



ELGIA

ELECTORAL LAW AND GOVERNANCE
INSTITUTE FOR AFRICA

STANDING THE TEST OF TIME: THE JUDICIARY'S ROLE IN THE 2013-2017 ELECTORAL CYCLE



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I. Introduction

Elections are an important part of any democratic process, providing citizens with the opportunity of periodically evaluating the quality of their governance and determining those they would like to donate their sovereign power to as their leaders. The manner in which the elections are conducted are therefore normally a primary preoccupation of enhancing democratic development in any society. Both international law and continental rules provide guidelines on conduct of credible elections, stipulating that such elections must be free and fair and reflect the will of the electorate.

Ensuring that elections reflect the will of the people at the national level, requires a sound legal framework, independent and professional management body, active and engaged citizenry and the collaboration of a wide array of stakeholders both in and out of government. The Judiciary is one of the institutions that contribute to credible elections. Its role is to adjudicate all disputes that arise as part of the electoral process. While traditionally, it was argued that judiciaries come at the tail end of the electoral cycle, once citizens have made their electoral choices and these have been verified and pronounced upon by the electoral management body, recent changes have challenged this traditional position.

The Kenyan elections of 2017 saw the Judiciary move from being an adjudicator of electoral petitions largely to a principal player in the electoral process, sometimes even having a more pronounced and definitive role than the Independent Electoral Boundaries Commission (IEBC). The role played by Kenya's judiciary was occasioned by the political context of the 2017 elections and the increased judicialization of Kenya's elections.

The 2017 elections came close to ten years since the post-election violence of 2007. The post-2007 period saw fundamental reforms on the role and performance of the Judiciary as relates to electoral disputes. The post-election violence was partly due to the failure of the Judiciary to provide a fair and credible forum for resolving the political disputes that arose from the 2007 elections. The Opposition felt that the Judiciary was incredibly partisan, aligned to the executive and presenting any case to them would be to provide an opportunity for legitimizing a flawed election.

The reforms that followed ushered in by the work of the Kriegler Commission report and captured in the 2010 Constitution led to a restructuring of the electoral dispute resolution architecture in Kenya. It established the Supreme Court and vested it with exclusive authority to handle Presidential election disputes; set a strict timeline of fourteen days for handling Presidential Election Petitions and six months for handling all the other electoral disputes; vested the Independent Electoral and Boundaries Commission with powers to handle pre-electoral disputes; and elaborated clear standards that an election must meet so as to be adjudged as free and fair. In addition, the Constitution set the basis for the reforms of the entire judiciary, including through vetting of judges, creation of office of Deputy Chief Justice, term limit for the Chief Justice, and clarifying that judicial authority was derived from the people of Kenya.¹

Based on the above context, the Judiciary charted a reform path, supported by a Judiciary Transformation Framework, for the years 2012-2016. As part of that process, the Chief Justice established a Judiciary Working Committee on Elections Preparations(JWCEP) with responsibility to coordinate the institution's activities to ensure that it was ready to handle disputes arising from and related to the 2013 elections, being the first elections under the 2013 Constitution. The committee undertook several activities as part of its five-point mandate and made commendable achievements.² A publication comprising ten chapters written by scholars and practitioners in the area of electoral justice concluded that the Judiciary had made several strides in the handling of the 2013 election disputes as evidenced from the disposal of 188 petitions within the statutory timelines and developing a rich electoral jurisprudence.³

The 2017 elections were thus held on the backdrop of a Judiciary in which citizens had renewed confidence in the judiciary's ability to make fair determination of electoral

¹ Akech, M., P. Kamere-Mbote, C. Odote, and G. Mwangi. *Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution*. Nairobi: PACT, 2011.

² Majanja, D, "Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections" in C. Odote and L Musumba(Eds), *Balancing the Scales of Electoral Justice: Resolving the Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, (IDLO and JTI, 2016) 19-45.

³C. Odote and L Musumba(Eds), *Balancing the Scales of Electoral Justice: Resolving the Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, (IDLO and JTI, 2016)

disputes. Partly because of this, the Judiciary became involved in making critical decisions in almost all aspects of the electoral cycle and process. By the time that the elections were over, the Judiciary had handled 2 Presidential Election Petitions, 388 election petitions and hundreds of pre-electoral disputes. Coming on the backdrop of a political environment that was still laced with the bad blood from the ICC cases, an environment that had complaints about the IEBC leading to the departure of the IEBC commissioners and appointment of a new set of Commissioners, eight months to the 2017 general elections, fundamental changes to the legal framework following negotiations led by a Joint-Parliamentary Select Committee⁴ and a context where technology once again was held as the magic to solving Kenya's contestation over electoral fraud concerns.

Against this background, this report assesses the role that the Judiciary played around the 2017 elections to determine its compliance with the constitutional dictates and whether the intervention enhanced the integrity of the judicial process and the consolidation of democracy and promotion of the rule of law. In doing so the report interrogates the role played by the Judiciary at every stage of the electoral process, the driving forces, the emerging jurisprudence, and the lessons for the future. To do so, the report is structured around seven Sections. Following this introduction, Section Two provides the theoretical lenses against which the extra-ordinary role of the Judiciary in the 2017 electoral cycle is assessed. This is done by discussing the nature of electoral disputes and the unique role of the judiciary in the electoral process. The concept of judicialization of elections is elucidated against the theory of judicialization of politics and that of politicization of the judiciary. The Chapter provides the issues to consider in determining whether the Kenyan judiciary adopted the approach of avoiding political disputes following the political question doctrine, or whether its approach was one of limited interference, or a guarantor of elections or if its engagement was one of overreach.

In assessing the role of the Judiciary, three fundamental areas are of focus in this report. These are the courts as evaluators of the electoral legal framework, courts as enforcers of electoral rules, and courts as determiners of the integrity of electoral outcomes. These are the focus of Section three, four and five. Section six draws from the previous chapters and

⁴ Republic of Kenya, *Report of the Joint Parliamentary Select Committee on Electoral Reforms* (2016).

seeks to answer the question about the significance of the interventions by the judiciary in the 2017 electoral cycle. Section seven concludes the report and makes forward looking recommendations to help the Judiciary and other actors committed to credible elections and integrity in resolution of electoral disputes.

II. Conceptualizing Judiciary's Interventions in Kenya's Electoral Process

Some scholars have argued that a review of the role of the Judiciary in the 2017 electoral cycle reveals that courts took central stage in electoral management and overshadowed IEBC.⁵ They further argued that this centrality had its genesis in the 2010 Constitution and its desire to temper the winner-takes out all approach to politics and this prevents a recurrence of election related violence.⁶ This desire led to what they categorize as “judicialization of elections.”⁷

Judicialization of elections draws from the concept of judicialization of politics. The modern depiction of this rule can be derived from the court's assertion of its power as a co-equal arm of Government with power to exercise the powers of checks and balances in relation to the other arms of Government, an issue affirmed in the famous US Constitutional case of *Marbury v Madison*.⁸ The case affirmed the right of the Court to interpret the Constitution and declare Acts of parliament unconstitutional. This power raises the debate as to whether Judges are not encroaching into the arena of other arms of Government and thus playing politics. While originally contested, it is now well-settled that Judiciaries have this responsibility as part of the doctrine of separation of powers and the resultant checks and balances. Constitutional reform across the African continent has reaffirmed and strengthened this role of the courts,⁹ leading some scholars to argue that *Marbury v Madison* is receiving a renaissance in the continent.¹⁰

With the increased focused on judiciaries, debate continues on the linkages between judicial decision making and politics. On the one hand is the clarity on this role of courts, there is an argument that courts make decisions purely on legal rules and are above politics¹¹ thus play a huge role in shaping policy and legal developments in ways that

⁵ Kanyinga, K and Odote, C. “Judicialization of Politics and Kenya’s 2017 Elections” 13(2) *Journal of Eastern African Studies* 235-252 at 236.

⁶ Ibid.

⁷ Ibid.

⁸ 5 US (1 Cranch) 137 (1803).

⁹ Isanga, M.J, “African Judicial Review, The Use of Comparative African Jurisprudence and the Judicialization of Politics” 49 *George Washington International Law Review* 749-800(2017) at 749.

¹⁰ Prempeh, H.K., “Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,” 80 *Tulane Law Review* 1239 (2006).

¹¹ Anthony E. Varona, “Politics, Pragmatism and the Court”, 2 *GEO. J. GENDER L.* 155 (2001) at 155.

optimize legitimacy.¹² However, there is increasing realisation that “politics is never far away from the judges’ chambers”.¹³ Consequently Professor Joe Oloka-Onyango argues that courts relate to and are affected to by politics in several ways, including, selection process of judges, law-making by judges, determining conflicts between the branches of Government and judicial review to determine compatibility of legislation with the Constitution.¹⁴

The above reality demonstrates that contrary to the oft-quoted political question doctrine¹⁵, courts are increasingly called upon to determine political questions. This reality led to the emergence of the concept of judicialization of politics, which has been defined as “the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.”¹⁶ These controversies originally dealt with sensitive human rights cases revolving around such issues as “the rights of privacy and equality, and public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection.”¹⁷ The idea, expanded to what has been categorised as “mega-politics”¹⁸, being “matters of outright and utmost political significance that often define and divide whole polities.”¹⁹ Elections has been categorised as one of those that fall within the category of mega-politics and have thus been judicialized.

Traditionally courts did not involve themselves in election disputes, with such petitions being determined by legislatures, who only turned it over to judiciaries when they proved

¹² Isanga, Supra, Note 10

¹³ Oloka-Onyango, J., *When Courts Do Politics: Public Interest Law and Litigation in East Africa*, (Cambridge Scholars Publishing, 2017) 2

¹⁴ Ibid, pages 3-7.

¹⁵ For a discussion of this doctrine that holds that Judges are not well-suited to nor mandated to make political decisions and that remaining away from the fray of politics, enables Judges to retain their integrity and impartiality in the process of making decisions, See Harrison, J., “The Political Questions Doctrine” 67(2) *American Law Review*,

¹⁶ Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science*, 11, no. 1 (2008): 94. Issue 9 Available at: <http://digitalcommons.wcl.american.edu/aulr/vol67/iss2/9>. See also Cown, M., “Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems,” 59(3) *The American Journal of Comparative Law* (Summer, 2011) 675-713.

¹⁷ Ibid.

¹⁸ Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science*, 11, No. 1 (2008).

¹⁹ Ibid, Page 94.

incapable of making an impartial decision regarding their members.²⁰ Courts ²¹were initially reluctant to determine such disputes due to their potential to drag the judiciary into essentially political contests. Such concerns remain especially within the continent of Africa because of concerns of lack of independence of Judiciaries and fear of backlash from the executive when they make decisions that go against the wishes of the executive and political elite.²² Despite these concerns, the modern trend is towards judicialization of election dispute settlement²³ across the world. The 2017 elections have been judged as the most judicialized in the country's history.²⁴ Judicialization of elections, however, can also lead to politicisation of the Judiciary as the 2017 elections demonstrated with courts coming under increasing political attack.

It is, therefore, essential to assess Kenya's judiciary electoral dispute resolution performance to assess whether the increased judicialization of the judiciary and the attendant and consequential politicisation of the judiciary were worth it. This is about answering the question whether the Judiciary's role contributed to more credible and acceptable electoral outcome. This is done against the three roles that the judiciary plays in electoral dispute resolution, being interrogating electoral rule-making as evaluators of the legal framework's constitutionality; second, the courts intervened to enforce electoral rules; and third, to determine the integrity of electoral results. In the assessment, the report seeks to show the extent to which the Kenya Judiciary adhered to what is considered as the basic goals of election dispute resolution:

- To give effect to the will of the people
- To give effect to the desire of the voter
- To avoid upsetting the results of an election where possible; and
- To respect the specific legislative commands.²⁵

²⁰ Prempeh, K.H. "Comparative Perspectives of Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence," in C. Odote and L Musumba(Eds), *Balancing the Scales of Electoral Justice: Resolving the Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, (IDLO and JTI, 2016) 146-176; at 152-3.

²¹ Ibid, page 153.

²² Kanyinga and Odote, Supra, note 5 at page 237.

²³ Supra, note 20 at page 153.

²⁴ Supra, note 5, at page 237.

²⁵ Weinberg, B.H., *The Resolution of Election Disputes: Legal Principles That Control Election Challenges*, 2nd Edition, (IFES, 2008) Xviii.

III. Courts and Evaluation of Electoral Rules

a. The Concept of Evaluation of Rules

An electoral system consists of a multitude of constitutional standards and electoral rules. These electoral standards and rules establish the methods and procedures by which citizens choose their political leaders. They also regulate the question on who is entitled to vote or to be elected. Finally, they function as norms whose goal is to ensure electoral fairness.

The courts are vested with the role of resolving disputes over the constitutionality of electoral rules, by determining whether the electoral legal framework conforms to the standards stipulated in the Constitution.²⁶ When courts are engaged in the function of evaluation of rules, the courts decide whether the rules regulating the electoral process are in accordance with superior norms and the principles laid down in the Constitution.²⁷ While the Electoral management body is responsible for making sure that the electoral laws passed are properly enforced and is vested with the mandate of formulation of administrative regulations (statutory instruments), it does not have the mandate to rule on the constitutionality of the electoral laws themselves, which remains the responsibility of the courts.²⁸ A most important factor is that the 2010 Constitution provides the courts with a broad mandate and extensive powers of judicial review. The High Court under article 165(3)(d) of Constitution has the responsibility of interpreting the Constitution and ensuring that all laws conform to the Constitution. This provision of the Constitution grants to the courts a broad and explicit “accountability-mandate” not only by expressly authorising it to resolve political disputes whenever constitutional questions arise, but also by giving courts specific powers that enable them to claim authority to decide on a question as to the conformity of electoral rules with constitutional principles. The effect of judicial review may be to invalidate or revoke a statutory provision or an administrative

²⁶Rule making involves designing the basic rules of the electoral game. See in this regard: Shaheen Mozaffar and Andreas Schedler, ‘The Comparative Study of Electoral Governance – Introduction’ (2002) 23(1) *International Political Science Review*, pp. 5, 7.

²⁷ Siri Gloppen, ‘Elections in Court: the Judiciary and Uganda’s 2006 Presidential and Parliamentary Elections’, in Julius Kiiza, et al (eds.) *Electoral Democracy in Uganda. Understanding the Institutional Processes and Outcomes of the 2006 Multiparty Elections* (Kampala: Fountain Publishers, 2008) p. 53.

²⁸ For a discussion of differences between rule-making and judicial supervision of electoral activities see Shaheen Mozaffar and Andreas Schedler, ‘The Comparative Study of Electoral Governance – Introduction,’ (2002) 23(1) *International Political Science Review*, pp. 5–27.

regulation that is found to be unconstitutional. No doubt then, the Kenyan judiciary has a sound formal basis for asserting its authority to evaluate whether the legal rules conform to the dictates of the Constitution.

Specifically, with respect to rule evaluation in electoral related adjudication, the courts discharge the obligation of judicial review by preventing self-serving alterations of the legal and institutional framework for the elections, and by protecting the rights of actors and stakeholders in the electoral process. The core concern is to prevent those in positions of power from “tilting the playing field and using their power to manipulate the electoral contest. As the last and most fundamental protectors of the democratic process, courts are expected to scrutinise self-beneficial rules created by incumbents or dominant parties within the legislature aimed at retaining power or weakening the influence of the opposition in the electoral process.

Early in the 2017 electoral cycle, courts were involved in resolving conflicts arising from the process of establishing the rules to regulate the election. Several cases were filed concerning the constitutionality of the rules that were to be used in conducting the 2017 elections. From challenges regarding the place of technology in the elections, to the process of announcing and processing electoral results the courts dealt with evaluating the rule-making power in the electoral process. From a normative perspective, such cases represented opportunities for judicial intervention in the electoral process as they enabled the Courts to police the process of regulating the political playing field and thus the process of political representation. A review of the jurisprudence from the courts will reveal the attitude and contribution of the courts to this aspect of the 2017 elections.

b. Key Jurisprudence

1. *IEBC v Maina Kiai & 5 Others*, Nairobi Civil Appeal No. 105 of 2017

The *Maina Kiai Case* arose from the judgment of a 3-judge bench, in the High Court through a constitutional petition, whereby the petitioners sought several declarations: first, that constituency presidential election results were final once declared and announced by the respective returning officers; Second, that the constituency returning officers had the mandate to declare the final results and that such declaration was not subject to alteration by any person or authority other than an election court; and Third,

that in so far as sections 39 (2) and 39 (3) of the Elections Act, as read with Regulations 83 (2) and 87 (2) (c) of the Elections (General) Regulations, granted the IEBC power to confirm, alter, vary and/or verify the presidential election results declared at the constituency, the same were contrary to Articles 86 and 138 (2) of the Constitution, and therefore null and void. The High Court granted all three declarations as prayed.

The IEBC went on to appeal the decision. Having reviewed the plurality of stages involved from voting to declaration of results, and the jurisprudence of the Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, [2014] eKLR and *George Mike Wanjohi v Stephen Kariuki & 2 Others* [2014] eKLR on the question of declaration of results, the Court of Appeal was not convinced by the arguments of the IEBC that the results as declared at the polling stations and constituency tallying centres were merely provisional, awaiting verification at the national tallying centre. The Court was also not persuaded that there was need for the chairperson of the IEBC to verify the results tabulated by employees of the IEBC, asserting that the law provided for means of dealing with malfeasances by such officers, without the need to have a process of verification to assure itself of the competency, proficiency and honesty of its own staff. In any event, the Court reasoned, the IEBC was under an obligation to vet prospective employees to assure itself of their integrity before engaging them. To leave the process from the polling and constituency tallying centres open-ended pending conclusion by the chair of the IEBC would defeat the very mischief that was intended to be cured by electronic transmission of results.

The Court of Appeal found that to suggest that a law empowered the chairperson of the IEBC to correct, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency was to donate an illegitimate power. Such a law would in the view of the Court introduce an opaqueness and arbitrariness to the electoral process, which was the very mischief that the Constitution sought to remedy. The Court of Appeal concluded that the High Court was not at fault in holding that to the extent that section 39 (2) and (3) of the Elections Act and Regulation 87 (2) (c) of the Elections (General) Regulations provided that the results declared by the returning officer were provisional, and to the extent that Regulation 83 (2) provided that the results of the returning officer were subject to confirmation by the IEBC the same were inconsistent with the Constitution, and therefore null and void.

In the intervening period between the decision of the High Court and the filing of the appeal in the *Maina Kiai Case*, the IEBC issued a Gazette Notice²⁹ which amended the Elections (General) Regulations. The effect was to amend the forms used to declare results at the polling station. Form 34, which was previously titled ‘Declaration of Presidential Election Results at a Polling Station’ was replaced by two forms: 34 A ‘Presidential Election Results at the Polling Station’ and 34B ‘Collation of Presidential Election Results at the Constituency Tallying Centre’. Form 34 C replaced Form 37 as the form to be used to make the final declaration of the presidential election result at the national tallying centre. Regulation 87 was amended to indicate that upon receipt of Form 34A from the constituency returning officer, the Chairperson would ‘verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre’. The net effect of these amendments according to the Court of Appeal was to circumvent the finding of the High Court on the unconstitutionality of the impugned sections 39 (2) and (3) and Regulations 83(2) and 87 (2) (c).

The Court of Appeal acknowledged the significant constitutional role granted by Article 138 (10) of the Constitution to the IEBC as the authority with the ultimate mandate of making the declaration that brings to an end the presidential election process. However, the Court demarcated this role as restricted to tallying all the results ‘exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying centre.’ The constitutional role of the IEBC under article 138(10) of the Constitution is limited to tallying all the results received from constituency returning officers country-wide.

According to the Court of Appeal, the verification anticipated under the Constitution could only relate to either one of two things: firstly, confirming or verifying that the candidate declared elected president has met the threshold set out in the Constitution; or secondly, accountability of the ballot such as, the number of ballot papers issued to constituencies, the number of ballot papers issued to and correctly used by voters, the number of spoilt ballot papers and the number of ballot papers remaining unused against Form 34. The Court therefore upheld the interpretation of Article 138 (3) which sets out the role of the IEBC in tallying, verifying and declaring the result to confirming what is

²⁹ Legal Notice No. 72 of 2017, 21 April 2017.

received from the constituencies and makes it clear that the Chairperson cannot add, subtract, multiply or divide any number contained in Forms 34A and 34B. The rationale for this position is to create checks and balances on the role of the chairperson of the IEBC.

Subsequently, the Supreme Court clarified that the finality of the results declared by the constituency returning officers did not relieve the IEBC of its obligation to verify the results before declaring them. However, the Commission could not change or alter the results under the guise of verifying the results. The obligation to verify the results meant that the duty of the Chairperson of the IEBC is to bring to the attention of the public any inaccuracies discovered during verification of Forms 34A and 34B even as he declares results as generated from Form 34B to generate Form 34C.³⁰ Where there are any discrepancies, it is the role of the Chairperson of the IEBC to state whether the discrepancies affected the overall result.

In addition the Supreme Court observed that the IEBC and the Chairperson of the IEBC can neither correct any errors neither identified in Forms 34B nor amend the same where there are discrepancies with the results in the relevant Forms 34A.³¹ The role of IEBC and the Chairperson of IEBC is restricted to simply expose such discrepancies and leave the resolution of the matter to the Supreme Court.

2. Kenneth Otieno v Attorney General & Another, Petition No. 127 of 2017

In *Kenneth Otieno v Attorney General & another, Petition No. 127 of 2017*, the petitioner challenged the constitutionality of sections 6, 6A, 8A and 44 of the Elections Act. He argued that the said provisions, which were amended or introduced by the Elections Laws (Amendment Act) No. 36 of 2016, and which amended the Elections Act 2011, introduced timelines that are contrary to the constitutionally provided timelines set out under Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution.

The core of the petitioner's case was that the law gave the IEBC a very limited time period within which to undertake a host of activities connected with the elections. The

³⁰*Raila Amolo Odinga & Another v IEBC and 2 Others*, Presidential Election Petition No. 1 of 2017 Ruling on Clarification of Judgment delivered on 17th October 2017.

³¹*Raila Amolo Odinga & Another v IEBC and 2 Others*, Presidential Election Petition No. 1 of 2017 Ruling on Clarification of Judgment delivered on 17th October 2017.

activities that were subject to the said stringent timelines, in the last ninety days before the general elections, included: Opening the Register of Voters for inspection pursuant to section 6(2) of the Act; Opening the Register of Voters for verification of biometric data under section 6A(2) of the Act;

Implementing the recommendations of the audit report as required under section 8A (6) of the Act; Testing, verifying and deploying an integrated electronic electoral system as required under section 44(4) (b) of the Act; and Procuring the technology to be used during the general election under section 44(7) (b) of the Act.

Furthermore, the petitioner argued that section 6A(1) of the Elections Act, 2011 that introduced stringent statutory amendments would lead to a breach of articles 38(3), 82(2), and 83(3) of the Constitution in so far as they may obstruct the deployment of a simple and transparent electoral process for reasons that the time may not be adequate for the logistics needed to effect these processes, and this would end up limiting the rights of citizens in rural areas or persons with disabilities.

The petitioner also called upon the court to rule on the constitutionality of the technical committee established under section 44 (8) of the Elections Act to oversee the adoption of technology. The Petitioner expressed concern, *inter alia*, that amendments which had been introduced via Elections Laws (Amendment Act) No. 36 of 2016 had brought changes which were radical and impractical to the electoral process. In relation to the technical committee, the petitioner expressed concern that section 44(8) of the Elections Act had left it unclear which agencies, institutions or stakeholders would constitute the technical committee.

The High Court held that Section 6A (1) of the Elections Act, 2011 that requires IEBC to, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days, is constitutional and does not violate Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution. This was because while the section gives citizens the right to verify data within a period of 30 days, such period must be at least 60 days prior to the elections. The provision gives IEBC the option to start early enough, and allow sufficient time to put all the necessary logistical arrangements in place to ensure that all voters are able to verify their biometric data, as long as this is done not less than

sixty days before the general election. The section does not give any specific timeline to IEBC as to when the logistical arrangements should begin or end.

The Court also held that section 8A(3) of the Elections Act, 2011 that requires IEBC to within thirty days of the commencement of the section to engage a professional reputable firm to conduct an audit of the Register of Voters had been overtaken by events. The operative section that governs the audit of the Register of Voters is section 8A (1) of the Elections Act 2011, which does not violate Article 227 of the Constitution. In addition, the Court found that sections 44(4) and 44(7) of the Elections Act 2011, that provide the timelines within which IEBC should establish an electronic electoral system are constitutional, and do not violate Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution. The basis for the finding was that these sections provide for minimum timelines, and nothing prevents IEBC from undertaking the actions therein way before the set deadlines.

It is significant that the High Court found that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and declared the provision unconstitutional. This finding was made on the basis that the establishment and composition of the technical committee would interfere with the independence of IEBC as it leaves room for inclusion of people expressly excluded by Article 88(2) of the Constitution from running the affairs of IEBC, and the composition of the committee and the functions given to it threatens the structural independence of IEBC that is guaranteed by the Constitution.

3. Mugambi Imanyara & another v Attorney General & 5 others, Constitutional Petition 399 of 2016

The High Court in *Mugambi Imanyara & another v Attorney General & 5 others, Constitutional Petition 399 of 2016* was tasked to determine the question as to whether the statutory amendment under section 8A (1) of The Election Laws (Amendment) Act requiring the IEBC to engage a professional reputable firm to conduct an audit of the Register of Voters was unconstitutional.

The High Court held that the provisions of article 88 (5) of the Constitution appeared to have been ignored by the petitioners while advancing the argument that section 8A(1) of the Election Laws (Amendment) Act was unconstitutional in that it created a scenario whereby the IEBC was required to cede its constitutional mandate to another body. Article 88 (5) provided that the commission would exercise its powers and perform its function in accordance with the Constitution and national legislation. By engaging a professional reputable firm as prescribed by the said provision, IEBC's acts were in conformity with the Constitution and the relevant national legislation and therefore the provision was not unconstitutional.

4. Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others, Nairobi High Court Petition No. 548 of 2017

The constitutionality of the Election Laws (Amendment) Act No. 34 of 2017 was challenged at the Supreme Court and in the High Court, and the apex court deferred making a finding on constitutionality to the High Court under Article 165 (3) (d) of the Constitution in *Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others, Nairobi High Court Petition No. 548 of 2017*.

This case challenged the constitutionality of amendments to the Elections Act, the IEBC Act and the Election Offences Act which were introduced by the Election Laws (Amendment) Act 34 of 2017. Among the impugned sections was a revised section 83 of the Elections Act. The amendment altered the provision by removing the disjunctive word 'or' and replacing it with the conjunctive 'and', requiring both non-compliance with electoral principles and effect on the results to be proved before an election can be annulled. It also introduced the word 'substantially' in the assessment of the effect of non-compliance on the result of an election.

The Petitioners argued that the introduction of the amendment after the majority judgment in the *2017 Raila Odinga Case* changed the invalidity test from a disjunctive one to a conjunctive one, making it difficult to challenge an election even where there was violation of constitutional principles. It was also the petitioners' case that the amendment was intended to circumvent the Constitution and the Supreme Court decision on the proper conduct of elections, making it more onerous to annul a flawed election.

The learned judge of the High Court, Mwita J, reviewed the findings of the apex court on section 83 in the majority judgment in the 2017 *Raila Odinga Case*. The Supreme Court had maintained that the interpretation given to section 83 had to be in harmony with constitutional principles and therefore an election could be nullified where it was not conducted in accordance with these principles. The Supreme Court had therefore asserted that section 83 was in harmony with the Constitution and this made it different from previous electoral laws since the retired Constitution did not contain any constitutional principles relating to elections. The removal of the disjunctive word ‘or’ and the introduction of the conjunctive word ‘and’ together with the introduction of the word ‘substantially’ was a departure from the constitutional requirements for free, fair and transparent elections and would serve as a drawback to the electoral reforms introduced by the Constitution.

The amended section 83, in the view of the Court, clearly disregarded constitutional principles in considering whether to annul an election, which could not have been the intention of the framers of the Constitution. Given that these were constitutional imperatives, it was not open to Parliament to enact legislation which had the effect of whittling down constitutional principles which had been harmonised and embodied in section 83 prior to its amendment by demanding that failure to comply with the Constitution and electoral law have a substantial effect on the result before an election can be annulled.

The net effect of the amendment was to allow violation of constitutional principles and election laws so long as they did not substantially affect the result. The Court deprecated the amendment for aiming at shielding mistakes that vitiate an electoral process, rather than making elections more free, transparent, and accountable. In the Court’s view, there was no constitutional rationale in amending section 83 to remove the disjunctive ‘or’ and replace it with the conjunctive ‘and’ so that an election could only be annulled where there were failures to comply with the Constitution which substantially affected the results. Such an amendment would negate the principles of the electoral system contained in the Constitution and ignore the constitutional imperatives of free, fair transparent and accountable elections.

Having found that Parliament was under an obligation to defend and protect the Constitution and enact laws in conformity with its values and principles, it was not open

to the legislature to invite the aid of the Statutory Interpretation Act to shield violations of the Elections Act and Regulations enacted to enforce the Constitution.

IV. Ensuring Adherence to Electoral Rules and Procedures

a. The Meaning of Ensuring Adherence to Electoral Rules and Procedures

Besides the judiciary's role and duty to sanction unconstitutional law and administrative regulations, the courts also have a role in securing adherence to the rules of the electoral process.³² The courts "ensure that each action, procedure and decision related to the electoral process is in line with the law".³³

After the enactment of electoral rules, the Electoral Commission is tasked with responsibility of administering and managing the elections in compliance with the legal framework that undergirds the electoral process. This process involves rule application by the Electoral Commission. Rule application in the electoral context consists of innumerable technical activities whose efficient organization and execution determine the credibility of elections. It involves the coordination of the tasks of diverse personnel and organizing the execution of an array of interdependent activities to establish a stable institutional basis for voting and electoral competition. Inadequate attention to the legal regime that undergirds the electoral process can seriously compromise the credibility of elections.

In ascertaining whether the administration and management of an electoral process is credible, compliance with the electoral rules plays a central role. This is important given the fact that the administration and management of elections involves the exercise of discretionary authority constrained by formal rules. Electoral rules set boundaries to permissible behaviour but do not eliminate discretion. They are seldom sufficiently clear, specific, and consistent to realize the bureaucratic ideal of mechanical rule application. The ambiguity and indeterminacy that inevitably dwell in electoral rules require election authorities to exercise some measure of administrative discretion. The exercise of this discretion, however, may put into question administrative efficiency and political neutrality – hence, the demand for public accountability.

³² Siri Gloppen, 'Elections in Court: the Judiciary and Uganda's 2006 Presidential and Parliamentary Elections', in Julius Kiiza, *et al* (eds.) *Electoral Democracy in Uganda. Understanding the Institutional Processes and Outcomes of the 2006 Multiparty Elections*. (Kampala: Fountain Publishers, 2008) p. 53.

³³ International IDEA, *Electoral Justice: The International IDEA Handbook* (Stockholm, Sweden: International IDEA, 2010) p.1.

The courts provide a forum for public accountability by the Electoral Commission. They play a role in policing the how the Electoral Commission discharges its functions within the set legal framework. Through the mechanism of judicial review, the courts get involved in oversight over the administration and management of elections by requiring election officials to publicly justify their decisions in the light of legal rules, normative principles, and material constraints obtaining during the electoral process. Thus, the exercise of the judicial review jurisdiction in the electoral context is designed to discourage abuses of discretionary authority by the Electoral Commission during elections.

In addition, rule adjudication involves the authoritative resolution of disputes that arise from ambiguities in election rules and operational problems in their implementation. Interpreting electoral laws and rules and applying them in concrete cases is the constitutional preserve of the judiciary. It is the judiciary that ultimately decides the meaning of various electoral laws and rules, and the meaning that the judiciary accords to the laws and rules may promote or hinder the democratic process.

Similar to the Electoral Commission, political parties and candidates also participate in rule application and implementation. Some actions of political parties related to their internal democracy – such as approval and selection of candidates for office– may be subject to challenge before courts. It is noteworthy that the Kenyan courts have increasingly assumed the role of *internal arbiter* for the political parties participating in the electoral contest, in particular on disputes related to the selection of candidates for public office. While these challenges are often resolved in the first instance through the political parties' Internal Dispute Resolution Mechanism (IDRM), there is an opportunity for further appeal of the decisions by the IDRM to the Political Parties Disputes Tribunal(PPDT), the Independent Electoral and Boundaries Commission(IEBC), and ultimately an appeal can be preferred to the courts. From the point of view of the institutional framework of the elections, these cases represent the most intrusive exercise of judicial power in Kenyan elections, in the sense that the courts intervened to set standards for the conduct of the internal affairs of political parties.

Practically all activities related to the administration and management of elections can give rise to challenges. Such administrative and managerial decisions that can be challenged include those related to the delimitation of electoral boundaries;

determinations on whether to grant, reject or cancel the registration of political parties; the updating of voter registers; information on the electoral process and civic education; the nomination or registration of lists of candidates; the conduct of the campaign; the distribution and placement of polling stations; the appointment of polling officers, and the accreditation of election observers.

During the 2017 electoral cycle, the process of administering and managing the elections was contested on numerous occasions during the electoral cycle. It is therefore necessary to examine judicial action involving matters that arise even before the actual date of the elections. Amongst the pre-election disputes that the courts dealt with in discharging their role of ensuring adherence to electoral rules included questions around the registration of candidates, oversight over the political parties' candidates nomination disputes, the compilation of the voters' register, the procurement and printing of ballot papers and other election materials, and the appointment and recruitment of electoral officers.

b. Key Jurisprudence

1. Judicial Oversight over the IEBC's Approach to "Fresh Presidential Elections"

Article 140 (3) of the Constitution states that if the Supreme Court determines that the election of the president-elect is invalid, a fresh election will be held within sixty days after that determination. The Constitution and the Elections Act do not define the term fresh elections. Following the nullification of the presidential election results after the 2017 general elections, it was up to the courts to clarify and interpret the meaning of the term fresh elections under article 140(3) of the Constitution and to determine whether all presidential candidates who had participated in the nullified Presidential elections were eligible to participate in the fresh elections.

In *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 Others, Petition 471 of 2017*, the High Court in a constitutional petition lodged by one of the presidential candidates who had initially been excluded from participating in the fresh presidential election held that the "fresh election" contemplated by the Constitution is conceptually different from a runoff election. The court had due regard to the fact that article 140(3) of the Constitution would come into play after the nullification of the results of a presidential

election. Nullification is the act of making something void. Article 140(3) used the words fresh election and the word fresh is defined as recent, not stale, characterized by newness without any material interval not previously known or used; new or different. The question that would arise from that terminology was on whether a fresh election would also mean fresh nominations. In determining that, it was necessary to consider the fact that the fresh elections were to be held within 60 days of the judgment nullifying the presidential election results. In light of the applicable principles of interpretation and the need to avoid an interpretation that would lead to absurd results, the 60 days period would not be adequate for fresh nominations. The interpretation which would serve public interest was that those who participated in the invalidated election were qualified to contest in the fresh election.

Having reviewed the Constitution and the Elections Act, the High Court found that the term ‘fresh elections’ was not defined. A ‘run-off’ had the dictionary meaning of “a further competition, election, race, etc., after a tie or inconclusive result”. Since the former involved the two leading candidates in the presidential election, it was clear to the Court that Articles 138 (5) and 140 (3) did not envisage the same election. In the view of the Court, since on one hand Article 140 (3) dealt with the validity of a presidential election, what was envisaged was a ‘completely fresh election’. On the other hand, the term ‘fresh election’ as used in Article 138 (5) envisaged a run-off between the two leading candidates. This was particularly so because the provisions of Article 140 (3) came into effect after the results of a presidential election were nullified by the Court. This would necessitate a new election. The High Court therefore took the view that the meaning of ‘fresh election’ as used in Article 138 (5) of the Constitution should not be imposed on Article 140 as had been suggested by the apex court in 2013. Mativo J contended that that could not possibly have been the intention of the draftsman since such an intention ought to have been captured in clear terms, and in any case, the two provisions envisaged different scenarios. As to the question on whether the petitioner had conceded defeat and was thus ineligible to participate in the fresh presidential election, the High Court held that having offered a reasonable explanation for his statement conceding defeat, the Court found that in the circumstances, he could not have been said to have conceded defeat. The Petition was therefore merited and the Court issued a declaration that failure by the IEBC to include

the Petitioner in the fresh elections was a violation of his rights under Articles 27, 38 and 140 (3) of the Constitution and a further order compelling the IEBC to immediately issue a fresh Gazette Notice or amend the Gazette Notice dated 5 September 2017 to include the Petitioner as a presidential candidate for the Thirdway Alliance Party in the fresh election scheduled for 26th October 2017.

Subsequently, the Supreme Court held that a fresh election conducted pursuant to article 140(3) was anchored upon the nullification of a Presidential election, which could have been part of a general election; an election upon a vacancy occurring in the office of the President; or an election held under article 138(5) of the Constitution. It was therefore not a stand-alone election, devoid of a historical foundation. It emerged from that analysis that, a fresh election under article 140(3) was not a disjointed phenomenon, but one lodged within the motions of the previous electoral contest.³⁴

In the Supreme Court's view, appraisal of the law relating to the nomination of candidates for Presidential election, the purposive standpoint, predicated on the Constitution's intent of assuring unbroken governance process was preferred. The nominations for Presidential-election candidates which took place on May 28 & 29, 2017, remained valid and no other nomination was required for the purposes of the fresh Presidential election held on October 26, 2017. All the Presidential candidates in the election held on October 26, 2017, were validly nominated, and it was proper for the IEBC to include them in the ballot papers as Presidential candidates.³⁵

2. Procurement of Electoral Materials Related Adjudication

In the run up to the 2017 General elections and the preparations in place for the same, IEBC found itself entangled in court cases filed against it in relation to procurement of electoral materials. The laws in place had provided for stringent timelines that had to be strictly adhered to ahead of the election as well as the intricacy of procurement, testing and deployment of the complex system known as the Kenya Integrated Electoral Management System (KIEMS), which by law had to be ready before the election. The

³⁴*John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others*, Petition 2 & 4 of 2017 (Consolidated).

³⁵*John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others*, Petition 2 & 4 of 2017 (Consolidated).

Commission was therefore required to put in place alternative measures to ensure that the integrated electronic technology provided for in Elections Laws (Amendment) Act 2016 at section 17 which amended section 44 of the Elections Act were established within the legal timelines and on time for the May 10th biometric voter verification process. Section 44 of the Elections Act compelled the Commission to set up a simple, transparent, secure, reliable, and a verifiable system to integrate biometric voter identification and electronic transmission of results. This also involved the advertisement for the printing tender for the ballot papers, election results declaration forms and poll registers.

IEBC grappled with a myriad of procurement related cases that directly affected its preparations for the 2017 General Elections. Below is an analysis of some of the outcomes of the cases.

The first procurement related dispute was *Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others*³⁶ where the applicant sought to quash the award of a tender to supply and deliver ballot papers for elections, election result declaration forms, and poll registers to Al Ghurair Printing and Publish LLC. The High Court held that the award of the subject tender was unconstitutional and unlawful as the IEBC was not duly constituted in compliance with the law at the time of the procurement. This decision was appealed to the Court of Appeal.

In *Al Ghurair Printing and Publish LLC v Coalition for Reforms and Democracy & another, Civil Appeal No. 63 of 2017*, the Court of Appeal determined the issues whether the IEBC was properly constituted at the time of awarding the impugned tender given that there were vacancies in the office of the Chairperson of the Commission and Commissioners of IEBC and whether the tender award failed to comply with the provisions of the Election Laws (Amendment) Act 2016. The Court in analysing the relationship between the Commissioners and the Secretariat as well as the role of the Commission, found that the Secretariat could not legally function in the absence of the Chairperson and the Commissioners. It thus held that the Commission was not properly

³⁶ Misc. Application No. 637 of 2016.

constituted as at November 30, 2016 when the procurement contract in issue was executed by the Commission's secretary and accounting officer and therefore the contract for the award of tender was void in law. In the absence of the Chairperson and the Commissioners, the Secretary acted *ultra vires* his powers and the decision of the IEBC was therefore properly quashed. It matters not that the decision of the Review Board was not quashed; as long as the procurement process was unconstitutional and contra statute, the decision to award the said tender was void.

In addition, the court observed that The Elections Laws (Amendment) Act 2016 that amended the Elections Act became operational after the invitation for tenders was done. Anything done subsequent to the enactment would have to comply with those amendments. Nonetheless, it was noteworthy that the tender was for the supply of electoral materials as and when required. When placing the orders for the materials, the IEBC was to ensure that the specifications and standards of such materials were compliant with the legal requirements in place as at the time of making such orders.

The second procurement related dispute related to the decision of the IEBC to award the tender for the supply and delivery of ballot papers, election result declaration forms, and poll registers to Al Ghurair Print and Publishing Company which was challenged in *Republic v IEBC & 3 Others ex parte Coalition for Reform and Democracy*.³⁷ The High Court ruled that the IEBC was under an obligation to operate in an open and transparent manner when procuring electoral materials to be deployed in elections. This meant procuring the electoral materials in consultation with the relevant stakeholders to maintain the perception of fairness and win the confidence of the electorate.

The Court of Appeal, in the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*,³⁸ upheld the finding of the High Court that as a general principle, public participation was mandatory in all procurements by a public entity. However, it overturned the High Court and found that public procurement was not necessary in all cases, including direct procurement, since neither Article 227 of the Constitution nor section 103 of the Public Procurement and

³⁷ Nairobi High Court Miscellaneous Civil Application No. 637 of 2016.

³⁸ Civil Appeal (Nairobi) No. 224 of 2017.

Asset Disposals Act 33 of 2015 mandated it in respect of direct procurement. Direct procurement is therefore an exception to public participation in procurement.

On the issue of timelines, the Court of Appeal found that the timelines for the procurement processes was statutorily regulated through Regulations made under the Public Procurement and Disposal Act (PPDA) and the procuring entity was simply implementing them. The court observed that a simple calculation of the timelines provided for in the Procurement Regulations demonstrated that if the Presidential election was to be conducted on August 8, 2017, a procurement method other than Direct Procurement would not lead to an award of tender before the constitutionally ordained date.

The Court of Appeal further observed that the architecture of procurement methods as stipulated in part IX of the PPDA promoted public participation and competitiveness in procurement processes in a progressively decreasing manner and that the scope and degree of competitiveness and public participation was progressively reduced as one approached direct procurement method. The PPDA provided for open tendering as the preferred procurement method for procurement but an alternative procurement procedure could be used if that procedure allowed and satisfied the conditions under the PPDA. Section 103 and 104 provided for detailed instances when direct procurement could be used and the procedure. This was allowed so long as the purpose was not to avoid competition. The Court of Appeal also found that the PPDA and the Constitution had not imposed a mandatory requirement for public participation prior to using or adopting or making the decision to adopt direct procurement neither had it provided for public participation as one of the conditions to be satisfied prior to adopting direct procurement.

In *National Super Alliance (NASA) Kenya v The Independent Electoral & Boundaries Commission & 2 Others*,³⁹ the place of technology in the 2017 elections was the subject of contention. The High Court was urged to declare that the General Election on 8th August 2017 was to be exclusively electronic in respect to identification of voters and transmission of results. The Petitioners were concerned that the IEBC had not complied

³⁹ Nairobi High Court Petition No. 328 of 2017.

with the timelines established by the Elections Act, not having procured and tested the technology 40 days prior to the general election.

The High Court, in a decision which was upheld on appeal,⁴⁰ acknowledged that the legal regime obtaining in the country required an integrated electronic system that enables biometric voter registration, electronic voter identification, and electronic transmission of results. The Court however observed that the complementary mechanism envisaged in section 44A only sets in when the integrated electronic system fails.

In *Khelef Khalifa & 2 others v Independent Electoral & Boundaries Commission & another Constitutional Petition No. 168 of 2017* the court considered the issue whether in establishing an integrated electronic electoral system, the IEBC had met the requirement for public participation. The Court held that Section 44(4) of the Elections Act which was amended by the Election Law (Amendment) Act required the IEBC, in an open and transparent manner, to procure and put in place the technology necessary for the conduct of General Election at least eight months before the election and to test, verify, and deploy such technology at least sixty days before the general election.

The Court observed that the requirements of that provision had been addressed adequately by the IEBC in that all electronic devices, as stated by the Chairperson of the Commission, had undergone physical inspection and laboratory testing of the K.I.E.M.S. and K.E.B.S. and had been certified as devices which met proper standards. In the absence of evidence to the contrary, the Court's finding was that the IEBC had satisfied the requirements of section 44(4) of the Elections Act. The Court further observed that to ensure public participation in the procurement process IEBC had set up a technical committee as provided for under section 44(8) of the Elections Act to validate the K.I.E.M.S. specifications as prepared by the specification committee. The Technical Committee was composed of representatives of professional bodies as well as state and non-state agencies and various political parties and it worked in consultation with the relevant agencies and various stakeholders including representatives of political parties. Therefore, IEBC demonstrated that there was some public participation which was sufficient to satisfy the requirement for public participation.

⁴⁰ *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others*, Civil Appeal 258 of 2017.

3. Adjudication in Relation to Appointment of Returning Officers

The Elections (General) Regulations, 2012, established under the Elections Act spells out the procedures for the appointment of the Constituency Returning Officers and other election officials. It outlines the duties of the Returning Officer and further provides that the appointments shall be done transparently and competitively and thereafter published in the Gazette and in such other manner as the Commission may deem necessary in order to widely publicize the appointment. The Regulations also provides for a deputy constituency Returning Officer who shall be subject to the general direction and control of the Returning Officer under these Regulations.

Regulation 4 provides for the appointment of County Returning Officers by the Commission and outlines their roles and provides for a corresponding deputy County Returning Officer. It further provides that prior to appointment, the commission shall provide the list of persons proposed for appointment to political parties and independent candidate's at least fourteen days prior to the proposed date of appointment to enable them to make any representations. Every appointment made under this Regulation shall be done transparently and competitively and thereafter published in the Gazette and in such other manner as the Commission may deem necessary in order to widely publicize it. There is also a provision for the County Elections Coordinator to be appointed as the Returning Officer or the deputy returning Officer of the county in which he or she is deployed.

The importance of transparency in the appointment of election officials formed the subject of the decision in *Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & another Judicial Review Misc. Application 628 of 2017*. The High Court considered the issue whether the requirement under Regulation 3 of the Election (General) Regulations to present a list of proposed appointees to political parties and independent candidates was directory or mandatory; whether the IEBC by appointing Returning officers and deputy returning Officers without presenting the list of the proposed appointees to political parties and independent candidates at least 14 days prior to appointment violated regulation 3 of the Election (General) Regulations, 2012 and whether IEBC acted in an unconstitutional manner in appointing Returning Officers

for the Presidential Elections in 2017 without granting the ex-applicants, political parties and the independent candidates an opportunity to make representations on persons to be appointed.

The Court opined that General Elections were a process as opposed to a one-off event and therefore all the process leading to the elections were subject of scrutiny and could lead to nullification. To avoid such an eventuality, the preparation leading to the elections had to meet the minimum standards articulated in both the Constitution and the law. The court thus held that Regulation 3 was meant to achieve the principles of transparency, impartiality, neutrality, and accountability which were entrenched in article 81 of the Constitution. Consequently, IEBC had to comply with the letter and spirit of the Constitution, the relevant legislation, and regulations.

Article 81 of the Constitution required IEBC electoral body to ensure that the elections were free, fair, accurate, and accountable and to ensure that was attained, Parliament in its wisdom had enacted laws and approved regulations in that regard and they had to be followed in order to attain the constitutional dictates. The requirement under Regulation 3 was not just directory but was mandatory for the purposes of ensuring that the elections were free and fair. The words “shall” appear to be more commanding than directory and were clear, positive, and unambiguous and dictated that literal interpretation had to be given to them. The Court thus held that where Regulation 3 was not complied with, such appointments ought, all things being equal, to be set aside. The Court’s mandate was to ensure that the elections were conducted in accordance with the Constitution and the law and would not allow itself to be a rubber stamp for a process that was clearly flawed and whose result was unlikely to meet the constitutional and legal threshold. The court further held that Regulation 3 was clear that the commission would provide the list of persons proposed for appointment to political parties and independent candidates and not only to the political parties participating in the elections.

The Court further observed that the mere fact that a person was appointed as a returning officer for a particular constituency did not necessarily qualify him or her to be suitable as a Returning Officer for another constituency. That could only be determined when the list was provided to the political parties for the purposes of representations as required by the law. The least that the respondent would have done was to provide the names of

the proposed transferees to the political parties and independent candidates fourteen days prior to the proposed appointments. The court therefore concluded by holding that it was mandatory for the respondent to comply with regulation 3 of the Elections (General) Regulations which they did not comply with.

However, the Court of Appeal later suspended the High Court's ruling that the appointment of returning and presiding officers was irregular and illegal and declared that the functions of the returning officers and their deputies relating to the presidential election slated for the repeat elections were not valid. This was after the IEBC filed an appeal under a certificate of urgency arguing that the High Court ruling would invalidate the repeat presidential poll.

4. Adjudication Related to Audit of the Register of Voters

Voter registration is regulated by the Elections (Voter Registration) Regulations, 2012 which provide for the manner and procedure of conducting voter registration, inspection, and verification of the register of voters. It also provides for the audit of the Register of Voters. Section 8 of the Elections Act provides for the updating of the Register of Voters where the commission is mandated to maintain an updated Register of Voters. Subsequently, the Election Laws (Amendment) Act section 6 amended the Elections Act by inserting section 8A which provided for an audit of the register of voters and requiring the Commission to engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the register, recommending mechanisms of enhancing the accuracy of the Register and updating the Register.

The High Court in *Republic v Independent Electoral & Boundaries Commission (IEBC) & 2 others, Judicial Review Misc Application 447 of 2017* was asked to make a finding that the IEBC had without any basis refused or failed to publish and open up the voter register for public inspection as required by the provisions of the *Elections Act* and the *Elections (Registration of Voters) Regulations*. It was the applicant's contention that whereas the IEBC had opened the register of voters for the verification of voter details in line with the requirements of the law under section 6A of the *Elections Act* as amended by the *Election (Laws) Amendment Act*, verification of biometric data is different from a public inspection as the verification involves each individual voter that is registered

confirming their biometric data while the public inspection is an exercise that is open to all members of the public to confirm details of all registered voters including if numbers reported by the Respondent per constituency or polling station are accurate. It was therefore the applicant's position that the exercise of verification of biometric data does not suffice to meet the requirements for conducting a public inspection of the register of voters given that these processes are provided for under different provisions of the law.

The High Court held that the IEBC is pursuant to section 6(1) and (2) of the *Elections Act* as read with Regulation 27 of the *Elections (Voters Registration) Regulations* statutorily bound to cause the Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate. Furthermore, the Electoral Commission is bound to, within ninety days from the date of the notice for a general election, open the Register of Voters for inspection for a period of at least thirty days or such period as the Commission may consider necessary. The said register is to be availed for inspection to the public at all polling stations, by way of public web portal or any other medium the Commission may approve. The court went ahead to direct the Electoral Commission to publish in the media a confirmation that the register of voters is open for inspection and the manner of and the period for such inspection by the public within forty eight (48) hours.

It is noteworthy that the court found that there is no duty cast on the Electoral Commission to publish the register as opposed to opening it up for public inspection. Further it held that there is no requirement that the register be clustered as per polling stations.

5. Enforcement of Campaign Related Standards and Regulations

The courts were also asked to ensure accountability and fairness in the electoral process with regards to aspects of the campaign process. In *Katiba Institute v Presidents Delivery Unit & 3 others, Constitutional Petition No 468 of 2017* the petitioner filed a petition in relation to the practice by the state of publishing various advertisements in the media, and through billboards to publicise the achievements of the ruling party. The petitioner sought orders that the respondents be compelled to provide it, and to publicise to the

general public, information with respect to costs of the advertisements and who met the costs of the subject advertisements. The petitioner argued that the use of public resources to publish the achievements of the ruling party violated the constitution and section 14(2) of the Elections Offences Act which prohibits government from advertising in print or electronic media or by way of banners in public places its achievements during election period.

The High Court held that the petitioner was entitled to information from the state with respect to the dates when advertisements were done, nature and copies of advertisements, cost of advertisements and who meets the cost of those advertisements. The court went further and ordered the state organs concerned to publicise the sought information with respect to the advertisements to the public pursuant to article 35(3) of the Constitution.

6. Internal Party Disputes over Selection of Candidates

Among the cases placed before the courts in the pre-election period were *party-internal disputes*, concerning the selection of candidates to represent various parties as candidates in the 2017 general elections. The courts exercised appellate jurisdiction over decisions by the Political Parties Disputes Tribunal and the Independent Electoral and Boundaries Commission over the selection of candidates to represent various political parties. Typically, the cases involved complaints about the unfairness of the candidate selection processes.

Although the courts were quite willing to intervene in the intra-party disputes relating to candidate selection, to some extent, the judiciary would rather have such disputes settled internally by the parties themselves through the Internal Disputes Resolution Mechanisms with appeals to the Political Parties Disputes Resolution or the Independent Electoral and Boundaries Commission before the disputes could be appealed to the courts. Despite the restraint expressed in most cases, the judiciary generally engaged in standard-setting in the candidate-selection phase.

Some of the significant cases adjudicated by the judiciary in this cluster of cases include: *Thomas Ludindi Mwadeghu v John Mruttu & another, Election Petition Appeal No. 8 of 2017*, where the complainant appealed from a decision of the Political Parties Disputes Tribunal as to whether the Orange Democratic Movement (ODM) party acted in

accordance with its constitution when it awarded a direct nomination to the 1st Respondent. The High Court held that it is not in doubt that the party's constitution allows the National Executive Council (NEC) to direct the National Elections Board (NEB) to issue an automatic or direct nomination to a candidate. However, what arose for determination was whether the decision to award the direct nomination was in accordance with the law as set out in the party's constitution and electoral laws.

The court found that it is clear that whereas the party may directly nominate a candidate, such a candidate must be vying in a county designated as a Zone C county. For all other counties, nomination must be by way of universal suffrage. Taita Taveta was designated as a Zone B county. It was therefore not open to the party to nominate candidates vying in counties outside of Zone C. With respect to the party's contention that the decision of the Central Committee to directly nominate the Appellant was guided by the short timelines within which the party was operating, guided by the IEBC timelines, the court held that a perusal of the Rule 7.5A2 (ii) Party's Election and Nomination Rules indicates that there is no reference to direct nomination. It provides for the power of the Central Committee to supervise the conduct of the organisation's activities. It does not give the power to directly nominate to the Central Committee. The court thus returned the verdict that the decision to directly nominate the appellant was not made in accordance with the party's constitution and election laws.

In *Elphas Odiwour Omondi v Joan Minsari Ogada & 3 others, Elections Petition Appeals No. 51 and 53 of 2017* the High Court directed the Orange Democratic Movement (ODM) Party to conduct fresh nomination for the seat of Member of County Assembly (MCA) seat for Kojwach ward, in Homa – Bay County. The High Court held that where the court is faced with an appeal arising from nominations, it should as a primary duty, try to ascertain whether the people spoke in a clear and demonstrable manner on who their chosen representative was, and whether in making that decision the party followed democratic principles of open, transparent, fair and credible nomination in accordance with its constitution and rules whose ultimate purpose is to enable members express their free will. This was so given that political parties are required by Article 91(1) of the constitution to, among others, abide by democratic principles of good governance, promote and practice democracy through regular fair and free elections within

themselves, and promote the objects and principles of the constitution and the rule of law.

The court found as a fact that it was not possible to tell who won the nomination, since tallying was incomplete and the results could not be said to have indicated the overall will of the people of Kojwach ward. It was therefore imperative that the members of the party in Kojwach ward are given an opportunity to exercise their democratic right in determining the person they wanted to represent them in the general election. The court noted that one of the principles of Kenya's constitution is that citizens must exercise their free will to elect their representatives through an open fair and democratic process. Furthermore, the court observed that a political party choosing to subject its members to a nomination process, has a duty to ensure that its members exercise their political democratic right to nominate their representative in an open, fair, credible and democratic process where their will prevails.

In *Yasir Noor Mohammed Noor v Jubilee Party of Kenya & another*, Civil Appeal No. 172 of 2017, the Court of Appeal held that the failure by the Jubilee Party of Kenya to conduct voting at two polling stations without providing an alternative polling station, or taking steps to notify the concerned voters of an alternative polling station where they could cast their votes violated article 38(3)(b) of the Constitution that accords, every adult citizen "...the right without unreasonable restrictions to vote by secret ballot in any election or referendum." Such omission resulted in depriving the voters of subject two polling stations of their right to vote by secret ballot for a candidate of their choice in the nomination exercise which was contrary to the provisions of Article 38 3 (b) of the Constitution, and in breach of their rights under the election provisions of the Constitution. In the view of the court, this irregularity significantly affected the nomination exercise from a qualitative as well as quantitative perspective.

V. Assessing the Integrity of Electoral Outcomes

a. Conceptualizing Assessing the Integrity of Electoral Outcomes

In a democracy, the judiciary has a constitutional responsibility to secure the integrity of democracy as it harmonises the enjoyment of political rights with electoral rules.⁴¹ This the courts do by intervening in disputes over the legitimacy of electoral outcomes. They do this by adjudicating disputes that challenge the legitimacy of electoral outcomes and thus challenges to the legitimacy of those winning office.

There are several conditions that may lead to the disputing of election outcomes in the courts. Electoral actors (parties or candidates) and voters tend to contest an electoral outcome in court when they have cause to believe that an election outcome is marred by widespread and systematic irregularities, frauds, and manipulations.⁴² Electoral challenges provide direct oversight to the electoral process by ensuring that elections comply with the legal framework and they have the effect of preserving or restoring the correct electoral legal order.

The judiciary has a central role to play in resolving disputes over electoral outcomes by providing an avenue for electoral grievances to be resolved. The alternative to this is to resort to self-help, with consequential anarchy. If electoral actors believe that irregularities can be fairly challenged in an impartial venue, they may be less likely to resort to violence to win. Furthermore, if political actors believe that an independent court system will hold them accountable for electoral infractions, they may be less likely to engage in fraud and violence. If no such judicial avenue exists, the inverse may be true.⁴³ In Kenya, adjudication over the integrity of electoral outcomes is done through post-election petitions. Election petitions are court cases that seek to invalidate an election result in order to either have a recount of the votes, have another candidate declared the winner, or a new election called. The courts during the 2017 electoral cycle received large

⁴¹ Ben Kiromba Twinomugisha 'The Role of Judiciary in the Protection of Democracy in Uganda' (2009) 9 *African Human Rights Law Journal* p. 3.

⁴² James Otieno-Odek, 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections"' Available at: <https://www.judiciary.go.ke/wp-content/uploads/2017/12/LIST-OF-AUTHORITIES-DR.EKURU-AUKOT.pdf> (Accessed on 24th March 2020).

⁴³ Stephanie M. Burchard and Meshack Simati, 'The Role of the Courts in Mitigating Election Violence in Nigeria', (2019) 38 *Cadernos de Estudos Africanos* [Online], <http://journals.openedition.org/cea/4407> (Accessed on 12th March 2020).

number of such petitions, both in relation to the presidential, parliamentary, and county level elections. In adjudicating the petitions, the courts acted as a site for determining the integrity of the electoral outcomes announced by the Electoral Commission.

In the discharge of this role, the courts were able to verify compliance with the constitutional standards enshrined in articles 81 and 86 of the Constitution, the political rights in article 38 of the Constitution, and the legal rules undergirding the electoral process. It is worth noting that election courts have the authority not only to review elections but also invalidate election results. Thus, judicial intervention makes it possible to reverse the effects of the unlawful or wrongful conduct, and correcting or repairing the damage or harm caused by such conduct.

b. Key Jurisprudence

1. Presidential Election Petitions

Presidential election petitions are the most spectacular form of court involvement in elections and are a true test of the courts' accountability function. In the 2017 election cycle, the Supreme Court of Kenya, pursuant to its exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of president,⁴⁴ heard and determined two presidential election petitions.

The first case, *Raila Amolo Odinga & another v IEBC & 2 Others, Presidential Election Petition 1 of 2017* related to the August 2017 elections. On the 8th August 2017, the Republic of Kenya held its second general election under the 2010 Constitution. On the 11 August 2017, the Electoral Commission declared the incumbent, Uhuru Kenyatta, as the outright winner. Kenyatta garnered 8,203,290 votes, beating his closest rival, Raila Odinga, who secured 6,762,224 votes. Dissatisfied with the results, Odinga and his running mate, Stephen Kalonzo Musyoka, filed a petition challenging the election of Kenyatta in the Supreme Court of Kenya.

The main issues for determination were as follows: a) Whether the 2017 presidential election was conducted in accordance with the principles laid down in the Constitution and the law relating to the elections; b) Whether there were irregularities and illegalities

⁴⁴ Article 163(3)(a) of the Constitution.

in the conduct of the 2017 presidential election; c) If there were irregularities and illegalities, what impact, if any, these had on the integrity of the election; and d) What consequential orders, declarations and relief the Court should grant, if any.

By a majority of four to two judges, the Court held that: a) The presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and applicable law, rendering the declared result invalid, null and void; b) The irregularities and illegalities in the presidential election were substantial and significant, and affected the integrity of the election; c) Uhuru Kenyatta was not validly declared as president elect and that the declaration was invalid, null and void; and d) The IEBC should organize and conduct fresh presidential elections in strict conformity with the Constitution and applicable electoral laws within 60 days.

The Supreme Court's judgment is significant for at least four reasons. First, it reflects the first time that an African court has nullified a presidential election. Despite the numerous defective presidential elections that have been challenged in courts, African courts have until this decision evolved a jurisprudence that has upheld all presidential elections, regardless of the severity of anomalies proved. The Kenyan Supreme Court deviates from this jurisprudence and correctly restates the role of courts in adjudication related to integrity of elections, which is fidelity to the Constitution and the law.

The second important point about the judgment, and perhaps its greatest contribution to electoral jurisprudence, is its correct application of the "substantial effect" rule. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and bear on the fairness and legitimacy of an election. When courts are faced with an election petition, there is therefore a need for a legal device or mechanism to determine which irregularities are minor and inconsequential, and which are significant and in need of redress. The substantial effect rule does that. For many Anglophone African countries, this is an old rule inherited from the English legal system. The main point of the rule is that elections should not be nullified for minor irregularities or infractions of rules. In

Africa, the substantial effect rule has worked in the most disingenuous way to uphold elections fraught with major irregularities and fraud.

The *Raila Odinga (2017)* decision demonstrates that it is not only what happens on polling day that matters, but the entire process. Elections, as the Court correctly observed, “are not events but processes”. It was the process of the 2017 Kenyan election — and in particular, the use of the country’s new electoral management system — that led the Court to invalidate the result. Prior to the 2017 Kenyan election, the Elections Act was amended to introduce the Kenya Integrated Electoral Management System (KIEMS). This system was intended to be used in the biometric voter registration and, on polling day, for voter identification. The system was also to be used to transmit election results from polling stations simultaneously to the Constituency Tallying Centre and the National Tallying Centre. The transmission of results required the use of standard forms (Forms 34A and 34B). In practice, however, the transmission of results was not done as required by the law. No plausible explanation was given by the IEBC for this.

The petitioners alleged that the system was hacked, and results tampered with in favour of the incumbent. The Court appointed its own IT experts to assess the IEBC servers and report their findings to the Court. IEBC, in violation of the Court order, declined to give the Court appointed IT experts access to critical areas of the server. The Court held that the failures by IEBC were a clear violation of the Constitution and the Elections Act, and caused serious doubt as to whether the election results could be said to be a free expression of the will of the people as required by the Constitution. The Court declined to take what has been the easy way out by many African courts, as urged by the respondents. That easy way out was to state that even if all the anomalies were taken into account, in terms of numbers, the gap between the declared winner and the runner up was too big to be bridged. It held that elections are not just about numbers, but that in order to gauge whether the result reflects the will of the people, the quality of the entire process must be taken into account.

The third important point about the court’s judgment in *Raila Odinga (2017)* relates to consequences for disobeying a court order in the process of adjudicating a disputed presidential election. The *Raila Odinga (2017)* decision demonstrates that disobeying a

court order should have adverse consequences. The Supreme Court in the course of the petition had appointed independent IT experts and ordered IEBC to give them access to the servers in order to independently determine whether the system had been hacked. IEBC, however, “contumaciously disobeyed the order,” leading the Court to draw an adverse inference against IEBC, and to accept the petitioners’ claim that “either IEBC’s IT system was infiltrated and compromised and the data therein interfered with or IEBC’s officials themselves interfered with the data...”

The fourth and final point of significance of the *Raila Odinga (2017)* decision relates to the Court’s statement regarding election observation. It often happens that observers trivialize some anomalies or, without observing the entire electoral process, certify an election as credible. This often gives a veneer of legitimacy to frequently spurious election results. The Kenyan Supreme Court rightly frowned upon this kind of election observation. In the case of 2017 Kenyan General elections, all the major international election observers certified the election as credible, or largely reflecting the will of the people. The Court pointed out that these conclusions were entirely based on what was observable on polling day, without taking into account the transmission of results.

The Second case is that of *John Harun Mwau & Others v IEBC & Others*, Presidential Election Petitions No. 2 & 4 of 2017. Following the fresh election conducted on 26th October 2017 and the declaration of the chairperson of the IEBC that the incumbent, Uhuru Kenyatta had won the election with 7,483,895 out of the 7,616,217 votes cast, two petitions were filed on 6 November 2017. The first petition (Petition 2 of 2017) was filed by John Harun Mwau while the second petition (Petition 4 of 2017) was filed by Mr. Njonjo Mue and Mr. Khelef Khalifa. By an order of the Court on 14 November 2017, the two petitions were consolidated under Petition No. 2 of 2017.

The Supreme Court identified the following as the legal issues arising from the consolidated petitions: a) the *locus standi* of the Petitioners under Article 140(1) of the Constitution; b) whether the petitions were filed in the public interest; c) the legal effect of the withdrawal of a presidential candidate before an election; d) whether the IEBC and its Chairperson conducted the presidential elections in strict conformity with the Constitution and applicable laws; e) whether the fresh election met the constitutional

threshold of a free and fair election under Article 81 of the Constitution; f) the legal consequences of not holding a presidential election in each constituency under Article 138 (2) of the Constitution; g) whether the presidential election held on 26 October was marred with illegalities and irregularities; h) the effect of the Election Laws (Amendment) Act on the fresh presidential election; i) whether the fresh presidential election and its results were legitimate and credible, both in law and in fact; and j) what orders the Court should issue.

On the first issue, it was contended that the petitioners lacked *locus standi* to file the petition, as they had not exercised their rights under Article 38 of the Constitution. It was asserted that Article 140 (1) only grants locus to persons who had voted, and not merely to registered voters. The Court reviewed Article 140 as well as Article 260 of the Constitution. The former entitles every person to file an election petition challenging the presidential election, while the latter defines person to include a natural as well as a juristic person. Having found that there was no substantiation of the allegation by the 3rd respondent as to the ineligibility of the petitioners, the Court dismissed their claim and found that the petitioners had *locus standi* to file the petition.

In assessing whether fresh nominations were required prior to the fresh presidential elections, the Court reviewed the purpose of nomination in a presidential election and the standing of the *2013 Raila Odinga & Ekuru Aukot 2017* decisions on fresh nominations. It determined that the nomination process is not just a formality, or an exercise in futility; but a process through which candidates are identified for participation in an election, subject to being qualified under the law for the elective seats they seek. As to whether a nomination process was required prior to the repeat election, the Court found that whereas the term '*whenever a presidential election is to be held*' had been used in that section to signal that a nomination was required for all the instances when a presidential election was held, nominations were only required in three instances: in the case of a general election, where no candidate had met the constitutional threshold under Article 138 (5), and where there was a vacancy in the office of the President.

It was the Court's finding that the failure to recognise nomination in respect of an election under Article 140 (3) was not an oversight on the part of the drafters but a proper appreciation of the law. Since each presidential election was conducted under different circumstances, each had to be appraised separately. The election conducted under Article

140 (3) was not a stand-alone election; rather it was anchored on an ‘initial’ election. Since the nomination process had not been the subject of contest in the petition that nullified the August 8 election, the Court deemed it illogical for a person who was not a candidate in the August 8 election to be a contestant in the repeat election and to compel candidates to take part in a fresh nomination exercise when the process had not been in issue in the petition challenging the initial election.

The next issue for determination was the legal effect of the withdrawal of a presidential candidate before an election. The Petitioners faulted the IEBC for retaining Hon Raila Odinga’s name on the ballot paper after he issued a letter dated 10 October withdrawing his candidature. The Court held that the finding in the 2013 decision ought to be departed from as it was made *per incuriam*. This was because Article 138 (8) (b) only contemplated the cancellation of an election in three instances: when no person had been nominated within the nomination period, where the candidate for election as President or Deputy-President died before the scheduled election date or where a candidate scheduled to be declared elected as President died. Since withdrawal was not one of the scenarios contemplated by Article 138 (8) (b), withdrawal did not constitute a basis for cancellation of the election. Moreover, given that Regulation 52 was not applicable to the fresh election, the Court found that the writing of a formal letter by Hon Odinga constituted a substantive and legally effective withdrawal from the elections.

As to whether the election met the constitutional threshold established under Article 81, the Court considered it necessary to determine whether every citizen’s right to vote without unreasonable restrictions was afforded and whether the election was free from intimidation, improper influence, or corruption and whether there were any acts of violence or election offences committed by the 3rd respondent. This included the issue of the alleged use of government resources to advertise by the 3rd respondent. The Court noted that there were incidences of violence which prevented the conduct of the fresh election and threatened officials, voters, electoral infrastructure and private property. Nevertheless, the Court found that neither the State nor the IEBC or any other state organ failed to fulfil its duty to guarantee the right to vote, but rather, measures had been put in place to guarantee the enjoyment of this right. The failure to vote in certain areas was therefore occasioned by unidentified private citizens and political actors. However, the election could not be impugned on this ground alone.

As to the legal effect of the postponement of elections in some constituencies, the Court had been urged by the petitioners to find that irrespective of the source of the violence, the occurrence of violence itself was enough to vitiate an election, as Article 138 (2) requires that the presidential election be held in every constituency. The IEBC and its chairperson on the other hand cited section 55 B of the Elections Act as the legislative authority for postponing elections in the 25 constituencies since the provision allow postponement where it is impossible to hold the same for among other reasons, a likelihood of a breach of the peace. Regulation 87 of the Elections (General) Regulations, also gives the IEBC discretion to declare the result without results from certain constituencies where it is certain that the result will not be affected by the omission. The Court therefore ruled that the declaration of the result by the IEBC, without results from 25 constituencies, was nevertheless in accordance with the Constitution.

Finally, the Court was required to determine whether the presidential election and subsequent results were legitimate and credible. To assess legitimacy, the Court asserted that the election had to be assessed within recognized legal practice, the operative law and governance institutions and within the context of a stable socio-political order and the economic dynamics sustaining the economy.

On the question of credibility, the Court was guided by an assessment of whether there was valid preparation, whether the election was conducted as prescribed by law, whether discretion was properly exercised and whether a candidate was duly elected declared. The Court found that only failure of the conduct of the election would constitute lack of legitimacy as it would have occasioned such uncertainty and appearance of crisis as would have affected the social, economic, and political engagement of the whole population. The Court also faulted the petitioners for making generalized allegations of violence and intimidation. In the assessment of the Court, the petitioners were under a burden to lay objective evidence to sustain each of their allegations, rather than making generic claims. Since none of the allegations of irregularities and illegalities were at play in a significant manner in the view of the Court, the elections had met the requisite threshold of legitimacy and credibility. The Court was also not satisfied that the low voter turnout was sufficient by itself to invalidate an election. Since the threshold under Article 138 (4) requires the winner to have garnered a majority of the votes cast, to invalidate the election

result due to voter turnout was in the assessment of tantamount to depriving citizens who vote of the benefit of their franchise.

2. Down- Stream Ballot Election Petition Adjudication

Following the 2017 General Elections, 388 election petitions were filed in the High Court and Magistrates Courts. Of the 388 petitions filed post 2017 general election, 174 related to county elections (challenging either the election of the county governor or member of county assembly), 125 related to Parliament (15 concerned senatorial elections, 12 concerned the election of woman representative and 98 challenged elections of Members of the National Assembly). A total of 89 petitions were filed (both in the High Court and in Magistrates' Court) in respect of party lists. Several of these petitions were later appealed to higher courts including the Supreme Court.

This study reviews a few select election petitions to provide a snapshot of how the courts discharged their mandate of assessing the integrity of electoral outcomes in down-stream ballots during the 2017 election cycle.

Mawathe Julius Musili v IEBC & another, Supreme Court Petition 16 of 2018

The appeal followed the decision of the Court of Appeal in which the election of the Appellant as Member of National Assembly for Embakasi South Constituency in Nairobi County was invalidated. The Appellant had been declared as duly elected as a Member of the National Assembly following the General Elections of 8 August 2017 having garnered 33,174 votes against the 2nd Respondent who garnered 33,009 votes. The 2nd respondent consequently approached the High Court seeking that the impugned election be nullified. In the said petition, the High Court identified 13 issues for determination including whether there were substantive illegalities and irregularities to warrant nullification of the election and whether the 2nd respondent was therefore the validly elected member of National Assembly for Embakasi South Constituency. The High Court, on 2 March 2018, dismissed the petition, and confirmed the appellant as the Member of the National Assembly for Embakasi South Constituency. The matter was appealed to the Court of Appeal and subsequently to the Supreme Court, with both courts coming to the conclusion that the elections for the Member of National Assembly for Embakasi South Constituency was not conducted in a free and fair manner.

As regards the verifiability of the election results, the Supreme Court found that the issue in question was the alleged ‘recognition’ of four separate sets of results by the Court of Appeal. The Supreme Court however noted that this appeared to be the Court pointing out what appeared on record rather than making a pronouncement on the same. On Form 35Bs and the lack thereof of the original copy in the petition, the Supreme Court noted that this being a material document, failure to have it on record was fatal to the validity of the election. The Supreme Court agreed that underpinning the electoral process is the principle of verifiability under article 81(e) of the constitution. The Court noted that because the Form 35B bore the formal results, failure to file it meant it is impossible to state with certainty and clarity what the contents of the original Form 35B showed, and whether the certified copy was a true copy of the original. Therefore, the result of the election was uncertain, a situation further compounded on by the presence of divergent sets of ‘results’. The Supreme Court took issue with the fact that the IEBC failed to provide the same document even after being ordered to do so by the Trial Court terming it as a dereliction of constitutional duty on their part.

On whether the question of bias of the presiding officer was a question of fact, the Supreme Court determined as follows. The 2nd respondent had challenged the presiding officer given that she belonged to the same party as the appellant. Whereas the Trial Court held that it was of no consequence finding that, it was impossible to ascertain “whether the presence/conduct of the partisan officer had an impact on the results” the appellate court found that the Trial Court had misdirected herself on the evidence before her. The Supreme Court refused to be persuaded by the argument that this amounted to the Court of Appeal delving into questions of fact. The Court instead found that The tenor of the Court of Appeal’s finding was that it would appear to the reasonable man that the 1st respondent, who bore a constitutional charge to remain impartial, had on the contrary, employed a person who had an interest in the outcome of the election.

The Court of Appeal had earlier considered the trial court’s determination and finding on the discrepancies in the results as announced in the forms 35A and that of 34B. The Court also cited Article 86(1) of the Constitution on functions of the IEBC in the timely tabulations and remission of the results. The Court found it suspicious that the original form was not then how comes the copy thereof was provided. The Court held that the

results given by the 1st Respondent were not verifiable and was in violation of the mandatory requirements of Articles 81 and 86 of the Constitution, section 39 and regulation 83 of the Elections Act and the Elections (General) Regulations.

On the question of scrutiny and recount of the electoral results, the Trial Court had directed for scrutiny and recount of the results. Unfortunately, it emerged that some of the original forms were missing during the scrutiny exercise. This made the Court of Appeal to question the integrity of the process citing the Supreme Court's decision in the *2017 Raila Odinga Case*, and whether the lack of original forms during scrutiny went into the core of the validity of the election. The Court of Appeal faulted the Trial Court for not address its mind on the outcome of the scrutiny exercise.

In the view of the Court of Appeal, the question verifiability of the results of the election could only be determined by considering the outcome of the scrutiny. The Court of Appeal considered that the Trial Court allowed the petition but on totally different grounds. The results in the opinion of the Court were not verifiable, accurate, and transparent as there were discrepancies in the reporting of the results and the absurd outcome of the scrutiny. The Court of Appeal held that the trial judge did not properly address herself to the evidence before her. The Court of Appeal opined that if to a reasonable man it appeared that a party who had an interest in the outcome of the election was employed by the 1st Respondent, there was likely than not to be bias. The election therefore in the court's opinion was not conducted in a free and fair manner.

This position by the Court of Appeal was upheld by the Supreme Court.

Cyprian Awiti & Another v IEBC & 3 Others, Supreme Court Petition No. 17 of 2018

The appellants appealed to the Supreme Court seeking to reverse the Appellate Court's decision that affirmed the annulment of the gubernatorial election of Homa Bay County. In that election, the appellants were declared as the duly elected governor and deputy governor, respectively.

At the High Court, the 3rd and 4th respondents filed an election petition in which they challenged the conduct of the gubernatorial elections. They alleged that the gubernatorial elections were tainted with irregularities, illegalities, and malpractices and infringements of the provisions of the Constitution and the electoral law. At the trial Court the 3rd and

4th respondents made two applications (on September 5, 2017 and September 6, 2017 respectively): one for the Independent Electoral and Boundaries Commission to produce the originals of Forms 32A, 37A, 37B and 37C relating to the Homa Bay County gubernatorial election which the trial Court dismissed; the other(which lay at the center of the appeal that there be a scrutiny of votes cast in all, or in randomly selected polling stations; the trial Court allowed for partial scrutiny and recount for 91 polling stations from all the eight constituency in the Homa Bay County.

The partial scrutiny and recount were duly conducted under the superintendence of that Court's Deputy Registrar, who duly compiled a report and filed it in the trial Court, on January 24, 2018. The High Court held that the gubernatorial elections in Homa Bay County were not conducted in strict compliance with the Constitution and the applicable electoral laws. The trial Court invoked electoral irregularities as the basis for annulling the election in question. In its finding that there were electoral irregularities, the High Court made no reference to the scrutiny and recount report.

The appellants were aggrieved by the High Court's decision and made a petition of appeal to the Court of Appeal. The Court of Appeal faulted the High Court's decision for failing to mention, consider and evaluate the scrutiny and recount report. Despite the Appellate Court finding that the trial Court erred in law for failure to incorporate the scrutiny and recount report in arriving in its judgment, it termed that a question of facts, concerning which it lacked jurisdiction. The Court of Appeal went ahead and upheld the High Court's judgment.

The appellants further appealed to the Supreme Court against the Court of Appeal's decision. At the Supreme Court, the appellants contended that the Court of Appeal found that the trial Court erred in law for failing to mention, consider and evaluate the scrutiny and recount report. They said that if the trial Court had considered and evaluated the scrutiny and recount report, it would have arrived at a different judgment and that failure to consider the report amounted to violation of the right of fair hearing.

The issues for determination included: a) whether the Appellate Court erred in failing to consider the scrutiny report upon finding that the Trial Court had glossed over the report; b) whether it was necessary for the Supreme Court to undertake an examination of the

scrutiny report; c) whether there was a violation of the appellant's rights of fair hearing under Articles 25 (c) and 50 of the Constitution by failing to consider material evidence lawfully recorded, and whether the material would shed light on the condition of irregularity; and d) whether there was a violation of Article 88 (4) of the Constitution in preferring election data records of the 3rd and 4th Respondents in place of the results held by the IEBC.

On the question of whether the Appellate Court erred in failing to consider the scrutiny report upon finding that the Trial Court had glossed over the report, the Court noted that the scrutiny report was vital for the evaluation of the 3rd and 4th Respondent's allegations of election irregularity. Nevertheless, the Trial Court did not refer to the scrutiny report, despite the fact that it was ordered by the Trial Court and was made with the input of all the parties, when the Court cited electoral irregularities as a basis for nullifying the election. This was a definite and glaring error in the finding of the Trial Court.

On appeal, while the Court of Appeal appreciated the serious consequence of the omission in relation to ascertaining the merits of the case, it sustained the Trial Court's finding on the basis that it lacked jurisdiction to disturb the findings of the Trial Court on the basis that it was a matter of fact. The Supreme Court found that the appellate court had overlooked the essence of questions of law flowing from the constitutional process and from the rights and obligations annexed to the electoral process. It found no basis for the Court of Appeal to abdicate its jurisdiction, particularly after it had ascertained that the Trial Court had made errors of law.

Next, the Court determined whether it was necessary to undertake an examination of the scrutiny Report. Assessing the facts of the case against the criteria for what amounts to a matter of law under section 85A of the Elections Act, the Court noted that it was quite evident that the conclusions of the trial judge were not supported by any evidence from the scrutiny report. It was therefore a tenable proposition that hardly any reasonable tribunal would have arrived at the conclusion that the trial judge did, as his conclusion did not rest on the scrutiny report. This was therefore clearly a question of law going to the mandate of the Court of Appeal.

In addition, in the absence of the findings of the scrutiny report, the Trial Court had no reference in assessing the magnitude of the impact of any electoral irregularities such as

may have prevailed upon the electoral outcome. There was therefore no legal basis for the annulment, which was a crucial issue of law that the Court of Appeal overlooked as well. Lastly, the Supreme Court found that neither the High Court nor the Court of Appeal accorded deference to the *prima facie* legitimacy of official records emanating from the IEBC, to the established procedure for evaluating evidence bearing upon claims of irregular conduct of election or to the relevant law regarding proof in election petitions. The Supreme Court thus affirmed the IEBC's declaration of the Appellants as the duly elected governor and deputy governor for Homa –Bay County.

Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 others, Supreme Court Petition No 26 of 2018

In the general elections held on August 8, 2017, the 1st respondent was declared the elected Member of the National Assembly, Wajir West Constituency. The appellant came in second in that election. The appellant challenged the outcome of the election at the High Court where he alleged that it was marred by various irregularities and illegalities. Upon the making of an application by the appellant, the High Court allowed for a scrutiny of votes in 4 polling stations-Qara, Korich, Arbajaha and Mathow Primary School. Because of the scrutiny, the results for Qara Polling Station were disregarded. The High Court delivered its judgment on March 2, 2018 and found that the elections were not conducted in accordance with the law and nullified the results.

The appellant lodged an appeal at the Court of Appeal where he asserted that the High Court should have declared him the winner of the election. He explained that after disregarding the results at Qara Polling Station, the final tally showed that he had garnered more votes than the 1st respondent. The 1st respondent cross-appealed and stated that the High Court went beyond its jurisdiction and made determinations on matters that did not arise from the pleadings. He stated that the issues relating to Qara Polling Station were not pleaded in the petition and only arose during scrutiny. The appeal was dismissed, and the cross-appeal was allowed. The judgment and decree of the High Court were set aside and substituted with an order dismissing the High Court petition. In response, the appellant filed an appeal at the Supreme Court.

The main questions for determination were: a) what circumstances would allow the High Court to disregard or strike out votes during the conduct of scrutiny? and, b) whether the election of August 8, 2017 for Member of the National Assembly, Wajir West Constituency, was conducted in accordance with the law and the Constitution.

The Supreme Court held that section 82 (2) of the Elections Act specified conditions under which the High Court could strike out certain votes after the conduct of scrutiny. The irregularities that occurred at Qara Polling Station were not within the category provided for in section 82(2) of the Elections Act. Therefore, the High Court lacked the jurisdiction to disregard the votes recorded at Qara Polling Station.

Furthermore, the scrutiny process did not identify a certain contestant as the winner of the election; it only created uncertainty and blurred the outcome of the election. The doubt relating the correct winner had various indicators. The total number of votes cast at Qara exceeded the voter turnout. The votes cast could not be attributed to the candidates individually. Considering what the winning margin was in the 74 polling stations, the vote at Qara Polling Station had the potential to shift victory to either the appellant or he 1st respondent. The irregularities at Qara Polling Station, therefore, affected the entire election process.

In the end, the court came to the conclusion that the election for the seat of Member of Parliament for Wajir West Constituency was not conducted substantially in accordance with the terms of the Constitution, and more specifically, the terms of articles 81, 82 and 86 of the Constitution.

Alfred Nganga Mutua & 2 others v. Wavinya Ndeti & another, Supreme Court Petition Nos. 11 and 14 of 2018

The consolidated appeals by the appellants faulted the Court of Appeal for nullifying the 1st appellant's election and directing the 2nd appellant (the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh election, arguing among others that the Court of Appeal paid undue regard to procedural technicalities contrary to article 159(2)(d) of the Constitution and that it misapprehended the burden and standard of proof in electoral disputes.

The Supreme Court held that in the absence of any law prohibiting public officers from being engaged as election officials and more particularly in the absence of evidence of anything the employees of the Machakos County Government engaged in the election did or omitted to do that compromised their impartiality, IEBC's conduct of the election was not compromised. It took note of the fact that under section 45 of the Political Parties Act and section 15(1)(a) of the Elections Offences Act, it was an offence for any public officer to engage in any partisan political activity. Under section 15(2) of the Election Offences Act, it was equally an offence for any candidate to engage such an officer as her or his party's agent. The allegation that 1st appellant's party's agent in the election was one and the same person as the Chief Officer of the Machakos County Government was therefore an allegation of commission of an election offence.

The Supreme Court observed that the burden of proof lay upon the party alleging a fact to prove it to the required standard. The standard of proof of any election offence or quasi criminal conduct was that of beyond reasonable doubt. The allegation that Maendeleo Chap Chap Party's (MCCP) agent was one and the same person as the Chief Officer of the Machakos County Government amounted to commission of an election offence, proof of which the law required to be beyond reasonable doubt. Other than making that allegation in their petition and in the evidence of the 1st respondent, the respondents never provided any proof of the allegation. A mere allegation could not be proof, leave alone proof to the required standard of beyond reasonable doubt. The respondents needed to do more than that. To discharge their burden of proof on that allegation, the respondents should have invoked article 35 of the Constitution and obtained records from the Machakos County Government to verify that allegation. Thus, the Court of Appeal erred in basing its nullification of the 1st appellant's election partly on that ground.

With respect to the issue of non-compliance of the impugned Form 37C was pleaded in the petition before the Trial Court, since the respondents had pleaded that the votes garnered by each candidate had wrongly been captured on impugned Form 37C and that IEBC failed to use standardized statutory forms to declare the results of the elections. Consequently, the ground of appeal based on failure to plead the illegality of Form 37C was dismissed.

The Supreme Court held that the words of section 39(1B) of the Elections Act required the County Returning Officer to announce and declare the election of the county governor,

county senator and county women representative in the prescribed form, of final results from constituencies in the county. Regulation 87(1)(b)(iii) of the Elections (General) Regulations, 2012, on the other hand went further to require Forms 37C, 38C and 39C used for the declaration of the election results of the county governor, senator and county women representative respectively to have a column for the votes cast for each candidate in each polling station. And the format of those forms, contained in the schedule to those Regulations, had such a column. It noted that the impugned Form 37C that was used in the declaration of the Machakos gubernatorial election results omitted a column for votes cast for each candidate in each polling station and was therefore not in the prescribed form. It fouled regulation 87(2)(b)(iii) of the Regulations and was thus non-compliant.

The court observed that the provisions of section 39 of the Elections Act could not be said to apply *mutatis mutandis* to other elections with regard to the handling of the results in the presidential election. Read as a whole, that section made a clear distinction between the handling of results in the presidential election and other elections. It was clear from section 39 (1) of the Elections Act that at the constituency level, the constituency returning officers (CROs) were required to tally and collate the final results from each polling station and announce the results for the election of a member of the national assembly and members of the county assembly and for the election of the President, county governor, senator and county women representative to the national assembly. The results from the polling stations were on the A forms which were the primary documents. CROs were required to submit, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county governor, senator and county women representative to the respective county returning officer.

The court proceeded to observe that section 39 (1C) of the Elections Act dealt with the tally, collation, and announcement of the presidential results at the county level. There was a clear distinction between that subsection and subsection (1B). Unlike subsection (1B), subsection (1C) required under clause (a) the electronic transmission and physical delivery of the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre. Section 39 (1B) of the Elections Act dealt with tallying, collation and announcement or declaration of election results at the county level. The section made no mention of results from polling stations.

It only talked of final results from constituencies in the county. The section required the county returning officers, for purposes of the election of the county governor, senator, and county women representative, to tally only final results from constituencies in the county. The final results from the constituencies were on the B forms. It followed that in the tallying and announcement of the results for the election of the county governor, senator and county women representative, although they would have been delivered to the CRO and they would therefore be in his possession at the time of declaring the results, the CRO did not go into the figures in the A forms. He would only tally and collate into the C forms the results on the B forms from the constituencies in the county. The Court of Appeal erred in holding that the CRO was concerned and had to be concerned with the Forms 37A's being the primary documents that capture the results at the polling stations.

It was the court's position that the position of the President was different from those of other elective posts. Because of the importance of the office of the President, section 39 of the Elections Act demanded for a more rigorous process in the tally, collation, and verification of the presidential election results than those of the other elections. That was why clause (b) of subsection (1C) demanded not only for the tally but also for the verification of the results received at the constituency tallying centre and the national tallying centre. Hence, there was a clear distinction between the handling of the presidential election results and those of other elections. The tallying and announcement of the results for the election of the county governor, senator and county women representative, under section 39(1B) of the Elections Act, the CRO was not required to go into the results on the A forms from polling stations. But in contradistinction, regulation 87(2)(b)(iii) of the Regulations which was supposed to give effect to that section, required the CRO to transpose results of each polling station on Form 37C. For that purpose, the prescribed template of that form contained in the schedule to the Regulations had a column for results cast for each candidate at each polling station. That was an additional requirement that was not in the section which incidentally formed the turning point of the Court of Appeal decision giving rise to the appeal.

The court proceeded to hold that a provision of any subsidiary legislation that conflicted with that of the parent Act was *ultra vires*. Thus regulation 87(2)(b)(iii) of the Elections (General) Regulations, 2012, was *ultra vires* section 39(1B) of the Elections Act and was null and void *ab initio*. The Court assumed it never existed and concluded that the

3rd appellant was right in ignoring it and omitting from the impugned Form 37C used in the declaration of the Machakos County gubernatorial election results a column with results from the polling stations. In the light of the provisions of section 72 of Interpretation and General Provisions Act and section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if regulation 87(2)(b)(iii) of the Regulations were not *ultra vires*, the variation on Form 37C was minor and inconsequential. Even if regulation 87(2)(b)(iii) of the Regulations was not *ultra vires*, the transposition of the results on to Form 37C would not be the only way of verifying the results of the election. The deviation on the impugned Form 37C was immaterial.

The court proceeded to hold that the distinction between the handling of presidential election results and those of others did not in any way affect the verification demanded by article 86(a) of the Constitution. According to regulation 76 of the Regulations, after voting closes, the ballot papers were to be held up and openly displayed for all the candidates or their agents to verify that they were valid votes and ascertain for who they were cast. The counting was opened, and any dissatisfied candidate was entitled to demand for a recount up to two times. The countersigning of the result forms by the candidates and/or their agents was a declaration that they had verified and were satisfied that the data was correct. The candidates and/or their agents were involved, and they countersign the forms used in the declaration of results at the subsequent tallying and collations of the results at the constituency, county, and the national tallying centres. The impugned Form 37C was signed not only by the CRO but also by the candidates' agents, including the 1st respondent's agent. The data on that Form left the 1st appellant ahead of the 1st respondent with a margin of over 40,000 votes. The deviation on the impugned Form 37C that the 3rd appellant used to declare the results would not have affected the verifiability of those results. Unverifiability could not be pegged only on failure to transpose the polling station results on Form 37C.

In the end, the Supreme Court held that the Court of Appeal erred in holding that the Machakos County gubernatorial election was not conducted in accordance with

constitutional principles thus rendering it null and void. To the contrary, the 1st appellant was duly elected governor of Machakos County in a fair and free election.

VI. Significance of Judiciary's Interventions in 2017 Electoral Cycles

In the run up to the 2017 elections, the Judiciary appointed the Judiciary Committee on Elections (JCE) to coordinate its preparatory activities. JCE took over from the previous Judiciary Working Committee on Election Preparations, but this time as a permanent Committee. It had a six-pronged mandate of: advising the Judiciary on the administrative arrangements and measures for the efficient disposal of election-related disputes; developing and implementing, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff; developing and designing a system for monitoring and evaluating the management and administration of election-related disputes in court; liaising and co-operating with other stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences; advising the Judiciary on the information that needs to be developed and disseminated to the public through the avenues open to it to pursue electoral disputes and the approaches that will be employed.

The rationale for the existence of the Committee was to ensure that the Judiciary is continuously prepared for handling disputes both in 2017 and into the future, due to the recognition that “while elections are held every five years, the nature of electoral disputes is such that the manner of their handling has a long-lasting effect on the credibility of the Judiciary.”⁴⁵ The preparatory activities were geared towards ensuring that the judiciary plays its role in ensuring that the 2017 elections met the constitutional standards of credibility.

The interventions by the Judiciary were important in several respects. First, viewed against the history of 2007, when the lack of independence and perceptions of partiality of the institution contributed to post-election violence, the judiciary's interventions ensured that electoral disputes were resolved peacefully and through the constitutionally mandated arena for such resolution, thus avoiding violence with their attendant economic and political consequences. By delivering on its constitutional mandate as a fair arbiter of electoral disputes and largely standing the test of politicization that such disputes portend, the judiciary contributed to a peaceful election, a critical indicator of credibility.

⁴⁵ Republic of Kenya, *Judiciary Committee of Elections: Strategic Plan 2016-2019*(Judiciary, 2016)

The 2017 elections, were, however, still accompanied by violence and economic disruptions, but these cannot be attributed to the performance of the Judiciary. Instead it is more about the nature of Kenya's politics, a feature that the reforms of the 2010 Constitution did not successfully address. The country still has a "winner-takes-all" system hence the call by the interim report of the Building Bridges Initiative Taskforce report for a reform of the political structure.

The political environment in the run up to the 2017 elections was heated and at times threatened to turn ugly. Politicians carried their disputes from the 2013 elections, including over the conduct of IEBC and the decision of the Supreme Court in Raila Odinga decision of 2013. The contestations ranged from the push to amend the Constitution, for IEBC commissioners to resign, the role of security forces during the election process, constitutionality of the amendments to the election laws, party nomination, procurement, adoption of technology, and voter registration. While each of these processes saw political contestations, the Judiciary was called upon to intervene in several of the stages. By their interventions the courts ensured that political machinations and disagreements did not mar the elections. At some stage there was fear that the elections would not be held on the stipulated time of 8th August 2017. The Judiciary had to pronounce itself on the issue declaring that elections would proceed as scheduled. This brought confidence in the electoral process.

This was particularly important since the primary election body entered into the election with a credibility deficit. The IEBC went into the election with an exceptionally low confidence level. Its initial Commissioners had been hounded out of office in 2016 and fresh Commissioners appointed just eight months to elections. Although the appointment process involved religious leaders, there was complaint that the quality and competence of those selected as Commissioners were not sufficiently equipped to deal with the elections. The secretariat was also accused of being partisan. Consequently, while the election management body has the constitutionally mandated role of administering elections, and even though in certain jurisdictions like India once the election commences, Courts cannot intervene and have to wait until an election is concluded, in the Kenyan case the courts helped to settle intractable disputes around the election process hence ensuring that the elections not only proceeded on schedule but also with satisfaction from electoral

players and the public. This confidence building and clarification procedures and rules was a huge boost from the Judiciary.

The Judiciary not only stepped into the shoes of IEBC, in certain instances, it also performed the role of rulemaking and clarification. Traditionally, lawmaking is the purview of the legislature with the Judiciary tasked with the responsibility of making decisions based on the rules passed by the legislature. However, as the Kenyan election history has demonstrated, electoral rules are a huge part of the election contest with players seeking to use it as a tool to gain electoral advantage over their competitors. President Moi, for example, sought to make changes to the rules on elections in the run up to the 1992 multi-party elections so as to reduce the period within which the elections were to be held with a view to catching the opposition unaware. The election laws and the security laws were a big source of contest between the ruling party and the opposition. By settling disputes around the laws, they participated in law-making. The law-making contribution by the Judiciary went beyond court determination. One of the mandates given to JCE was stakeholder engagement. JCE formed a committee on Law-reform and Stakeholder Engagement. The Committee engaged in law reform especially as relates to dispute resolution. They made representations to Parliament and to the Joint Parliamentary Committee on IEBC which led to the 2016 amendments to the Elections Act. Their contributions led to the enactment of the Election Offences Act and clarification of the role of various institutional actors during party primaries and nominations. While they raised concern about the period for determination of Presidential Petition, this was not acted upon and remains a key legislative agenda.

The other contribution by the Judiciary was bringing harmony amongst the dispute resolution bodies to avoid forum shopping and ensure coherence and efficiency. In 2013, there was jurisdictional conflict between the IEBC which had constitutional mandate to resolve disputes arising from nominations and the PPDT with statutory responsibility to listen to and make decisions between political parties and members and their parties. The result was that political party nominations were handled by both institutions in 2013. The Judiciary through the JCE mediated an understanding between the two institutions in the run up to the 2017 elections. This understanding was captured in an MOU signed between IEBC and PPDT. Coupled with the legislative amendments pushed by JCE, amongst other

actors, the IEBC focused on disputes relating to their nominations while PPDT was left with disputes arising from the selection of candidates by political parties, referred to as political party primaries.

The other contribution by the Judiciary was to move beyond dispute resolution to engage other actors in the electoral process. This underscored both the electoral cycle approach to election management and the approach of viewing election as comprising interlinked parts, each reinforcing and impacting on the other. Through stakeholder engagement, dispute resolution was more timely and responsive. For example, by engaging with the IEBC, the Judiciary was able to incorporate their perspectives in developing election petition rules for the 2017 elections. One of the notable improvements in those rules was to stop requiring IEBC to deliver Ballot Boxes and ballot papers to the Judiciary warehouse in cases where there were election disputes. This practice in the 2013 elections led to more complaints in addition to raising security and logistical challenges. They also helped avoid the huge pending Bills that the Judiciary would incur on storing these electoral materials. By the engagement with the IEBC, an agreement was reached that IEBC would continue storing the election materials and that the Judiciary could secure the materials at the warehouse of the IEBC. This both enhanced efficiency but also saved costs. The engagement with the IEC also helped Judges to practically appreciate the workings of the Kenya Integrated Elections Management (KIEMS) kits way before Election Day thus aiding the judiciary to resolve disputes arising from technology from a point of knowledge. Similar engagements were held with other stakeholders including the Office of the Director of Public Prosecutions, media, National Cohesion and Integration Commission, and members of the National Council on the Administration of Justice.

The Judiciary also contributed to developing of a rich body of electoral jurisprudence. While the 2013 elections had settled many jurisprudential issues as captured in the Bench Book on Electoral Disputes,⁴⁶ there were several grey areas still outstanding. As this report has aptly captured, the Judiciary was able to further deepen the electoral Jurisprudence through the 2017 decisions. Due to the work of the JCE, the decisions from Judges benefited each other as there was real-time sharing and distilling of the emerging

⁴⁶ The Judiciary, *Bench Book on Electoral Disputes Resolutions*(2017)

reasoning. This ensured that even before uploading onto the website by *Kenyalaw*, judges and magistrates were able to access not just decisions from their peers but also quick highlight on the reasoning. This enhanced both consistency but also provided room for developing informed and ground-breaking jurisprudence. Three areas stand out as jurisprudential grounds in addition to those highlighted in this report. First, was the area of finality of results at the Constituency level as espoused in the Maina Kiai decision, which sought to avoid manipulation of election results after they had been announced at the constituency and polling station level and as they were being transmitted to the national tallying center. The second was jurisprudence around election technology, an issue that formed the bulk of election petitions around the 2017 elections. The courts underscored the importance of technology around elections, were critical about any attempts to interfere with it, navigated around preserving information in the KIEMS kits while allowing their use for the repeat Presidential elections and also enabling access to technology without compromising the security of the data through concepts like read-only access. They also clarified the role of election officials during scrutiny of technology materials.

The third jurisprudence area that the courts clarified was that of quantitative versus qualitative standards for nullifying an election, or what is referred to as the “substantiality”⁴⁷ test. The debate revolved around whether an election can be nullified on qualitative issues alone if there were no disputes around the figures or if you required both qualitative and quantitative issues to be proved. In the 2017 *Raila Odinga* case, the court made a landmark decision affirming that either of the tests was sufficient to nullify an election.

The Judiciary’s handling of the 2017 election petition continues to be celebrated across the world. There is contestation about the powers of the election court. In 2013 the Supreme Court was urged to be cautious in deciding Presidential election petitions. Quoting from the US case of *Gore vs Bush* the court was warned against interfering with the will of the people, it being argued that elections are determined by the electorate and

⁴⁷ Kabumba, B, “How Do You Solve a Problem like ‘Substantiality’? The Supreme Court and Presidential Elections, in Oloka-Onyango, J., and Ahikire J(Eds), *Controlling Consent: Uganda’s 2016 Elections* (African World Press, London, 2017) 477-501

courts have no business trying to overturn such will during a petition hearing. This argument was not unique to Kenya and largely explained why very few presidential petitions had been overturned by the courts. By making the decision it made in 2017, and becoming the first country in Africa and the Fourth in the world to nullify the elections, the Kenyan judiciary affirmed its role in ensuring that the rule of law is respected in the conduct of elections and that the powers granted to the Judiciary can be used in appropriate cases to nullify an election when they do not meet the constitutional threshold of free and fair elections. They, therefore, gave strength to other judiciaries and demonstrated that the African Judiciary had released itself from the shackles of the executive control. This has led to other Judiciaries seeking to learn from them and even going as far as them, as the Malawi courts recently did.

VII. Conclusions and Lessons for the Future

This report sought to document the momentous role played by the Judiciary in the 2017 elections. Adopting the approach of identifying and highlighting key jurisprudential moments and decisions by the Kenyan judiciary around three parameters of evaluators of electoral rule making, enforcers of electoral rules, and determinants of integrity of electoral outcomes, the report has demonstrated that the Kenyan judiciary lived up to its billing of one of the central anchors of the Kenya's constitutional architecture with a focus on transformation and democracy consolidation in the country. It was able to reinforce the standards of free and fair elections not only in the traditional sense of determining the integrity of electoral outcome through deciding a high number of election petitions, but ensuring too that the rules enacted to regulate the conduct of those elections were aligned to the Constitution and further that once enacted those charged with their implementation did so faithfully and fairly. They did not shy away from and did declare sections of the election laws unconstitutional thus calling into question the role of Parliament in ensuring free and fair elections, struck down though its Judicial review powers numerous decisions of IEBC and gave directions on how certain processes should be conducted. Finally, the courts nullified the elections of several candidates including the Presidency in an election cycle where they became a central anchor in the electoral cycle.

Moving into the future there are several lessons and recommendations that arise from this study. *One*, the judiciary is a central player in the quest for deepening Kenya's electoral democracy. An independent and aware judiciary has the potential of supporting the conduct of credible elections and standing up when other actors either do not play their role at all or in an objective and timely manner. Investing in developing the capacity of the Judiciary should, consequently, continue being a central pillar of electoral support programmes.

Second, Kenya's elections will continue being judicialized. With a robust Constitution, a high-stakes political environment and a winner-takes all electoral system, elections generated a lot of disputes. If Kenya is to avoid electoral violence, continued reliance on courts to settle what should largely be political disputes is not just inevitable but

necessary. It ensures that the country continues being a bastion of peace without sacrificing the necessity for electoral justice.⁴⁸ Consequently building the capacity of the Judiciary to handle election disputes should not be frowned upon but encouraged. Investing in the judiciary is an investment for both peace and stability in the country.

Third, successful election dispute resolution requires linkages with other players in the justice chain. The recognition of the link is already evident through the creation of the National Council on the Administration of Justice to coordinate administration of justice and reforms in the justice sector. Deepening the role of NCAJ in electoral regulation and strengthening the role of all players in the electoral process will also enhance the performance of the Judiciary. The collaboration between the Judiciary and other role players enabled it to be better prepared and helped contribute to improving the electoral process. It is important that such collaborations be encouraged and supported to ensure coherence.

Four, the quality of laws governing elections required to be relooked. Several of the cases that went to the Judiciary related to law-making. While critics have argued that Kenya's elections are over-legislated the reality is that those rules still do not fully promote credible elections. There are several lessons learnt from the 2017 electoral cycle that will require to be used to make adjustments to the election laws. The Judiciary has declared several sections unconstitutional and made proposals too in their judgments for legal reforms. Issues like the structure of PPDT and its mandate will require to be looked at deeply. It is therefore necessary that a multi-stakeholder process for law reform, involving the Judiciary and other actors be put in place to spearhead electoral reforms in the run up to the 2022 elections.

Fifth, there are numerous lessons from the 2017 elections. However, unlike the 2013 elections, there has been extremely limited analysis and documentation of the 2017 election experience. For example, an In depth-publication of key themes from the 2017 elections is necessary so as to provide a permanent reference of the key issues, including dispute resolution around election offences, party list petitions, party primaries, role of

⁴⁸ Odote, C, "The 2013 Elections and the Peace Narrative (2013-2015)" in Cheeseman N, Kanyinga, K and Lynch G, The Oxford Handbook of Kenyan Politics (Oxford, 2020).

the appeal Court and role of the Supreme Court. This publication could take the form of *Balancing the Scales of Justice* published in 2016.

Sixth, sharing of Kenyan judiciary experience with other judiciaries across the continent is useful for two purposes. It would help ensure that other Judiciaries are able to borrow good practices from Kenyan judiciary's model of election dispute resolution and preparations as spearheaded by JCE. It would demonstrate that support of the top Judiciary leadership and engagement of all levels of the Judiciary is essential. In addition, the sharing will enable the Kenya Judiciary to also learn from her peers within the continent. This should be encouraged.

Seventh, the achievements by the Kenyan Judiciary was aided by the existence of a standing and engaged committee, the Judiciary Committee on Elections and dedicated support from both Government and development Partners. The committee developed a road map, in the form of the 2016-2018 Strategic Plan, which has since expired. It is important that the Committee be strengthened and resourced so as to spearhead the preparations for the Judiciary's role in the 2022 electoral cycle.