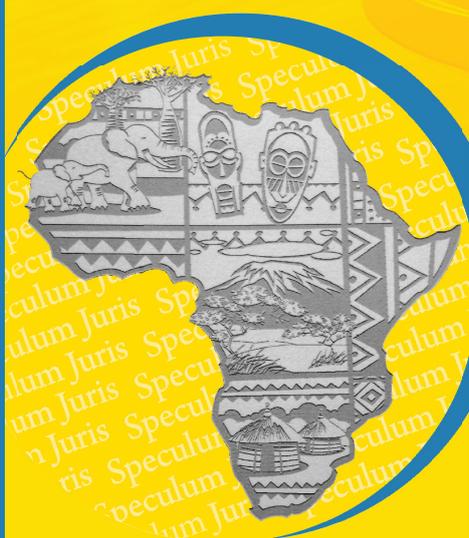


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Kenya's annulled presidential election: A step in the right direction?

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Abstract

On 1 September 2017, in a first of its kind, the Supreme Court of Kenya by a majority decision annulled the presidential election. The Independent Electoral and Boundaries Commission (IEBC) had announced that the incumbent, Uhuru Kenyatta, had won the election with 54% of the vote, compared to that of his rival, Raila Odinga's 44%. As with previous elections, this contest was highly emotive and split the country into two. Fears abounded of a repeat of the 2007 mass protest and post-election violence, particularly as the opposition had rejected the courts as arbiters given their past experience. Contrary to this earlier rejection, Raila Odinga petitioned the Supreme Court, which, in an unprecedented move, invalidated the results and called for a fresh election. Externally, the decision has been applauded as being transformative. Locally, the reaction is more nuanced. A section of society believes the judgment restored the credibility of the court in a context of rampant election irregularities. Another section believes the court delved into politics through a dangerous form of judicial activism. These divisions are reflective of the positions taken by the majority and minority judgments. The majority judgment is framed around the importance of the means, or the process of conducting an election, and not just the end, or outcome of the election. In contrast, the minority decision sees this approach as onerous because it calls for an election devoid of administrative errors, and overturns an earlier precedent requiring a nexus between alleged irregularities and the outcome of the election. This chapter hopes to analyse these two viewpoints by drawing upon jurisprudence from different jurisdictions.

Keywords: constitutionalism, democracy, Kenya, presidential election petitions, electoral reform, court intervention

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1 INTRODUCTION

Elections and the adjudication of disputes arising therefrom are embedded in constitutionalism and the rule of law. Constitutionalism in this sense speaks to the adherence of both the letter and spirit of a constitution; that is, the core values upon which a constitution is based (such as a democratic governance system, human rights, independence of the judiciary and the rule of law). Given the direct link between elections and the governance structures within a constitution, elections and the resolution of disputes emanating therefrom are of great importance since it is through elections that government is constituted and power distributed. Thus, the conduct of free and fair elections in an environment where political leaders are committed to constitutionalism contributes to quality governance. In the same vein, the independence of national institutions responsible for the elections (such as the electoral commissions) and adjudication of disputes that may arise thereafter (such as the judiciary) ought to be guided by similar ideals. It is these ideals of establishing a new dispensation of democratic governance in which the management of elections was undertaken in line with constitutionalism that formed the heart of the Constitution of Kenya, 2010 (Constitution). It is on the same basis that the decision of the Supreme Court in August 2017, annulling the presidential election, has attracted great attention and specifically, whether the same decision was a highpoint of re-establishing constitutionalism and the rule of law.

On 8 August 2017, the people of Kenya turned up at various polling stations to exercise their democratic right to elect their representatives as provided for under article 38 of the Constitution. The IEBC declared the incumbent, Uhuru Kenyatta, the winner bringing to a temporal halt a long and emotive campaign between two rival political formations that had dragged for the whole of 2017.¹ In a twist of events, the Supreme Court of Kenya in *Raila Amolo Odinga v Independent Electoral and Boundaries Commission (Raila Odinga 2017)*² annulled the presidential election and ordered the IEBC to conduct a fresh election within 60 days.³ A fresh election was conducted on 26 October 2017 across the country save for 25 constituencies where elections were postponed due to insecurity. In their decision to annul the August 2017 election, the Supreme Court held that the presidential election was not conducted in accordance with the principles contained in the Constitution and that the irregularities and illegalities therein were substantial so as to have affected the integrity of the elections.⁴ This was the first time an African court had nullified a presidential election.⁵

Against this background, this chapter is organised as follows: first, it provides an overview of presidential elections in Kenya; second, it outlines the electoral institutional and legal framework; third, it provides an overview of the outcome of the Supreme Court decisions in the Odinga 2013 and 2017 petitions; fourth, it discusses the Court's approach in addressing questions in relation to illegalities and irregularities, and the impact that these may have on the electoral process; and finally, it examines the rationale of the Odinga 2017 decision, and in particular its application of the substantial effect rule *viz a viz* other jurisdictions that have reached a similar outcome, albeit with their own unique *raison d'être*.

2 AN OVERVIEW OF PRESIDENTIAL ELECTION PETITIONS IN KENYA

The quest for political office in Kenya has never been about democratic representation but rather about access by an elite political class to national resources and their ability to mobilise around ethnicity.⁶ Since the government is the largest employer, supplier, and consumer, it is arguable that the one who controls government acquires access to all these resources. In this regard, the political elite has for a long time understood this control as a powerful lever through which they can exercise patronage and acquire other favours such as individual wealth and political power. This patronage is aimed at their ethnic base and becomes a basis for the ethnic mobilisation of the electorate.

1 Obwocha & Kinyanjui "Celebrations as Chebukati declares Uhuru winner" *Daily Nation* 11 August 2017.

2 Presidential Election Petition No 1 of 2017.

3 Khamisi *Looters and Grabbers: 54 Years of Corruption and Plunder by the Elite 1963-2017* (2018) 622.

4 *Raila Odinga 2017*.

5 Freytas-Tamura "Kenya Supreme Court nullifies Presidential Election" *New York Times* 1 September 2017.

6 Ndegwa "Citizenship and ethnicity: An examination of two transition moments in Kenyan politics" 1997 *American Political Science Review* 599.

Voting patterns are, therefore, largely informed by one's ethnic background. Political ideology is irrelevant as most political parties draw their identity from specific ethnic communities.⁷ Individuals seeking power have found a way to mask their needs to appear synonymous with the needs of their ethnic communities. Communities are made to believe that if "their son or daughter" wins the election then the "goodies" of the state will automatically flow to them. This effectively makes elections about a race and conflict between different communities, while in reality, the elections are in fact about the political elites' own access to power and resources.

Consequently, the combination of access to resources and ethnic mobilisation gives rise to a toxic environment of bitter political rivalry where so much is at stake that competing rivals do not hesitate to use undue political influence and even violence.⁸ This is particularly the case with presidential elections where the institution both past and present is viewed as the centre of dispensing patronage and favours.⁹ As the ultimate adjudicating forums for resolving disputes, the courts must contend with the intense political climate that surrounds presidential petitions. It is interesting to reflect upon their history in handling presidential petitions.¹⁰

The history of presidential petitions dates to 1992 after the first multi-party election was conducted. Cabinet ministers Kenneth Matiba and Charles Rubia, and then political activist Raila Odinga were arrested and detained on 4 July 1990 for demanding the re-introduction of multi-party democracy. The political tension in Kenya in the early 1990s laid a strong foundation for the Kenyan Constitution.¹¹ Save for 2002, all presidential elections in Kenya have been disputed. Most of these petitions have been dismissed on technicalities. For instance, in 1992 six of the seven petitions were dismissed on procedural technicalities.¹² In the 1997 election, the petitioner unsuccessfully raised issues regarding the "free and fair" doctrine of the electoral process. Unfortunately, the substance of the petition went unaddressed, the court instead relying on technical grounds of whether service of the petition had been properly effected upon the respondent.¹³ As mentioned, the 2002 election did not give rise to any petition, largely because the margins of the win were huge and the process by historical standards was perceived as credible by both local and international observers. However, the history of the court's decision-making process continued to cast a shadow on the future and by the time of the next election in 2007, the legitimacy of the judicial system remained subject to question, as it was still perceived to be under the control of the executive.¹⁴ The blatant manner in which the IEBC declared the incumbent the winner following massive irregularities even after its chairman admitted that he "did not know" who had won the election, was the last straw. Instead of turning to the courts, the opposition opted for street protests that would eventually lead to post-election violence that shook the country's conscience and acted as a springboard for accelerated judicial reforms.

Reforms that aimed to address the causes of the post-election violence were eventually put in place under a government of national unity composed of the incumbent and opposition parties. These reforms sought to, *inter alia*, address the underlying root causes behind the electoral cycles of violence inherent in a governance system that marginalised sections of its population as well as the immediate causes of the violence, which mainly related to the role and the constituency of the IEBC as an impartial electoral arbiter. The reforms culminated in the promulgation of the 2010 Constitution and new legal dispensation. It was under this new dispensation that the 2013 petition of *Raila Odinga v Independent Electoral and Boundaries Commission (Raila Odinga 2013)* was filed citing as its grounds, massive electoral fraud, and malpractices in the electoral process. With the reforms and a newly constituted judiciary, there was great hope in the outcome of this petition. However, there was an air of disappointment when the Supreme Court unanimously dismissed the petition without affording the public of

7 Omolo "Political ethnicity in the democratisation process in Kenya" 2002 *African Studies* 209.

8 Lynch *I Say To You: Ethnic Politics and the Kalenjin in Kenya* (2011) 2.

9 Ibid.

10 Bratton & Kimenyi "Voting in Kenya: Putting ethnicity in perspective" 2008 *Journal of Eastern African Studies* 272.

11 J Mawira & T Kagwe *Wanjiku's Journey: Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum* (2010) 9.

12 Anonymous "The grim history of presidential petitions in Kenya" *Daily Nation* 11 August 2017.

13 *Mwai Kibaki v Daniel Toroitich Arap Moi* Civil Appeal No 172 of 1999.

14 International Development Law Organization *Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond* (2017) 4.

the *raison d'être* of the individual judges that comprised the bench.¹⁵ In paragraph 304 of its judgment, the court laid down the test for overturning a petition, namely, the need to establish a nexus between the process (in this case the malpractices that had occurred) and the eventual outcome of the election that is, whether the nature of the irregularities observed were so abundant that it raised doubt on the outcome of the election.

At the centre of the controversy in all past elections has been the role of the electoral management body as a neutral arbiter in the electoral process.¹⁶ Both before and after the 2010 Constitution, the IEBC has been accused of failing in its mandate by one side or the other of the political divide.¹⁷ As far as petitions are concerned, the position taken by the electoral body has established a pattern that has further called into question its role as a neutral arbiter. The electoral body adopts the same line of argument as the respondents (normally the incumbent), which in turn defends the IEBC's role in the conduct of elections, raising questions as to its neutrality *viz a viz* its ability to conduct a free and fair election.¹⁸

The 2013 judgment of the court extended this doubt to the newly reconstituted judiciary, leading some commentators to suggest that it was easier to remove a sitting president through the ballot than through an election petition.¹⁹ In that judgment, the court refused to admit vital documents in support of the petition calling into question whether the country had entered into a new democratic dispensation where the courts were a credible option as neutral arbitrators that can render judgment against an incumbent where evidence was available to support this conclusion. More importantly, the conclusion reached in the 2013 judgment stands in contrast to that of the 2017 decision, both of which were guided by the same legal framework; that is, that established under the 2010 Constitution.²⁰ As later discussed in this chapter, the judgment in the 2013 petitions insisted that the standards established the Kenyan Constitution would only be breached if one could show a nexus between the irregularities in an election and the eventual outcome of the presidential results. In contrast, the later decision of 2017 highlights the importance of the process and not necessarily the result.

Before discussing both decisions, it is useful to provide a summary of the legal framework. It will be demonstrated that the framework was the culmination of years of agitation for electoral reform due to illegalities and irregularities that had characterised previous elections.

3 THE ELECTORAL LEGAL AND INSTITUTIONAL FRAMEWORK

The relevant laws governing election in Kenya include the following: The Kenyan Constitution; the Elections Act, 2011; the Election Laws (Amendment) Act, 2016; the Political Parties Act, 2011; the Independent Electoral and Boundaries Commission Act, 2011; and the Election Offences Act, 2016. Cumulatively, the Constitution together with these accompanying statutes outline the electoral process and key institutions involved in the conduct of elections. At the centre of this is the IEBC, a body that is established by the Constitution.²¹ Its mandate is to conduct and supervise elections and any referendum that may be necessary as well as any other elections that Parliament may enact.²² In addition, the IEBC is tasked with conducting continuous voter registration as well as revise and keep a current list of voters. It is further mandated to regulate the nomination process for candidates taking part in elections as well as settle electoral disputes arising from the nominations, but not election petitions. The IEBC is further responsible for conducting voter education and sensitisation and is charged with the mandate of facilitating external observers from the international community who visit the country to satisfy themselves that the elections have been carried out in a free and fair manner. The Commission also regulates the amount of money to be spent by candidates or a political party during the campaign period as well as establishing a code of conduct in which parties

15 Cheeseman "State of the Nation: Kenya After the Fragile 2013 Polls" *Daily Nation* 17 February 2014.

16 Genyi & Ortom "Deciding elections in Africa: Comparative role of the courts and the ballot box in Nigeria and Kenya" 2017 *Advances in Social Sciences Research Journal* 145.

17 Anonymous "Kenya Government urges critics not to protest over electoral body" *VOA News* 19 May 2016.

18 Awuor & Achode "Comparative Analysis of Presidential Elections Petitions in Kenya and Other Jurisdictions" *Kenya Law* 19 May 2016.

19 Anonymous (n 13 above).

20 Cheeseman, Kanyinga, Lynch, Ruteere & Willis "Kenya's 2017 elections: winner-takes-all politics as usual?" 2019 *Journal of Eastern African Studies* 215–234.

21 Article 88(1) of the Constitution of Kenya 2010.

22 Article 88(4) of the Constitution of Kenya 2010.

contesting in the elections must adhere to.

The Constitution guarantees certain rights to its citizens with regard to elections, which include the right to be registered as a voter, vote by secret ballot for any candidate they desire,²³ be a candidate (and if elected, to hold public office) and participate in a political party.²⁴ Every adult citizen of sound mind has the right to be registered to vote²⁵ provided that they have not been convicted of an election offence during the preceding five years.²⁶ Article 81 of the Kenyan Constitution gives a clear outline of what is to be the hallmark of an election exercise in Kenya. Certain principles must be adhered to such as the two-thirds gender rule for aspirants in a party, representation of persons with disabilities, universal suffrage, free and fair elections that facilitate secret ballot, and is without violence or intimidation.²⁷ During elections, the IEBC is mandated to ensure that they employ appropriate mechanisms to avoid election malpractice and also to make sure the voting system used is simple, accurate and transparent.²⁸ The votes cast are to be counted and announced by the presiding officer at each polling station as soon as is practicably possible.

In terms of presidential elections, candidates may be nominated by a political party or be independent, provided that they are endorsed by a minimum of two thousand voters from each of the 47 counties. After tallying the votes following an election the IEBC declares the individual who receives more than half the votes cast and at least 25% of the votes cast in each county, as president.²⁹ The chairperson of the IEBC must make this declaration within seven days of the election date and deliver a document indicating the winner to the Chief Justice and the incumbent president.³⁰ If no candidate attains this threshold, a fresh election is held where the contest is between the two candidates who received the highest number of votes,³¹ and the one who receives the most votes is declared president.³² In either case, if no petition challenging the presidential elections is made within fourteen days after the declaration of the winner, the Chief Justice shall swear in the president-elect.³³ There is an elaborate statute that outlines the procedure for the swearing-in of a president-elect.³⁴

The Supreme Court is the only court with jurisdiction to hear presidential election petitions.³⁵ As mentioned, the IEBC should file a presidential petition within seven days of the announcement of the presidential election results³⁶ and the Supreme Court has fourteen days to hear and determine the election petition.³⁷ A pre-trial conference is held within eight days³⁸ followed by a trial that is conducted by way of affidavit evidence, written submissions and oral highlights.³⁹ At the close of a hearing, the court hands down its decision, although it may reserve its reasons for the decision to a later date, but not later than fourteen days. The decision of the court is final⁴⁰ and in the event of an invalidation of the presidential election, a fresh election will have to be held within 60 days of the court judgment.⁴¹

4 THE RAILA ODINGA 2013 DECISION

In reaching its decision to uphold the presidential election, the Supreme Court discussed two main issues: The standard or burden of proof applicable in election disputes and the effect of illegality and irregularity in election results.⁴² The court adopted the rule in civil cases that the

23 Article 38(3) of the Constitution of Kenya 2010.

24 Article 38 of the Constitution of Kenya 2010.

25 Constitution of Kenya 2010, Article 83(1)(b).

26 Section 5(3) of the Elections Act.

27 Article 81 of the Constitution of Kenya 2010.

28 Article 86 of the Constitution of Kenya 2010.

29 Article 138 of the Constitution of Kenya 2010.

30 Article 138(10) of the Constitution of Kenya 2010.

31 Article 138(4) of the Constitution of Kenya 2010.

32 Article 136(2) of the Constitution of Kenya 2010.

33 Article 141(2)(a) of the Constitution of Kenya 2010.

34 Assumption of the Office of the President Act 21 of 2012.

35 Article 87(1) of the Constitution of Kenya 2010.

36 Article 140(1) of the Constitution of Kenya 2010.

37 Article 140 of the Constitution of Kenya 2010.

38 Rule 14 of the Supreme Court (Presidential Election Petition) Rules, 2017.

39 Rule 17(2) of the Supreme Court (Presidential Election Petition) Rules, 2017.

40 Rule 27 of the Supreme Court (Presidential Election Petition) Rules, 2017.

41 Article 140(3) of the Constitution of Kenya 2010.

42 *Raila Amolo Odinga v Independent Electoral and Boundaries Commission* [2017] eKLR.

burden of proof in an election petition lies with the petitioner.⁴³ In this regard, the Supreme Court relied on the Nigerian case of *Abubakar v Yar'Adua*,⁴⁴ where it was held that the burden of proof lies with the petitioner to prove non-compliance with electoral law and to show that such non-compliance affected the results of the election.⁴⁵ The Supreme Court also cited the jurisprudence established in the Ugandan election case of *Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission (Kizza Besigye)*,⁴⁶ in which the Supreme Court of Uganda held that it was upon "the petitioner to prove his case to the satisfaction of the Court." In this regard, it has been argued that the application of this burden proof in electoral disputes raises the challenge that a petitioner who approaches the court is required to prove a case against the IEBC, when the Commission is the custodian of all relevant records relating to the election.⁴⁷ This leaves the petitioner in a disadvantaged position in proving its case given that it is highly probable that the IEBC would frustrate or block access to certain records crucial for the determination of a case.⁴⁸

To its credit, the Supreme Court on its own motion ordered independent scrutiny of the forms used by the IEBC to declare the presidential results.⁴⁹ The court, however, did not take into consideration the results of the scrutiny in its judgment. This was unexpected, as the scrutiny would have revealed that there were several electoral forms missing and duplicated. This has led some commentators to suggest that the leniency afforded to the IEBC by the Supreme Court offended the "missing evidence rule".⁵⁰ The rule provides that where a party fails to produce evidence that would have been proper to present, a court is allowed to conclude that the evidence would have been damaging to the party's case.⁵¹ In sum, *Raila Odinga 2013* decision can be criticised for placing a too onerous burden on a petitioner and for its failure, amidst the request put to the IEBC, to indicate how the applicable standard of proof had been met.

As pointed out, the Supreme Court also dealt with the impact of an illegality and irregularity to election results as provided for under section 83 of the Elections Act, 2011, which provides that, "no election shall be void by reason of non-compliance with any written law ... if it appears that the non-compliance did not affect the result of the election." In relation hereto, the court noted that the evidence tendered by the petitioners did not disclose any profound irregularity in the management of the electoral process.⁵² Although the petitioner raised questions around the electronic facilitation of the presidential election, the court opined that that technology has not yet achieved a level of reliability for it to be considered a permanent or irreversible foundation for the conduct of the electoral process and for this reason a presidential election cannot be nullified on grounds of technological devices.⁵³ As will be shown, the Supreme Court took a completely different view in the 2017 decision as far as the question of irregularities is concerned.

5 THE ODINGA 2017 DECISION: RAILA AMOLO ODINGA & STEPHEN KALONZO MUSYOKA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & UHURU MUIGAI KENYATTA⁵⁴

The petition following the outcome of the August 2017 election, presented an opportunity for the Supreme Court to explain the substantive ground upon which an election could be annulled. In this regard, the court laid out two tests. The first, the court held, was the constitutional requirement based upon the principles that the "the electoral process and results should be simple, yet accurate and verifiable." In their judgment, the Supreme Court

43 n 42 above.

44 *Abubakar v Yar'Adua* [2009] All FWLR (Pt. 457) 1 S.C.

45 *Raila Odinga v Independent Electoral and Boundaries Commission* Petition No 5 of 2013 para 184; *Buhari v Obasanjo* (2005) CLR 7(k) (SC).

46 Election Petition No 1 of 2001 [2007] UGSC 24.

47 n 44 above.

48 Cheeseman et al (n 21 above) 215–234.

49 *Raila Odinga 2017*.

50 Anonymous "Supreme Court pulls off surprise in verdict" *Daily Nation* 1 September 2017.

51 n 48 above.

52 *Raila Odinga 2017*.

53 *Raila Odinga 2013* para 237.

54 *Raila Odinga 2017*.

concluded that “the presidential election of 8 August 2017, did not meet that simple test” and they were unable to validate it.⁵⁵ The second test concerned the question whether there were illegalities and irregularities committed in the conduct of the elections.⁵⁶ The court turned to examine the petitioner’s allegations that the election process was not only conducted devoid of constitutional aspirations but that it was also marred with irregularities and illegalities that rendered its result unverifiable and thus indeterminate. The court dealt with both concepts separately, but first it sought to distinguish between an irregularity and an illegality.

The court defined illegalities as a breach of the substance of a specific law while irregularities denote a violation of specific regulations and administrative arrangements put in place.⁵⁷ The petitioners in this context claimed that the presidential election of 8 August was characterised by systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election. Some of the alleged illegalities included blatant non-compliance with the law, while irregularities included infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the IEBC, for the management of the elections.

6 ILLEGALITIES

In addressing the question of illegalities, the court considered both the use of inducements and compulsions as two ways in which an incumbent administration may exercise undue or improper influence on the electoral process. In this regard, the court relied upon certain principles within article 81 of the Constitution, which prohibits actions that may have an improper influence on an election. Such principles include the importance of an election that is “free from violence, intimidation, improper influence or corruption”.⁵⁸ In the context of what had transpired prior to the August 2017 elections, the rationale behind this prohibition was to prevent a sitting government leveraging achievements, that were the result of the expenditure of public resources, as a campaign tool. The court cited section 14 of the Elections Act, which limits publication and advertisements of achievements of the incumbent government during the election period in the print media, electronic media, or by way of banners or hoardings in public places. Although the court found that the incumbent had not violated article 81 of the Constitution and section 14 of the Elections Act in this regard, it clearly confirmed that actions that fell afoul of these provisions would have constituted an illegality.⁵⁹

Conversely, the court confronted the provisions of section 10 of the Elections Offices Act 37 of 2016 which makes it an offence for a person to use fraud or violence (including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss) to compel another on whether to vote, register as a voter or become a candidate. In reliance of the jurisprudence of the Indian Supreme Court,⁶⁰ the court stated that the test of undue influence is whether one’s conduct created an impression in the mind of a voter that adverse consequences would follow as a result of exercising their political choices. Alternatively, as it explicitly stated, whether there was interference or an attempted interference with the free exercise of any electoral right to choose. Once again, although the court based on the evidence before it found that the incumbent had not contravened section 10 of the Elections Offices Act, the judgment set the parameters of the test to be used when a similar court is confronted by the same question.

7 IRREGULARITIES

With respect to irregularities, the court grappled with concerns related to various processes that are anchored in law. These included concerns around the nature of prescribed forms in entering the results and the requirements relating to their use in the electoral process. In this regard, the petitioner alleged that many samples of Forms 34A, 34B and 34C, which were used in the election, had no security features,⁶¹ had different layouts or patterns,⁶² had

55 *Raila Odinga 2017* para 379.

56 *Raila Odinga 2017* para 125.

57 *Raila Odinga 2017* para 125.

58 Article 81(e)(ii) of the Constitution of Kenya 2010.

59 *Apollo Mboya v The Attorney General* [2018] eKLR and *Jack Mukhongo Munialo v Attorney General* [2017].

60 *Charan Lal Sahu v Giani Zail Singh* 1984 SCR (2) 6; *Shiv Kirpal Singh v Shri V v Giri* 1971 SCR (2) 197.

61 *Raila Odinga 2017* para 93.

62 (n 60 above) para 360.

no serial numbers, bar codes, official stamps, and watermarks,⁶³ anti-copying, among other concerns. The other irregularities alleged were that many of the prescribed forms did not contain handover notes, bore no official stamp of the IEBC, were signed by unknown persons, or not signed accordingly or originated from polling stations that were not gazetted.⁶⁴ The petitioners claimed that these discrepancies were contrary to section 39 of the Elections Act, as read with Regulation 82 of the Elections (General) Regulations, 2012 (Elections Regulations), and compromised the integrity of the election.

The court approached the question of irregularity by reviewing the issues of discrepancies that the petitioners raised. In this regard, the court granted interim orders authorising scrutiny of the forms after which the registrar of the court drafted a report on the outcome of the scrutiny. The report indicated the existence of all the discrepancies alleged, and largely informed the basis upon which the court annulled the elections. In particular, the report revealed that the chairperson of the IEBC was obligated to complete Form 34C and to make available a copy to any candidate⁶⁵ and avail the original form, but failed to do so.⁶⁶ Further, as far as Form 34B was concerned, the court noted that whereas the registrar received all 291 forms, some forms were photocopies,⁶⁷ did not have the watermark features, bore the requisite serial numbers⁶⁸ or were only stamped but not signed by the returning officers or agents and many did not comply with the general security features demanded in the prescribed forms.⁶⁹ Considering these discrepancies, the court was of the opinion that failure to adhere in this respect cast doubt on the credibility of the whole election process.

The court noted that all these security features were purposely driven to ensure the veracity and accountability of the election. Furthermore, the court rejected the first respondent's argument that most of the security features were not grounded in law as legal requirements and instead adopted the rationale set forth by the petitioner. The petitioner submitted that there is a reasonable expectation that all the forms ought to be in a standard form and format; and although there is no specific provision requiring the forms to have watermarks and serial numbers as security features, there was no plausible explanation for all the discrepancies evidenced in the forms.

As mentioned earlier, in considering the question of irregularities, the Supreme Court examined whether electoral officials had handled the prescribed forms in accordance with the law. In this regard, it noted that the Elections Regulations⁷⁰ mandate each polling officer to physically deliver all Form 34Bs to the constituency returning officer, who in turn delivers these to the chair of the IEBC at the national tallying together with a summary of the collated forms. Each of these forms had a "Hand Over" section, which is completed when the forms are submitted to the constituency returning officer, and a "Taking Over" section that is completed when they are delivered to chairperson at the national tallying centre.⁷¹ At each of these stages, the relevant officials (that is, the constituency returning officer or the chairperson) verify the results transmitted electronically against those contained in the physical forms delivered.⁷² In the court's opinion, the Regulations were clear on the duties of the officials and purpose of including the requirement for indicating the number of forms received by various officers was to ensure accountability and transparency. Thus, the court could not understand why these forms could not be availed for scrutiny and verification⁷³ and in this regard the majority of the bench felt this raised the question as to the kind of verification done, if at all, by the Chairperson of the Commission and thereby the credibility of the entire electoral process.⁷⁴

8 IMPACT OF IRREGULARITIES AND ILLEGALITIES & THE INTEGRITY OF THE

63 (n 60 above).

64 (n 60 above) para 338.

65 Regulation 87(3) of the Elections Regulations.

66 *Raila Odinga 2017* para 357.

67 (n 65 above) para 345.

68 (n 65 above) para 347.

69 (n 67 above).

70 Elections Regulations, reg 87(1)(b); s 39(1A)(i) of the Elections Act.

71 Elections Regulations, reg 87(1)(b).

72 (n 65 above); Elections Regulations, reg 87(3)(a).

73 *Raila Odinga 2017* para 288.

74 (n 71 above) para 371.

PROCESS

The court reasoned that none of the factors highlighted above could be viewed in isolation without running the risk of cannibalising a sovereign process. In the court's view, elections were the way in which the people expressed their sovereignty and aligned with the founding principle of the Constitution that is, the sovereign will of the people in whom all power resides. As the people exercise such power through the representatives who they democratically elect in free, fair, transparent, and credible elections, the court in the majority stated, that "whether it be about numbers, ... laws, ... processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency."⁷⁵ Against this background, the court concluded that it had considered the impact of the irregularities that characterised the presidential election and held that it had some of the most glaring irregularities and moved to disannul the election setting a historical precedent on the continent. In its landmark judgment it stated:

At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.⁷⁶

In essence, the August 2017 decision deliberated on the link between irregularities and illegalities and how these affect the outcome of an election. In doing so it overturned its earlier 2013 decision and the jurisprudence it relied upon which seeks to draw a nexus between the irregularities or illegalities committed and the outcome of the presidential results. In the 2013 decision, the court's reasoning suggested that the irregularities or illegalities must affect the results of the election in a substantial manner.⁷⁷ The minority judgment in the 2017 judgment was guided by this reasoning and argued that whatever defects may have occurred, it was necessary for the petitioners to show that these defects undermined the will of the electorate as evident in the outcome of the election.⁷⁸

However, the majority decision is revolutionary in the sense that it demonstrates that its sole focus is not what transpires on Election Day only, but the entire process. In this sense, the court faulted the IEBC's reliance on the conclusions of international observers to the election who in its view were limited to make observations on what had occurred on the material day of the election. As the court observed, elections are not events but a process and fidelity to the rule of law in this context requires one to respect the entire process as established under the new electoral management.⁷⁹ The court held further that the failures of the IEBC were a clear violation of the Constitution and brought into question whether the result was a reflection of the will of the Kenyan citizens.⁸⁰ The decision of the court in this regard is not only the first of its kind but unique in the context of the three other global decisions – in the Maldives, Austria and Ukraine – that have invalidated a presidential election. The next section considers the reasoning behind these three decisions.

9 THE 2017 DECISION IN COMPARATIVE NATIONAL OUTCOMES

Decisions that have annulled presidential elections remain rare across the globe – to date there were only three. The 2017 decision joins this small number and it is useful to compare the rationale employed in other jurisdictions alongside that employed by the Supreme Court in the 2017 decision. In the discussions that follow on the annulments of presidential elections in Maldives, Austria, and Ukraine it will be observed that the respective national courts were drawn to irregularities that had occurred during the elections. In some cases, a clear link could be seen between these irregularities and the outcome of the elections and formed a clear

⁷⁵ Raila Odinga 2017 para 371.

⁷⁶ Raila Odinga 2017 para 373.

⁷⁷ Raila Odinga 2013.

⁷⁸ *Muhammadu Buhari v Chief Olusegun Aremu Obasanjo* (2003) Lpelr-Sc.133/2003.

⁷⁹ Raila Odinga 2013 para 162.

⁸⁰ (n 73 above).

basis for the ruling by the domestic court. In other cases, this link was not as clear, particularly where it related to illegal practices that could potentially influence the electorate. Nevertheless, this did not stop the adjudicating body from reaching a similar conclusion of annulling the presidential results. The latter approach stands in sharp contrast to presidential jurisprudence emanating from Africa where the absence of a nexus between irregularities and the result has been put forward as a reason to uphold a presidential result. In what follows the global cases are analysed and will provide a useful comparison with which to assess the approach taken by the Supreme Court.

The Maldives Supreme Court annulled the results of the 7 September 2013 presidential election and scheduled a fresh vote for 20 October.⁸¹ Similar to the Kenyan case, local and international observers had declared the elections free and fair.⁸² In a majority election of four to three, the court ruled that president Mohammed Nasheed fell short of the 50% requirement in the second round of the elections. It reached this conclusion by citing irregularities, which in its view tainted the elections making it difficult to determine the winner.⁸³ These irregularities included a large number of fraudulent votes such as votes cast by minors, by invalid identity cards, double voting and in the name of deceased persons.⁸⁴ As a result, the court gave directions to guide the fresh elections including *inter alia*: the development of a national voter database signed and fingerprinted by the candidates and available publicly and the enhancement of security features of ballot boxes.⁸⁵ This meant that the Election Commission was forced to cancel its earlier plans to have a run-off on 28 September 2013, particularly because the Supreme Court had ordered security forces to ensure compliance with its order.⁸⁶ After fresh elections were conducted, the incumbent came in fourth, while President Yamen's votes rose from 30% to 51%.⁸⁷

In 2016, Austria's Constitutional Court annulled President Alexander van der Bellen's election. Van der Bellen had beaten his opponent by 1%.⁸⁸ During the two weeks' trial, the challenging party argued that the ballot boxes were mishandled and that minors and foreigners were allowed to vote. While the court asserted that the allegations were not proven, it still stated that election rules had been violated⁸⁹ in a way that could have influenced the results.⁹⁰ In its view, the irregularities involved affected 77 926 votes that could have gone to either party – a margin enough to change the outcome of the elections.⁹¹ In words that resemble those adopted by Kenya's Supreme Court, the head of the Austrian Constitutional Court, Gerhard Holzinger, asserted that the decision was based on strengthening the rule of law and not simply using numbers to get a winner or loser. Even though the court had not found evidence of electoral malpractice, the court could not ascertain that there was no manipulation of the elections at all.⁹²

The third example of the annulment of a presidential election comes from Ukraine. Here the Supreme Court annulled presidential elections held on November 2004.⁹³ It declared that both the head of government business, Prime Minister Viktor Yanukovich and the Central Election Commission had acted improperly in their attempt to influence the outcome of the elections.⁹⁴ In making the decision, the court reiterated that elections were one of the forms of direct

81 *Jumhooree Party v Elections Commission* 42/SC-C/2013.

82 Gonzi "Maldives Presidential Elections 2013: Interim statement" *Commonwealth Observer Group* 9 September 2013.

83 Ombuor "Kenya third country in the world and first in Africa to annul a Presidential Election" *The Standard* 2 September 2017.

84 Samir "Supreme Court annuls the first round of the Presidential Election" *Ministry of Foreign Affairs* 7 October 2013.

85 (n 78 above).

86 Robinson "Maldives Top court annuls September 7 Presidential Vote, sets new election" *Reuters* 7 October 2013.

87 Wilson "Maldives Supreme Court annuls presidential election result" *Telegraph UK* 8 October 2013.

88 *Challenge to the Run-off Election of the Federal President on 22 May 2016, filed by Heinz-Christian STRACHE, c/o Freedom Party of Austria, Constitutional Court, W16/2016-125, 1 July 2016.*

89 (n 86 above) para 2.6.2.2

90 Anonymous "Austria Presidential Poll Result Overturned" *BBC News* 1 July 2016.

91 Oltermann "Austrian presidential election result overturned and must be held again" *The Guardian* 1 July 2016.

92 (n 89 above).

93 *Yushchenko v Central Election Commission*, The Supreme Court of Ukraine Decision of 3 December 2004.

94 Kuzio "From Kuchma to Yushchenko: Ukraine's 2004 presidential elections and the Orange Revolution, problems of post-communism" 2005 *Problems of Post-Communism* 29–44.

democracy as set out in the Ukrainian Constitution and its fundamental principles extended to electoral law. In light of this, and taking into consideration the behaviour of the executive, the court asserted that government officials were barred from participating in pre-election campaigns to avoid the unfavourable use of public resources and use of working time.⁹⁵ In this case, the court called for a run-off between the two leading candidates.

Clearly, as discussed earlier, the August 2017 Kenyan decision stands as a milestone within the context of jurisprudence on the African continent. The Kenyan Supreme Court departed from its earlier 2013 judgment as well as from other African cases that relied on the need to establish a nexus between the irregularities or illegalities found and the outcome of an election. Instead, it affirmed the need to consider elections as a process where fidelity to the rule of law demands compliance with the principles of the Constitution as the mirror of the sovereign aspirations of the people of Kenya.⁹⁶ The August 2017 decision is also unique from a global perspective. While decisions in other jurisdictions reached similar outcomes by disannulling the election, one gets the sense that in each of the cases there was an attempt to show how the electoral malpractices on the eventful day had an impact on the outcome of the election. In the Maldives, the Supreme Court was convinced that the irregularities on the material day were so extensive that it rendered determining the winner difficult if not impossible. Similarly, it was the view of the Austrian Constitutional Court that irregularities had the potential of influencing the margin of votes to such an extent that it could affect the outcome of the election. In this regard, the Kenyan decision goes beyond the obsession with numbers and outcomes by re-affirming the fidelity of the electoral process as a whole to the constitutional principles and the corresponding legal framework. In this regard, both the Kenyan and Ukrainian decisions agree that the undue influence of the executive prior to the election forms a ground for nullification, even though this was not proved in the Kenya case.

10 OCTOBER 2017 PRESIDENTIAL ELECTION

Following the Supreme Court's decision in August 2017, a fresh election was held on 26 October 2017.⁹⁷ This election took place against the backdrop of protests by the opposition decrying the lack of preparedness by the IEBC to run an election before certain reforms had been undertaken, or what the opposition termed as "irreducible minimums".⁹⁸ Citing the various irregularities and illegalities referred to in the Supreme Court judgment, some of which had found the IEBC culpable, and unwilling to subject itself to an electoral process it fell below the prescribed standards, the leading opposition party boycotted the repeat election.⁹⁹ This decision, as well as protests across various constituencies, led to a poll contest with one dominant candidate, the incumbent and the absence of voter participation in 25 constituencies.¹⁰⁰ The matter once again went before the Supreme Court in a highly fractious environment on many fronts in *John Harun Mwau v Independent Electoral and Boundaries Commission*.¹⁰¹ Prior to the elections there had been attempts through applications at both the High Court and the Supreme Court to have the elections postponed in order for the IEBC to comply with statutory requirements.¹⁰² In one of these applications the Supreme Court was unable to meet the required quorum, as five of the judges excused themselves for various reasons – one of whom was the Deputy Chief Justice, whose bodyguard had been shot a day prior to the sitting.¹⁰³ This was indicative of an environment that did little to affirm respect for the judiciary and judicial independence. Nowhere was this more evident than in the pronouncements made by the executive. Immediately following the annulment of the election, the incumbent had gone on a tirade against the Supreme Court referring to it as the *wakora* network¹⁰⁴ (loosely translated from Kiswahili to mean "thugs") that had stolen his election and promising to "revisit" this misgiving once he was sworn in. How was the Supreme Court going

95 (n 91 above).

96 *Raila Odinga 2017*.

97 *Raila Odinga 2017*.

98 *Raila Odinga 2017* para 621.

99 *Raila Odinga 2017* para 622.

100 Craig "Analysts fear low voter turnout will undercut Kenya election results" *VOA News* 27 October 2017.

101 *John Harun Mwau v Independent Electoral and Boundaries Commission*, Presidential Election Petition 2 & 4 of 2017.

102 Anonymous "Last-minute court bid to block Kenya poll" *BBC News* 25 October 2017.

103 Houreld "Gunman injures bodyguard of Kenya's Deputy Chief Justice" *Reuters* 24 October 2017.

104 Anonymous "Uhuru Kenyatta to Court: We Shall Revisit This" *Aljazeera* 2 September 2017.

to manage a follow-up petition in this kind of context?

Given the boycott by Raila Odinga's party and absence of polling in 25 constituencies, the central issue following the October 2017 election concerned assessing the validity of the presidential election amidst the kind of voter turnout that had occurred. The test for determining the validity of a presidential election in Kenya as provided under article 138 (4) of the Constitution and is two-fold. A candidate is to be declared President if such candidate received: a) more than half of all the votes cast in the election; and b) at least 25% of the votes cast **in each** of more than half of the counties. The first part of the test was easily complied with given the fact that the incumbent managed to garner 7 483 895 votes during the fresh elections.¹⁰⁵ Of greater importance was whether the October 26nd presidential election complied with the second requirement that an election shall be held **in each** constituency. On its part, the IEBC submitted before the Supreme Court that it was not able to conduct elections in 25 constituencies in the National Super Alliance (NASA) strongholds following security concerns.¹⁰⁶ In affirming the election, the Supreme Court was persuaded by section 55B (1)(a) of the Elections Act which gave the IEBC the prerogative of postponing the election in a constituency where there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date.¹⁰⁷ The Supreme Court went on to validate the results declared by the IEBC based on the fact that the aggregate tally received from the 266 constituencies would not be affected by voting in the 25 constituencies where voters made a deliberate decision to boycott the poll.¹⁰⁸

The Supreme Court of Kenya decision on the Presidential Election Petition in October 2017¹⁰⁹ did not address the question of whether the IEBC had revamped its electoral machinery to address the irregularities cited by the Supreme Court in its judgment of August 2017.¹¹⁰ This was the main reason that the opposition had chosen to boycott the election. Moreover, the Supreme Court in August had not only raised the question of irregularities but also of illegalities on the part of the electoral Commission. This pointed at a degree of culpability to be borne by the IEBC and some of its officials pursuant to the court's finding. The subsequent decision was silent on this aspect. There is reasonable suspicion that this silence was linked to threats made by the executive against the judges that formed a part of the majority decision. As part of their re-election posturing, the executive used snippets of the minority judgment and its references to judicial tyranny to rally their support base by painting the judges that were part of the majority as villains sabotaging the will of the electorate.¹¹¹ The approach was not new and carried undertones of the 2013 presidential campaign, which sought to scapegoat the International Criminal Court in a similar fashion. Furthermore, they issued veiled threats of impending violence by their supporters if this was what was needed to restrain the Supreme Court from 'stealing' (as they perceived it) their election in the subsequent ruling to determine the outcome of the re-run. It is plausible that judges faced with the likely prospects of being blamed for impending violence if they ruled once again against the incumbent, may have opted to exercise restraint in their scrutiny of the subsequent October election.¹¹²

This may lead one to surmise that following the tension and particularly the intimidation by the executive after its earlier decision, the court adopted a more timid stance. A year after the election, this suspicion seems to be affirmed with the arrest of the Deputy Chief Justice on charges of abuse of office dating to her tenure in the Court of Appeal.¹¹³ Could this be the "revisiting" that the incumbent had spoken about? Whatever the case, the sequence of events appears to have watered down the ground-breaking jurisprudence inherent to the August 2017 decision, which promised so much for the future of the country under a truly independent judiciary.

105 *John Harun Mwau v Independent Electoral and Boundaries Commission*, Presidential Election Petition 2 & 4 of 2017.

106 *Raila Odinga 2017* paras 103–104.

107 Titus "Raila Odinga Withdraws from Repeat Presidential Election" *The Standard* 10 October 2017.

108 (n 103 above).

109 *John Harun Mwau v Independent Electoral and Boundaries Commission*, Presidential Election Petition 2 & 4 of 2017.

110 Anonymous "Kenya election: Last-minute court bid to block Kenya poll" *BBC News* 25 October 2017.

111 Were "Judicial independence as a contemporary challenge: Perspectives from Kenya" 2017 *Comparative Law Working Papers* 6–7.

112 (n 107 above).

113 *Republic v Philomena Mwilu*, Nairobi Chief Magistrate's ACC No 38 of 2018.

11 CONCLUSION

The 2017 decision of the Kenyan Supreme Court is a bold move and a step in the right direction that serves to indicate to Africa and the world that all state officers and state organs charged with conducting elections must at all times respect and uphold constitutional norms and values. It elevates the environment and the process of conducting an election to its due place and correctly deviates from the jaundiced view that elections are simply about numbers and outcomes. The Supreme Court in the *Raila Odinga 2013* decision endorsed this latter view by relying on the statutory provision to reach this conclusion; the statutory provisions, which the 2017 decision subsequently ruled were in conflict with the Constitution. It is this view that has jeopardised the integrity of the electoral process across Africa as incumbent administrations have flouted electoral rules and engaged in illegalities in order to achieve the outcome that they desire. This view, which is based upon the misuse of the 'substantive effect rule', has been propounded by different African courts contrary to the concept of the rule of law and constitutionalism. The substantive effect rule entails that acts or omissions and illegalities committed during elections should not disannul an election unless these acts or omissions and illegalities are so extensive so as to affect the results. In the Ugandan case of *Kizza Besigye*, the Supreme Court relied on the substantive effect rule to hold that although there had been illegal practices and irregularities, these would not have significantly reduced the numbers between the petitioner and respondent. A similar approach was taken following the 2001 Zambian¹¹⁴ and the 2012 Ghanaian¹¹⁵ presidential elections. In the former case, the 'substantial effect rule' was expanded beyond the numerical outcome to include the geographical spread of the irregularities, while in the latter case, although significant irregularities were committed contrary to the Constitution, the court went on to rule that the election was conducted substantially in accordance with the Constitution. The approach taken in each of these cases appears to endorse an approach that focuses on the numerical impact of irregularities and in so doing undermines the need to run elections in accordance with constitutionalism.

With that said, such progressive jurisdiction must be matched with a society that fundamentally respects the rule of law. Sadly, events subsequent to the ruling do not serve as inspiration that Kenya has come of age in this respect. The attacks by the executive post the decision have served only to undermine the independence of the judiciary in the eyes of society. The potential of the Supreme Court's August judgment, in favour of constitutionalism and respect for the rule of law, to bring about progressive change in the conduct of elections requires an environment where society has equally embraced these valuable tenets. Furthermore, in certain instances closely linked to events surrounding the elections, the executive has openly refused to comply with court orders. For example, the Minister of Interior and Coordination of National Government refused to comply with an order restraining the deportation of Miguna Miguna, a key opposition leader.¹¹⁶ All of this has left the judiciary in the untenable position, where, on the one hand, it seeks to establish the rule of law, and on the other hand, aiming to do so without losing institutional authority. Faced with this dilemma it is quite possible that judges in the future may restrain themselves to secure political stability and to justifiably preserve their judicial authority.

While Kenya's Constitution provides substantial guarantees in this regard, to the extent that one can comfortably talk of a *de jure* imagery of the rule of law, there are doubts about whether Kenya is a society undergirded by a *de facto* rule of law where the judicial independence is a functional reality. The Kenyan Constitution went to great lengths to address many of the shortcomings in the post-independence 1963 Constitution, many of which undermined democracy and formed the basis of violations of individual rights by the state. Amongst other things, it appropriately restructured the governance structure of the country establishing a clear separation of powers between the different components of government, embedded human rights at the core of its implementation and enshrined national values (including the rule of law).

114 *Anderson Kambela Mazoka v Levy Patrick Mwanawasa* ZR 138 (SC) L SCZ/EP/01/02/03/2002 [Zambia].

115 *Nana Addo Dankwa Kufo-Addo v John Dramani Mahama* [2013] (J1/6/2013) GHASC.

116 *Miguna Miguna v Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government; Kenya National Commission on Human Rights (Interested Party)* Constitutional Petition No 51 of 2018.

The August 2017 Supreme Court judgment is an attempt to align society with the aspirations of a new dispensation. However, as observed, the events post this judgment appears to raise questions as to whether the judiciary has a free hand to operate within the bounds of these aspirations. As the country's democracy continues to progress, and given Kenya's election experiences, the Supreme Court deserves all the support it can get towards enshrining the rule of law where it is crucial – during elections. This will call for multi-stakeholder efforts from all those in the academia, media, non-governmental organisations in order to bring about a vibrant and healthy electoral process.