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**NULLIFICATION OF PRESIDENTIAL ELECTIONS IN KENYA: ADDRESSING THE LACUNA IN
THE ELECTIONS ACT 24 OF 2011**

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DEDICATION

I dedicate this dissertation to all those honest politicians who have lost elections because of electoral illegalities and irregularities that are committed with impunity before and during the voting day.

ABBREVIATIONS

AU	African Union
ECK	Electoral Commission of Kenya
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundations for Electoral System
IPPG	Inter-Parties Parliamentary Group
KANU	Kenya African National Union
KNDR	Kenya National Dialogue and Reconciliation
MDP	Maldivian Democratic Party
MMD	Movement for Multi-Party Democracy
PDP	Peoples Democratic Party
PPDT	Political Parties Disputes Tribunal
PPM	Progressive Party of Maldives
SADC	South African Development Community
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE: INTRODUCTION

1 Introduction and background

On 1st September 2017, the Supreme Court of Kenya made history both in the country and on the continent after it nullified the Presidential election victory of the incumbent President, Uhuru Kenyatta, in a petition that was filed by the opposition leader Raila Odinga and others (2017 Case).¹ In this landmark decision, the Supreme Court stated that section 83 of the Elections Act of 2011 (Elections Act) was ‘the fulcrum’ of the petition,² as it guided the Court on what to consider when deciding election petitions.³ Currently, section 83 of the Elections Act no longer exists for reasons that will be highlighted in this section. The lack of this ‘guiding section’ of the law means that the judiciary does not have a vital tool, that it relied on in the 2017 Case, to appropriately decide elections disputes should they arise in the 2022 presidential elections and beyond.

At the time of making the 2017 judgement, Section 83 of the Elections Act read as follows:⁴

no election shall be declared to be void by reasons of 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 the constitution and in that written law *or* that the noncompliance did not affect the results of the election. (my emphasis).

The question that the Supreme Court had to grapple with in the 2017 Case was, if illegalities and irregularities happen in an election, would the illegalities and the irregularities committed be sufficient by themselves to nullify an election, or would a nullification only be possible if the illegalities and the irregularities affected the outcome of the election?⁵

The Supreme Court in the 2017 Case deliberated on the use of the disjunctive term ‘or’ in section 83 of the Act, as compared to the use of the conjunctive term ‘and’ as used in other comparable jurisdictions.⁶ The Court concluded that the use of the term ‘or’ was disjunctive, and it meant that an election could be nullified if it did not comply with the principles laid down in the Constitution and written law, irrespective of whether it affected the results of the elections or not.⁷

This interpretation of the term ‘or’ was critical since the same Court, while upholding the victory of Uhuru Kenyatta over Raila Odinga in the 2013 presidential petition (2013 Case),⁸ stated that an election could only be nullified if it failed to comply with the principles laid down in the Constitution and the written law, and in addition to this, that this failure to comply with the

¹ O Kaaba ‘Judgments and jurisprudence: Presiding over presidential petitions in Africa’ *Mail & Guardian* 7 March 2021 <https://mg.co.za/africa/2021-03-07-judgments-and-jurisprudence-presiding-over-presidential-petitions-in-africa/> (accessed 15 August 2021).

² *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR 35 para 171.

³ *Raila* (n2) 64 para 303.

⁴ Sec 83, Elections Act 24 of 2011, before amendment.

⁵ *Raila* (n2) 35-37 para 171-187.

⁶ *Raila* (n2) 38-39 para 192-194.

⁷ As above.

⁸ *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR.

law affected the results of the elections.⁹ This principle which holds that for a court to nullify an election, the irregularities committed must affect the results of the elections is known as the substantial effect rule.¹⁰ The rule is borrowed from a common law tradition that was established in the 1800s and is commonly applied in Anglophone jurisdictions of which Kenya is one.¹¹ Kaaba and Fombad note that the substantial effect rule has been misused by courts in many African countries to dismiss presidential petitions.¹²

In the 2017 Case, while interpreting the meaning of section 83 of the Act, the Supreme Court stated that it was instructive to note that in the 2013 Case, the Court ‘did not render an authoritative interpretation of Section 83 of the Elections Act as read together with the relevant provisions of the Constitution.’¹³ The Court further noted that the critics of the 2013 decision assert that if the Court had considered the two limbs of that section disjunctively, then it would ‘perhaps have reached a different conclusion.’¹⁴ Indeed, the Supreme Court in 2017 interpreted the section disjunctively and consequently reached a different conclusion from that of the 2013 case, that of nullifying the elections.

1.1 Statutory introduction of the substantial effect rule

After the nullification of the 2017 presidential election, the Supreme Court ordered the Independent Electoral and Boundaries Commission (IEBC) to conduct fresh elections within 60 days of the judgement.¹⁵ A day after the judgement was delivered, President Kenyatta and his deputy, William Ruto, addressed governors, members of parliament, and members of the county assemblies who had been elected under their political party (Jubilee Party) and attacked the judgement and the judiciary, stating that they would revisit the issue after the scheduled repeat elections and that they would ‘fix’ the judiciary.¹⁶

In those general elections of 2017, Kenyatta’s Jubilee Party and its coalition partners had won 195 seats in the National Assembly, while Odinga’s National Super Alliance Coalition had 125 seats.¹⁷ In total, Jubilee Party and its coalition partners held 56% of the seats, while the main opposition coalition had 35%.¹⁸ This meant that Uhuru Kenyatta had control over the National Assembly since passing an ordinary Bill requires a simple majority.¹⁹ In what was seen as the beginning of the actualisation of the President’s threats against the nullification judgement, the very first Bill that the Majority Party Leader in the National Assembly presented was the Election

⁹ As above.

¹⁰ O Kaaba & CM Fombad ‘Adjudication of Disputed Presidential Elections in Africa’ in CM Fombad & N Steytler (eds) *Democracy, Elections, and Constitutionalism in Africa* (2021) 375.

¹¹ As above.

¹² Kaaba & Fombad (n10) 375 – 376.

¹³ *Raila* (n2) 37 para 187.

¹⁴ *Raila* (n2) 40 para 201.

¹⁵ *Raila* (n2).

¹⁶ Al Jazeera “Uhuru Kenyatta to court: ‘We shall revisit this’” 2 September 2017

<https://www.aljazeera.com/news/2017/9/2/uhuru-kenyatta-to-court-we-shall-revisit-this> (accessed 16 September 2021).

¹⁷ Independent Electoral and Boundaries Commission ‘Data Report of 2017 Elections’ April 2020 <https://www.iebc.or.ke/uploads/resources/siEABKREDq.pdf> (accessed 21 August 2021).

¹⁸ As above.

¹⁹ Art 122, Constitution of Kenya 2010.

Laws (Amendment) Bill.²⁰ The purpose of the Bill was to ‘address the concerns raised following the 8th August 2017 general elections’ among other objectives.²¹

The amendments included changes to section 83 of the Elections Act, which was made to conform to the substantial effect rule. The disjunctive term ‘or’ was replaced with the conjunctive term ‘and’, and the word ‘substantially’ was added right before the word ‘affect’ to read as follows:²²

(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it *appears* that-

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; *and*

(b) the non-compliance did not *substantially* affect the result of the election. (my emphasis).

This meant that for a court to nullify an election, a petitioner would have to prove that there was non-compliance with constitutional principles and the written law, and that the non-compliance had an impact on the election result.

These amendments to the Elections Act were thereafter challenged at the High Court, and section 83 was declared unconstitutional after the Court decreed that:²³

ii. A declaration be and is hereby issued that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the *entire 83* of the *Elections Act, 2011* are constitutionally invalid (my emphasis).

In such circumstances, it would have been better if the Court had given the National Assembly timelines within which it should have aligned the section with the Constitution as it has done in past cases, but it did not, therefore creating a lacuna.²⁴

It is important at this point to note that the Constitution of Kenya 2010 along with the Elections Act 2011 were born from a history where presidential elections used to be marred with election malpractices, and a complicit and non-independent judiciary which would decide cases in favour of the incumbent even when the irregularities were glaring.²⁵ It is because of this that the Constitution of Kenya dedicates a whole chapter to elections and the modalities around elections.²⁶ The Constitution also cements political rights in the Bill of rights,²⁷ and protects the independence of the judiciary from interference from the other arms of government, more so

²⁰ 1 of 2017.

²¹ *Katiba Institute & 3 others v Attorney General & 2 others* (2018) eKLR 3 para 11.

²² Sec 83, Elections Act 24 of 2011, after amendment.

²³ *Katiba* (n21).

²⁴ See the decision in *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* (2019) eKLR where the Court gave parliament 12 months to make the appropriate amendments.

²⁵ Kaaba & Fombad (n10) 373-374; ‘Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007’ (2008); The Independent Review Commission on the General Elections held in Kenya on 27th December, 2007.

²⁶ Chapter 7, Constitution of Kenya 2010.

²⁷ Chapter 4, Constitution of Kenya, particularly art 38.

the executive.²⁸ The clarity that was brought about by the Elections Act in 2011 in the way that section 83 of the Act was framed should be seen from this historical lens.

1.1.1 Importance of fair presidential election adjudication in Kenya

Electoral malpractices have been a source of post elections conflict in Africa.²⁹ Kenya is not an exception. Elections in Kenya are highly emotive, and they have led to ethnic tensions since the resumption of multi-party system in 1991.³⁰ Pre-election clashes, fought on ethnic grounds and sparked by politicians, took place in the general elections of 1992, 1997, and on a smaller scale in 2003.³¹ In 2007, the worst election violence happened in Kenya immediately after the presidential results were announced by the then Electoral Commission of Kenya (ECK) leaving 1, 100 people dead, many more maimed, raped.³² Over 350, 000 citizens were internally displaced, and 1916 fled to neighbouring Uganda as asylum seekers.³³ The situation was eventually contained under the stewardship of the African Union (AU), the United Nations (UN), and the East African Community (EAC).³⁴ The matter also ended up at the International Criminal Court, with the future winners of the 2013 and the 2017 elections, that is Uhuru Kenyatta and his running mate William Ruto, being taken to the Hague to answer charges of crimes against humanity.³⁵ In 2017, the opposition coalition led by Raila Odinga opposed the outcomes of the elections, and lives were again lost this time almost entirely at the hands of the Police.³⁶

1.1.2 The role of the judiciary

Before the adoption of a new progressive Kenyan Constitution in 2010, opposition parties did not trust the judiciary to resolve electoral disputes independently.³⁷ However, under the current constitutional dispensation, the Judiciary is now empowered and its independence is protected under the Constitution,³⁸ and it has proven itself to be independent in carrying out its mandate.³⁹ Therefore, unlike in 2007 where the opposition under the leadership of Raila Odinga refused to petition what they referred to as election theft and resorted to mass action,⁴⁰ in 2013 the opposition filed a presidential petition at the Supreme Court. Even though the

²⁸ Chapter 10 & 15, Constitution of Kenya 2010.

²⁹ Kaaba & Fombad (n10) 361.

³⁰ The Commission of Inquiry into the Post-Election Violence 'Report of the Commission of Inquiry into the Post-Election Violence' (2008) ii, 22.

³¹ The Commission (n30); The Judicial Commission of Inquiry into Tribal Clashes in Kenya 'Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya' (1999) 57.

³² Commission (n30) 308, 335.

³³ Commission (n30) 351.

³⁴ Commission (n30).

³⁵ The Prosecutor v. Uhuru Muigai Kenyatta No. ICC-01/09-02/11; The Prosecutor v. William Samoei Ruto and Joshua Arap Sang No. ICC-01/09-01/11-302.

³⁶ Human Rights Watch 'Kenya: Post-Election Killings, Abuse' 27 August 2017 <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse> (accessed 21 August 2021).

³⁷ CM Fombad 'Election Management Bodies in Eastern and Southern Africa: Some Reflections on their Legal Framework' (2016) 15 *African and Asian Studies* 289-335.

³⁸ Chapter 10 & 15, Constitution of Kenya 2010; *Raila* (n8) 393-394.

³⁹ Kaaba & Fombad (n10) 393-394.

⁴⁰ The Independent Review Commission on the General Elections held in Kenya on 27th December, 2007 'Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007' (2008).

presidential petition did not succeed because the Supreme Court applied the substantial effect rule in adjudicating that election petition,⁴¹ Raila Odinga still filed another petition in the aftermath of the 2017 general elections. In the 2017 Case, and on the strength of the then section 83 of the Election Act, the Court moved away from entirely relying on the substantive effect rule and instead applied what could be referred to as the ‘substantial non-compliance with the qualitative principles approach.’⁴² Under this approach, the Court is required to nullify the elections if substantial illegalities and irregularities are proven, irrespective of whether the illegalities and irregularities affect the results of the elections.

It was this approach, which was enabled by section 83 of the Elections Act, that empowered the Supreme Court to nullify the Presidential elections after finding that there were irregularities around the integrity of the results transmission system, misuse of state resources by the incumbent during campaigns, tallying of results among other irregularities.⁴³ It did not matter whether the irregularities affected the results or not. This was unlike in the 2013 Case where worse irregularities took place, but the Court still upheld the victory of Uhuru Kenyatta. For example, in 2013, the Electronic Voter Identification Devices failed in almost all the polling stations and the IEBC had to rely on manual identification.⁴⁴ The Electronic Results Transmission System also totally crashed.⁴⁵ Further, a re-tallying of random presidential result forms, ordered by the Supreme Court on its own motion during the hearing, showed discrepancies in a many of the forms, while some forms were even missing.⁴⁶ In the absence of section 83 of the Elections Act, it is important to probe how the Courts will be guided to resolve any disputes that may arise in 2022 presidential elections and beyond.

1.2 Problem statement

When deciding whether presidential elections should be nullified or upheld, courts have to among other issues, decide whether to arrive at their decision through the substantial effect approach or to use the substantial non-compliance with the qualitative principles approach. Kaaba & Fombad note that most courts on the continent have preferred the substantial effect approach, which has been misused usually in favour of the incumbents.⁴⁷ The Supreme Court of Kenya was the first on the Continent to depart from this rule, thus ushering a new era where the quality of the elections process, and not merely the numerical results truly mattered in an election.⁴⁸ Section 83 of the Elections Act which was the ‘fulcrum’ that enabled the Supreme Court to depart from the substantial effect rule no longer exists in Kenyan law. This means that there is a risk that the courts may fall back to applying the restrictive substantial effect rule, given that it is a common law principle that is applicable in the Kenyan Courts unless it is repealed. The purpose of this dissertation is to interrogate the legal framework on elections disputes resolution in Kenya, and to particularly explore how the qualitative aspects of the

⁴¹ *Raila* (n8).

⁴² *Raila* (n2).

⁴³ *Raila* (n2).

⁴⁴ *Raila* (n8) 42.

⁴⁵ As above.

⁴⁶ *Raila* (n8) 29.

⁴⁷ Kaaba & Fombad (n10) 375-380.

⁴⁸ As above.

election process can continue to play an essential role in the adjudication of election disputes in Kenya even in absence of section 83 of the Elections Act as it were.

1.3 Research questions

1. Is the legal framework on adjudication of presidential election disputes in Kenya adequate to ensure electoral justice?
2. What are the international standards on adjudication of presidential election disputes?
3. How have past presidential election disputes influenced changes in election laws in Kenya?
4. What is the future of adjudication of presidential election disputes within the existing legal framework in Kenya?

1.4 Hypothesis

This dissertation argues that even in the absence of specific statutory guidelines on how the courts may adjudicate election petitions, there are constitutional and other legal provisions that can still guide the court to arrive to a decision that ensures that procedural, qualitative and substantive justice when deciding election matters.

The dissertation also argues that it is of paramount importance that the National Assembly re-introduces the original (disjunctive) section 83 into the Elections Act to ensure in cases where the elections are held in an environment of substantial illegalities and irregularities, then the courts shall have specific statutory tools to deliver substantive electoral justice.

1.5 Significance

This study is of significance to all the actors in the electoral process in Kenya. The need to have clarity on the position of section 83 of the Elections Act before Kenya goes to the 2022 elections and beyond cannot be overemphasised. Parliament has less than a year to bring about this clarity. Lawyers and aspirants also need to know the probability of success in their litigation, while judges need to have a clear legal framework for determination of the election disputes.

1.6 Methodology

The study will review existing academic and general literature around the topic. The study will focus on jurisprudence developed through the relevant judgements of the higher courts in Kenya, and will compare this jurisprudence with those from selected common law jurisdictions in Africa. The documents analysed will largely be primary, and will include court decisions, statutes, constitutional provisions, and commission reports. The dissertation will also rely on secondary material which will include academic sources and popular reliable writings including reports from development organisations, Non-Governmental Organisations, newspapers, and relevant internet sources. The analysis will predominantly be qualitative, but will also include some quantitative methods where figures are to be relied upon to reinforce some points.

1.7 Literature Review

1.7.1 Principles of the electoral system in Kenya

The Constitution of Kenya states that the general principles of the electoral system include the freedom to exercise political rights which include universal suffrage, the right to contest in elections, equality of the vote, gender inclusion, and inclusion of persons with disabilities.⁴⁹ The Constitution further states that elections must be managed by an impartial body, and that they shall be held by secret ballot, must be free, fair, transparent, accurate, efficient, accountable and must be carried out ethically and without any coercion or corruption.⁵⁰ Kaaba and Fombad list some of the fundamental values of an effective adjudicatory system to include fairness, legitimacy, accuracy, transparency, promptness, finality, efficiency, cost effectiveness and credibility.⁵¹ It is trite that as a principle, elections must be held in conformity with the constitution and relevant laws.

This means that a court determining an election petition in Kenya has to be bound by the above-mentioned general principles of the electoral system. Beyond this, courts have to be guided by specific rules guiding adjudication of election matters to, for example, decide whether an election was free and fair, or whether the elections were transparent and accurate among other general principles including those mentioned above.

1.7.2 Substantial effect rule

As discussed earlier, the substantial effect rule holds that for a court to nullify an election, evidence of illegalities and irregularities is necessary, but not sufficient. The illegalities and the irregularities committed must have the effect of materially interfering with the numbers that the various candidates/entities have garnered, to the extent that it would affect the results of the election.⁵² Kaaba critiques this rule as defeatist as it was borrowed from an old British law that operated in an era when it was considered that electoral malpractices were inevitable.⁵³ By citing examples from Kenya, Uganda, Ghana, Zambia and other African common law jurisdictions, Kaaba and Fombad show how the rule has been used to disenfranchise voters, usually in favour of presidential incumbents.⁵⁴ They note that based on this rule, courts have upheld elections even when the irregularities and fraud are massive.⁵⁵

Kaaba notes that it is difficult for a judge to objectively evaluate whether ‘non-compliance affected the election results in a substantial manner’, since this would force a judge to make subjective evaluation of the consequences of their prospective decision, and this tends to

⁴⁹ Art 81, Constitution of Kenya 2010.

⁵⁰ As above.

⁵¹ Kaaba & Fombad (n10) 363.

⁵² O Odek ‘Election Technology Law and the Concept of “Did the Irregularity Affect the Result of the Elections?”’ <https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf> (accessed 21 August 2021) 39.

⁵³ O Kaaba ‘The challenges of adjudicating presidential election disputes in domestic courts in Africa’ (2015) 15 *African Human Rights Law Journal* 345.

⁵⁴ Kaaba & Fombad (10) 375-380.

⁵⁵ As above.

transport ‘the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment.’⁵⁶

He finds that the rule violates the principle of supremacy of the Constitution since when it is applied, violation of the Constitution and other laws cease to matter.⁵⁷

U Kari cites a dissenting decision from Nigeria where the judge stated that ‘once the atmosphere of an election has been fouled through irregularities, the mathematical computation of votes becomes an irrelevant factor.’⁵⁸ He posits once non-compliance with the law is established, the burden of proving whether the non-compliance substantially affected the result should be shared particularly with the Electoral Management Body and the defendants.⁵⁹

H Nyane notes that no election result has ever been overturned in Lesotho since their courts have always blatantly misapplied the substantial effect doctrine.⁶⁰ He also notes that the doctrine in Lesotho is statutory and not constitutional.⁶¹ He goes further to praise Kenya’s Odinga Case (2017), and advises that Lesotho should borrow a leaf from the Kenyan jurisprudence.⁶²

1.7.3 Quantitative vs qualitative approaches in Kenya

O Odek clarifies the substantial effect rule by stating that the ‘result being affected’ is that of the winner of the election. It is the success of one candidate over the other, and not mere change in numbers.⁶³ Therefore the evidence must show that either the non-compliance with the law raises doubt as to who won the elections, or it proves that the person announced winner did not even win in the first place.⁶⁴

Odek further opines that articles 81 (e) and 86 of the Constitution of Kenya represent the quantitative and qualitative principles of Kenya’s electoral system respectively.⁶⁵ He warns that qualitative requirements cannot be measured quantitatively, and he further notes that qualitative requirements are present throughout the electoral process.⁶⁶ He adds that ‘substantial non-compliance with the qualitative requirements render the entire electoral results void.’ He cites pre-2017 Odinga Case judgements where Kenyan courts (contrary to the jurisprudence set by the Supreme Court in the 2013 case) held that what the court should look at is not necessarily the outcome of the elections, but the integrity of the elections process.⁶⁷

⁵⁶ Kaaba & Fombad (n10) 377.

⁵⁷ Kaaba & Fombad (n10) 378.

⁵⁸ U Kari ‘Issues in Election Petition Adjudication in Nigeria’s Fourth Republic: A Sociological Critique of the Role of the Judiciary’ (2017) 5 *Global Journal of Politics and Law Research* 82-83.

⁵⁹ Kari (n58) 86.

⁶⁰ H Nyane ‘A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho’ (2018) 17 *Journal of African Elections* 7-8.

⁶¹ As above.

⁶² Nyane (n60) 21.

⁶³ Odek (n52) 58.

⁶⁴ As above.

⁶⁵ Odek (n52) 6.

⁶⁶ As above.

⁶⁷ As above.

Therefore, serious malpractices should lead to nullification of the elections since election results are as good as the electioneering processes that produced those results.⁶⁸

He further explains that the quantitative test requires that a court deals with arithmetic issues including validity of votes cast, counting, tallying, accuracy and verifiability of results.⁶⁹

Odek, citing Justice Anin Yeboah of the Ghana Supreme Court, writes that for a court that prefers the quantitative approach to nullify an election based on failure to have a signature (qualitative), a legal provision must;⁷⁰

(a) in explicit statutory language state that the provisions are mandatory; (b) in explicit statutory language specify that the election is voided because of the failure; (c) state that the violation affected an essential electoral component; (d) state that the violation changed the election's outcome or rendered it uncertain.

In the Odinga case of 2017, beyond the fact that section 83 of the Elections Act required that elections be nullified for qualitative infringements, statutory regulations provided for specific conduct at the polling station with respect to the filling of forms, which meant that it was possible to void an election for failure to comply with those requirements.

M Azu highlights cases where the courts found the substantial effect doctrine to be relevant. First, she posits, small infractions to the law should not invalidate the whole election process.⁷¹ Indeed, this is the position that the Kenyan court in the 2017 Case took. Secondly, when the law explicitly provides for the substantial effect rule, then the courts are bound by that explicit provision.⁷² Concerning the 2017 Case, Kaaba and Fombad state that 'perhaps the greatest contribution to electoral jurisprudence in Africa was the correct application of the substantial effect rule' by the Kenyan courts.⁷³ They also observe that most African countries do not have laws that provide adequate substantive guidance to courts on the exact principles that should guide their decisions, which allows the court in the Anglophone jurisdictions to rely on common law (substantial effect rule) and equitable principles.⁷⁴

This dissertation has so far shown that in 2017 Kenya had the most ideal law guiding the courts on how to decide election petitions. Section 83 of the Elections Act specifically required the judges, in mandatory terms, to void an election if the electoral process was not held in accordance with the constitution and other written law. As things currently stand, this law no longer exists, and there is the risk that the Kenyan courts might in the future resort back to relying on the common law principle of the substantial effect rule. The authors cited have praised the Kenyan courts for using the qualitative approaches to nullify the 2017 elections, and have gone further to recommend the jurisprudence to other African countries. It remains to be

⁶⁸ Odek (n52) 6-7.

⁶⁹ Odek (n52) 58.

⁷⁰ Odek (n52) 72.

⁷¹ M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 156.

⁷² Azu (n71) 159.

⁷³ Kaaba & Fombad (n10) 390.

⁷⁴ Kaaba & Fombad (n10) 366.

seen whether and how this jurisprudence can be applied to Kenya itself, given the current circumstances.

1.8 Scope and limitations

The scope of this dissertation is to interrogate the legal framework for presidential election disputes adjudication in Kenya, and it particularly focuses on the conflicting approaches of the substantial effect rule and the substantial non-compliance with the qualitative principles rule with respect to nullification of presidential elections. The dissertation limits itself to presidential elections, even though it has included instructive observations from other elections petitions. There are many factors to consider when deciding presidential elections. They include procedural technicalities, burden of proof, standard of proof among other considerations. This dissertation specifically focuses on the two mentioned rules that a Court applies when deciding whether to nullify an election or to uphold it. Another limitation of this dissertation is that past presidential petitions in Kenya, specifically those arising out of the 1992 and 1997 general elections were dismissed by the courts on preliminary technicalities even before they could be heard substantively. These dismissals have denied the paper access to information that would have been instructive to this dissertation. Lastly, only five countries in the world have nullified presidential elections (or their equivalent) after following a substantive judicial process, and this therefore limits the sources where this paper would have drawn key lessons.

1.9 Chapter breakdown

Title: Nullification of presidential elections in Kenya: Addressing the lacuna in the Elections Act.

Chapter one: General Introduction

Chapter one introduces the topic of study. It gives an insight into the paper by giving the background and a brief historical context of the study. The chapter also provides the problem statement, outlines the research questions and gives a justification and the methodology used in the research. The chapter reviews the relevant literature and identifies the existing gap that the paper intends to interrogate. The chapter ends by explaining the limitations of the study, and framing the chapter breakdown of the dissertation.

Chapter Two: Adjudication of presidential election disputes: An international perspective

This chapter engages with some of the existing international literature and case law that address the standards used when adjudicating presidential elections with an aim of gaining insights on how electoral disputes should be handled in general, and how they have particularly been handled in jurisdictions where presidential elections have been nullified. The chapter also looks at the African context, where it similarly interrogates the existing literature, and also analyses the Malawian presidential case of 2020, where the nullification of the presidential elections was upheld. The chapter will focus on material that is relevant to the question of nullification of presidential elections in line with the argument of the dissertation. In conclusion, the chapter

gives an indication of the principles, concepts and rules that guide courts in adjudicating presidential elections outside Kenya. The chapter identifies lessons on adjudication of presidential elections that may be applicable to Kenya.

Chapter Three: Adjudication of past presidential election disputes in Kenya and the resultant legal reforms

Chapter three looks at the history of adjudication of presidential elections disputes in Kenya from the onset of multipartyism in 1991, up to 2017 when the last presidential petition was decided. The chapter looks at how past presidential election disputes and politics have influenced law reform and changes in the electoral laws in Kenya.

Chapter Four: The future of election disputes adjudication in Kenya

This chapter explores the possible ways of adjudicating presidential election disputes in Kenya by applying the lessons from the foregoing chapters, and interrogating the legal framework governing elections and nullification of presidential elections in Kenya. The legal framework includes the Constitution, the electoral laws and the relevant regulations guiding elections in Kenya.

Chapter Five: Overall findings, Conclusion and Recommendations

This chapter summarises the findings from each of the chapters and draw the lessons in the general conclusion. The chapter also gives recommendations arising from the findings.

1.10 Conclusion

This proposal has identified the problem that the dissertation intends to investigate, situated it in its historical context, and has set the foundation and the parameters that will guide the dissertation to its conclusion.

CHAPTER TWO: ADJUDICATION OF PRESIDENTIAL ELECTION DISPUTES: AN INTERNATIONAL PERSPECTIVE

2 Introduction

This chapter engages with some of the existing international and regional literature and case law that address the standards used in adjudicating presidential election disputes. The aim is to identify the standards of adjudicating electoral disputes in general, and to also find out how they have particularly been applied in jurisdictions where presidential elections have been nullified. The chapter focuses on content that is relevant to the question of nullification of presidential elections, and it argues that Kenya can complement some of the existing legal gaps in its electoral legal framework by using the international standards applicable to it, and that it can further draw lessons from how other jurisdictions have applied the substantial effect rule and the qualitative approach of adjudicating presidential election disputes when deciding whether or not to nullify elections. To achieve these objectives, the chapter discusses the electoral principles of free and fair elections; analyses the rules that are used to assess whether an election was indeed free and fair; looks at the general grounds for nullification of presidential elections; discusses the electoral standards as outlined in relevant African Union treaties; draws lessons from countries that have nullified presidential elections; and finally concludes by noting the lessons relevant for adjudication of presidential elections disputes in Kenya.

2.1 The principle of free and fair elections

International standards of elections and consequently standards for their adjudication may be contested, however, it is trite that as a principle, elections must be free and fair for democracy to hold. International standards on elections are found in international instruments and in the interpretation of these international instruments by relevant human rights bodies and courts.⁷⁵ In this regard, article 21 of the Universal Declaration of Human Rights (UDHR) provides that;

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.

The UDHR further provides for the right to a fair hearing by an independent and impartial tribunal where effective remedies are provided in cases where rights are violated.⁷⁶ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) reiterates the need for free and fair elections, based on universal suffrage and equality of votes.⁷⁷ The right to fair hearing

⁷⁵ European Union 'Compendium of International Standards for Elections' (2016) 13.

⁷⁶ Art 8 & 10, Universal Declaration of Human Rights (1948).

⁷⁷ Art 25, International Covenant on Civil and Political Rights (1966).

by a competent and independent body is also enshrined in the ICCPR.⁷⁸ The United Nations Human Rights Committee through General Comment 25 has extensively interpreted article 25 of the ICCPR, and provides that for elections to be free, then there must be free association, free movement and free communication of those participating in those elections. International standards on elections involve the right to freely take part in government, to vote and to be voted for, and the right to equal access to public service.⁷⁹

The United Nations Centre for Human Rights explains that for elections to be free, the will of the people must be expressed freely and without fear, and the freedoms that enable this free expression of the people's will must be assured.⁸⁰ The will of the people is expressed through the right to participate in the governance of one's country either directly, or through freely elected representatives.⁸¹ For this to happen, citizens must have the right to freedom of opinion, freedom of assembly and freedom of association.⁸² In addition, there must exist an independent judiciary that can impartially adjudicate on election matters.⁸³ Under freedom of opinion, the requirement that voting be done by way of secret ballot is indispensable.⁸⁴ Freedom of opinion also involves seeking, receiving and imparting information in accessible formats.⁸⁵ Freedom of association includes the right to form and participate in a political organisation of one's choice.⁸⁶ In essence, free elections should facilitate the fullest expression of the political will of the people.⁸⁷

Fair elections on the other hand means that the election process should be based on equal, universal and non-discriminatory suffrage that is free of bias, fraud and corruption.⁸⁸ Further, even though certain restrictions around elections like age and citizenship are acceptable, restrictions based on economic, linguistic and literacy requirements would make the elections process unfair.⁸⁹

This therefore means that an election that substantially violates the elements that constitute the principles of free and fair elections is short of the acceptable international standards, and should, for the sake of electoral justice, be nullified. In Kenya, the requirement that elections be free and fair is a constitutional imperative,⁹⁰ which then means that significant violations of this constitutional requirement should have a nullifying effect on the elections.

⁷⁸ ICCPR (n77) Art 2.

⁷⁹ United Nations Centre for Human Rights 'Human Rights and Elections; A Handbook on the Legal, Technical and Human Rights Aspects of Elections' (1994) 4.

⁸⁰ United Nations (n79) 6.

⁸¹ As above.

⁸² UN (n79) 7-8.

⁸³ UN (n79) 8.

⁸⁴ UN (n79) 10.

⁸⁵ UN (n79) 6.

⁸⁶ UN (n79) 8.

⁸⁷ UN (n79) 10.

⁸⁸ UN (n79) 11.

⁸⁹ As above.

⁹⁰ Art81(e), Constitution of Kenya 2010.

2.2 Rules governing elections and their adjudication should be clearly defined

The legal framework for elections entails relevant constitutional provisions, election laws and laws related to elections, and the relevant election regulations.⁹¹ This legal framework should clearly address all components of an electoral system, and should be accessible and understandable.⁹² The legal framework should be written, rather than be based on customary law or administrative policies as this makes it easier to interpret, and is more accessible to the contesting parties and to the voters.⁹³

This clearly defined regimen of election standards and procedures should codify the electoral complaint mechanism for adjudicating electoral disputes, and has to include substantive and procedural guidelines.⁹⁴ The legal framework ought to cover the whole electoral cycle, right from delimitation of electoral boundaries, rules for vying in elections, qualifications of a voter, party funding, contents of a voter register, conduct at voting among other particulars.⁹⁵ Political players and the citizenry need to know in advance where and how to lodge their disputes, and more importantly, 'which procedural and substantive rules will govern the complaint.'⁹⁶ As a principle, the complaint procedure must be transparent and accessible, and should include 'dispute resolution procedures, deadlines for complaints, matters of jurisdiction, burdens of proof, and standards of evidence.'⁹⁷

BH Weinberg goes even further and argues, from his findings on the jurisprudence from the United States of America, that election petitions must be based on written laws and that there is no common law basis for challenging elections,⁹⁸ unless fairness demands that common law principles be applied.⁹⁹ He states that the rules that govern elections contain all of the rules for challenging an election, and there are no other grounds on which an election challenge can be made.¹⁰⁰

As already explained in the previous chapter, section 83 of the Elections Act does not exist anymore, yet international standards require that the rules concerning adjudication of elections should be written in a clear manner, and should be accessible to all those involved in the electoral dispute resolution process. Further, relying on common law principles when dealing with election matters is not the most appropriate of standards of electoral adjudication.

⁹¹ International IDEA 'International Electoral Standards Guidelines for reviewing the legal framework of elections' (2002) 11.

⁹² As above.

⁹³ International IDEA (n91) 13.

⁹⁴ IFES 'Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)' (2011), 25.

⁹⁵ BH Weinberg *The Resolution of Election Disputes: Legal Principles That Control Election Challenges* (2008) 22.

⁹⁶ Weinberg (n95) 17.

⁹⁷ O Ipp & TF Hoverter 'Identifying International Principles for Resolving Election Disputes' (2005) 57(3) *Administrative Law Review* 837.

⁹⁸ Weinberg (n95) 131.

⁹⁹ Weinberg (n95) 10.

¹⁰⁰ Weinberg (n95) 2.

2.3 Regional electoral standards and approaches to resolution of presidential electoral disputes

In the African region, the need for free elections is underscored through article 13 of the African Charter on Human and Peoples' Rights (African Charter) which states that 'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.' In addition to this, the African Union's (AU) Declaration on the Principles Governing Democratic Elections in Africa provides that elections in Africa should be conducted freely and fairly under democratic constitutions and in compliance with a supportive legal framework.¹⁰¹ The African Charter on Democracy, Elections and Governance reaffirms the need for transparent, free and fair elections in Africa. It particularly requires states to:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.
3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.

In 2015, the South African Development Community (SADC) adopted the revised regional principles and guidelines that govern elections. These principles include transparency, media freedom, equal coverage in state media, integrity, fairness among other principles.¹⁰² The SADC guidelines also require that member states ensure that elections are free from violence, corruption and intimidation.¹⁰³ Through these principles and guidelines, SADC intends to ensure that elections are held in accordance with the constitution and the laws, and that member states adhere to the rule of law.¹⁰⁴ The Economic Community of West African States (ECOWAS) requires that 'every accession to power must be made through free, fair and transparent elections.'¹⁰⁵ The AU also requires that states shall ensure that electoral disputes are heard in accordance with the electoral laws of the country and by competent judicial authorities.¹⁰⁶

Kaaba and Fombad note that the legal framework for presidential disputes resolution in most African countries provide little substantive guidance on which exact principles the courts should apply when adjudicating the disputes.¹⁰⁷ They find that the principle that most courts in Africa rely upon when rejecting presidential petitions is the substantial effect rule, which is unfair for petitioners who in addition to proving substantial breach to the electoral law, they have to

¹⁰¹ African Union 'Declaration on the Principles Governing Democratic Elections in Africa' (2002).

African Union 'African Charter on Democracy, Elections and Governance' (2007).

¹⁰² Southern African Development Community 'SADC Principles and Guidelines Governing Democratic Elections' (2015) 5.

¹⁰³ As above.

¹⁰⁴ SADC (n102) 3.

¹⁰⁵ Art 1, ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001).

¹⁰⁶ European Commission for Democracy through Law (Venice Commission) 'Report on the Cancellation of Election Results' (2003) 4.

¹⁰⁷ Kaaba & Fombad (n33) 366.

further prove that the breach affected the results of the election, notwithstanding the need to uphold fairness and transparency in elections.¹⁰⁸

2.4 The grounds for nullification of presidential elections in Maldives, Austria, Ukraine and Malawi

Globally, it is only in the Maldives (2013), Austria (2016), Kenya (2017) and Malawi (2020) where the courts have annulled a presidential election after following a judicial process.¹⁰⁹ It is therefore appropriate that this paper looks at these nullifying judgements so as to identify the basis that was used in arriving at the historic judgements. In addition to these four countries, the Supreme Court of Ukraine also nullified the Ukrainian Prime Ministerial elections of 2004.¹¹⁰ Unlike the practice in most countries where the Prime Minister is either elected by Parliament or appointed by the President, in Ukraine the Prime Minister is elected through universal suffrage akin to a presidential election. This dissertation will therefore highlight how the nullification process took place in Ukraine, with a view of getting jurisprudential lessons from how Ukraine's Supreme Court arrived at its decision. Of course, the history, context, legal framework and other conditions are different from country to country and this paper by no means suggests that Kenya or any other country for that matter can copy the practice from these countries. However, the thinking behind these judgements can be instructive for Kenya and other jurisdictions.

2.4.1 Maldives

Whereas nullification of election understandably attracts mixed reaction from the winners and losers, the case of the Republic of Maldives was quite exceptional. This is because the Supreme Court of Maldives was criticised by both the United Nations and the Commonwealth Elections Observer Group for nullifying the presidential elections that were held on 7th September 2013, and for further postponing the repeat elections until the directions issued in the nullifying judgement were complied with. The Maldivian elections of 2013 had raised considerable international interest since they were held on the backdrop of a military and police coup that had ousted the first democratically elected President Mohamed Nasheed from power in 2012.¹¹¹

Just like in Kenya, the Supreme Court of Maldives has the original and final jurisdiction on presidential election petitions.¹¹² Similarly, for a presidential candidate to win, he/she is required to garner over 50% of the votes in the first round, failure of which the first two candidates

¹⁰⁸ Kaaba & Fombad (n33) 375-376.

¹⁰⁹ Metropoltv 'Malawi joins list of 5 countries to annul presidential elections globally' 4 February 2020 <https://metropoltv.co.ke/2020/02/04/malawi-joins-list-of-5-countries-to-annul-presidential-elections-globally/> (accessed 07 October 2021); O Kaaba 'Judgments and jurisprudence: Presiding over presidential petitions in Africa' 7 March 2020 <https://mg.co.za/africa/2021-03-07-judgments-and-jurisprudence-presiding-over-presidential-petitions-in-africa/> (accessed 07 October 2021).

¹¹⁰ OSCE 'Ukraine Presidential Election 31 October, 21 November and 26 December 2004 OSCE/ODIHR Election Observation Mission Final Report' <https://www.osce.org/files/f/documents/5/f/14673.pdf> 32 (accessed 28 September 2021).

¹¹¹ The Guardian 'Maldives president: I was forced to resign at gunpoint' 9 February 2012 <https://www.theguardian.com/world/2012/feb/09/maldives-president-forced-resign-gunpoint> (accessed 27 September 2021).

¹¹² Art 113, Constitution of the Republic of Maldives 2008.

proceed to a run-off.¹¹³ After the presidential elections were held on 7th September 2013, *Jumhooree* Party, which had come in third in the first round of the presidential elections, challenged the outcome where the Maldivian Democratic Party (MDP) led with 45.45% of the votes cast, while the first runner up, the Progressive Party of Maldives (PPM), had garnered 25.35% of the votes.¹¹⁴ The Supreme Court of Maldives nullified those results and ordered for a repeat of the first round of the elections.¹¹⁵

The grounds for nullification were that the elections had been carried out in a manner that violated the Constitution of Maldives, the Elections Commission Act, and a judgement that had been issued by the Supreme Court concerning how those elections should have been carried out.¹¹⁶ During the hearing, the Supreme Court conducted its own forensic investigations and found out that the Elections Commission had committed illegalities that included corruption, intimidation and undue influence in the elections process.¹¹⁷ In particular, 18 votes were cast by people who had already been registered as dead, 7 voters had their names manually added to the voters' list, 225 people voted yet they had not been issued with identity cards, 773 votes were cast using incorrect identity card numbers while 2830 voters had conflicting addresses. The Court further gave specific guidelines that had to be followed in those repeat elections to prevent the illegalities from being repeated. The first date given by the Supreme Court was 19th October 2013, but the Court postponed the elections to the 9th of November 2013 since the guidelines it had issued had not been adhered to.¹¹⁸

The nullification and postponement of the elections was criticised not only by MDP,¹¹⁹ but also by the Commonwealth Observer Group,¹²⁰ Ban Ki Moon, the then Secretary General of the United Nations,¹²¹ and the then United Nations High Commissioner for Human Rights, Ms Navi Pillay.¹²² The criticisms were based on the substantial effect rule. For example, the Commonwealth Observer Group noted that the number of votes disputed 'would not have been sufficient to materially affect the outcome of the 7 September election.' Ban Ki Moon stated that the elections that were held on 7th September 2013 had expressed the aspirations of the people since the turn out stood at 88% and he argued that 'the legitimate will of the people should not be denied.'¹²³ Navi Pillay's comments were even more brazen after she stated that she was alarmed that the Supreme Court of Maldives was 'interfering excessively in the presidential elections,' and by doing so it was 'subverting the democratic process and violating

¹¹³ Art 111(a), Constitution of the Republic of Maldives 2008.

¹¹⁴ The Commonwealth 'Reports of the Commonwealth Observer Group: Maldives Presidential Election 7 September 2013 and Re-Run of Maldives Presidential Election 9 November 2013 and Maldives Presidential Run-Off Election 16 November 2013' (2013) 71.

¹¹⁵ *Jumhooree Party v Elections Commission* Case No. 42/SC-C/2013, as translated in Reports of the Commonwealth Observer Group.

¹¹⁶ Commonwealth (n114) 73.

¹¹⁷ *Jumhooree* (n115).

¹¹⁸ Commonwealth (n114) 73.

¹¹⁹ BBC News 'Maldives election: Supreme Court delays run-off vote Published' 10 November 2013 <https://www.bbc.com/news/world-asia-24887515> (accessed 25 September 2021).

¹²⁰ Commonwealth (n114).

¹²¹ UN News 'Maldives: UN chief voices deep concern at delay of presidential re-run' 20 October 2013 <https://news.un.org/en/story/2013/10/453362-maldives-un-chief-voices-deep-concern-delay-presidential-re-run> (accessed 25 September 2021).

¹²² UN News 'Maldives Supreme Court undermining democratic process – UN rights chief' 30 October 2013 <https://news.un.org/en/story/2013/10/454202-maldives-supreme-court-undermining-democratic-process-un-rights-chief> (accessed 25 September 2021).

¹²³ UN News (n121).

the right of Maldivians to freely elect their representatives.’ She went further to state that ‘Whoever wins the election should embark on fundamental reforms to the judiciary to safeguard Maldives’ progress in democracy and rule of law.’¹²⁴

It is worth noting that the then incumbent President Mohamed Waheed Hassan was not contesting in the elections.¹²⁵ Also, the total valid votes cast in the first round was 209,495.¹²⁶ The re-run was held on 9th November 2013 where MDP garnered 46.93%,¹²⁷ and since no one gained over 50%, the run-off was finally held on 16th November 2013. The presidential poll was eventually won by the PPM which got 111, 203 (51.39%) votes against MDP’s 105,181 (48.61%).¹²⁸ The voter turnout stood at 91.41%, and the difference of votes was only 6022 votes.¹²⁹

The Maldivian example shows how qualitative approaches to election adjudication can in the long run change how the substantial effect rule functions. At the time of the first round of elections, the vote difference between the first and the runner up Political Party was huge, and the irregularities appeared to be insignificant and therefore without any ‘substantial effect to the results’ as the Commonwealth Observer Group had stated. If the Supreme Court had buckled into the external pressure and not insisted on strict adherence to the Constitution, the written law and its own orders, the irregularities would have become numerically significant in the eventual run-off, and probably MDP would have been declared winner of those elections had the irregularities not being resolved early enough. Basically, whereas nullifying elections on qualitative grounds is appropriate in its own right, the qualitative approach has a second advantage since it may in the long run have a direct impact on the number of votes and the consequences of this number on the final result/winner.

2.4.2 Austria

In the Austrian presidential elections of 2016, the presidential run-off between Alexander Van der Bellen, who had been declared winner by the electoral commission, and Norbert Hofer was nullified by the Austrian Constitutional Court on the grounds of both the substantial effect rule, and non-compliance with the constitutional principle of free elections.¹³⁰ This was after the Court found that the postal ballots casted in some of the regions were opened by unauthorised persons contrary to the electoral law which requires members of the District Elections Board to handle and evaluate the ballots.¹³¹ The court found that the vote difference between the two candidates was so close that this violation of the electoral law could have affected the outcome of the elections (hence the substantial effect rule). In addition to this ground, the Court also ruled that the Federal Electoral Authority had violated the constitutional principle of free elections by releasing partial election results to the media before closing of

¹²⁴ UN News (n122).

¹²⁵ BBC News (n119).

¹²⁶ Commonwealth (n114) 39.

¹²⁷ Commonwealth (n114) 56.

¹²⁸ Commonwealth (n114) 63.

¹²⁹ As above.

¹³⁰ Austria, Constitutional Court ‘W I 6/2016-125 01/07/2016’ https://www.vfgh.gv.at/downloads/VfGH_W_I_6-2016_EN_2.pdf 171-172, para 553-556 (accessed 26 September 2021).

¹³¹ Austria, Constitutional Court ‘W I 6/2016’ https://www.vfgh.gv.at/downloads/Bulletin_2016-1_W_I_6-2016_01.07.2016.pdf 10-11 (accessed 26 September 2021).

polls (thus the qualitative rule).¹³²The Court made it clear that the practice of transmitting results of the count before the closing of the elections had to be put to an end.¹³³

K Lachmayer criticised this judgement because the Court had nullified the elections on the grounds of violation of the formal rules of the Federal Presidential Elections Act, rather than by interrogating, using statistical mathematics and not just simple arithmetic, the effect of those violations on the overall number of votes.¹³⁴ He adds that by taking the strict rule-of-law-based approach, the Court departed from its previously established jurisprudence since it ‘now focused on the principle of legality to protect democracy,’ instead of considering the ‘effects on democracy caused by annulling a run-off vote in such a highly politicised and close election.’¹³⁵

This Austrian case is important as it gave equal weight to both adherences to the law for the law’s sake, and to the substantial effect rule. The lesson here is that both approaches are equally important and either of them, or even both of them can be used to nullify a presidential election. The case also shows that going forward, courts may need to shift from their own jurisprudence around elections so as to achieve electoral justice for the voters and the candidates.

2.4.3 Ukraine

In 2004, Ukraine held its run-off elections that pitted incumbent Prime Minister Viktor Yushchenko against the independent candidate Viktor Yushchenko. The Central Election Commission announced the final result declaring Yushchenko winner with 49.46% of the vote against Yushchenko 46.61%.¹³⁶ The announcement was followed by a series of huge protests dubbed ‘Orange Revolution,’ and a petition being filed against that declaration by the electoral commission. Nine days later, a 21-member Supreme Court bench nullified the elections and ordered for a rerun of the run-off elections. The rerun was held on 26 December 2004 where the incumbent lost.¹³⁷

The judges allowed most of Yushchenko’s accusations, and the irregularities confirmed by the Supreme Court included the concern that there was no fair media coverage for both candidates, the executive bodies continued to campaign for the incumbent in spite of them being banned from campaigning, the voter register was compiled irregularly, and there was a misuse of absentee voting certificates.¹³⁸ Yushchenko’s lawyers based most of their case on constitutional

¹³² Austria (n130) 555.

¹³³ As above.

¹³⁴ K Lachmayer ‘The Austrian Presidential Crisis 2016’ (2016) https://www.lachmayer.eu/wp-content/uploads/2016/12/Lachmayer_The-Austrian-Presidential-Crisis.pdf (accessed 26 September 2021).

¹³⁵ Lachmayer (n134) 4-7.

¹³⁶ Jeremy Franklin ‘Ukraine: Presidential Elections 2004 Report’ (2005) <https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2005/0605.pdf> 32 (accessed 27 September 2021).

¹³⁷ OSCE ‘Ukraine Presidential Election 31 October, 21 November and 26 December 2004 OSCE/ODIHR Election Observation Mission Final Report’ <https://www.osce.org/files/f/documents/5/f/14673.pdf> 32 (accessed 28 September 2021).

¹³⁸ European Parliament Presidential Elections Ukraine Ad Hoc Delegation ‘Election observation of rerun second round 24-27 December 2004 Report’ https://www.europarl.europa.eu/cmsdata/212719/Election_report_Ukraine_26_December_2004.pdf 4-5 (accessed 29 September 2021).

issues and not the specifics of the election law.¹³⁹Yunakovich’s allies criticised this approach, stating that the judgement was blatantly overreaching, and that it was a political decision that had crossed the boundaries of existing legislation and law. Yushchenko’s lawyers on the other hand praised the Supreme Court for taking the initiative to fill in gaps in the election laws which was a ‘very courageous stand.’¹⁴⁰

The Ukrainian experience shows that when electoral laws are insufficient, the Courts can still deliver electoral justice by inferring constitutional principles including that of free and fair elections.

2.4.4 Malawi

Perhaps the case that brings the best clarity to the question of evolving approaches to adjudication of presidential elections is the Malawian Supreme Court of Appeal Presidential petition that upheld the nullification of the victory of Peter Mutharika, who was the incumbent, by the Constitutional Court of Malawi.¹⁴¹ The judgement relied heavily on Malawian electoral laws which are quite detailed.

The background of the case was that in May 2019, Malawians went to the general elections and the incumbent President Peter Mutharika was announced winner by the Malawi Electoral Commission, having garnered 1,940,709 (38.57%), against his closest rivals Mr Lazurus Chakwera who had 1,781,740 (35.41%), and Mr Saulos Chilima who got 1,018,369 (20.24%).¹⁴² At the time of those elections, the electoral system in Malawi was first-past-the-post meaning that the declaration by the electoral commission made President Chakwera the president-elect for a second term.¹⁴³ The announcement of the results was met by protests across the country, and Chakwera and Chilima challenged the results at the Constitutional Court.¹⁴⁴ In February 2020, the Constitutional Court annulled the presidential results and ordered fresh elections within 150 days. Mutharika and the Electoral Commission appealed the decision to the Supreme Court of Appeal (Supreme Court) which is Malawi’s highest Court, and the Supreme Court upheld the decision of the Constitutional Court. The Supreme Court also concurred with the Constitutional Court that the proper interpretation of the Malawian Constitution and the Presidential and Parliamentary Elections Act was that if no candidate garnered over 50% of the votes cast, then a run-off would be held. This basically transformed the presidential election system from that requiring a simple majority, to an absolute majority system.¹⁴⁵

¹³⁹ SL Myers ‘Ukrainian Court Orders New Vote for Presidency, Citing Fraud,’ *New York Times*, 4 December 2004 <https://www.nytimes.com/2004/12/04/world/europe/ukrainian-court-orders-new-vote-for-presidency-citing-fraud.html> (accessed 28 September 2021).

¹⁴⁰ As above.

¹⁴¹ *Professor Arthur Peter Mutharika & Another v Dr Saulos Klaus Chilima & Another* (2020) Supreme Court of Appeal, MSCA Constitutional Appeal No 1 of 2020.

¹⁴² Africa News ‘Peter Mutharika wins Malawi’s presidential election: official’ 27 May 2019 <https://www.africanews.com/2019/05/27/peter-mutharika-wins-malawi-s-presidential-election-official/> (accessed 28 September 2021).

¹⁴³ Election Guide ‘Republic of Malawi’ 20 May 2014 <https://www.electionguide.org/elections/id/2320/> (accessed 28 September 2021).

¹⁴⁴ Africa News (n68).

¹⁴⁵ *Mutharika* (n141) 109.

The issues for determination in the matter included whether the Constitutional Court had erred in finding that there were irregularities, and whether in any case, those irregularities could have changed the results.¹⁴⁶ The Court affirmed that there were irregularities including the unlawful altering of result sheets;¹⁴⁷ introduction of new forms contrary to the stipulations in the Elections Act;¹⁴⁸ introduction of constituency tallying centres that were not provided for in law;¹⁴⁹ and failure to resolve complaints as provided for by the law.¹⁵⁰

On the issue of whether those irregularities affected the outcome of the elections (the substantial effect rule), the Supreme Court ruled that both the qualitative and quantitative tests could be applied in nullifying a presidential election, and not just the quantitative approaches.¹⁵¹ The Court based its reasoning on the fact that:¹⁵²

‘the law on elections is developing, and will continue to develop both within the jurisdiction as well as outside the jurisdiction where the electoral law is comparable to our electoral law. Thus, since the law on elections is developing this Court will be mindful that it will not be restrained in its approach’

The Supreme Court disagreed with the proposition that an election should only be nullified if the petitioners demonstrate that the non-compliance or irregularities affect the number of votes in the election.¹⁵³ The Court stated that ‘for an election to be truly free, fair and credible it must be conducted in full compliance with the constitution and applicable electoral laws.’¹⁵⁴ The Court further reiterated that elections are a process and not just an event, and that the ‘integrity of the entire electoral process has been recognized to have an important bearing on what happens at the polls.’¹⁵⁵ The Court therefore departed from its own jurisprudence¹⁵⁶ and noted that the use of the substantial effect rule was narrow and simplistic, and it may account for increased electoral malpractices where the law is largely ignored, and focus is only made on maximising the number of votes by whichever means.¹⁵⁷

The Court finally observed that¹⁵⁸

‘whether to apply the qualitative or quantitative test will largely depend on the manner the petition has been framed. Accordingly, where the petition is principally challenging figures then the quantitative approach may be used. Where the petition is challenging quality then the qualitative approach may be used. If the petition is raising issues of both quality and quantity, then the Court should be able to use both.’

¹⁴⁶ *Mutharika* (n141) 30.

¹⁴⁷ *Mutharika* (n141) 57.

¹⁴⁸ As above.

¹⁴⁹ *Mutharika* (n141) 60.

¹⁵⁰ *Mutharika* (n141) 67-75.

¹⁵¹ *Mutharika* (n141) 77-84.

¹⁵² *Mutharika* (n141) 78-79.

¹⁵³ *Mutharika* (n141) 84.

¹⁵⁴ As above.

¹⁵⁵ *Mutharika* (n141) 84-85.

¹⁵⁶ *Loveness Gondwe and Another v Catherine Gotani Nyahara* (2005) Supreme Court of Appeal, MSCA Civil Appeal No 3 of 2005.

¹⁵⁷ *Mutharika* (n141), 89

¹⁵⁸ *Mutharika* (n141) 92.

2.5 Conclusion

This chapter has shown some of the international electoral standards that courts should rely on when adjudicating election matters. When courts are adjudicating presidential elections, they should be guided by the twin principles of free and fair elections. The assessment on whether an election was free and fair is also dependent on whether other rights, like the right to freedom of assembly, freedom of association, freedom of movement among other rights were respected during the whole electoral cycle, and not just on the voting day. Further, adherence to non-numerical aspects of the electoral process, for example the integrity of statutory electoral forms and the strict observance by the electoral commission of the election laws and the constitution is of paramount importance. The chapter has also used concrete examples to show the relevant principles applicable to this dissertation that have been used to nullify presidential elections in other jurisdictions. The Kenyan courts can borrow from these international non-binding authorities by relying on constitutional principles on elections when the statutes and regulations are not adequate. The Kenyan courts should also view electoral jurisprudence as evolving, and therefore should build on the 2017 jurisprudence, rather than reverse back to using the common law principle, that is, the substantial effect rule, in the absence of specific statutory guidance. The chapter has also shown that when it comes to electoral matters, there is need to have specific laws that guide all aspects of the election process, and that can consequently be relied upon by the judiciary when adjudicating on election matters. It will be critical that the Kenya National Assembly amends the Elections Act so as to have provisions that may in a specific way guide the Supreme Court when adjudicating presidential petitions.

CHAPTER THREE: RESOLUTION OF PAST PRESIDENTIAL ELECTION DISPUTES IN KENYA AND THE RESULTANT LEGAL REFORMS

3 Introduction

This chapter focuses on how past presidential elections disputes in Kenya were resolved, and addresses the question of how the resolution of these disputes influenced constitutional, statutory and regulatory legal reforms governing presidential elections. Kenya has a presidential election cycle of five years, and this chapter will analyse presidential election disputes arising out of the elections of 1992, 1997, 2007 and 2013 presidential elections. The analysis begins from the 1992 elections because from 1966 up to 1992, the independence party, the Kenya African National Union (KANU), ruled Kenya under one Party system first from 1966 to 1982 (*de facto*) then *de jure* from 1982 up to 1991 when multipartyism was legally reinstated.¹⁵⁹ During this period, the Chairman of KANU automatically doubled up as the sole presidential candidate at the national elections and was elected unopposed.¹⁶⁰ The 2003 presidential elections are not addressed in this chapter since they didn't lead to an election dispute.¹⁶¹ The limitation of this chapter is that the presidential petitions that were filed in 1992 and 1997 were all dismissed on technicalities even before they were heard substantively, while in 2007 the opposition dealt with the matter politically through demonstrations and negotiations rather than through litigation in court. Nevertheless, the chapter will show how legal reforms arose from these presidential election disputes notwithstanding how the disputes were resolved. The legal issues and the reforms that should arise out of the 2017 presidential elections will be interrogated in chapter four. This chapter analyses the presidential elections chronologically where each section gives a brief context of the main issues in each of the presidential elections, and subsequently looks at the reforms that arose from how the elections in question were handled.

3.1 Presidential election disputes in 1992

The 1992 presidential election pitted the incumbent President Daniel Moi and eight other candidates, of note being Kenneth Matiba, Jaramogi Odinga and Mwai Kibaki.¹⁶² The incumbent won the elections on a plurality of votes with 1,962,866 (36.35%) votes, defeating the second candidate, Kenneth Matiba, who had 1,404,266 (26%) votes.¹⁶³ The elections were highly controversial and the whole process in the run up to the elections and the counting of votes was marred with allegations of unfairness, illegalities and irregularities.¹⁶⁴ For example, the incumbent President appointed all the commissioners of the Electoral Commission of Kenya (ECK), and he had the power of selecting the date of the elections within the election year.¹⁶⁵

¹⁵⁹ D Throup 'Understanding Elections in Africa' (1993) 63(3) *Journal of the International African Institute* 375.

¹⁶⁰ P Wanyande 'Electoral Politics and Election Outcomes in Kenya' (2006) 31(3) *Africa Development* 66.

¹⁶¹ News 24 'I accept defeat - Uhuru Kenyatta' 29 December 2002 <https://www.news24.com/News24/I-accept-defeat-Uhuru-Kenyatta-20021229> (accessed 17 October 2021).

¹⁶² African Elections database 'Elections in Kenya' <https://africanelections.tripod.com/ke.html> (accessed 17 October 2021).

¹⁶³ As above.

¹⁶⁴ S Brown 'Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya's Daniel Arap Moi in Power' (2001) 22(5) *Third World Quarterly* 726-728.

¹⁶⁵ As above.

Political parties were registered by the Attorney General's registrar of societies who had wide discretion on which party to register and which not to.¹⁶⁶ Further, pre-election violence was instigated in areas that were considered to be strongholds of the ruling party KANU.¹⁶⁷ The pre-election violence was intended to evict, from the KANU strongholds, people who belonged to ethnicities that were considered to support the opposition, to ensure that they would not vote against KANU.¹⁶⁸ Over 300, 000 were internally displaced and over 1, 500 were killed in the process.¹⁶⁹ The main opposition candidate, Mr Matiba was also arrested and detained without trial, and suffered a stroke while in detention and as a consequence he came out of prison with disjointed speech and uncoordinated hand and body movement.¹⁷⁰ The police and the provincial administration (the system of decentralised authority of the office of the president) interfered heavily with the election process, and many rallies organised by opposition politicians were either denied meeting permits, or were disrupted even after being given the green light to proceed.¹⁷¹ The state also interfered with the elections by not issuing youths with identity cards, particularly in opposition constituencies, which is a prerequisite to being registered as a voter.¹⁷² KANU also formed a youth campaigning team dubbed Youth for KANU 92 (YK92) which bribed the poor youth in the capital city and the opposition zones with so much money that as a result, inflation was experienced in the country's economy.¹⁷³

3.1.1 Presidential election petitions arising from the 1992 polls

Three presidential elections petitions were filed after the election results were declared. These were the *Matiba v Moi*,¹⁷⁴ *Mwau v Moi*¹⁷⁵ and *Orengo v Moi*¹⁷⁶ cases. All the cases were filed at the High Court, which sat as an election court for the purposes of electoral disputes. The *Orengo v Moi* case challenged the candidature of President Moi arguing that he had already served three terms by the time the 1992 elections were held and he was therefore not qualified to contest in the 1992 elections.¹⁷⁷ The Court dismissed the case by finding that the 1991 legal reforms that ushered in multipartyism and introduced presidential term limits could not be applied retrospectively,¹⁷⁸ and therefore this section will not address this particular petition since it was not based on the claim that the elections were fraudulent.

¹⁶⁶ Brown (n164).

¹⁶⁷ F Holmquist & M Ford 'The Future of democracy in Kenya' (1998) 45(2) *Africa Today* 229.

¹⁶⁸ As above.

¹⁶⁹ Holmquist & Ford (n167).

¹⁷⁰ Daily Nation 'Matiba seeks Sh12 billion for torture under Moi 03 July 2020

<https://nation.africa/kenya/news/politics/matiba-seeks-sh12-billion-for-torture-under-moi-1085802?view=htmlamp> (accessed 17 October 2021).

¹⁷¹ KG Adar 'The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational Code' (2000) 4(1) *African Sociological Review / Revue Africaine de Sociologie* 74-96.

¹⁷² Adar (n171) 89.

¹⁷³ The Standard 'Taxpayers still paying for State's 90s money-printing debacle' 3 August 2021

<https://www.standardmedia.co.ke/business/financial-standard/article/2001419844/taxpayers-still-paying-for-states-90s-money-printing-debacle> (accessed 17 October 2021).

¹⁷⁴ *Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi* (1994) eKLR.

¹⁷⁵ *Daniel Toroitich arap Moi v John Harun Mwau* (1997) eKLR.

¹⁷⁶ *James Orengo v Daniel Moi* (1993) eKLR.

¹⁷⁷ L Awuor & M Achode 'Comparative Analysis of Presidential Election Petitions in Kenya and Other Jurisdictions' 01 June 2013 <http://kenyalaw.org/kenyalawblog/comparative-analysis-of-presidential-election-petitions-in-kenya-and-other-jurisdictions/> (accessed 15 October 2021).

¹⁷⁸ As above.

In the *Matiba v Moi* case, the Respondent, President Moi made a preliminary objection on the grounds that the Petitioner had not signed the petition himself, contrary to the Election Petition Rules which required that an election petition be signed by all petitioners.¹⁷⁹ The petition in this case had been signed by Matiba's wife who had the Power of Attorney donated to her by the husband.¹⁸⁰ Matiba could not sign the petition documents himself due to the uncoordinated hand movement that had been caused by the stroke suffered during detention.¹⁸¹ The High Court dismissed the preliminary objection because Matiba's wife had (on behalf of the husband) also signed the presidential nomination forms that he presented to the ECK and which the ECK had accepted despite the Nomination Rules having a similar requirement as the Petition Rules.¹⁸² President Moi then appealed this ruling, and the Court of Appeal overturned the decision of the High Court and agreed with Moi that the Petition Rules had been framed in mandatory terms and that Matiba had to sign the petition documents himself.¹⁸³

In the second petition, which pitted Harun Mwaui as the petitioner against President Moi and the ECK as the respondents, the petitioner argued that President Moi was not duly nominated to contest in the elections since his nomination forms were not presented in the manner that had been prescribed in the Constitution, that is, that the 'respondent did not present the 40 standard sheets of foolscap papers to the Commission as was required by section 5(3)(b) of the Constitution.'¹⁸⁴ The High Court dismissed the petition on the grounds that the court had to approach the matter of the nomination forms substantively rather than look at it in the restricted manner as the petitioner intended.¹⁸⁵ The petitioner appealed to the Court of Appeal, which agreed with the decision of the High Court and further dismissed the appeal on a legal technicality stating that the issue brought before it was not appealable.¹⁸⁶ This was unlike its approach in the *Matiba* case where the Court of Appeal refused to approach the matter from a substantive point of view, and instead strictly followed what the law had provided with respect to signing of forms.

The decision of the Court of Appeal in the *Matiba* case was criticised for being unfair to the petitioner and in favour of the incumbent since the court should have interpreted the law purposively, rather than give it the literal interpretation given the circumstances of the case.

3.2 Presidential elections of 1997

The election experiences of the 1992 presidential elections greatly influenced how the opposition and civil society organisations approached the 1997 elections. They launched a campaign for the amendment of the Constitution and the election laws, and the clarion call for the broad reform movement was 'no reforms, no elections.'¹⁸⁷ The reform movement organised countrywide demonstrations demanding for reforms, and eventually President Moi caved in, and KANU and the parliamentary parties agreed to form an Inter-Parties Parliamentary Group

¹⁷⁹ *Matiba* (n174) 3.

¹⁸⁰ *Matiba* (n174) 11.

¹⁸¹ As above.

¹⁸² *Matiba* (n174).

¹⁸³ As above.

¹⁸⁴ *Moi* (n175) 2.

¹⁸⁵ Awuor & Achode (n177).

¹⁸⁶ *Moi* (n175) 4.

¹⁸⁷ Brown (n164) 733.

(IPPG) whose mandate was to identify and make the necessary electoral reforms that would create a level playing field for the 1997 elections.¹⁸⁸ After negotiations, both sides made compromises and agreed to amend some relevant sections of the Constitution and the elections Acts as illustrated below.

3.2.1 The Inter-Parties Parliamentary Group (IPPG) reforms

The IPPG process made four amendments to the Constitution which 1) reaffirmed that Kenya would remain a multiparty republic; 2) increased the number of ECK commissioners from the existing 11 to 21, with the additional 10 being nominated by parliamentary opposition parties; 3) introduced protection against discrimination of women and 4) it stipulated that the 12 nomination slots to parliament would be based on proportional representation rather than be appointed by the President.¹⁸⁹

To limit the powers of the police and the provincial administration during elections, the Vagrancy Act was repealed, and the section of the Public Order Act that required police to issue permits for political meetings was replaced with a requirement that the police would only be notified of such a meeting. The Penal Code was also amended and the sedition laws were repealed.¹⁹⁰ The Chief's Authority Act was also amended to prevent them from interfering in any way with the activities of political parties.¹⁹¹ Amendments were also made to the Societies Act so that the registrar had 120 days to register a new party, and those denied registration could appeal to the High Court within 90 days of the refusal of registration. The registrar also had to give reasons for the refusal of registration.¹⁹²

Administrative changes were also included and it was agreed that all political parties would have equitable coverage in the state-owned radio and TV stations, and that all pending licenses for private media would be issued.¹⁹³ The prerogative of determining the election timeline was also taken away from the President and given to the ECK, even though in the real sense the President still had some role in determining the elections timetable since he could still decide when to dissolve parliament, after which elections would be held.¹⁹⁴ It was also agreed that all presidential candidates would also be provided with state security.¹⁹⁵

However, the KANU government did not adhere to the new laws and the agreed terms, and in any case the ECK had already made critical decisions for example delimitation of constituency boundaries months before the additional commissioners were appointed by the opposition parties.¹⁹⁶ The delimitation of constituencies ensured that there were more constituencies in regions where KANU was popular, while the opposition areas had large constituencies with

¹⁸⁸ The Irish Times 'Kenyan reforms adopted ahead of protests' 12 September 1997 <https://www.irishtimes.com/news/kenyan-reforms-adopted-ahead-of-protests-1.105545> (accessed 18 October 2021).

¹⁸⁹ SN Ndegwa 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' (1998) 45(2) *Africa Today* 203-206.

¹⁹⁰ As above.

¹⁹¹ Ndegwa (n189).

¹⁹² Ndegwa (n189).

¹⁹³ Ndegwa (n189).

¹⁹⁴ Ndegwa (n189).

¹⁹⁵ Ndegwa (n189).

¹⁹⁶ Ndegwa (n189) 207.

higher populations. The effect of this is that KANU would win more seats in parliament with lesser votes per constituency (KANU won 95 seats with an average of 14 138 votes per seat; (FORD)-Kenya won 31 seats with an average of 32 152 votes per seat; FORD-Asili won twenty-nine seats with an average of 38 220 votes; and DP won 23 seats with an average of 43 779 votes per seat).¹⁹⁷

3.2.2 Presidential petition arising from the 1997 presidential elections

President Moi was once again announced winner in the 1997 presidential elections, and Mwai Kibaki who came in second filed a petition in high court praying that the election be nullified as it was marred by so many irregularities that the will of the people was not reflected in those elections.¹⁹⁸ President Moi objected to the petition on the ground that he had not been served in person as was required by law and that he had only learnt of the petition from newspaper reports.¹⁹⁹ Rule 14 (1) under the National Assembly and Presidential Elections Act regulations required that a petitioner serves a respondent personally.²⁰⁰ Kibaki argued that it was not possible to serve the respondent personally since he was inaccessible as the President of Kenya.²⁰¹ However, Kibaki had made service through a Kenya Gazette Notice which in ordinary circumstances is deemed as alternative service.²⁰² The High Court and later the Court of Appeal rejected Kibaki's mode of service, and insisted that he should have served the President personally as that is what is required by law.²⁰³

3.3 Presidential elections of 2007

Mwai Kibaki was eventually elected president of Kenya in the 2002 elections, and he successfully defended his seat in 2007 against his main opponent, Raila Odinga.²⁰⁴ The hotly contested elections were marred with allegations of vote stealing, and where the results from many of the polling stations differed from those announced at the national tallying centre.²⁰⁵ The results from President Kibaki's strongholds also took longer to arrive at the national tallying centre and the opposition alleged that this was done deliberately to ensure that the final results were altered so that they could be comparatively higher than those of Odinga.²⁰⁶ After the ECK announced Kibaki the winner, the President-elect was hastily sworn for his second term at State House in the evening. In the days that followed, the opposition vowed that they would not challenge the outcome of the elections in court since they could not trust the judiciary and instead called for mass action.²⁰⁷ This was followed by the worst elections violence in the history

¹⁹⁷ As above.

¹⁹⁸ *Mwai Kibaki v Daniel Toroitich Arap Moi* (1999) eKLR.

¹⁹⁹ *Kibaki* (n198) 4.

²⁰⁰ *Kibaki* (n198).

²⁰¹ *Kibaki* (n198).

²⁰² *Kibaki* (n198) 2.

²⁰³ *Kibaki* (n198) 18.

²⁰⁴ African Elections database 'Elections in Kenya' <https://africanelections.tripod.com/ke.html> (accessed 17 October 2021).

²⁰⁵ EU Election Observation Mission 'Final Report on the General Elections in Kenya 27 December 2007' (2008).

²⁰⁶ The Guardian 'Riots and vote-rigging claims as Kenyan polls go to the wire' 30 December 2007

<https://www.theguardian.com/world/2007/dec/30/kenya.xanrice> (accessed 18 October 2021).

²⁰⁷ News 24 'Odinga calls for mass action' 31 December 2007 <https://www.news24.com/News24/Odinga-calls-for-mass-action-20071231> (accessed 18 October 2021).

of Kenya since independence.²⁰⁸ Over 1000 people were killed in ethnically targeted violence, and over 350, 000 were internally displaced.²⁰⁹ The African Union, the United Nations and the East African Community had to intervene and the Kenya National Dialogue and Reconciliation (KNDR) process was established.²¹⁰ Eventually a power-sharing agreement between Kibaki and Odinga was made, and the Constitution was amended to make Odinga the Prime Minister of Kenya.²¹¹ Part of the KNDR agreement was to ensure an overhaul of the Constitution so that it would reflect a political, social and economic reality for multiparty democracy in Kenya.²¹² A new Constitution of Kenya was eventually promulgated on 27th August 2010 bringing with it fundamental changes to the electoral legal framework in Kenya.

3.3.1 Electoral reforms under the 2010 Constitution

The 2007 post elections violence gave a great impetus to the process of reforming the Constitution of Kenya.²¹³ The drafting process, which had been initiated ten years earlier, recognised the negative experiences of the past and it sought to cement and build on the gains that were made in the past.²¹⁴ Many progressive provisions were included in the Constitution, and the Constitution gave a timeline by which certain enabling statutory laws had to be passed by Parliament so as to operationalise the corresponding constitutional provisions.²¹⁵ A Constitutional Commission on Implementation of the Constitution was established to guide the enactment of these laws.²¹⁶

The 2010 Constitution confirmed Kenya as a multi-party democratic state,²¹⁷ and it has a Bill of rights which enshrines political rights that include the right to form, join and participate in activities of a political party of one's choice.²¹⁸ Article 38 (2) of the Constitution also provides for the right to free, fair and regular elections based on universal suffrage, and the right to contest in elections. These political rights are further buttressed under articles 91 and 92 of the Constitution and the Political Parties Act of 2011 and the Elections Act of 2011. Article 92 of the Constitution requires that state-owned media shall give equitable airplay to all political parties and requires regulation of the media to ensure fair election campaigns. The Political Parties Act establishes the office of the Registrar of Political Parties as an independent office, where the Registrar of political parties enjoys security of tenure for a non-renewable term of six years.²¹⁹ The Act also established the Political Parties Disputes Tribunal (PPDT), which is a specialised

²⁰⁸ The Commission of Inquiry into the Post-Election Violence 'Report of the Commission of Inquiry into the Post-Election Violence' (2008) 308, 335.

²⁰⁹ As above.

²¹⁰ Kenya National Dialogue and Reconciliation 'Statement of long-term issues and solutions' p5.

²¹¹ The Guardian 'Kenya's leaders agree power-sharing deal' 28 February 2008

<https://www.theguardian.com/world/2008/feb/28/kenya> (accessed 16 October 2021).

²¹² KNDR (n210).

²¹³ F Owuor 'Electoral Laws and Process the 2007 General Elections in Kenya' (2008) 7(2) *Journal of African Elections* 114.

²¹⁴ Committee of Experts on Constitutional Review 'Final Report of the Committee of Experts on Constitutional Review' (2010) 16.

²¹⁵ Fifth schedule, Constitution of Kenya 2010.

²¹⁶ Sixth schedule, Constitution of Kenya 2010.

²¹⁷ Art 4, Constitution of Kenya 2010.

²¹⁸ Art 38(1), Constitution of Kenya 2010.

²¹⁹ Sec 33(9), Political Parties Act 11 of 2011.

court dealing with political parties' disputes, which must be heard and determined within three months and whose decision is appealable to the High Court.²²⁰

A whole chapter of the Constitution (Chapter seven) is dedicated to 'representation of the people', and the chapter outlines details of the establishment, independence, and functions of the Independent Electoral and Boundaries Commission (IEBC).²²¹ The IEBC Act 2011 gives the finer details on the operational and administrative aspects of the Commission. For instance, before the Commissioners are appointed, a selection panel is first appointed by the President, the Judicial Service Commission, the Ethics and Anti-Corruption Commission and the Association of Professional Societies of East Africa, and the names are submitted to the National Assembly for approval.²²² After approval, the selection panel invites comments from the public on the applicants, and it then conducts public interviews, and finally submits the final names to the National Assembly through the President.²²³ The National Assembly vets the nominees further and if it approves the nominees, the names are sent to the President who does the final ceremonial appointment.²²⁴ This process is a sharp contrast and marks a big leap forward as compared to the 1992 and even the 1997 compromise appointment processes. The removal of the Commissioners is also an intricate constitutional process which begins with a petition to the National Assembly, which if approved, the President appoints a tribunal made up of at least three advocates of over 10 years experience.²²⁵ The tribunal investigates the allegations and makes binding recommendations to the President who must act on them within thirty days of receipt.²²⁶ The Constitution also gives the IEBC some level of financial independence since it provides that its expenses shall be charged to the consolidated fund and therefore the National Assembly is responsible for the appropriation of its budget.²²⁷ Articles 81 and 86 of the Constitution contain the guidelines of how elections should be conducted. Article 81 reiterates the centrality of free and fair elections that are conducted transparently, accurately and impartially by an independent body. It also requires that elections be free from improper influence, intimidation and violence. Article 86 of the Constitution requires the IEBC to ensure that elections are carried out in a simple, transparent and verifiable manner, and to ensure that votes are counted and tallied accurately and announced promptly.

Unlike in the pre-2010 constitutional dispensation where high court had jurisdiction over presidential petitions, the current Constitution gives the original jurisdiction to the Supreme Court which must hear and determine the matter within 14 days.²²⁸ If a petition is lodged, the swearing-in of the president-elect is suspended until the matter is determined.²²⁹ Also, perhaps in response to President Kibaki's evening swearing-in at state house in 2007, the Assumption of the Office of President Act requires that the swearing-in ceremony be conducted between 10am and 2pm on a day declared a public holiday.²³⁰

²²⁰ Political Parties (n219) sec 39.

²²¹ Art 88 & 89, Constitution of Kenya 2010.

²²² First schedule, IEBC Act 9 of 2011.

²²³ As above.

²²⁴ IEBC (n222).

²²⁵ Art 251, Constitution of Kenya 2010.

²²⁶ As above.

²²⁷ Art 206, 221, 249(3) & 250 (7)(8), Constitution of Kenya 2010.

²²⁸ Art 163 (3)(a) and 140 (2), Constitution of Kenya 2010.

²²⁹ Art 141, Constitution of Kenya 2010.

²³⁰ Sec 13, Assumption of the Office of President Act 21 of 2012.

3.4 Presidential election dispute in 2013

The 2013 presidential elections were the first to be conducted under the Constitution of Kenya 2010 and the new election laws and regulations. The IEBC declared Uhuru Kenyatta the president-elect, with Raila Odinga coming in second.²³¹ Unlike in 2007 where the main opposition avoided the courts because it didn't faith in them, this time round Odinga filed a presidential petition at the Supreme Court.²³² The petitioner prayed for the nullification of the elections on several grounds including the fact that the IEBC relied on manual results to announce the winner yet it had put in place technology that should have been used for electronic voter identification and electronic result transmission, both of which failed in most polling stations across the country therefore giving leeway for interfering with the results especially at the constituency and at the national levels.²³³ The Supreme Court, on its own motion, ordered for a comparison and re-tallying of randomly sampled results from different regions of the country and found that there were indeed discrepancies that would have been avoided had the technology been used successfully.²³⁴ The Court eventually dismissed the petition since it found that the irregularities committed did not have a substantial effect on the outcome of the elections.²³⁵

3.4.1 Electoral reforms after the 2013 presidential judgement

Three major changes were made in the electoral framework following the 2013 presidential petition. First, the IEBC did an internal audit and found out that it need to change how it engaged its constituency and county returning officers since they used to be hired for a short period preceding the elections, after which the contract would end after the elections. The IEBC therefore resolved to employ the returning officers on a permanent basis so that they would be given appropriate and continuous training and also so that they would be more dedicated to their work.²³⁶ Second, the Election Offences Act of 2016 was passed into law and it listed electoral offences whose violation would lead to jail terms of up to between three to six years.²³⁷ The offences include;²³⁸ tampering with the voter register; multiple registration as a voter; personation; bribery; commission of electoral offences by members of IEBC; use of violence and intimidation; use of national security organs to sway voters; use of public resources to campaign; refusal by employers to allow employees reasonable time to vote; offences related to interference with election technology; failure of election officials to maintain secrecy; and breach of the electoral code of conduct by party officials and candidates. These offences cover both qualitative and quantitative aspects of the elections process. The Act also provides for the appointment of specialised magistrates to handle offences under the statute.²³⁹ Third, the

²³¹ *Raila* (n8).

²³² BBC News 'Raila Odinga files Kenya election appeal' 16 March 2013 <https://www.bbc.com/news/world-africa-21812559> (accessed 16 October 2021).

²³³ *Raila* (n8) 18.

²³⁴ *Raila* (n8) 29.

²³⁵ *Raila* (n8) 53-55.

²³⁶ Independent Electoral and Boundaries Commission 'Annual Report 2013-14' (2014).

²³⁷ Election Offences Act 37 of 2016.

²³⁸ Election Offences (n237) sec 3-20.

²³⁹ Election Offences (n237) sec 23.

importance of the reliance on technology by the IEBC was underscored by the High Court and the Court of Appeal in the *Maina Kiai v IEBC* case, where the Court ruled that the results announced by the constituency returning officers could not be amended by the IEBC at any other level.²⁴⁰ The Court also ruled that the electronic results were not provisional and were as final as the manual results.²⁴¹

3.5 Conclusion

This chapter has demonstrated how presidential election disputes since 1992 have influenced critical changes in the electoral laws of Kenya. Most of the changes to the electoral laws involved the qualitative aspects of the elections, which have a bearing on the eventual quantitative outcome of the elections. It is therefore difficult for example to conclude that an election was free and fair when the appointment of the election commissioners is done by one of the contestants. Also, when the State and public resources are used to support one candidate, then the elections can be said to be rigged even before they actually happened. The Constitutionalisation of the 1997 political compromises was important since they are more likely to be adhered to by all parties including the incumbent when they are enshrined in the Constitution. Indeed, a comparative analysis done by Fombad on the Constitutional entrenchment of Elections Management Bodies (EMB) in Africa found that Kenya had gone a great length in entrenching the key features necessary for an independent and effective EMB.²⁴² The legislation on election offences and the establishment of specialised courts to hear election offences serves as significant deterrence to those who intend to engage in electoral malpractices. The codification of these offences is also important since it helps the judiciary to determine what constitutes electoral illegalities. This history is important as it shows that the process towards free and fair elections in Kenya is a developing one, and that past challenges have always given way to better election laws in the country. In this regard, the 2017 elections and the presidential petition should be used to strengthen democracy in Kenya and to promote free and fair elections in the future.

²⁴⁰ *Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR; *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR.

²⁴¹ As above.

²⁴² Fombad (n37) 10-12.

CHAPTER FOUR: THE FUTURE OF PRESIDENTIAL ELECTION DISPUTES ADJUDICATION IN KENYA

4 Introduction

This chapter explores the future of adjudicating presidential election disputes in Kenya by applying the findings from the foregoing as applied to the legal framework governing elections and nullification of presidential elections in Kenya. The chapter begins by distinguishing between qualitative and quantitative requirements in elections, and interrogates how the substantial effect rule has been applied in selected African jurisdictions. The chapter then looks at how the Kenyan Supreme Court departed from the use of the substantial effect rule therefore leading to the nullification of the presidential election of 2017. The chapter recognises that the amendment to section 83 of the Elections Act and the subsequent declaration that section 83 of the Elections Act 2011 is unconstitutional poses a great challenge to the gains made so far in the actualisation of electoral justice in Kenya. The chapter discusses the prospects of ensuring that electoral justice is promoted in the country by arguing that the Constitutional provisions, just like in other jurisdictions where presidential elections have been nullified, can be interpreted progressively to achieve this objective.

4.1 Relevance of quantitative and qualitative requirements in adjudicating presidential elections

Quantitative aspects in elections are those that deal with numbers.²⁴³ This includes issues of casting of votes, accuracy in counting and tallying of votes, and the announcement of the correct results.²⁴⁴ Qualitative aspects of an election on the other hand deal with the whole election process before and during the elections day and not just the numbers.²⁴⁵ Qualitative requirements are used to determine whether an election was free and fair and whether the elections were conducted in a lawful manner irrespective of who garnered more votes, while quantitative aspects are simply concerned with who won the elections.²⁴⁶ Both the quantitative and the qualitative aspects of the elections are important since the number of votes do matter in an election, and also a candidate who wins in a process that is not free and fair cannot be said to have won the elections in a legitimate way.²⁴⁷

When deciding presidential elections, courts in several African jurisdictions including Zambia, Uganda, Nigeria, Ghana and Kenya have relied on the substantial effect rule which puts more emphasis on the quantitative requirements, that is, numbers and results, and subordinates the qualitative aspects of the election process to the quantitative aspects.²⁴⁸ The substantial effect rule asserts that if there are irregularities in an election, then a court should only annul that election if the irregularities have substantially affected the results of the elections to an extent

²⁴³ Odek (n52) 6-7.

²⁴⁴ As above.

²⁴⁵ *Mutharika* (n141) 78.

²⁴⁶ Odek (n52).

²⁴⁷ *Mutharika* (n141) 92.

²⁴⁸ *Kaaba & Fombad* (n10) 376-380.

where it is no longer clear who the winner is, or it is clear that the person declared winner did not actually win.²⁴⁹ The substantial effect rule holds that minor infractions and irregularities should not have a bearing on the legitimacy of an election.²⁵⁰ Kaaba and Fombad argue that ‘the substantial effect rule has been applied in Africa in the most disingenuous way in Africa to uphold elections otherwise fraught with major irregularities.’²⁵¹ They further posit that in modern democracies, voters should be entitled to a free and fair election, and therefore requiring that a litigant who has proven substantial violations of the election laws to also prove that the violation had an effect on the results is not fair.²⁵²

4.2 Substantial effect rule as applied in presidential polls in Ghana, Uganda, Nigeria and Zambia

In 2013, the Electoral Commission of Ghana announced that the incumbent President John Dramani Mahama had won the presidential elections with 50.7% of the votes, defeating Nana Akufo-Addo who had 47.7%.²⁵³ Akufo-Addo petitioned the results at the Supreme Court of Ghana, where he alleged that President Mahama had not been validly elected.²⁵⁴ The Supreme Court broadly identified two issues for determination; first, whether there had been any violations to the electoral laws; and secondly, whether the violations, if any, had affected the results of the elections.²⁵⁵ The Court found that there was evidence of multiple voting, and voting without biometric authentication.²⁵⁶ The Court also found that the elections presiding officers had not signed some of the result declaration forms as was required by law and therefore unanimously concluded that there were violations of the electoral laws.²⁵⁷ However, the Court finally dismissed the petition in a majority decision of five to four, and declared that the violations of law did not affect the results of the elections.²⁵⁸ The minority judgement on the other hand held that the violations identified affected the validity of the election of President Mahama and that the elections should have been nullified.²⁵⁹ It is important to note that even from a strict substantive effect rule approach, the win by President Mahama was quite slim, since he required over 50% of the vote to be declared winner failure to which a re-run would be held.

In Uganda, a similar approach was taken by the Supreme Court of Uganda in the 2006 presidential petition between Kizza Besigye and Yoweri Museveni.²⁶⁰ In this case, Kizza Besigye challenged the victory of incumbent President Museveni, where the Electoral Commission announced that Museveni had won with 4, 078, 911 votes (59.28%) against the petitioner’s

²⁴⁹ Odek (n52) 39 & 42.

²⁵⁰ Kaaba (n53) 344.

²⁵¹ Kaaba & Fombad (n10) 376.

²⁵² As above.

²⁵³ BBC News ‘Ghana Supreme Court upholds John Mahama’s win’ 29 August 2013 <https://www.bbc.com/news/world-africa-23878458> (accessed 24 October 2021).

²⁵⁴ *Akufo-Addo & Others v Mahama & Another* (Ruling) (J8/31/2013).

²⁵⁵ Azu (n71) 155-157.

²⁵⁶ As above.

²⁵⁷ Azu (n71).

²⁵⁸ Azu (n71).

²⁵⁹ Azu (n71).

²⁶⁰ *Kizza Besigye v Electoral Commission & Yoweri Kaguta Museveni* (Election Petition-2006/1).

2, 570, 603 (37.36%).²⁶¹ The Court identified five issues for determination, among them whether there was non-compliance with the Constitution and the electoral laws and whether the elections were conducted in accordance to the principles laid down in the Constitution, and whether any violation that might have occurred affected the results of the presidential elections in a substantial manner.²⁶² The Court found that there was non-compliance with the Constitutional provisions and the electoral laws.²⁶³ It particularly established that some of the voters found their names deleted from the voters' register and others were prevented from voting.²⁶⁴ The Court also found that there was non-compliance with the principles laid down in the Constitution and the Electoral laws since the 'principle of free and fair elections was compromised by bribery and intimidation or violence', and since the principles of equal suffrage and secrecy of the vote was violated through vote stuffing and multiple voting in some constituencies.²⁶⁵ Concerning the third issue for determination, the Supreme Court, by a majority decision of four to three held that the petitioner had not proved that the violations had affected the results of the elections in a substantial manner and the petition was therefore dismissed.²⁶⁶

The 2007 presidential elections in Nigeria had three main candidates, Umaru Yar'Adua, Muhammadu Buhari and Atiku Abubakar who garnered 24.6 million, 6.6 million and 2.6 million votes respectively.²⁶⁷ Yar'Adua was the candidate for the Peoples Democratic Party (PDP) which was the party of the outgoing President Olusegun Obasanjo.²⁶⁸ The elections were marred with allegations of massive electoral violations, including ballot stuffing, under-age voting, bribery, multiple voting, altering result forms, and intimidation of voters.²⁶⁹ Even the winner Yar'Adua and the outgoing President Obasanjo agreed that the elections were marred with irregularities.²⁷⁰ Both Buhari and Abubakar challenged the results at the Court of Appeal which dismissed their petition, and the Supreme Court also dismissed the petitions in split decisions (4-3 in Buhari's case and 6-1 in Abubakar's case) on the basis of the substantial effect rule, notwithstanding confirming that the irregularities and the illegalities had occurred.²⁷¹

In Zambia, the 2001 presidential elections pitted Levi Mwanawasa (with 28.69% of the votes) and Anderson Kambela Mazoka (with 26.76%) as the front runners.²⁷² Just like in Nigeria, none of the candidates was an incumbent since the outgoing President Frederick Chiluba had served his two terms.²⁷³ Levi Mwanawasa however came from the ruling party, Movement for Multi-

²⁶¹ *Besigye* (n260) 2.

²⁶² *Besigye* (n260) 4.

²⁶³ *Besigye* (n260) 5.

²⁶⁴ *Besigye* (n260) 5.

²⁶⁵ *Besigye* (n260) 5.

²⁶⁶ *Besigye* (n260) 5.

²⁶⁷ Reuters 'Yar'Adua declared winner of Nigeria poll "charade"' <https://www.reuters.com/article/us-nigeria-election-idUSL2149632920070423> (accessed 24 October 2021).

²⁶⁸ CJ Ubanyionwu 'Election petition cases and the right to fair trial within a reasonable time in Nigeria' (2012) 3 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 120.

²⁶⁹ Ubanyionwu (n268) 121.

²⁷⁰ As above; The Guardian 'Ruling party named winner in disputed Nigerian election' 24 April 2007 <https://www.theguardian.com/world/2007/apr/24/chrismcgreal.international> (accessed 25 October 2021).

²⁷¹ Ubanyionwu (n268) 121.

²⁷² P Burnell 'Zambia's 2001 Elections: The Tyranny of Small Decisions, 'Non-Decisions' and 'Not Decisions' (2002) 23(6) *Third World Quarterly* 1108.

²⁷³ The New Humanitarian 'Chiluba finally bows out of Zambian politics 25 March 2002' <https://www.thenewhumanitarian.org/fr/node/199695> (accessed 25 October 2021).

Party Democracy (MMD), and he had been handpicked by President Chiluba as his successor.²⁷⁴ The Supreme Court of Zambia found that irregularities had occurred in the elections including unlawful use of state resources by the MMD, misuse of the national intelligence services in support of the ruling party and misuse of funds from state parastatals.²⁷⁵ The Court however held that the irregularities and the illegalities did not ‘seriously affect the result’ of the presidential poll.²⁷⁶ Unlike in Ghana, Uganda and Nigeria, the substantial effect rule is not codified in Zambia,²⁷⁷ and it was therefore relied upon by the Supreme Court of Zambia as a common law principle.

4.3 Qualitative approach as applied in Malawi in 2020 and in Kenya 2017

As already stated, the quality of the election is as important as the final results of the elections. The Kenyan and the Malawian Supreme Courts made history in 2017 and in 2020 respectively when they nullified the presidential elections of the incumbent presidents of the two countries.²⁷⁸ This was in great contrast to the practice of the African courts as shown in the previous section that have a past of upholding the victory of the incumbents or candidates from the ruling parties notwithstanding evidence of contravention of the electoral law as shown in the previous section. Both the Malawian and the Kenyan Supreme Courts departed from the strict application of the substantial effect rule and instead focused on the election process as a whole.²⁷⁹ However, this does not mean that the quantitative aspects and the substantial effect rule should not be considered in an election. In the Malawian 2020 judgement, the Court noted that section 114 of the Parliamentary and Presidential Elections Act provided for the substantial effect rule, but went ahead and stated that:²⁸⁰

‘Further, whether to apply the qualitative or quantitative test will largely depend on the manner the petition has been framed. Accordingly, where the petition is principally challenging figures then the quantitative approach may be used. Where the petition is challenging quality then the qualitative approach may be used. If the petition is raising issues of both quality and quantity, then the Court should be able to use both. We so find and conclude.’

In the Kenyan nullification judgement of 2017, the Kenyan Supreme Court noted that the drafting of what would be considered to be an equivalent of the substantial effect rule in Kenya’s Elections Act was different from how it appears in England, Nigeria, Ghana, Uganda and other comparable common law jurisdictions, and therefore the Kenyan Court could not be bound by the substantial effect rule, or be persuaded by the jurisprudence from the common law jurisdictions that the Respondents relied on.²⁸¹ This is because the electoral laws in the mentioned countries required that for a court to nullify a presidential election, a petitioner needed to prove both substantial non-compliance with the law, and the fact that the non-compliance substantially affected the outcome of the elections, unlike Kenya’s law which

²⁷⁴ As above.

²⁷⁵ Kaaba (n53) 348.

²⁷⁶ As above.

²⁷⁷ Kaaba (n53) 348.

²⁷⁸ *Mutharika* (n141); *Raila* (n2).

²⁷⁹ *Raila* (n2) 64 para 303; *Mutharika* (n67) 119.

²⁸⁰ *Mutharika* (n141) 92.

²⁸¹ *Raila* (n2) 38-39 para 193.

allowed for the nullification of a presidential petition based on non-compliance with the law, without the need to prove that the non-compliance affected the results of the elections.²⁸² For example, section 135(1) of the Nigerian Electoral Act of 2002 provides that:

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 was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.

Similarly, section 59 (6)(a) of Uganda's Presidential Elections Act of 2005 states that a Presidential election can only be nullified if the Court is satisfied that there is:

non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner

On the other hand, section 83 of Kenya's Elections Act of 2011 provided that:

no election shall be declared to be void by reasons of 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 the constitution and in that written law or that the noncompliance did not affect the results of the election.

In the judgement, the Supreme Court of Kenya distinguished the conjunctive term 'and' as used in other jurisdictions from the disjunctive term 'or' as used in the Kenyan law and concluded that for nullification to occur, the non-compliance with the law did not need to affect the result of the elections.²⁸³ The Court however agreed with the aspect of the substantial effect rule that minor irregularities and illegalities are unavoidable in elections and that elections should not be nullified just because small violations to the law occurred.²⁸⁴ The Supreme Court therefore introduced an approach that an election should be nullified if there was substantial non-compliance with the Constitution and the electoral laws irrespective of whether the substantial non-compliance affected the outcome.²⁸⁵

The Court then proceeded to find that the IEBC had not complied with various sections of the Elections Act since it failed to electronically transmit all presidential results; failed to simultaneously transmit the presidential results from the polling stations to the National Tallying Centre; failed to employ verifiable technology; failure to allow scrutiny of the IEBC servers in contravention of a Court order; used elections result forms that did not have the required signatures; and announced the final results by use of photocopied elections result forms rather than original statutory forms among other contraventions.²⁸⁶

²⁸² As above.

²⁸³ *Raila* (n2) 40 para 201.

²⁸⁴ *Raila* (n2) 42 para 209.

²⁸⁵ As above.

²⁸⁶ *Raila* (n2).

The interpretation of section 83 obliged the Supreme Court to depart from the jurisprudence that it had established in the 2013 presidential petition when it upheld the victory of Uhuru Kenyatta over Raila Odinga, and annulled the 2017 presidential elections by making the following historic final orders:²⁸⁷

(i) A declaration is hereby issued that the Presidential Election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

(ii) A declaration is hereby issued that the irregularities and illegalities in the Presidential election of 8th August, 2017 were substantial and significant that they affected the integrity of the election, the results notwithstanding.

(iii) A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;

(iv) An Order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination of 1st September 2017 under Article 140(3) of the Constitution.

4.4 The future of presidential election disputes adjudication in Kenya

Section 83 of the Elections Act was instrumental in the nullification of the Presidential election of 2017 on the grounds of substantial breach of the qualitative requirements of the Constitution and the election laws in Kenya. Unfortunately, in October 2017, Parliament amended section 83 of the Elections Act and introduced the conjunctive term ‘and’ and the requirement a Presidential election could only be nullified if the non-compliance with the Constitutional and the election laws ‘substantially’ affected the results of the elections. The new section thus read as follows:²⁸⁸

(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and

(b) the non-compliance did not substantially affect the result of the election.

The above changes were challenged at the High Court, and the whole section 83 was declared unconstitutional.²⁸⁹ The consequence of this judgement is that the section of the Elections Act that the Supreme Court relied upon when it made its landmark annulment judgement no longer exists. In absence of this guiding section, there is a possibility that in future presidential petitions, the Supreme Court may revert to the reliance on the substantial effect rule thereby watering down the jurisprudential progress that Kenya had made. As this chapter has shown, the Supreme Court of Zambia applied the substantial effect rule in the case of *Anderson Kambela Mazoka v Levi Mwanawasa* as a common law principle since it was not provided for in its electoral laws.

²⁸⁷ *Raila* (n2) 89 para 405.

²⁸⁸ Sec 83, Elections Act 24 of 2011, after amendment.

²⁸⁹ *Katiba* (n21).

The fact that common law forms part of Kenyan law means that the Supreme Court can follow the Zambian route. The analysis of past presidential election disputes in Chapter 3 of this dissertation revealed a history of judicial partiality in adjudicating presidential election disputes. This was largely cured by the 2010 Constitutional order which ushered an era of important reforms, not only in elections matters but also in securing judicial independence therefore promoting a future of free and fair elections. However, this is not to say that Parliament should abdicate its legislative mandate insofar as formulating the appropriate laws for nullification of presidential election. Elections laws and the rules for adjudication of election disputes should be clearly defined and known.

4.5 Electoral justice and electoral legal framework in Kenya

Chapter three highlighted articles 38, 81 and 86 of the Constitution of Kenya as being the pillars of the country's electoral legal framework. In summary, article 38(2) of the Constitution guarantees every Kenyan a right to free and fair elections based on universal suffrage. Article 81 of the Constitution enshrines the qualitative aspects of an election by reiterating the rights in article 38 of the Constitution, and further outlining the requirements for free and fair elections to include; vote by secret ballot; an election that is free from violence, intimidation, improper influence or corruption; and a transparent election that is conducted by an independent body which administers the election in an impartial, neutral, efficient, accurate and accountable manner.²⁹⁰ Article 86 of the Constitution on the other hand deals with the quantitative requirements of an election and it provides that elections should use methods that are simple, transparent and verifiable. It also requires that election results are collated openly, accurately and announced promptly in a process that is void of malpractices.

Chapter two also highlighted how treaties ratified by Kenya, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the African Charter on Democracy, Elections and Governance speak to the need for free and fair elections based on equal and universal suffrage.

Even though it is ideal that there be a law that specifically guides the Court in deciding presidential petition in a manner that encompasses both qualitative and quantitative electoral requirements, failure to have such a law does not mean that a presidential election cannot be nullified for not complying with provisions of the Constitution and the applicable election laws. Indeed, chapter three analysed examples from Maldives, Austria, Ukraine and Malawi where elections were nullified yet they did not have an equivalent of Kenya's section 83 of the Elections Act (as it were) in their Constitutions or electoral laws. In fact, Malawi had a provision in their Parliamentary and Presidential Elections Act that provided for the substantial effect rule but the Supreme Court gave more weight to the Constitutional requirement of free and fair elections.²⁹¹ In Austria, the Presidential elections were nullified for violating the constitutional principle of free elections and for violating the electoral laws the results notwithstanding. In the Maldives, the Supreme Court nullified the Presidential elections for violating the Constitution of Maldives, and it further postponed the repeat elections until the guidelines it had issued were complied with by the Electoral Commission. Lastly in Ukraine, the elections of the Prime

²⁹⁰ Art 81(e), Constitution of Kenya 2010.

²⁹¹ *Mutharika* (n141) 4.

Minister were nullified for violating various Constitutional principles including the qualitative requirement that elections should be free and fair, and that there should be fair media coverage of presidential candidates during the elections period.

4.6 Conclusion

This chapter has highlighted the misuse of the substantial effect rule when it comes to the adjudication of presidential election disputes in various African countries. The chapter has also shown how section 83 of the Elections Act of 2011 was instrumental in the nullification of the presidential election in 2017, and how it was subsequently amended and declared unconstitutional. The chapter however argues that even in the absence of article 83 of the Elections Act, substantial violations of qualitative electoral requirements can still lead to nullification of elections if a court relies on articles 38, 81 and 86 of the Kenyan Constitution as well as other similar provisions in international and regional treaties ratified by Kenya.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5 Introduction

This chapter gives a summary of the whole study with a focus on the findings and conclusion of the dissertation. The chapter highlights the objective of each chapter of the dissertation and summarises the analysis that cuts across the dissertation as well as the conclusion of each chapter as it builds onto the next one. The chapter concludes the dissertation by giving recommendations which include petitioning parliament to reinstate section 83 of the Elections Act No 24 of 2011 as it were before the amendment of October 2017.

5.1 Conclusion

This dissertation observed that there is a gap in Kenya's Elections Act of 2011, after section 83 of the Act, which specifically guided the Court on the rules of nullifying presidential elections in Kenya, was amended by parliament and later declared unconstitutional by the High Court in 2018. The Supreme Court of Kenya made a historic judgement when it nullified the election of President Uhuru Kenyatta and ordered for fresh elections in strict compliance with the Constitution and the applicable laws. In making this judgement, the Supreme Court relied on section 83 which provided that a presidential election could be annulled if it did not comply with the Constitution and the written law, notwithstanding the outcome of those elections.

The dissertation therefore investigated whether the existing electoral legal framework in Kenya was adequate to ensure electoral justice in presidential elections, especially in a scenario where the constitution and the written laws have been violated substantially. To achieve this end, chapter one of the dissertation laid the foundation for research by interrogating the existing literature on the approaches that courts take when nullifying presidential elections with a particular focus on Africa. The dissertation established that most courts have upheld questionable presidential elections in favour of incumbent presidents/parties by relying on the substantial effect rule. This rule provides that elections can only be nullified if the announced results are substantially affected by any contraventions of the law to such an extent that it cannot be established who actually gained the most votes in the elections. Chapter one identified the research questions that would aid in the investigation, and it also highlighted the limitations of the study.

Building on this foundation, the dissertation sought to find out what the international standards of adjudicating electoral disputes are in general, and presidential disputes in particular. To achieve this, the dissertation explored various international and regional instruments that speak to elections and it found a running theme that elections should be free and fair. The study found out that for elections to be said to be free and fair, the whole election cycle, right from the appointment of the Electoral Commission through to the voting day and the announcement of the election must adhere to the law, and must be assessed through the lenses of observing other rights like freedom of movement, freedom from intimidation and violence, right to vote without undue limitations, equality and secrecy of votes, fair coverage of the presidential aspirants in the media among other rights. The dissertation also established that electoral laws should ideally cover all aspects of elections and election adjudication so that voters, politicians,

courts and all those involved in the election cycle can be aware of what to expect when participating, conducting or adjudicating elections.

The study also looked at the jurisdictions where presidential and similar elections have been nullified with an intention of drawing lessons on the principles that the Courts in those jurisdictions relied on when nullifying those elections. The dissertation observed that the violation of the constitutions and the electoral laws of these countries (Maldives, Austria, Ukraine and Malawi) particularly the principle of free and fair elections was critical in deciding whether to nullify or to uphold those elections. In Ukraine, the Supreme Court relied on the principle of free and fair elections that was enshrined in the constitution to fill in the gaps in the election laws. In Austria, the Courts nullified the elections for violation of the Austrian Constitution and laws, and also for not accounting for the number of votes (results) in those elections. The Malawian judgement showed that even when the statutes provide for the substantial effect rule, courts have a responsibility of applying all principles including constitutional ones so as to ensure that the elections are free and fair.

Chapter three traced the evolution of electoral laws in Kenya since the reinstatement of multipartyism in 1991. The study found out that each presidential election dispute since 1992 had a consequence of advancing the electoral law in Kenya. This is evident from the fact that in the elections of 1992 and 1997, the Courts had a tendency of dismissing elections on technicalities rather than substance, yet the political and legal struggles that arose out of these disputes led to strong laws and an independent judiciary that could eventually invalidate the election of an incumbent president.

Chapter four finally highlights, by use of concrete examples from common law jurisdictions in Africa, how the substantial effect rule has been used by Courts to uphold fraudulent elections especially in favour of incumbents. The chapter has also summed up how section 83 of the Elections Act of 2011 was instrumental in the nullification of the presidential election in 2017 and it found that even in the absence of article 83 of the Elections Act, substantial violations of qualitative electoral requirements can still lead to nullification of elections if a court relies on articles 38, 81, 86 and other relevant provisions of Constitution as well as other relevant provisions in international and regional treaties ratified by Kenya.

5.2 Recommendations

Whereas this dissertation has established that the existing electoral legal framework in Kenya is adequate for delivering electoral justice in Kenya, the dissertation has also identified that it is important that key legislation that guide the courts to deliver electoral justice should be in place. This dissertation therefore recommends that legislative amendments to the Elections Act of 2011 should be made so as to reinstate section 83 as it were at the time of adjudicating the 2017 presidential elections.

Civil society groups, political parties, academicians, politicians and other people in the society can petition parliament so that the process of reinstating this law can begin as a matter of urgency. Interested parliamentarians can also be approached so that they can sponsor an amendment Bill to the Elections Act.

Another recommendation is that the Election Offences Act of 2016 should be popularised so that people can be familiar with the stiff punishment of interfering with the election process or violating election laws. This would act as a deterrent thereby reducing the chances of electoral malpractices.

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