all other cases, jurisdiction over such cases is usually vested in specially designated courts, with limited, if any, appellate review. This, in effect, truncates or shortens the process of adjudicating election petitions. Thus, for example, in Ghana, Nigeria, and Sierra Leone, the apex court has jurisdiction over disputed presidential elections but not parliamentary elections; in both Ghana and Sierra Leone, the supreme court's jurisdiction to decide presidential election petitions is an original jurisdiction, while in Nigeria a presidential election petition must first be heard by the federal Court of Appeal, subject to final appeal to the federal Supreme Court. In all three of these Anglophone countries, the intermediate Court of Appeal, not the Supreme Court, is the final appellate court with respect to petitions challenging the results of legislative elections.

In addition to a shortened jurisdictional route, election petitions also usually face highly restrictive statute of limitations and case disposition time limits. Where these time-sensitive procedural rules distinguish between presidential and non-presidential (e.g., parliamentary) election petitions, the rules for presidential petitions are usually more stringent—an acknowledgement of the incomparably greater political stakes involved in presidential contests and the equally greater urgency to fill the single most important national executive office to ensure stability and continuity in government.

Timeframes for *bringing* election petitions vary from country to country. As a rule, they are generally shorter than the deadlines for bringing challenges in ordinary civil litigation and administrative action.[31] The timeframe can be as short as three to five days to as long as thirty days from the declaration of the election results.[32] Poland has the shortest time limit, requiring a challenge to be lodged with the Supreme Court within three days of the announcement of the results.[33] The time limit is 10 days in France, Russia, and Uganda, 21 days

30 Koter v. Cosgrove (2004) 844 A.2d 29 (Pennyslvania) ("The continuing and efficient operation of government is dependent on the prompt resolution of election contests. Our system depends upon the timely certification of a winner. The operation of each of three branches of government would be threatened in the absence of clear limitations for the challenging of an election.")

31 International IDEA, *Electoral Justice Handbook* (2010)126.

32 International IDEA, *Electoral Justice Handbook* (2010).

33 Leung Chun Ying v Ho Chun Yan Albert (2013) 16 HKCFAR 767.

in Ghana, and 30 days in India.[34] In the UK, there is a 21-day time limit but if the case involves corrupt practices it is extended to 28 days.[35]

Unlike time limits for filing petitions, which are stipulated by law in nearly every jurisdiction where a judicially cognizable election petition is allowed, only a few countries expressly impose time limits for *resolving* election petitions.[36] The Czech Supreme Administrative Court, for example, is required to issue a decision within 20 days (whereas most civil cases in the Czech Republic take over a year).[37] Russian courts are given two months.[38] In Guatemala, the Supreme Court of Justice has three days to rule on an election petition, while the Constitutional Court has five days to rule on an appeal.[39] Colombia allows 50 days for judicial resolution of an election petition. Nigeria limits the entire process of litigating a petition, from start to finish, to 180 days. In many common law jurisdictions, however, there is no constitutional or statutory maximum time period for the resolution of electoral challenges. The overriding principle, however, is that election challenges must be resolved before the harm becomes irreparable.

It is difficult, if not impossible, to reconcile this principle with an open-ended adjudication calendar, such as obtains in common law countries like Ghana. As the 2013 examples of the Kenyan and Ghanaian Supreme Courts' handling of their respective presidential election petitions demonstrate, the time it takes to resolve a dispute may be susceptible to *Parkinson's Law:* "Work expands so as to fill the time available for its completion". Thus, restricted constitutionally to 14 days, the Kenyan court in The *Raila Odinga Case* took 14 days to complete the trial and reach a decision. On the other hand, its Ghanaian counterpart, which had no fixed time limit to comply with, while presumably mindful of the urgency of the task before it, took a full eight months to conclude the case.[40] Without the discipline of a time constraint, the Ghana court allowed itself to be drawn into needless courtroom theatrics,

34 International IDEA, Electoral Justice Handbook (2010)163.

35 International IDEA, Electoral Justice Handbook (2010).

36 International IDEA, Electoral Justice Handbook (2010).

37 International IDEA, Electoral Justice Handbook (2010).

38 International IDEA, Electoral Justice Handbook (2010).

39 International IDEA, Electoral Justice Handbook (2010).

40 The results of Ghana's general elections held on December 7 and 8, 2012 were announced on December 9. The petition to challenge the Electoral Commission's announcement declaring John Dramani Mahama President-elect was filed on December 28, 2012, within the 21-day constitutional time limit for filing such petitions. Pre-trial activity took almost three months. The trial on the merits did not commence until April 17, 2013. Judgment was finally rendered in favor of the respondents on August 29, 2013.

adjournments, and contempt of court sideshows that only took away valuable time.[41] The Ghanaian experience, then, counsels against open-ended, completely discretionary adjudication time frames.

A key factor accounting for the relatively prolonged litigation in the Ghana presidential election petition, *Akufo Addo v. Mahama*, is that, unlike the Kenyan Constitution, which is designed so that litigation in a presidential election petition will conclude before the president-elect takes office, Ghana's generally less regulatory constitution has no such linkage between a presidential election petition and the date for installing a newly elected president. It requires only that a petition challenging the election of the president be filed within 21 days of the declaration of the results of the election.[42] The petition in *Akufo Addo* was filed within the constitutional time limit on 28 December 2012. The declared winner of the December presidential elections, John D. Mahama, was sworn in as President on 7 January 2013, while the petition challenging his election was pending. The Supreme Court did not commence trial of the substantive case until 17 April 2013, over three months after the president-elect (and lead respondent in the presidential petition) had been installed in office. Thus, the Ghana Supreme Court, freed from the pressure of an approaching presidential succession deadline, had little incentive to keep to a strict timetable. An election dispute resolution system, such as Ghana's, that is not appropriately time limited or synchronized with the timetable for transition and succession to the disputed office and, as a result, allows that office to be occupied for an uncertain duration by the person whose election to the same office is in litigation, defeats the very policies (of finality and stability) that presumably underpin the system.

Of course time-bound procedural rules are not without their costs. In the context of election petitions, the cost of such procedural rules, whether they limit the time for filing or for resolution, fall invariably on the election challenger. Statutes of limitations that allow a challenger only a few short days after an election to file a petition challenging the results, including the time needed to gather all the supporting evidence to matters alleged, naturally impose a heavy burden on the ability of the challenger to put together a

41 In all the court cited 5 individuals for contempt, all of them for comments made in the media about the case. Four of these resulted in summary convictions; the fifth person was ordered excluded from the courtroom for the duration of the trial. See, e.g., 'Ghana Supreme Court Jails Editor for Contempt', Africa Review, July 3, 2013; http://www.africareview.com/News/Ghana-Supreme-Court-jails-editor-for-contempt/-/979180/1903312/-/lnupe7z/-/index.html, at 6 October 2015.

42 Constitution of Ghana 1992, article 64(1).

strong case in a timely fashion. The judicial policy of construing these time limits strictly compounds the hardship restrictions of this kind impose on challengers. In reality, too, these time limits have proved to be outcome-determinative in some cases.

For example, in *Leung Chun Ying v. Ho Chun Yan Albert*,[43] involving an election petition brought to challenge the March 2012 election of the chief executive of Hong Kong, the challenger, an unsuccessful candidate, missed the statutory period of seven (7) days (from the date of the announcement of the election result) for the lodging of an election petition. In court, he argued that the statutory seven-day time limit, insofar as it was non-extendable, was unconstitutional, citing a provision of the Hong Kong Basic Law that guaranteed citizens "access to the courts . . . for timely protection of their lawful rights and interests . . . and to judicial remedies." While acknowledging that the seven-day time limit for filing a petition (the same as Kenya's in presidential elections) was a "tight one,"[44] the court nevertheless held that, within the context of election petitions and "the need for any proceedings questioning an election to be dealt with speedily," the seven-day time limit was not unreasonably short. The court also found that a non-extendable seven-day time limit "is more or less in line with the limits imposed for similar proceedings in other jurisdictions."[45] On how a challenger might reasonably be expected to put together and file a strong, evidence-backed case within seven days of an election, the court answered that, "the class of persons entitled to lodge election petitions proceedings are those who can be expected to have been intimately involved in an election right from the start and who can therefore be expected to pay close attention not only to their own election activities but also the activities of their opponents."[46] This logic is hard to sustain where the petition is prosecuted by an individual voter, as opposed to the losing candidate or party. Even in the case of the latter, it seems unrealistic to expect contestants in an election, especially the underdog, to devote scarce human and material resources to monitor the activities of rivals and the election management body to gather evidence of electoral irregularities or violations during the heat of an election contest.

Two lessons may be drawn from the discussion so far. First, the time-bound

43 Leung Chun Ying v. Ho Chun Yan Albert (2013) 16 HKCFAR 735.

44 Leung Chun Ying v. Ho Chun Yan Albert (2013) 16 HKCFAR 766.

45 Leung Chun Ying v. Ho Chun Yan Albert (2013) 16 HKCFAR 767.

46 Leung Chun Ying v. Ho Chun Yan Albert (2013) 16 HKCFAR 766.

procedural rules that are commonly associated with election petitions--and which receive their policy justification from the *sui generis* character of an election petition—generally operate to disadvantage the party that seeks to invalidate the results. They are such that "departure from them could prove fatal to the case."[47] Second, the primary policy goals (speed, finality, stability, continuity, etc.) that undergird the resolution of election petitions (especially presidential petitions) and inform its procedural rules may conflict with the pursuit of "substantive justice". Thus, in resolving election petitions courts may find themselves compelled to subordinate substantive justice to other more pressing policy considerations—an outcome that is at war with the popular conception of the judicial role as one of doing justice above all else.

Election challengers are not necessarily always better off, however, with a regime of procedural rules that completely relaxed or dispensed with strict time limits. For instance, at the time of the 2013 presidential election petition in Ghana, it was widely believed that, the absence of a time limit for judicial resolution of the case would work to the advantage of the petitioners, as it would allow them time to develop and put forth a strong case.[48] Indeed, the petitioners in the petition in *Akufo Addo v Mahama* had ample opportunity to make their case, including being granted permission twice by the court to amend their petition to enable them introduce additional evidence. In the end, however, the long drawn litigation, which carried on for the best part of eight months, arguably—and predictably—hurt the petitioners' case *politically*. By the time the Ghana case got underway, the first respondent had already been installed in office as president. Over the course of the petition proceedings, the president would go to appoint his cabinet, ambassadors, and other key administration personnel, including appointing as his executive secretary a close relative of the presiding judge of the Supreme Court panel that was hearing the petition.[49] Once a person is sworn into office as President and has activated the powers and prerogatives of his office, the question

47 Fitch v. Stephenson (2008) EWHC 501 (QB), para 86.

48 A G Otchere-Darko, 'Balancing Speed with Justice: The Task Before the Nine Justices' Ghanaweb, 11 February 2013; http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=264647.\, at 12 October 2015. For a contrary view demonstrating the superiority of the Kenyan over the Ghanaian court's handling of the presidential election petition see, K A Essuman, 'Of Course Ghana Is Not Kenya' Ghanaweb Online, 31 March 2013; http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=269523, at 12 October See also P Ofori-Atta, 'The thing about Ghana and Kenya' The Africa Report, April 8, 2013; http://www.theafricareport.com/Columns/the-thing-about-kenya-and-ghana.html, at 12 October 2015.

49 Another important difference between the Ghanaian and Kenyan courts' respective handling of their cases is that, unlike Kenya, where the full Supreme Court bench (6 justices at the time) sat to hear the petition, in Ghana, whose Supreme Court has no constitutional or statutory upper limit, the Chief Justice, following longstanding practice, picked a panel of nine (out of 14 or so available justices) to hear the presidential petition.

whether he or she was validly elected becomes, especially in the African context of a tradition of imperial presidents, every bit a political question, and any expectation that judges hearing a petition challenging the election of a fully installed president will approach that question merely or solely as legal technicians is a little fanciful.

3.2 Jurisprudence and Substantive Rules

The procedural challenges an election petitioner must surmount are compounded by the substantive rules and judicial doctrine that typically govern the resolution of election petitions. And where, as in most common law democracies, jurisdiction over election petitions has been ceded to or conferred on the courts by law, the common approach of the courts to resolving such disputes, reflecting the early concerns of Chief Justice Cockburn, has been one of judicial restraint.

This is not judicial restraint borne out of insecurity about the source of the courts' authority. Modern courts that must resolve election petitions do not suffer from doubts about the legitimacy of their power; they typically derive their authority from constitutions and supplemental legislation. Nonetheless, judges still feel a justifiable apprehension when called upon to discharge a duty that carries with it the risk of second-guessing or supplanting the popular will. This attitude of judicial restraint is reflected in different aspects of the comparative jurisprudence governing election petitions.

As a start, courts are often at pains to explain that, as a cause of action, the election petition is statutory (or constitutional) in origin and has no independent "common law" grounding.[50] This is essentially a judicial bow to separation of powers; a way of saying that in considering and deciding an election petition, the court is limited, jurisdictionally, to what the legislature or constitution has provided.

Judicial restraint in election dispute resolution also manifests in the courts' generally conservative construction and interpretation of applicable statutory

50 See, e.g., Jyoti Basu & Others v. Debi Ghosal & Others (1982) AIR 983; SCR (3) 318: "An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket."

or constitutional texts in the election petition context. Election petition adjudication is not considered an appropriate occasion for judicial activism or making "new law" that departs from the prior understanding of all parties at the time of the elections.[51] In fact, one of the most forceful scholarly criticisms of *Bush v. Gore* is that, in ruling to terminate the manual recount of ballots in certain contested counties in the state of Florida, the five-judge Supreme Court majority relied on an unheard of theory of the Equal Protection clause of the US Constitution that it had invented just for that case--and that case only.[52]

Judicial restraint in the resolution of election petitions is also very much in evidence in the way courts have dealt doctrinally with acts and omissions of election management bodies ("EMBs"). The general judicial attitude toward EMBs is one of presumptive deference. Deference toward the EMB is usually expressed in a number of different ways. First, the results of an election, as declared by the EMB, benefit from a judicial presumption of legality.[53] Second, courts express a general reluctance to annul officially declared election results.[54] Third, courts allow EMBs significant latitude and margin for error when reviewing the conduct of an election against applicable laws and regulations. In effect, while courts generally hold petitioners seeking to set aside an election to strict compliance with the requirements of the law, when it comes to dealing with EMBs, who are often respondents in election petitions, courts do not hold them to nearly the same standard of strict compliance with the law. Rather, EMBs benefit from a highly liberal and deferential construction and application of the law when courts must review their management of an election in an election petition proceeding.

This general judicial deference toward EMBs is best captured in the doctrine of "substantial compliance" (or, expressed in the negative, substantial noncompliance), a doctrine that pervades comparative election

51 See R A Posner, Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts (2001), p. 159 ("Nothing is more infuriating than changing the election rules after the outcome of the election, conducted under the existing rules, is known.")

52 R H Pildes, 'Judging "New Law" in Election Disputes' 29 Florida St. University Law Review. 691 (2001).

53 See M Azu, 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' 14 African Human Rights Law Journal 150 (2015), p. 160 ("At common law, it is generally presumed that all official acts are rightly and regularly done. It is also presumed that all official records are accurate. Consequently, it is presumed that presidential elections are conducted regularly, and that presidential results as published by an EMB are also right and accurate.")

54 See, e.g., Fitch v. Stephenson, above n 48, para 29 ("The decided cases, including those which lord Denning considered in Morgan v Simpson, establish that the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. . . This is because, whenever possible, the Courts seek to give effect to the will of the electorate.")

jurisprudence.[55] Courts have generally approached allegations of irregularities and illegalities in the conduct of an election from the basic premise that a perfect or error-free election is an unattainable ideal. Building on this premise, courts have held consistently that "strict compliance" with all the requirements or terms of applicable law is not required before an election will be upheld as valid.[56] In other words, not every irregularity or breach of law in the conduct of an election provides sufficient grounds to void an election; as long as there has been substantial compliance—or there has not been substantial non-compliance—with the applicable laws and regulations the election will not be upheld.[57]

In the context of an election petition, substantial non-compliance is not simply a matter of magnitude;[58] it is also a matter of kind. In some jurisdictions, notably in the US, England, and other common-law countries, a distinction is made between "directory" and "mandatory" statutory requirements.[59] Although all election statutes may be said to be facially or nominally mandatory, in the sense that compliance is expected of those who

55 See generally B H Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges (2nd ed, 2008) ch. 3 (discussing the doctrine of strict compliance and substantial compliance using several illustrative cases).

56 B H Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges (2nd ed, 2008) ch. 3 (discussing the doctrine of strict compliance and substantial compliance using several illustrative cases).

57 B H Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges (2nd ed, 2008) ch. 3 (discussing the doctrine of strict compliance and substantial compliance using several illustrative cases).

58 See, e.g., Reaburn v Lorje (2000) SKQB 81 (Saskatchewan)

59 The Supreme Court of Illinois discussed the distinguishing principles in Pullen v. Mulligan (1990) 561 N.E.2d 585, 595-596 as follows:

The Election Code is a comprehensive scheme which regulates the manner in which elections shall be carried out. Strict compliance with all applicable provisions in the Election Code is not necessary, however, to sustain a particular ballot. Rather, our courts draw a distinction between "mandatory" provisions and "directory" provisions. Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots . . .

There is no universal formula for distinguishing between mandatory and directory provisions. Rather, whether a particular statutory provision is mandatory or directory depends upon the intent of the legislature, which is ascertained by examining the nature and object of the statute and the consequences which would result from any given construction. . . [W]here a statute, in prescribing the duties of the election officials, expressly states that failure to act in the manner set forth in the statute will void the ballot, the statute will generally be given a mandatory construction. However, if the statute simply prescribes the performance of a certain act in a certain manner, and does not expressly state that compliance is essential to the validity of the ballot, then the statute generally will be given a directory construction. . . We do not mean to suggest, of course, that election officials may simply ignore directory provisions of the Election Code. All of the provisions of the Election Code are mandatory in the sense that election officials are obligated to comply with their terms. It does not follow, however, that every failure to comply should invalidate the ballot in question. Literal compliance with directory provisions will be required if it appears that the spirit of the law has not been violated and the result of the election has been fairly ascertained.

See also Fitch v Stephenson, above n 48, para 68 ("The Court must ask itself whether the statutory requirement is mandatory or directory. It is only in the rare circumstances of mandatory requirements that a failure to comply with a procedural requirement will be fatal to the proceedings.").

incur a legal duty under the statute, courts treat certain compliance failures as breaches only of directory provisions and, therefore, not fatal, especially if the failure is not challenged until after the election.[60] The general idea is that election statutes must be construed and applied so as to protect, not defeat, the right to vote. Thus, where compliance failures, including those involving violations of statute, did not deny or obstruct voters' ability to cast a vote, the legal requirements have been deemed directory or the noncompliance insubstantial. For instance, in *Jonas v. Quinn-Leandro*,[61] decided by the High Court (Antigua and Barbuda) of Eastern Caribbean Supreme Court, the applicable statute contained a provision stating that "the Register of Elections published under section 24(1) shall be used for any election held in a constituency to which the register relates."[62] Due to poor planning and late preparation on the part of election officials, the Register was not ready for use in the election in petitioner's constituency. Instead, a "Photo List" containing the same information statutorily required to be on the Register of Elections was used. While it "strongly deprecated" the use of the Photo List instead of the statutorily required Register, and cautioned the election officials against future violations of the law, the Court nonetheless excused the violation, as it did not find "that the use of the Photo Lists resulted in persons who were entitled to vote not being able to vote; or persons who ought not to have voted being allowed to vote."[63]

Similarly, where election officials failed to have all voters sign the official poll books, or failed to initial all ballots,[64] or substituted a manual for the required electronic method of voting, these breaches of law have been judged not be rise to the level of substantial noncompliance. The policy, as the Supreme Court of the US state of Illinois put it, is that "ignorance, inadvertence, mistake, or

60 See, e.g., Henderson v Maley (1991) 806 P.2d 626, 630 (Oklahoma) (finding statutory post-election ballot preservation requirement is directory and not mandatory so substantial compliance is sufficient); Johnson v Tanka (1967) 154 N.W.2d 185, 187 (Minnesota)(construing post-election review statutes as directory rather than mandatory unless the election's results are uncertain because of a departure from statutory requirements); Donn v McCuen (1990) 797 S.W.2d 455. 456 (Arkansas) (finding election provisions mandatory if enforcement is sought pre-election, but directory if not challenged until post-election); Pullen v Mulligan (1990) 561 N.E.2d 585, 596 (Illinois) (holding that if only the spirit of the directory law is violated and the election result is fairly ascertainable, then literal compliance is not required); McNally v Tollander (1981) 302 N.W.2d 440, 444 (Wisconsin) (finding, in the face of substantial compliance with statutory requirements the court traditionally construes the statutes as directory).

61 Jonas v. Quinn-Leandro (2009) Claim No. ANUHCV2009/412; http://www.eccourts.org/dean-jonas-v-jacqui-quinn-leandro-et-al-st-clair-simon-v-winston-baldwin-spender-et-al-arthur-nibbs-v-trevor-walker-et-al-charles-fernandez-v-john-maginley-et-al/, at 15 October 2015.

62 Jonas v. Quinn-Leandro (2009) Claim No. ANUHCV2009/412 para 214.

63 Jonas v. Quinn-Leandro (2009) Claim No. ANUHCV2009/412 para 215.

64 See, e.g., Jackson v Maley (1991) 806 P.2d 610 (Oklahoma).

even intentional wrong on the part of election officials will not be permitted to disenfranchise voters."[65] In contrast, where the violations are committed intentionally by candidates or parties or individuals associated with them, such as where unregistered individuals cast a vote or registered voters double-vote or the respondent employed fraud, bribery, or other corrupt practice in the election, courts have found such non-compliance to be substantial.[66]

The substantive bar that a petitioner must clear is made harder still by the fact, even where courts find substantial non-compliance, such non-compliance alone is frequently not enough to void an election. In the vast majority of jurisdictions, the substantial non-compliance must also be shown to have "affected the results." In some jurisdictions that do not appear to weigh non-compliance for substantiality, such as Uganda or India, the non-compliance or irregularities must be shown to have affected the results of the election in a "substantial" or "material" way for the petitioner to prevail.[67] In other words, either the non-compliance itself or its effect on the outcome of the elections must be substantial or material.

In *Besigye v. EC*,[68] the petitioner challenged as unconstitutional the additional statutory requirement of proof of a substantial effect on the results of the election upon a finding that there had been noncompliance with applicable laws. The Ugandan Supreme Court, however, rejected the constitutional challenge. In that case, the court found that the Electoral Commission had failed to comply with provisions of the Constitution, Presidential Elections Act and the Electoral Commission Act in the conduct of the 2006 Presidential Elections, both with regard to disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote and with regard to the counting and tallying of results. The court also accepted that the principle of free and fair elections was compromised by bribery, intimidation or violence in some areas of the country; that the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by

65 Pullen v Mulligan, above n 60, 607. See also *McCavitt v Registrars of Voters of Brockton*, 434 N.E.2d 620, 626 (Mass. 1982) ("A voter who has cast his ballot in good faith should not be disenfranchised 'because of the failure of a ministerial officer to perform some duty imposed on him by law.")

66 See, e.g., Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

67 Election Commission of India v Shivaji and Others (1988) SCR 1 (878) ("It has to be stated here that it is not the law that every noncompliance with the provisions of the Act or of the Constitution will vitiate an election. It is only when it is shown that the result of the election was materially affected by such non-compliance the High court would have jurisdiction to set aside an election.")

68 *Besigye v Electoral Commission & Another* (2007) UGSC 24; Besigye Kiiza v Museveni Yoweri Kaguta & Another (2001) UGSC 3.

multiple voting, and vote stuffing in some areas. Notwithstanding these findings, the court ruled, by a 4-3 majority, that "it was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles … affected the results of the presidential election in a substantial manner."

Other courts, relying primarily on Lord Denning's opinion in *Morgan v. Simpson,*[69] have however applied the two requirements disjunctively, holding, in effect, that substantial non-compliance (or absence of substantial compliance) alone is sufficient to void an election, without the need for a showing as to whether the non-compliance affected the election results, or, alternatively, that, as long as the non-compliance affected the results, the election must be set aside regardless of whether the non-compliance was substantial or not. There are also cases suggesting that elections may be voided on grounds of non-compliance or substantial non-compliance with applicable laws but only where the violations involve fraud or a "corrupt" practice on the part of the declared winner.[70] The comparative majority rule, however, appears to require proof of both (substantial) non-compliance and an effect on the election results, including in cases of electoral fraud or corruption.

Petitioners must also contend with the fact that, in the majority of jurisdictions, it is the petitioner that must bear the burden of proving both that there was substantial non-compliance and that the non-compliance affected the election results. In a small minority of cases, however, the burden of proof is split between the litigants: first, the petitioner must prove substantial non-compliance with election laws, after which the burden shifts to the respondent to demonstrate that the irregularities and violations did not affect the results.[71] There is far less comparative consensus, however, as to the standard of proof applicable to election petitions. Many jurisdictions require petitioners to prove the non-criminal allegations in an election petition by the normal civil litigation standard of a preponderance of the evidence (or balance of probabilities). A significant number of jurisdictions, however, do not consider the balance of probabilities standard suitable for the election petition context, preferring a more rigorous or demanding standard in order to ensure that only those cases supported by very credible and persuasive evidence will filter through.

69 Morgan v. Simpson (1975) 1 QB 151.

70 See B H Weinberg, The Resolution of Election Disputes: Legal Principles that Control Election Challenges (2nd ed, 2008) 85-89.

71 See, e.g., Shaw v Gift Lake Metis Settlement (2015)] ABQB 470 (Alberta, Canada).

The alternative standard adopted in such jurisdictions, which include most states within the federal US, is proof by "clear and convincing evidence" – which is an intermediate standard between balance-of-probabilities and proof "beyond reasonable doubt". As to those allegations in an election petition that are criminal in nature, notably fraud and vote-buying, the general view is that those must be proved beyond reasonable doubt, as liability predicated on such allegations often carry with them punitive and other collateral consequences of a more personal nature.[72] The Court in *The Raila Odinga Case* also held that, where the law specifies certain quantitative or numerical thresholds or requirements that a candidate must meet to prevail in an election, the petitioner who alleges non-compliance with, or a failure to meet, those requirements must prove that beyond reasonable doubt.

4.0 The Emerging Kenyan Experience in Comparative Perspective

The foregoing survey of the comparative procedural and substantive legal framework relating to election petitions highlights the doctrinal barriers and practical difficulties that those who seek to challenge officially declared election results must overcome. Owing to the Westminster origins of the modern election petition,[73] the procedural and substantive rules and principles governing election petitions have been fashioned largely in the context of parliamentary, as opposed to presidential, elections. However, with the rise and growth of presidential democracies, the election petition has been extended beyond its parliamentary origins to cover presidential elections. In the process, the election petition has carried along with it the rules, standards, and principles developed in the parliamentary election context.

In general, the rules and principles governing election petitions have a significantly greater (adverse) impact on the petitioner challenging a presidential election result than on the parliamentary election petitioner. There are at least two explanations for this disparity. First, the national, as opposed to local, geographic scope of a presidential election means that the loser who seeks to contest a presidential election in court faces significantly greater difficulties and costs in meeting the time limits and evidentiary burdens and proofs associated with election petitions. Second, the policies that

72 See Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

73 See R Grist, 'Challenging elections in the courts' [2015] Public Law 375, 376.

animate and inform the adjudication of election petitions (finality, urgency, stability, continuity, etc.) assume far greater force and significance in the case of the election of the one person who shall occupy the office of president--the sole office in which is reposed the executive authority of the state--than the election of one legislator among a few hundred members of a legislative assembly. Thus, while some parliamentary election petitions succeed despite the odds, successful presidential election petitions are not so common.

Kenya's contemporary election dispute resolution system is, in many respects, quite typical in a comparative sense. Like other jurisdictions, Kenyan law treats election petitions as cases *sui generis*, as is reflected in the tighter statutes of limitations and adjudication timeframes and the tougher-than-usual standards of proof and other substantive rules that the Kenyan courts apply in resolving such cases. Not unusually, too, in the litigation that ensued in the aftermath of the 2013 general elections, the burden of these procedural and substantive rules was felt more by the petitioners in *The Raila Odinga Case* than by the petitioners in the many parliamentary and other local, non-presidential election petitions across the country. While the petitioners' case in *The Raila Odinga Case* failed, some of the non-presidential elections petitions have been successful. Not surprisingly, the bulk of the criticism and negative commentary directed at the judicial resolution of the court challenges arising from the 2013 general elections dispute resolution have, in fact, been directed primarily at The Raila Odinga Case.[74] There are a number of possible explanations for this.

First, the harshness of the restrictive time frames relating to election petitions in Kenya, and especially their possible adverse impact on substantive justice, is more evident in a presidential election petition than in a parliamentary election petition. Compared to a parliamentary petition, which has to be resolved within six months at the High Court, subject to (possibly two tiers of) appeal, a presidential petition must be tried and determined, once and for all, by the Kenyan Supreme Court within 14 days (with no opportunity for appeal or rehearing). This tight timeframe adversely affected the First Petitioner's case in at least two instances. Notably, the Court declined to entertain a "further affidavit" submitted by the First Petitioner and by means of which the Petitioner had sought to introduce "new evidence" into the case

74 See T Mogeni and M Kerretts-Makau, Judiciary Working Committee on Election Preparations: Evaluation of the performance of the Judiciary and the Judiciary Working Committee on Election Preparations in managing the electoral dispute resolution process (2014) 8.

after the petition had been filed. The First Petitioner also failed to get into his filed petition the claim that his votes had been deflated by 11,000 votes. That evidence came in later, at the submission stage of the proceedings, and was excluded for being procedurally out of time. In essence, then, the merits of the First Petitioner's case did not get a full hearing, primarily for reasons of time.

The Court defended its decision thus:

> "Were the Court to admit the new evidence, then the ends of justice would demand that the Respondents be granted reasonable time to file a response . . . . The Respondents urged that they needed the same length of time it had taken for the 1st Petitioner to file the "further affidavit", to make a response – six days as from 27th March, 2013. Even had the Court granted only half that time, the main hearing of the Petition would not have started before 30th March, 2013, and the Supreme Court would, consequently, have failed to hear and determine the Petition within 14 days as required by the Constitution."[75]

The First Petitioner rightly protested that the "prescriptions of procedure and form" had been allowed to trump "substantive justice". To that charge, the Court had no choice but to invoke as authority for its inflexible stance Article 140 of the Kenyan Constitution. The policy behind the tight, non-extendable constitutional timeframe, as the Court explained, was "expedition" in the resolution of presidential petitions, which, in turn, was necessary because "the protracted holding-on of a President-elect, as well as a retiring President, would, in our opinion, present a state of anticipation and uncertainty which would not serve the public interest."[76]

It mattered, too, in *The Raila Odinga Case*, that the time limit that proved fatal to the Petitioner's "further affidavit" was constitutional, as opposed to statutory, in origin. In a number of recent English cases, the courts have been willing to waive compliance with presumably non-waivable statutory time limits and other formalistic requirements in election petition proceedings on the grounds that a rigid adherence in the specific circumstances of those cases would be incompatible with Britain's commitments under the European Convention of Human Rights.[77]

In contrast, petitioners in the parliamentary and county election cases did not

75 The Raila Odinga Case para 216.

76 The Raila Odinga Case para 217.

77 See, e.g., Miller v. Bull (2009) EWHC 2640 (QB); Ali v. Bashir (2012) EWHC 3007 (QB).

suffer a similar curse of insufficient time. In accordance with the constitution, each had 28 days after the declaration of results to file their petitions,[78] and the High Court had six months within which to conclude a filed case.[79] Moreover, the Supreme Court's assertion of appellate jurisdiction in non-presidential elections, in reliance on an idiosyncratic theory arising from its reading of the interaction between Article 163 (4)(a) of the Constitution and the Election Petitions Act, means that, unlike the one-stop adjudication of presidential petitions, parliamentary petitions have the benefit of a three-tier adjudication structure, comprising initial trial before the High Court plus the possibility of two appeals, first to the Court of Appeal, then to the Supreme Court. In fact, in terms of statute of limitations, tiers of jurisdiction, and adjudication timeframes, one could argue that parliamentary petitions in Kenya have lost essential aspects of the general *sui generis* character of election petitions. As a result, in comparison with petitioners in presidential election disputes, parliamentary election petitioners in Kenya receive far greater procedural justice and, with that, an enhanced prospect of obtaining substantive justice from the judicial system.

Second, the question of the EMB accountability, and the related charge that the emerging election jurisprudence in Kenya leaves the Kenyan EMB, the Independent Election and Boundaries Commission (IEBC) largely "off the hook" for its conduct of elections, is one that arises primarily in the presidential election petition context than in the parliamentary context. Central to the litigation in The Raila Odinga Case was the conduct of the IEBC, not so much the conduct of Mr. Odinga's rival in the elections. Petitioners' case alleged multiple violations of law and administrative regulations by the IEBC. The Supreme Court's ultimate conclusion that, such irregularities, although factually established, did not represent substantial noncompliance enough to affect the results, was bound not only to leave the petitioners aggrieved, it also raised questions about impunity and accountability in relation to the IEBC. In contrast to The Raila Odinga Case, the post-2013 parliamentary petitions were frequently about alleged illegalities and general malfeasance on the part of the declared winner or his campaign. Irregularities attributable to the IEBC do not appear predominant in the non-presidential petitions—not the successful cases, at least.

78 Constitution of Kenya 2010, Article 87(2).

79 Constitution of Kenya 2010, Article 105(2).

This persistent complaint that a failed presidential election petition means EMB impunity and the failure of the rule of law is not confined to Kenya. In fact, courts that decide such cases, typically in favor of not disturbing the election results despite evidence and findings of noncompliance with the law by the EMB, are well aware of the risk of being perceived as condoning official impunity by the EMB. This is evidenced by the words of reprobation directed at EMBs by courts for their errors and omissions in conducting an election—at the same time as the same courts find insufficient legal grounds to void the election. Thus, while dismissing the petition in *Besigye v. EC,* the Ugandan Supreme Court excoriated the Electoral Commission and other state agencies for, among other things, "the massive disenfranchisement of voters by deleting their names from the voters register, without their knowledge or being heard; the apparent partisan and partial conduct by some electoral officials."[80] In *Akufo Addo v. Mahama*, the justices of the Ghana Supreme Court, while dismissing the petitioners' case, nonetheless implored the Election Commission, albeit in dicta, to consider certain administrative and institutional changes and reforms to improve the future conduct of elections. The Court in *The Raila Odinga Case* also adopted a "rebuke-without-remedy" approach in dealing with the acts and omissions of the IEBC. Thus, for example, while it excused the IEBC's recourse to manual transmission when the legally required electronic transmission system failed, the Court felt there may have been some impropriety in the procurement of the transmission technology and recommended that this matter be entrusted to the relevant State agency for further investigation and possible prosecution of suspects."

The disparity in constitutional, statutory, and jurisprudential treatment between presidential election petitions, as represented by *The Raila Odinga Case*, on one hand, and parliamentary election petitions, on the other, is no doubt attributable to the sharp difference in the political stakes of the two classes of petitions. As the Court noted in *The Raila Odinga Case,* "It is particularly significant that the organ which is the subject of dispute is the most crucial agency of the Executive Branch, namely the presidency. The new Constitution will not be fully operational without the Presidential office being duly filled, as provided by the Constitution and ordinary law." There is no comparable judicial acknowledgment of the political weightiness and urgency of a parliamentary election petition. Obviously, the business of government

80 Besigye v Electoral Commission & Another (2007) UGSC 24; Besigye Kiiza v Museveni Yoweri Kaguta & Another (2001) UGSC 3.

will not grind to a halt merely because of prolonged litigation over the election of one or a few members of a large, multi-member legislative chamber.

This situation gives rise to an interesting paradox: The greater the political stakes associated with a particular class of elections, the less the procedural and substantive justice the petitioner can expect to receive. While this is driven, understandably, by a need to resolve a specific presidential election dispute speedily in the interest of finality and timely succession and continuity in government, it does indeed create a palpably inferior system of electoral justice for presidential election petitioners. In that regard, it is likely to leave such petitioners unsatisfied and feeling still aggrieved even after getting their day—though, in their view, not their due—in court. Such a persistent sense of grievance and injustice on the part of presidential election petitioners carries a risk of complicating and undermining the orderly conduct of future presidential elections. Specifically, the emerging jurisprudence of presidential election petitions, including the procedural and substantive rules governing the petition, if it is understood to say that a post-election presidential election petition is doomed to failure *ab initio*, might signal to rival candidates and presidential campaigns that the election must be won, fair or foul, at the polling station. In political contexts such as Kenya, where the stakes in presidential elections are extraordinarily high and feelings of electoral injustice have led to violence in the past, a regime of procedural and substantive rules that is perceived as incapable of delivering justice poses a threat to election security and social peace and order.

5.0 Some Concluding Thoughts and Suggested Reforms

In this chapter, we have noted that, in jurisdictions where the resolution of election disputes has been judicialized, the election petition is treated, both legislatively and judicially, as *sui generis* for a host of policy reasons. In Kenya, as elsewhere, this fact is reflected in procedural and substantive rules and accompanying judicial doctrine that have the effect, if not the purpose, of placing significant hurdles in the path of a contestant who decides to pursue justice in the courts after a disputed election. The comparative evidence also shows that, when strictly applied (against petitioners), as they typically are, these rules are usually outcome-determinative. In that regard, they partly explain why election petitions, particularly presidential petitions, overwhelmingly fail.

Although the standard policy justifications for treating the election petition as a special breed of cases are legitimate and sound, the wider implications of the generally adverse impact of the resulting rules on the chances of success of an election petition cannot be ignored. This situation may not present a social or political problem for long established and stable democracies, where the legitimacy of the courts and election petition jurisprudence are a settled matter. The situation is markedly different, however, in fragile or nascent democracies like Kenya.

If popular and educated opinion in reaction to the results in *The Raila Odinga Case* is anything to go by, there is clearly considerable political difficulty with the notion that errors and omissions of an EMB, including violations of law, whether statutory or administrative (or, in Ghana's case, even constitutional), committed in the course of an election, though established by evidence, will not necessarily result in relief for the petitioner. "How can a court condone proven illegality by an EMB and thus sanction impunity?" "If elections must be fought according to a set of rules, how come there is no penalty or remedy when the "rules of the game" are disregarded?" "What about the rule of law?" These questions deserve some persuasive answers.

In situations where public trust in the independence of the EMB or the courts is tenuous at best, and where there is a tradition of government abuse of incumbency for electoral advantage, questions and concerns such as those commonly expressed in the aftermath of *The Raila Odinga Case* cannot simply be brushed aside. If contestants come to believe that it is fruitless to mount a judicial challenge against an election after the fact, the related belief that elections are won and lost, fair or foul, at the polling station, might serve to encourage various acts of election malpractice by contestants as all sides try to avoid recourse to the loser-unfriendly post-election petition machinery.

The inherent advantages that Kenya's election dispute resolution system and law confer on the party that is declared the winner of an election cannot, of course, be blamed on the judiciary. As the discussion has shown, they are primarily constitutional and legislative in origin. Moreover, they are generally in line with comparative "best practice". Nonetheless, some reforms should be considered, both to create avenues for certain disputes to be resolved outside the petition framework as well as give petitioners—specifically in presidential elections--a reasonable and fairer opportunity to put their case forward.

First, there should be a right to a recount of the ballots in certain limited circumstances after provisional results of a legislative or presidential election (at the polling station level) have been determined—but before they are officially declared. A statutory automatic recount, called by the EMB itself or at the request of an interested party, when the difference between the first and second place is less than a specified percentage, is available a number of jurisdictions. In the Netherlands and Costa Rica, everything done by the polling officers is subject to review and correction at the highest level of the EMB.[81] Thus, the EMB undertakes a manual recount of the vote received at each and every polling station, regardless of whether the result is close or has been contested. While such automatic, across-the-board recount and review confers a high degree credibility and legitimacy on the final results, it is not feasible or cost-justified in poorer democracies or democracies with large-size electorates. Thus, in jurisdictions that permit or require post-polling manual recounts, this is generally limited to those instances where the vote count is very close. For example, in Canada an automatic recount is required when the difference is less than 0.1 per cent of the votes cast; in Lithuania when the difference is less than 50 votes; and in Hungary and Mexico when it is less than 1 per cent of the votes cast.[82] The idea is to provide an opportunity for the EMB, in very close elections, to identify and correct any initial errors and omissions on its part before a winner is finally certified. With this proposal, no winner would be officially announced on the basis of the provisional results until the recount is completed and final results certified. The right of recount would be available where the provisional results (at the polling station level) are "close" (as defined by statute) and could include a review of initially rejected ballots. The automatic recount, where it applies, would be undertaken by an official of the EMB other than (and ideally senior in hierarchy to) the presiding officer who was in charge of the initial count. The recount period would be strictly time-limited---say within 48 hours of the election. It should, therefore, be easy to accommodate within Kenya's current, constitutionally mandated seven-day period following an election during which time the final results of the election must be certified.[83]

Second, room should be provided in the election cycle calendar for certain pre-election issues, particularly those related to the integrity and accuracy of

81 International IDEA, *Electoral Justice Handbook* (2010) para 519.

82 International IDEA, *Electoral Justice Handbook* (2010 para 521.

83 Constitution of Kenya 2010, Article 138(10) (a).

the voters register, to be resolved conclusively, administratively or judicially, before Election Day. At the minimum, the integrity of the voters register, on the basis of which the election is to be held, must be settled and agreed before election day, thereby saving the election petition for complaints associated with the conduct of the poll, the tabulation of the ballots, election day fraud and other violations. Pre-election issues that are not timely resolved but held off to be litigated later in an election petition are unlikely reasonably to get fair consideration, especially if mixed in with election day complaints. Australia follows this bifurcated approach to resolving pre-election day and election day complaints.

Third, the time limits for filing and resolving a presidential petition—seven days to file, 14 to resolve--should be reconsidered. As noted previously in the discussion, the election petition and its tight time limits evolved in the context of legislative elections. Thus, due allowance must be made for the significantly larger geographic scope of a presidential election. It is instructive that, in comparison to the current 21-day (seven for filing, 14 for adjudication) total time limit allocated for a presidential election challenge, a parliamentary election petition, which is geographically local (as opposed to national) in scope, has a 28-day filing period and a six month trial period, plus two-tiers of appeal. Learning from the experience in The *Raila Odinga Case,* and considering the extraordinarily high political stakes involved in a presidential election and the fact the judgment in a presidential election petition is non-reviewable, it is clear that seven days to gather all the necessary evidence and file a petition, plus fourteen days to commence and conclude the case (including pre-trial conference), is unreasonably short. Although settling on any number is bound to be arbitrary, a forty-day time limit, consisting of a maximum ten days for filing (and answer) and thirty or so days for adjudication and decision, would be a significant advance on the existing situation and provide petitioners a realistic opportunity to make their case.

Fourth, the argument that existing doctrine leaves the IEBC largely unaccountable for statutory and administrative violations and other irregularities in the conduct of an election is one that deserves a satisfactory answer. One possible "remedy" would be to relieve a petitioner who has successfully carried the burden of showing substantial or material noncompliance with applicable law of the additional burden of having to prove that the noncompliance materially affected the outcome of the election. Instead, once a petitioner has established noncompliance, the burden must

shift to the IEBC to show that the noncompliance did not materially affect the results. A petitioner who is able to establish that the conduct of the election was characterized by nontrivial irregularities and infractions on the part of the IECB has, in effect, rebutted the initial presumption of legality with which the IEBC is cloaked at the start of the case. Therefore, it makes sense to shift the burden at that stage. This "sharing of the burden" between petitioner and the IEBC introduces the right incentives in terms of the IEBC's conduct of elections, as it ensures that the IEBC will bear appropriate responsibility for its errors and omissions by making it shoulder at least some part of the litigation burden arising from its conduct. Moreover, given that the IEBC is in possession of all the relevant election-related information needed to show whether its acts and omissions might have a material effect on the elections, shifting the "effect-on-election" burden to the IEBC in noncompliance cases seems eminently fair and reasonable.

Finally, in relation to substantive law, the development of a robust and coherent jurisprudence on the "corruption" ground for voiding an election would go a long way toward cleaning up "old style" politics and enhancing free and fair elections. The courts have had opportunity to address corruption-related claims in parliamentary and county elections, though not yet in the presidential context, as the petition in *The Raila Odinga Case* focused almost exclusively on the errors and omissions of the IEBC, not the second respondent. There is a need to build on and clarify the emerging local case law in this area. The electoral playing field in Kenya, as in the rest of Africa, has long been distorted by flagrant acts of corruption and other forms of cheating, including abuse of incumbency. This is not, of course, a uniquely African problem, as the recent English case of *Erlam v Rahman*[84] shows. However, the local jurisprudence in this area remains underdeveloped. If contestants come to understand that they will not be allowed to profit from the use of corruption (or deception or abuse of incumbency) to win votes, this should have a cleansing and salutary effect on the conduct of election campaigns and elections.

84 Erlam v. Rahman & Another (2015) EWHC 1215 (Comm.).

VI

Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise

Prof. Wanjiku Mukabi Kabira and Prof. Patricia Kameri-Mbote

Abstract

The road to gender equality has been long and arduous for Kenyan women's movement. While progress has been made over time, a lot remains to be done in the area of representation in elective and appointive positions. Up to 2010, the Constitution and law were cited as the biggest obstacles in the way of gender equality. The promulgation of the Constitution of Kenya 2010 contains very robust equality, non-discrimination and participation provisions. However, it did not provide clear implementation mechanisms for the affirmative action provisions for women's representation. It was hoped that the promulgation of this constitution would ensure gender equality. However, the promulgation and enactment laws is not sufficient. In the area of electoral politics, while the number of women in Parliament has increased, compliance with the constitutional rule of 'not more than two thirds of the same gender' remains a challenge because of the absence of mechanisms to ensure adherence. Not surprisingly, the earliest court matters and advisory opinions sought on the Constitution related to gender equality.

It is against this background that this Chapter analyzes the promise of gender equality and non-discrimination in electoral politics. Contextualizing the issue within history, women's struggles and the road to the Constitution of Kenya 2010, the authors identify critical milestones highlighting the role of the women's movement. This provides the backdrop against which the 2013 elections are

discussed. The authors also navigate the political and social manoeuvres that have surrounded attempts to meet the two thirds gender rule. The Chapter looks at how women fared in the 2013 elections -nominations, campaigns; the voting process; and the results of the first elections under the Constitution. The authors use gender analysis to illustrate how that politics remain a citadel of male political dominance noting that given the nature of Kenyan society, affirmative action measures and quotas remain the most effective pathways towards gender equality in electoral politics.

The authors discuss disputes that have arisen noting the lack of canvassing of the gender question as a substantive issue to buttress the point that discussions on gender in Kenya are still at the periphery. They decry the dearth of bold, transformative and path-breaking jurisprudence on the substantive gender question in electoral politics in Kenya, which in their view is what is needed to alter the political playing field and the rules of the game. In conclusion, the authors argue that in no country has gender representation in politics been achieved through the promulgation of laws alone, highlighting the need for effective implementation mechanisms; incentives for actors to follow through; and sanctions meted against those who do not comply.

1.0 Introduction

The challenge of subjugation of certain groups such as women and other minorities is one that many countries have had to confront. Such groups are usually dominated by those who are in privileged positions and are favoured by existing laws and policies. This raises the need for measures to level the playing field such as affirmative action programmes in different fields, including politics. Frene Ginwala in her foreword in *Women in Parliament Beyond Numbers*[1], observes:

> The seeds of democracy lie in the principle that the power to make decisions about people's lives, society and their country, should derive from a choice by those who will be affected. For many centuries, the basis of this legitimacy was limited and many were excluded from making a choice: slaves, those without property or formal education, those not "civilised"

1 F Ginwala, "Foreword" in J Ballington and A Karam(ed), *Women in Parliament Beyond Numbers*,)(2005) 14.

> or not part of the dominant culture or religion in society, people of colour, of a particular race, of ethnic group, indigenous people of countries and overwhelmingly, women.

This Chapter begins with this quotation because gender issues in electoral politics including the 2013 Kenyan elections have been unique. While election issues have been guided by traditional consideration of the issues of representation, the gender question has challenged the meaning of democracy and related questions. It is generally accepted that participatory democracy must take into consideration the voices of those who would be affected by decisions being made. The advocates of women's representation in election processes suggest that, conscious and deliberate steps must be taken to ensure that minorities and other disadvantaged groups that are marginalised are included in decision-making and mainstream development processes.[2] This flows from the premise that any laws passed affect all persons, even those that were deliberately left out in the formulation process.

Proponents of the traditional definition of democracy for centuries did not consider that the concept and reality of its implementation excluded the majority of the people.[3] Patriarchal leadership in Kenya has for a long time refused to acknowledge this fact but the 2010 Constitution is forcing the institutions of governance to address this issue as this chapter shows. Women in Kenya have not done well in competitive politics in Kenya since independence owing to socio-cultural factors such as patriarchy, lack of adequate resources needed to garner support of the electorate, gendered power relations and roles, election violence and the fact that as argued above, democracy, leadership and elective politics have traditionally not considered women and other marginalised groups to be part of the political leadership. While women comprise more than half of Kenya's population, this is not usually reflected in competitive electoral politics or appointments in public offices.[4] The following table shows how poorly women have performed in Kenyan parliament for the last 50 years.

2 *in J Ballington and A Karam(ed), Women in Parliament Beyond Numbers,)(2005; W Kabira, Time for Harvest: Women and Constitution Making in Kenya* (2012); M Nzomo, *Women in Politics* (1991).

3 Ballington and Karam, above.

4 FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's* 2013 Election Process (2013); W Kabira, *Making politics Gender responsive: Towards Gender Responsive Politics* (1997); Nzomo, above.

Parliament	Period	Total No. of Constituencies	No. of Women Elected	Available Slots for Nomination	No. of Women Nominated
1st Parliament	1963-1969	158	0	12	0
2nd Parliament	1969-1974	158	1	12	1
3rd Parliament	1974-1979	158	4	12	2
4th Parliament	1979-1983	158	5	12	1
5th Parliament	1983-1988	158	2	12	1
6th Parliament	1988-1992	188	2	12	0
7th Parliament	1992-1997	188	6	12	1
8th Parliament	1997-2002	210	4	12	5
9th Parliament	2002-2007	210	10	12	8
10th Parliament	2007-2012	210	16	12	6

In the last 20 years, however, women in Kenya and Africa have made great progress in the area of political participation. Africa now boasts of some of the highest levels of women's representation in national assemblies in the world with women claiming over the 33 percent critical mass representation in a number of countries.[5] This is attributable to the work of African women's movements and women's organisations that have successfully lobbied for constitutional reforms.[6] This emerging visibility of women as political actors and adoption of policies advancing women's rights is clearly evident[7] as is as shown below:

Women in politics and decision making positions-parliamentary representation in Africa

	Country	National Assembly		Senate	
		Elections	% W	Elections	% W
1.	Rwanda	2013	63.8%	2011	38.5%
2.	South Africa	2014	41.9%	2014	35.2%
3.	Namibia	2014	41.3%	2010	23.1%
4.	Mozambique	2014	39.6%	-	-
5.	Angola	2012	36.8%	-	-
6.	United Republic of Tanzania	2010	36.0%	-	-

5 IPU, Women in National Parliaments: Situation as of December 2015 (2015), http://www.ipu.org/wmn-e/classif.htm, at December 4, 2015.

6 A Tripp et al, *African Women's Movements Changing Political Landscapes* (2009).

7 As above.

	Country	National Assembly		Senate	
		Elections	% W	Elections	% W
7.	Uganda	2011	35.0%	-	-
8.	Algeria	2012	31.6%	2012	6.9%
9.	Zimbabwe	2013	31.5%	2013	47.5%
10.	Tunisia	2014	31.3%	-	-
11.	Cameroon	2013	31.1%	2013	20.0%
12.	Burundi	2010	30.5%	2010	46.3%
13.	Sudan	2015	30.5%	2015	35.2%
14.	Ethiopia	2015	28.0%	2010	16.3%
15.	South Sudan	2011	26.5%	2011	10.0%
16.	Lesotho	2015	25.0%	2015	24.2%
17.	Eritrea	1994	22.0%	-	-
18.	Kenya	2013	19.7%	2013	26.5%
19.	Morocco	2011	17.0%	2009	2.2%
20.	Malawi	2014	16.7%	-	-
21.	Somalia	2012	13.8%	-	-
22.	Burkina Faso	2014	13.3%	-	-
23.	Niger	2011	13.3%	-	-
24.	Djibouti	2013	12.7%	2013	12.7%
25.	Zambia	2011	12.7%	2011	12.7%
26.	Liberia	2011	11.0%	2014	10.0%
27.	Ghana	2012	10.9%	2012	10.9%
28.	Gambia	2012	9.4%	-	-
29.	Cote d'Ivoire	2011	9.2%	-	-
30.	Democratic Republic of the Congo	2011	8.9%	2007	4.6%
31.	Mali	2013	8.8%	-	-
32.	Congo	2012	7.4%	2014	19.4%
33.	Nigeria	2015	5.6%	2015	6.5%

Source: Inter-parliamentary Union, Women in National Parliaments: Situation as of December 2015 (2015) http://www.ipu.org/wmn-e/classif.htm at December 4, 2015

This table shows clearly that African countries have made progress towards gender equality in electoral politics with mixed results. Countries doing

poorly include: Morocco, Somalia, Burkina Faso, Niger, Djibouti, Kenya (19.7 percent), Zambia, Liberia, Ghana, Gambia, Nigeria, and Congo, among others. These countries have less than 20 percent women's representation in national assemblies. Nigeria, the most highly populated country has only 5.6 percent. However, some African countries of have done very well. These include: Rwanda (63 percent), South Africa (41.9 percent), Namibia (41.3 percent), Mozambique (39.6 percent), Angola (36.8 percent), Tanzania (36 percent), Uganda (35 percent), Algeria (31.6 percent), Zimbabwe (31.5 percent), Tunisia (31.3 percent), Cameroon (31.1 percent), Burundi (30.5 percent) and Sudan (30.5 percent). It is indeed commendable that Rwanda leads the world in women's representation in the National Assembly and that seven African countries have gone beyond the critical mass expected to have impact on legislation and other processes and another six are on their way to realising the critical mass. The associated study, however, notes that all these countries have made so much progress through use of quotas and affirmative action provisions introduced through constitutions.[8]

In terms of decision-making, a new survey prepared by UN Women and the Inter-Parliamentary Union shows that Cape Verde has the highest number of women occupying ministerial positions in Africa with nearly half of its 17 ministers being female. With nine women, the island nation is also ranked second globally, after Finland, which has 10 of its 16 ministerial positions occupied by women.[9] South Africa is the next highest ranked country in Africa, with 41.7 percent, or 15 of its 36 ministers being female. Rwanda has 11 of its 31 ministers as women, ahead of Burundi, Tanzania and Guinea-Bissau, which all come in the top 20 positions globally. Africa has seven countries where at least 30 percent of ministers are women, on a list that counts 30 nations meeting this threshold, suggesting it holds a quarter of the global representation and making it only second to Europe. Africa's biggest economy, Nigeria, has seven of 29 ministers as women, the same representation as the Central African Republic, and just ahead of South Sudan, which has five women out of 22 ministers. Rwanda takes the lead globally on the percentage of women in either unicameral parliament, the lower house of parliament, at 63.8 percent, or 51 of 80 seats. Sub-Saharan Africa has an average 22.4 percent

8 Inter-parliamentary Union, Women in National Parliaments: Situation as of November 1, 2015 (2015), http://www.ipu.org/wmn-e/classif.htm, at December 4, 2015.

9 Intelligence Transfer Centre, 2015 http://www.intelligencetransferc.co.za/conferences/7th-annual-women-in-politics-conference/?at 2nd January 2016.

of women in a single house or lower parliament, and 20 percent in an upper house or senate.[10]

The increase in women's representation in the National Assemblies has been mainly due to a quota system. Some of the countries such as Kenya and Uganda have created special seats for women through the Constitution, while Tanzania and Ethiopia have used political party quotas. The Constitution of Kenya, promulgated on 27 August 2010, is a milestone in addressing the issue of affirmative action, not only for women but for many excluded groups including minorities, persons with disabilities and youth.[11]

The necessity for affirmative action measures to ensure the representation of women and other socially excluded groups is a clear recognition of the hurdles women face in a patriarchal society like Kenya and an acknowledgement of the many inequalities that exist.

One of the most glaring impediments to women's participation in electoral politics and governance is the organization around formal political units such as political parties whose skewed nomination rules relegate women to the back as preference is given to men in leadership and flag bearing positions. Indeed political parties have been referred to as 'citadels of male political privilege'.[12] This has been further entrenched by the largely adversarial and duel like electoral system of First-Past-the-Post (FPTP) where the majoritarian winner-takes-all principle is used. This explains the use of affirmative action and quotas in many of the African countries to mitigate the impacts of this system.

In arguing a case for quotas in the Pacific Region, Lesley Clark in her *Affirmative Action-Gender Representation in Parliament: Quotas, Political Parties and Reserved Seats*, suggests, among other arguments, that quotas for women do not discriminate, but compensate for actual barriers that prevent women from their fair share of the political seats. She adds that, the presence of women gives greater legitimacy to parliament. Women's experiences are needed in political life and it is not true that men can represent women in the same way that women can represent other women.[13] She adds that the

10 As above.

11 Articles 97 (1) (b)&(c), Article 98 (1) (b)&(c) and Article 177 (1) (b)&(c) deal with these marginalized groups.

12 M Kimmel, Misframing Men: The Politics of Contemporary Masculinities, Rutgers University Press, New Brunswick, New Jersey and London (2010).

13 L Clark, Affirmative Action–Gender Representation in Parliament: Quotas, Political Parties and Reserved Seats (2006) 2-3.

history of women's representation in parliament proves that there are no other alternative methods for significantly increasing the number of women in parliament in a short period of time. Further that the countries that include women in their decision making have an advantage over those that limit themselves to men's perspectives and solutions and that the leadership style of women which stresses consensus, collaboration and partnership is more likely to avoid intra and inter country conflicts with the resulting economic and social costs.[14]

Scholars such as Kathleen Fallon argue that transition to democracy opened up new possibilities for women to fight for political rights in Ghana and elsewhere in Africa.[15] Using proportional representation and party lists in electoral systems offers more opportunities for women to be included in political leadership. In this regard, many scholars note that quotas are often the most immediate and most successful tools for increasing the number of women in national office.[16]

We agree with Tripp *et al*[17] that women's movements in Africa, particularly in countries that have had no major political upheavals are the reason why governments have adopted policies and constitutional provisions related to gender equality and affirmative action policies and strategies for women's representation in political institutions. These policies have increased women's representation even in countries that have not been democratic, those that have risen from the ashes (such as Uganda, Rwanda, Mozambique, and South Africa) and those that have had some level of stability (like Kenya and Tanzania). With regard to Kenya, the women's movement contributed immensely to the adoption of the affirmative action provisions in the constitution.[18]

This chapter is divided into six parts. Part one is the introduction. Part two discusses the path towards gender electoral related provisions in the Kenyan Constitution, 2010 highlighting the role of the women's movement in securing the same. Part three focuses on the provisions of the Constitution of Kenya 2010 addressing the gender question in elective politics. This leads to Part

14 As above 4.

15 Fallon, *Getting Out the Vote: Women's Democratic Political Mobilization in Ghana. (2003) 8(3) Mobilization: An International Quarterly,* 273-296.

16 Tripp, n 6; Mi Yung Yoon (2004); Fallon, as above; Gretchen Bauer; and Hannah Briton 2006.

17 As above.

18 W Kabira, above n 4; Kimani & Kabira, *The Historical Journey of Women's Leadership in Kenya (2012) 3(6) Journal of Emerging Trends in Educational Research and Policy Studies* (JETERAPS) 842, 849.

four which looks at how women have fared in election processes, including the implementation of legislative frameworks, nominations, campaigns and actual elections and results of the 2013, which were the first under the Constitution of Kenya, 2010. Part five looks at cases that have come before the courts on gender and elections under the 2010 Constitution, noting the lack of canvassing of gender as a substantive question in election disputes which buttresses the fact that affirmative action measures and quotas remain the most effective pathways towards gender equality in electoral politics as shown in the introductory section. Part six concludes.

2.0 Towards Gender Electoral Related Provisions in the Kenyan Constitution: The Role of the Women's Movement

2.1 1991-1997

The period between 1992 and 2010 will go down in history as one when the women's movement in Kenya focused on issues of elections and women's representation with immense energy. The Kenya African National Union (KANU) had found it necessary to append the umbrella women's organization *Maendeleo ya Wanawake* to itself so that they could use them for mobilising political support but not to have women participate as candidates in the electoral process.[19] From the moment Section 2A of the Kenyan Constitution was repealed in December 1991, women's voices from within and outside the Women's Movement were strong and consistent, particularly on the issues of representation in political institutions such as political parties, Parliament and local governments. They lobbied to influence changes particularly in the electoral processes.[20] The objective was to increase women's power and influence by working towards ensuring a critical mass of at least 33 per cent women's representation in parliament and other political and public decision-making bodies. The publication of a paper by Maria Nzomo entitled "Women in Politics" in 1991[21] detailing the global problem of absence of women in leadership positions and the desire to ensure a critical mass of women in leadership if any gains were to be realised, was significant.

19 Nzomo, as above, n2.

20 Wachira & Mbugua, *Gender and Democracy: An Analysis of Kenya's Political Parties Manifestos (1996); W Kabira & M Masheti, ABC of gender analysis (1995); W Kabira, Making politics Gender responsive: Towards Gender Responsive Politics (1997); M Gituto & W Kabira, Affirmative Action: The Promise of a New Dawn*. Nairobi (1998).

21 Nzom, as above, n 2.

On 22 February 1992, a women's convention to discuss their representation in political parties and legislative bodies was organised at the Kenyatta International Conference Centre. The meeting brought together Kenyan women from all walks of life to dialogue with each other on the women's agenda in the democratisation process. This set the agenda for women's mobilisation to participate in the electoral processes and can be cited as one of the definitive moments that have brought women to where they are[22]. This meeting, organised by FEMNET and the National Council of Kenya, included political luminaries, Martha Karua, Phoebe Asiyo, Julia Ojiambo, and Wangari Maathai, among others, who set the pace for the struggle.

1997 was another landmark year when Hon. Phoebe Asiyo, then a Member of Parliament for Karachuonyo, tabled a motion on affirmative action in Parliament. Her motion called for Parliament to increase the number of women parliamentarians by 18, made up of at least two from each of the eight provinces, and an extra two from the Rift Valley Province due to its population size and diversity. Hon. Asiyo's motion also included a proposal for an amendment to the Constitution to provide for two parliamentary constituencies in each province exclusively for women candidates, and for legislation for funding for all registered political parties. Significantly, the motion also required that the level of public funding for political parties be linked to the percentage of women candidates fronted by the party.[23]

The motion was discussed at various fora by women's organisations that also appeared before the national assembly to support the motion. The few women parliamentarians, including those in the ruling party, supported the motion. However, it was defeated. The motion did plant a seed that grew a strong political women's movement.

After the defeat of the affirmative action motion, women recognised that although there was no statutory clause barring them from participating in politics, the political climate, cultural attitudes, and other related factors would continue to hinder their participation in the electoral process. They knew that this had to change because, promises to women by those running for office over the years never yielded results in getting their issues on the

22 Kabira, as above, n 2.

23 NA Deb 23 April 1997, Vol 334, https://books.google.co.ke/books?id=pvGspftZ3qoC&pg=PT26&dq=National+assembly+Parliamentary+Hansards,+kenya+23+April+1997&hl=en&sa=X&ved=0ahUKEwiMj5zv2MTKAhVGWBQKHerLAq0Q6AEIGjAA#v=onepage&q&f=false, at 20th December 2015.

table. They had to find a way to get to the centre of leadership. Women's organizations came together as the women's 'political caucus' after the defeat of Asiyo motion in 1997[24] declaring that there was no such thing as being non-political because as Janet Kirna noted, *by making a decision to stay out of politics, you are allowing others to shape politics and exert power over you"*.[25] The consciousness of women's status and desire to change the situation became the driving force in the struggle by women for representation in elective positions. They understood that *true emancipation begins neither at the polls nor at the courts, it begins in a woman's soul.*[26]

2.2 Kenyan Women in the Review Process

The involvement of women in the Constitution Review Process was the result of clamour by women's organisations, civil society and opposition parties to have an inclusive and comprehensive review of the constitution, popularly known as the people driven process by the *Ufungamano* led processes and the People's Commission of Kenya that was chaired by Oki Ooko Ombaka.[27] This was after a long struggle by women's organisations under the leadership of the Women Political Caucus. The Constitution of Kenya Review Bill (1998) ensured women's representation at all levels through affirmative action using women's organisations as nominating body mechanisms. Use of the quota system re-configured the traditional definition of representation and democracy. However, this was challenged by the ruling party KANU which introduced a motion in parliament to remove the Kenya Women's Political Caucus from the process of coordinating women's nomination to the CKRC. During the second reading of the Constitution of Kenya Review Commission (Amendment) Bill (1998), Hon. Amukowa Anangwe, the then Minister for Cooperative Development in contributing to the motion, said:

> Sir, I can see that they have created space for women's organisations in the review process which is fine. But many of the women's organisations represented in this bill are all urban based. They speak one language. They all reside in urban areas and yet the bulk of Kenyan women reside in rural areas. All I am trying to say is that, as we restructure representation of the various actors and interest groups like Kenyan Women's Political Caucus,

24 W Kabira, above, n 2.

25 K Weeks, Women Know Everything, (2007) 324.

26 As above, 172.

27 CKRC, The People's Choice, Report of the Constitution of Kenya Review Commission. Mombasa, Kenya. (September 2002).

> League of Kenya Women voters, Collaborative Centre for Gender and Development, Federation of Women Lawyers and the National Council of Women of Kenya should be represented by one person. The other four places should go to *Maendeleo ya Wanawake* which has grassroots support. Therefore, they have no right to take the places which should really be due to groups which are in the rural areas.[28]

Some men however supported the Bill. Hon. Mukhisa Kituyi, then Member of Parliament for Kimilili said:

> I wish to inform my eloquent colleague that *Maendeleo ya Wanawake* is a member of the Kenya Women's Political Caucus and its chairlady voluntarily and freely declared support to the position that they should mobilise the numbers through the Kenya Women's Political Caucus. If they are not complaining, what is the problem with the male honourable members who are complaining on their behalf?[29]

Hon. Martha Karua explained to Parliament that:

> When the discussion on the constitution review process began, women were not there; Women lobbied to get space for themselves; That the emergence of self-proclaimed advocates of rural women were nowhere to be heard; That women reject those divide and rule tactics; That the Women's Political Caucus, of which she was a member, was the largest umbrella organization and included *Maendeleo ya Wanawake*, Muslim Sisters Network, Federation of Women's Lawyers and League of Kenya Women Voters. That the KWPC had already sent letters to all women organizations all over the country including those at the grass roots level. Those women did not need to be directed and divided by dictators.[30]

Martha drew the attention of the members to the definition of the Caucus in section 2 of the Bill and how the definition referred to those organizations in Part C of the first schedule which included:- Kenya Women's Political Caucus; *Maendeleo ya Wanawake*; League of Kenya Women Voters; Collaborative Centre for Gender and Development; Widows and Orphans Welfare Society of Kenya (WOWESOK); Federation of Women Lawyers, Kenya Chapter; National Council of Women of Kenya; Muslim Consultative Council Sisters Network. She concluded by saying that the list was not exhaustive and so: *"Let*

28 NA Deb 24 November 1998, Vol. 2215.

29 As above.

30 As above.

no woman fear and let no person instil fear in women that they are going to be left out".[31] *In addition, Martha noted, "Let political parties give us one third of the 13 slots they have … to show that they are committed to the principle of Affirmative Action."*[32]

The motion to amend the Bill on 24 November 1998 was defeated but that was not the end of the resistance to women's inclusion. When women's organisations nominated commissioners, KANU Parliamentarians declared the nominees unacceptable. Kenyan women knew, as Achebe would say that, *"history is also that dusty road in my town and in every villager (woman) living and dead, who has ever walked on it. It is my country, my continent, yes, in the world. That dusty little road is women's link to the other destination".*[33] The little dusty road that women walked and whose experience they identified with was to later be confirmed by women's views throughout the country as they participated in the review process. They had all walked that little dusty road and understood the experience that women leaders were talking about.

The review Bill had structures that ensured women's participation at different levels and thus women's agency through its own representatives was able to shift social power by challenging the long held concepts of democracy and representation and social inequality through this process. The agency would move systematically to ensure change in the electoral process through the CKRC. The first draft of the Constitution, referred to as the *Ghai* Draft[34] contained provisions, which prohibited discrimination against women and was premised on the principle of equality. The draft incorporated three electoral systems that would have been beneficial to women namely, a Mixed Member Proportional Representation (MMPR) system, a hybrid FPTP system and the Proportional Representation System (PR).[35] The *Ghai* Draft also proposed in Article 77(2) that political parties were to ensure that at least one third of the candidates contesting for direct elections and 50 percent of those in proportional representation were women. Normally, political processes such as constitution making exclude women, either intentionally or by default but women's agency had defined its vision and mission as it got involved in the centre of the process. The women's agency freely and optimally utilised all

31 NA Deb 24 November 1998.

32 Kabira, above, n 2.

33 C Achebe, Home and Exile (2000).

34 Constitution of Kenya Review Commission, The Draft Bill to Amend the Constitution, 2002 (hereinafter Ghai draft).

35 K Muli, "Mixed Member Proportional Representation," in Safeguarding Women's Rights-Training Manual, 57.

opportunities available to pursue their goals throughout the struggle to get into the process and expand their freedoms.

The various drafts of the constitution generated in the review process: Ghai (2002); Bomas (2004); Wako (2005); Harmonised (2009) and the final referendum draft (2010) included many gains for women due to the solidarity of women at every stage. Women commissioners in the CKRC ensured that the structures and process of collecting, analysis and interpretation of the views of Kenyans was done. In addition, women were included in the massive civic education that took place at various stages in the process. The rules and regulations governing the review process also took gender into consideration ensuring a strong presence of women's representatives at the National Constitutional Conference (NCC) at Bomas of Kenya. At the NCC in 2003-2004 women were represented in all the critical committees including: Committees on *Representation; Legislature; Devolution; Bill of Rights; and Constitutional Commissions*. Women also chaired critical committees such as the ones on representation of the people and the Bill of Rights. This ensured that their issues were taken on board. It is through this process that they brought in critical perspectives on electoral issues such as MMPR in party lists; women's representation in the devolved governments; affirmative action; and women's rights in the Bill of Rights, among other issues[36].

The Bomas draft had many gains for women, but as the process went through other stages, between the 2005 and 2010 referendums, the gains were reduced. Some of the gains that were lost were provisions on the implementation of mechanisms for affirmative action provisions for women's representation in Parliament (National Assembly and Senate). These provisions were removed by the Parliamentary Select Committee (PSC) in Naivasha during the negotiations leading to 2010. They were replaced by provisions bringing in the forty-seven (47) special seats (one in each county) for women and the increase in the number of constituencies from 220 to 290.

3.0 The Constitution of Kenya 2010: Measures Addressing Gender Inequalities in Elective Politics

As noted above the Constitution of Kenya 2010 contains very robust provisions on gender equality. We will focus here on those that facilitate equality in elective politics. Suffice it to note that even before the promulgation of the

36 W Kabira, above, n 2.

Constitution, Kenya had signed up to international treaties that provide for equal rights of men and women in public life[37] and was under pressure to ratify the Protocol to the African Charter on Human and Peoples' Rights on Women's Human Rights (the African Protocol) adopted by the African Union's General Assembly in 2003.[38] The inclusion of participation of the people, equity, non-discrimination and protection of the marginalised among the national values and principles of governance in Article 10 of the Constitution underscores the importance of this issue. Article 27 in the Bill of Rights further elaborated the right to equality providing for equal protection of all before the law;[39] the Right to equal protection for men and women and equal opportunities in political and other spheres;[40] and outlawing discrimination on sex among an expansive list of grounds[41]. The mechanisms for ensuring gender representation under Article 27 were outlined as *'legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'*[42]*; and "…..legislative and other measures to implement the principle that not more than two-thirds of the members of elective bodies shall be of the same gender"*.[43] These provisions provide a window for the use of a variety of tools including quotas. Quotas can be fixed by statute law requiring parties to adopt a certain affirmative action measure with penalties prescribed for noncompliance.[44] Parties can also adopt quotas aimed at creating a targeted number of female candidates to be fielded by the political parties. As indicated earlier in this paper, Ethiopia has used this method to increase women's representation in parliament.

For these measures to deliver the requirement that *not more than two-thirds of the members of elective bodies shall be of the same gender*, a clear formula is required ex ante. This is the spirit behind the provision in Article 177 (1)(b) and (c) of the Constitution with respect to county assemblies which includes among the members of the County Assembly *"the number of special seats*

37 See, for example, *The International Covenant on Civil and Political Rights (ICCPR), 6 I.L.M. 360 (1967); and The Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), 8 I.L.M. 679, entered into force Jan. 27, 1980.

38 Kenya only ratified the Protocol after the 2010 Constitution was promulgated.

39 Constitution of Kenya, Article 27(1).

40 Above, Article 27(3).

41 Above, Article 27(4).

42 Above, Article 27(6).

43 Above, Article 27(8).

44 Clark, n 13, 4.

members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender". This provision ensured that the principle of not *more than two-thirds of the members of elective bodies shall be of the same gender* was realised with respect to county assemblies in 2013. The removal of a similar provision that had been in earlier drafts with respect to membership in Parliament (National Assembly and Senate), which provided the mechanism for realisation of article 27, was removed during the last negotiation as the harmonised draft in 2010[45] led to the failure of meeting the Constitutional standard.

It is notable that Article 90 (1) provides that *"elections for the seats in parliament provided for under articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists."* This was meant to ensure that political parties did not just hand pick the nominees but would go through a process that brought in marginalised groups such as women in a fair and transparent manner. Kenyan women had hoped that pre-election nomination processes would socialise women to electoral processes and give them opportunities to learn so that after nominations they would bring their experiences to the party philosophies, management styles and help prepare them for campaigns in the subsequent elections. In other words, affirmative action was meant to be a training ground for women for competitive politics.[46]

With the gains in the Constitution of Kenya 2010 discussed above, which the women's movement in Kenya had laboured hard for, the 2013 elections were a do or die moment for women. They had very high expectations. However even as they went into elections, women leaders in Kenya were aware about the problematic issues arising from the lack of implementation mechanisms for articles 97 and 98 of the Constitution. They still hoped that political parties would at the very least, utilise the provisions in the new Constitution to increase the numbers in the open seats and use party lists to bring in more women as they had proposed many times during the review process.

Kenyan women leaders knew that the 2013 Parliamentary elections would not realize the imperatives of Article 27 (8) owing to the absence of mechanisms proposed for it in relation to Article 97 and 98 on the membership of the

45 W Kabira, Time for Harvest: Women and Constitution Making in Kenya, University of Nairobi Press (2012).

46 (note 41 above); W Kabira & E Kimani, The Historical Journey of Women's Leadership in Kenya (2012) 3(6) Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS) 842, 849.

National Assembly and Senate respectively. They were however, hopeful that Article 177 (1) (b) and (c) on membership of the county assemblies would be implemented. They had also hoped Article 100 of the Constitution on the promotion of the representation of marginalised groups would have been translated into the legislation that would ensure enhanced representation of women. This did not happen.

Article 81 on the general principles for the electoral process reiterates the principle at Article 27 that *not more than two-thirds of the members of elective bodies shall be of the same gender*[47] while article 90 (2) charges the Independent Electoral and Boundaries Commission (IEBC) with the responsibility for the conduct and supervision of elections for seats provided in Articles 97 (1) (c)[48], 98 (1) (b), (c) and (d)[49] and article 177 (1) (b) which provides for special seats for women as discussed above.

4.0 Women's Experiences with the 2013 Elections

Women expected the 2013 elections to be free and fair given their experiences of the 2007 elections and the ensuing violence. Like other Kenyans, they were concerned and that is why the women's movement and women leaders, in partnership with the United Nations Development Programme (UNDP) and UN Women, constituted a Team of Eminent Persons led by Hon. Phoebe Asiyo to promote peaceful elections through high level negotiations with political party leaders, the African Union, IEBC, the executive, the police service, the media and other parties who could ensure peaceful elections.[50] The Team of Eminent Persons and women's organisations monitored the elections through the 'Women Situation Room' where issues of concern were relayed[51]. This was not the first time that the women's movement in Kenya constituted a team of senior women leaders to act as bridge builders and door openers. They had done this during the review process and during the 2002 and 2007 elections when the teams were referred to as 'Women Negotiating Teams'.

This section highlights experiences of women with the 2013 elections and

47 Constitution of Kenya, Article 81 (b)

48 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly to represent special interests including the youth, persons with and workers

49 Sixteen women members nominated by political parties according to their proportion of members of the Senate; two members, being one man and one woman, representing the youth; and two members, being one man and one woman, representing persons with disabilities;

50 UNDP, Kenya's Team of Eminent Persons-Final Report (2013).

51 As above.

discusses the institutional frameworks as well as the expectations of the women at various stages.

4.1 Nominations and Institutional Framework for the 2013 Elections

The IEBC in the electoral law, the Elections Act 2012[52], simply restated the constitutional provisions and provided no guidance as to how the party list which was critical should have been arrived at.[53] This guidance should have included further provisions, such as regulating the development of the lists and affirmative action measures requiring the party list to start with a woman's name in order to ensure increased representation of women.[54] This is important for the gender question because the women's movement had during the review process presented this methodology of presenting party lists and required that it be made public. Unfortunately, this did not happen. IEBC which is supposed to supervise the process by which party lists are formulated and ensure compliance with the law failed to do so. They failed to publish the party lists submitted before the elections. In addition, the lists submitted did not comply with the law, given that there were no guidelines and therefore it was easy for political parties to manipulate the process.

This led to disputes around the party lists, a situation which could have been avoided if the law had been clearer, guidelines provided, and supervision by IEBC been done.[55] Closed lists should have been published before elections to ensure transparency and accountability as required in the constitution.[56]

It is worth re-noting that women had proposed the method of using the party lists of political parties as a strategy for increasing women's representation in political institutions and had introduced the concept of MMPR during the review process and in the CKRC 2002 draft constitution. Women therefore expected that party lists would be used particularly in the implementation of article 177 (1) (b) and 98 (b) for transparency and accountability. This did not happen and as a result, the women nominated to the county assemblies joined the assemblies long after elections of speakers, chairs of the various committees and other positions in the assemblies had been determined. The

52 Chapter 7 Revised Edition 2012.

53 FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013).

54 As above, 19.

55 As above, n 53 above.

56 As above, n 53, 34.

nominated women only joined the assemblies after National Gender and Equality Commission took IEBC to court to gazette the nominees[57], and hence to protect the women's right to representation on the lists. The nominees were not gazetted by IEBC until July 2013[58] four months after the elections.

In its defence, IEBC, in their 2013 report, noted that although the Act provided for the order and categorization of nominated members, Political Parties ignored the rules and procedures as provided. This, according to IEBC, is what led to the confusion and the late publication of the list. IEBC pointed out that political parties started reviewing their lists without proper procedures and insisted on retaining their lists as they were. There were cases where women went to court because of the flawed nomination processes. These included the *Lydia Mathia v Naisula Lesuuda*.[59] In this case, Lydia Mathia who was a candidate of TNA party was listed number three on the party list while Naisula Lesuuda was ranked number five in the TNA party list[60]. When the list was gazetted, Naisula Lesuuda was listed as number three and Lydia was left out. Lydia argued that Naisula Lesuuda was not validly nominated and/or elected pursuant to Article 90 and Article 98 (1) (b), of the Constitution. That under Article 90 of the Constitution, for any person to become a Senator under Article 98 (1) (b) one must fulfill two conditions namely: - (a) Must be validly nominated and included in the party list; and (b) The list must be subjected in a general election through submission of the party list to IEBC in accordance with section 35 of the Elections Act.[61]

After the long arguments presented which included detailed discussions of the various constitutional provisions, issues of regional and ethnic balance, shortcomings of the Elections Act, 2012 as well as the role and powers of political parties, the court decided that Naisula Lesuuda was validly elected and nominated as a member of Senate in compliance with Article 88 (4) (d), 90 and 98 (1) (b) of the Constitution. This case makes very interesting reading on the kind of problems women continue to face even in cases where the quota for women is presented and where political parties have the power to make choices.[62] It also points to the fact that contestations on gender representation

57 The National Gender and Equality Commission (NGEC) versus Independent Electoral and Boundaries Commission (IEBC) Petition 147 of 2013 reported in [2013] eKLR.

58 FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013).

59 Lydia Mathia V Naisula Lesuuda & Another [2013] eKLR Election Petition No.13 of 2013.

60 published gazette notice No. 3508 dated 20 March 2013.

61 Above, note 59.

are not necessarily between men and women but can be and tended to be between women.

Another case related to the nomination process is that of *Mary Wangari Mwangi V John Omondi Ogutu & 2 Others*. The petitioner complained to the IEBC that she had been sidelined in the party list. However, she was issued a nomination certificate and her name was included in The National Alliance (TNA) list.[63] Mary Wambui, a contestant for the National Assembly for Othaya constituency, also complained to the IEBC that her name was not on the list of nominated candidates for the TNA parliamentary seat in Othaya, despite her success in the party primaries. An agreement to include her name was reached internally in the party. In general, out of the total number of 207 complaints related to candidates' nomination process, 26 complaints concerned women, contesting both the special seats and the open seats.[64]

In seeking to secure the nomination of representatives of special interest groups through proper application of the law, in March 2013, the National Gender and Equality Commission (NGEC) commenced proceedings against the IEBC.[65] The High Court found that the IEBC failed to meet its obligation to conduct and supervise the conduct of the election for special seats under Article 90 of the Constitution. The court ordered IEBC to publish party lists submitted with regard to County Assembly seats within five days and put in place a dispute resolution mechanism to deal with all the disputes. The High Court judgment resulted in the nomination of women to the County Assemblies.[66]

However, literature available suggests that the nomination exercise preceding the 2013 General Elections was hostile for women aspirants.[67] There was violence against women candidates, marginalization and exclusion of women from the nomination process; and lack of dispute resolution mechanisms at both party and nominations levels.[68] IEBC in its report also notes that the implementation of the Act at various levels was met with challenges especially due to the fact that the parties had no standardized rules.

62 (note 55 above).

63 Kenya Law Reporting, *Mary Wangari Mwangi V John Omondi Ogutu* & 2 Others [2013] eKLR, Election Petition 9 o f 2013.

64 B Namunane, "*Uhuru party hands Wambui poll ticket'* in the *Daily Nation* Online, Wednesday, January 23, 2013.

65 *Kenya Law Reporting, The National Gender and Equality Commission (NGEC) v Independent Electoral and Boundaries Commission* (IEBC) Petition 147 of 2013 reported in [2013] eKLR.

66 *FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process* (2013) 33.

67 As above.

68 As above.

Political parties did not perform their role as expected.[69] While article 81 (b) of the constitution required that not more than two thirds of the elective body shall be of the same gender, the political parties, which should have taken the opportunity to increase women's representation through nomination of women in their strongholds, did not do so. In addition, political parties, according to the Political Parties Act, 2011, were meant to take into consideration gender balance and ensure that it was respected in the composition of the Political Party Boards, while making sure that the not more than two thirds gender rule was observed. The parties were also meant to put aside 30 per cent of the Political Parties Fund for promoting the representation of women, persons with disabilities, youth and other minorities. This did not happen despite the fact that the parties had opportunities and supportive provisions in the Constitution to develop guidelines to help realize or at least move closer to the implementation of the two thirds principle through political parties. Having failed to nominate women and therefore flouting Articles 27 (8) and 81 (b) of the Constitution, women's representation was below expectations. If no changes are made to the rules of the game, the same, or worse could happen in the next general election.

Women thought that they could trust the citadel of justice-the judiciary-for a favorable interpretation of the Constitutional provisions on the not more than two thirds members of the same gender in an elective body. The 2012 Supreme Court Advisory Opinion[70] just before the 2013 elections discussed in part four is a case in point. The Supreme Court, through its ruling, dashed women's hopes by advising that Article 27 (8) in relation to women's representation in the National Assembly and Senate is intended to be progressive not immediate. Responding to the Attorney General's request for an advisory opinion on the implementation of article 27 (8) of the Constitution and related provisions on the two thirds gender rule in elective positions specifically with regard to the National Assembly and the Senate, the Supreme Court on 11 December 2012 advised that the provision was not applicable to the 2013 elections and that it should be implemented progressively by 27 August 2015. The timing of this Opinion was excellent as it would have forced political parties and other actors to find ways of abiding by the principle. The advice given, however,

69 As above.

70 In the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant.

removed the pressure from political parties to nominate female candidates and ensure their success.[71]

According to IEBC, the new parliament has 290 elected members, out of which only 16 which are held by women although 160 women vied. Of the 12 nominated seats, five are held by women and there are the 47 special women seats. If it were not for the special seats, the representation would have been as it has always been in the past Kenyan elections (see table 1). Senate has 47 elective seats and no woman won any of these seats although some vied. Senate however has the 16 seats reserved for women. Out of 1,450 county assembly seats, 85 were won by women.[72] That women encountered obstacles raised by candidates at the hands of their political parties is not a surprise. Indeed the law envisaged an arbiter: IEBC. The Constitution, the Elections Act, and the IEBC Act give the IEBC the authority to regulate political party nominations. This power included: (i) the ability to specify days during which nominations could be conducted, which must be at least 45 days before elections; and (ii) the role of monitoring compliance with the legislation relating to nomination of candidates by parties. IEBC had a responsibility to ensure that a transparent and safe nomination exercise was conducted, giving women aspirants a better chance to compete fairly. IEBC's failures in providing oversight left the nominations open to the malpractices and abuse that were witnessed.[73]

4.2 The 2013 Campaign Period

Despite the failure to implement constitutional provisions and the legislative framework that led to flawed nominations particularly in relation to affirmative action provisions, many international observers reported that the campaigns were generally peaceful.[74] However, various observers pointed out problems that women have historically experienced.

According to election monitoring reports of EU Election Observation Mission (EU EOM), the Women's Representative seats were used to push women out of the competition for open seats. Male politicians were telling the electorate that women have their own seats "guaranteed" by the nomination procedures (for the Senate and county assemblies). In addition, men pointed

71 FIDA, As above, n 66); EU EOM, European Union Election Observation Mission to Kenya, General Election 2013 Final Report (2013).

72 UNDP, Kenya's Team of Eminent Persons-Final Report. (2013).

73 FIDA, as above, n 66.

74 EU EOM, 2013; UNDP, Kenya's Team of Eminent Persons-Final Report. (2013).

out that in every county, the women had their own seats which men could not contest for. Those contesting the open seats were therefore seen as intruders in the male electoral world. Unsuccessful constituency candidate Rebecca Otachi stated that '*some of my opponents kept reminding the electorate that Kitutu constituents since independence [have] never been led by a woman, so let Rebecca contest for the Women Representative's seat and leave the National Assembly seat to male candidates*'.[75]

Rhoda Rotino, who ran for election in West Pokot County pointed out that "*Some male rivals confused the electorate [by arguing] that women could not vie for any other positions apart from that of women's representative,*" She continued that, "*Men are highly rated in society and the propaganda was taken as gospel truth*".[76]

In addition to propaganda aimed at tarnishing the character of the candidates, rivals used the affirmative action seats as arguments to deter voters from voting for women candidates. Reports from women from various parts of the country indicate that there was widespread misinformation circulating to the effect that women could not vie for any position other than those reserved for them. FIDA, 2013 report[77] notes that this type of propaganda was meant to discourage voters from voting for women in seats that were open to both men and women. As Institute for War and Peace Reporting (IWPR) notes, beyond the implementation of constitutional provisions, women who were running for the 47 women special seats experienced similar problems as those in open seats. Some of them complained that their parties gave them fewer resources for the campaigns than they gave to their male counterparts running for other positions.[78]

According to IWPR Some political parties (ODM, URP, UDF, and TNA) charged women lower nominations fees and provided some financial and organisational support to the more promising candidates during the campaign.[79] According to EU EOM field findings, many female candidates from larger parties such as TNA, ODM, URP, and UDF paid for their own security while campaigning, by employing party activists.[80]

75 African Woman and Child, Kenyan Woman (2013) 4.

76 As above.

77 Above, n 66.

78 IWPR, Female Candidates Claim Discrimination in Kenyan Elections: They say underhand tactics were used to discredit their campaigns (2013), https://iwpr.net/global-voices/kenyan-women-face-obstacles-public-life.

79 As above.

80 EU, above, n 74.

4.3 Situation Room to Deal with Electoral Violence in Nairobi, Kenya

In a report from UNDP (2013), it was noted that some information was given through the "Women's Situation Room", (a concept initiated by the Angie Brooks International Centre to ensure peace and security during elections and ensure women are actively involved in peace advocacy, intervention, coordination, political analysis, monitoring and documentation)[81] which was established in Nairobi to monitor women's participation in the 2013 elections. The initiative worked closely with IEBC, the police, political parties and African women ambassadors to monitor the elections. The Team of Eminent Persons working in the Women's Situation Room also engaged in high level negotiations with political parties, the African Union (AU) and other stakeholders and shared information. The Women's Situation Room employed expertise and experience of women to prevent conflict during elections. With 500 trained observers in the field, over 1,200 reports were made to the Situation Room in just three weeks, ranging from electoral complaints, threats, damage to property, and a small number of violent incidents. This information was relayed to IEBC and the police service regularly before the election, during elections on the Election Day, and after the elections. The process of conflict resolution and peace mediation took place immediately.[82]

Kenya's Women's Situation Room is launched by Assistant Police Commissioner Beatrice Nduta (centre) with UN Women Country Director and members of the Team of Eminent Persons. (Photo credit: UN Women/Zipporah Musau)[83]

81 UNDP Kenya, Kenya's Team of Eminent Persons-Final Report. (2013).

82 As above.

83 UN Women, Women Elected to One-Fifth of Seats During Kenyan Elections (March 28, 2013).

The Women's Situation Room report further indicates that women candidates faced challenges related to the enforcement of the Elections Act as well as other laws particularly in relation to electoral offences. They were subject to threats and intimidation, underhand actions by opponents, and smear campaigns.[84]

On Election Day, The Elections Observation Group (ELOG) report (2013)[85] indicates that 99.9 percent of the polling stations sampled had security personnel present, which contributed to peace on Election Day.[86] The participation of women on Election Day processes acting as polling officials, security officers, observers, and party agents was noted. The Election Observation Group report also indicated that the elderly, expectant mothers and disabled were exempted from queuing in most polling stations.[87] However, there were cases where expectant mothers and old women were neglected with some fainting while waiting to vote.[88]

The Women's Situation Room reported six gender-based violence cases on Election Day. Of the six, two were wife battering by husbands for not voting for the "correct" candidates (p59).[89] In Kitui County, Mlango location, the Kenya Human Rights Commission report indicated that a husband threatened to disown his wife (Nzembi Mwendwa) for not voting for his brother-in-law, who was contesting for the County Assembly seat as a Wiper candidate.[90]

4.4 Election Results

According to SIDA, 2014 report, women constitute 21 per cent in the bicameral parliament, a major gain in women's political leadership.[91] There are a total of 86 elected and nominated women leaders out of the 416 parliamentarians (349 National Assembly members and 67 Senators). 12 of the 16 elected women members of parliament have served in the previous parliament, which represents re-election of 75 per cent of the previous women leaders compared to the previous 20 per cent re-election in 2007. An important factor for the

84 UNDP, above, n 81.

85 ELOG, Final Report on 2013 Elections in Kenya (July 2013), http://www.gndem.org/ELOG_Report_2013, at January 18, 2016.

86 As above.

87 ELOG, Final Report on 2013 Elections in Kenya (July 2013) 57, http://www.gndem.org/ELOG_Report_2013, at January 18, 2016.

88 FIDA, above, n 66.

89 UNDP, above, n 81, 57

90 UNDP, above, n 81.

91 SIDA, Women´s political participation, (May 21, 2014), http://www.sida.se/English/where-we-work/Africa/Kenya/examples-of-results/Cecily-Mbarire/Facts-Womens-political-participation-/, at January 18, 2016.

re-election was the collaborative support to Kenya Women Parliamentarians Association (KEWOPA). In addition, the county assemblies constitute 33 per cent of women representatives.[92]

The table below shows the number of women that vied for various electoral positions versus men and how they fared in the elections.

	Governor			Senator			MP			Member of County Assembly		
	Vying	Elect-ed	% who vied and were elect-ed	Vying	Elect-ed	% who vied and were elect-ed	Vying	Elect-ed	% who vied and were elect-ed	Vying	Elect-ed	% who vied and were elect-ed
Men	231	47	20	227	47	21	1968	274	14	9287	1359	15
Women	6	0	0	17	0	0	129	16	13	623	91	15
Total	237	47		244	47		2097	290		9910	1450	
% men	97	100		93	100		94	94		94	94	
% women	3	0		7	0		6	6		6	6	

Source: FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013)

The Table above shows that in the case of county open seats namely, the positions for governors and senators, no woman was elected. If it were not for affirmative action provision for women's representation in the Senate, there would be no women in the Senate. We argued above that women representatives in the 1992 National Conference and in other organs of the review process argued for affirmative action knowing very well that history has shown that when there is one seat being vied for, the chances of women capturing the seat in Kenya is slim. It is therefore gratifying to note that without affirmative action, representation of women would not have moved from 10 percent to 20 percent and would have definitely not moved to 33 percent at the county level. [93]

Indeed the facilitative provisions in the constitution explain how the numbers moved from 10 percent in 2007 to almost 20 percent in 2013.[94] The adoption of the quota system in the Constitution was a success for the women's movement that had sustained the struggle for over 20 years. The struggle by

92 Kenya Law Reporting (http://www.kewopa.org/).

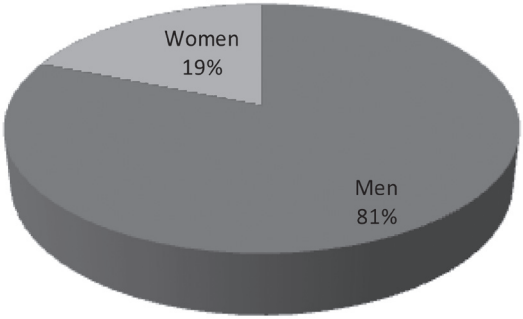
93 SIDA, above, n 91.

94 As above.

the Kenyan women also resulted to 33 percent representation of women as members of the county assemblies. This is despite the nomination problems discussed earlier in this section.

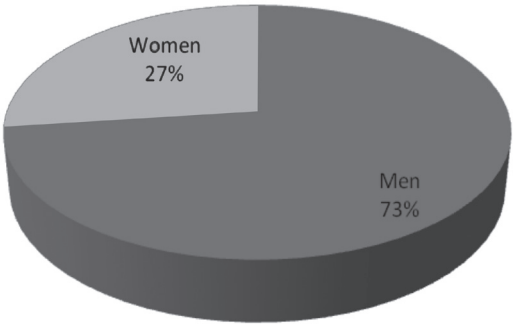
The pie charts below show the progress made mainly due to affirmative action provision.

National Assembly Composition



Source: FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013)

Senate Composition



Source: FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013)

In the 2013 general elections, out of 416 elected Members of Parliament (both houses) 86 are women (21 percent). Though these figures indicate increase in

numbers of women in elected positions in Kenya which have come through implementation of constitutional numbers remain low when compared to international standards on [women's] representation.[95] Other international observers including the Carter Center noted the low number of women nominated by political parties to run for seats in the 2013 elections.[96]

The Table below also shows that, beyond the elections, leadership positions continue to be held by men. Neither the national assembly nor the senate has implemented two thirds gender rule as shown below in selecting members of parliament to leadership positions in parliament.

Leadership position in Senate	Women Representation
Speaker	None
Deputy speaker	None
Majority Leader	None
Deputy Majority Leader	None
Majority Chief Whip	1 – Hon. Beatrice Elachi
Majority Deputy Chief Whip	None
Minority Leader	None
Deputy Minority Leader	None
Minority Chief Whip	None
Minority Deputy Chief Whip	1 – Hon. Janet Ongera

Source: FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013)

Leadership position in National Assembly	Women Representation
Speaker	None
Deputy speaker	1 – Hon. Dr. Joyce Laboso
Majority Leader	None
Deputy Majority Leader	1 – Hon. Naomi Shabaan
Majority Chief Whip	None
Majority Deputy Chief Whip	None
Minority Leader	None
Deputy Minority Leader	None

95 IIDEA (2014).

96 The Carter Center, Observing Kenya's 2013 March 2013 Elections(2013), https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf , at 14 February, 2016.

Leadership position in National Assembly	Women Representation
Minority Chief Whip	None
Minority Deputy Chief Whip	None

Source: FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process (2013)

Kenya made some progress towards the envisaged 33 percent women's representation. Strategies must be put in place to ensure that, women's representation moves beyond 33 percent. In addition, sealing the loop holes that have resulted in the marginalization of women county assembly members and better implementation of the provisions on party lists would help in ensuring women's quality participation as well as their being treated as equal to the male counterparts in the assemblies.

5.0 Handling of Gender Electoral Disputes by the Courts

With all the difficulties encountered by women during the 2013 elections highlighted above, one would have expected a flurry of litigation to right the wrongs. As noted above however, there is very little jurisprudence coming out of the Kenyan courts to guide the discussion on gender in electoral processes. The very progressive provisions of the Constitution on gender equality and non-discrimination have not been the subject of many court cases. The most instructive cases remain two that were brought before the 2013 elections. The first one which is directly relevant to the 2013 elections is *In the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant*.[97] The Attorney General sought an advisory opinion from the Supreme Court on whether Articles 27 (8) and 81(b) on gender equity ought to be achieved immediately or progressively upon the first elections under the Constitution of Kenya 2010. This was in recognition of the fact that in case the two thirds gender rule enshrined in the Constitution was not achieved in the impending 2013 General Elections, then the elected Parliament would be unconstitutional and this could lead to a major constitutional crisis.

The Attorney General argued that the implication of the provisions of Articles 27(3) (6), 27(8), 97 and 98 was that there were inconsistencies and this

97 Advisory Opinion No. 2 of 2012.

particularly arose in determining whether the two-thirds gender-equity rule in the national legislative entities (National Assembly and Senate) was to be implemented immediately or progressively. He argued that for the provisions of the Constitution to be complied with, there was need to adopt other criteria and that this might necessitate an increase in the tax burden borne by the citizens. He further argued that the Constitutional provisions were not clear on whether the two-thirds gender-equity rule was to be applied progressively or whether the Constitution required immediate implementation. In his view, a corrective measure was needed if the Constitutional requirements were to be realized. He further opined that using nominations by parties to bridge the gap would result in unduly-large legislative bodies.

In its majority opinion, the Supreme Court stated that in light of the provisions of Article 81 (b) of the Constitution, and in the event that the electorate did not meet the two thirds gender rule threshold, nominations would have to be done to bridge the gap. However, the Court noted that this would again be problematic and present a constitutional crisis since the members of the National Assembly would then exceed the constitutionally stipulated numbers.[98] The Court reiterated that it was aware of the social imperfections that had led to the inclusion of the gender equity provisions in the Constitution. The Supreme Court further had regard to various international human rights instruments that Kenya is signatory to and that bind Kenya by dint of Article 2 (6) of the Constitution such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Universal Declaration of Human Rights, and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). These international instruments also call for the realization of gender equity in elective political offices.

While agreeing that gender equity in elected political office is a constitutional imperative, the Supreme Court held that this right as enshrined under Article 27 of the Constitution could only be achieved or realized progressively over a particular period of time. It further held that this progressive realization will require the political will and exercise of governance discretion in good faith through policy measures in addition to legislative measures. In arriving at this conclusion, the Court interpreted Articles 27(8) and 81(b) as

98 Article 89 of the Constitution fixes the members of the National Assembly at 290 representing the electoral constituencies.

giving a broad statement of principle or aspiration of Kenyans rather than an immediate right. On this ground, the Supreme Court held that the two thirds gender rule could not be achieved immediately in the 2013 General Elections. Instead, the Supreme Court gave the government up to 27 August 2015 to come up with legislation to effect the rule. While the decision of the majority seemed convenient and reasonable at the time to avert what many expected would be a major constitutional crisis, it failed to move the country towards gender equality in the remaining citadel of male political privilege. The framing of the question by the Attorney General was erroneous in our view because cost alone cannot be a justified ground for excluding groups from representation. Democracy is expensive and it is not acceptable that cost is only a factor when gender representation is the issue. Indeed the implementation of the Constitution of Kenya on representation of the people and specifically the introduction of a Second House of Parliament (Senate) and 47 county assemblies was an expensive engagement. The fact that law set the ceiling for the number of members for the National Assembly, as pointed out by the judges, was and continues to be problematic. It is our view that the Court could have put pressure on the parties to ensure that more women were nominated to run for competitive posts and give more support to such candidates. Postponing the date of adhering to the constitutional provisions on equality validated the status quo and provided space for the hardening of anti-gender equality stances.

The August 2015 date given by the court has now passed and there is no mechanism in sight for facilitating the movement towards gender equality. Discussions on this question have noted the need for a provision similar to Article 177 (b) for Parliament, but there is no consensus on this matter with three bills before Parliament by the end of 2015 seeking to untangle the knot.[99] What has become increasingly clear is that nothing short of a Constitutional amendment will deliver the requisite result. To continue with a Parliament that is constituted in violation of the Constitution begs the question of our commitment to implement the hard earned constitutional provisions. The Supreme Constitutional Court in Egypt declared the Egyptian parliament unconstitutional in *Anwar Subh Darwish Mustafa v The Chairman*

99 The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No.50 (National Assembly Bills No. 18 30th April 2015; The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No.112 (National Assembly Bills No. 38 24th July 2015; The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No. 143 (Senate Bills No. 16) 21st August 2015.

of the Supreme Council of the Armed Forces[100] for failure to abide by the one third gender rule relating to independent candidates. Such boldness has not been forthcoming on the part of Kenyan courts on the issue of gender equality. The dissenting opinion of Chief Justice Mutunga in the advisory opinion is encouraging even though a minority opinion. He noted that taking the history of Kenya into account and the constitutional provisions on non-discrimination and national values, political and civil rights demanded immediate realization. He was cognizant of the resistance that changes aimed to bring gender equality would elicit. The picture painted in Part four of this chapter detailing the experiences of women vindicates the Chief Justice's dissenting opinion.

In *Centre for Education Rights Awareness & Others-v-The Attorney General*[101], the petitioners challenged the appointment of 47 County Commissioners by the President on grounds that they did not meet the gender-equity rule enshrined under Article 27 of the Constitution. 37 of the Commissioners were male while 10 of them were female. To this extent they argued the appointment was void for not adhering to the provisions of the Constitution. The High Court agreed with the petitioners and declared the appointment unconstitutional thus giving effect to the gender equity provision under Article 27 of the Constitution. Of particular interest is what the Court stated:

> In my view, the primary obligation imposed by Article 27(8) on the state is to do its utmost to meet the constitutional requirement. An effort must be made, bearing in mind the historical disadvantage to which women have been subject, to ensure gender equity. From the facts before me, there does not appear to have been any effort made to meet the requirements of the Constitution (…) The Constitution is thus very clear on what rights are subject to the progressive realisation test-the social and economic rights to health care, education, water, housing, and sanitation. Such rights require the allocation of resources, and as is the case with similar provisions in the International Covenant on Economic, Social and Cultural Rights, the state's obligation is made subject to the availability of resources. Had it been the intention to make the principle that not more than two thirds of elective and appointive positions should be of the same gender subject to progressive realisation, nothing would have been easier than for the Constitution to make this specific provision." (Underlined for emphasis).

100 Supreme Constitutional Court Case No. 20/24.

101 High Court Petition No. 208 of 2012.

Although the matter in issue was with respect to appointive positions, the principle would apply to elective positions as evidenced in the quoted extract of the judgment. This differs markedly from the High Court decision in *Federation of Women Lawyers-Kenya (FIDA-K) & 5 Others v Attorney General & Another*[102] where the Court rejected a similar petition challenging the composition of the Supreme Court for failing to comply with the two third gender rule. In this case, the learned judges were of the view that Article 27 of the Constitution that provides for gender equality did not place any duty or obligation on the part of the Judicial Service Commission (JSC) in the performance of its functions. In the judges' view, Article 27 could only be claimed or sustained against the government with particular complaints and even then, only if the government fails to take legislative and other policy measures to achieve gender equity. Such a finding is strange when one considers that Article 27 is contained in the Bill of Rights and secures the concept of equality and freedom from discrimination and affords the right to equal treatment of both men and women. The Court in this case refused to compel the JSC or the State to enforce Article 27 on grounds that this would be an encroachment on the Executive's policymaking turf. The Court's sentiments with regard to the enforcement of gender equity provisions were arguably in bad taste. The judges said this of the petitioners:

> Keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.

Article 27 and 81 of the Constitution on gender equity cannot simply be said to be an empty grant. Neither should gender equity as a principle be couched as an aspiration that should be left to the State to implement if it feels like doing so.

The bulk of the electoral matters that have come before courts after the 2013 elections that would have a gender flavor relate to nominations by parties. The issue of party nominations and the unstructured way in which it was done has been canvassed above. We pointed out above that Article 90 of the Constitution bestows upon the IEBC the responsibility for the conduct and

102 2011 eKLR.

supervision of elections for seats provided for, *inter-alia,* the members of the county assembly under Article 177 (1) (b) and (c), which shall be on the basis of proportional representation by use of party lists. Pursuant to Article 177 (1) (a), it is the duty of a political party that nominates a candidate for election to submit to the commission a party list and a political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution. This seems to give political parties unfettered discretion in drawing up party lists with nominated candidates of their choice for submission to the IEBC. The latter's only responsibility being allocating such special and gender top up seats as are available to the presented candidates. So then what happens when the same parties present more than one party list with conflicting information?

Interestingly, in *Nestehe Bare Elmi v Sarah Mohamed Ali & another* [2014] eKLR[103] a list was received by IEBC on 18 January, 2013, by the National Vision Party. The party had submitted the name of the 1st Respondent herein as a nominee for the Mandera County assembly. The said list however did not indicate the position for which the respondent was nominated. The party submitted another list to the IEBC on 12th March 2013, with the name of the 1st Respondent under the category of the marginalized group. By another list received by IEBC on 22nd April 2013, the same party submitted the appellant's name under the gender top up category. When the IEBC moved to declare the appellant as the gender top up nominee, the party petitioned in court to have her nomination nullified citing *Imelda Nafula Wanjala vs. IEBC High Court Petition No. 239 of 2013* and were successful, prompting a successful appeal by the applicant in this case.

It is noteworthy that the trial magistrate had sought to disqualify Nestehe on the basis of her academic qualifications which were below those required in the Elections (General) Regulations, 2012 (hereinafter referred to as the Regulations). This was however overturned on appeal with the judge holding that that the legal requirement under which the qualification for a person to be elected as a member of the county assembly of post secondary education was amended and was no longer a requirement and any rule purporting to require such qualification was contrary to the Act even if supported by the

103 Election Petition No. 1 of 2014 (HC, Nairobi).

party nomination rules. In the Court's opinion, soon any party rule contrary to the legal provision in the amendment was null and void to the extent of its inconsistency. The court further noted that party nomination rules cannot be superior to national legislation as this would defeat the very purpose for which the electoral legislation and the Constitution were promulgated. Party constitutions including their rules must be in conformity with the national legislation. Accordingly, it was his view that the appellant was academically qualified to be nominated as a Member of the County Assembly of Mandera and the learned trial Magistrate had erred in holding otherwise.

Other cases[104] were challenges over the election of women representatives. Some were resolved on the fluid parameters of ethnic and regional balance[105]. Such parameters rendered the order in the party list useless. In many jurisdictions as we have noted above the lists are presented in a way that guides the selection and need to have been presented before the elections to avoid manipulation. Clearly, the parties had a free hand to offer support to candidates at the bottom of the list without having to explain the rationale. Indeed if ethnic and regional balance was a crucial consideration, it should have informed the party list right from the start.

In *Peninah Nandako Kiliswa v Independent Elections & Boundaries Commission & 2 others* [2014] eKLR[106], the appellant sought to overturn the judgment of the High Court of Kenya that upheld a decision of the IEBC Nomination Dispute Resolution Committee recognizing the third respondent, Edith Were Shitandi as the duly nominated Ford Kenya party member of the Bungoma County Assembly for purposes of Article 177(1) (b) of the Constitution. The appellant contended that the respondent was not in the original list submitted by the party to IEBC and that she was not a member of the party whatsoever. Similar allegations were brought up in *NARC Kenya Party & Another v IEBC & Another*[107] where the party alleged that IEBC had nominated a candidate who was not of their choice, that the candidate had forged documents to the 1st respondent and that despite the party's outcries that the nominations were faulted, the IEBC proceeded to nominate the 2nd respondent to the county

104 HC Election Petition No.13 of 2013 - Lydia Mathia vs. Naisula Lesuuda & another [2013] eKLR; HC Election Petition No. 7 of 2013; Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 others [2013] eKLR; Bungoma HC Pet. No. 8 of 2013 - Major Rtd. Godfrey Masaba vs. Reginalda Nakhumicha Wanyonyi ; Embu HC Pet. No. 3 of 2013 - Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga; HC Pet. No. 6 of 2013 - Fatuma Zainab Mohammed vs. Ghati Dennitah;

105 HC Election Petition No.13 of 2013 - Lydia Mathia vs. Naisula Lesuuda & another [2013] eKLR.

106 Civil Appeal No. 201 of 2013 (CA, Nairobi).

107 Civil (Election) Petition 2 of 2014 (2014 eKLR.

assembly of Garissa. In both instances, the candidates were women and the quarrel was on which one of them was the more suitable one. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*[108] relating to election of Lamu County women's representative, the issue revolved around electoral irregularities but the contenders were both women and so the issue was more procedural than substantive.

6.0 Conclusion

The Constitution of Kenya 2010 is a robust document and has opened important pathways for women and other marginalized groups to participate in all sphere of life including politics. While women's agency in Kenya may not have articulated the philosophy guiding it, the focus on the electoral process is clear. A number of conclusions can be made from the discussions in this chapter. *One,* the failure to provide for implementation mechanisms for critical provisions relating to Parliament that would have enhanced women's representation in electoral politics is a major shortcoming in the Constitution. There is need to address that shortcoming if the principles of non-discrimination and equality in electoral politics are to be effectively implemented in future elections. It is noteworthy that where provisions are clear as in the case of Article 177 (1) (b) and (c), relating to county assemblies, women's representation has adhered to the not more than two thirds constitutional principle.

Two, the Supreme Court's 2012 Advisory Opinion was a missed opportunity for the judiciary to force a country that has historically discriminated against women in electoral matters to change. The postponement of the date by which this provision is required to have been implemented has placed the country at the pre-constitution status. *Three,* while law has utility in bringing about change in social relations such as gender, its effectiveness is limited when the norms it seeks to replace are stronger and greatly entrenched. This is the case with gender relations in Kenya. Indeed in no country has gender equality been realized through changes in law alone. Beyond law, there is need for commitment to the principles of law. *Four,* electoral rules and party structures can be an obstacle to the realization of constitutionally provided for rights. We have noted above that nomination processes by parties can facilitate the enhancement of women's representation in politics. It has however been a

108 (2013) eKLR.

major obstacle. This is one area where the electoral process needs to change if the not more than two thirds principle is to be realized. We appreciate that this is not a simple matter because nomination processes represent a struggle over scarce resources (elective or nominated posts) that pit men against women. Women are late entrants into the scene where the rules of the game have been set and without support by the parties for gender responsive rules of the game, women continue to play at a disadvantage. Party lists provide an avenue through which women's representation can be enhanced. It is disheartening that party lists pit women against women for gender top up and other nomination positions. This ensures that women remain in the periphery of the game squabbling over affirmative action posts but not challenging the citadel of mainstream politics where they are shut out despite favourable laws. We need more successful challenges by women of party nomination processes for competitive elective positions.[109]

Five, affirmative action measures and mandatory political party quotas remain the most effective way to get women onto the political stage and ensuring gender equality in politics through them is too important to be left to political parties alone. There is need to use incentive measures and penalties for parties to adhere to gender equality provisions. Incentives could be in the form of increased funding for parties while penalties could be in the form of some disadvantage for parties that do not conform to the set rules.

Six, women continue to challenge the non-implementation of constitutional provisions such as the two-thirds gender principle. Through this challenge and in line with the feminist ideology that has guided this chapter, we hope that a new jurisprudence will emerge that fundamentally questions the absence of women in electoral politics and indeed the discrimination against women in this sphere through shifting positions in parties rather than just dealing with technical electoral rules that pit women against other women. Courts must be more vigilant in safeguarding the gains of the constitution if new path-breaking and transformative jurisprudence is to be developed in handling elections and electoral processes bringing in new measurements, new theories and new procedures that take on board new experiences and new challenges. The judiciary has great potential to transform gender relations, shifting social

109 See e.g. Mary Wambui, the National Assembly representative for Othaya constituency in 2013, supra note 26; HC Pet. No. 2 of 2013 - *Rozaah Akinyi Buyu vs. IEBC & John Olago Aluoch* (Petition challenging election of Member of the National Assembly for Kisumu West Constituency).

power by challenging ideologies that justify social inequalities and therefore lock out women and other groups from moving to the center.

Finally, not having mechanisms to implement the two-thirds gender rule is not a good justification for non-conformance with the rule. These mechanisms can be found as others have been for different aspects of the constitution. It is encouraging that women are questioning long held theories and perceptions of politics. It is now generally agreed that participatory democracy must take into consideration the voices of those who will be affected by the decisions being made. Conscious and deliberate steps must be taken to ensure that even the minorities or any other disadvantaged group are included in decision-making and mainstream development processes.

Related to this is the misplaced focus on the financial cost of bringing in more women. In our view, focus should shift to the loss that the country suffers by excluding women. One of the arguments for increasing women's representation in the elective positions is that they bring a different perspective to issues related to legislation, and management of resources among others.[110]The list of the KEWOPA Members of Parliament bills and motions in Parliament since 2013 is a testimony to the fact that this could happen.[111] It is notable from this list that the women in Parliament have focused on social economic rights provided for under Article 43 of the Constitution, which include rights to food, health, education and natural resources among others. Out of 17 bills/motions tabled by women, 6 are on health; 1 on food; 3 on education and information; 1 on persons with disabilities; 1 on youth; and 1 on county governments. Clearly, the focus is on bills that will benefit the whole family and community as well as those that are marginalised. The unrealised constitutional promise of the constitution will continue to hinder the effective and equal participation of the women's agency to ensure a transformative agenda for the country. The struggle continues.

110 W Kabira, *So Near Yet So Far,* a publication of American Scholarly Research Association (2016).

111 These bills and motions include: The Persons with Disabilities (Amendment) Bill, 2013; The Diabetes Management Bill, 2014; The Traditional Health Practitioners Bill, 2014; The In-Vitro Fertilization Bill, 2014; The Pharmacy Practitioners Bill, 2014; The Engineering Technologists and Technicians Bill, 2015; The Access to Information Bill, 2015; Reproductive Health Care Bill, 2014 (Sen. Bill No. 17); The Food Security Bill, 2014; The Universities (Amendment) Bill, 2014; The Employment (Amendment) Bill (Senate Bill No. 1 of 2015); The County Governments (Amendment) (No. 2) Bill, 2014; The National Youth Service Bill (Amendment) Bill, 2014; The Self Help Associations Bill, 2015; The National Hospital Insurance Fund (Amendment) Bill, 2015; The Natural Resources (Benefit sharing) Bill, 2014; and The County Library Services Bill, 2015, (KEWOPA).

VII

Evidentiary Matters in Election Petitions in Kenya: Progress or Backsliding?

Elisha Z. Ongoya

Abstract

Evidence, in its most elementary sense connotes proof. At the heart of litigating election petitions in a jurisdiction with an adversarial legal tradition like Kenya is the question of proof. In the final analysis, the court has to reach a definitive finding on whether the allegations in an election petitions have been proved or not. With proof, an election petition succeeds. Without proof, an election petition fails. As a body of legal knowledge, the law of evidence has a number of rules and principles that have been applied in election petitions over time. Some of these rules have been subject to changes as part of the reforms resulting from the promulgation of the Constitution of Kenya, 2010. Other rules have remained unchanged in spite of the reforms following the promulgation of the Constitution of Kenya 2010. These rules were a subject of varied, and sometimes contradictory application and interpretation by the courts following the 2013 General Election in Kenya. This Chapter identifies various concerns around the rules, principles and practice of evidence law as have been applied by courts exercising jurisdiction over election disputes in Kenya. The Chapter looks at the rules themselves, their underlying philosophy and the somewhat restrictive and contradictory manner in which the courts have applied them. In essence, the Chapter endeavours to ascertain whether the country's election laws and rules, so far as they relate to evidentiary concerns, as interpreted and developed by courts over time, has fostered the realization of free and fair elections, or whether the same has hindered the realization of this important ideal. Whereas in some of the areas the courts have been progressive in their interpretation and

application of the rules, the Chapter argues that viewed in totality the current restrictive and contradictory and lack of innovation in the interpretation and application of these rules by the courts has generally hindered the realization of free and fair elections contrary to the principles enshrined in the Constitution of Kenya 2010 as well as international best practices governing elections. It has also led to greater uncertainty in the body of election law.

"Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence."[1]

1.0 Introduction

Kenya's legal system, by virtue of the country's colonial history, is of the common law tradition. Because of its common law origins, the legal system, as far as trial and determination of disputes is concerned, is adversarial in nature. Being an adversarial legal system, the same is substantially an "evidence-based" legal system. It, therefore, follows that in any dispute brought before the courts, it is the party who adduces the most compelling evidence who "wins" the case. The manner in which the makers of the rules and the interpreters of the rules treat the rules of evidence as well as the evidence presented is, therefore, critical to the capacity of the system to achieve its goals.

An electoral process that does not provide for a sound process of resolution of electoral disputes cannot be said to be a free and fair. It is against this understanding that the Constitution of Kenya, 2010 has a number of provisions on settlement of election disputes.[2] The question that arises, therefore, whether the manner in which the electoral law, and the election courts have treated the subject of evidence in election petitions fostered or impaired the realization of the ideal of free and fair elections? Secondly, has the law on evidence in election petitions in Kenya and the jurisprudence of the courts on

1 Joho v Nyange and Another (No 4) (2008) 3 KLR (EP) 500.

2 Article 87(1) of the Constitution of Kenya 2010 provides that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. Article 88(4)(e) of the Constitution of Kenya, 2010 provides, as one of the functions of the Independent Electoral and Boundaries Commission, the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of election results. Article 50 of the Constitution of Kenya 2010 provides it as a right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

the same subject tended towards supporting substantive electoral justice or is focus on technicalities?

Disputes in the electoral process concern different substantive matters. They also attract various institutions, which have different competences to resolve them. This is because the election process involves multiple actors and role players at various stages of the electoral cycle. There are, for instance, disputes over delimitation of electoral boundaries, registration of voters, nomination of candidates for various electoral offices, management of relationships between political parties and their members as well as coalitions of political parties, disputes over the validity of declarations of persons as validly elected for respective electoral offices, disputes whether certain electoral offices have become vacant, disputes regarding (non)compliance with the electoral code of conduct, disputes in the nature of alleged commission of election offences among many others.[3] The law prescribes judicial as well as quasi-judicial mechanisms for resolution of each of these disputes. However, upon declaration of the final results of an election any resultant disputes are a subject of determination by courts of law. The analysis in this Chapter is limited to the law of evidence as applied in the resolution of election disputes arising after the declaration of the final results of the election, which are commonly referred to as "election petitions."

The foregoing diversity of disputes in the electoral process has been acknowledged in a number of cases. In the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*[4] the Supreme Court of Kenya observed:

> An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate was vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests, they teeter in their regulatory framework from the civil to the criminal mechanisms and they cut across a plurality of dispute settlement typologies.

Similarly, in the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*[5] the Supreme Court of Kenya held:

3 E Ongoya, The Role of Institutions in Resolution of Election Disputes, in The Law Society of Kenya, Handboook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence, (2013) Nairobi, 96.

4 Moses Masika Wetangula V Musikari Nazi Kombo & 2 Others [2015] EKLR.

5 The Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion Number 2 of 2012.

> It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.

Essentially, the Supreme Court of Kenya is acknowledging two important facts. First, is that elections are a process and not an event with each stage of the process potentially attracting disputes. Secondly, where a dispute inviting application of Kenya's electoral law is brought before the court, principles deriving from constitutional and administrative law, civil law and even criminal law are applicable, depending on the circumstances of each case.

This Chapter focusses on a number of distinct but related subjects, all falling under the umbrella of the law of evidence that are relevant to, and which have been applied in law and practice, in election petitions. The Chapter addresses the distinction between an evidentiary/factual matter and a legal matter. The Chapter also considers the question of burden and standard of proof in election petitions. There is also the question of the form/type of evidence that may be used in election petitions; is it *viva voce* evidence or is it affidavit evidence or is it both? The question of pre-trial disclosure of evidence in election petitions is also considered in this Chapter. This Chapter further interrogates the evidentiary value of material, which the law requires the Independent Electoral and Boundaries Commission (IEBC) to present to court in advance of the hearing of an election petition. Another evidentiary subject that the law makes provision for in respect of election petitions is the question of scrutiny and recount of votes and other electoral material. The relevant question that this Chapter shall interrogate, therefore, relates to the law, the practice and procedure relating to scrutiny and recount as an evidentiary concern in election petitions? The nexus between procedural evidence and substance in election petitions is also discussed. A look at the statute law that followed the promulgation of the Constitution of Kenya 2010

reveals an innovation in the sense that an election court is also empowered to find one guilty of an election offence during trial and then refer the person to the DPP for further investigation.[6] The question that this begs is what the evidentiary considerations are that must underpin such a finding with grave attendant consequences?

The Chapter critically interrogates these questions in a historical context, addressing how the law and the jurisprudence of the courts over each of the questions have evolved over time. The Chapter adopts a critical approach in the sense that it dissects the reasoning of the courts as they grapple with each of these questions to see whether the courts seek to achieve the ultimate goals of the electoral dispute resolution process, namely, to support a 'free and fair' election.

2.0 Key Evidentiary Issues

2.1 Distinguishing Between Question of Law and Question of Evidence

The importance of distinguishing between questions of law and questions of fact in election petition matters in Kenya has become increasingly relevant with the passage of the Elections Act, 2011 and its later amendments. Prior to the enactment of the Elections Act 2011, election petitions were statutorily governed by the National Assembly and Presidential Elections Act of 1969 and its later amendments[7]. Section 23(4) of this statute provided that:

> (4) Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision.

The Elections Act, 2011 as initially enacted did not provide for a right of appeal in election matters. Following amendments, the statute made provision for a circumscribed right of appeal in Section 85A[8]. This Section provides:

> An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on *matters of law only* and shall be—

6 Section 87 of the Elections Act, 2011.

7 Chapter 7 of the Laws of Kenya.

8 These amendments were part of the proposals and recommendations of the Judicial Working Committee on Election preparedness. The recommendations resulted from consultations between various actors in the electoral process under the aegis of the Judicial Working Committee on Election Preparedness where the need for a provision in the law for a right of appeal was urged.

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal.

Similarly, Section 75 of the Elections Act 2011, as amended, prescribes that:

> … (1A)A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.
>
> … (4) An appeal under subsection (1A) shall lie to the High Court *on matters of law only* and shall be—
>
> (a) filed within thirty days of the decision of the Magistrate's Court; and
>
> (b) heard and determined within six months from the date of filing of the appeal.

It is evident from the foregoing statutory prescription that no right of appeal exists from the High Court to the Court of Appeal in election petition concerning membership of the National Assembly, Senate and the Office of County Governor on evidentiary findings of the trial court. Similarly no appeal lies to the High Court from the decision of the Resident Magistrate's Court on the validity of an election of a member of the County Assembly on evidentiary matters.

The constitutional validity of Section 85A of the Elections Act, and to that extent of Section 75 of the Election Act has been affirmed by the Supreme Court. In the case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 Others (The Outa case)* the Court rejected the argument that the limitation of the subject matter jurisdiction of the Court of Appeal in election petition to "matters of law only" as provided for in Section 85A of the Elections Act was unconstitutional. The Court held:

> A statutory provision can be said to be unconstitutional only if it contravenes an express provision of the Constitution. A reading of Section 85A of the Elections Act shows that there is nothing in it that runs into conflict with the constitutional provision conferring appellate jurisdiction upon the Court of Appeal, or with any other constitutional provision. To allow Section 85A to be impugned, without a cogent forensic ground, would open up improper avenues for contests to yet other statutory provisions: such as Section 75 of the Elections Act, which limits the appellate jurisdiction of the High Court (on appeals from a Resident Magistrate Court, on the validity of the election of a County Assembly Member) to matters of law only; and Section 71A of the Civil Procedure Act, which also limits the appellate jurisdiction of the High Court to matters of law only.

> … We reaffirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to "matters of law," is not a limitation to, or a restriction of the Court of Appeal's jurisdiction under Article 164 (3) (a). It is our view that the appellate jurisdiction in electoral disputes, is donated not simply by virtue of Article 164 (3) (a), but also by legislation contemplated under Article 105 (3) of the Constitution.
>
> [77] We hold that the law can regulate or confine the time within which, or the scope or nature of questions that, an appeal Court may accord a hearing – as long as that restriction does not negate or defeat the essence of the right of appeal, or diminish the spirit of the fundamental right to adjudication of electoral disputes. Any such restrictions embodied in statute law, we would hold, are not to be regarded as a breach of the Constitution. We hold, accordingly, that Section 85A of the Elections Act entails no qualification to the terms of the Constitution.[9]

Earlier, in the case of *Gitarau Peter Munya v Dickson Mwenda Githinji and 2 Others*[10] *(Munya 2)* the Supreme Court had also asserted the constitutional validity of Section 85A of the Elections Act, 2011 by stating that:

> "By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.
>
> "Section 85A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: 'Limit your appeals to the Court of Appeal to matters of law only'."

It follows, therefore, that litigants, their legal advisers and judges must remain alive to the distinction between a matter of law and an evidentiary matter, or a matter of fact in pursuit of appeals arising from election petitions.

The Supreme Court of the Philippines has supplied guidance on this distinction in two cases. In the case of *Republic v. Malabanan*,[11] the Court held:

9 Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition Number 6 of 2014.

10 Supreme Court Petition Number 2B of 2014.

11 Republic v. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345. This finding was subsequently approved in the case of New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan; G.R No. 161818 (2008).

> A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court…. absent any showing that there are significant issues involving questions of law."

This approach by the Supreme Court of the Philippines has been approved and adopted by the Supreme Court of Kenya in a number of decisions.

In *Munya 2*[12], the Supreme Court of Kenya held:

> "… it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."

In The Outa case[13], the Supreme Court of Kenya held:

> Similarly, the Munya case affirms that credibility or veracity of witness statements is a factual conclusion that only the trial Court can make; and that an appellate Court should treat with a degree of deference the trial Judge's findings on the record, thus according due primacy to a trial Judge's special knowledge derived from first-hand perception - an approach that upholds the integrity and dignity of the judicial process in electoral matters …

12 Gitarau Peter Munya Vs Dickson Mwenda Githinji and 2 Others, Supreme Court Petition Number 2B of 2014.

13 Above, n 9.

> We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact.

These two cases may be taken to suggest that the trial court has the final word on appraisal of witness accounts and other evidentiary material in election petitions. However, a close consideration of the words used by the Supreme Court reveals that the Court is calling for appeal courts to show deference to the factual findings of the lower courts. Deference, however, does not mean unquestioning religious following on the part of appellate courts to evidentiary findings of the trial in election petitions. This position is borne out of the Court's statement *"Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact"*.[14] It follows that an appellate court may still "interfere" with evidentiary findings of a trial court where the same are *absurd, or decidedly irrational.*

This Chapter takes the position that the text of the law that appeared to immunize evidentiary findings of the trial court in election petitions from scrutiny and re-appraisal by an appellate court was a legal step in the reverse – a retrogressive development. The latitude opened by the Supreme Court in circumstances where the said findings are *absurd, or decidedly irrational* is, a progressive development.

2.2 Burden of Proof in Election Petitions

According to a legal scholar Mr Kyalo Mbobu, the phrase *burden of proof* generally refers to the obligation on a litigant to adduce evidence of a contested allegation of fact before a court of law or other judicial or quasi-judicial tribunals.[15] Several court decisions arising prior and post the March 2013 general elections have contributed to the jurisprudence on the question of burden of proof.

The burden of proof, generally, can be divided into a legal burden and the evidentiary burden of proof. *Cross & Tapper* define the legal burden, also known as "the persuasive burden of proof on pleadings" or "the ultimate

14 As above.

15 K, Mbobu, The Law and Practice of Evidence in Kenya, (2011) 107.

burden" as "the obligation of a party to prove (or disprove) a contested fact either by a preponderance of evidence or beyond reasonable doubt, as the case may be.[16] The evidentiary burden (the burden to supply evidence), on the other hand, refers to the obligation on a party to adduce sufficient evidence of a particular fact in order to justify a decision on that fact in his favour.[17] In *Joho v Nyange & Another (No 4)*[18] the court stated *"The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election."* It is apparent that the Court dealt with the question of burden of proof without addressing the distinction between the "legal burden" and the "evidentiary burden" of proof.

The Supreme Court of Kenya had occasion to address this same question in the land-mark case *Raila Odinga & Others v The Independence Electoral and Boundaries Commission and Others (The Raila Odinga case):*[19]

> [195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the *legal burden* rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.
>
> [196] We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been *non-compliance with the law,* but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta:* all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

In summary, the Supreme Court's decision in *Raila Odinga* case provides that the legal burden of proof remains with the Petitioner from the beginning to

16 Tapper C, Cross & Tapper on Evidence, 12th Ed. (2010) 121.

17 Mbobu, above n 15, 107.

18 Above, n 1.

19 Raila Odinga & Others v The Independence Electoral and Boundaries Commission and Others Election Petitions Numbers 3, 4, and 5 of 2013 (Consolidated) (2013) eKLR.

the end. The evidentiary burden may keep shifting from the Petitioner to the Respondent and vice-versa depending on how each party discharges its burden in the course of the matter. This Chapter opines that this approach on this principle of law is sound, in tandem with scholarly writings on the subject and clearer in comparison with that in *Joho v Nyange & Another (No 4)*.

2.3 Standard of Proof in Election Petitions

Closely related to the concept of burden of proof is its sister concept, the standard of proof. The question that this later concept deals with is the quantum or cogency of evidence that a party must lead in order to succeed in its claim or to establish its defence. Generally, in evidence law and practice, there are two broad categories of standards of proof, namely, proof beyond reasonable doubt, and, proof on the balance of probabilities. Proof beyond reasonable doubt is the standard usually applicable to criminal cases, and, proof on the balance of probabilities is the standard generally applicable to civil cases[20].

As to what constitutes proof beyond reasonable doubt, Lord Denning, in *Miller v. Minister of Pensions*[21] stated as follows:

> (T)hat degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence 'of course it is possible but not in the least probable', then the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In respect of proof on a balance of probabilities, Lord Denning stated:

> (I)t must carry a reasonable degree of probability but not as high as is required in criminal cases. If the tribunal can say 'we think it more probable than not,' the burden is discharged but if the probabilities are equal, the burden is not discharged. The degree of cogency in burden of proof required is less than in criminal law.[22]

Kenyan courts have treated election petitions as such serious claims that should not generally be countenanced on flimsy grounds. This is principally

20 Lord Denning in the case of Miller v. Minister of Pensions [1947] 2 All ER 372.

21 [1947] 2 All ER 372.

22 As above.

because it is not the role of the court to disturb the sovereign will of the people for minor irregularities in the election process. As a result, the emerging jurisprudence on the question of the standard of proof has been to insist on a standard that is higher than the standard in other civil cases.

There is, however, a secondary concern. That is, election law may also entail "electoral criminal law' in circumstances where allegations of acts and omissions of a criminal nature are raised in an election petition. Questions are bound to arise regarding the standards to which such allegations should be proved so as to be regarded as established. This was considered in *Joho v Nyange and Another*[23] where the court held:

> "while the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required."

What is not clear in the above jurisprudence is whether the Court in Joho v Nyange and Another intended the "very high degree of proof" to be high enough as to amount to *beyond reasonable doubt* or whether it still falls below the *beyond reasonable doubt* bar.

As discussed below, subsequent decisions of the Supreme Court following the 2013 General Election have, largely settled this question of the standard of proof applicable to allegations of criminal acts and omissions in election petitions.[24] In the case of Moses *Masika Wetangula v Musikari Kombo & Others*[25], allegations of commission of the offence of bribery by the appellant arose in the election petition before the High Court and the subsequent appeals before the Court of Appeal and the Supreme Court. In dealing with this issue, the Supreme Court set out three jurisprudential guidelines. First, the Court established that bribery is both an electoral offence and a criminal

23 As above, n 1.

24 There is also an ongoing debate on the power of a court presiding over an election petition to determine commission of an election offence. This debate has arisen out of the concern that the circumstances under which an election petition is tried may not meet the constitutionally prescribed fair trial guarantees for criminal trials as set out in article 50 of the Constitution of Kenya 2010 and other international human rights instruments. As at the time of writing this Chapter there was a report in The Standard newspaper of Wednesday February 10, 2006 at page 12 titled "New elections bill protects offenders from being struck off the register" which addressed a raft of proposed reforms to the Elections Act 2011 including the process of dealing with allegations of election offences in election disputes resolution.

25 2015 eKLR.

offence. Being such, proof of the same must be by credible evidence and nothing short of proving this offence beyond reasonable doubt will suffice.

Second, the Court established that there is no distinction between bribery in a criminal case and in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act[26], bribery is an election offence under section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of the offence upon proof. On account of this criminal aspect of bribery in elections, the offence is to be proved beyond any reasonable doubt. The Petitioner has to adduce evidence that is *cogent, reliable, precise and unequivocal,* in proof of the offence alleged.

Third, the Court established that the offence of bribery is cognizable meaning that a person alleged to have committed it is liable to arrest without warrant. According to the Court, this illustrates the gravity of the offence and signals, that a high standard of proof was required. That requirement was part of the guarantees of the right to fair trial for the persons(s) against whom such allegations were made.

From an evidentiary point of view, therefore, an allegation of commission of any of the crimes, as set out in the election statutes, as a basis for challenging the election outcome, requires proof beyond reasonable doubt. Considering the legal consequences of a finding of election offences on a party to an election petition, the requirement that such allegations must be proved "beyond reasonable doubt" is a progressive step in the jurisprudence of the Supreme Court of Kenya on the subject.

Regarding the issue of ultimate burden of proof, the Court in the *Raila Odinga* case[27] stated as a principle that "ultimately, of course, it falls to the Court to determine whether a *firm* and *unanswered* case has been made …" Yet again, at that juncture, the court was cagey on the question whether the *"firm and unanswered case"* test was tantamount to beyond reasonable doubt, or, what has now come to be described as "not as low as to amount to on a balance of probabilities and not so high as to amount to beyond reasonable doubt."

The Supreme Court of Kenya, when confronted with the specific question of the exact standard of proof applicable in election petitions in Kenya in the

26 The Elections Act, 2011.

27 Above, n 19.

Raila Odinga case started by interrogating comparative jurisprudence on the subject. After examining jurisprudence from Mauritius[28], Canada[29], India, and Zambia[30], the Court established the following as the Kenyan standard of proof in election petitions:

> The lesson to be drawn from the several authorities is, in our opinion, that *this Court should freely determine its standard of proof,* on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10], *judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.* (emphasis added)

The Supreme Court has in effect adopted three categories for which different standards of proof apply in election petitions. First, the Court adopted the imprecise *"above the balance of probability though not as high as beyond reasonable doubt"* as the general standard of proof in election disputes are concerned. Second, the Court set out as a standard applicable to circumstances where criminal charges linked to elections are in question what it referred to as *"the normal standards"*. We take the view that this could only have meant proof beyond reasonable doubt.

The Court then described a third scenario, that is, where data specific or quantitative electoral requirements apply, such as the ones set out in article 38(4) of the Constitution of Kenya, 2010. In this category of circumstances, the applicable standard is "beyond any reasonable doubt."

28 Jugnauth v. Ringadoo and Others [2008] UKPC 50.

29 Opitz v. Wrzesnewskyj 2012 SCC 55-2012-10-256.

30 Lewanika and Others v. Chiluba (1999) 1LRC 138, and, Anderson Kambela Mazoka and Two Others v. Levy Patrick Mwanawasa and Two Others SCZ/EP/01/02/03/2002.

Litigants, and their legal advisers, as well as judicial officers must, therefore, assess which of the three categories their matter falls within closely as it will affect the weight of evidence that they need to provide to the court or apply.

2.4 The Form of Evidence Used in Election Petitions - Is it *Viva Voce* Evidence or is it Affidavit Evidence or is it Both?

What form of evidence should be presented to courts in election petitions in Kenya? Is it the same across all courts exercising jurisdiction over election disputes or does it vary from one court to the next? One of the various dichotomies of evidence is, *viva voce* evidence on the one hand and affidavit evidence on the other hand. By *viva voce* evidence is meant oral evidence of witnesses. Affidavit evidence, on the other hand, means written statements on oath by witnesses.

It has long been held that a court sitting as an election court exercises a special jurisdiction under a special and peculiar regime of law – the election law regime. Kenyan courts have consistently held that such legal regime is complete and self-contained. It has also been long held that other legislation or rules can only be applicable to election petitions if they are made applicable by the election laws themselves or the rules.[31]

This position of the law was established under the legal regime preceding the Constitution of Kenya 2010 and has since been restated with approval. In *Hassan Ali Joho & Another v Suleiman Said Shabhal,*[32] the Supreme Court cited with approval the decision of the Court of Appeal in *Ferdinand Waititu v Independent Electoral and Boundaries Commission & 8 Others*[33] (the Waititu case), where it had been held:

> The Elections Act and the Rules made there under constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution

31 See Ahmed Vs Twaha & 2 Others. (2008) 2 KLR (EP) 783. See also Mwai Kibaki Vs Daniel Arap Moi, Nairobi Court of Appeal Civil Appeal Numbers 172 and 173 of 1999 consolidated where the Court of Appeal observed that "The Act and the Rules both form a complete regime and other legislation or rules can only be applicable to election petitions if they are made applicable by the Act itself or the rules. And we also agree that the purpose of this regime is to have election petitions dealt with in as quick and efficient a manner as is reasonably possible and the reason for this is not difficult to understand. The voters in a particular constituency and also the general voters in Kenya are interested in knowing who their legitimate representative in parliament is.

32 Supreme Court Petition Number 10 of 2013.

33 Civil Appeal No. 137 of 2013.

> is the Supreme law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution.

The Court of Appeal in the *Waititu* case had itself considered with approval decisions made prior to the promulgation of the Constitution of Kenya, 2010 when it held:

> In *Murage v Macharia* [2008] 2KLR (EP) 244, it was held that election petitions are governed by a self-contained regime and the Civil Procedure Rules were inapplicable except where expressly otherwise stated. That principle has been reiterated in several other election petitions including *Muiya v Nyaga & Others*, [2003] 2 E.A. 616. The Court must therefore, in making any decision or interpreting its mandate in regard to an election petition give due regard to the provisions of the Constitution cited hereinabove as well as the Elections Act and the Rules made thereunder.

The foregoing decisions made after the promulgation of the Constitution of Kenya 2010 have reinforced the principle that election laws in Kenya are a self-contained regime of law.[34]

Three courts can hear election petitions in Kenya: the Resident Magistrates Court in respect of membership to the County Assembly[35], the High Court in respect of membership to the National Assembly and the Senate as houses of parliament[36], and, the office of Governor[37], and the Supreme Court in respect of presidential election petitions[38]. In addition to aspects of procedure that are addressed in the body of substantive law such as the Constitution of Kenya 2010 and various statutes governing elections, the rules of procedure for election petitions are set out in the Elections (Parliamentary and County Elections) Petition Rules 2013[39] developed by the Rules Committee as constituted

34 Other decisions are Benjamin Oguyo Andama v Benjamin Andola Andayi, Kisumu Court of Appeal Civil Application Number 24 of 2013 where the court held: In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor Civil in nature. We may say there is an element of Public law in them but even that is not all correct. They are a class of their own. Patrick Ngeta Kimanzi v Marcus Mutua Muturi & 2 Others, Machakos High Court Election Petition No. 8 of 2013 where Justice Majanja held: Similarly the Petitioner cannot call in aid the provisions of Civil Procedure Rules. The Election Act 2011 and Rules and the regulations made thereunder is comprehensive code of substantive and procedural election hence the Civil Procedure Act Cap 21 Laws of Kenya and Rules made thereunder do not apply to Election Act 2011 except where expressly provided for in the Act or the rules. Dr Thuo Mathenge v Nderitu Gachagua, Nyeri High Court Election Petition Number 1 of 2013, and, Richard Nchapi Leiyagu v Independent Electoral and Boundaries Commission and Others, Nyeri High Court Election Petition Number 4 of 2013.

35 Section 75(1A) of the Elections Act 2011.

36 Article 105 of the Constitution of Kenya, 2010.

37 Section 75(1) of the Elections Act 2011.

38 Article 140 of the Constitution of Kenya, 2010.

39 Legal Notice Number 54 of 2014.

under the Civil Procedure Act, and the Supreme Court (Presidential Election Petition) Rules 2013[40] developed by the Supreme Court.

The Elections (Parliamentary and County Elections) Petition Rules 2013 (hereinafter "the Petition Rules") apply both in the Resident Magistrates Courts and the High Court as they try election cases and appeals from the said petitions[41]. Nonetheless, an administrative law issue that calls for urgent reform of the law relates to Section 96 of the Elections Act 2011, which provides:

> Subject to the provisions of section 98, the Rules Committee as constituted under the Civil Procedure Act, may make rules generally to regulate the practice and procedure of the *High Court* with respect to the filing and trial of election and referendum petitions (emphasis added).[42]

Strictly speaking, it would appear that the Rules Committee has no statutory authority to make rules of practice and procedure of subordinate courts such as the Magistrates courts for the filling and trial of election petitions. This is a clear anomaly in the law that needs to be cured at the earliest opportunity through an amendment to the Elections Act, 2011.

2.5 Form of Evidence for County, Parliamentary and Gubernatorial Election Petitions

As noted above, the original jurisdiction for these categories of election petitions is in the Resident Magistrates Courts (for petitions that challenge membership to county assemblies) and the High Court (for petitions that challenge outcomes in parliamentary and gubernatorial elections. Rule 10(3)(b) of the Elections (Parliamentary and County Elections) Petition Rules requires that "an election petition shall be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner."[43]

40 Legal Notice Number 15 of 2013.

41 See Benjamin Oguyo Andama v Benjamin Andola Andayi, Kisumu Court of Appeal Civil Application Number 24 of 2013 where the Court held: Although Rule 35 of the Election Petition Rules to which we shall refer herein later says:- "An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules," still there are some Court of Appeal Rules which cannot be applied in the Election Petition matters. One glaring example is the time allowed for filing the appeal which, if the Court of Appeal Rules were to be applied, would be 60 days from the date of filing the Notice of Appeal but which under the Elections Act is thirty days from the date of announcement of the results which we take to be thirty days from the date of gazettement of the results by the Independent Electoral and Boundaries Commission. This is only one example. There are many other provisions of the Court of Appeal Rules, which cannot be applied to Election Petition Rules.

42 Section 96 of the Elections Act, 2011.

43 Rule 10(3)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

In addition to rule 10 above, rule 12 of the Petition Rules mandates that a Petitioner should, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial. According to Rule 12, such affidavit should state the substance of the evidence; and be served on all parties to the election petition with sufficient copies filed in court. The Rule prescribes that the affidavit, once filed and served forms part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issue contained therein.

Pursuant to Rule 12 (3) as read with Rule 12(4), a witness cannot give evidence on behalf of the Petitioner unless an affidavit is filed in accordance with this rule without the leave of the court. At the same time, the court should not grant leave under sub-rule (4), unless sufficient reason is given for the failure to file an affidavit.[44]

The Petition Rules then proceed to import the provisions of Order 19 of the Civil Procedure Rules[45] and the Oaths and Statutory Declarations Act[46] as applicable to affidavits under the rule. Similarly Rule 15 of the Petition Rules make provision for affidavits by or on behalf of the Respondent. A Respondent is expected to file a response to the petition, and at the time of filling the response to file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit should set out the substance of the evidence.[47] Each affidavit should be served on all parties to the petition including all Petitioners in the same petition and the Respondents. Under Rule 15(3) the affidavit shall form part of the record of the trial and a deponent may be cross-examined by the Petitioners and re-examined by the Respondent.[48] Just as in the case of the Petitioner, a witness cannot give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use of the court and the Petitioner, is filed with the response as required by this rule without the leave of the court.[49] There is a prohibition against the grant of such leave by the court in the absence of sufficient reason for the failure to file an affidavit.[50]

44 Rule 12(5) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

45 Legal Notice number 151 of 2010.

46 Chapter 15 of the Laws of Kenya.

47 Rule 15(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

48 Rule 15(3) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

49 Rule 15(4) as read with rule 15(5) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

50 Rule 15(6) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

In respect of affidavits in support of the respondents' case, the entire body of Order 19 of the Civil Procedure Rules and the Oaths and Statutory Declarations Act of 1919[51] are expressly made applicable.[52]

The Petition Rules, to the extent of the above provisions, clarify a number of aspects concerning the appropriate form for the presentation of evidence in election petitions. First, the Petition Rules admit affidavit evidence as the mode of evidence in chief by both the petitioners and the respondents together with their respective witnesses in election petitions relating to county assembly, parliamentary and gubernatorial elections. Second, the Petition Rules admit *viva voce* evidence for purposes of cross-examination and re-examination of witnesses. Third, the Petition Rules expressly apply the provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act of 1919 to affidavits filed under the Petition Rules. The two regimes of law, are, therefore, part and parcel of the regime of election law in this country concerning the question of affidavits. Finally the Petition Rules are silent on the applicability of the Evidence Act of 1963[53], an important piece of legislation in Kenya's general civil and criminal trial process to election petitions. It follows, therefore, that the legislation is not applicable to the trial of petitions filed under the Petition Rules, 2013 by dint of the jurisprudence on the self-contained nature of the regime of law governing election petitions. This prescription of the law is too limiting and there is need to amend the rules to specifically apply the Evidence Act to election petitions filed under the Elections Petition Rules. This is because the Act has broader provisions regarding to aspects of evidence such as use of computer print-outs, electronic evidence, character evidence, evidence by video-conferencing among other aspects that may be important to the trial of election petitions but which are not provided for in the Petition Rules as well as the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act of 1919.

The other question for interrogation is the effect in cases where a Petitioner or Respondent who filed a witness affidavit fails to call the said witness at the trial. This issue becomes even more contentious when considered against the background of the fact that once filed, such an affidavit became part of the record. Does it remain part of the record to be considered by the court notwithstanding that its veracity was never tested by instrument of cross-

51 Chapter 15 of the Laws of Kenya.

52 Rule 15(7) of the Elections (Parliamentary and County Elections) Petition Rules 2013.

53 Chapter 80 of the Laws of Kenya.

examination? Does it behove the court to, *suo moto*, expunge such affidavit from the record? Does the court leave the affidavit to remain part of the record, consider the same as part of evidence but only attach little evidentiary weight to it? Or further still, does the court leave the affidavit to remain part of the record but simply fail to consider it at all in its determination of the facts and matters in issue? The research culminating into this Chapter did not reveal answers to these pertinent questions from the jurisprudence of the courts either before or after the 2013 General Election.

This Chapter takes the view that it is good practice for such affidavits to be expunged from the record unless admitted by consent with the adverse part expressly waiving its right to cross-examine.

2.6 Form of Evidence for Presidential Election Petitions

As noted above, in addition to the substantive laws of the Constitution of Kenya, 2010, the Elections Act 2011 and the Supreme Court Act 2011,[54] the procedural law regime governing the trial of presidential election petitions is the Supreme Court (Presidential Election Petition) Rules 2013 (hereinafter referred to as "Presidential Petition Rules"). Compared to the Petition Rules discussed above, this procedural piece of law stands out as, perhaps, an even more inadequate and inconsistent collection of rules regarding the regime of evidence applicable in Election Petitions.

Rule 5 of the Presidential Petition Rules prescribes that a petition under the Presidential Petition Rules shall conform to the provisions of the First Schedule and shall be in Form A set out in the Second Schedule. Section 7 of the First Schedule to the Presidential Petition Rules prescribes that an affidavit in support of the petition shall be sworn personally by the petitioner or by one of the petitioners, if more than one and shall contain the grounds on which relief is sought, setting out the facts relied on by the petitioner or petitioners; be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of subject, and every paragraph shall be numbered consecutively; and, conclude with a statement setting out particulars of the relief sought.

Rule 8 of the Presidential Petition Rules, provides that upon service of a petition under Rule 7, a respondent who wishes to oppose the petition may

54 Chapter 9A of the Laws of Kenya.

within three days of service of the petition file a response which shall be in form of an answer to the petition in the manner specified in Form B set out in the Second Schedule; and may be accompanied by a replying affidavit.

It is noteworthy that unlike the Petition Rules, the Presidential Petition Rules do not apply the Oaths and Statutory Declarations Act 1919 and Order 19 of the Civil Procedure Rules 2010 to affidavits filed in the context of Presidential Elections. As a result of the jurisprudence on the exclusive nature of the regime of law governing elections, these two pieces of the law would appear to be inapplicable to presidential elections. It, therefore, follows that there is no express provision for cross-examination or re-examination of a deponent of an affidavit sworn and filed in a presidential election petition unlike in the county and parliamentary petitions. There is no provision for any other affidavit by any other witness in support of, or in opposition to the petition.

There is, then, the discretion vested in the Respondent to file a Replying Affidavit meaning the Respondent may elect to supply or not to supply evidence in support of his or her line of defence.

Relevant to the question of evidence in presidential election petitions is Rule 10 of the Presidential Petition Rules which provides for a pre-trial conference at which conference the court shall, among other things "give directions in regard to the filing and service of any further affidavits or the giving of additional evidence"[55], and "notify the Commission to furnish it with all the relevant election documents relating to the petition before commencement of the hearing.[56]"

Rule 10 attracted considerable controversy in the context of the *Raila Odinga* case.[57] In this Petition, the Petitioner filed a further affidavit whose admissibility was the subject of contest and eventual rejection by the Supreme Court.[58] In rejecting the said further affidavit, the court reasoned thus:

55 Rule 10(f) of the Supreme Court (Presidential Election Petition) Rules 2013.

56 Rule 10(i) of the Supreme Court (Presidential Election Petition) Rules 2013.

57 As above, n 19.

58 This affidavit had provided a detailed analysis of the inconsistencies in the election result declaration forms which the Independent Electoral and Boundaries Commission (IEBC) had supplied to court. The affidavit had also sought to prove that the results of the candidate who was declared president-elect had been topped up to enable him pass the constitutional threshold of more than half the votes cast in the election as required by Article 138 of the Constitution. Finally, the affidavit had also sought to show how the electronic result transmission system had been deliberately tampered with by the service provider. The said service provider had been contracted by the IEBC to transmit all election results to the National tallying centre. He also had been contracted by the Jubilee Alliance (an alliance of the political parties that had sponsored Uhuru Kenyatta and William Ruto for the presidency and deputy presidency) to transmit results as captured by their agents from various polling stations to their own party tallying center.

> It should be noted that it is not mandatory for the Petitioner to annex an affidavit to his/her Petition. However, a Respondent is required to annex a Replying Affidavit to the Response. At the Pre– trial Conference, the Court, under the provisions of Rule 10 (f), may:
>
> > "give directions in regard to the filing and service of any further affidavits or the giving of additional evidence;"

Upon careful consideration of the said Rule and submissions by Counsel, we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right. As stated earlier, there is no provision for further affidavits in the Supreme Court Act, whatsoever.

> …It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.
>
> … The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

This Chapter contends that the Court was unacceptably technical in its approach on the admissibility of this further affidavit. First, the Supreme Court took issue with the fact that there were other affidavits attached to the further affidavit. It is noteworthy that the highest court in the land did not allude to any law that was violated by attaching an affidavit as an annexure to another affidavit. It simply described it as "unusual" as if to generate jurisprudence in the line

that what is unusual is irregular, unprocedural or, far still, unlawful. Worse still, while disposing of this issue in the casual manner that it did, the Court did not address itself to the very essential issue that the rules only prescribe the filling of an affidavit by the Petitioner as discussed earlier above. In this respect, the only option available for the Petitioner was to make any other witness affidavit to be part and parcel of the petitioner's affidavit by presenting such witness affidavit as annexures to the petitioner's affidavit.

Second, the Court took the view that an application for adduction of further evidence had to be filed before the pre-trial conference. The Court did not state any law or rule of procedure founding such a requirement. On the strength of the foregoing assumption bereft of legal validity, the Court took the position that a request to have additional affidavits admitted, after the filling of the said affidavit, was not permissible.

It may appear that the Court in this case was determined to reject the additional affidavit more out of its own pressures to limit the amount of material available for its consideration in light of the time constraints for determining the petition, than out of sound legal principles on relevance and admissibility of evidence. In a way, it would appear that the Court decided to reject the evidence, then sought reasons to justify such rejection following such a decision.

This decision ended up being an unjust decision. The eventual decision of the Court on the merits of the petition was reached without taking account of all material that could possibly be available from the respective parties (having rejected the affidavit of the Petitioner). The Court, by being too technical, limited its own capacity to contribute to the realization of the ideal of free and fair elections. As a reform question, this chapter recommends that the Court should re-examine Presidential Petition Rules to address such concerns about evidence applicable to presidential election petitions. Such re-examination should be inclined to push the balance towards admission of as much evidence as can possibly be adduced so that the final decision is based on the full set of evidence.

2.7 The Law on Pre-trial Disclosure of Evidence in Election Petitions

In the regime of law governing resolution of election disputes that pre-dated the Constitution of Kenya 2010, there was legal approval for trial by ambush.

The National Assembly Elections (Election Petition) Rules 1993 prescribed that the petitioner had to deliver to the office of the Registrar an affidavit sworn by each witness whom the petitioner intended to call at the trial, setting out the substance of his or her evidence not less than forty-eight house before the time fixed by the election court for the trial of the election petition.[59] Each affidavit had to be enclosed in a sealed envelope together with sufficient certified true copies for each of the judges, all other petitioners in the same petition and the respondents, and could only be opened by the election court when the witness who has sworn the affidavit is called to give evidence.[60] In relation to evidence by the Respondent, the Rules prescribed that a witness could not be permitted to give evidence for the Respondent unless an affidavit sworn by him or her, setting out the substance of that person's evidence, together with sufficient certified true copies for the use of the judges and the petitioner, was handed to the election court when called to give evidence[61].

The rationale for this approach was to protect witnesses from interference, compromise or even injury owing to the high stakes nature of election disputes. The injustices that resulted from trial by ambush were many. There was also a great deal of delay while parties were grappling with evidence coming to light for the first time when the witness took to the witness stand.

This problematic situation changed with the adoption of the Constitution of Kenya 2010, and the passage of the Elections Act 2011 both of which require, either expressly or through general principles that there is full and candid disclosure of all evidence ahead of the trial.[62] As discussed above, under the Petition Rules and the Presidential Petition Rules all affidavits filed in support of, or in response to, the petition are served in advance on all parties concerned. In this context, substantial progress has been made in relation to this aspect of evidence in election petitions.

2.8 Scrutiny and Recount of Votes

Section 82 of the Elections Act prescribes the regime of scrutiny and recount of votes. It provides that an election court may, on its own motion or on

59 Rule 18(1) of the National Assembly Elections (Election Petition) Rules 1993 (repealed).

60 Rule 18(2) of the National Assembly Elections (Election Petition) Rules 1993 (repealed).

61 Rule 18(5) of the National Assembly Elections (Election Petition) Rules 1993 (repealed).

62 See the detailed discussion of the form of evidence relating to county and parliamentary elections as well as presidential elections above in the manner in which evidence is now disclosed well in advance of the trial. The Constitution of Kenya 2010 provides principles of guiding principles for Kenya's justice system at article 159 of the Constitution, which cannot countenance trial by ambush.

application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.[63] The statute provides for certain types of votes that should be struck off in the course of scrutiny namely:

- the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
- the vote of a person whose vote was procured by bribery, treating or undue influence; the vote of a person who committed or procured the commission of personation at the election;
- the vote of a person proved to have voted in more than one constituency; the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
- the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.[64]

The question that remains for reflection is the purpose of such order for scrutiny and recount. Is it purely to identify whether there are any votes for striking out then recounting the remainder of the votes to ascertain the accuracy of the tally by each of the candidates, as the statute appears to prescribe or is the objective larger? Courts in Kenya have used the results of such scrutiny, where they reveal serious anomalies in the conduct of the election, to annul to election outcome.

Following the 2013 General Election, the Supreme Court of Kenya was the first court to take advantage of and apply the provisions on scrutiny of votes under Section 82. The approach by the Court in the *Raila Odinga* case on this question was rather puzzling. In this case, the Supreme Court made a *suo moto* order for scrutiny of votes and registers in certain specified polling areas which came across as a proactive and positive gesture.

Commenting on this order one author has observed thus:

> … With this in mind, it is argued that the Supreme Court, in ordering *suo*

63 Section 82(a) of the Elections Act, 2011.

64 Section 82(2) of the Elections Act, 2011.

> *moto* scrutiny in advance of all relevant forms containing tallies of the presidential results in the March 4, 2013 elections, the Court made a ruling that aligned itself closely with the letter and spirit of Article 159(2) (d). .. I suggest that such a scrutiny should be orders in all cases where substantial malpractice is alleged or manifest.[65]

While the order itself was positive the use that the Court put the outcome this inquiry to was problematic. First, in its final judgment, the Court stated the purpose for which it had ordered the scrutiny in the following terms:

> [169] On 25th March 2013, the Court ordered the scrutiny of all Forms 34 and Forms 36, which were used in the country's 33,400 polling stations. *The purpose of the scrutiny was to better understand the vital details of the electoral process, and to gain impressions on the integrity thereof*.
>
> [170] The Court also ordered a re-tallying of the Presidential votes in 22 polling stations, using Forms 34, 36 and the Principal Register, as these stations had featured in the Petitioner's grievance. The purpose of the re-tally was to establish whether the number of votes cast in these stations exceeded the number of registered voters as indicated in the Principal Register (emphasis added).

At the end of this exercise, the Court documented its findings as follows:

> [171] After the re-tally of the votes cast in the said stations was complete, it was found that *5 polling stations, out of the 22, had discrepancies as to the number of votes cast as reflected in Form 34 and Form 36.* These were: Lomerimeri Primary School, Tiaty Constituency; Nthambiro Primary School, Igembe Central Constituency; Kabuito Primary School, Igembe Central Constituency; Mugumoini Primary School, Chuka Igambang'ombe Constituency; and NCC Social Hall, Lang'ata Constituency.
>
> [172] With respect to the scrutiny of all Forms 34 which were used by the IEBC in tallying the Presidential election votes, from the 33,400 polling stations in the country, only 18,000 polling stations were scrutinized. It was found that Forms 34 were missing in some polling stations such as: Zowerani Primary School, Kilifi North Constituency; Show Ground, Kapenguria Constituency; Nakatiyani Water Point, Loima Constituency; and Mjanaheri Primary School, Magarini Constituency. *In addition, the aggregate results of Form 36 voters from 75 constituencies were missing*.

65 Godfrey M Musila, Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws, in Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence, Law Society of Kenya, October 2013, 1, 11 -12.

> [173] Reports showing the above discrepancies were availed to counsel, who were asked to comment on the facts and data reflected therein.

Despite being confronted with these problematic statistics and irregularities the Court still reached the conclusion that the said elections were indeed conducted in compliance with the Constitution and the law. The Court, therefore, responded in the affirmative in regard to the question whether the presidential election held on March 4th 2013, was conducted in a free, fair, transparent and credible manner, in compliance with the Constitution and all relevant provisions of statutory law. The Court further held that the 3rd and 4th Respondents were validly elected and declared President and Deputy President-elect respectively.

The Court found its own ascertained discrepancies in the electoral exercise to have been inconsequential. Having found that there were no aggregate results in 75 out of the country's 290 constituencies, it is puzzling that the Court never questioned what the basis of declaration of the results was. The Court was not quizzical on the impact of the missing results to the final election result.

2.9 Evidence Gathering Preparations By Candidates

Prior to filing before the Supreme Court, *Raila Odinga* had filed an application before the High Court of Kenya to access information on the nature of data held by the IEBC at its national tallying centre. Why did this candidate have to approach the Respondent for data when he is expected to have had agents collecting the same data primarily from all polling and tallying units across the country?[66] Essentially, there is need for candidates at all levels of elections to take advantage of the regulations that provide for posting of polling and tallying agents. These are expected to be credible people who can collect, store and relay data for evidentiary purposes in case of any resultant election disputes. Failure to prepare adequately compromises the quality of evidence that is available at the candidate's Disposal so as to satisfactorily discharge their burden in Court. This also impacts negatively on the timelines available and eventual success of a candidates' case in Court.

66 See generally the Elections (General) Regulations 2012 for detailed provisions on attendance by candidates and or their agents at polling and tallying stations.

3.0 Conclusion and Suggestions for Reform

From the foregoing analysis of the laws, rules of procedure and attendant jurisprudence of courts relating to evidentiary aspects of election petitions, it is arguable that there have been tremendous changes in the normative content of the constitution, statute and rules of procedure regarding evidence in election petitions. Some of these changes are positive and they need consolidation. Other changes are retrogressive and need amendments. Pre-trial disclosure of evidence through service of contesting affidavits in advance, advance release of material by the IEBC, and procedures for scrutiny and recount are part of the positive progresses that the regime of law relating to evidence in trial of election petitions has achieved.

However, there is still a technicality minded judiciary. A case in point is the jurisprudence from the Supreme Court of Kenya on admissibility of additional evidence in election petition. This is despite the clear constitutional dictate that Courts should focus on substantive and not procedural justice.

The level of preparedness by political parties and candidate in terms of collection and storage of evidence in the course of the electoral practice is also very poor. There is need for capacity building. Political Parties have to take their responsibility in the electoral process more seriously moving forward.

There is need to review the Petition Rules and the Presidential Petition Rules to import provisions of the Evidence Act into the regime of law governing trial of elections. For the Presidential Petition Rules, there is an additional need to import the provisions of the Civil Procedure Rules 2010 and the Oaths and Statutory Declarations Act 1919 to govern the affidavits filed as evidentiary material in petitions filed before the Supreme Court.

VIII

Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective

Justice David K. Maraga*

Abstract

Because of the tremendous public interest that elections generate, scrutiny is an integral aspect of any democratic electoral process intended to demonstrate openness in the entire process. It transcends the entire electoral process from the registration of voters; balloting; as well as counting, tallying and collating of votes. In election petitions, scrutiny of the voting materials is one of the methods the courts use to determine the integrity of an election. This chapter discusses scrutiny in the entire electoral process; what it entails; when and on what basis an order for scrutiny is granted; how the exercise of scrutiny is carried out; and the application of the result of the exercise.

1.0 Introduction

One of the main pillars of a functioning democracy is a peaceful transition of office through elections, which the public perceives as transparent, free and fair.[1] The right to free, fair and regular elections based on universal suffrage has been billed as "the fountain source of … democracy."[2] As one of the world democracies, transparency and integrity are hallmarks of Kenya's

* This chapter expresses the personal views of the author. It is not a reflection of the official position of either the JCE or the Judiciary. The author is grateful to Brian Omwoyo and Priscilla Nyokabi for their research assistance.

1 V Autheman, *The Resolution of Disputes Related to Election Results: A Snapshot of Court Practice in Selected Countries around the World'* (2004), IFES Rule of Law Conference Series, available online at, http://www.aceproject.org, at 29 December 2015.

2 K M Shradha Devi v. Krishna Chandra Pant & Others, (1980) SCI CA No. 277, [para 16].

electoral system. The Constitution of Kenya, 2010(the Constitution) requires, in imperative terms, that whatever methods are employed, the conduct of elections shall be "simple, accurate, verifiable, secure, accountable and transparent."[3]

Elections the world over, however, are competitive "features."[4] Heads of State in many parts of the world, and especially in Africa, wield a lot of power.[5] "The influence that comes with the office makes it very attractive."[6] That influence cascades down through all elective positions. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally agitated.[7] Candidates and political parties often do anything to be elected. Incumbents who are eligible for re-election marshal state power and all means at their disposal to get re-elected.[8] All these factors make elections at every level extremely "high-pressure events."[9]

If they are mismanaged or candidates do not respect and adhere to the rules of the game; if the average citizen, political parties and candidates do not perceive them as free and fair, elections can stoke and foment conflict, which can lead to instability of a country with attendant economic breakdown.[10]

With such eventualities, the proper management of elections is of crucial importance to both the stability and prosperity of nations, especially on the African continent. To enjoy public confidence as credible and legitimate, the entire electoral process from the registration of voters and the integrity of the voters register; nomination of candidates; campaigns; the conduct of elections; and the counting and tallying of votes, must be transparent, verifiable and accountable and be perceived to be so. The objectivity and impartiality of the electoral dispute resolution mechanism[11] (EDR) inspires public confidence

3 The Constitution of Kenya, 2010, Article 86(a).

4 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

5 *E O Abuya, 'Can African States Conduct Free and Fair Elections?' (2010) 8 Northwestern Journal of International Human Rights, 123.*

6 *E O Abuya, 'Can African States Conduct Free and Fair Elections?' (2010) 8 Northwestern Journal of International Human Rights, 123.*

7 E O Abuya, 'Consequences of a flawed presidential election' (2009) Legal Studies, 29, 127-158.

8 E O Abuya, 'Consequences of a flawed presidential election' (2009) Legal Studies, 29, 127-158.

9 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

10 The flawed presidential elections in Kenya in December 2007 led to post-election skirmishes that left about 1,000 people dead, about 700,000 others displaced and drove the country to the brink of precipice not to mention the gargantuan economic crisis that was thereby wrought. A similar situation was witnessed in Cote d'Ivoire following the bungled presidential elections in November 2010. See Communiqué of 252 Meeting of the Peace and Security Council of African Union held on 9 December 2010.

11 V Autheman, Note 1.

and lends credibility and legitimacy to the electoral process in any democratic system.[12]

Electoral disputes are essentially political contestations, which should ideally be left to politicians to resolve.[13] However, the electoral process from which they arise is also legal in nature and embraces wider and fundamental aspects of the rule of law and governance principles,[14] which call for resolution by an independent and non-partisan body enjoying public confidence. Because of its neutrality and impartiality[15] and more importantly being the vanguard of the rule of law[16] the "final interpreter of the Constitution,"[17] the judiciary, in most common law jurisdictions, is considered the right organ of state to resolve electoral disputes and its jurisdiction to do so is, in most cases, entrenched in the national constitution.[18]

In electoral disputes, scrutiny is one of the tools the court employs to determine the integrity and credibility of an electoral process. The term "scrutiny" has not been defined in the Constitution of Kenya, 2010 (the Constitution) or the Elections Act, 2011[19] (the Elections Act). It is a term with complex layers of meaning. The ordinary English dictionary defines it as a close and thorough examination, observation or study.[20] In election dispute resolution jurisprudence, courts have defined scrutiny as a technical term, which refers to a court supervised forensic investigation into the validity of the votes cast in an election,[21] and the subsequent determination of who ought to have been returned as the winning candidate.[22]

12 International Foundation for Electoral Systems (IFES), Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections' (GUARDE) (2011) 11.

13 Bush v. Gore, (200) 531 U.S.; In Germany, Under Article 41 of the German Basic Law, objections challenging the validity of federal elections are heard by the Committee for Scrutiny of Elections, Immunity and Rules of Procedure of the German Bundestag which makes recommendations to the Bundestag for a final plenary decision. In most Latin American countries, electoral tribunals are the entities designated to resolve such disputes while in the United States and some countries in Latin America and Europe, mixed systems of ordinary courts and specialized tribunals are used.

14 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 475,, http://www.heinonline.org, at 23 October 2015.

15 R Hirschl, 'The New Constitution and the Judicialization of Pure Politics Worldwide,' (2006) 75 Fordham Law Review 721. Available at, http://www.ir.lawnet.fordham.edu/flr/vol75/iss2/14.

16 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 465,, http://www.heinonline.org, at 23 October 2015.

17 International Development Law Organization (IDLO) and Judiciary Training Institute (JTI) and Katiba Institute (2015) *Animating Devolution in Kenya, The Role of the Judiciary, A commentary and Analysis of Kenya's Emerging Devolution Jurisprudence under the New Constitution*, (2015) 150

18 In Kenya, this jurisdiction is set out in Articles 105 and 140 of the Constitution of Kenya, 2010.

19 The Kenyan Elections Act, 2011 (No. 24 of 2011).

20 Oxford University Press, *The Concise Oxford English Dictionary*, (2011) 12th ed.

21 *Halsbury's Laws of England*, (1990) 4th ed, 12, 454.

22 *Robert Chapman v. Silas Rand* (1885) 11 SCR 312.

This definition by the courts restricts scrutiny to only matters brought before courts. In the electoral process, however, scrutiny is broader. It transcends the entire electoral process. In most cases, electoral disputes raise issues from all stages of the electoral process: the integrity of the voters register; commission of election offences during election campaigns; the conduct of the ballot; and the counting and tallying of votes before the declaration of election results. These are among the areas that generate protracted issues in election petitions.[23] Viewed in that context, scrutiny is "a scrupulous audit,"[24] sometimes referred to as an examination[25] or inspection,[26] carried out in Kenya, and in many other jurisdictions,[27] at several stages in the entire electoral landscape. Its primary objective is twofold: determination of the validity of election results as well as the integrity of the electoral process and a demonstration of the transparent nature of electoral dispute adjudication and fair determination of electoral disputes.[28]

If scrutiny is well facilitated and properly carried out at all stages of the electoral process, disputes such as those relating to the integrity of the voters' register and nominations of candidates will be resolved before elections and thus substantially minimize the issues raised in election petitions, thus enabling the judiciary to expeditiously dispose of election petitions. This Chapter critically examines the type of scrutiny carried out at every stage of the electoral landscape and how that weaves into electoral dispute adjudication. The primary objective of this broader view of scrutiny is to identify problematic areas that require closer attention for a seamless, expeditious, competent and fair resolution of electoral disputes and ultimate restoration of public confidence in the judiciary.

23 The integrity of the voters register and the tallying and collation of votes were among the issues which were raised in the Presidential petition of Raila Odinga & Others v. The Independent Electoral and Boundaries Commission & Others, [2013] eKLR. (hereinafter referred to as Raila Odinga case). In Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others, [2015] eKLR, bribery in the campaign period was the major issue.

24 J Harrington and A Manji (2015) 'Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,' (2015) Journal of Eastern African Studies, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

25 The Elections Act, No. 24 of 2011, marginal note to s.101.

26 The Elections Act, No. 24 of 2011, s. 6(1).

27 Countries such as the USA, Canada, Australia, India, and South Africa carry out scrutiny at various stages of their respective electoral processes.

28 With some election petitions taking as long as five years and more to resolve, as the Supreme Court held in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR [par.62], the courts have, in the past, justifiably been blamed for tardiness. One of the alleged causes of the 2007/2008 post-election violence was said to be the Kenyan Judiciary's biased, indolent and incompetent handling of election petitions, particularly the Presidential petitions. That informed the strict timeframe set in the Constitution of Kenya, 2010 and the Elections Act, 2011 for the resolution of election petitions. Scrutiny to demonstrate the courts' transparent and competent determination of electoral disputes is crucial.

This Chapter is divided into six parts. Part one is the introduction which also defines the term "scrutiny" and what it entails; part two sets out the legal framework for scrutiny; part three examines the pre-election day scrutiny process; part four looks at the scrutiny carried out on the election and subsequent days up to the declaration of election results; part five examines scrutiny pursuant to court orders and the utilization of the result of the exercise; and the last part makes concluding remarks and suggests possible reforms to achieve the intended objectives of a seamless election dispute resolution.

2.0 The Legal Framework for Scrutiny

The pith of the legal framework for scrutiny in the electoral process is discernable from the letter and spirit of the Constitution. Article 38 of the Constitution provides for political rights. Chapter Seven entitled "Representation of the People," provides for free, fair, transparent, accountable and verifiable elections. All these terms import the element of scrutiny in one way or the other to guarantee the integrity of an electoral process.

The Elections Act and the Election Regulations provide for public scrutiny of the voters register and scrutiny by the election officials of the nomination papers of the candidates seeking elective positions.[29] The right to a recount before election results are declared is provided for in Regulation 80 of the Election Regulations, which permits up to two recounts. In EDR, the legal framework for court-supervised scrutiny is anchored in Section 82 of the Elections Act and Rule 33 of the Election Petition Rules. Section 82 of the Elections Act states:

> 82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.
>
> Rule 33 of the Election Petition Rules provides:
>
> (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

29 See Elections Act, ss. 6, 13 and Election Regulations, Parts III to X.

3.0 Pre-Election Day Scrutiny

3.1 Inspection of the Voters Register

The right to vote guaranteed by Article 38(3) of the Constitution is exercisable by all adult Kenyans who are registered as voters.[30] That renders the right to be registered as a voter and the integrity of the voters roll sacrosanct. Every citizen's right to be registered as a voter[31] and to demand scrutiny of the voters' register to ensure that his or her name is in it cannot therefore be overemphasized.[32]

As is the case in many other jurisdictions such as Australia,[33] Nigeria,[34] Pakistan,[35] South Africa,[36] and Tanzania,[37] upon completion of the registration of voters and compilation of the voters register, Section 6 of the Kenyan Elections Act grants the public the right to inspect the register at any time "for purposes of rectifying the particulars therein"[38] and confirming that one's name is on the register.[39]

For the public to exercise their right to vote, a proper and authentic register should be compiled and made public. After finding out that the voters register used in the 2007 general election was bloated with over 1 million deceased persons on it,[40] the Independent Review Commission (IREC), which was appointed by the Government of Kenya to inquire into the botched 2007 elections and the cause of the 2008 post-election violence and make remedial recommendations, singled out voter registration as "open to serious

30 Elections Act, s 3.

31 In Kituo Cha Sheria v. IEBC & Another, [2013] eKLR the High Court held that even prisoners are entitled to register and vote.

32 This is probably why, save for short periods prior to and after elections, Section 5 of the Elections Act provides for continuous the registration of voters.

33 The Australian Commonwealth Electoral Act of 1918, s 90A.

34 The Nigerian Electoral Act No. 6 of 2010, s 19.

35 The Pakistan Electoral Rolls Act, No. XXI of 1974, s 8.

36 The South African Electoral Act No. 73 of 1998, s 16.

37 The Tanzanian National Elections Act, 2010, Cap 343, s 22.

38 Elections Act, 2011, s 6. In the election year sixty days prior to the general election, the inspection of the register is limited to a period of fourteen days or such period as the Independent Electoral and Boundaries Commission, (the IEBC) shall by notice in the Kenya Gazette specify. See Section 24(2) and Regulation 27(2) of The Elections (Registration of Voters) Regulations, 2012. Although it is not expressly stated, the particulars for rectification may include disputes on the names of persons in the register who may not be eligible to vote and removal from the register of deceased persons. See Section 8(2)(b).

39 If one finds one's name missing from the register, under Section 12 one has a right to lodge a claim to the registration officer for the area with a right of appeal, first to the Principal Magistrates Court and then to the High Court, if one's plea is denied by the registration officer.

40 *Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.*

criticism."[41] IREC in particular deprecated the use of the manual register, then known as the 'Black Book,' in the 2007 election, on the ground that it created a fertile ground for "electoral malpractice."[42] In its stead and to minimize voting malpractices, IREC recommended the compilation, by the biometric voter registration (BVR) system,[43] of a single national register for use in subsequent elections.[44] Following this recommendation, IEBC compiled an electronically based register, which it successfully used on a pilot basis in the 2010 referendum in some parts of the country.

As is common knowledge, in the 2013 general elections, the electronic voter identification device (EVID), based on BVR completely collapsed forcing IEBC to resort to the manual register, known as the Green Book, for identification of voters. This later formed the basis of a serious contestation in *Raila Odinga & Others v. The Independent Electoral and Boundaries Commission & Others*,[45] on the authenticity of the voter register used in the 2013 general elections which would have been obviated had a secure BVR register been compiled pursuant to the IREC recommendation, and proper scrutiny facilitated and carried out prior to elections.[46]

Given the ethnic and highly factional Kenyan political landscape, IEBC cannot afford to have an oscillating voters register and leave room for allegations of its manipulation. To minimize multiple voter registrations and voting, IEBC should develop a proper BVR register in good time, avail it for public scrutiny, and obtain a secure EVID. Pursuant to IREC's other recommendation of electronic transmission of results from polling stations as a parallel record against which the manual records of results would be verified and thus authenticated,[47] IEBC should also obtain functional devises for electronic transmission of election results from the polling stations to its national database.

41 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

42 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

43 A BVR register would electronically capture the voters' fingerprints and eliminate double voting and personating frauds.

44 J Harrington and A Manji (2015) 'Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,' (2015) Journal of Eastern African Studies, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296..

45 Raila Odinga case [2013] eKLR.

46 In the Raila Odinga case, the petitioner accused IEBC of maintaining an oscillating voter's register. It was claimed that at the close of the voter registration process on 18 December 2012 the figure for the total number of registered voters was given as 14,333,339 while the figure later gazetted was 14,352,445. At one stage, the number of the registered voters on the Special Register was given as 31,318 and at another as 36,236.

47 J Harrington and A Manji (2015) 'Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,' (2015) Journal of Eastern African Studies, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

3.2 Scrutiny of Nomination Papers

The next stage of scrutiny in the electoral process is at the nomination of candidates seeking to vie for any election. The objective of this inspection is to confirm the prospective candidates' compliance with the criteria set out in the electoral laws. In Kenya, election officials carry out this type of scrutiny. The Elections Act sets out the criteria for eligibility to vie for any elective position and requires the IEBC to vet the names of applicants forwarded to it by political parties or independent candidates who present themselves for nomination.[48]

Some other jurisdictions, however, go a step further to allow inspection of the prospective candidates' nomination papers by their rivals and the public. In India for instance, after the nomination of candidates is completed, Section 36(1) of the Representation of People Act, 1951 authorizes inspection of candidates' nomination papers by their rivals with a right to challenge their validity.[49] In South Africa, the inspection is open to the public at large,[50] while in Uganda it is limited to registered voters only.[51]

Kenya, like many other African states, is a patriarchal society.[52] As such, women, youth and persons with disabilities[53] do not have equal chances of success to elective positions and fare poorly even in appointive positions. To achieve some form of balance, the Constitution has provided for affirmative action[54] for appointive positions and election of women, the youth, persons with disabilities, to Parliament and the County Assemblies on the basis of proportional representation by use of party lists[55] (nominations). In the aftermath of the 2013 general elections, many petitions were filed in court challenging the composition of party lists. Such disputes can greatly be minimized if Kenya were to adopt the open form of scrutiny of candidates' nomination papers and party lists found in the said jurisdictions.

48 See Elections Act, ss. 22 to 37and Election Regulations, Parts III to Part X.

49 A B Kafaltiya, Democracy and Election Laws, (2003) 140.

50 The South African Elections Act No. 73 of 1998, s. 29.

51 The Ugandan Parliamentary Elections Act, 2005, s. 15.

52 In a literal sense, patriarchy refers to the rule of the father in a male dominated society. See S Walby, Theorizing Patriarchy, 1990.

53 In Kenya, the Constitution lists the youth, without specifying the age range, women and persons with disabilities as vulnerable groups in whose favor there should be affirmative action.

54 See Constitution of Kenya, 2010, Article 27(6).

55 See Constitution of Kenya, 2010, Articles 81; 90; 97(1) (c), 98(1) (b), (c) & (d) and 177(1) (b), (c) & (d).

4.0 Scrutiny on Polling Day

4.1 Inspection of Election Materials Prior to Polling

The third stage of scrutiny is at the polling stations. This appears to be a universal practice whose objective is to ensure transparency of the poll. Globally, on the election day, before polling commences, the election officials are required to display, "in full view of the candidates, or their representatives,"[56] the ballot boxes to be used in the election for them to confirm "that [they are] empty"[57] and allow candidates or their agents to examine the ballot papers to be used in the election.[58] As this is done at the outset when all parties are keen to ensure the poll commences on a clean slate, no complaints have been brought to Kenyan courts of ballot boxes being stuffed with votes prior to the commencement of the poll.

4.2 Scrutiny at Polling Stations after the Poll

The fourth and perhaps the most crucial stage of scrutiny is carried out at the polling stations after the poll to determine the validity and accurate number of votes cast for each candidate. This is of course done before the results are announced.[59]

Regulations 75, 76, 77 and 80 of the Elections Regulations set out an elaborate procedure of the mechanism of this scrutiny. Great emphasis is laid on the transparency of this exercise. The presence of the candidates or their agents and there being availed a reasonable opportunity of ascertaining that each ballot paper is actually marked in favor of the candidate to whom it is credited should be guaranteed.[60] As stated, the purpose of this scrutiny is to determine

56 The Canada Elections Act, 2000, s.140.

57 Section 34 of The Sri Lankan Presidential Elections Act, No. 15 of 1981, s.34. See also The South African Elections Act No. 73 of 1998, s.37 and Halsbury's Laws of England, (1990) 4th ed., 15, [par. 515] in respect of the UK.

58 Election Regulations, reg. 67(1) and 68(5) require presiding officers to allow the candidates' election agents to inspect the ballot boxes before they are sealed and to affix their own seals if they so wish.

59 Before this scrutiny is carried out, Regulation 73 requires the presiding officer to make, in the polling station diary, a statement of "(a) the number of ballot papers issued to him or her under Regulation 61; (b) the number of ballot papers, other than spoilt ballot papers, issued to voters; (c) the number of spoilt papers; and the number of ballot papers remaining unused." After making that record, Regulation 73 requires the presiding officer to seal, with his or her own seal and the seal of the Commission in separate tamper proof envelopes, "the spoilt ballot papers, if any"; "the marked copy register …;" "the counterfoils of the used ballot papers" and the said statement. Once again, the candidates or their agents have a right to place their own seals to those envelopes. The rationale for this record is accountability. All election materials, especially the ballot papers, which Regulation 68(4) (d) requires to be serially numbered, are accountable documents. It is from this record that the court is able to determine if there is any malpractice (such as over voting) where such allegations are made.

60 The Elections Regulations, 2012, reg. 76(2).

the validity of each ballot paper and ensure that the rejected ballot papers or votes are not taken into account in favor of any candidate; that valid ballots are not rejected and that the votes of every candidate are correctly credited to him or her.

In sorting out the ballot papers used in an election, there are those that are "spoilt" and others that are "rejected." The distinction between a "spoilt" ballot paper and a "rejected" vote is important. It is manifest from Regulation 71 of the Election Regulations that a spoiled ballot paper is one that is inadvertently wrongly marked and cannot be used for the intended purpose of casting a vote.[61] It is never cast into a ballot box. Instead, it is replaced with another one. A rejected ballot paper or vote, on the other hand, is a ballot paper that is cast into a ballot box, which is, however, declared invalid during the scrutiny at the close of polling. Regulation 77(1) of the Election Regulations sets out the criteria for determination of rejected votes or ballot papers as: lack of the Commission (IEBC) security features on a ballot paper; a ballot paper bearing different serial numbers from those supplied to the polling station concerned; or the ones on which the voter's choice is indeterminate. Any other ballot papers with more than one mark or those marked outside the required box are to be accepted as long as the voter's choice is clearly discernable from them.[62]

After the determination of rejected votes, the valid ones are counted and the results are then announced. The presiding officer then seals up the votes and other voting materials in the ballot boxes and transmits them to the returning officer.[63]

The determination of the rejected votes in turn may determine the winners and losers of the election concerned. As regards the election of the President, the figures compiled from the polling stations are important in the

61 The Election Regulations, 2012, Regulation 71 provides that "A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and providing to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt ballot paper shall be immediately cancelled and the counterfoil thereof marked accordingly."

62 Regulation 76(4) of the Election Regulations gives each candidate the right to dispute the inclusion of rejected votes in the computation of votes count or oppose the exclusion of a ballot paper on the ground that it is a rejected vote.

63 At the completion of scrutiny at the polling stations, Regulation 81 of the Election Regulations requires presiding officers to "seal in separate tamper proof envelopes—(a) the counted ballot papers which are not disputed; (b) the rejected ballot papers together with the statements relating thereto; (c) the disputed ballot papers; and (d) the 'rejected objected to' ballot papers," and put them into an empty ballot box and transmit them to the returning officer.

determination, first and foremost, of whether or not the President-elect has garnered the threshold set out in Article 138(4) of the Constitution [64] of more than 50% of all the votes cast and 25% of the votes cast in at least half of the counties to obviate a run-off.[65]

The interpretation of Article 138(4) of the Constitution took center stage in *Raila Odinga* case. After the 2013 general elections, three presidential petitions were filed. They were *Petition No. 3 of 2013 (Moses Kiarie Kuria and 2 Others v. Ahmed Issack Hassan & Another), Petition No. 4 of 2013 (Gladwell Wathoni Otieno & Another v. Ahmed Issack Hassan & 3 Others) and Petition No. 5 of 2013 (Raila Odinga v. the Independent Electoral and Boundaries Commission & Three Others)*. The main contention in Petition No. 3 of 2013 was that contrary to Articles 86(b) and 138(c) of the Constitution, the IEBC had taken into account rejected votes in the final tally, which had the "prejudicial effect" of reducing "the percentage" of the "votes won by Mr. Kenyatta." Counsel for the petitioners in that petition earnestly urged, what, in their view, was the dichotomous nature of a "ballot paper" and a "vote." They submitted that the court should make a clear distinction between a "ballot paper" and a "vote." They contended that a ballot paper is just a tool used "to convey the choice of a voter" while "a vote" is a ballot paper with a "definable and ascertainable" choice of a voter.[66] Counsel further argued that a ballot paper remains a ballot paper until it is declared as validly cast in favor of a particular candidate. In other words, it is the determination of a ballot paper as valid that transforms it from a ballot paper into a vote. As such, and relying on the decision of Burhan, J. of the Seychellois Constitutional Court in *Popular Democratic Movement v. Electoral Commission*[67] and Regulation 77(1) of the Kenyan Elections (General) Regulations 2012,counsel for the petitioner in Petition No. 3 of 2013 urged that rejected votes, which, at any rate Regulation 78(2) declares null and void, should not be included in the computation for the determination of whether any presidential candidate had met the threshold set out in Article 138(4).

64 The Kenya Constitution, 2010, Article 138(4) reads: "A candidate shall be declared elected as President if the candidate receives—(a) more than half of all the votes cast in the election; and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties."

65 The Kenya Constitution, 2010, Article 138(5) provides that if no candidate meets the threshold set in Article 138(4), there shall be a run-off.

66 J Harrington and A Manji (2015) 'Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,' (2015) Journal of Eastern African Studies, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

67 Constitutional Case No. 16 of 2011.

For the respondents in that petition, it was contended that unlike the former constitution, which restricted the computation for the determination of the threshold for the election of the President to "valid votes", the current Constitution requires "all the votes cast" to be taken into consideration. In their view, "all the votes cast" meant all ballot papers cast into the ballot boxes including those that are subsequently determined as rejected votes. On that contention, they urged that even rejected votes should be taken into consideration in that computation. On a purposive interpretation of Article 138 of the Constitution, the Elections Act and the Election Regulations and relying on the said Seychellois decision, the Supreme Court excluded the rejected votes from the computation and declared Mr. Uhuru Kenyatta as the duly elected President of the Republic of Kenya.

While taking or not taking into consideration the rejected votes was the issue in the *Raila Odinga* case, in the American case of *Bush v. Gore,*[68] the central issue was the validity of about 9000 votes, cast in some counties in the state of Florida. Because of some voters' failure to clear hanging chad and chips from the punch card ballots, the counting machines recorded some ballots as having no vote for any presidential candidate (under vote) and some as having a vote for more than one candidate (over vote).[69] Holding the view that "[t] o invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end,"[70] the Florida Supreme Court ordered a manual recount. The US Supreme Court overturned that decision on the ground that manual recounts "with the use of differing sub-standard for determination the voter intent in different counties,"[71] would foul the equal protection rule in the Fourth Amendment of the American Constitution and lead to unequal treatment of voters.

The scrutiny at polling stations at the close of the poll is an important feature in other jurisdictions as well. At the close of polling, the above procedural steps are more or less followed in other jurisdictions such as Canada,[72]

68 531 U.S. 98 (2000).

69 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Reviews 425 2001-2002, 437. Also available at, http://heinonline.org, at 23 October 2015.

70 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Review 425 2001-2002, 444. Also available at, http://heinonline.org, at 23 October 2015.

71 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Review 425 2001-2002, 448. Also available at, http://heinonline.org, at 23 October 2015.

72 *Elections Act, 2000, s. 283.*

Australia,[73] India,[74] and South Africa.[75] In Canada, which has provisions for advance voting, the chief electoral officer engages an auditor with technical and specialized knowledge to perform an audit and report if the election officials have strictly complied with the law in the process of advance voting.

4.3 Recount of Votes at Polling Stations

Scrutiny is not restricted to only the examination of election documents for determining the validity of votes. It includes a recount of votes.[76] This proposition comes out clearly from Rule 33(3) of the Election Petition Rules, which talks of "scrutiny or recount of ballots." The Kenya courts appear to equate scrutiny with recounts and use these terms interchangeably. Recounts are the ones that verify[77] and authenticate not only the accuracy, but also the validity, of the votes cast for each candidate, which in turn determines the winners and losers. Regulation 80 of the Election Regulations makes recounts mandatory when demanded by a candidate or his agent.[78]

Recounts before the results of an election are announced are also an important feature in other jurisdictions. In Australia, after the initial counting of the votes by the Polling Place Manager, a fresh or second scrutiny, returning officers carry out the main objective being essentially quality control, within 48 hours of polling prior to the declaration of the election results.[79] In Canada, if the margin between the two top candidates is less than 100th of the votes cast, an automatic recount is carried out.[80] Where the margin is greater than that, "on the affidavit of a credible witness,"[81] one is entitled to a judicial recount. This recount, though presided over by a judge, should be distinguished from the challenge of the election results. This judicial recount, which is conducted before the results are announced, is a tabulation of the votes cast to correct counting errors. Though not expressly authorized by the

73 Commonwealth Electoral Act, 1918, s.265.

74 The Representation of the People Act, 1951, s. 47.

75 Electoral Act No. 73 of 1998, ss.47, 49 and 52.

76 See Said v. Mwaruwa & Another, [2008] 1 KLR (EP) 323.

77 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 465,, http://www.heinonline.org, at 23 October 2015.

78 The Election Regulations, 2012, reg. 80 authorizes the presiding officer to suo motu carry out a recount and accords candidates or their agents a right to at most, two recounts and states in imperative terms that "[n]o steps shall be taken on the completion of a count or recount of votes until the candidates and the agents present at the completion of the counting have been given reasonable opportunity to exercise the right given by this regulation."

79 Commonwealth Electoral Act, 1918, s. 265.

80 This recount is carried out under Section 300 of the Canadian Elections Act, 2000 within four days of the poll and before the results are declared by the Returning Officer under the supervision of a judge.

81 The Canadian Elections Act, 2000, s. 301(1).

Canadian Elections Act, a judicial recount is in practice granted on an ex-parte application[82] and in conducting it, the presiding judge subsumes the role of the returning officers. A contest of election results on the other hand is premised on allegations of irregularities, fraud or corruption and illegal practices[83] and is filed after the declaration of election results. It is akin to the Kenyan election petition.

4.4 Scrutiny at the Tallying Centers

The fifth stage of scrutiny is at the tallying centers.[84] The first phase of tallying is at county headquarters for the senatorial, gubernatorial, and county women representative elections; and at the constituency or district headquarters for Presidential election and that of the members of the national and county assemblies. The scrutiny at this stage is limited to the examination of the forms with the numerical results from polling stations.[85] After this tallying and collation of votes, the results thereof are transposed to Forms 36 for Presidential election and to Forms 35 for all other elections.

The second phase of tallying and collation of votes is in respect of the Presidential election and is carried out at the national tallying center. This tallying is limited to only the examination of Forms 34, which have the numerical results from polling stations and 36, which have the constituency tallies. Particular emphasis is, once again, placed on the aspect of transparency in the tallying of the votes at that center. One of the major complaints in the *Raila Odinga* case was the ejection of the party agents and observers from the presidential vote tallying room. The parties traded accusations on the cause of that ejection. While the petitioners claimed that, contrary to Regulation 85(1) (e) of the Election Regulations, the IEBC ejected party agents and accredited observers from the National tallying center when they pointed out

82 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 477,, http://www.heinonline.org, at 23 October 2015.

83 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 474, (http://www.heinonline.org) at 23 October 2015.

84 The Election Regulations, 2012, reg. 84 provides for three tallying centers, which shall be located in public buildings and gazetted by the Commission. They are in Nairobi, for the presidential election; at county headquarters for the senatorial, gubernatorial, and county women representative elections; and at constituency or district headquarters for the election of the members of the national and county assemblies.

85 These are Forms 34 for presidential elections; Forms 35 for elections of members of the national county assemblies as well as senatorial, gubernatorial and county women representative elections. The results of the tallying and collation of votes at the constituency and county tallying centers are recorded on Forms 36 and duly announced at those centers. The winners of the elections, that is, members of the national and county assemblies as well as the county senatorial, gubernatorial and women representatives are then issued with the certificates of results in Forms 38.

irregularities in results from Constituencies,[86] the IEBC retorted that party agents had become "rowdy and quarrelsome and [had] engaged Commission staff in paralyzing confrontations," a claim that the agents and observers subsequently denied.[87] Consequently, the agents were relocated to another room at the tallying center at the Bomas of Kenya where they were unable to scrutinize the paperwork with details of the tallies. The petitioner termed that a gross illegality. However, the Supreme Court tacitly endorsed the ejection on the ground that IEBC was under obligation to keep order in the tallying center and that, in ejecting the rowdy agents, it acted within its mandate under Article 249 (2)(b) of the Constitution.

As the Supreme Court correctly observed, this was a precedent-setting petition in which it needed to provide the baseline for future petitions and jurisprudence.[88] Bearing in mind that the disputed Presidential election was the cause of the 2007/2008 post-election violence in the country, this kind of scenario does not augur well for IEBC, the judiciary and the nation at large. Given the security detail at its disposal, in the authors view, IEBC should have controlled the rowdy agents and exercised restraint by allowing them to remain in the tallying hall.

Although they gave the 2013 general elections a clean bill of health, most election observers censured IEBC's opaque tallying and collating of the Presidential votes with the Commonwealth Observer Group describing the exercise as representing "an untidy end of a critical part of the process.[89] Quite a number of scholars have since also made more or less similar observations.[90] These are the kind of comments IEBC cannot afford to have repeated in future. Every effort should therefore be made to forestall any such eventuality. To accord legitimacy and integrity to the Presidential election and obviate any strife, the national tallying center should not only be accessible to the party and presidential candidates' agents, but also to the accredited observers and the media representatives and tallying should be open, transparent and verifiable.

86 See *Raila Odinga Case* [par.35].

87 See *Raila Odinga Case* [par. 239].

88 See *Raila Odinga Case* [par. 177].

89 Commonwealth Observer Group (COG), 2013. Some of the other observers were the Election Observer Group (ELOG), the European Union Election Observer Mission (EUEOM) and the Carter Center Election Observer Mission (CCEOM).

90 J Harrington and A Manji (2015) Note 23.

Beside the peace and tranquility for the nation and the good reputation of IEBC, a transparent and credible tallying and collation of presidential election votes will forestall or minimize presidential election petitions. Proper and transparent scrutiny at the national tallying center cannot therefore be overemphasized.

5.0 Judicial Scrutiny

5.1 The Purpose of Judicial Scrutiny

Neither Section 82 of the Elections Act nor Rule 33 of the Election Petition Rules states the objective of scrutiny when it is ordered by the court *suo motu*.[91] However, when scrutiny is predicated on an application by a party to an election petition, these provisions give the purpose of scrutiny as being for the establishment of the "the validity of the votes cast."[92] The courts have interpreted these provisions as vesting them with jurisdiction "to investigate" the veracity of the allegations made[93] in the petition to determine whether or not the conduct of the impugned election was in accordance with the dictates of the Constitution[94] and ensure that "justice is done"[95] and seen to be done to the parties. By examining the election materials enumerated in Rule 33(4) of the Election Petition Rules,[96] the court is able to sieve and flag the invalid ballot papers[97] and strike them out as stated in Section 82(4) of the Elections Act and add those that may have been wrongly excluded.[98]

91 The purpose of suo moto scrutiny was given in the Raila Odinga case as intended to enable the court "to understand the vital details of the electoral process, and to gain impressions on the integrity thereof."

92 The Election Petition Rules, Rule 33(1).

93 Ramadhan Seif Kajembe v Returning officer of Jomvu Constituency & 3 others, Mombasa High Court Election Petition No. 10 of 2013.

94 Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & IEBC Meru High Court, Election Petition No. 5 of 2013. See also Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another, Malindi High Court Election Petition 9 of 2013. Besides the principles of complete freedom of choice in the conduct of a free and fair election based on universal suffrage, in scrutiny the courts also ascertain compliance with Articles 27 and 81 which provide for affirmative action to achieve gender equity and fair representation of the youth and persons with disabilities who have in the past been marginalized.

95 Thomas Malinda Musau & Two others v. Independent Electoral Boundaries Commission & 2 Others, Machakos High Court Election Petition No. 2 of 2013. See also Nicholas Salat v IEBC & 7 others, Kericho High Court Election Petition No.1 of 2013.

96 The materials the Rule enumerates for examination are the written statements made by the presiding officers under the provisions of the Elections Act; copies of the registers used during the elections in the relevant polling stations; the written complaints of the candidate or his representative; the packets of spoilt papers; the packets of counterfoils of used ballot papers; and the packets of rejected ballot papers.

97 Section 82(2) of the Elections Act sets out the votes, which, though on their face appear valid, should nonetheless be rejected and struck out. These are the votes of people whose names are not on the voters register for the station concerned; who voted more than once; votes procured by corruption; votes of convicts disqualified from voting; and those cast for disqualified candidates.

98 Halsbury's Laws of England, 15, 4th ed, 501.

Since, as stated, election petitions are not limited to alleged balloting improprieties, scrutiny is a demonstration by the election officials to the candidates or their agents and the public at large that the procedural steps set out in the Elections Act and Regulations intended to achieve free and fair elections have all been followed. The principal objective of judicial scrutiny therefore is to determine whether the electoral process was transparent, accountable and verifiable as required by the Constitution.[99]

5.2 Sufficient Cause for an Order of Scrutiny

The sixth and final scrutiny exercise, when necessary, is carried out in court during the hearing of election petitions. This scrutiny, as already stated, is anchored in the provisions of Section 82 of the Elections Act and Rule 33 of the Election Petition Rules.[100] Some courts have viewed these provisions as conflictual. The contentions in some petitions alleged that by requiring an application for scrutiny to be made "at any stage," Rule 33(1) is in conflict with Section 82(1) of the parent Act that states that an order for scrutiny is to be made "during the hearing." In *Joash Wamang'oli v. IEBC & 3 others,*[101] *and Ramadhan Seif Kajembe v Returning officer of Jomvu Constituency & 3 Others,*[102] Omondi, J. and Odunga, J. respectively held that there is a conflict and called for the harmonization of the provisions. In *Kombo v. Wetangula,*[103] however, Gikonyo, J. held that there is no conflict, but the provisions created some confusion, which should be cleared.

It is submitted that there is no conflict in these provisions. A court cannot grant an order for scrutiny without first hearing the petition, even partly, or an application in that regard. As Gikonyo, J. suggested in *Kombo v. Wetangula* (supra) the phrase "during the hearing" in the parent Act and "at any stage" in the Rule should be read to mean scrutiny can be ordered "at any stage during the hearing."

Section 82(1) provides that a court can make an order for scrutiny *suo moto* or on application by any party to a petition. Whereas Rule 33(2) requires the party seeking scrutiny to satisfy the court that there "is sufficient reason" for

99 The Constitution of Kenya, 2010, Article 86(a).

100 In the old regime, scrutiny was provided for in Section 26(1) of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya.

101 Bungoma High Court Election Petition No. 6 of 2013.

102 Mombasa High Court Election Petition No. 10 of 2013.

103 Bungoma High Court Election Petition No. 3 of 2013.

an order of scrutiny, there is no condition precedent for an order of scrutiny at the court's own motion. It appears that the court is supposed to discern the need for an order for scrutiny from the material placed before it and make the order suo motu. In the *Raila Odinga* case, on allegations of, inter alia, manipulation of the election documents, the Supreme Court ordered scrutiny *suo moto.*

5.3 Pleadings of Pleas for Scrutiny

Before examining the manner of conducting court supervised scrutiny upon application by a party to a petition, it is important to consider the pleadings required for an order of scrutiny and the criteria for the grant of such an order.

Neither the Elections Act nor the Election Petition Rules specifically require a plea for scrutiny to be made in the petition. They both talk of an "application."[104] The courts have, however, interpreted the provisions for scrutiny in Section 82 of the Elections Act and Rule 33 of the Election Petition Rules as requiring a specific plea in the petition as a basis for the grant of an order for scrutiny[105] arguing that to allow an application for scrutiny not grounded on any prayer to that effect in the petition would be tantamount to amending and thus changing the character and scope of the petition.[106]

In the author's view, this is a correct interpretation of these provisions for scrutiny. Rule 10(1)(e) of the Election Petition Rules requires the grounds upon which the petition is based to be pleaded in the petition and the facts in support thereof to be deposed in the affidavit in support of the petition. It therefore follows that the irregularities or malpractices that may warrant scrutiny should be concisely pleaded in the petition and in the affidavit in support.[107] This requirement is also in other jurisdictions[108] and was even in the old Kenyan regime.[109]

104 See the Elections Act, 2011 s. 82(1) and the Election Petition Rules, Rule 33(1) & (2).

105 Abdikam Osman Mohamed & another v IEBC & 2 others, Garissa High Court Election Petition No. 2 of 2013. See also Ndolo v. Mwangi 2 Others,[2014] 5 KLR (EP) 178, 225.

106 Kakuta Hamisi v Peris Tobiko & 2 others, Nairobi High Court Election Petition No. 5 of 2013.

107 In Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013, Tuiyott, J. opined that "[f]or a petitioner to deserve an order for scrutiny," as Rule 10(1)(e) and (3)(b) of the Election Petition Rules requires, "then, as a starting point, [that] the petition and the affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made."

108 The law in most US states requires specificity in the pleadings and prima facie proof of alleged election irregularities. See Steve Bickerstaff, 'Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election,' Florida State University Law Review, 29, 4252001-2002, htt://heinonline.org Accessed on 23.10. 2015.

109 Murgor v. Inginga & Another, [2008] 1 KLR (EP) 191.

The courts' requirement for specific pleas for scrutiny is also sound on the general principles of pleadings. Pleadings are of crucial importance in adversarial litigation. They not only ensure "procedural fairness"[110] by "acquainting the court and the parties with the facts in dispute"[111] but also, for expeditious disposal of suits, particulars of pleadings "enable the parties to know" in advance the type of evidence they will require to adduce at the hearing.[112]

There is no reason why these sound principles of pleadings should not apply with equal force to pleadings in election petitions. Besides complying with this legal requirement in election petitions, pleas for scrutiny also serve the purpose of putting both the respondent and the court on notice to expect an application to that effect. This enables the court, during the pre-trial conferencing for time management, to set aside time for the scrutiny exercise. Like in ordinary cases, parties to election petitions should also be bound by their pleadings. As such, they cannot be allowed to adduce evidence "outside" the ambit of their pleadings in the petition.[113]

Having shown that scrutiny must be specifically pleaded in the petition, the courts have also held that pleas for scrutiny must be precise. Scrutiny is not to be granted on ambiguous pleadings intended to enable a petitioner to engage in a fishing expedition[114] and perhaps enlarge his case beyond the scope of his pleadings[115] or on pleadings couched in general terms.[116] Courts have held that it "would be an abuse of process" to look upon scrutiny "as a lottery" and "to allow a party to use [it] … for purposes of chancing on new evidence."[117]

Scrutiny can also never be granted on a blanket prayer.[118] As is deducible from Rule 33(4) of the Election Petition Rules, specificity is crucial.[119] The prayer for scrutiny must specify the polling station(s) in which the results

110 Banque Commerciale SA, En Liquidation v. Akhil Holdings Ltd, (1990) 169 CLR 279 at 286.

111 Charles E. Clark, 'History, Systems and Functions of Pleading'(1925) Virginia Law Review, 518

112 Bailey v Federal Commissioner of Taxation (1977) 136 CLR 214 at 219.

113 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, (Supra) and Kakuta Hamisi v. Peris Tobiko & 2 Others, Nairobi High Court Petition No. 5 of 2013.

114 Philip Mukwe wasike v James Lusweti Mukwe Bungoma High Court Election Petition No. 5 of 2013; see also Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

115 Nuh Nassir Abdi v. Ali Wario & 2 Others, Mombasa High Court Election Petition No. 6 of 2013.

116 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

117 In Philip Osore Ogutu v Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.

118 Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

119 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

are disputed and the documents which should be scrutinized.[120] The party seeking scrutiny must therefore ensure that its petition and affidavit in support "contain concise statements of material facts" upon which the prayer is grounded.[121]

The only limited exception to the general rule on pleadings that should be had in election petitions is with respect to unanticipated irregularities that come to the fore during scrutiny of election materials. Given that the election materials are accountable documents kept by the IEBC and the public has no access to them,[122] it is impossible for any petitioner to have knowledge of their contents. Before scrutiny, no petitioner will know, for instance, of the presiding officers' doctoring of the records; allowing people whose names were not on the voters' register to vote; or failing to account for some of ballot papers used in the election. In the circumstances, it is submitted that any irregularities revealed by scrutiny of election materials pursuant to a court order, whether pleaded or not should be taken into account in the final determination of a petition. To ignore any such irregularities or malpractices will be condoning illegalities, an act that will undermine public confidence in court determinations. The parties should, however, be accorded an opportunity of commenting on any such irregularities before they are taken into consideration.

Although Section 82(1) of the Elections Act and Rule 33(1) of the Election Petition Rules do not require a formal application for scrutiny, from the wording of the former and the court's view in *Hassan Mohamed Hassan & another v IEBC & 2 others* [123] it appears that one is advisable. To enable the court to properly manage its time for the trial of the petition as stated, such an application should be filed along with the petition or soon thereafter.

5.4 The Criteria for and the Stage at which an Order of Scrutiny is Granted

Though provided for in the Elections Act and the Election Rules, scrutiny is not an automatic right to be granted as a matter of course. [124] The courts

120 Nicholas Salat v IEBC & 7 others, Kericho High Court Election Petition No.1 of 2013.

121 See Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.

122 Save for Forms 34, which contain election results copies of which are required to be supplied to candidates or their agents.

123 Garissa High Court Election Petition 6 of 2013.

124 Nicholas Salat v. IEBC & Others, SC Petition No. 23 of 2014; Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 others (supra); Tuiyott, J. in Philip Osore Ogutu v. Michael Aringo & 2 Others, Busia High Court Petition No. 1 of 2013.

hold the view that not every claim of misconduct in an election or plea in a petition warrants scrutiny. Rule 33(2) of the Election Petition Rules which sets out the broad criteria upon which an order of scrutiny can be granted on a party's application, [125] makes it clear that granting an order for scrutiny is at the discretion of the court upon being "satisfied that there is sufficient reason" for granting it. The party seeking scrutiny must therefore provide sufficient reasons why materials and documents in the identified stations should be scrutinized. [126] However, what is the rationale for this requirement?

There are several reasons why the law demands that a party gives sufficient reason(s) before it is entitled to an order of scrutiny. First, as long as the election is conducted in accordance with the law, Section 83 of the Elections Act provides that any irregularities, which do not affect the result of the election, will not vitiate it. [127] Secondly, as the High Court observed in *Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 others,* [128] scrutiny "is a time consuming, laborious and arduous exercise" which is also costly.[129] It should not therefore be needlessly undertaken. Thirdly, the courts will not meet the peremptory timelines set out in the Constitution and the Elections Act within which election petitions should be disposed of,[130] if they were to grant every prayer for scrutiny. Therefore, apart from the criterion set out in Rule 33(2) of the Election Petition Rules, as stated, the court must be satisfied that granting the order for scrutiny will be in aid of "an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the petition."[131]

In terms of Section 82(1) of the Elections Act and Rule 33(1) of the Election Petition Rules which respectively state that the order for scrutiny can be sought "at any stage" "during the hearing of an election petition, "such an application can be heard before the actual hearing commences, in the course of the hearing, or at the end of the trial.[132] At whatever stage it is heard, the

125 Rule 33(2) states that "Upon an application under sub-rule (1), the court may, if it satisfied that there is sufficient reason, order for a scrutiny or recount of the votes."

126 Nicholas Salat v IEBC & 7 others, Kericho High Court Election Petition No.1 of 2013.

127 Section 83 of the Elections Act reads: "No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principle laid down in the Constitution and in the written law or that the non-compliance did not affect the result of the election." In Morgan v. Simpson, [1975] 1 QB 151 which has been followed in many cases in Kenya including in the Raila Odinga case, it was held that it is "substantial" failure to carry out an election in accordance with the principles laid down in the constitution and in the written law that will void an election.

128 Mombasa High Court Election Petition Number 1 of 2013.

129 See Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

130 The Kenya Constitution, 2010, Article 140(2) and the Elections Act, 2012, ss. 75(2) & (4) (b), 85A.

131 Hassan Mohamed Hassan & another v IEBC & 2 others, Garissa High Court Election Petition 6 of 2013.

132 Hassan Mohamed Hassan & another v IEBC & 2 others, Garissa High Court Election Petition 6 of 2013.

requirement of sufficient cause must still be fulfilled. To be heard before the hearing commences, a cursory glance at the pleadings, especially the affidavit in support of the petition or the application for scrutiny, should clearly and precisely make out the petitioner's case for scrutiny.[133] Such an affidavit must be sworn by a credible witness who should depose to the grounds for this belief, for instance, that invalid votes were counted or valid ones were improperly rejected, if that is the allegation in the petition, or any other reason why the conduct of the election in question was believed flawed. Even in cases of narrow margins of victory where applications for scrutiny are normally heard before the hearing commences, it must be clear from the pleadings that the counting was flawed.

In all other cases, the petitioner has to lay a foundation for an order of scrutiny by adducing sufficient and credible evidence to show the need for scrutiny. He has to prove that the irregularities or malpractices complained of were so widespread, or so pervasive that they affected the final tally of the votes[134] or those they ultimately substantially and materially affected the result of the election. [135] There are several cases where this threshold was met and scrutiny was granted.

In *Richard Kalembe Ndile v. Patrick Musimba Mweu*,[136] where sufficient evidence of, inter alia, alterations and errors in Forms 35 and 36 which affected the result of the election was adduced, the court had no difficult granting the petitioner's application and ordering a scrutiny of the election materials in all the 164 polling stations in Kibwezi West constituency. Similarly, in *Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another*,[137] in which the authenticity of the forms used was in issue, the court granted a similar order for scrutiny of the entire Lamu County. In *Dickson Daniel Karaba v. John Ngata Kariuki & 2 Others*[138] where, under cross-examination, the Returning Officer conceded that he had wrongly tallied the votes from various polling stations and as a result declared the respondent, instead of the petitioner, as the winner, the court ordered a scrutiny that confirmed that evidence and voided the election. Further, in *William Maina Kamanda v. Margaret Wanjiru*

133 See Philip Osore Ogutu vs Michael Aringo & 2 Others Busia High Court Election Petition No. 1 of 2013.

134 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

135 Hassan Mohamed Hassan & another v IEBC & 2 others, Garissa High Court Election Petition 6 of 2013.

136 Machakos High Court Election Petition No. 7 of 2013.

137 Malindi High Court Election Petition 9 of 2013.

138 [2014] 5 KLR (EP) 388.

Kariuki & 2 Others,[139] on evidence being adduced that several Forms 16A and 17A had alterations that were not countersigned by the Presiding Officers thus casting aspersions on their authenticity, scrutiny was inevitably ordered.

In other petitions such as *Musikari Nazi Kombo v Moses Masika Wetangula*,[140] *Wavinya Ndeti v. The IEBC & 4 Others*,[141] and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & IEBC*[142] which had unsubstantiated allegations, the courts dismissed pleas for scrutiny.

The requirement for a basis to be laid as a condition precedent for an order of scrutiny is not new. Though not specifically provided for in the old constitution or the now repealed National Assembly and Presidential Elections Act, Rule 33(2) is a codification of a long held practice in electoral jurisprudence for this requirement, which was hinged on the need for expeditious determination of election petitions.[143] It is also a requirement in the US[144] and in India.[145]

5.5 Recounts Pursuant to Court Orders

The right to a recount pursuant to a court order is provided for in Rule 33(2) of the Election Petition Rules. Though it is part of scrutiny, a recount is a completely distinct process.[146] A recount refers to the tallying and counting, for the second or more times, of the votes cast in a particular election. Scrutiny on the other hand is broader. It is an examination of electoral materials to determine the result and validity of an election and, as stated, it includes a recount.

Recounts pursuant to court orders are particularly important in three main situations: where it is the only plea in the petition; whereupon recount of the ballots cast, the winner is apparent; and, lastly, where the margin of victory is narrow. They not only assist in the expeditious disposal of election petitions but they also enhance transparency and public confidence in the electoral dispute adjudication.

139 Nairobi High Court Election Petition No. 5 of 2008.

140 Bungoma High Court Election Petition No. 3 of 2013.

141 Machakos High Court Election Petition No. 4 of 2013.

142 Meru High Court, Election Petition No. 5 of 2013.

143 See Masinde v. Bwire and Another (2008) 1KLR (EP) 547, and Joho v. Nyange and Another, (2008) (No. 2) 3 KLR (EP) 188.

144 Steve Bickerstaff, 'Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election,' Florida State University Law Review, 29, 425 2001-2002, htt://heinonline.org Accessed on 23.10. 2015.

145 KM Shradha Devi v. Krishna Chandra Pant & Others, (1980) SCI CA No. 277, [par. 16].

146 Halsbury's Laws of England, (1990) 4th ed., 15, 454.

5.6 Where the only Plea in the Petition is for a Recount

Rule 32 of the Election Petition Rules makes provisions for a special type of scrutiny. This is when a recount and tallying of votes is the only issue in an election petition. It reads:

> (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the petitioner may apply to the court for an order to recount the votes or examine the tallying.
>
> (2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.

To the author's knowledge, no petition was solely based on this provision. Therefore, we do not have the benefit of any court interpretation of this provision.

Several questions spring to mind as one grapples with the correct interpretation of this Rule. What is the scope of the petition based solely under this Rule? What is meant by, "the tallying of the votes" or "the examination of the tallies." Does the recount of votes referred to in this Rule extend to full scrutiny of all votes in the impugned election? Does a petitioner, in a petition based solely on this Rule, require establishing a basis by adduction of evidence before he obtains an order for recount or is the recount automatic? In other words, does a petitioner with such a pointed plea need to satisfy the court that a recount is justified as in other petitions? What type of averments should a petitioner make in his pleadings in such petition? At what stage should the recount be done? These are not by any chance simple and straightforward questions.

It is not difficult to discern the scope of this provision. As the Rule states, a petition premised on this provision must be one limited to only a prayer for recount and/or tallying of the votes of the election in question. In addition, it appears mandatory that the petitioner should specify in the "election petition that he does not require any other determination except a recount of the votes or the examination of the tallies." Since it is premised on Rule 32 of the Election Petition Rules, which does not apply to Presidential petitions, this right is only available to petitioners challenging parliamentary and county elections.

Looked at on face value, the term "recount" appears to pose no problem. There is, however, more to a recount than a mere counting of votes for two or

more times. Is it all the votes cast in an election or only valid votes that are to be counted?

The cannons of sound statutory interpretation demand that, when considering a particular provision, the entire statute and its objects should be born in mind.[147] On the basis of this profoundly sound principle, considering that, besides "recount," Rule 32 of the Election Petition Rules further talks of "the tallying of the votes" and "the examination of the tallies", it is submitted that as Omollo JA held in in *James Omingo Magara v. Manson Onyongo Nyamweya and 2 Others*,[148] the court is not bound by the returning officer's determination on the validity or otherwise of the ballot papers. It has to re-examine them and reach its own decision on their validity after which only valid votes are counted. It follows therefore that a petition based solely on Rule 32 of the Election Petition Rules, in which the term "recount" is intrinsically linked to the phrases "the tallying of the votes" as well as "the examination of the tallies, "requires a de novo re-examination of the votes, exclusion of invalid ones from the computation, and tallying of votes for the purpose of determination of the winner of the election in question. Therefore, this is a full scrutiny, which is, however, limited to the examination of the ballot papers and Forms 34 and 35 in respect of the impugned election.

With the settlement of the issues of "recount" and "the tallying of the votes" as well as "the examination of the tallies", the next issue for determination is whether in such a petition, the petitioner needs to lay a basis for the plea.

We have already cited the provisions of Section 83 of the Elections Act, which in a nutshell provide that not every infraction of the electoral law warrants voiding an election unless such infraction affects the result of the election in question; that scrutiny being a time consuming, laborious, arduous and costly exercise, it should not needlessly be undertaken; and that pleas for scrutiny should not be granted as a matter of course or on ambiguous pleadings intended to enable a petitioner to engage in a fishing expedition.[149] Based on these principles, it is respectfully submitted that that parties should never be allowed to play lottery[150] in matters of great national importance such as

147 See also Royal Media Services v. AG, Petition No. 346 of 2012 following Olum & Another v. AG of Uganda, [2002] EA 505.

148 [2014] 5KLR(EP) 292.

149 Omondi, J. in Philip Mukwe Wasike v James Lusweti Mukwe, Bungoma High Court Election Petition No. 5 of 2013; see Wendo, J. in Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

150 Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.

challenging elections of people's representatives in the hope that they might by chance succeed. To shut out frivolous petitions, the criterion for adducing sufficient reasons before scrutiny is granted, should therefore apply to even petitions based solely on Rule 32(1) & (2) of the Election Petition Rules. Sufficient reasons should be given in the petition itself, the affidavit in support of the petition or the affidavit in support of an application in that regard. Some cases, such as those with admittedly narrow margins of victory, in the author's view, do not require adduction of any evidence to establish a basis for an order of scrutiny in such petition. Any other case will require evidence.

5.7 Power of Court to Declare the Winner

Section 80(4) of the Elections Act vests the election court in respect of presidential, parliamentary and county election petitions to declare the winner after a recount of votes. It provides that:

> (4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—
>
> (a) Upon recount of the ballots cast, the winner is apparent; and
>
> (b) That winner is found not to have committed an election offence.

This is an innovation in the current Elections Act, which was not in the old electoral regime. In the old system, even where the petitioner met the threshold in Section 80(4) of the current Elections Act, there was no provision authorizing the court to declare the winner of the election. Instead, the courts simply nullified elections and directed the conduct of by-elections.[151]

Though prayers were made under Section 80(4) in most petitions arising from the 2013 general elections, especially where there were narrow margins, none was granted as, in terms of the Court of Appeal's definition of the term "apparent" in *John Oroo Oyioka v. IEBC & Others,*[152] as "visible; manifest; [and] obvious, "no winner was "apparent" in any of them. For instance in *Richard Kalembe Ndile v Patrick Musimba Mweu*[153] the winner was

151 In the cases Ambala v. Waithaka & Another, Election Petition No. 5 of 1983 (2008)1KLR(EP)296 ; Anaswa v. Mberia & Another, Election Petition No. 6of 1988((2008)1KLR(EP)359; Wabuge v Limo & Another, Election Petition No. 7 of 1988(2008) 1 KLR(EP) 417; Gitau v Thuo & Others Election Petition No.10 of 2008(2014)5KLR(EP) 254; and Masaka v Khalwale & 2 Others, Election Petition No.2 of 2008(2014)5KLR(EP)550, after recounts pursuant to court orders, the petitioners emerged clear winners but were not declared winners. Instead, the election courts directed the conduct of by-elections.

152 [2013] EKLR.

153 Machakos High Court Election Petition No. 7 of 2013.

indeterminate because the409 votes, which went missing, could have tilted the result either way. Even where the criteria in the section are met, a winner cannot be declared if the impugned election was fundamentally flawed. In the said case of *John Oroo Oyioka v. IEBC & Others,*[154] besides other irregularities, the Court of Appeal held that permitting people, whose names were not on the voters' register to vote undermined the integrity of the election, set aside the trial court's declaration of the petitioner as the winner and directed the conduct of a by-election.

5.8 Where the Margin of Victory is Narrow

Where the margins of victory are relatively narrow,[155] courts have generally held that for justice to be done and be seen to be done, recounts should be ordered.[156] In such cases, as a recount might, on its own, determine a petition, the courts have often ordered scrutiny without requiring the petition to lay any basis by adduction of evidence.[157] These principles notwithstanding, it appears that narrow margins of victory do not guarantee an automatic right to a recount. The integrity of the recount itself has to be considered. In *Bush v. Gore,*[158] the US Supreme Court held that the manual recount directed by the Florida Supreme Court was going to foul the equal protection rule in the Fourth Amendment of the American Constitution and lead to unequal treatment of voters.

5.9 Conduct of Scrutiny

While Section 82 of the Elections Act provides in broad terms the right to an order of scrutiny, Rule 33 of the Election Petition Rules sets out the mechanism of conducting the court supervised scrutiny. It states that the scrutiny exercise is to be supervised by the Deputy Registrar[159] and shall be confined to the polling stations in which the results are disputed. Sub-rule

154 [2013] EKLR.

155 In the cases of William Maina Kamanda v. Margaret Wanjiru Kariuki & 2 Other, Nairobi High Court Election Petition No. 5 of 2008 with a margin of 895; Richard Kalembe Ndile v Patrick Musimba Mweu, Machakos High Court Election Petition No. 7 of 2013 with a margin of 200 and John Oroo Oyioka v. IEBC & Others, [2013] EKLR with a margin of only 5 votes, scrutiny was ordered. However, Wavinya Ndeti v. The IEBC & 4 Others, Machakos High Court Election Petition No. 4 of 2013 where the margin was 164,963 votes, scrutiny was declined.

156 Joho v. Nyange and Another, (2008) (No. 2) 3 KLR (EP) 188.

157 In Hemed Said v. Ibrahim Mwaruwa, Machakos High Court Election Petition No. 4 of 2013; Onamu v. Maitsi, High Court Election Petition No. 2 of 1983; Burundi Nabwera v. Joshua Angatia, High Court Election Petition No. 4 of 1983; and Kirwa v. Muliro, High Court Election Petition No. 13 of 1988 with margins of 62, 30, 534, and 7 respectively, cases decided in the former electoral regime, scrutiny was ordered in each case without laying any basis.

158 531 U.S. 98 (2000).

159 In the case of county petitions tried by the Subordinate Courts, the Executive Officer supervises the exercise.

(3) thereof enumerates the documents that should be scrutinized.[160] At the conclusion of the scrutiny exercise, the Registrar makes a report of his or her findings. As this exercise is usually carried out in the presence of counsel for or representatives of parties to the petition, disputes on the contents of such reports are rare.

5.10 Irregularities Revealed by Scrutiny

Chapter 7 of the Constitution underscores the importance of grounding in due process the integrity of the entire electoral process. Articles 38 and 81 of the Constitution enumerate, *inter alia*, the integrity of the voters' register; complete freedom of choice; absence of violence, intimidation, improper influence, and corruption; as well as the conduct of elections in a transparent, impartial, accurate, accountable, and efficient manner as the overarching principles which underpin a free and fair election.

Other than numerical accuracy of the votes garnered by each candidate, which is a quantitative test, all the other principles in these provisions relate to the qualitative factors of the electoral process that deal with the process employed in arriving at the quantitative results of an election. That renders the qualitative principles the bedrock of any free and fair election. This is why most, if not all, election petitions are premised upon alleged impeachments of qualitative principles.

Section 83 of the Elections Act provides for two disjunctive situations, which will void an election. This is where there is failure to carry out an election "in accordance with the principles laid down in the constitution" and where there is "non-compliance with any written law relating to [an] … election" that affects "the result of the election." In the famous English case of *Morgan v. Simpson*,[161] a decision that has been followed in several cases in this country, it was held that the "non-compliance" referred to in the English equivalent of this provision is "substantial" failure to carry out an election in accordance with the principles laid down in the written law governing the impugned election.

160 These are: (a) the written statements made by the presiding officers under the provisions of the Act; (b) the copy of the register used during the elections; (c) the copy of the register of the results of each polling station in which the results of the election are in dispute; (d) the written complaints of the candidate and their representatives; (e) the packets of spoilt papers; (f) the marked copy register; (g) the packets of counterfoils of used ballot papers; (h) the packets of counted ballot papers; (i) the packets of rejected ballot papers; and (j) the statements showing the number of rejected ballot papers.

161 [1975] 1 QB 151.

The second aspect of this section is the "non-compliance" that will affect the results of the election. That this relates to either the qualitative or the quantitative aspects of an election or both is not in dispute. The vexing issue in this aspect of Section 83 of the Elections Act is what type of non-compliance can affect the result of an election.

It is relatively easy to determine when the quantitative elements have affected an election. For instance, if the counting of votes is flawed, wrong figures will be obtained. In the electoral system of first-past-the-post, even one vote will affect the result of an election. In *William Maina Kamanda v. Margaret Wanjiru Kariuki & 2 other*;[162] the election was voided because the returning officer admittedly altered the numerical results. The position is, however, not as clear-cut when an election is challenged on infractions of the qualitative test. The question then is: when does the infringement of qualitative factors per se affect the result of an election?

There are two aspects of infractions of qualitative factors that should automatically affect the result of an election. The first one is commission by a candidate of the election offences of treating;[163] undue influence;[164] and bribery.[165] Besides unduly influencing and therefore impairing the voter's freedom of choice, these offences also impeach the integrity of the candidate committing them. Integrity is one of the cardinal values Article 10 of the Constitution requires of anyone aspiring for leadership. In the author's view, proof of any of these offences to the requisite standard of beyond reasonable doubt, is a substantial violation of the Constitution and the Elections Act, which should automatically void an election.[166]

The second aspect of infraction of qualitative factors that can void an election relates to violation of the principles of due process. Election goes "beyond simple arithmetic."[167] As stated above, the qualitative test is the major determinant of a free and fair election. The qualitative principles have their grounding in due process. Due process, which is concerned with the quality of the ballot, is the hallmark of any democratic electoral process.

162 Nairobi High Court Election Petition No. 5 of 2008.

163 The Elections Act, 2012, s. 62.

164 The Elections Act, 2012, s. 63.

165 The Elections Act, 2012, s 64.

166 In Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others Supreme Court Petition No.12 of 2014, [2015] eKLR where the offence of bribery was proven beyond reasonable doubt, the election was nullified.

167 James Omingo Magara v. Manson Onyongo Nyamweya and 2 Other, [2014] 5KLR (EP) 292.

The result of an election is therefore affected when the violation of qualitative factors fundamentally undermines the integrity of the electoral process. That is to say, apart from the figures, the result of an election is affected when the irregularities and malpractices committed render the legitimacy or reliability on the numerical result and the sanctity of the ballot questionable. The cases of *James Omingo Magara v. Manson Onyongo Nyamweya and 2 Other;*[168] *Richard Kalembe Ndile v. Patrick Musimba Mweu;*[169] *John Oroo Oyioka v. IEBC & Others;*[170] and *Musikari Nazi Kombo v. Moses Masika Wetangula*[171] provide good examples of violation of qualitative principles, which undermine the integrity of an election.

In *Magara v. Nyamweya,* scrutiny revealed that the seals of the apertures to most ballot boxes had been broken and were missing; three ballot boxes could not be accounted for; one ballot box, which contained votes of only three out of seventeen candidates had its lid open; the presiding officers did not sign Form 16A, which carried the numerical results of the votes garnered by each candidate in 53 polling stations thus casting doubt on their authenticity; and an attempt had been made to burn down the building where the election materials were stored. To make matters worse, in his testimony to court, the returning officer for that election conceded that he could not vouchsafe the tallies on Form 17A, as he had not verified them against the numerical results on Forms 16A in the South Mugirango Constituency. On those anomalies, despite the fact that in the court supervised recount, the appellant emerged the winner with over 4000 votes, the trial Judge held that the integrity of the poll was seriously dented and he accordingly voided the election. A majority of the Court of Appeal bench of three upheld that decision.

The integrity of the elections in *Kalembe Ndile v. Patrick Musimba and Oroo Oyioka v. IEBC* were similarly undermined. In the former case as, 409 ballots from three polling stations went missing. That rendered the election indeterminate. In the Oroo Oyioka case, as stated, the scrutiny report revealed numerous irregularities: the number of ballot paper counterfoils used in the election did not tally with the votes cast; the counterfoils from 10 polling stations exceeded the number of votes cast; counterfoils from 2 polling stations were missing; the ballot box from one polling station was also

168 [2014] 5KLR (EP) 292.

169 Machakos High Court Election Petition No. 7 of 2013.

170 [2013] EKLR.

171 Supreme Court Petition No. 12 of 2014

missing; people whose names were not on the voters' register were allowed to vote; Forms 35 from 5 polling stations were missing; and there were also alterations on some of Forms 35 which made it impossible to determine how each candidate scored. On those irregularities, the Court of Appeal held that the election was not free and fair.

5.11 Utility of Scrutiny Results

As stated, at the conclusion of the scrutiny exercise, the Registrar makes a report of his or her findings. Such report is taken into consideration in the determination of the petition in question. This, however, does not seem to have happened in the *Raila Odinga* case. Save for the mention of mismatches between the contents of Forms 34 and 36, which it dismissed as coming belatedly in the petitioners' counsel's final submissions,[172] the Supreme Court never addressed the objective and result of court supervised scrutiny.

6.0 Conclusion and Recommendations

This Chapter has discussed the concept of scrutiny in the entire electoral process and how that mirrors the electoral dispute resolution mechanism. It has also argued that elections arise from politico-legal processes that render the intercession of the judiciary, which is a law-applying body inevitable.[173] That calls for the harmonization of politics and law to "produce election results that are both legitimate and legally valid."[174] Given the complex nature of Kenya's general elections of filling six elective positions all in one day, errors especially in the counting of votes, are bound to occur from even sheer fatigue of the polling officials. Scrutiny accords the electoral process a golden chance of correcting such errors.

Transparency is the bedrock of scrutiny. The openness with which it is supposed to be carried out is not only a great boost of public confidence in the IEBC, as the election management body, and the judiciary, but also an authentication of the integrity of the electoral process. As argued, if it is well facilitated and properly carried out, scrutiny with its in-built pre-election dispute resolution mechanisms will address a reasonable proportion of the

172 See Raila Odinga case[par.246].

173 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 515,, http://www.heinonline.org, at 23 October 2015.

174 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 515,, http://www.heinonline.org, at 23 October 2015.

issues raised in election petitions and thus limit election petitions to disputes relating to the conduct of the poll.

The achievement of these noble objectives, however, presupposes co-operation of all the stakeholders in the electoral process. To compile a credible national BVR register and acquire functional electronic voter identification devices, as well as competently conduct the general elections, IEBC requires colossal sums of money. If the Treasury does not avail the required funds in sufficient amounts and in good time, IEBC will be hamstrung and the result is anybody's guess. If the political parties, aspirants for elective positions and the general public do not bother to inspect the voters register, pre-election disputes will continue crowding election petitions. The proper conduct of scrutiny at all stages of the electoral process cannot therefore be overemphasized.

To achieve its desired objective of determining the validity of the votes cast and the result of an election, a few aspects of the electoral process need to be addressed. The first one is the integrity of the voters register. As IREC recommended, there should be one principal register incorporating the special register of persons whose bio data cannot be captured by the BVR devises due to their physical deformities and the BVR register.

Associated with an authentic national voter register is the issue of the use of technology in EVID and electronic transmission of provisional election results. Besides certainty and reliability, the greater the speed with which election results are publicly transmitted, the greater their acceptance by the public.[175] This informed the IREC recommendation for electronic transmission of results as a parallel system upon which the manual results can be counterchecked and verified. As is clear from Bush v. Gore, at times technology fails even in advanced countries. In our country, with no reliable electric supply to many schools and public premises, which are used as polling stations, chances are that technology can fail again. A compromise should therefore be made and clearly provided for in statute. Given the vitriolic attack on the Supreme Court decision in the *Raila Odinga* case, the issue of "all the votes cast" in Article 138(4) of the Constitution is far from being settled. A constitutional amendment will be necessary to settle it.

175 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 478, http://www.heinonline.org, at 23 October 2015.

A skim through the election petitions judgments reveals the courts' reluctance to readily order scrutiny. This reluctance is partly because of the judiciary's limited capacity to carry out scrutiny on a large scale within the limited timeframe for the disposal of election petitions. The judiciary needs to enhance its capacity and train its Deputy Registrars and Executive officer who carry out scrutiny.

Save for these hiccups, scrutiny is a crucial aspect of the electoral process as it goes a long way in boosting public confidence in the electoral process and the judicial determination of electoral disputes. Barring unreasonable costs and the length of time it takes to carry out, scrutiny should not only be encouraged but also be readily granted.

IX

Friend of the Court or Partisan Irritant? The Role of *Amicus Curiae* in Kenya's Election Disputes Resolution

Dr. Collins Odote

Abstract

The involvement of amicus curiae in Kenya's first Presidential election petitions raised important issues on the nature of election petitions and the distinction between private and public litigation. That distinction is the more critical in light of the changed landscape following the adoption of the Constitution of Kenya, 2010 with a focus on larger public interest. In light of these changes, the Chapter discusses the jurisprudence emerging from the Presidential election petition on the issue of amicus curiae. The paper argues for a shift in the treatment of amicus away from representation of private partisan interests to a policy tool for ventilating larger societal and public interest matters. It concludes that such an approach requires a careful balance in the context of election petitions, which although partisan and private in their nature, raise wider constitutional and public interest issues.

1.0 Introduction

The case of *Raila Odinga v IEBC and Others*[1] (hereafter *Raila Odinga* case) saw an application by the Law Society of Kenya (LSK),[2] Katiba Institute[3]

1 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

2 The Law Society of Kenya is established by statute, the Law Society of Kenya Act, as a professional body for all Advocates in Kenya with the responsibility of assisting both the Government and the Judiciary in matters relating to legislation, administration of justice and legal practice.

3 Katiba Institute is a non-governmental organization registered in Kenya and engaged in promoting constitutionalism and implementation of the Constitution of Kenya. See, http://www.katibainstitute.org/, at 26 September 2015.

and the Attorney General of the Republic of Kenya apply to join the case as *amicus Curiae*. While the first two applications were rejected by the Supreme Court, that of the Attorney General was accepted. Like several other aspects of the case, this decision raised heated debate amongst a cross-section of Kenyans.

The Supreme Court, in arriving at the decision on whom to admit and not admit as an *amicus* in the petition held that an *amicus* should not be partisan.[4] Instead they are expected to be neutral parties whose admission is to assist the court arrive at an informed decision either way. Their contribution and interest is expected to be restricted to fidelity to the law. This decision raised concerns not just about the meaning of the term *amicus curiae,* but also its application by the Supreme Court in Kenya.

As originally conceived *amicus curiae*, acted as a friend of the court and was seen as a bystander without an interest in the case before the Court. All they sought was to share their experience on either the law or fact to help the Court arrive at an informed decision. However, as several scholars have argued, this concept has gone through developments and innovations across the world. In the United States of America (US), for example, there have been discussions about the extension of the concept away from non-partisan friends of the court to interest groups and activists pursuing a particular agenda. Hellen Anderson categorizes the many facets of *amicus curiae* into five.[5] These include(1) lawyers appointed to argue a particular issue;(2)groups or persons invited by the court to provide their perspective;(3)those who advocate for one side of the dispute;(4)those who support neither party; and (5)those who just missed qualifying as interveners yet have a stake in the outcome.[6] The author argues that courts need to look at the numerous cases of applications for and faces of *amicus* and put restrictions on the friendship. Other commentators accept that the option gives courts the opportunity to listen to diverse voices, including from political groups.

This Chapter assesses the decision of the Supreme Court on the question of *amicus*. Its central thesis is that modern developments on the use of *amicus*

4 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

5 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

6 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

have shifted it away from its traditional position of a non-partisan friend of the court to an extent where it is invariably a backhanded manner of canvassing matters as an interested party. The key options to be considered in addressing this challenge is whether courts should depart from admitting *amicus* completely or set rules whose focus is not about if an applicant has an interest in a matter but what the nature of that interest is. Secondly, courts should be more clear and appreciative of the value that admission of *amicus* adds to a case, hence seek to and balance between benefiting from that value with the disadvantages that multiplicity of partisan parties to a suit under the guise of *amicus* poses to the objective and expeditious determination of disputes by courts.

This Chapter is divided into eight sections. Following this introductory section, section two conceptualizes the nature of the term *amicus curiae*, discusses its historical evolution and development. In section three, a case is made for the reliance of the *amicus* in dispute resolution in a democracy. The fourth section of the Chapter summarizes the context in which the term has been applied in Kenya broadly and the legal and constitutional framework that regulates its application. In sections five and six, the facts in Raila Odinga case as relates to *amicus* are stated, the rules relied on by the Court to make its determination are explained and the advantages and shortcomings with the Court's approach are discussed. Section seven details comparative experience and borrowing from these and recent developments in the *amicus* debate, the section canvases the critical issues to consider in modern application of *amicus*. Section eight concludes the paper.

2.0 Evolution of *Amicus Curiae* in Litigation

The term *amicus curiae* as originally used meant friend of the court, a definition still maintained to date. Abbott's Dictionary of terms and phrases defines the term as "a friend of the court. A term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."

The acceptance of the concept of *amicus curiae* as part of the judicial system of determining cases dates back to several centuries. Its origins are traceable to Roman law.[7] It also found usage in early common law. Since then, the

7 S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 694.

concept has been used in several jurisdictions and now has almost universal usage worldwide including in civil law jurisdictions[8] and in international adjudicatory proceedings,[9] extending to regional mechanisms and at the African continental level. In the process, some of its early characteristics have been retained, while changes have been made some universally and others to respond to country and regional specificities and legal systems.

While its origins are traceable to Roman law, its usage became common practice in the 17th century in England.[10] It later spread to other parts of the common law jurisdiction, with its most extensive application being in the US. The first *amicus* brief in the US was submitted when the Supreme Court requested Henry Clay to aid in determining the application of the commerce clause to a land agreement between Kentucky and Virginia.[11] While this case was filed in 1823, The US Supreme Court promulgated its first written rule on the subject of *amicus* briefs in 1939.[12] Since that time, the role of the *amicus* in US law has changed drastically, such that almost every case that goes to the US Supreme Court attracts numerous *amicus* submissions. Not just in the US but the rest of the common law jurisdictions, *amicus* emerged as response to the resistance by the common law to expand the scope of participation of third parties in trials.[13] Even when *amicus* was adopted as an avenue for allowing third party intervention, the common law viewed the role of such interveners as being that of "bringing up of cases not known to the judge."[14] In a system based on precedent, this oral role was important at a time when there was no law reporting for it enabled judges to be made aware of relevant decisions made in court, that may not be readily within the Court's knowledge. This would also guard against the failure of opposing counsel not bringing such cases to the attention of the court, when they thought they were not in their client's interest to do so.

8 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1659.

9 E De Brabandere "NGOs and the 'Public Interest': The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investments Decisions", (2011) 12(1)(5) Chicago Journal of International Law 85; J Crawley " Friend of the Court: How the WTO Justifies Acceptance of the *Amicus* Brief From Non-Governmental Organizations," [2004-2005] 23(1) Penn State International Law Review 47; D Shelton "The Participation of Non-governmental Organizations in International Judicial Proceedings", (1994) 88 American Journal of International Law 611.

10 A Lucas, "Friends of the Court: The Ethics of *Amicus* Brief Writing in First Amendment Litigation," [1998] 26(5) Fordham Urban Law Journal 1605, 1607; S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.

11 Green v Biddle 21 U.S. (8 Wheat.) 1 (1823), cited in S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 700.

12 M Solimine, "The Solicitor General Unbound: *Amicus Curiae* Activism and Deference in the Supreme Court," (2013) 45 Arizona State Law Journal 1183, 1189.

13 *S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.*

14 *S Krislov, "From Friendship to Advocacy" (1963) 72(4) Yale Law Journal 694, 695.*

Historically, *amicus* briefs did not appear in modern civil law jurisdictions.[15] This is despite arguments that *amicus* participation has more of a civil law as opposed to common law jurisdiction characteristics. Unlike the common law adversarial system, *amicus curiae* is more about objective gathering of facts without only relying on the parties, similar to fact-gathering of some civil law courts.[16] In more recent times, though, a practice that has civil law elements but was largely a common law innovation has found its way to the civil law. This has happened in two instances. First, formally through inclusion in rules and statutes and as a result of Court decisions. In this first category, include Brazil, Israel, Mexico and France. Second mode is through informal action by non-governmental organizations (NGOs), who despite non-recognition by rules, statues and courts have gone ahead and filed *amicus* submissions. NGOs informally submit briefs to courts in virtually every region in the world, from Southeast Asia to the former Soviet Union to sub-Saharan Africa.[17] The main explanation of the evolution of *amicus* in civil law jurisdictions as well, is the emergence of *amicus curiae* as a "global procedural norm."[18]

The third development has been in the field of international dispute resolution fora. This development has been largely at the instance of non-governmental organizations who have relied on the concept of *amicus* to be able to access international courts and tribunals. The approach has been relied on due to the historical position in international law where only states were considered subjects thus able to participate as parties in litigation at international fora. Despite debate about the role of non-state actors in international law, the involvement of non-state actors as participants, either formally or informally, in international law has increased substantially over the past years.[19] Non-state actors have benefited from being admitted as friends of the courts, from which position, despite not being parties to the suit before international tribunals, they have been able to submit written statements during proceedings. However, only in very limited instances are they allowed to orally address court.

15 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1659.

16 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1656.

17 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1662-1663.

18 S Kochevar, "Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1669.

19 E De Brabandere "NGOs and the 'Public Interest': The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investments Decisions", (2011) 12(1)(5) Chicago Journal of International Law 85; J Crawley " Friend of the Court: How the WTO Justifies Acceptance of the *Amicus* Brief From Non-Governmental Organizations," [2004-2005] 23(1) Penn State International Law Review 47; D Shelton "The Participation of Non-governmental Organizations in International Judicial Proceedings", (1994) 88 American Journal of International Law 611.

From this historical sketch, it is clear that *amicus curiae* has undergone transformations in many jurisdictions, some more than others. The most development towards being parties is in the US, where *amicus* are now almost like participants to a suit. In all jurisdictions though, there are still common traditional elements that define *amicus*. These include the fact that *amicus curiae* are not considered and should not be viewed as parties to a suit. Their participation in a suit is thus at the discretion of the court. In addition, they are expected not to raise new causes of action. Instead, their contribution is in highlighting or raising new, novel or different perspectives to the case before the court. This way they will comply with the traditional dicta of being experts whose role is to raise technical aspects of law or fact and not have a personal partisan stake in a case.

3.0 The Place of *Amicus* in Litigation

Amicus curiae developments needs to be seen within the larger context of litigation and roles it serves in society. In its traditional and ordinary sense, litigation was always private to the parties seeking to determine disputes and vindicate rights. The traditional function of a lawsuit as understood in common law jurisprudence is that it is a vehicle for settling disputes between private parties about private rights.[20] Lawsuits were consequently, initiated and confined to private individuals to whom judgment was confined. The basis of determination of cases was the rule of *locus standi,*[21] determined based on personal or proprietary interest in the subject matter of the dispute. Public matters, in this arrangement, could only be pursued by the defender of the public interest, who was the Attorney General.

Over time, however, the restrictive nature of private interest litigation became evident leading to the development of the field of public interest litigation. This is litigation where issues of personal or sufficient interest or personal injury take a back seat and instead focus is on public-spirited entities seeking to ventilate public rights. The reliefs sought are for the entire or a large section of the population. The entity moving court may not even have a personal interest in the matter and will not receive any special benefit should the court rule in their favor. Public interest litigation has, over the years been used in

20 M Makoloo, B Ochieng and C Odote, Public Interest Environmental Litigation in Kenya: Prospects and Challenges (2006) 13; E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 71.

21 This means the right or capacity to bring an action or appear in court.

many field including human rights, environment, labor rights and gender rights.[22] The emergence of public interest litigation as a tool for social change and seeking justice in Kenya is traceable to the establishment and work of the Public Law Institute. The Public Law Institute was the first, pubic spirited, NGO in Kenya to employ the tool of litigation in the public interest in modern Kenya at a time when the legal and policy environment was restrictive.[23] The Public Law Institute instituted cases on consumer protection, human rights and the environment with the most famous being representing Professor Wangari Mathai in a case against the efforts to grab a public recreational space, Uhuru Park, to construct an office complex.[24]

With the adoption of the Constitution of Kenya, 2010, there has been an increase in public interest litigation cases. This increase is attributable to the nature of Constitution itself, hailed as a progressive and transformative document, useful as an "instrument for change."[25] The Constitution provides space for citizens to use courts as an avenue for protecting rights and seeking justice. Unlike the past Constitutional order, there is greater recognition and space for public rights and their protection by individuals. There is also increase in use of Courts to provide policy guidance in certain instances, expanding frontiers for public interest litigation.[26]

Many options exist for public-spirited entities to participate in litigation. One such option has been through the avenue of *amicus curiae*. A rough review of *amicus curiae* cases in Kenya reveals that NGOs and other public interest bodies, like the LSK, have mainly relied upon it.

Amicus Curiae participation is important for several reasons. It sensitizes the Court in its decision-making process ensuring that a court is better informed when making its decision.[27] *Amicus* also bring new and different perspectives to matters before a court. They help to not only develop jurisprudence but

22 For discussions on public interest litigation see generally: D Robinson and J Dukley(Ed), Public Interest Environmental Litigation (1995); M Makoloo, B Ochieng and C Odote, Public Interest Environmental Litigation in Kenya: Prospects and Challenges (2006) 13.

23 For a discussion of the history and mandate of the Public Law Institute see, O, Ooko-Ombaka, "Education for Alternative Development: The Role of the Public Law Institute" [1985] 4(11) Third World Studies (1985) 171.

24 Wangari Maathai V Kenya Times Media Trust Limited (1989) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/53011/, at 12 October 2015.

25 YP Ghai and JC Ghai, Kenya's Constitution: An Instrument for Change, (2011).

26 See J Oloka-Onyango, "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View" (2015) 47 George Washington International Law Review 763; Ghai, n 24, 173-4.

27 C Murray, "Litigating in the Public Interest: Intervention and the *Amicus Curiae*," (1994) 10 South African Journal of Human Rights 240, 250.

also create awareness on the jurisprudence of the courts due to their focus on wider jurisprudential aspects of a case and its public impacts.

It also acts as an avenue of representation and ventilation of wider societal impacts of a case even if only between two private litigants. For example, the *amicus* brief is an institutional part of US court systems, serving to broaden the transparency and democratic legitimacy in the courts.[28] As part of a democracy, it is important that all views be heard before making a decision. This is the essence of deliberative democracy. However, this has to be balanced against the fact that the judiciary in its functioning is not a political institution, less one that is based on open public input. It is for this reason that *amicus curiae* participation is important to the judicial process. Some scholars argue that it provides avenues for democratic input in what is otherwise not a democratic arm of government.

In the US, reliance on *amicus curiae* has evolved away from the traditional position of a friend of the court to a tool for lobbying and advocacy, especially within the Supreme Court. As highlighted above, Professor Hellen Anderson[29] categorizes the different types of amici in the US into five: lawyers appointed to argue a particular issue[30]; groups or persons invited by the court to provide their perspective[31]; those who advocate for one side of the dispute[32]; those who support neither side[33]; and those who just missed qualifying as interveners[34] yet they had a stake in the outcome.[35] Of these categories, the friend of party has grown most tremendously leading to complaints that the avenue as opposed to being one for helping the court to arrive at an informed decision by supplying information or pointing the court to material or legal issues it may have overlooked has turned into an avenue either for parties to get those who support their cause to join in the case or an avenue for lobbyists to seek to influence judgments. This has led to *amicus* being increasingly viewed with less approval than before by courts.

28 R Garcia, " A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319.

29 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 361.

30 Also referred to as Court's lawyer.

31 Also known as the invited friend.

32 The friend of a party.

33 The independent friend.

34 The near intervener.

35 H Anderson, "Frenemies of the Court: The Many Faces of *Amicus Curiae*" (2014-2015) 49 University of Richmond Law Review 363.

One of the greatest critics of *amicus curiae* is the US judge, Judge Posner. He has argued that *amicus* briefs filed in his court provide little or no assistance to judges because they largely duplicate the positions and arguments advanced by the parties.[36] In one instance, he explained his decision for denying an application for admission as *amicus* on the following ground:

> After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion. The vast majority of *amicus curiae* briefs are filed by allies of the litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief. Such *amicus* briefs should not be allowed.[37]

The above is the context within which the debate as to whether to admit or not admit those who seek to serve in *amicus* is seen across many jurisdictions. Essentially, however, every common law jurisdiction in the world recognizes some form of *amicus* participation.[38] While there are several differences and viewpoints on *amicus curiae*, the reality is that in its modern form *amicus curiae* has moved away from its traditional role as a neutral dis-interested by-stander to a form of "participant". In the US, for example, it has shifted "from a source of neutral information to a flexible tactical instrument available to litigants and third parties." The question that continues to exercise legal minds and courts is what extent, if at all, this is legitimate and serves the interests of justice.

This debate is critical in the light of modern trends where a judge can at the click of a button retrieve huge amount of literature and material on matters before them. Coupled with increase in law-reporting one would be tempted to side with Judge Posner in his critiques of *amicus curiae*. Others would even opine that the roles that *amicus* play could very well be covered by having expert witnesses. However, the author opines that expert witnesses are normally more focused on facts and not the law. Secondly, expert witnesses are governed by the law of evidence and expected to provide perspectives on the evidence before the court. Their testimony is consequently restricted to a

36 J Kearney and T Merrill, "The Influence of the *Amicus* Brief in the US Supreme Court." (2000), Faculty Publications. Paper 568. Available at, http://scholarship.law.marquette.edu/facpub/568, at 30 December 2015.

37 Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers). Cited in Kearney, J.D., Ibid.

38 S Kochevar, 'Amici Curiae in Civil Law Jurisdictions', (2013) 122 Yale Law Journal 1653, 1656.

particular technical aspect of the evidence before the court. An *amicus* on the other hand, is more broadminded in approach, including brings in new and novel aspects of a discussion. Courts are not compelled to admit *amicus*, but their inclusion is an appreciation that effects of a court decision may be much wider than just the interests of the parties to the dispute.

4.0 *Amicus Curiae* in Kenya's Constitutional and Legal Framework

The inclusion of *amicus curiae* in Kenya's constitutional and legal framework has to be seen within the larger context of reforms ushered in by the Constitution adopted in 2010. Kenya, as a common law system, for long viewed cases before courts in the strict sense of an adversarial system. Judges were to make decisions based on the representation by the parties, their analysis of that evidence and application of relevant law. However, over time this traditional adversarial system was tinkered with. Judges have a slightly larger role than this, including some law-making functions.[39] In deciding cases, they are expected to also carry out their own research and analysis. In public interest cases, it also soon became clear that decisions would not just ventilate the rights of private parties before the courts. On the contrary, most public interest cases affected a wide spectrum of the population.[40]

It is for the above reasons that courts, which were originally in favor of the traditional position that litigation was purely the preserve of the private parties with no third party involvement, started changing. From early 2000, Courts started admitting public-spirited citizens especially in matters that had a public angle. This was more extensive in cases of human rights, land, environment and gender. In the case of Kenya Bankers Association and others Versus Minister of Finance and Another,[41] the Court justified relaxation of the traditional rule of locus standi based on personal injury or proprietary interest in favor of public spirit and interest. It held that:

> We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice

39 There is an important distinction though between the role of judges in law making in the US and Common law traditions. Despite this distinction, some scholars give judges much more law-making functions than is reasonable in a common-law country based on a written constitution like ours. See this reasoning in JB, Ojwang, *The Common Law, Judge's Law: Land and Environment before Kenyan Courts* (2014).

40 M Makoloo, B Ochieng and C Odote, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges* (2006) 13.

41 *Kenya Bankers Association and others Versus Minister of Finance and Another* (2002) 1 KLR 61.

> entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented.

While this progressive approach was evident in several cases decided by the judiciary even before the promulgation of the Constitution in 2010, it was not based on a supportive constitutional foundation or statutory rules. In several instances, cases were not determined on their merits but on technicalities based on arguments of lack of locus standi, or the failure of the Chief Justice to develop rules on procedures for enforcement of fundamental rules as required by the Constitution.

The Constitution of Kenya, 2010 has sought to depart from this approach and adopt a more liberal approach to access to justice. It provides for access to justice for all persons, requires purposive and wide application and interpretation of the Bill of Rights so as to "promote the spirit, purport and objects of the Bill of Rights"[42] and the values that underlie an open and democratic society based on human dignity, equality, equity and freedom."[43] In addition, courts are required to avoid over-reliance on technicalities as a bar to access to justice.[44] The Constitution, consequently seeks to provide space for fair, objective and inclusive decision-making and opportunity for anybody desirous of ventilating a matter before the courts to do so subject to adherence to the rules set. Such rules though have to be seen within the overall purpose of the Constitution. Article 259 of the Constitution demonstrates this approach of promotion of a culture of protection of rights, providing space for the voices of especially the marginalized to be heard and a focus on substantive justice. The approach to interpreting the Constitution that is required by Article 259 is one that promotes its values, principles; an approach that advances the rule of law and human rights and fundamental freedoms; permits the development of the law; and contributes to good governance.[45]

42 Constitution of Kenya, 2010, Article 20(4) (b).

43 Constitution of Kenya, 2010, Article 20(4) (a).

44 Constitution of Kenya, Article 159(2) (d).

45 Constitution of Kenya, 2010, Article 259.

Kenya's Constitution, thus, seeks to protect both the rights of private individuals while also giving support to public rights. In its letter and spirit, it ensures that strict rules of standing are no longer a bar to seeking justice. Two substantive provisions of the Constitution address themselves to allowing public-spirited individuals to access courts. Article 70(3) of the Constitution provides that a person who goes to court seeking the enforcement of the right to a clean and healthy environment does not have to demonstrate that either they or any other person has suffered any personal loss or injury because of the action complained about. In all the other human rights and fundamental freedoms, the Constitution also provides every person, including one acting in the public interest, the right to go to court and seek relief when human rights and fundamental freedoms are threatened.[46]

The Chief Justice is required by the Constitution to develop rules to govern proceedings on the enforcement of the fundamental freedoms and human rights.[47] However, unlike in the past, the failure to develop such rules cannot bar people from seeking the enforcement of human rights and fundamental freedoms.[48] Importantly, the rules are to meet a certain threshold, one of which provides for the admission and participation of *amicus curiae* in such proceedings. The Rules by the Chief Justice are required to, inter alia; contain provisions that seek to ensure that "an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court."[49] The participation as an *amicus* is not restricted just to individuals and organizations. Article 156 which provides for the Office of the Attorney General lists as one of his functions, the authority to appear, with leave of court, as a friend of the court in any civil proceedings to which the Government is not a party.[50] Through these provisions, the role of *amicus curiae* is now constitutionally recognized. While discretion is still with the court to admit one as an *amicus*, *amicus* and their importance in court proceedings is accepted as part of Kenya's constitutional culture.

On June 25 , 2013, the Chief Justice of the Republic of Kenya and President of the Supreme Court published The Constitution of Kenya (Protection of Rights and Fundamental Freedoms)[51] (Mutunga Rules) to provide

46 Constitution of Kenya, 2010; Article 22(2).

47 Constitution of Kenya, Article 22(3).

48 Constitution of Kenya, Article 22(4).

49 Constitution of Kenya, 2010, Article 22(3) (e).

50 Constitution of Kenya, 2010, Article156 (5).

51 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013.

procedures for enforcement of Bill of Rights and access to justice as required by the Constitution. The Mutunga Rules recognize and make provisions for *amicus curiae* in proceedings. In its definitions section. It refers to an *amicus* as a "friend of the Court" and defines such a person as "an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise."[52] It is clear from this definition that the criteria for one to be an *amicus* is that they should be impartial and independent, and secondly, that they are an expert. It is not everybody who can be an *amicus*. One should have demonstrable expertise while at the same time be independent and impartial. Either the courts can request such expert to appear and act as a friend or the person can apply on their own and seek the court's leave.[53] The upshot of the foregoing is to underscore the importance of independent expert involvement in relevant cases to aid the court in arriving at sound decisions.

Similar provisions exist in the Supreme Court of Kenya Rules, 2012 made under and pursuant to the Provisions of the Supreme Court Act.[54] It defines *amicus* as "a person who is not party to a suit, but has been allowed by the Court to appear as a friend of the Court", similar to the definition in the Mutunga Rules. The Rules set the contours of participation of *amicus* before the Supreme Court.[55] It sets three instances where an *amicus* may participate in proceedings at the Supreme Court. The Court may allow an *amicus* in any matter before it; appoint a legal expert to assist it in submissions; or either at the request of any party or on its own initiative appoint an independent expert to assist the court in any technical matter before the court.[56] The Rule shows that *amicus*, is not restricted to lawyers only. It can either be a legal or non-legal entity. The only time when only a lawyer can be a friend of the Court is when the court requires someone to help it with submissions. In the other two instances, both legal and laypersons can be admitted as a friend of the Court. The overriding consideration for the Court in all cases of determination whether or not to admit an *amicus* is the "expertise, independence and impartiality of the person."[57] In addition, the Court "may take into account the public interest"[58] involved in the matter. It is clear from the Kenyan legal

52 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013.

53 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 6.

54 Act Number 7 of 2011.

55 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 54.

56 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 54.

57 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28th June, 2013, Rule 45(2).

58 Legal Notice Number 117 of 2013, Kenya Gazette supplement Number 95 of 28 June 2013, Rule 45(2).

framework that the role *amicus* has been expanded beyond their traditional role of bringing to the Court's attention cases or provision of the law unknown to the Court.

With the above supportive legal framework, there has been a rise in the number of applications for admission as *amicus curiae* to the courts. The jurisprudence from the Supreme Court has sought to develop guidelines on when to admit one as *amicus curiae*. The Raila Odinga[59] case saw the court pronounce itself on the issue, a pronouncement that raises several jurisprudential issues on the role of *amicus* in Kenya's landscape especially in the context of election disputes.

5.0 The Three *Amicus* in *Raila Odinga Case*

The high stakes and context for the 2013 Presidential election petition case was set by the number of applications that the Court had to deal with before addressing the substance of the petition.[60] The Court disposed of several issues ranging from parties to the suit, access to documents, and scrutiny of votes in contested polling stations to application for leave to file further affidavit.

As part of the preliminary processes, three parties applied to be enjoined to the case as friends of the Court. The Court dismissed the application of the LSK and that of the Katiba Institute but accepted that of the Attorney General to act as an *amicus*. The reasons advanced by the Court in arriving at these decisions have continued to raise concerns on the exact nature of *amicus* in Kenya, the rules for their participation in court and the real difference between interested parties or interveners and *amicus* and whether that difference is necessary to maintain. LSK's application was grounded on its statutory mandate in aiding courts and government in legal matters while the Katiba Institute sought to be enjoined as part of its continued advocacy to support the implementation of the 2010 Kenyan Constitution. The advocates for Uhuru Kenyatta strenuously opposed both applications on the grounds that both LSK and Katiba Institute had demonstrated partiality in their prior conduct, writing and comments as relates to the elections and their client to disqualify them from being objective and hence qualifying as an *amicus*.

59 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

60 There were three petitions and numerous interlocutory applications.

The application by the Attorney General for admission was grounded on the role of the Attorney General as being vested with the constitutional authority to protect public interest. The Attorney General also pointed out to the court that the nature of the case, and its importance for Kenya's constitutional democracy, coupled with the fact that the Attorney General as defender of public interest would not be partisan, justified his inclusion in the case. He further relied on the recognition of the Attorney General in Article 156 of the Constitution as the one who promotes, protects and uphold the rule of law and defends public interest. In addition, the Article provides that the Attorney General had authority with leave of the Court to appear as a friend of the Court in any civil proceedings to which the government is not a party.

The Court, in granting the application by the Attorney General, held that doing so would neither prejudice the scope of the Court's authority or the best interests any of parties to the proceedings.[61] The Court held that:

> Firstly, the State Law Office, the chief officer of which is the Attorney-General, is the custodian of the legal instruments of the Executive Branch, and the recognized advisor of the State in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive's role vis-a-vis the operationalization of the Constitution. Thirdly, the Constitution expressly provides that, in certain instances, the Attorney-General may obtain the Court's permission to appear as *amicus*. Fourthly, the Court, which is the custodian of rules of validity, propriety and fair play under the Constitution and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as *amicus curiae*.[62]

The admission of the Attorney General was based on a two-pronged test of whether the inclusion was in the public interest and whether the Attorney General was non-partisan. On both counts, several issues arise as relates to admission of *amicus* that this article will canvass in later sections.

The LSK, on its part, sought to be part of the case based on the argument that this was in pursuit of fulfilling its statutory mandate to assist the government in

61 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

62 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3 (2013). eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

law making matters. However, its application was denied due to its perceived partisanship in the case evidenced by the swearing of an affidavit by the Vice-chairman of the LSK in support of one of the parties to the Raila Odinga case. Partisanship was the same reason for the refusal to allow the Katiba Institute to join the case as an *amicus*, based on an article written by Professor Ghai of the Katiba Institute arguing that due to the cases against Uhuru Kenyatta and William Ruto in The Hague, the two were not qualified to vie as President and Deputy President in the 2013 elections. The Court held that unlike in advisory opinion cases, where admission to *amicus curiae* was much easier in adversarial cases non-partisanship was a key criteria for admission. In the words of the Court:

> …Where in an adversarial proceedings, parties allege a proposed applicant for *amicus curiae* is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the court, then (the court) must consider such an objection seriously.[63]

The case marked a departure from the previous open-door approach to the admission of *amicus curiae* in Kenya. In the instance, the court's ruling pointed out to consideration of bias, non-partisanship and public interest as the main considerations in determining whether to admit each of the three applicants. While theoretically these criteria help determine who should or should not be an *amicus*, the critical concerns that the case raised related to the exhaustive nature of the criteria, and the objectivity in their application. While in both the cases of LSK and that of the Katiba Institute, reliance was had on past writings to demonstrate their lack of objectivity and bias against one of the parties, the Court seemed to have taken as a given the admission of the Attorney General as a friend to the court. In the next section, we undertake a critical analysis of the application of these criteria and determine whether they help clarify the nature and role of *amicus curiae* in Kenya's dispute resolution generally and in specific context of election disputers.

6.0 Kenyan Supreme Court and *Amicus Curiae* Jurisprudence: Restricting or Clarifying Rules?

From the preceding discussions, it is emerging that there has been an effort to develop jurisprudence on admission and participation of *amicus*. The main point of debate is whether the rules as elaborated in the *Raila Odinga*

63 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

Case above were clear and objective. Additional debate is whether the rules have served to guide the practice of *amicus curiae* in Kenya. Conversations between the authors, Katiba Institute, and LSK who were both denied *amicus* status by the Supreme Court reveal dissatisfaction with the manner in which their respective applications were dealt with. Katiba Institute, had applied for *amicus* in several cases before the courts and been admitted in others, a fact that even the Supreme Court recognized in the ruling in the Raila Odinga case. However, the Supreme Court sought to distinguish admission in cases of an advisory nature from those that involved litigation of interests between two or more parties, arguing that in the admission in advisory proceedings is more relaxed.[64] This should not be the case. In both instances, the judgment should be on the technical value that an *amicus* would be able to add to the court proceedings and their objectivity.

In determining objectivity and impartiality, the Court relied on public comments by Professor Ghai of Katiba Institute and the affidavit signed by Lilian Renee Omondi the Vice-Chairperson of LSK in favor of one of the petitioners, which demonstrated their partiality hence the refusal to admit them as *amicus*. This raises the question on the test of impartiality. Courts have to balance between avoiding partisan interests being clothed as friends of the court. The rationale behind this is to ensure that a friend of the court is one helping the court to arrive at a just decision and not helping one of the parties to the dispute. However, the contrary argument is whether partisanship on its own would be a bar to an accurate determination of cases before the courts. In any case, even the parties before the court will be canvassing partisan arguments. In the process, though, advocates are under a duty to bring to the attention of the court all relevant matters and case law, both those that are in favor of and those against their case. This is out of the need to ensure that justice is served when courts finally make a determination. Based on this logic, it is essential that the test of partiality be applied within the context of the broad aims it seeks to serve.

The approach that would help the court is one where we use a test which focuses on ensuring *amicus* actually serve the role of providing technical and expert assistance to the court. To do so it would be more desirable to adopt an approach that encourages those with expertise to aid the court in appropriate

64 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/, at 25 September 2015.

cases, while ensuring that they focus on technical contributions and not turn themselves into parties to the case, canvassing partisan interests. However, a question may be raised why these should not come in as expert witnesses. The important point to note is that this route, while providing the requisite technical information, would have these organizations appearing only at the instance of the parties either to the suit or at the court's instance. In an adversarial system as Kenya's, a witness must witness for somebody, a fact that would restrict the latitude available to *amicus* to come to court on their own volition. They do not need to wait for a party to seek them out.

To achieve the above aim, the approach that should be adopted is one that looks favorably at most applications for admission as *amicus curiae* but puts conditions on the conduct of those admitted. Some of the conditions are already evident from Rule 54 of the Supreme Court Rules. When a friend knocks at your door, you should be ready to welcome them to the house. In return, the person knocking should be able to be identified as a friend and not an enemy. The friend should know that as a friend, there are things he/she can do and others they cannot do. The balance to be struck is between only allowing friends to get in while blocking enemies. The test of partisanship has been utilized as the basis for determining friendship. The danger is that it ends up locking out even genuine friends. It is imperative that the application of these rules should lean more towards welcoming potential friends. The courts should, however, require those who apply and are admitted, to behave like friends of the court and not friends of the parties. To achieve this requires setting parameters on how friends should act. Rule 54 already suggests this approach. It requires that friends of the court should be those who are technical experts. As opposed to asking, upfront whether one will be partisan or non-partisan, a similar result may be achieved in a more acceptable manner if the court applied the test of assessing the expertise of the applicant, and if admitted restricting their submissions to technical issues in their areas of expertise. The Rule even shows that lawyers can be admitted to help with submissions, should the court require this aid demonstrating the importance of an expertise approach to determination of *amicus*. If we were to take this approach in admission of *amicus*, we may get around the controversies of partisanship. It is important to remember that in the final analysis the court retains the final authority to determine whether to take into account the ideas from the *amicus* or not. At this stage, the court can determine the technical nature and objectivity of the contributions made.

It is also important to adopt this approach to address the second concern around the partisan test as applied by the Supreme Court. Although the Court rejected both the Katiba Institute and LSK on this ground, it admitted the Attorney General without deep reflection on the discussions of partisanship. The only argument the Court made was that since the Attorney General was the custodian of the legal instruments of the executive branch of government and the 2010 Constitution also required that the with leave of Court in appropriate cases he could act as *amicus*, it would proceed to admit him as *amicus curiae*. The Court also used the public interest test, pointing out that as "the recognized advisor of the State in matters of public interest," the Attorney General would be admitted as *amicus*. While the Attorney General is the accepted defender of the public interest, it is important to always keep in mind the context. Historically, there were times when even as the public defender, the Attorney General did not defend public interest. The case of *El-Busaidy v Commissioner of Public Lands and 2 others*[65] illustrates instances when the Attorney General, while expected to act in the public interest failed to do so. The case involved an application seeking to restrain the defendants from alienating a public park in Mombasa and converting it to private ownership. The applicant was a private citizen and resident of Mombasa. The applicant was opposed based on, amongst other objections that the applicant had no locus standi, to institute the suit since it is only the Attorney General who could bring such a suit seeking to protect public interest. This preliminary objection was raised, by amongst others state counsel appearing for the Attorney General. In declining this line of argument, Judge Onyancha stated as follows:

> I find it necessary to point out that this case and this application also raise the issue of whether or not the Attorney General who is the protector of public interest in the now notorious issue of land-grabbing, has played his part in the manner he should, to protect the state and public institutions from losing public land to private individuals. Has the office taken up the position of protecting the public from being deprived of public land the subject matter of this suit?[66]

The essence of the Judge's questions was that while the Attorney General is the defender of public interest, in practice he does not act in such interest all the times. This is the theoretical rationale for allowing other public interest bodies

65 El-Busaidy v Commissioner of Public Lands and 2 others KLR (E&L) 1, 2006 pages 479-502.

66 El-Busaidy v Commissioner of Public Lands and 2 others KLR (E&L) 1, 2006 page 501.

to also speak in the public interest. The issue becomes even more vexing in electoral cases, which by their nature are political-legal. Due to the political nature of electoral disputes and the high stakes involved, partiality becomes a fluid concept whose application may raise more heat than light. Even when it is accepted that the Attorney General is the public defender, there will be debates in electoral matters about whether they are acting in the public interest or if the state is a disinterested and non-partisan actor.

To avoid the above controversy, it is preferable that the test for *amicus* focuses on post-admission limitation. The Court in Raila Odinga case held that admitting the Attorney General as *amicus* would not "present a condition prejudicial to either the scope of the Court's authority, or the best interests of the parties to the several petitions."[67] The Court should in admitting all *amicus* set conditions for ensuring that the participation of the admitted *amicus* does not prejudice either its authority as a dispute resolution body or the interests of the parties. This can be done much better through providing parameters for the *amicus* participation once admitted as opposed to focusing on locking them out from admission. Using the above approach, we would take as granted that the Attorney General as defender of public interest would always speak in the interest of the larger public. This could be further buttressed by restricting the Attorney General to technical expert issues and not factual evidentiary submissions. This way a fair balance will have been struck for all applicants to be friends of the courts, hence avoiding classifying friendships into levels.

The Supreme Court, though, in subsequent cases on *amicus* has restated the approach in the Raila Odinga case. It has since given detailed guidelines on how it views applications on *amicus* and the standards for considering whether or not and in what circumstances to accept request for friendship from applicants. It has done so in the case of *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 6 others*.[68] In the case before the Supreme Court, the Katiba Institute applied to be enjoined as *amicus curiae* in the substantive appeal even though they did not participate in the earlier case. In considering the case, the Court pointed out the rationale for the increase

67 Raila Odinga and 2 others Versus Independent Electoral and Boundaries Commission and 3 others, Petition Number 5 of 2013 as consolidated with number 4 and 3. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/87380/\, at 25 September 2015.

68 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

in number of applications for *amicus* on the transformative nature of the Kenyan constitution and increased vigilance of citizens. It also praised the roles that such *amicus* play in helping the Court discharge their mandate and develop jurisprudence. The Court however argued that it needed to regulate the admission of *amicus*. It justified this as follows:

> *Amicus* briefs ought to be carefully appraised so as not to interfere with the causes of the parties or the bounds of jurisdiction. While the Court may admit a motion to appear in any proceedings as *amicus*, there was the risk of the real interest of the *amicus* threatening the position of the original suitors whose rights and obligations stood to be upset by the outcome of the appeal.[69]

In seeking to provide guidelines to achieve this aim, the court resorted to an approach that may end up limiting *amicus* to the Attorney General only, since the bar for other entities is exceedingly high. In the Supreme Court's view, the test to be applied is one that first relates to the traditional role of an *amicus* as one that focuses on points of law. The Court argued "the legitimacy of briefs flows from their engagement with points of law."[70] However, the author is of the opinion that this cannot be the correct position, since the most important consideration is expertise and such expertise cannot be restricted to law only. In appropriate cases, an *amicus* may have technical information that would aid the Court to reach a correct decision and should be admitted even if the technical information does not concern the law.

In the author's view, the Supreme Court was right though in distinguishing *amicus* from interveners or interested parties in the Kenyan context. Balancing the two is a delicate one, with the guide being that interveners will have an interest in the matter, not necessarily have to be technical experts and will have more partisan inclinations. In the words of Justice Odunga in the case of *Judicial Service Commission versus Speaker of the National Assembly and Another.*[71]

> ....(I)t is clear that an interested party as opposed to an *amicus curiae* or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or

69 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

70 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

71 High Court of Kenya at Nairobi, Petition Number 518 of 2013. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/92015., at 29 September 2015.

> legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favorable to his stake in the proceedings. *Amicus curiae* on the other hand is defined as a "an expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise." *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the Court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the Court get a clear picture of the issues in dispute in order for the Court to arrive at an informed and just decision.[72]

The Supreme Court developed a catalogue of rules to guide *amicus* applications and admission in Kenya in the following terms:

- An *amicus* brief should be limited to legal arguments.
- The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the direction of *amicus* intervention, ought to be governed by the principle of neutrality, and fidelity to the law. When parties to a suit challenge such impartiality, they should get a chance to be heard before the Court makes a decision.
- An *amicus* brief ought to be made timely, and presented within reasonable time.
- An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other amici, to introduce only novel aspects of the legal issue in question that aid the development of the law.
- The Court may call upon the Attorney- General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
- An *amicus curiae* is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.
- The Court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
- In appropriate cases and at its discretion, the Court may assign questions for *amicus* research and presentation.

72 High Court of Kenya at Nairobi, Petition Number 518 of 2013. (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/92015., at 29 September 2015.

- An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.
- The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
- Whereas consent of the parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.
- The Court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae*.
- The Court reserves the right to summarily examine *amicus* motions, accompanied by *amicus* briefs, on paper without any oral hearing.
- The Court may also consider suggestions from parties to any proceedings, to have a particular person, State Organ or Organization admitted in any proceedings as *amicus curiae*.[73]

The principles are detailed and seek to give clarity to *amicus* presentation. They, however, focus too much on control as opposed to regulation. To cure the problem of partisanship, courts should apply the above cited rules developed in this paper. Such an approach seeks to "both welcome and regulate"[74] the participation of *amicus curiae*. Adopting this approach would turn the focus to a friendly approach where applicants will be more easily admitted. However, once admitted they will have less latitude than parties will during cases. As friends, they will be expected to have a restricted audience, to focus their interventions to well-defined parameters and in a manner that is helpful to the court.

7.0 Some Comparative Experiences

While the concept of and application of *amicus* originated in either Roman law[75] or common law,[76] it has spread across many jurisdictions and civilizations. Kenyan experience can be compared with, not because they are similar but because they have a fairly well developed experience with

73 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

74 A Loux, "Hearing a Different Voice: Third Party Intervention in Criminal Appeals," (2000) 53(1) Current Legal Problems 449, 460.

75 See SC Mohan, "The *Amicus Curiae:* Friend no More?" (2010) Singapore Journal of Legal Studies 355.

76 See, F. Covey, Jr., "*Amicus Curiae:* Friend of the Court" (1959 - 1960) 9(1) (5) DePaul Law Review. 30, 34-35; A Levy, "The *Amicus Curiae:* An Offer of Assistance to the Court" (1972) Chitty's Law Journal 94.

amicus several jurisdictions. As already discussed above, the most extensive experience with use of *amicus* over the past century is in the US. This expansion is captured by an article that surmised that about 85 percent of the cases argued before the US Supreme Court at the end of the 20th century had at least one *amicus* brief filed.[77] Despite this increase, there is divergence of opinion on the importance of *amicus* and the rules of their admission. While judges like Judge Posner already discussed above see *amicus* more as partisan parties disguising themselves as objective experts out to assist the court, others like US Supreme Court justice, Judge O'Connor opined that ""[t]he 'friends' who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed."[78] In her view, ""[t]hese *amicus* briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions."[79]

What is clear is that the US experience has expanded the notion of *amicus* away from its traditional position as an impartial assistant to the judiciary to an active participant in litigation, including representation of third parties. However, even with the expansion the *amicus* in the US is still not a traditional party, its participation is at the discretion of the court. In addition, he/she will not raise new cause of action of repeat what the parties have already argued. They are still required to assist courts by bringing in fresh perspectives.

The one country that modern judicial decisions have sought to draw parallels and inspiration from is South Africa. This is due to the similarity between Kenya's 2010 Constitution and that of South Africa, a fact based on the fact that Kenya's Constitution borrowed substantively from the South African one. Secondly, as South Africa is an African country, it has more in common with Kenya than Western and other democracies. Since 2010, both the Supreme Court and other Kenyan courts have relied on South African jurisprudence as they determine cases before them. For that reason, the experience of South Africa on *amicus* provides useful comparative information.

77 J Kearney & T Merril "The influence of *Amicus Curiae* Briefs on the Supreme Court" (2000) 148. University of Pennsylvania Law Review 743.

78 Honorable Justice Sandra Day O'Connor in his speech while accepting Henry Clay Medallion from the Henry Clay Memorial Foundation on 4 October 1996, available at, http://henryclay.org/?page_id=372, 31 December 2015.

79 Honorable Justice Sandra Day O'Connor in his speech while accepting Henry Clay Medallion from the Henry Clay Memorial Foundation on 4 October 1996, available at, http://henryclay.org/?page_id=372, 31 December 2015.

Initially *amicus curiae* in South Africa adopted the traditional common law position that saw them as assistants to the Court or helpful bystander. This position had been captured in a 1939 case in *South Africa Connock's (SA) Motor Co. Ltd V Pretorius.*[80] The court held that:

> So far as concerns the position of *amicus curiae*, I have looked into the matter and I find the definition of the term is to be found in several legal dictionaries, such as Sweet and Bouvier and Whorton. They all speak of an *amicus curiae* as a bystander – someone who is present in Court and not concerned with the matter in hand, who may be counsel or may not. He is a person who, if he observes the judge is in doubt about something, or likely to fall into error through failure to recollect a fact of which he ought to take cognizance, such as a legal decision or a statute, asks leave to come to his assistance and to mention it, and thus helps the judge by pointing out what appears to be in danger of being overlooked. But the point is also made that it is not the function of an *amicus curiae* to seek to undertake the management of a cause….I think we should be laying down a dangerous precedent if we were to allow intervention of this kind.[81]

With the adoption of a progressive constitution in 1994, the role of *amicus* expanded significantly in South Africa.[82] The 1994 Constitution expanded standing and voice for marginalized groups and focused on deliberative and participatory democracy. It included the Constitutional Court as an organ for determining matters that dealt with the implementation and protection of the Constitution. Rule 10 of the Constitutional Court adopted in 1995 provided for legislative provisions on *amicus*. Essentially, Rule 10 of the Constitutional Court Rules provides guidelines as to who can act as an *amicus curiae* n a Constitutional Court hearing.[83] According to the rules, admission as *amicus* can be sought either with the consent of the parties or the approval of the Chief Justice. The Constitutional Court has in laid down clear guidance on *amicus* in the South African context stating that admission will be based on discretion of and approval by the court, irrespective of the parties.[84] Further, in exercising its discretion, the court would determine whether the

80 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 355.

81 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 357.

82 C Murray, "Litigating in the Public Interest: Intervention and the *Amicus Curiae,"* (1994) 10 South African Journal of Human Rights 240, 250.

83 JC Mubangizi, &C Mbazira, "Constructing The *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa" (2012) 16 Law, Democracy and Development 199, 203.

84 Institute for Security Studies: In re S v Basson 2006 (6) SA 195 (CC) Para 6.

submissions by the *amicus* were useful to the court and different from those of other parties.[85]

In South Africa, *amicus* have helped expand the jurisprudence from the courts, making South Africa's cases to be cited across the continent. They have also helped the courts in deciding cases in addition to assisting in the implementation of the Constitution. They have provided an avenue for the participation of public interest organizations, especially NGOs, in litigation.[86]

Parallels can be drawn from the experiences of Canada and New Zealand, with their approach to what they call public interest intervention. A public interest intervener is not a full party to the proceeding, having fewer rights and liabilities than a party. Their intervention does not concern itself with the concrete facts of the dispute between the parties, just the legal issues that are of interest to them.[87] This mirrors the role of *amicus curiae* in other jurisdictions. The overriding test to be applied is whether the court can gain assistance from the intervener's submissions that will go beyond the assistance that counsel from the parties can provide. Legitimate interest of the intervener is not an issue for consideration. In New Zealand, "the courts do not see any practical difference between public interest intervention and appearance as *amicus curiae*. Neither form of non-party appearance is seen as more neutral or more partisan than the other."[89]

What the comparative experiences show is the evolution of *amicus* away from the traditional position of friend of the court to a more expansive role that focuses on public interest.

In dealing with rules to govern *amicus* participation, the judicial system has to balance two overriding interests. In the first instance is the right of the parties to litigate their matter unencumbered by non-parties and extraneous matters against the interest of justice and that of the wider public. *Amicus* brief are useful as a litigating strategy for interest groups and as a source of information

85 Ibid, Para 7; See also in Re: Certain *Amicus Curiae* Applications; Minister of Health and Others v Treatment Action Campaign and Others, 2002 (5) SA 713 (CC).

86 JC Mubangizi, &C Mbazira, "Constructing The *Amicus Curiae* Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa" (2012) 16 Law, Democracy and Development 199, 203.

87 E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 74.

88 E Clark, "The Needs of the Many and the Needs of the Few: A New System for Public Interest Intervention in New Zealand," (2005) 36 Victoria University Wellington Law Review 71, 74.

89 Connock's (SA) Motor Co. Ltd V Pretorius 1939 TPD 357.

for the court.[90] With the robust constitutional framework that the country now has and the increasing role of the Judiciary in public policy discourse and determinations,[91] the importance of *amicus* is bound to increase.

It is important to bear in mind that "*amicus* filers are not parties and judges have wide discretion to reject *amicus* briefs if they believe that the *amicus* participation does not add anything to the briefs already filed by the parties."[92] The critical question is what *amicus* should be expected to add. Is it only legal issues, as some courts have argued? If adding to legal issues, should the legal issues be novel? On the other hand, should it be adding to matters of both law and fact? This article argues that there has been growth in the application of *amicus* away from the traditional position of a disinterested by-stander. In practice most applicants for *amicus* status have some interest in the outcome of the case. The reasoning by the court in the *Raila Odinga Case* sought to provide contours within which one would be admitted as a friend of the court. It sought to ensure that such a person was a friend of the court and not of the parties. However, in the process it developed rules that have since been expanded by the Supreme Court[93] whose import has been to take back the debate on who a friend of court is to its traditional position.

While it is true that every country has to develop its own jurisprudence based on its legal provisions and social context,[94] the modern day role that entities who are not the traditional disputing parties to the court play in expanding the materials before the court and helping the court to arrive at a just decision is such that a restrictive rule on *amicus* is much more detrimental to the ideals of an open and democratic society that ours is. The main test should be one of public interest and not restriction based on independence/partisanship. A survey of the cases where parties have been admitted as *amicus curiae* in Kenya show that in none of the cases have the parties adhered to the ideal friend that

90 R Bradley, and P Gardner, "Upper dogs and the Use of the *Amicus* Brief: Trends and Explanations" (1985) 10(1) Justice System Journal 78, 79.

91 For a discussion of the Judiciary and its role post-2010 Constitution see generally JB Ojwang, The Ascendant Judiciary in Kenya (2013); JB, Ojwang, The Common Law, Judge's Law: Land and Environment before Kenyan Courts (2014).

92 R Garcia, "A Democratic Theory of *Amicus* Advocacy" (2008) 35Florida State University Law Review 315,315.

93 Petition Number 12 of 2013, Supreme Court of Kenya (2013) eKLR. Available at, http://kenyalaw.org/caselaw/cases/view/110554/, at 11 October 2015.

94 For detailed discussions on imperative for an indigenous jurisprudence, See Willy Mutunga, "The 2010 Constitution and its Interpretation: Reflections from the Supreme Court Decisions," Paper Presented at the University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014. Available at, https://www.google.com/search?q=Mutunga+Kenyan+Court+and+Indigenous+Jurisprudnece&ie=utf-8&oe=utf-8, at 30 October 2015.

the Supreme Court seems to paint in its judgments on who an *amicus* should be. The reality is that those who seek to join cases have a reason for doing so. They are not your traditional non-interested party. What is important is for the courts to require that the interest they seek to advance is a public and not personal interest. This way the perceptions of bias on the part of the court in its admission of friends of the court will cease to be raised. Secondly, it will enable deepening of Kenyan jurisprudence through allowing public-spirited bodies, including civil society, to contribute to the determination of cases, even if they are not parties.

8.0 Conclusion

As we assess the place of *amicus curiae* in Kenya it is important that the courts remember that as a developing country, our interpretation of the rules on admission of *amicus* should be facilitative and not prohibitive. Should courts continue with their current restrictive conditions the result will be a decline or disappearance of the feature of *amicus* from our court processes. If this became the result, Kenyan jurisprudence would be the loser. The rich jurisprudence that has developed in the country following the promulgation of the Constitution, especially in the area of enforcement of fundamental rights and freedoms has been because of work by public interest organizations, with several of them participating in cases more as an *amicus* as opposed to a party or interested party. While rules for admission as necessary to ward off 'busy bodies', they should not end up throwing out the baby with the bathwater. Courts must always remember the dicta by the High Court of Tanzania, which argued as follows:

> The relevance of public litigation in Tanzania cannot be overemphasized. Having regard to our socio-economic conditions, these development promises more hopes to our people than any other strategy currently in place. First, illiteracy is still rampant. Secondly, Tanzanians are massively poor. Our ranking in the World on the basis of per capita income has persistently been the source of embarrassment…
>
> Given all these and other circumstances, if there should spring up a public spirited Individual and seek the Court's intervention against legislation or actions that pervert the constitution, the Court, as a guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing.[95]

95 Christopher Mitikila vs. The Attorney General, Tanzanian High Court Number Civil Suit Number 5 of 1993.

While the above guidance was given in a case relating to public interest litigation, the caution and approach equally should apply to the treatment of *amicus curiae* cases. In dealing with such cases, courts should help friends to remain true to the test of expertise and non-partisanship, by focusing on their engagement in the cases that come before it rather than not locking them out. This approach will still adhere to the requirements in the Constitution, help serve the interest of justice and advance the jurisprudence in the country. Reconsideration of the current approach to *amicus* by the Supreme Court will help to ensure that the court continues to benefit from the input of public-spirited organizations. As Loux has opined, "The experience in Canada has been that specialized human rights, feminist, and other organizations have at their fingertips a wealth of information that for reasons of time … [or] resources … are unavailable to the average barrister or advocate."[96] This is not to ignore the potential negative effects that *amicus* has on proceedings, including its effects on the parties and on the court and its time management. It is possible to balance these through strict rules on role of *amicus* once admitted. In any case, benefits of admission of *amicus* usually outweigh the negative implications often cited.[97] It will also be in keeping with both a pluralist and deliberative conception of democracy,[98] options that Kenya has adopted in its new Constitution.

The jurisprudence in the *Raila Odinga Case* on the question of *amicus* is one that does not help develop the public-spirited nature required to help implement and protect a transformative Constitution, such as that of Kenya. While it recognizes the need to guard against partisanship, a legitimate concern arising from those who seek to be admitted as *amicus*, the manner it goes about solving the problem will not deliver the intended results in the end.

96 A Loux, "Hearing a Different Voice: Third Party Intervention in Criminal Appeals," (2000) 53(1) Current Legal Problems 449, 460.

97 See Generally, O Simmons, "Picking Friends from the Crowd: *Amicus* Participation as Political Symbolism" (2009)42(1) Connecticut Law Review 185; R Garcia, " A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319; R.J. "A Democratic Theory of *Amicus* Advocacy,".

98 R Garcia, "A Democratic Theory of *Amicus* Advocacy" (2008) 35 Florida State University Law Review 315,319.

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Best Foot Forward: A Critical Assessment of the Lawyering Demonstrated During the 2013 Presidential Election Petition in Kenya

Dr. Linda Musumba*

Abstract

The importance of the quality of 'lawyering' to the success or otherwise of a case cannot be gainsaid. This was amply demonstrated in the first presidential election petition in Kenya under the Constitution of Kenya, 2010. This Chapter explores the concept of lawyering and particularly good lawyering whereby an advocate is expected to represent the interests of clients to good effect through the utilization of known and discoverable methods and practices that position one's client to best advantage throughout their case. It is argued in this Chapter that the Raila Odinga Case, the first presidential election petition after the adoption of the Constitution of Kenya 2010, provided a formidable ground for the advocates representing the various parties to the Petition to display their best skills. This is because of the peculiar pressure and urgency that was created by the potential implication of the presidential election being annulled and the country carrying out fresh presidential elections. Confined by the Constitution to 14-days within which to make a decision, all eyes were on the Supreme Court of Kenya whose proceedings were broadcast live. Through a review of the performance of select advocates in this case, this Chapter highlights pertinent aspects regarding the quality of lawyering that was apparent during the case. The comparative analysis undertaken with select cases from other jurisdictions also provides a background upon which the quality of lawyering in this case can be assessed alongside that of other similarly high profile and high stakes cases.

* The author acknowledges the assistance of Ms Joyce Muthoni Maina and Ms Jane Wanjiku Muhia, her fourth year students at Kenyatta University, School of Law, in carrying out the research for this Chapter.

In seeking a lawyer, you are looking for, "… a problem-solver, an advocate, an expert adviser on the law and on your rights and responsibilities, a strategist, a negotiator, and a litigator."

(Laura Wasser)[1]

1.0 Introduction

In the end, in the very end, what factors held sway for the Judges of Kenya's Supreme Court in arriving at their decision during the precedent setting 2013 Presidential Election Petition? Was it the nature of the representations made by the learned counsel for the protagonists? The order, sequence and manner in which they were made? The persona and gravitas of the learned counsel that articulated the issues? Or the strategies that were employed by the respective counsel throughout the case? These and other questions abound and comprise the substance of this paper that seeks to interrogate the quality of lawyering that was demonstrated in this epic case. No doubt, the stakes were quite high including the possibility of the results that had been announced for the presidential ticket by the Independent Electoral and Boundaries Commission [IEBC] being overturned, and the electorate having to go for a run-off.[2]

Clearly, the rationale of the decision by the Supreme Court Judges is amply explained in their judgment[3], which is in the public domain. However, given that the Kenyan judicial system is adversarial[4] in nature whereby the judges sit as neutral umpires, the onus is on the 'adversaries' to move the bench such as to decide in their favor on the basis of evidence. In light of the foregoing, this Chapter is concerned not with the substance of the decision of the Supreme Court, but rather the means used by the 'adversaries' to try and convince the

1 Born 23 May 1968 Wasser is an American high profile attorney with a specialty in celebrity divorce cases. This is one of the tips given in her celebrated book, L Wasser, *It Doesn't Have to Be That Way: How to Divorce without Destroying Your Family or Bankrupting Yourself* (2013).

2 Run-off in this context means the subsequent presidential election that is expected to take place in accordance with Article 138 (5) of the Constitution of Kenya where no candidate was successfully elected during the first instance. This Article states, "If no candidate is elected, a fresh election shall be held within thirty 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.

3 For a reading of this Judgment see Republic of Kenya in the Supreme Court of Kenya at Nairobi Petition No. 5 Of 2013 as Consolidated with Petition No. 3 of 2013 and Petition No. 4 of 2013 Raila Odinga & 2 Others versus Independent Electoral and Boundaries Commission, Issack Hassan, Uhuru Kenyatta and William Ruto eKLR(2013).

4 According to Black's Law Dictionary, "[An adversary system is a] jurisprudential network of laws, rules and procedures characterized by opposing parties who contend against each other for a result favorable to themselves. In such a system, the judge acts as an independent magistrate rather than prosecutor; distinguished from an inquisitorial system." See Black's Law Dictionary 6th ed. (1990); 53.

Judges of the qualitative superiority of their positions; In other words, the quality of lawyering. While winning a case is no doubt the outcome most desired by litigants, this Chapter explores the question, whether the legal counsel won or lost in the most efficacious and respectable manner and in conformity with the rules of professional ethics and responsibility.

To allow for an in-depth examination into the quality of lawyering exhibited during the presidential election petition in question, this Chapter discusses the concept of lawyering in Section Two, while in Section Three, the circumstances leading up to the said presidential election petition are reviewed as well as the key protagonists identified. Section Four evaluates the performance and styles of the counsel for a number of the parties to this suit in the course of representing their clients. In Section Five, a comparative analysis of aspects of the lawyering evident in three other high profile cases in two other jurisdictions are examined and particularly the presidential election of *Bush V Gore*[5] in the United States of America [US], the trial of the famous American footballer Orenthal James Simpson,[6] and the recent trial in South Africa of the erstwhile 'blade runner' Oscar Pistorious.[7] Finally, Section Six concludes the paper. While it is appreciated that each case is different from the other in terms of facts, counsel representing the parties, and the bench listening to the case, it is contended that the nature of lawyering apparent in the 2013 presidential election petition is representative of the parameters within which lawyering in Kenya generally takes place. The recommendations suggested forthwith are expected to reiterate and improve the quality of lawyering in Kenya.

Notably, the insights into the elements of lawyering in this Chapter as were played out in the *Raila Odinga Case* were achieved through an interrogation of the conduct and actions of select learned counsel for the respective protagonists. This was as relates to their representation of their client's interests in this epic case. In this regard, recordings of the live proceedings of the case, which was covered from start to end, were reviewed in detail as well as various reports and articles in the print and electronic media at the time as the primary source of information. Furthermore, where possible, legal

5 Bush v Gore 531 U.S 98, 121 S. Ct. 525, 148L. Ed. 2d388, 69 US LW 4029 (2000).

6 Superior Court of California County of Los Angeles, in the Matter of the People of California v Orenthal James Simpson (1995).

7 In the matter between the State and Oscar Leonard Carl Pistorius Case No CC 113- 2013, High Court of South Africa Gauteng Division, Pretoria.

counsel for the key protagonists were interviewed in order to gain in-depth knowledge and explanations about their choice of process and strategy during the representation of their clients.

2.0 The Concept of Lawyering

2.1 Defining Lawyering

The term lawyering dates back to the 19th Century and despite its constant use in articles, reviews, commentaries, journals, books and court decisions there exists no definitive definition of the term. To date, it is still used to mean different things as dictated by the context it is used. Black's Law Dictionary[8] adopts a practical perspective and defines lawyering simply as *'to practice as a lawyer'*. This perspective is also adopted by Merriam Webster's Third New International Dictionary of the English Language Unabridged[9] in its definition of the term as *'following the profession or performing the functions of a lawyer.'*

According to a publication on 'Ethics and Legal Professionalism in Australia', the term lawyering refers to *what it is that lawyers do*.[10] Further, that while there are broad similarities in what lawyers do generally, the specifics of what they do is subjective to the jurisdiction and legal system in question. In this regard the publication states that,

> … In Australia, lawyers may be barristers or solicitors or both; they may work in large firms, or as sole practitioners; they may work as in-house counsel or government lawyers; they may be generalists or specialists; work for the underprivileged or for the elite; work in one of the major cities, in the suburbs, or in regional or rural practice.[11]

Notably, while there has always been a measure of diversity in the description of what lawyers in common law systems do because of the range of roles they play, their traditional role can be summed up in three key components namely, *"advising if not directing the client, actively engaging in the litigation process and upholding the rule of law"*.[12]

8 B.A Garner, Black's Law Dictionary, 8th Edition (2004).

9 M. Webster, Webster's Third New International Dictionary of the English Language Unabridged (2002).

10 Oxford University Press ANZ, Ethics and Legal Professionalism in Australia, http://lib.oup.com.au/he/Law/samples/baron_ethicslegal_sample.pdf, at 12 September 2015.

11 Oxford University Press ANZ, Ethics and Legal Professionalism in Australia., http://lib.oup.com.au/he/Law/samples/baron_ethicslegal_sample.pdf, at 12 September 2015.

12 Oxford University Press ANZ, Ethics and Legal Professionalism in Australia., http://lib.oup.com.au/he/Law/samples/baron_ethicslegal_sample.pdf, at 12 September 2015.

A further understanding of what it is lawyers do is offered by the American Bar Association Model Rules of Professional Conduct (2004) whereby the different roles and functions of a lawyer are unpackaged as follows,

> A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[13]

The publication on 'Ethics and Legal Professionalism in Australia' referred to earlier suggests that problem solving is a fundamental characteristic of lawyering and occurs across varied dispute resolution locations and in myriad workplaces including government departments, corporate organizations and private law firms.[14] According to Lopez, lawyering is actually problem solving. This perception arises from a realization that the real world varies from the world as we would like it to be, and hence to align it to the desired direction requires that the problems that create the variance be solved.[15] On the other hand, Scherr and Farber[16] approach the definition of lawyering from the perspective of decision-making, which should be undertaken in collaboration with clients. In their view decision-making under these circumstances is based on legal concepts, methods, and the relevant institutions for resolving disputes or managing opportunities.

In a reflection of the above definitions of lawyering offered by Lopez, as well as Scherr and Farber, Daniel argues in his article titled *A Proposed Definition of the Term "Lawyering"*[17] that Lopez's definition is too diffuse to serve as a useful definition. On the other hand, that of Scherr and Farber has three deficiencies: firstly it is not sufficiently client centered given that the client is the principal of the lawyer rather than a collaborator or colleague; secondly, the reference to a

13 American Bar Association Model Rules of Professional Conduct (2004).

14 Oxford University Press ANZ, Ethics and Legal Professionalism in Australia, http://lib.oup.com.au/he/Law/samples/baron_ethicslegal_sample.pdf, at 12 September 2015.

15 Gerald P. Lopez, Lay Lawyering, 32 UCLA L.REV. 1, 2 (1984).

16 A. Scherr and H. Farber, Popular Culture as a Lens on Legal Professionalism, (2003).

17 J M Daniel III, 'A Proposed Definition of the Term "Lawyering' (2009) 101:2(2009-2012) Law Library Journal 207, 218.

'process of decision-making' is suggestive of judicial or tribunal adjudications, whereas there are more encompassing descriptors indicative of active effort rather than just thoughts which present a more enriching description of what lawyers do; thirdly, whereas the reference to dispute resolution sits well as one possible goal of lawyering, the second aspect of Scherr and Farber's definition with respect to managing opportunities is too general.

Building upon the thinking expressed in the definitions above, Daniel thus proposes that an appropriate definition for lawyering is,

> ...the work of a specially skilled, knowledgeable or experienced person who serving by mutual agreement as another person's agent, invokes, manipulates or advises about the dispute resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in or preserving the status quo for his/her principal. This definition encompasses what a lawyer does and what he/she can do to the greatest extent possible for his/her client to gain control over a situation.[18]

The earlier mentioned publication on 'Ethics and Legal Professionalism in Australia' posits that there is a new 'lawyering' attributable to authors such as Lopez. The characteristics of this new 'lawyering' are that the lawyer's role is facilitative, collaborative and evaluative in the generation of legal options for the client because of its client-centered nature rather than being directive. Secondly, from the problem, the lawyer does not focus on adversarial methods only but looks at a range of problem solving methods including the option of alternative dispute resolution. Additionally, the 'new lawyer' is a creative problem solver who is empathetic of their client, conscious of the client's needs, and furthermore displays fidelity to the pursuit of a solution rather than a keen interest in a 'win at all costs' with respect to the client's problem.[19]

Based on the arguments made by various authors above, it is evident that a definition of lawyering comprises two basic essentials i.e. the lawyer as a problem solver and the lawyer utilizing a client centered approach. Indeed to solve the problems of clients effectively the lawyer must possess certain skills that enable them to deftly strike a balance between being an experienced problem solver, a tenacious advocate of the client's interests, a skillful negotiator for the best terms and an adroit evaluator capable of demystifying

18 J M Daniel III, 'A Proposed Definition of the Term "Lawyering' (2009) 101:2(2009-2012) Law Library Journal 215.

19 Oxford University Press ANZ, Ethics and Legal Professionalism in Australia, http://lib.oup.com.au/he/Law/samples/baron_ethicslegal_sample.pdf, at 12 September 2015.

the problem, weighing all available options and strategizing in pursuit of the best option.

The above ideas provide a fitting background for the decision in the case of *O.P. Sharma v High Court of Punjab and Haryana*[20] where the Court established that a lawyer has a duty to the court, a duty to the client and a duty to the legal profession. Further, that in carrying out their duties, a lawyer must endeavor to contribute towards the development of the law, observe the rule of law and uphold professional ethics.

2.2 Lawyering Skills

As already acknowledged previously, lawyering is not limited to litigation but also includes other modes of dispute resolution, formulation of contracts and drafting for clients.[21] A Report by a task force of the American Bar Association created to study and report on how to improve the process by which law students are prepared for practice noted that *"a lawyer cannot capably represent or advise the client or other entity unless he/she has the breadth of knowledge and skill necessary to perceive, evaluate and begin to pursue each of the options."* The Task Force further noted, *"that the fundamental lawyering skills essential for competent representation are problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation and litigation."*[22]

In her article, 10 Secrets of Good Lawyering, Israel[23] enumerates key lawyering skills which include; assessing a situation and being able to determine the most appropriate means of resolution, asking open ended questions so as to elicit as much information as possible, giving good advice, maintaining good relations with the opposing counsel(s), weighing all available solutions before settling on a solution and making an independent assessment of the facts and the law. Employment of the latter skills to good effect is expected to result in good lawyering as opposed to bad. The suggestion therefore is that where the use of these skills is ignored or applied in half measure, there is a likelihood, even strong likelihood, of the client being disadvantaged.

20 (2011) 6 SCC 86.

21 S L Schwarcz, 'The Limits of Lawyering: Legal Opinions in Structured Finance' (2005) 84 TEX. L. REV 1, 25, 26; M I Steinberg, Lawyering and Ethics for the Business Attorney (2007).

22 American Bar Association, Section of Legal Education and Admissions to the Bar, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (the 'McCrate Report') (1992) 135.

23 L Israel, 10 Secrets of Great Lawyering' (2006) Israel, Van Kooy& Days Law, http://www.ivkdlaw.com/the-firm/our-articles/prenuptial-agreements-and-lawyering/10-secrets-of-great-lawyering/, at 30 September 2015.

To buttress the foregoing, six distinct but inter-related skills of good lawyering are expounded herewith from Israel's list of lawyering skills as follows: Firstly, the ability for a lawyer to comprehend the issue at hand. Indeed a good lawyer must be able to understand their client's problem through analyzing the facts presented and more importantly placing or locating the issue in the right category of law. Certainly, the lawyer should correctly identify whether the issue relates to the law of tort, law of contract, criminal law, electoral law, constitutional law etc. It goes without saying that an accurate determination of the appropriate type of law applicable to an issue would enable the lawyer to then decide on the most prudent means to solve such a problem.

The second skill brought to bear is legal research. Following an accurate determination of what the issue is and which branch of the law is applicable; the lawyer must then know the sources from where to obtain the law. In addition, they must know the nature and extent of evidence required to be presented before the court in the event of litigation, they must be aware of relevant precedents on similar matters and be able to carry out useful comparative analyses with other jurisdictions operating a similar legal system. Definitely a lawyer should be possessed of the necessary knowledge and ability to make use of the fundamental tools of legal research as well as understanding the process of devising and implementing a coherent and effective research design.[24]

Thirdly, to support the cogent arguments developed from the process of legal research undertaken, a lawyer must then be able to reduce them into writing. In putting across their case in writing, the lawyer must do so in a logical, clear, comprehensive, persuasive but concise manner. Regardless of the nature of the claim, a lawyer will be required to file written pleadings in court proceedings as the court relies upon them in arriving at a decision. For this reason, sharp drafting skills are paramount. Fowler reiterates that, *"Anyone who wishes to become a good writer should endeavor to be direct, simple, brief, vigorous and lucid."* Clearly, a convincing argument that is not as powerfully articulated on paper does the client no favor in court.

The fourth skill of note of good lawyering is maintaining a working principal-agent relationship. A lawyer should ensure that the client is well informed about the progress of their matter throughout the course of the brief and that

24 Office of Career and Professional Development, U. C. Hastings College of the Law, Overview of Lawyering Skills and Values (2013).

at all times the lawyer's conduct is dictated by professional ethics. As noted in the case of *O.P. Sharma v High Court of Punjab and Haryana*[25] outlined previously, the duties of a lawyer are threefold namely to the court, the client and to the legal profession where in all cases strict professional ethics must be observed.

Fifthly, good lawyering involves recognizing and resolving ethical dilemmas. Lawyers ought to be aware of the nature, sources of ethical standards, and the means of enforcing the said standards. Their actions and decisions must therefore be guided accordingly by the written provisions of the standards as well as the established norms of the respective legal system.

Finally, good lawyering entails astute advocacy skills, which are what most laypersons associate the role of lawyers to be comprised of mainly. Lawyers must be able to precisely and persuasively articulate their arguments orally in the dispute resolution forum of choice. They should be able to present their client's case convincingly and forcefully, while carefully observing the necessary etiquette and decorum that allows for a productive rapport to be created with the court.

Certainly, the lawyer should have a coherent strategy for presenting their case so as to ensure that all the main points are argued systematically. To enable this, it would be prudent for the lawyer to outline the key points of argument, the law applicable, and the precedents on which they seek to rely on prior to proceeding to tackle each of the points. The possession and utilization of good communication skills cannot be overemphasized in the lawyers' articulation of their arguments. The lawyer should ensure they are audible, coherent in speech, devoid of monotony, have good diction and enunciation, use simple and clear language while avoiding unnecessary legal jargon. The lawyer should be able to capture the attention of the court and maintain its interest throughout their address.

In concluding the arguments and statements that have been advanced with regard to the concept of lawyering, three key issues have emerged. Firstly that there is a qualitative aspect to lawyering which can be adjudged as either being good or deficient. In other words, a lawyer's performance right from the moment they take up a client's brief to the moment judgment is entered in court can be assessed along a raft of parameters and conclusions made as to whether

25 O.P. Sharma v High Court of Punjab and Haryana (2011) 6 SCC 86.

their performance as skilled professionals was good or deficient. Secondly, that good lawyering entails the deliberate application of certain principles that have been identified as germane over time to the successful disposal of a brief. Lastly, there is a direct correlation between the quality of lawyering and the extent to which a client's interests are satisfactorily addressed regardless of whether a case is won or lost. In the subsequent Section, the 2013 presidential election petition, otherwise known as the *Raila Odinga Case*, will be discussed with a view to determining the relevance and applicability of the mentioned three key emergent issues.

2.0 About the Raila Odinga Case

The *Raila Odinga Case,* which counts as one of Kenya's most gripping courtroom cases since the promulgation of the Constitution of Kenya, 2010 [COK], was based upon the disputed presidential election results during the 2013 General Elections. For two weeks[26] following the filing of the case within the mandatory seven days[27] after the announcement of results, Kenyans, Africa, and indeed the rest of the world was captivated by the 'legal drama' unfolding within the Supreme Court of Kenya. Images of the Judges of the Supreme Court presiding over the court dressed in their official garb; distinguished lawyers making their submissions passionately, eloquently and sometimes menacingly; and representatives and supporters of the petitioners and respondents following the proceedings in court rather tensely and nervously were beamed into the homes of Kenyans in real time throughout. Recordings of the proceedings were further disseminated online with social media providing space for avid discussions to go on long after the court had adjourned for the day. Indeed the print media was not left behind in its quest to inform and educate the public with respect to the various facets of the unprecedented case that was unfolding. Section Two will focus on reviewing the facts of the case, which will be located within the context of Kenya's political environment prevailing at the time.

Essentially, on 4 March 2013 Kenyans went to the polls for the first time under the recently promulgated Constitution 2010 to elect their various leaders. Not

26 See Article 140(2) of the Constitution of Kenya on questions as to the validity of a presidential election, "Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

27 See Article 140 (1) of the Constitution of Kenya on questions as to the validity of a presidential election, "A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

only were the elections unprecedented because they were the first under the COK, but because of the number of leaders that voters had to elect all at once i.e. six.[28]

Following the announcement of the results of the highly contested presidential seat and the declaration of Mr. Uhuru Muigai Kenyatta as the President-elect by the Chairman of the IEBC, Mr. Issack Hassan, three presidential election petitions were filed in the Supreme Court, namely; Petition No. 3 of 2013, Petition No.4 of 2013 and Petition No.5 of 2013. Notably, this was the first presidential election petition to proceed to hearing in the history of election petitions pertaining to the presidential seat. Previous petitions filed after the 1992 and the 1997 General Elections were thrown out on grounds of technicality and hence the important legal issues were never subjected to scrutiny.

In Petition No. 5 of 2013, which perhaps elicited the most interest, the parties were Mr. Raila Odinga V IEBC, Mr. Issack Hassan, Mr. Uhuru Kenyatta and Mr. William Ruto. The Petitioner challenged the manner in which the elections were conducted and argued that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful. The Petitioner averred that; the first and second Respondents did not carry out a valid voter registration exercise in contravention of Article 83 of the Constitution and Section 3(2) of the Elections Act because their official tally of registered voters changed several times. For this reason, the final total number of registered voters differed materially from that which was in the Principal Register.

The Petitioner also argued that the first Respondent failed to carry out a transparent, verifiable, accurate and accountable election as required by the Constitution. The Petitioner asserted that there were several anomalies that occurred in the process of manual tallying such as the votes cast in several polling stations exceeding the number of registered voters, differences between results posted and the results released by the first Respondent, and the use of unsigned Forms 36 to declare the results.

Ultimately, the Petitioner contended that the electronic system acquired and adopted by the first Respondent to facilitate the General Elections was poorly

28 The electorate exercised their constitutional right by voting for persons of their choice for the positions of president, county governor, senator, women representative, member of the National Assembly and member of the County Assembly.

designed, implemented and destined to fail. That due to the failure of the system the first Respondent was unable to transmit the results of the elections in contravention of Regulation 82 of the Elections (General) Regulations, 2012.

For ease of reference and handling of the above Petitions, the Supreme Court directed that they be consolidated and that Petition No. 5 be deemed to be the pilot file. The court drafted a summary of issues, which were served upon the parties for scrutiny and consideration. These formed the basis of agreement on the issues for trial.

In another series of firsts, Petition No. 5 of 2013 was the first presidential election petition to be heard and determined by the newly established Supreme Court under the Constitution 2010. The establishment of the said Court was one of the major reforms undertaken in the legal and justice sector following the tragic aftermath of the disputed results of the General Elections held in December 2007. Over 1000 people were killed and hundreds of thousands of others displaced as a result of the chaos that followed the announcement of the presidential election results. At that time, the Honorable Raila Amollo Odinga, who is also the Petitioner in Petition No. 5 of 2013 that is the subject of the study in this Chapter, disputed the results of the presidential election in 2007 upon losing. However, he vehemently declined to avail himself of the use of the courts to challenge the results given his and his supporters' lack of confidence in the judicial system that was in place at the time. Consequently, there arose violence in certain parts of Kenya that was based on ethnic grounds. The *Raila Odinga Case* was thus a litmus test on the true value of the constitutional and legal reforms that had since been undertaken under the umbrella of the newly promulgated Constitution, 2010 for the management of elections.

While most international and domestic observer groups indicated in their reports that the elections were credible, free and fair despite some irregularities, notice was taken of the inordinate amount of time it took for the presidential election results to be tabulated and announced with finality.[29] The delay did in fact cause significant panic and alarm to the supporters of the two main protagonists who were considered the main contenders in this race. One of

29 C.S.Herzenberg, P.Aling'o and S.Gatimu: The 2013 general elections in Kenya .The integrity of the electoral process (2015); Commonwealth Observer Group: Kenya General Elections 4 March 2013 (2013); S Raghavan, 'Kenyatta wins Kenya Presidential Election by narrow margin', The Washington Post, (Nairobi) 7 March 2013.

the contenders was Honorable Uhuru Muigai Kenyatta, the current President of Kenya and the scion of Kenya's founding President Jomo Kenyatta, who was representing The National Alliance Party [TNA]. TNA had teamed up with the United Republican Party [URP] among other political parties to form the Jubilee Coalition. The other was Honorable Raila Amollo Odinga, the immediate former Prime Minister of Kenya and member of the Orange Democratic Movement, which had teamed up with Wiper Democratic Movement and FORD-Kenya among other political parties to form the Coalition for Reforms and Democracy [CORD]. Evidently, the mood of the public in the run up to these elections was quite heightened with anxiety and apprehension and the schism between the supporters and candidates of the two main Coalitions was ever wider. It is against the foregoing abridged background that the General Elections, and particularly presidential elections, took place in 2013.

Further, the Supreme Court had its work cut out for it in the *Raila Odinga Case*. The six-Judge bench that sat to determine the 2013 presidential petition was under immense pressure on at least six counts. These are: firstly, the great pressure brought to bear by the history of the 2007 post-election violence and thus the desire by all to avoid a repeat; secondly, the stakes for all parties to the suit were quite high given the consequences expected for each party based on the outcome; thirdly, the fact that this was the first presidential election petition to go to full trial and thus had precedent setting potential; fourthly, the fact that the Supreme Court was only newly constituted then and therefore was under pressure to prove its mettle and worth; fifthly, the very tight and compressed time-lines within which the Supreme Court had to make a decision; and lastly, the fact that the entire trial was going to beamed live across the various television networks thus intensifying the interest of the already highly polarized public.

The *Raila Odinga Case* elicited keen public interest and generated endless media coverage and commentary not only in Kenya but also in the international arena. Tension was high as the whole nation awaited the court's verdict in fear of a reoccurrence of the events that followed the 2007 General Elections. In the interests of justice and for the efficient, effective, transparent and impartial determination of the petition, the court issued directives to control the ongoing public debates that would likely result in chaos. The Petitioners, Respondents and their agents, supporters or advisors were directed to desist from prosecuting the merits of their cases in any forum other than the court.

Essentially, by allowing for live coverage of the trial, the Court had in the same breadth invited to itself the vagaries that go with such live coverage during delivery of the most important decision since its establishment[30].

Overall, it is clear from the foregoing that the pressure and the urgency that was created by the presidential election presented unique circumstances for all the parties from the bench and the bar to work under. In other words, it was high noon for the Petitioner and Respondent whose only fall back was the quality of lawyering that was to be exhibited by their respective legal counsel.

3.0 Lawyering as Demonstrated in the Raila Odinga Case

3.1 Five Common Features among the Legal Counsel in the Raila Odinga Case

As a preliminary, five things generally stood out insofar as the participating legal counsel were concerned. Firstly, the great number of lawyers retained by the various parties to the case; secondly, the prominence of the profile of the lawyers; thirdly the exemplary professional ethics and responsibility that was displayed by most of the legal counsels; fourthly, the distinct personal attributes of most of the legal counsels that were alluring; and lastly the remarkable coincidence that there was between the ethnicity of the parties and their respective lead counsel.

With respect to the first issue, this case was clearly conspicuous for the number of lawyers that were retained by the various parties and thus the exemplary teamwork that was displayed by each team as they went about their work. The number of lawyers on record for the respective parties appeared evenly matched, and in some cases surpassed, by the number of lawyers not on record but supportive of the positions of the respective parties. The advocates and parties in the consolidated presidential election petitions were:

> Prof. Githu Muigai, Attorney General (Amicus Curiae); Mr. George Oraro, Mr. Ochieng Oduol, Mr. Elisha Ongoya –for Raila Amolo Odinga (1st Petitioner); Ms. Kethi Kilonzo, Mr. Donald Deya, Mr. Harun Ndubi – for AfriCOG (Africa Centre for Open Governance)(2nd Petitioner); Mr. Njoroge Regeru – for Moses Kiarie, Dennis Itumbi and Florence Jematiah Sergon (Petitioners); Mr. Aurelio Rebello, Mr. Mohamed Nyaoga, Mr. Nani Mungai, Mr. Paul Nyamodi, Ms. Lucy Kambuni – for The Independent Electoral

30 However, there is no suggestion that the live coverage served to compromise the decision the Supreme Court would have arrived at had there been no live coverage.

and Boundaries Commission (1st Respondent); Mr. Ahmednasir Abdullahi, Mr. Kamau Karori- for Ahmed Issack Hassan (2nd Respondent); Mr. Fred Ngatia, Mr. Tom Macharia – for Hon. Uhuru Kenyatta (3rd Respondent) Mr. Katwa Kigen – for Mr. William Ruto (4th Respondent)[31]

Mr Kennedy Ogeto, formally on record for Hon. Uhuru Kenyatta, and Mr. Fred Ngatia who was the lead counsel appearing in court did confirm that beyond the names publicly listed, there were several other lawyers engaged formally in their team who each played a specific role. Other lawyers played various supportive roles voluntarily being supporters of the Jubilee Coalition.[32] Mr. Ahmednassir Abdullahi, the lead counsel for the Chair of the IEBC, Mr. Ahmed Issack Hassan, also attested to the fact that the IEBC had engaged numerous other lawyers other than those on record for the Chair, and for the IEBC in its own right as an elections implementation and supervision entity. Mr. Abdullahi indicated that the team of lawyers comprised of individuals with different specializations and skills in the legal field that were brought to bear on the various aspects of the case insofar as the extent of the responsibility for the first and second respondents lay.

The second outstanding issue was that the legal counsel for all the parties were known lawyers of great repute in their respective areas of practice. Indeed the cast of lawyers read like a who is who list given the visibility of the legal counsel based on their previous cases and engagements.. The legal counsels were distinguished on various counts; some for their long years of service as advocates of great repute handling major cases and others for their handling of prominent cases that were contemporaneous at the time in diverse fields. The legal counsel impressed many with knowledge and dexterity in handling the complex and emerging legal, political and social issues pertaining to the case whose jurisprudence in Kenya was yet to be interrogated or settled by precedent.

The Supreme Court acknowledged the solid skills exhibited by the advocates and stating that, "*…we do however greatly appreciate the outstanding contribution of all counsel appearing before us in these historic proceedings. We acknowledge them for their ingenuity and enterprise, in arguing before us the*

31 See For further information see, The Presidential Election Petitions 2013, Mwananchi Series, 2 (2013) , viii.

32 The Jubilee Coalition comprises The National Alliance (TNA), The United Republican Party (URP), The National Rainbow Coalition and The Republican Congress Party (RC).

vital questions of law and evidence."[33] The media too referred to this petition as akin to the making of a titanic legal battle[34] due to the caliber of advocates that participated in the case from the setting out of issues for determination, legal research, drafting of pleadings and the oral submissions made in court.

The exemplary professional ethics and responsibility that was displayed for the most part by the legal counsels was the third outstanding thing about the case. Almost always, the legal counsels displayed the required respect to the Court, to the parties and to each other even if on opposing sides over a matter as emotive as was before the court. There were, however, some incidents where the court found it necessary to admonish some of the legal counsels where unsavory remarks were made or where a legal counsel appeared to have been unfair to a fellow learned friend. A case in point was the admonishment to the lead counsel for the IEBC, Mr. Aurelio Rebello, by Justice J.B. Ojwang because of the manner in which he had appeared to ridicule the person of Mr. Donald Deya, counsel for AfriCOG. Mr. Rebello had opined that the descriptions used by Mr. Deya, who had admitted to this being his first time to address the court, with respect to the manner in which the IEBC had conducted the elections were only calculated to show off his prowess in the English language. Mr. Deya had stated that, *"the process has been opaque, it's been clumsy, it's been inefficient, it's been inaccurate, it has been unaccountable to such a level any results coming out of it is actually incredible."*[35] To this Justice Ojwang stated, *"Mr Rebello, there is the question of decorum in the court…If you are unhappy or very angry don't pour it out here in court. You must respect the counsel."*[36] Mr Rebello's polite response to the Judge was, *"I apologise. But comments like that are deliberately intended to insult and I'm sorry if at this late hour I lose my sense of decorum."*[37] Essentially, this incident illustrated

33 Paragraph 311 of the judgment in Republic of Kenya in the Supreme Court of Kenya at Nairobi Petition No. 5 Of 2013 as Consolidated with Petition No. 3 of 2013 and Petition No. 4 of 2013 Raila Odinga & 2 Others versus Independent Electoral and Boundaries Commission, Issack Hassan, Uhuru Kenyatta and William Ruto (Coram: W.M Mutunga, Chief Justice and President of the Supreme Court; P.K Tunoi, M.K Ibrahim; J.B Ojwang; S.C Wanjala, N.S Ndungu, SCJJ.); Kenya Law, The Presidential Election Petitions 2013: Compilation of the decisions made by the Supreme Court on the Presidential Election Petitions filed in March 2013 (2013) 120.

34 Bull's Eye: Making of a Titanic legal battle (2013), https://www.youtube.com/watch?v=H6nHDEJdFvQ, at 1 September 2015.

35 See Daily Nation newspaper article by Peter Mwaura titled, Petition Hearings Showcased Traits of a Good Lawyer, published on 29/3/2013., http://www.nation.co.ke/oped/Opinion/-/440808/1734146/-/view/printVersion/-/111wvrl/-/index.html , at 05 January 2016.

36 See Daily Nation newspaper article by Peter Mwaura titled, Petition Hearings Showcased Traits of a Good Lawyer, published on 29/3/2013., http://www.nation.co.ke/oped/Opinion/-/440808/1734146/-/view/printVersion/-/111wvrl/-/index.html , at 05 January 2016.

37 See Daily Nation newspaper article by Peter Mwaura titled, Petition Hearings Showcased Traits of a Good Lawyer, published on 29/3/2013., http://www.nation.co.ke/oped/Opinion/-/440808/1734146/-/view/printVersion/-/111wvrl/-/index.html, at 05 January 2016.

the vagaries of courtroom practice that is sometimes fraught with lapses in decorum by legal counsel. On the other hand, it demonstrated the court's clear intention for the case to be determined with utmost decency from all parties. More importantly, this incident displayed the immense deference that legal counsel, even of several years standing such as Mr. Rebello, have for the court. Mr. Rebello showed this in his quickness to accept the guidance given by the Honorable Judge.

The fourth factor of note was the distinct diversity in the personality and personal attributes of the legal counsel for the respective. The public was able to discern the characteristics of the legal counsel through this fast-paced case that had interesting twists and turns. Some of the legal counsels came across as quite methodical in the organization and progression of their arguments and others less so; others appeared witty, humorous and sometime sardonic while others stern, firm, or somber; distinction could also be made with regard to the modulation of voice and speech as well as the tendency to use metaphors, similes, hyperboles, repetition, drama and other such methods of enhancing the quality of communication.

Clearly, where harnessed effectively, one can use these traits and others to the advantage of their client depending on the issue at hand. Ms. Kethi Kilonzo, the youngest of all the legal counsels and the only female lead counsel illustrated this point. Though appearing soft-spoken, Ms. Kilonzo stood out among the rich pool of senior counsels given her astute ability to hold her own when faced with the pressure and challenges that arose intermittently during the case. At one point while strongly contesting Senior Counsel Ngatia's attempt to raise an objection in the middle of her submission, she stated, *"Senior Counsel must surely sit even though he is my senior. Today is the Petitioner's day in court."*[38] She was firm, assertive, and measured in her choice of words whilst putting across her points and on occasion stated, *"the court should not shut its eyes to these irregularities ….it is a fraud because it is in breach of the law, in breach of the Constitution and day theft or is it night theft. The only logical conclusion this court can make I dare say about the results of Nyeri County is to vitiate the entire results of that county."*[39]

38 Kethi Kilonzo: Like Father, Like Daughter, https://www.youtube.com/watch?v=HDoMEwKUbSg, at 6 September 2015.

39 Kethi Kilonzo: Like Father, Like Daughter, https://www.youtube.com/watch?v=HDoMEwKUbSg, at 6 September 2015.

The character exuded by Mr. Abdullahi also illustrates the potential for one's personality to influence the course and in some cases the outcome of a case. Mr. Abdullahi is no stranger to Kenyans whether on court corridors or outside them given the general perception of him being controversial and even combative. Indeed he is renowned for being fearless in voicing his opinion in black and white for instance when in the late 1990's he criticized the then judges for being corrupt and terming them as pedestrians who were barely literate as they were political appointees.[40] In an interview with a local daily, he referred to himself as a rebel who abhors the status quo.[41] With particular reference to the case at hand, Mr. Abdullahi, during his robust representation of the interests of the Chair of the IEBC made some remarks that could otherwise be described as brash, ostentatious, offensive and even rude. For instance, in his submissions he had the following to say to the first Petitioner, Mr. Raila Odinga, whose legal counsels were clearly rankled thereafter;

> The election of 2013 redeemed the image of this country. We did a peaceful election. We cannot equate free and fair elections with the historic desires of one person; petitioners have failed to show what prejudice they suffered…My Lords, the petitioner has a screen-saver on his phone showing that his votes have been stolen; only the year changes.[42]

As for the Supreme Court, Mr. Abdullahi advised during his submissions that nullification of the results of the presidential election would invite an enormous constitutional crisis with the possibility of the Coalition Government that had been in place prior to the 2013 General Elections continuing indefinitely. It was also his view that granting Mr. Raila's prayers to invalidate the results of the presidential election would have significant social and economic repercussions. Further, the Supreme Court was advised to adopt and exercise restraint and caution in its approach for the good of the country. Following an appreciation of various decisions on presidential election petitions by the Supreme Courts of America, Uganda and Philippines, Mr. Abdullahi pointed out that, no country yet had allowed such a petition seeking to nullify presidential elections and thus the absolute necessity for the Supreme Court to show restraint as this was not a political issue but a philosophical evolution.

40 "C Mabinda 'Ahmednasir: Kenyan Lawyers are half baked" (2013), http://thekenyanmirror.blogspot.co.ke/2013/06/ahmednasir-kenyan-lawyers-are-half-baked.html, at 5 September 2015.

41 As above.

42 Lordrick Mayabi , "Raila Has No Case, IEBC Boss Argues. Published by Capital News", http://www.capitalfm.co.ke/news/2013/03/raila-has-no-case-iebc-boss-argues/, at 10 January 2016.

Mr. Abdullahi further stated that the decision of the Supreme Court would have political consequences. His pithiest remark to the Supreme Court was that the Judgment they made would have the consequence of either building or breaking the Supreme Court. Legal and political pundits both in the mainstream and social media interpreted the latter statements as amounting to soft threats to the Court.

During interview, Mr. Abdullahi was however categorical that he did not set out to offend anybody either through the substance of the statements or the manner in which they were made. He was of the view that the intrinsic nature of the case did invite the strong remarks he had made because in the first place the Petitioner's case was quite weak.

Lastly, the remarkable coincidence between the ethnicity of most of the parties to this case and their respective lead counsel was quite outstanding. It did not escape the notice of the Kenyan public and academia that the first Petitioner, Mr. Raila Odinga shared the same ethnicity with his lead counsel, Mr. George Oraro. The same was applicable to the second, third, and fourth respondents Messrs. Ahmed Issack Hassan, Hon. Uhuru Kenyatta, Mr. William Ruto who shared the same ethnicity with their respective lead counsels Mr. Ahmednassir Abdullahi, Mr. Fred Ngatia, and Mr. Katwa Kigen. Notably, one has the right to engage a legal counsel of their choice based on whatever parameters they choose to place a premium upon. However, an inescapable conclusion that counsel were engaged in keeping with the tendency of Kenyans to elevate ethnicity as a basis for discrimination in matters of choice may not entirely be misplaced. Arguably, the coincidence in ethnicity was such a fantastic occurrence such that the chances of it being by accidental rather than design, appear quite low. To fully understand the foregoing, further studies may be carried out to establish whether it is a widely occurring phenomenon in litigation cases in Kenya and whether litigants link competency to ethnicity given that ultimately the winning of a case is the most desired outcome for a litigant. Notably, when asked directly, Mr. Abdullahi did indicate that he would have been happy to represent the Petitioner, or any other party, had such a request been made provided that his legal costs were fully met.

3.2 Lawyering as Evident through the Pre-Trial, Trial, and Post-Trial Phases of the Raila Odinga Case

The pre-trial, trial, and post-trial phases of the *Raila Odinga Case* provide scope for the examination of the roles and functions of a lawyer as unpackaged by

the American Bar Association Model Rules of Professional Conduct (2004)[43] namely: adviser; advocate; negotiator; and evaluator. Thus, the conduct of select legal counsel in the *Raila Odinga Case* is reviewed through the three phrases that span right from the conceptualization of the case to the moment judgment was delivered.

3.2.1 Pre-Trial Phase

The pre-trial phase is characterized by a number of activities of which four are examined. The first activity comprises of the initial consultation, confidence building between client and lawyer, and the process of taking instructions. When a client settles on their choice of lawyer, they need to provide the lawyer with all the relevant information necessary for the lawyer to understand their issue. Pascoe, a Canadian lawyer specializing in family law matters reiterates it is the responsibility of the client to provide the lawyer with all the necessary information and states,

> The result of any case depends on two factors - the facts and the law. It is the client's responsibility to provide all the facts that the lawyer requests. This may involve extensive work by the client. Old records will have to [be] found, time and energy will be needed to detail all the assets in a marriage and their costs and to prepare a budget. A client may have to interview relatives and friends to confirm certain events. This work is very necessary for the success of the case....A good working relationship between the client and the lawyer... will result in a better outcome, a smoother process, a lower account and a satisfied client... To obtain a good working relationship it is important that both client and lawyer recognize their own and each other's responsibilities.[44]

43 These are, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others." See the American Bar Association Model Rules of Professional Conduct (2004).

44 Advisory on the website of the law firm of Lawrence S Pascoe titled, The Client and Lawyer Relationship., http://www.thepascoedifference.com/client-lawyer.html, at 6 January 2016. Pascoe further notes that usually, the formal relationship between a lawyer and their client commences following the issue of specific instructions by the client to a lawyer of their choice concerning what service they desire. Taking instructions is preceded by the lawyer advising their client on several scores. These include how the law is applicable to the client's case; the possible range of outcomes that may result from the litigation of the client's matter before a magistrate/judge; the range of arguments that can be made for or against the client's case; the likelihood of success depending on which arguments are advanced; and the best strategy and legal procedure to adopt in order to achieve the desired outcome. The latter may involve doing nothing or taking the matter through the courts to the most beneficial level. Obviously, the advice at this point must be based on the facts as disclosed by the client and the relevant law applicable. Along the way, it may become necessary for the advice to change as well as the strategy.

In order to advise a client competently, it is essential that the lawyer appraises themselves thoroughly with regard to the law applicable, any relevant precedents, and any other relevant factors of a political, social or economic nature that may have a bearing on the client's case however remote. However, the client must ultimately then tell the lawyer what they wish to do given the advice proffered whereupon the lawyer proceeds to act on the said instructions.

If the process of a lawyer taking instructions from a client is erroneous, this may result in a mismatch of expectations between the client and the lawyer. The consequences of this include unnecessary delays occasioned by the need to clarify issues or to correct wrong moves that have already been made and at worst the suffering of a disadvantage by the client or eventual loss of a case. Indeed some of the mistakes that take place during the process of giving and receiving of instructions become the subject of disciplinary processes by professional and other bodies charged with maintenance of standards. It is obvious that to gain a clear appreciation of what the client needs, a lawyer must ask the client the appropriate questions so as to elicit the necessary responses.

From the progression of the *Raila Odinga Case* there was clear evidence of an effective client-lawyer relationship given the maintenance of a steady course from day to day devoid of public recriminations from either the clients or lawyers. Clearly, if an initial consultation which affords both the client and lawyer the opportunity to form impressions about the other as well as build confidence in each other does not succeed, it is obvious that this will have an impact on the progression of the rest of their relationship as well as outcome of their engagement. The legal counsels interviewed, confirmed having a satisfactory relationship with their clients, which formed the basis for their further engagement throughout the case. This can be contrasted with among others the case where a renowned criminal lawyer Mr. Cliff Ombeta pulled out of a high profile case involving a well-known televangelist, Pastor James Ng'ang'a, who had allegedly killed a woman through dangerous driving. Among other things Mr. Ombeta cited the disinterest from the client with regard to the insecurity he was experiencing in the course of representing him. He also stated that, *"He [the client] has not been working with the lawyers to an extent that I only meet him in the courtroom."*[45] Clearly, Mr. Ombeta did

45 See E Wainaina , "Why Cliff Ombeta pulled out of Pastor James Ng'ang'a Case", in the Daily Nation Newspapers dated 26 August 2015. Available online at, http://www.nation.co.ke/news/Why-Cliff-Ombeta-pulled-out-of-James-Ng-ang-a-case/-/1056/2846786/-/a2xt72z/-/index.html , at 03 January 2016.

not have confidence in the viability of the client – lawyer relationship lasting the course of the trial.

Evidently, all the legal counsel for the respective parties were well instructed by their clients given their robust articulation of the legal issues before the court. Based on a general observation of the footage of the trial, all the advocates were well versed with the facts of the case and the law. Indeed the legal counsels making representations on behalf of their clients in court displayed an admirable knowledge of the electoral process in Kenya as nuanced towards presidential elections. They were able to draw the necessary correlations between the Constitution and all other relevant local, regional and international laws that have a bearing on elections. Indeed the frequent reference to the voter register in its different manifestations as well as Form 34 and Form 36 among other materials used for capturing various records and tallies before and after elections, soon became common parlance among the legal counsel.

A second activity comprises the analysis of triable issues. Having received instructions from the client, the legal counsels had to assess the issues that were triable within the framework of all the relevant laws. As with all adversarial systems, it was the Petitioner's responsibility to set out all the facts and issues insofar as they related to the infringement of their rights in the context of the presidential election. Indeed the legal team for the Petitioner, led by Senior Counsel George Oraro, did establish a set of issues that in their view constituted the crux of the matter. Notably, the legal counsels for the Petitioners had only seven days following the declaration of the results of the presidential election, in accordance with Article 140(1) of the Constitution, within which to file the petition. Overall, the legal counsels were able to clearly set out the issues they wanted the court to address. For the Petitioners, the focus was on proving that the elections were not free and fair owing to the discrepancies in results announced in some polling stations. Further, that the failure of the Biometric Voter Registration (BVR) kits and the electronic transmission results system went to the core of the credibility of the results announced. The Respondents on the other hand focused on demonstrating that although there were irregularities, the Petitioners' assertions were inaccurate and that the said irregularities did not warrant a run-off. Ultimately, the legal counsels for both the Petitioners and Respondents had to locate the issues correctly within the applicable branch of law in addition to each seeking the appropriate remedy or relief. A wrong identification of the triable issues by the Petitioner would

have led to the case being dismissed at the outset before the issues were even addressed. Equally, the legal counsel for the Respondents would have had little to do with a petition that was intrinsically defective except to correctly argue for it to be struck off and their client be rightfully left in peace to savor their victory. However, Mr. Ngatia and Mr. Abdullahi appearing for Hon. Kenyatta and Mr. Hassan respectively did emphasize at interview that it was essential that the merits of the case were debated in order to allow for ventilation of the sensitive issues. It was imperative, in their view, that the public as major stakeholders were allowed the opportunity to examine the evidence through the course of the petition to enable them understand the issues at hand and to have confidence in the outcome of the presidential election.

The third activity to be examined in the pre-trial phase pertain to the development of a strategy to win the case, preparation, and filing of pleadings. Having decided on the issues to set forth in the Petition and those to argue in response to the petition, the legal counsels respectively also had to grapple with the issue of strategy. Given the high-pressure environment that the case was filed under and the fact that there was no precedent to guide the court, and by extension parties to the case, it was clear to all the legal counsels that they had to be strategic. As alluded to earlier, the Petitioners and Respondents retained not just one legal counsel, but a team of counsels playing different roles during the case. Generally, two distinct categories emerged, firstly, the team of lawyers that performed key 'back-office' roles. These included carrying out researches and analysis, monitoring of postings in the mainstream and social media and evaluating their importance to the case and drafting of the various pleadings or documents required to be filed in court. The second category of played the 'front office' role, which was to appear in court to make oral submissions. The roles of both teams had to be well synchronized in order to achieve their objective. Any weakness in one team would definitely have had an impact on the other.

With regard to teamwork, Mr. Kennedy Ogeto, who was officially on record for Hon. Kenyatta, and Mr. Ngatia, who appeared in court to make representations on behalf Hon. Kenyatta, agreed that the teaming up of lawyers playing different but integral roles in the back and front offices was strategic and deliberate. For instance, Mr. Ogeto explained that his role in the team was to primarily draft pleadings and ensure they were filed appropriately and timely in court. To draft a competent response to the petition, Mr. Ogeto indicated that there was need to carry out extensive and rigorous research, which was

undertaken in concert with a number of other advocates. On the other hand, Mr. Ngatia indicated that through teamwork, the strengths and talents of various lawyers were brought to bear effectively. Teamwork was also evident in the sharing out of time by the lead counsels for the other advocates on their team to also make presentations before the Court. Indeed many were the times the lead counsels explained to the Court the sequence of presentations on their team, identifying the aspects that would be handled by the respective advocate assigned and within what timeframe. As the lead counsel for Hon. Kenyatta, Mr. Ngatia indicated that he often had to consult with key persons in the team in order to gain a sure footing on the case throughout. Mr. Ngatia cited the decision he had to make as to whether to apply for the Chief Justice to disqualify himself from the proceedings based on the increasing voices from party supporters pointing to the likelihood of Mutunga's partisanship[46] as one that called for much discussion and consultation within the team both corporately and individually. He eventually did not make that application upon faith and conviction of the Supreme Court's ability to be non-partisan. He also cited the need to prepare fully to deal with any eventualities based on the court's own decision to order scrutiny of the votes as another instance that required close discussions. This was a move totally unforeseen and thus required the utmost alertness from legal counsel for both the Petitioners and Respondents as the results may have had the capacity to disorganize their train of thought and line of argument. Again, teamwork was quite crucial here given the fact some counsels had to be present throughout the process of scrutiny as others continued with the case in court. Mr. Ogeto indicated that the collaborative efforts in the team were overseen by an overall team leader who was a seasoned lawyer of great repute and in whose wisdom the team relied with respect to their role of defending Hon. Kenyatta at trial. Mr. Ogeto and Mr. Ngatia indicated that ultimately, they had to consult quite closely with their client with respect to what choices to make when necessary. They also stated that it greatly helped that their client remained cooperative and confident in his team throughout.

The sentiments expressed by Mr. Ogeto and Mr. Ngatia above with respect to the effective use of teamwork, talent-based allocation of tasks, and round

46 There were allegations of the Chief Justice, Honorable Willy Mutunga being a 'Raila man' and that he preferred Honorable Raila Odinga to Honorable Kenyatta. See B A Badejo, Raila Odinga: An Enigma in Kenyan Politics (2006); Does Willy Mutunga Prefer Raila? International Media Thinks So (2013), http://kenyauptodate.blogspot.co.ke/2013/03/does-willy-mutunga-prefer-raila.html , at 13 January 2016; M Gitonga, Do you know WILLY MUTUNGA wanted RAILA ODINGA as the PRESIDENT- Associated Press (2013), http://mashariazgitonga.blogspot.co.ke/2013/03/do-you-know-willy-mutunga-wanted-raila.html, at 13 January 2016.

the clock responsiveness of the legal team were strongly reiterated by Mr. Abdullahi appearing for the Chair of the IEBC. Mr. Abdullahi stated that the high level of teamwork and professionalism exhibited by the team of legal counsel defending the IEBC and the Chair of IEBC made their task exceedingly delightful. Mr. Abdullahi explained that their client had taken the exercise of being accountable to Kenyans quite seriously by retaining a team of legal counsel bringing diverse skills and thought processes to the table. To facilitate the effective working of the team, Mr. Abdullahi stated that it had become necessary for the client to provide a suitable space where the legal counsel, experts in other relevant fields, a team of researchers and administrators could operate from round the clock during the 14-day constitutional period provided for the determination of the presidential election petition. Within that space, the lead counsels were able to work in concert with the rest of the team comprising seasoned advocates who were accomplished in their own right. Mr. Abdullahi described in detail the efficiencies that they were able to acquire as the baton passed from one point of the relay to the other during the process of conceptualization and allocation of tasks, research, agreement of issues, drafting of pleadings in response to the petition, and interrogation of effective ways to make submissions to name but some. In Mr. Abdullahi's view, this method raised the capacity of the defence team compositely in mounting a robust defence of their clients' cases given that most, if not all, of the possible scenarios, angles and arguments of the case had been well thought out in advance and appropriate mitigating strategies adopted and implemented.

The final factor under the pre-trial phase is the advantage that accrued from complementary factors. Prior and during the filing of the presidential election petition, some factors created an advantage that enhanced the effectiveness of the client–lawyer relationship. Undoubtedly, the astuteness of the legal counsels worked in the favor for some of the parties. For instance Mr. Oraro, the lead counsel for Mr. Raila Odinga, is a renowned advocate with many years of good standing and experience in legal matters both local and foreign. His reputation, that is well known publicly known, preceded him in this case. Indeed the same is applicable to Mr. Ngatia, the lead counsel for Mr. Uhuru Kenyatta.

For almost all of the parties, there was evidence of prior connection where the legal counsel had represented the respective party in a previous case(s). Naturally, the extension of a client –lawyer relationship into another case is suggestive of satisfaction on the part of the client in the previous case. For instance, by the time the presidential election was filed, Mr. Ogeto was

widely known to have been in Hon Kenyatta's legal team in another widely publicized case. Equally, Mr. Ngatia was Hon. Kenyatta's chief agent at the National Tallying Center at the Bomas of Kenya. Mr. Ngatia stated that he had been in position as chief agent two months prior to the March 2013 election and thus by the time the presidential election petition was filed he was quite well versed with the law, procedure, and substance pertaining to elections in Kenya and comparative jurisdictions. Mr. Ngatia was categorical that his earlier involvement in the case had sharpened his ability to sift through the complexities of the case rapidly and thus take any necessary ameliorative steps. Mr. Ogeto and Mr. Ngatia were both clear that prior involvement, although not fundamentally necessary, was however, a boon in promoting an effective client-lawyer relationship that is essential for the robust representation of a client's interests.

According to Mr. Ngatia, another factor that worked to the advantage of his client's case was the concurrent petition filed against the IEBC by Mr. Moses Kiarie, Mr. Dennis Itumbi and Ms. Florence Jematiah Sergon, who were supporters of Hon. Kenyatta and the Jubilee Coalition. This Petition sought among other things a ruling by the Supreme Court on the validity of the inclusion of the rejected votes to the final tally of the presidential votes. It was the view of the Petitioners that the Respondent's decision to include rejected votes in the final tally had had a prejudicial effect on the percentage won by Hon. Kenyatta in contravention of the relevant laws. According to the Petitioners, if all rejected votes were included in the computation of vote-tally percentages, then this would work in favor of the first Petitioner, Mr. Raila Odinga, by increasing his percentage tally towards the 50% mark while lowering that of Hon. Kenyatta's to a figure below 50% thus necessarily triggering a run-off election between Mr. Odinga and Hon. Kenyatta. Ultimately, the Court ruled that the reference to 'all votes cast' in Article 138(4) of the Constitution refers only to valid votes cast and does not include ballot papers, or votes cast that are however later rejected for non-compliance with the terms of the applicable law and regulations. The upshot of this decision was to uphold Hon. Kenyatta's qualification for declaration as the President given his fulfilment of the requirement that a presidential candidate attain 50% plus one of all the votes cast in the election. According to Mr. Ngatia, the ruling in this Petition, to which little attention had been paid even by the media, was of paramount importance to his client's case as it went towards confirming the results so declared by the IEBC. Clearly, the decision by the

Petitioners in this Petition to file their case that focused on issues different from those in the main Petition, but that were of equal importance, proved extremely useful to bolstering the basis for upholding the results declared in the presidential election. In the end, Mr. Ngatia opined that nothing ever ought to be left to chance in a case, and on this occasion, the robustness of the representations made by the legal counsel for the Petitioners in this Petition had only served to illuminate his arguments with respect to the main Petition more powerfully.

3.2.2 The Trial Phase

The trial phase is characterized by a review of the preliminary applications that were prosecuted in the *Raila Odinga Case* and the main trial itself.

As regards the preliminary applications, several were made prior to the formal commencement of the presidential election petition. Clearly, the respective legal counsels had to think on their feet in order to formulate the substance of their applications, which in their view were aimed at helping their client's case. Among such petitions included the separate petitions by the Attorney General and the Law Society of Kenya as well as the Katiba Institute to be admitted as Amicus Curiae. Of these Petitions, only the Attorney General's was allowed and the others denied on the grounds of perceived partisanship. Others included the application by the main Petitioner Mr. Raila Odinga for further information from the IEBC whilst another Petitioner Ms. G Otieno and Another applied to be provided by the IEBC with the Marked Voters Register.[47] It is important to note that the preliminary applications whether allowed or disallowed by the Court served to reiterate key issues of law and procedure.

One of the notable preliminary applications made in the clearly fast-paced case was the one by the fifth Petitioner, Mr. Raila Odinga, who sought the court's leave to file a further affidavit in addition to the original one that had already been served to parties. Essentially, the presidential election petition commenced with Mr. Odinga's legal counsel filing a petition. The respondents in turn filed their respective replying affidavits in response to the petition. Subsequently, the Petitioner's legal counsel then filed what was referred to as a 'petitioner's affidavit in reply' and proceeded to serve some of the respondents

47 As above, n 31.

and not others.[48] The legal counsel for the Respondents, Hon. Kenyatta, the IEBC, Chair of the IEBC, and Mr. Ruto took great exception to the Petitioner's move citing it as highly irregular, unfair and un-procedural. In particular, the legal counsel stated as follows:

> Mr. Ngatia for the Third Respondent, Mr. Uhuru Kenyatta, stated that: -The said affidavit was inordinately lengthy, running to 900 pages. -The new affidavit contained a schedule of alleged inflated votes in 58 new constituencies.-The affidavit introduced 122 new electoral areas with specific complaints. Mr. Ngatia wondered whether the Court would allow complaints amplified by new complaints out of time.-It was a scientific impossibility for the Respondents to respond within a day, before the hearing, or even by the end of the week.-There was a right of fair trial for both the Petitioner and the Respondents.-The filing of the affidavit was prejudicial to the respondents, as it would occasion delay in the trial.-It was impossible to provide the material sought within time.-Parties must be held to their bargain as represented in their pleadings.-The Petitioner filed the affidavit without the leave of the Court, and as such there was no courtesy or decorum on the Petitioner's part. Mr. Ngatia asked the Court to disallow the affidavit… Mr. Ahmed Nassir Abdullahi for the Second Respondent, Mr. Ahmed Isaack Hassan, questioned the filing of the affidavit by the Petitioner. He asked whether the case will stop "mutating" so that parties can proceed with the hearing. He referred to Article 140 of the Constitution and the Supreme Court (Presidential Election Petition) Rules 2013 which provides the framework for responses. He added that:- There was no provision to respond to the Respondent's response before the Pre-Trial Conference.-There was a laid down procedure for the filing of responses.-The affidavit amounted to a flooding of evidence and was a flagrant abuse of the rules. -The Petition has now changed significantly by the introduction of 152 new areas.-He inquired whether amendment of the Petition can be done through an affidavit.-Finally, he concluded that the "original" Petition can be prosecuted without the new affidavit.[49]

48 Mr Regeru appearing for Petitioners Messrs. Moses Kiarie, Dennis Itumbi, and Ms. Florence Jematiah Sergon complained of not having been served. See the case of, Republic of Kenya, Supreme Court of Kenya, Petition 5, 3 & 4 of 2013, Raila Odinga (1st Petitioner); Moses Kiarie Kuria, Denis Njue Itumbi, Florence Jematiah Sergon (2nd Petitioner); Gladwell Wathoni Otieno, Zahid Rajan (3rd Petitioner) and Independent Electoral and Boundaries Commission (1st Respondent); Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent) As Consolidated with Petition no. 3 of 2013 Moses Kiarie Kuria (1st Petitioner); Denis Njue Itumbi (2nd petitioner); Florence Jematiah Sergon (3rd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent Independent Electoral and Boundaries Commission (1st Respondent) and Consolidated with Petition No.4 of 2013 Gladwell Wathoni Otieno (1st Petitioner); Zahid Rajan (2nd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent). Available online at Kenya Law Website at, http://kenyalaw.org/caselaw/cases/view/87291/ , at 20 December 2015.

49 See the case of, Republic of Kenya, Supreme Court of Kenya, Petition 5, 3 & 4 of 2013, Raila Odinga (1st Petitioner); Moses Kiarie Kuria, Denis Njue Itumbi, Florence Jematiah Sergon (2nd Petitioner); Gladwell .

In arriving at its decision to expunge from the Court records the Petitioner's Affidavit together with all its annexure, the Supreme Court found among other things that the Petitioner's Affidavit in Reply in reality was a composite of seven different Affidavits, a fact that had not been cited by any of the legal counsel for the Respondents. The Court stated, *"… to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view."*[50] The Court noted that using this unusual method, the payment of filing fees had been evaded and the question of their probative value raised. However, since this specific issue had not been raised by any of Respondents, the Court did not dwell on it. It was the Court's view that had leave to file the Affidavit been properly sought, there may have been scope for it to be allowed if deemed appropriate.[51]

As regards the related allegations of lacking in courtesy or decorum on the part of Senior Counsel Oraro for introducing the lengthy affidavit at the said juncture without leave of Court, the judges were reluctant to adopt the same view and stated:

Wathoni Otieno, Zahid Rajan (3rd Petitioner) and Independent Electoral and Boundaries Commission (1st Respondent); Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent) As Consolidated with Petition no. 3 of 2013 Moses Kiarie Kuria (1st Petitioner); Denis Njue Itumbi (2nd petitioner); Florence Jematiah Sergon (3rd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent Independent Electoral and Boundaries Commission (1st Respondent) and Consolidated with Petition No.4 of 2013 Gladwell Wathoni Otieno (1st Petitioner); Zahid Rajan (2nd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent). Available online at Kenya Law Website at, http://kenyalaw.org/caselaw/cases/view/87291/, at 20 December 2015.

50 See the case of, Republic of Kenya, Supreme Court of Kenya, Petition 5, 3 & 4 of 2013, Raila Odinga (1st Petitioner); Moses Kiarie Kuria, Denis Njue Itumbi, Florence Jematiah Sergon (2nd Petitioner); Gladwell Wathoni Otieno, Zahid Rajan (3rd Petitioner) and Independent Electoral and Boundaries Commission (1st Respondent); Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent) As Consolidated with Petition no. 3 of 2013 Moses Kiarie Kuria (1st Petitioner); Denis Njue Itumbi (2nd petitioner); Florence Jematiah Sergon (3rd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent Independent Electoral and Boundaries Commission (1st Respondent) and Consolidated with Petition No.4 of 2013 Gladwell Wathoni Otieno (1st Petitioner); Zahid Rajan (2nd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent). Available online at Kenya Law Website at, http://kenyalaw.org/caselaw/cases/view/87291/ at 20 December 2015.

51 The Court stated, "As indicated earlier, under Rule 31 (h), the Petitioner could have applied for leave to be allowed to file further affidavits and/or additional evidence at the Pre – trial Conference. Of course it would be prudent for one to file such an application before the date of the Pre-trial Conference, so that it is before the Court, in time. However, in this case, the Petitioner proceeded to file an affidavit in reply bearing on its back six substantial affidavits, without any application for leave to do so!...Senior Counsel, Mr. Oraro submitted, to our understanding, that it was the intention to ask for such leave at the Pre – Trial Conference. We understand that he would have made such request orally. The request for leave was made at the tail-end of the Petitioner's submissions in response to the objection. It was almost reluctantly made, if we may say so." See the case of, Republic of Kenya, Supreme Court of Kenya, Petition 5, 3 & 4 of 2013, Raila Odinga (1st Petitioner); Moses Kiarie Kuria, Denis Njue Itumbi, Florence Jematiah Sergon (2nd Petitioner); Gladwell Wathoni Otieno, Zahid Rajan (3rd Petitioner) and Independent Electoral and Boundaries Commission

> "We however give the benefit of the doubt to counsel on the allegations or suggestions of lack of courtesy or decorum. From what we know of the Senior Counsel, he is the last one to show disrespect to any Court of whatever level. We only deem that it was a judgment or decision which was not founded on foresight, or was taken due to pressures emanating from the kind of Petition that was before the Court, and the time constraints. But the Respondents and the Court should not shoulder the burden of the consequences of such omissions or inadvertences."[52]

From the circumstances, the arguments, and the Court's ruling in the foregoing application by the Petitioner, several issues emerge. It could be argued that the Petitioner's legal team ought to have paid strict attention and taken all the necessary care required to put together the pleadings as best as possible within the compressed timelines and in the prescribed manner. The failure by the Court to admit the Affidavit did not go down well with the supporters of the Petitioner who read mischief on the part of the Court given the provisions of Article 159(2)(d) of the Constitution that elevate substance over procedural technicalities in the dispensation of justice.

Overall, the question that was left unanswered was whether the 900-page Affidavit, if allowed at that point, would have served the fortunes of the Petitioner well. Evidently, despite the legal misstep on the part of the Petitioner's legal team, the Court relied on the record of accomplishment built by Senior Counsel George Oraro over the years in arriving at a conclusion as to whether his omissions in filing the Affidavit procedurally were deliberate or careless. On the other hand, it must be stated that the legal counsel for the Respondents did discharge their duties robustly in arguing against the

(1st Respondent); Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent) As Consolidated with Petition no. 3 of 2013 Moses Kiarie Kuria (1st Petitioner); Denis Njue Itumbi (2nd petitioner); Florence Jematiah Sergon (3rd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent Independent Electoral and Boundaries Commission (1st Respondent) and Consolidated with Petition No.4 of 2013 Gladwell Wathoni Otieno (1st Petitioner); Zahid Rajan (2nd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent). Available online at Kenya Law Website at,, http://kenyalaw.org/caselaw/cases/view/87291/, at 20 December 2015.

52 See the case of, Republic of Kenya, Supreme Court of Kenya, Petition 5, 3 & 4 of 2013, Raila Odinga (1st Petitioner); Moses Kiarie Kuria, Denis Njue Itumbi, Florence Jematiah Sergon (2nd Petitioner); Gladwell Wathoni Otieno, Zahid Rajan (3rd Petitioner) and Independent Electoral and Boundaries Commission (1st Respondent); Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent) As Consolidated with Petition no. 3 of 2013 Moses Kiarie Kuria (1st Petitioner); Denis Njue Itumbi (2nd petitioner); Florence Jematiah Sergon (3rd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent Independent Electoral and Boundaries Commission (1st Respondent) and Consolidated with Petition No.4 of 2013 Gladwell Wathoni Otieno (1st Petitioner); Zahid Rajan (2nd Petitioner) Versus Ahmed Issack Hassan (2nd Respondent); Uhuru Kenyatta (3rd Respondent); William Samoei Ruto (4th Respondent). Available online at Kenya Law Website at, http://kenyalaw.org/caselaw/cases/view/87291/, at 20 December 2015.

admittance of the Affidavit without leave of the Court. Had they been indolent, there is no telling to what extent the Affidavit, if admitted, could have harmed their clients' respective cases.

With respect to the main trial, given that this case was primarily paper-based, the performance of the respective legal counsel was necessarily brought into sharp focus. Thus, only the lead counsel could make oral presentations before the Court therefore narrowing down the action to a team of highly specialized persons making presentations and arguments. It goes without saying that in their quest to project themselves as best as possible for the sake of representing their clients ably, the personalities, work styles and methods of the legal counsels became pertinent. Under the circumstances, a general question that may arise is whether through eloquence, loquaciousness or ebullience a lawyer can cure manifestly weak pleadings as filed. The answer of course would have to take into account the general rule that a party cannot introduce issues or seek remedies that have not already been cited specifically in their pleadings, as this would amount to changing the substance of the case.[53]

The mode of delivery for most, if not all, was characterized by articulate, clear, concise, logical and time conscious arguments. While it is a common phenomenon in public speaking for many to stretch their speech beyond the time allocated, advocates in this case were generally quite obedient with respect to confining themselves within the time allocated. To assist them, the Court had placed a stopwatch visibly at the helm so that they could pace themselves appropriately. The advocates were able to create a rapport with the Court thus creating an engaging atmosphere. Consequently, the Bench posed questions to the advocates to which they ably responded. Etiquette and decorum was observed all through the hearing of the Petition. However, a majority of the advocates did not properly address the bench as they constantly referred to the bench as 'My Lords' while failing to mention' My Lady' in recognition of the single female Judge on the bench, the Honorable Justice Njoki Ndungu. No doubt much can be said about each of the lead counsel who made representations in this case. However, not all can be studied in this Chapter and hence a few are examined with a view to underscoring certain pertinent issues about lawyering.

53 See Mr. Ngatia and Mr. Abdullahi's arguments against the introduction of the 900-page Affidavit by the Petitioner as cited in Section 3.2.2.

While it is a matter of opinion whether one found the personalities of the legal counsels in this case agreeable or otherwise, the key issue in this Chapter is whether aspects of their personalities and styles served to assist the case of their client or not. To arrive at an answer one would have a rich basket from which to pick from and assess the legal counsels ranging from the clearly calm temperaments and respectful mien of the lead counsels for the two lead contenders for the presidential ticket namely Mr. Oraro and Mr. Ngatia. Indeed many were awed by the reverential demeanor of the two senior lawyers as they addressed the court despite their very different aims. For Mr. Oraro, it was important that the presidential election be nullified and a further contest ordered, while for Mr. Ngatia it was imperative that Hon. Kenyatta's victory of the elections was upheld. The public was able to see how advocates can 'fight' fiercely but in a very sophisticated manner, with words rather than with hammers and tongs, and with much decorum. Clearly, the two senior advocates, did not allow the diametrically opposed interests of their clients to affect the discharge of their duty with the professionalism and etiquette required of advocates when before the court. There is no doubt that when advocate conduct themselves in a calm and dignified manner in the course of making oral presentations before the court, this allows for the court to actually listen to what they are saying. This is as opposed to being distracted by unnecessary sideshows that only serve to reduce the seriousness with which the Court should regard the respective client.

The demeanor of the two senior advocates can be contrasted with that of Mr. Ahmednassir Abdullahi appearing for the Chair of the IEBC. While Mr. Abdullahi was equally respectful of the Court, the substance of his submissions was made more potent by his use of hyperbole and strong worded statements that have already been reviewed previously. While many who have observed Mr. Abdullahi in action in other cases, whether in court or through the print and electronic media, may claim that his demeanor in this case was in keeping with his usual self, it is also true the stakes were high for his client in this case. A ruling overturning the results of the presidential election as announced by the Chair of the IEBC would naturally have placed grave doubts on the entire elections process at all levels. It is plausible that in the quest to defend the interests of his client to the fullest, it was essential that Mr. Abdullahi articulate his points in such a way as to produce strong reactions such as shock, indignation, and even anger from the Court, Petitioner, and even the public that were glued to their television sets. When asked at interview

whether it was his intention to produce the said reactions, Mr. Abdullahi denied any intention to annoy or anger the Court or any other persons. He in fact contended that his words were carefully chosen and deployed deliberately to highlight as strongly as possible the need for the Court to be quite careful and measured about its decision in a case such as this whose consequences were potentially far-reaching. Regardless of one's views about the merits of Mr. Abdullahi's abrasive technique, it is clear that it had the effect of catching the attention of all and bringing into focus the points of law and fact that his client wished to rely on in his response to the Petition. Of course it must be stated that where deployed in careless abandon, the possibility of harming a client's case is not remote.

The performance of Ms. Kethi Kilonzo, the lead counsel for the second Petitioner, AfriCOG, demonstrates another perspective. Due to her demure stature, many had been duped into thinking that the only female lead counsel in this case was harmless and probably a push over. However, they were not only surprised but impressed with her eloquence and the quietly forceful and methodical way in which she put her arguments across and fought her client's corner. Ms. Kilonzo's exemplary and articulate performance in the discharge of her duties had both the mainstream and social media awash with much praise and admiration. One such admirer posted their comments on one of the popular Kenyan blogs, namely The Kenyan Daily Express and stated:

> The heavyweights in the Supreme Court room, some of whom are the age of her father and others her former lecturers, does not seem to deter her resolve to represent her client in the historic case. Ms. Kethi Kilonzo has won the hearts of Kenyans on the social media and is now the talk of town even before the presidential election petition gets under way this morning, owing to her manner of prosecuting the case. Kethi, the daughter of Makueni Senator-elect and Education Minister Mutula Kilonzo who is also a Senior Counsel, is a typical case of like father like daughter. Kethi… has not only done her father proud, but has also shown that the best legal minds can be found among young people…Unlike some of her seniors who have exhibited emotions, she has been able to prosecute her case in a composed manner, but hammering the point home to the delight of many. Kethi's determination has demystified the myth that only seniors can handle major cases before the Court of Appeal and Supreme Court.[54]

54 See The Kenyan Daily Express Blog entry dated Wednesday, 27 March 2013 online at, http://kenyanexpress.blogspot.co.ke/2013/03/kethi-kilonzo-like-father-like.html at 20 January 2016.

To put the above deliberations about the personalities and styles of the legal counsel mentioned as well as the impact of the same on their client's cases into context, Pascoe's thoughts are considered illuminating. In his view, among other things a lawyer is not two things, namely, 'a hired gun' or a 'miracle worker'. As regards not being a hired gun, Pascoe opines that where a client's position is untenable, completely unrealistic and with not a chance of success in negotiations or at court, then the lawyer reserves the right to withdraw from such a case. Indeed the lawyer must be mindful of not hurting their credibility amongst colleagues and judges through arguing ridiculous positions. Pascoe recognizes that some lawyers may hold a different view on the latter and thus the client should feel free to hire such lawyers who have no scruples even though the result is usually disastrous. On the other hand, where a relief requested is not agreeable or acceptable to the other party in a negotiation or to the court, then this must be accepted as such. Pascoe reiterates that given that law is not an exact science and is in fact vague and uncertain in many areas, much about the ruling depends on a judge exercising their permissible discretion to arrive at a decision, which is only one among a range of possibilities. It is therefore essential that clients understand that their lawyer is enjoined to argue their case to the best of their ability in court but that the final decision, whatever it may be, rests with the court. Once the court decides, the lawyer can do no miracle except to appeal to a higher court where such option exists.[55]

The essence of Pascoe's musings above regarding whether the performance of an advocate in Court has any bearing on the success or otherwise of their case is quite simple to see. Evidently, where a case is founded on legs of straw, then regardless of the calmness or flamboyance with which advocates make their arguments in court, and regardless of whether the arguments are made in full view of glaring cameras or in a judge's chambers, it is unlikely that the court will find in their favor. However, the assertion that there are certain personal attributes, methods and styles on the part of a lawyer that may serve to advance or weaken the case of a client is reasonable. Overall, it is essential that in their oral presentations an advocate enables the court to fully appreciate the circumstances of their client through a careful and deliberative exposition and interrogation of the facts and applicable law. Notably, the judges of the

55 See advisory on the website of the law firm of Lawrence S Pascoe titled, The Client and Lawyer Relationship. Available online at, http://www.thepascoedifference.com/client-lawyer.html, at 06 January 2016.

Supreme Court of Kenya, no less, were impressed by the performance of the legal counsel in this case.

Finally, although widely speculated upon, it remains a matter of conjecture whether the legal counsel in this case behaved any differently under the intense spotlight of television cameras than they ordinarily would have in a judge's chamber. It would be interesting to establish through further research whether the lawyers played to the gallery in any way and whether they felt any more pressure than they usually might feel when prosecuting such a high stakes high profile case.

3.2.3 The Post-Trial Phase

The period following the announcement of the verdict is equally important. Following the culmination of the emotive trial in question that had raised tensions and the hackles of various legal counsels enormously, one would have imagined that this was a good time to 'settle scores'. On the contrary, the public was treated to a great display of collegiality as indeed congeniality between the legal counsels for the Petitioner's and Respondents alike. This confirmed the impeccability of character of all the legal counsels involved as well as their adherence to the professional ethics and responsibility required of advocates.

Senior Counsel Oraro also won much admiration for standing tall with such graciousness in defeat besides his client, Mr. Raila Odinga, during the press conference convened by Mr. Odinga to convey his acceptance of the verdict of the Supreme Court. This was no doubt a hugely disappointing moment for Mr. Raila Odinga who had hoped for a different outcome and most certainly for his legal team too. However, Mr. Odinga thanked his lead counsel and legal team for their spirited efforts during the grueling 14-day period paying glowing tribute to their persistence and tenacity throughout. In the end, Pascoe states that a *"lawyer should treat each client and each file as very important and try his [her] best…It is more a matter of the lawyer's general attitude. Although what the lawyer is doing may be routine work, it is extremely important to the client and deserves the lawyer's best efforts."*[56] It was clear from Mr. Odinga's speech that despite the outcome, he still thought highly of his lead counsel and legal team.

56 See advisory on the website of the law firm of Lawrence S Pascoe titled, The Client and Lawyer Relationship. Available online at, http://www.thepascoedifference.com/client-lawyer.html, at 06 January 2016.

4.0 Comparative Lessons about Lawyering from Three High Profile Cases around the World

4.1 Bush V Gore[57]

This was a case decided by the United States Supreme Court in an equally highly contentious Presidential Election. According to an array of newspaper reports at the time, most people went to bed certain that the then Vice President, Al Gore, had won the elections only to wake up and find that President Bush had won. The determination as to who had won lay with the Florida State vote count as the winning margin came down to a few hundred votes.[58] The matter was first heard by the Florida Supreme Court but eventually ended up in the US Supreme Court that voted 5-4 to put a stop to the Florida recount. The Supreme Court argued that the recount would violate the Equal Protection Clause of the 14th Amendment.[59]

The *Bush V Gore* case elicited tremendous public attention, not only in the US but abroad, since in contention was the office of the president reputed to be the most powerful in the world. The courts were working on a strict deadline because the matter was so urgent and was thus heard even over the weekend. In fact, the matter had to be decided before the Electoral College met in a month's time. For many, the media 'circus' that surrounded the case was a spectacle to behold. In an interview of three key players that were involved in the case, Bolado states that, *"The attorneys and judges involved in Bush v. Gore in 2000 had to deal with conflicting election statutes, untested legal theories, impossible deadlines and a media circus, all while knowing that the most powerful job in the world was on the line…"*[60]

The lead counsels for both Mr. Bush and Mr. Al Gore were Mr. Theodore B. Olson and Mr. David Boies respectively. The two counsels were well seasoned and highly respected which was unsurprising given the premium placed on the case. Indeed in an interview with Hudson Union[61] in 2014, Mr. Boies

57 531 U.S 98, 121 S. Ct. 525, 148L. Ed. 2d388, 69 US LW 4029 (2000).

58 See Article by Miller Centre of Public Affairs, University of Virginia titled 'George W. Bush: Campaigns and Elections.' available online at, http://millercenter.org/president /biography/gwbush-campaigns-and-elections, at 26 January 2016.

59 See Article by Miller Centre of Public Affairs, University of Virginia titled 'George W.Bush: Campaigns and Elections. Available online at, http://millercenter.org/president /biography/gwbush-campaigns-and-elections, at 26 January 2016.

60 See C Bolado, 'Key Players in Bush V. Gore Recall Whirlwind Appeal', Published at Law 360, http://www.law360.com/articles/621994/key-players-in-bush-v-gore-recall-whirlwind-appeal , at 18 December 2015.

61 H Union 'David Boies On How Ted Olson Beat Him For Bush vs Gore & Why He is a Great Lawyer' (2014), https://www.youtube.com/watch?v=UFw4eo7jrII, at 7 September 2015.

asserted that good lawyering skills require preparation, intelligence, and the ability to adapt. In his view, it was extremely important that one be able to make a good closing argument. As it were, Mr. Boies applauded his opposing counsel, Mr. Olson, for his rebuttal in this case terming it as key to succeeding in a case. Mr. Boies further stated that a closing argument must be able to meet each argument of the other side, repeat coherently the basic points and be specific and concise. On the other hand, Mr. Olson emphasizes that a lawyer should be able to, "assemble your arguments in a very cohesive and persuasive way."[62]

The Bush team, led by Mr. Olson had anticipated the possibility of going to the Supreme Court. For this reason, their arguments were tactically structured to satisfy the requirements and standards of the United States of America Supreme Court. This single tactic, among others, gave the Bush team a significant edge over the Al Gore team that admitted to never having anticipated ending up at the Supreme Court.[63] From all available literature, this was the Achilles Heel of the Al Gore Team.

However, despite defeating Mr. Boies, Mr. Olson had the following to say about him in a question and answer by Wahlberg,

> In Bush v. Gore, what I detected, what I observed, was David was an unbelievably effective advocate. His expression of his client's position and point of view and legal arguments were so crystal clear and persuasive. I tell him now that he almost persuaded me, but not quite. But I admired the way that he represented his client and the way he explained to the American people his client's position. The legal work that he and his team did was superb.[64]

While all the general standards of good lawyering studied in the preceding Sections are reaffirmed in the *Bush V Gore* Case, one similarity is outstanding. In the Kenyan presidential election petition, it will never be known whether if the 900-page Affidavit in Reply that was sought to be filed out of time by the Petitioner's lead counsel could have served to alter the decision of the Court

62 As above.

63 Bolado, above n 60.

64 See W Adam, "Q&A: Ted Olson", Published in: 2012 Washington DC Super Lawyers — May 2012, http://www.superlawyers.com/washington-dc/article/QandA-Ted-Olson/f9f423d9-a608-4dc4-a329-a0e85aa7c8a4.html, at 22 November 2015.

in the Petitioner's favor. Similarly, it will also never be known whether if the Al Gore Team had anticipated the case going to the US Supreme Court like the Bush Team had and structured its arguments accordingly, if the outcome would have been different. Evidently, from both instances it is manifestly clear that nothing should ever be left to chance in the course of preparing for a trial in order to seal every possible loophole or gap that may give the opponent undue advantage.

4.2 Orenthal James Simpson Case[65]

Orenthal James Simpson, popularly known as OJ Simpson, who was a famous actor and football star, was accused of the murder of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman, on 13 June, 1994. The only eye witness was a dog.[66]

In conducting investigations, the police found several incriminating clues including blood on OJ Simpson's car as well as blood drops leading to his mansion. Testing of these blood drops later showed that the blood was consistent with that of OJ Simpson, Nicole Brown Simpson, and Ronald Goldman.[67] In this regard, OJ Simpson hired the best legal defence team ever assembled in the United States of America. His legal team comprised so many legal stars that the news media dubbed it the "Dream Team." Each member of the legal team was famous. According to a CNN Special Report titled The OJ Simpson Trial- Drama of the Century,[68] there has never been in America more prominent lawyers in a single trial like the OJ Simpson Case. It is no surprise that the Presiding Judge, Lance Ito, in his opening remarks, told those assembled in the courtroom that he expected to see 'some fabulous lawyering skills'.[69]

Fatefully, the large team of lawyers proved to be a challenge as they did not get along. There was also competition to be in the spotlight amongst the lawyers.

65 Superior Court of California County of Los Angeles, in the Matter of the People of California v Orenthal James Simpson (1995).

66 E Robitaille "101 pieces of evidence that prove O.J. Simpson murdered Nicole", pages.infinit.net/reparvit/nicole12.html , at 26 April 2016.

67 S Christianson, Bodies of Evidence, Forensic Science and Crime (2006); D. Linder, The Trial of Orenthal James Simpson, (2000), http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm; K Cochrane, 'Marcia Clark: life after the OJ Simpson trial', The Guardian Newspaper 23 May 2011.

68 The O. J. Simpson Trial: Drama of the Century (2015), https://www.youtube.com/watch?v=XU2V7Hzead4 , at 3 September 2015.

69 D Linder, The Trial of Orenthal James Simpson, (2000), http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm. , at 25 January 2016.

However, despite this challenge, the defence team nonetheless mounted a strong case that eventually led to a not guilty verdict.[70]

The state was represented by Mr. Christopher Darden and Ms. Marcia Clark. Mr. Christopher Darden made the opening statements portraying OJ Simpson as an abusive and jealous husband. Ms. Marcia Clark followed with a statement laying out the facts proving OJ Simpson's guilt that the prosecution sought to establish during the trial. To support their case, the prosecution strategically called witnesses to the stand. The first set of witnesses suggested that OJ Simpson had the opportunity to kill his ex-wife and Ronald Goldman. This first group of witnesses included relatives and friends of his former wife; friends of OJ Simpson; and a 9-1-1 dispatcher. They all produced evidence to demonstrate OJ Simpson's motive and his history of domestic abuse. The second set of witnesses suggested that OJ Simpson had in fact used the opportunity available to kill. These witnesses included a limousine driver who had driven OJ Simpson to the airport the night the offence was committed and officers of the Los Angeles Police Department that established a timeline of events that left OJ Simpson with ample opportunity to commit murder.

The defence team strategy was to undermine the prosecution's evidence concerning motive, suggesting that OJ Simpson was ailing at the time he allegedly committed the offence and hence was physically incapable of committing the crime. They also suggested that the key physical evidence against their client had been planted by a Los Angeles Police Department Police officer who was a racist. The officer refused to respond to a question by OJ Simpson's defence lawyers as to whether he had manufactured or planted any evidence by asserting his Fifth Amendment[71] privilege.

The trial involved 126 witnesses and 857 pieces of evidence. It received the most intensive wall-to-wall media coverage of any criminal trial in history, with live televised broadcasts of the proceedings and endless commentary by scores. According to, Geoffrey Turban, a news anchor who was doing coverage for The New Yorker, there was a forest of satellite dishes and news reporters working in trailers all built so that the trial could go out to the world. Another anchor, Jim Moret, likened walking to the courtroom to attending a red carpet

70 D Linder, The Trial of Orenthal James Simpson, (2000),, http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm; A Liptak, 'Johnnie L. Cochran Jr., Trial Lawyer Defined by O.J. Simpson Case, is Dead at 67 ', The New York Times 30 March 2005; S Christianson, Bodies of Evidence, Forensic Science and Crime (2006).

71 The Fifth Amendment to the U.S Constitution provides the right against self-incrimination. The right provides that no person shall be compelled in any criminal case to be a witness against himself.

event.[72] Indeed, the case leading to OJ Simpson's not guilty verdict is still considered one of the biggest, most talked about in history. In an interview, Paul Thaler,[73] the communications department chair at Adelphi University, explained the effect the wide media coverage had on the trial.[74] They stated that it affected the behavior of lawyers, jurors, trial participants and witnesses. A witness that could have taken an hour to testify was on the stand for days. The lawyers took their time before the camera raising endless legal issues that resulted in endless hearings.

Notably, OJ Simpson's lead defence Attorney, lawyer, Mr. Robert Shapiro, was a renowned Los Angeles Criminal Defence Attorney with a track record of taking on some of the most difficult cases in his time. He was reputed for most of his cases being decided without trial with his main task being the negotiation of favorable punishment terms for his clients, a task he was exceptionally good at.[75]

Clearly, there are some marked differences between the OJ Simpson case and the Kenyan presidential election petition. Firstly, the OJ Simpson case was tried before a jury[76] that is typically composed of ordinary persons from society called upon to assist the court to arrive at a determination whether through making a decision or making a finding on a question of fact. On the other hand, the Kenyan case was tried wholly before a panel of judges. A trial by jury naturally introduces unique dynamics that have been widely interrogated in ample literature[77] in the style and methods used by legal counsel as they go about their duty in court. This is because it generates the need and urgency to impress the members of the jury, who are generally not

72 The O. J. Simpson Trial: Drama of the Century (2015), https://www.youtube.com/watch?v=XU2V7Hzead4, at 3 September 2015.

73 Paul Thaler has written two books about the impact cameras had during the O.J. Simpson Case; The Watchful Eye: American Justice in the Age of the Television Trial and The Spectacle: Media and the Making of the OJ Simpson Story.

74 L. Raptopoulos, Twenty years after the OJ Simpson trial, an expert explains the way cameras in court have changed the justice system, The Guardian Newspaper 17 June 2014.

75 The O. J. Simpson Trial: Drama of the Century (2015), https://www.youtube.com/watch?v=XU2V7Hzead4, at 3 September 2015.

76 According to *The Law Dictionary* online, Featuring *Black's Law Dictionary* Free Online Legal Dictionary 2nd Ed., a jury is, "A certain number of men, selected according to law, and sworn (jurati) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them. This definition embraces the various subdivisions of juries; as grand jury, petit jury, common jury, special jury, coroner's jury, sheriff's jury, (q. v.) A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact. Code Civil Proc. Cal.", http://thelawdictionary.org/jury/, at 28 December 2015.

77 See generally the arguments and propositions made by Deosaran, R in his book titled, 'Trial by Jury: Social and Psychological Dynamics', Published by the Institute of Social and Economic Research, University of the West Indies, 1985, ISBN 9766180008, 9789766180003.

schooled in the law, enough to convince them. Writing during the course of the trial, Anastaplo's following observations about the dynamics among the jury in the OJ Simpson case are also quite telling. He states,

> As the trial of O.J. Simpson moves into its fourth week,70 percent of the nation's lawyers have come to believe the celebrity defendant will [because of racial differences among the jurors] not be convicted of killing his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman-an increase of nearly 10 percent from five months ago.[78]

Evidently, there are manifest similarities and differences between the Kenyan presidential election petition and the OJ Simpson trial. For instance, in the same way there were fears that some members of the Supreme Court in the Kenyan case were non-partisan, equally there were allegations of non-partisanship on the part of some of the jurors. On the other hand, while the legal counsel in the Kenyan case adopted a much more dignified and measured poise despite being under the constant glare of television cameras, there was evidence of jostling and posturing among the members of the OJ Simpson defence team as well as playing to the gallery. It is however important to underscore the fact that the latter mentioned behavior of the legal counsel in the OJ Simpson case notwithstanding, the evidence available confirms their utmost seriousness in discharging their duties to their client within the framework of the judicial system applicable in the USA. While it is arguable which style of behavior on the part of legal counsel is better or preferable and to what extent, what is not in doubt in both cases is the commitment to doing the utmost best for the client.

4.3 Oscar Pistorious[79]

Pistorious, often referred to as the 'blade athlete', was a prominent Olympian who was charged with the murder of his girlfriend Reeva Steenkamp, at his Pretoria home in the early hours of 14 February 2013. The issue in contention was not whether he actually shot his girlfriend leading to her death but the question was the motive behind the shooting. In other words the issue for determination by the court was whether the murder was premeditated. The case was widely covered by the media as Mr. Pistorious is a public figure due

78 See G Anastaplo, On Crime, Criminal Lawyers, and O.J. Simpson: Plato's Gorgias Revisited, 26 Loy. U. CHI. L.J. 455 (1995) 470.

79 In the matter between the State and Oscar Leonard Carl Pistorius Case No CC 113- 2013, High Court of South Africa Gauteng Division, Pretoria.

to his success in the world of athletics. The proceedings were covered live on national and global media.[80]

The lead defence lawyer was Barry Roux, a Senior Counsel admitted to the bar in 1982 with about thirty-one years of experience having represented high profile clients[81]. The prosecutor, Gerrie Nel, was equally proficient with over thirty years' experience in the legal profession and key convictions to boot.[82]

Gerrie Nel focused on laying blemish on the character of the accused. His style of cross examination was termed as aggressive by many legal pundits. Mr. Nel had been nicknamed "bull terrier" or "bull dog' for his approach in cross examination and indeed during the cross examination, he sought to attack the character of the accused, displaying him as an irresponsible person who did not want to take responsibility for his actions, a gun-enthusiast and a man prone to getting jealous and throwing tantrums. He sought to demonstrate that Pistorius and Reeva's relationship had not been going on smoothly at the time of the shooting and that indeed Pistorius' actions were premeditated with his account in court not being probable but rather a reconstruction of the real facts.[83] A review of the televised recordings of the case indicate several instances when Mr. Pistorius buckled and wept, sometimes literally sobbing, under the severity of the Prosecutor's badgering on with the gruesomeness of the events on the night Ms. Steenkamp was shot dead. Severally, the presiding Judge, Honorable Masipa, had to adjourn the case to allow Pistorius to compose himself. Surprisingly, during one stage of the trial, Mr. Nel laughed out loud at a response by Mr. Pistorius, which did not go well with the presiding Judge, although he apologized profusely and promised that it would not happen again. Clearly, this action was quite at variance with the respectful conduct expected of a legal counsel in court whether seasoned or a novice.

80 For example, the trial was covered live by BBC News available at, www.bbc.com/news/world-africa-26985342, at 20 January 2016.

81 These include Dave King a Glasgow – born businessman and Rangers Football club director accused of defrauding the South African Revenue Service of 2.3 Billion Rand said to have ran up the highest unpaid tax in South Africa's history. D.Gover, 'Oscar Pistorius Trial; Who is Barry Roux Master of Cross Examination Representing Bladerunner?'(2014), http://www.ibtimes.co.uk/oscar-pistorius-trial-who-barry-roux-master-cross-examination-representing-bladerunner-1438794, at 25 January 2016.

82 Mr Nel has taken over other big cases such as the 1993 trial of two white supremacists for the murder of anti-apartheid activist Chris Hani. He also prosecuted former Police Commissioner, Jackie Selebi who was found guilty of corruption and handed a fifteen years prison sentence. This case has won him two awards, the Society of State Advocates' Prosecutor of the Year and the International Association of Prosecutors (IAP) Special Achievement Award 2012 L.Chang,' Who is Oscar Pistorius Prosecutor Gerrie Nel; Everything you need to know about South Africa's 'Pit Bull' (2014), http://www.bustle.com/articles/22874-who-is-oscar-pistorius-prosecutor-gerrie-nel-everything-you-need-to-know-about-south-africas-pit, at 26 January 2016.

83 J. Thompson 'Oscar Pistorius is called a liar- Trial day 20' (2014), https://www.youtube.com/watch?v=uw6PDga4MlA, at 5 September 2015.

On the other hand the defence's case was that Pistorius' actions were accidental and that the investigators were not credible with the evidence having been tampered with. As a defence lawyer, Mr. Barry Roux's tactic was to poke holes in the state's evidence in order to cast doubt in the Judge's mind. He was also aggressive in cross-examination employing a tactic of asking the same question severally to a witness at different times to test the truthfulness of their testimony. He was also keen to point out similarities in the prosecution's witness accounts and in their testimonies thus alluding to possible conspiracy or coaching.[84] Although in the end Mr. Pistorius was convicted, the Judge reached the verdict that he was guilty of culpable homicide, rather than murder. The result of this was that Mr. Pistorius received a much more favorable sentence than would otherwise have been meted out if the Prosecutor had had his way entirely.

The Pistorius case is similar to the Kenyan presidential election case insofar as the keen interest that was shown by the media and the public throughout the course of the trial. While the Kenyan case was largely paper based with, only legal counsel allowed to make oral presentations in court, in the Pistorius trial the accused and a medley of witnesses including expert witnesses were arraigned in court. Indeed the arraignment of witnesses in court did also take place in the preceding OJ Simpson Case. However, the Pistorius case is remarkable for three things compared to the Kenyan case. Firstly, in the Pistorius trial the vagaries of interviewing or interrogating the accused or victims in the court were quite apparent for all to see given the extreme reaction elicited from Pistorius during cross-examination by Nel, the tenacious Prosecutor. The Kenyan presidential trial had a significantly much more composed aura and clinical efficiency about it because the key players in Court were all trained lawyers working within the confines of the professional ethics that bind them. They were thus familiar with the court processes and what was expected of them and thus there was predictability about the way the case proceeded from day to day. It is also the case that there were hardly extreme emotional reactions by the legal counsel for the Petitioners and Respondents in the Kenyan Case because they were simply executing their role as advocates on behalf of their clients. If at all the advocates were supporters of the respective political parties to which their clients belonged,

84 D. Cover 'Oscar Pistorius Trial: Darren Fresco 'Engineered Evidence' About River Vaal Trip, Claims Barry Roux' (2014), http://www.ibtimes.co.uk/oscar-pistorius-trial-darren-fresco-engineered-evidence-about-river-vaal-trip-claims-barry-1439925, at 26 January 2016.

this did not emerge because they were merely undertaking a professional role for which their political leanings were irrelevant.

Secondly, in the Kenyan Case a clear intention could be discerned from the judges as to the decorum they expected the parties to the case to keep. In the few instances where harsh words or opinions[85] were expressed, the judges of the Supreme Court were quick to admonish or urge temperance on the part of the concerned party. On the other hand, although from an observation of the recordings of the trial Judge Masipa was entirely in control of the Court, she was loathe to intervene and urge restraint on the part of the Prosecutor, Nel, whenever he used harsh methods and even cruel language in the course of cross-examining Pistorius.

Thirdly, in the Pistorius trial good use was made of expert witnesses who testified on various technical aspects that arose. Among other experts there was mental health expert, forensic experts and experts in ballistics. The experts were not spared either in the cross-examination process with the Prosecutor often poking holes in their testimony and ridiculing their evidence. Nonetheless, the Court and the public became well educated on key issues that were pertinent towards the determination of the case. However, in the Kenyan presidential election petition, while there were equally complex issues regarding the elections process for which public testimony by experts with the benefit of clarification through cross-examination might have been useful, there was no space for the same. The compressed timelines for decision-making in the Kenyan case precluded the opportunity for placing the Petitioners, Respondents, or experts in the witness box, except through written submissions canvassed by the legal counsel.

As regards lessons for Kenya, overall, the three preceding international cases and the Kenyan presidential election petition are similar in that they were heard or prosecuted in the public glare and widely covered by the media. They all involved well-known personalities and most importantly for this Chapter brought together great legal minds in their respective jurisdictions. As regards trials that are prosecuted publicly under the spotlight of the media, an abundance of literature and thinking warns of the dangers inherent in such trials where the parties to the case may be unfairly judged and vilified in the court of public opinion that does not obey the strict rules and principles

85 See the earlier cited example involving Mr. Rebello in Section 3.1. See also the opinion of the Court with respect to allegations of Senior Counsel Oraro lacking in courtesy and decorum because of filing the 900-page Affidavit in Reply out of time in Section 3.2.2.

applied in courts. There also might arise unintended consequences such as deepened polarization among the public depending on the issues at trial. In an illuminating Article written for the Washington Post and titled, *'How the O.J. Simpson murder trial 20 years ago Changed the Media Landscape'*[86], Babb observes the following:

> The cameras came on, and America stopped to watch…"White, black, immigrants who were from different races, women and men, rich and poor — and everyone was glued to the television," said Charles Ogletree, a professor at Harvard Law School who directs the school's Institute for Race and Justice… "What I realized is, this is entertainment," said Gerald Uelmen, one of Simpson's defense attorneys. "This is not news."…Players in the Simpson drama, large and small, quickly became international celebrities, millions glued themselves to televisions for the case's next twist, and TV producers and sports agents began preparing for a country whose trust in the criminal justice system and professional athletes had taken a direct hit. As for Simpson, he would be acquitted in October 1995, a verdict that split the nation… "It made a lot of things look pretty rotten, made things look pretty raw," said Greta Van Susteren, a former adjunct law professor at Georgetown University who became a star for her legal analysis on CNN during the Simpson proceedings and now hosts a nightly show on Fox News. Its conclusion quieted little of the talk that America remained divided; opinions on the case and verdict traveled racial lines, and two decades later, they often still do. "When you ask people today, African Americans will overwhelmingly say that, not that he's not guilty, but the government didn't prove that he was guilty," said Ogletree, the Harvard law professor. "White people will say that he killed two white people and got away with it."

5.0 Conclusions and Recommendations

Based on the discussions in this Chapter, five key conclusions emerge.

Firstly, with reference to lawyering, it is clear that any available checklist for good lawyering skills cannot be exhaustive. The circumstances of each case are different given that that the bench is different in every case, the trials unfold differently in each jurisdiction, and the applicable laws and rules are different. However, there are some basic skills of good lawyering including;

86 See Article by Babb, Kent, 'How the O.J. Simpson murder trial 20 years ago Changed the Media Landscape', Washington Post, 9 June, 2014, https://www.washingtonpost.com/sports/redskins/how-the-oj-simpson-murder-trial-20-years-ago-changed-the-media-landscape/2014/06/09/a6e21df8-eccf-11e3-93d2-edd4be1f5d9e_story.html , at 22 December 2015.

proper and thorough preparation, development of a cogent strategy as to how one should best present their case in court, and the use of proficient and coherent methods in the presentation of one's arguments in Court. With respect to the latter, simplicity in expression, conciseness and persuasion are clearly desirable skills for any lawyer to have.

While some of the above skills are natural to some, for the most part they are acquired through a process of training and correction. Whichever the case, the objective of legal counsel must be one, namely to apply one's knowledge and skills to their utmost best towards representing their client's interests as best as possible. Evidently, observance and adherence to laid down rules of professional ethics and responsibility is key to achieving the same. Notably, the legal counsel in the 2013 presidential election petition exhibited commendable levels of good lawyering during the course of the trial. The same cannot authoritatively be said of the quality lawyering in the lower courts. Thus, to improve the quality of lawyering in the lower courts, it is incumbent upon the Law Society of Kenya as the professional association for lawyers in Kenya, and law schools, to pay more attention to this as a substantive issue for improvement and debate in the legal profession and the enhancement of the law curriculum respectively.

Secondly, it is as much the duty of the court to enforce the standards of good lawyering as it is the duty of each lawyer to be well appraised of the same. The intervention of the judges in the Kenyan presidential election case saw the adoption and development of a dignified approach to the manner in which the legal counsel carried out their roles. On the other hand the reluctance on the part of Judge Masipa to guide the clearly uninhibited Prosecutor, Gerrie Nel, towards adopting a more restrained approach in the conduct of his duties resulted in the frequent interruption of the trial to allow the accused, Oscar Pistorius, time to calm down. Thus magistrates and judges in the various courts in Kenya should be proactive in ensuring that basic decencies are observed in court in order to promote the interests of justice by affording each player a conducive environment to prosecute their brief. Clearly, where such decencies are not observed, unnecessary distractions and sideshows take center stage which obfuscates issues to the detriment of clients and the advancement of jurisprudence.

Thirdly, the impact of widely published media coverage during a high profile trial is both good and undesirable. The information, education and

communication value of such media coverage was found to be quite important in keeping the public appraised of important developments that may have a significant impact on them. However, on the flip side it was discovered that such intrusive and invasive media coverage may interfere with the trial by creating suspicions of bias, real or perceived, and thus not affording the parties the right to fair trial. Thus, there is clear need for control measures to be put in place through legislation, the enactment of regulations, and the issue of practice rules by the legislature and the office of the Chief Justice respectively. This should aid in the achievement of the goal of a fair trial through utilization and implementation of best practice.

Fourthly, in order to ensure that all legal counsel, whether acting in high or low profile cases, are adherent to the professional standards expected of them and thus habitually practice good lawyering, it is essential that a competent punishment regime is instituted to deal with errant lawyers. Cases of lawyers who cause clients to suffer substantial and even irreparable harm to their interests because of carelessness on the part of the lawyer are rife in Kenya. Indeed many are the complaints by dissatisfied clients that make it to the opinion columns of daily newspapers outlining a cacophony of errors and mistakes that clearly point to professional and even criminal negligence on the part of their advocate. While an advocate is under no duty to ensure that a client wins a case, they are definitely under a duty to provide the correct advice and guidance to their client so that they can make a considered decision about the way forward. The rectification of these occurrences requires the robust use and application of disciplinary and enforcement mechanisms by the relevant regulatory bodies and agencies.

Lastly, an examination of the Continuous Professional Development calendar for the Law Society of Kenya for the last three years reveals that the topics availed for advocates to refresh their knowledge or learn more about are mainly of a substantive law nature. There are hardly topics that cover the essence of good lawyering. This spills over into the articles that are written by advocates in the Law Society of Kenya Journal. Indeed there is hardly much research, if at all, on the trends and patterns of lawyering in Kenya. The data and statistics from such research would go a long way towards enabling targeted training of law students and refresher courses of lawyers on the subject of lawyering and help improve the quality of lawyering in the country.

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