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The Nullification of a Presidential Election Result: The Case of Kenya and Malawi

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Dedication

To the memory of my parents, Alisand Duncan Singogo (Snr) and Bernas Banda Singogo.

Declaration

Student Number: UNISE2565IT

I declare that ***The Nullification of a Presidential Election Result: The Case of Kenya and Malawi*** is my own work and that all the sources that I have used or quoted have been to the best of my knowledge and abilities indicated and acknowledged by means of appropriate references.

Signed  Date 4.22.24

Abstract

Before 2017 no Presidential Election Petition in Africa had ever had the election results overturned by a Court of Law. For years most research in African Electoral Law focused on investigating the challenges the Judiciary in Africa faced when adjudicating presidential election disputes. Due to the discontent and feeling of a stifled democratic climate, in some jurisdictions, once the Presidential Election results were announced, a sense of injustice descended on the populations and this led to widespread violence, resulting in the loss of lives and property.

However, in 2017 this changed when the Supreme Court in Kenya overturned the elections results and called for a fresh election. Then, almost three years later in 2020, the Supreme Court of Malawi upheld the ruling of the Constitutional Court and annulled the Presidential elections results. Unlike in the first nullification, the reaction to the second nullification caused people from all walks of life to begin to wonder what was going on in the Courts of Law.

The reason was that after nearly decades of wondering if an African Court would ever overturn an Election Result it had happened. Many theories followed these rulings including that the Judges were brave, the Judges faced immense international pressure and that the Judges had simply exercised judicial independence. What was not in contention was that these cases where landmark rulings. However, for the legal mind these theories were simply an attempt at avoiding the real paradox which was what had transpired?

It is in view of the above background that this research seeks to investigate three main issues:

(1) How and why did these two Courts departed from the norm of upholding Presidential Election Results as pronounced?
(2) Why should these two cases be considered landmark decisions apart from being the first to nullify a Presidential Election Result?
(3) Did the Courts set a standard or threshold that ought to be met for a Presidential Election Petition to succeed or fail?

Key Words: Constitution, Election, President, Presidential Election, Dispute Resolution, The Judiciary, The Will of the People.

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List of Abbreviations

ACDEG - African Charter on Democracy, Elections and Governance

ALLER - All England Law Reports

CA - Court of Appeal

EDs- Editor (s)

EISDA- Electoral Institute for Sustainable Democracy in Africa

ELGIA - Electoral Law and Governance Institute for Africa

EKLR- Electronic Kenya Law Report

EWHC- England and Wales High Court

HC - High Court

IEBC- Independent Electoral and Boundaries Commission

IPDs- Institutions Protecting Democracies

KESC-Kenya Supreme Court

KLR-Kenya Law Report

MLR - Malawi Law Report

MR - Master of the Rolls

MSCA - Malawi Supreme Court of Appeal

PPEA-Presidential Parliamentary Election Act (Malawi)

SADC - Southern African Development Community

SC - Supreme Court

SC- State Counsel

SCM -Supreme Court of Malawi

SCZ - Supreme Court of Zambia

QB - Queens Bench

QC - Queens Counsel

UDHR- Universal Declaration of Human Rights

USA - United States of America

UK - United Kingdom

ZLR -Zambia Law Reports

CHAPTER ONE

INTRODUCTION

A Presidential Election Petition is a process for challenging the outcome, or any aspect of an election for President. The procedure varies from jurisdiction to jurisdiction, but almost always begins by way of an Election Petitioner complaining either of an undue election or an undue return (Awour et la 2013)[1]. In Africa despite alleged numerous defective Presidential elections that had been challenged in courts, Judges always upheld the results notwithstanding the severity of the alleged anomalies (Kaaba 2018)[2]. The results of the failed petitions led scholars to research extensively on why Presidential Election Petitions were failing before African Courts (Adetula 2009)[3i].Varying reasons were advanced including suggestions of fraud, corruption, and the competence of the judiciary which vices appeared to ensure Judges continued to endorse election results regardless of the evidence (Dunaway 2012)[4].

However, in 2017, the Supreme Court of Kenya sitting to hear a petition challenging the election of Kenyatta as President, overturned the results of that election. Then, almost three years later in 2020, the Supreme Court of Malawi in upholding the ruling of the High Court sitting as a Constitutional Court, ruled the Presidential elections result declaring Mutharika as President void. As this was highly unprecedented, the reactions to the rulings in Kenya were skeptical from some people (BBC News 2017)[5], whilst others dismissed the ruling as just a moment of heroics by the Judges and dismissed it as simply a case of the Judiciary exercising their judicial independence (BBC Africa, Nairobi 19

[1] 'Comparative Analysis of Presidential Election Petitions in Kenya and Other Jurisdictions' Linda Awour and Monica Achode in Election Petitions in the World May 15, 2013, P.1
[2] O'Brien Kaaba 'The Challenges of Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing an African Supranational Elections Tribunal' The University of South Africa, June 2015
[3] Victor A. Adetula, 'Measuring Democracy and Good Governance in Africa: A Critique of Assumptions and Methods' in Africa Focus: Governance and the 21st Century; The Economic Commission for Africa: Africa Governance Report AGRII 2009 p.17
[4] James Dunaway Long IV 'Voting Fraud and Violence: Political Accountability in African Elections' University of California San Diego 2012 p.xvii
[5] David Maraga, *The Brave Judge who made Kenyan History* in BBC News 2 September 2017 seen on 29 February 2021

2017)[6]. In the aftermath of the ruling in Malawi there was a feeling that the Judges had had no choice but to rule as they did to quell the series of mass protests that had initially proceeded soon after the results were announced (Equal Times 2020)[7].

Indeed, much as there could have been some truth that the Judges in both courts added to the tenants of judicial independence, for the legal mind questions ought to have arisen as to why these decisions diverted from what for a while had been a judicial norm. Legal bells ought to have begun to toll because this was unusual, a fresh approach to addressing presidential elections petitions and what the jurisprudential landscape of African Electoral Law now looked like.

The given and known position is that at common law, judicial rulings are a major source of law because of the role that judicial precedence or *stare decisis* plays in future judgments of the courts. Judge made law binds both horizontally and vertically (Davis v Johnson 1979)[8] until it is either overturned, revised, or set aside. Therefore, these judgments on Election Petitions have become a law unto themselves with binding effect on the contesting parties, their supporters and to a greater extent on the courts of law faced with an election petition. Honorable Justice Kiefel states this position as follows:

"In our system of precedential law, judgments of the ultimate court may correct an error in past judgements; may develop and extend an aspect of the common law, thus taking it closer to a legal principle. They may identify the direction which the law is taking, …and judgements have an educative role in our system. They form the basis for texts which explain the law and for academic discussions." (Kiefel 2012)[9].

[6] Wanyama wa Chebusiri, *Political Posturing* in BBC Africa News 19 September 2017 seen on 29 February 2021
[7] Charles Pensulo, *What Lessons Can be Learnt from Malawi's Annulled Election Results* in Equal Times 29 April 2020 seen on 1 March 2021
[8] *Davis v Johnson* 1979 AC 317
[9] Hon. Justice Susan Kiefel AC High Court of Australia, 'Reasons of judgment: Objects and Observations' Speech delivered at the Sir Harry Gibbs Law Dinner at Emmanuel College, University of Queensland 18 May 2012, p.2 emphasis added.

This dissertation is on *The Nullification of a Presidential Elections Result: The Case of Kenya and Malawi*. It is an opportunity to offer some response to the lingering questions on African Electoral Law. It is a contribution to the legal knowledge that has developed and is developing on the rulings delivered in the two countries. The remote possibility that Judges sitting in two different jurisdictions and at different periods elected to divert from the norm calls for a closer legal examination other than to dogmatically conclude that it was an exercise in Judicial Independence.

Further, this is a shift from previous research which was on why Presidential Election Petitions were failing in Africa to why these two Election Petitions succeeded. It is also driven by universal concerns that in the aftermath of most elections, widespread pockets of protesting voters have led to loss of life and destruction to public property (Telegraph 2017)[10]. At times this violence spread and injured private citizens and their property (Africanews 2019)[11ii]. The rulings in question could go far in quelling future violence by persons aggrieved with an election result if they feel assured that should they petition, their grievances will be justly considered and if flawed the results will be nullified. There will be a huge possibility that in future courts will primarily rely on these two rulings to buttress their decisions.

The dissertation does not deal with disputes for all elected positions but specifically deals with disputes in the election of a President. The choice is deliberate because firstly, these are unique cases that nullified an election result, and secondly that the election to the position of President has world over become of great significance and any questions as to their legitimacy is frowned upon (NPR 24 2020)[12]. Lastly an analysis of the two rulings should prompt legal thought as espoused by Keifel[13] when she addressed a gathering of lawyers at a dinner. This thesis therefore resonates with the latter

[10] Adrian Blomfield Kiamba 'Kenya fears return to bloodshed as unpredictable election looms' in the Telegraph 5 August 2017
[11] Daniel Mumbere, *Malawi Post-election Aftermath in 10 Highlights* in Africanews 08 July 2019 seen on 5 March 2020
[12] Mara Liasson, 'Why President Trump refuses to concede and what it might mean for the Country' NPR 24 Hour Program Stream November 18, 2020.
[13] Hon Justice Susan Kiefel ibid p.2

part of Keifels' remarks and lays the foundation to what the problem could be with the rulings when placed in context.

1.1 Problem Statement

After the collapse of the Regime in Eastern Europe (Schopflin 1990)[14] and later the gradual shift from command economies to more liberal economies, in most of Africa, elections became a preferred process for change of government. For a while this functioned well until discontent set in as the electorate became increasingly frustrated and concerned with whether the elections were free or fair. This was further compounded when petitioners who felt aggrieved and proceeded to challenge the results in court that the Judges appeared not to do enough to render fair rulings (Azu 2015)[15].

However, in *Raila Odinga and another v Uhuru Kenyatta and another 2017*[16] and again in *Peter Mutharika and another v Saulous Chilima 2020*[17], the courts in Kenya and Malawi reversed the electoral results. Being the first of their kind these two judgements can only be hailed as landmark rulings. A landmark ruling it can be argued, is one that is notable because it significantly changes, consolidates, updates, or effectively summarizes the law on a particular subject (Websters 2010)[18].

This dissertation therefore is on why after so many failed Election Petitions two succeeded thus reshaping the legal horizon on election law. This is an essential component of the study at hand because precedence has been set, history re-written and as envisioned by Azu (2015)[19] in her seminal work, the era of unsuccessful Presidential Election Petitions ended.

Given the above, the study analyzes the rulings of *Raila Odinga and another v Uhuru Kenyatta and another in 2017 Peter Mutharika & another v Saulous Chilima & another in 2020*. It examines the

[14] George Schopflin 'The End of Communism in Eastern Europe' in International Affairs Vol 66 No.1 January 1999 pp3-16 Oxford University Press
[15] Miriam Azu 'Lessons from Ghana and Kenya on why presidential Election Petitions usually fail' in African Human Rights Law Journal v.15 n1 a7 2015 p.166.
[16] Presidential Petition No.1 *Odinga v Kenyatta* in the Supreme Court of Kenya 2017
[17] Constitutional Appeal No.1 *Mutharika v Chilima* in the Malawi Supreme Court 2020
[18] Websters New World Law Dictionary © 2010 Wiley Publishing New Jersey
[19] Azu opcit

historical rulings in both jurisdictions prior to the landmark decisions, and explores in some detail the effect, impact, and importance of these landmark rulings. This is compelling as it gives substance to the purpose of this study.

Purpose of the Study

Scholars, practitioners, and the electorate at large did for a long-time grapple with the question 'can a presidential election result ever be overturned by the courts?' The answer retained by most research appeared to conclude that there seemed to be an unwritten pact within the judiciary, which was not to readily overturn election results. This position was fermented in the Supreme Court of Ghana when it heard the Presidential Petition of Dankwa-Addo v Dramani in 2019, were Atuguba JSC stated:

"*For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions*[iii] *does not readily invalidate a public election but often strives in public interest to sustain it*." (Supreme Court of Ghana,2019)[20]

Could these rulings under analysis then be said to have found nothing to protect in 'public interest' one might ask? Or indeed, did the courts come up with a threshold required of petitioners before the courts for them to succeed in ensuring Judges stop striving to sustain an election result? The question being asked is what were the points of departure from the norm?

Kerr in discussing how to read court rulings could not have explained this better:

"*You should look out for method (or methods) of reasoning that the court offers to justify its decision. For example, courts may justify their decisions on grounds of public policy…the idea here is that courts believe that the legal rule it adopts is a good rule because it will lead to better results than any other rule. Courts may also justify their decisions based on the courts understanding of the narrow*

[20] *Nana Addo Dankwa-Addo &others v John Dramani Mahama &others* No. J2/6 in the Supreme Court of Ghana Atuguba JSC 29 August 2013, p.40

function of the judiciary…other courts will rely on morality, fairness, or notions of justice to justify their decisions." (Kerr 2005)[21].

Since this is a unique case study, in arriving at any findings it is important to put to test some of the suggestions from Kerr[22] and Kiefel[23] to understand why the learned Judges in Kenya and Malawi ruled to set aside the election results. The dissertation therefore hinges on determining what caused the courts to depart from the position held in past rulings or put in another way why did they not follow Atuguba who appeared to speak on the norm developed by African Courts.

The justification is augmented by the fact that little has been written to critically examine the rulings from the two courts. Indeed, scholars like Kaaba[24] in his case law review of *Odinga*[25] made some substantive findings. However, he focused more on the majority decision of the court. This research proposes to analyze both the majority and dissenting view in the matter, hence enriching the analysis. It also delves into obiter because even though these do not constitute the mainframe of the ruling, as a practitioner it is common knowledge that they form a basis for further research or indeed give clarity on why the majority ruled as they did.

In making commentaries in the ruling of *Peter Mutharika and another v Saulous Chilima and another* [26] Mlambo[27] limited himself to the determination of the appropriate standard of proof as a legal test for nullifying election results. However, by so doing he did not address why the court revisited its ruling in a previously settled matter on what constituted a plurality decision as opposed to a majoritarian decision in the election to the office of President.

[21] Prof Kerr S. Orin 'How to read a judicial opinion: A guide for New Law Students 'George Washington University, Law School Washington D.C August 2005 p.4
[22] Kerr ibid p.4
[23] Kiefel opcit p.2
[24] Kaaba opcit
[25] *Odinga v Kenyatta* opcit
[26] *Mutharika v Chakwera* opcit
[27] Mlambo A '*Malawi Supreme Court breaks Ranks with Peers in Southern Africa'* in Newsday 30 May 2020 seen 5 March 2021

It is thus the position of this dissertation that there is a need to delve further and tease out other issues settled in the matter for it to qualify as a landmark ruling.

The hypothesis is that generally in all Presidential Petitions in Africa, the election results will not be readily overturned. Arising from this, the issue to be resolved is when can election results be set aside as was the case in the *Raila Odinga and another v Uhuru Kenyatta and another in 2017 and Peter Mutharika v Saulous Chilima in 2020* rulings. If it can be mused that the general rule, as implied in the matter of *Dankwa-Addo v Dramani* in Ghana, was not to set aside a Presidential election result is the exception to the unspoken general rule adopted by courts then found in the rulings that form the basis of the research? This position informs the objective of the research.

Objective of the Study

The broad objective of the study is to examine how the Judges in Kenya and Malawi deviated from what had become the embraced judicial practice and what then made them end up nullifying the election results. It seeks to explore a position augmented by Judge Atkinson as to the purpose of a judgment as follows:

"*The four purposes of any judgment are to (1) Spell out the Judges' own thoughts, (2) Explain those decisions to the parties, (3) Communicate the reasons for the decision to the public and (4) Provide reasons for an Appellate court to consider*" (Atkinson 2002)[28]

Indeed, in the Kenyan case the fourth leg of Atkinson did not apply because as will be shown the rulings of presidential petition of Kenya final and binding with no provision for appeal. In Malawi however, their legal system has a provision of appeal. To cement objective of the study this research goes further to examine if (a) the decisions taken were just (b) the reasonings were clearly spelt out

[28] Atkinson Roslyn J "Judgement Writing" at The AJIA Conference Brisbane 13 September 2002, viewed at http://www.aija.org.au/mag02/roslyn seen on 4 January 2021

and (c) whether the courts formulated any new rules and principles that could guide Judges in future Presidential Election Petitions.

At the pinnacle of the thought process will be a position elucidated by Cardozo, an apologist of judge made law who states the following and is quoted,

"Court decisions are not personal choices of Judges, unintended, illogical, or unconnected from the rest of the societal system, but a decision is diverse minds that come together to produce truth and order" (Cardozo 1921)[29].

Atkinson as read together with Cardozo provokes the following research questions.

Research Questions

To fulfill the objectives herein, the dissertation addresses the following three main questions.

(a) What led the Judges in 2017 and 2020 to nullify the presidential election results?
(b) Did the Judges develop a standard or threshold that must be met to nullify or uphold a presidential election result?
(c) What made the two cases landmark judgments apart from nullifying the election results?

The sub questions are,

(i) Did these rulings correct an error from past judgments?
(ii) Did they develop and extend an aspect of common law?
(iii) Did they identify the direction which electoral law is taking?
(iv) Did they have an educative role in their rulings and thus lay ground for future academic discussions?

To respond to these questions, it is proposed to utilize the following methodology.

Methodology

This is desk research which will explore both primary and secondary sources. As the judicial pronouncements are the major sources of law the two cases of *Raila Odinga and another v Uhuru*

[29] Cardozo N Benjamin The Nature of Judicial Process Yale University press, 1921 P.176-77

Kenyatta and another 2017[30] and *Peter Mutharika and another v Saulos Chilima and another*[31] are the main source for determining the findings. The study also considers past decisions on Presidential Election Petitions thus, it will draw on previous case law and the rulings made before 2017.

To broaden the research, the study will employ a judicial methodology proposed by McHugh (1982) in his seminal work[32] as a tool for examination of such cases. This methodology is considered a special approach for study and exposition and is founded on the belief that parties submitting their matter to court assume that a dispute will be decided on existing principles.

It is largely a common law approach that is anchored on the presumption that Judges make rulings devoid of their personal values and beliefs (McHugh 1998)[33]. Therefore, it looks at the rationalization, explanation, and the results in the settlement of a dispute. It will also draw on the guidelines of the directions on judgments as set out by Kerr[34] and Kiefel[35] as models of diagnostic instruments to probe the landmark rulings.

Research Limitations

As the research is conducted a few years after the landmark decisions, collection of data and its collation may lead to some texts being missed. However, this does not take away from the data collected as the rulings are currently precedence. The greatest challenge in this research is having to work, study and write as long distance research. However, the flexibility of the program more than guarantees successful completion within the time frame as defined in the work plan.

Chapter Summary

[30] *Odinga v Kenyatta* opcit
[31] *Mutharika v Chakwera* opcit
[32] McHugh M.H AC 'The Judicial Method' at The Australian Bar Association Conference, London England on *Democracy, and the Law 5 July 1998*
[33] McHugh M.H AC 'The Judicial Method' ibid
[34] Kerr supra-21
[35] Kiefel supra-23

Before 2017, Voters and Petitioners alike were resigned to the belief that no election petition could be successful and lead to the nullification or setting aside of the results. Nations had developed a form of democracy which on the boundaries appeared to embrace a legal framework for electoral dispute resolutions and those frameworks appeared to accommodate the plausibility of nullifying an election. Over time it became a norm for election results to be upheld regardless.

Various scholars had addressed the subject of failed election petitions and crafted various reasons as to why petitions failed and in a show of academic frustration some blamed the failings on the Judges. There was an unspoken resentment of the lackluster approach to matters that affected the very core of democratic states. However, all this was about to change for in 2017 and again in 2019, the Court in Kenya and later in Malawi nullified the election results from their respective elections. In Malawi even on appeal the nullification was upheld and an order for the elections to be re-run. The question that lingers is why and how the two courts arrived at these momentous decisions.

This Chapter is the introductory part. It discusses the background to the research briefly describing the subject matter, problem statement, purpose of the study, objectives of the study, research questions, methodology of the study and the limitations of the research. It sets out the hypothesis of the study, largely that election results are not nullified by the courts of law. It also looks at the challenges and the opportunities in undertaking this research. Thus, with this broad description the next chapter looks at the concepts that underpin this study as a foundation to the questions posed in the first chapter.

1.2 Organization of the Study

Chapter One: Introduction

Chapter Two: Literature Review

Chapter Three: Data and Methodology

Chapter Four: Contents and Results

Chapter Five: Discussions

Chapter Six: Conclusions

Chapter Seven: The Recommendations

CHAPTER TWO

KEY CONCEPTS

THE THEORATICAL FRAMEWORK, CONCEPTS AND GENERAL CONTEXT

2.0 Introduction

Judicial challenges to Presidential election results were hardly ever successful in Africa. Malawi and Kenya[36]are some of those countries with a history of failed petitions. Generally, matters on a framework for elections are found in the Constitutions of these two countries. Their Constitutions are drafted from ideas of their citizens who wished to entrench certain governance and democratic fundamentals in a document. A Constitution generally sets out the provisions for elections and stipulates how a person seeking to ascend to office for President is elected. The Constitution in tandem with other subordinated legislation lays out the process for voting and in the event of a grievance, how to petition the results.

For this research, it is imperative to discuss albeit briefly some of the concepts that underpin the study. These include the constitution, elections, president, presidential elections, dispute resolution, the Judiciary, and the Will of the People. These concepts are intertwined as they are the foundation framework for an ideal democratic electoral process.

It is against the above concepts that the successful nullification of the results in Kenya and Malawi will he be analyzed.

2.1 Theoretical Discussions of the Concepts: Constitution, Election, President, Presidential Election, Dispute Resolution, The Judiciary, and the Will of the People

The first of the concepts to be discussed is the constitution, a document that ordinarily ought to be the supreme law of the land. It is submitted that this document plays a critical role in Presidential Election Petitions.

[36] *Orengo v Moi & 12 Others* Election Petition 8 of 1993; *Mwau v Electoral Commission of Kenya &2 others* Petition 22 of 1993

2.1.1 Constitution

The Oxford English Dictionary defines a constitution as '*a body of fundamental principles or established precedents according to which a state ...is governed*'[37].The Constitution sets out the organizational elements of government and how power is distributed among different governance units. It contains what power exists, how it is wielded, who wields it and upon whom it is wielded in the management of a country. A Constitution guarantees certain rights of the people (Webster 2019)[38]. It is also defined as a body of doctrines or practices, and maybe written or unwritten. The Constitution as defined in the South African context is that it is a contract between those who assume authority and those subjected to it.

In essence, the Constitution may be viewed as the 'birth certificate' of nations and has a philosophical slant to it which is discussed in the next paragraph.

2.1.2 Philosophy of a Constitution

The philosophy behind a constitution is that it is a legal document which sets out basic principles of state governance. It also has a political, social, and legal dimension to it (Huls 2017)[39]. The political aspects relate to the governance system, citizenship, election process and the separation of powers. The social dimension relates to the values within the state which are set out in the preamble and is a declaration of the ideals the citizens wish to uphold. The legal dimension relates to the legislative process, protection of the citizens and the independence of the judiciary. When most African countries attained independence, their Constitutions were influenced by their former colonizers (Huls 2017)[40]. It is for this reason that any analysis of the concept of a Constitution in Africa is incomplete if one does not take into consideration the post-independence Constitutions which were devoid of the social dimension of a proper Constitution. Thus, the next paragraph briefly explores the deoxyribonucleic acid (DNA)of the African Constitution.

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[37] Oxford English Dictionary revised 2016
[38] Marriam-Webster. Com seen on 2 March 2019
[39] Huls Nick 'African Constitutions: An Introduction' on Occasion of the Stephen Ellis Annual Lecture by Muna Ndulo on 'Ethnicity, Diversity, Inclusivity and Constitutional Making in Africa' Leiden University 17 November 2017
[40] Huls 2017 ibid

2.1.3 African Constitutions at Independence

It is not uncommon in Africa for much debate to be held on the need for a new constitution[41]. The result is that across the Continent the drafting of a new constitution process is still ongoing, more so after what some envisaged was the 1990s political evolution. These phenomena may have some of its roots embedded in the genesis of most African Constitutions.

The narrative is that at Independence, African Constitutions were non-negotiated documents drafted by the colonialists and in strict sense lacked the social and legal dimension required of the legitimacy of the supreme law. A scholarly analysis of Constitutions in Africa reveals that the earlier Constitutions were simply hand me downs and lacked the necessary ingredient of the '*will of the people'* (Ojwang 2001)[42].

Notwithstanding the heavy influence of former colonialists, the resulting Constitutions provided the basis for elections in Africa as they are currently conducted, and it is the very same Constitutions as amended that make provisions of how election results can be challenged.

In the case of Kenya, for instance, the country attained independence in 1963. Its Independence Constitution was based on the standard 'Lancaster House Template' applied in the drafting of most former British Colonies in Africa[43]. Since then, the Constitution has been amended close to seventeen times all in a quest to get an amenable document acceptable to all. Thus, it has been argued that as late as 2010, amendments were made to the Constitution to try and incorporate the citizens desire to include curative articles to remove potential impediments for the proper settlements of disputes to Presidential election results[44].

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[41] Fombad Manga Charles 'Some perspectives on durability and change under modern African Constitutions' in International Journal of Constitutional Law Vol 11, Issue 2 April 2013 p.382-413

[42] Kenya Review Commission 'Constitutional Reform in Kenya: Basic Constitutionalism: On the Constitution of Kenya' Ojwang J.B University of Nairobi 14 December 2001

[43] 'Kenya Gazette Supplement No.105' before The Kenya Independence Order in Council 10 December 1963

[44] 'The Amendments of The Constitution of Kenya from 1963-2019' @ Kenya Law 8 December 2021

It must be stated however, that this did not come of a natural desire to craft a constitution but more because of violence that broke out after an election and the push to draft into the Constitution articles to address elections was because of a peace initiative between the two main rivals in the race. In essence it can be said to have birthed a compromised constitution.

In Malawi, its Independence Constitution was passed by way of an Act of the United Kingdom Parliament and an Order [45]. Not surprisingly, it too was amended on three occasions but did not undergo a rigorous and an elaborate scrutiny as the Kenyan Constitution but finally in 1995, the Malawi Constitution was passed albeit with much apprehension[46].

The importance of the background to this concept is to get a better comprehension of the difficulties inherent with African Constitutions drafted to give guidance on elections. The global surge in democratic liberalization witnessed attempts to entrench some fundamental principles, institutions, and values of modern Constitutionalism in the African Constitutions because most citizens felt that part of the reason the elections were flawed was to do with poorly drafted Constitutions (Fombad 2018)[47].

With the historical genesis of the Constitutions some scholars identified that because the ingredients that under pin a supreme law namely the will of the people was missing, most Constitutions were skewered and drafted to preserve sitting regimes.

If a will is a document that bequeaths assets, a constitution is the voice of the citizens as to their inalienable right to a Nation and how they wish to be governed. To this end this study looks briefly at the reforms in Kenya and Malawi to examine how the Constitution may have influenced the now landmark rulings.

2.1.4 Constitutional Reform in Kenya

[45] Simon Roberts 'The Constitution of Malawi' in Journal of African Law Vol. 8 No. 3 1964
[46] Peter A Mutharika 'The 1995 Democratic Constitution of Malawi' in Journal of African Law Vol. 40 No.2 1995 p.205
[47] Charles Manga Fombad 'Constitutional Literacy in Africa: Challenges and Prospects' in Commonwealth Law Bulletin Vol 44, issue 3 2018

When one undertakes a historical perspective of the Constitutional reforms process in Kenya one notes four many phases first it had the Colonial Constitution governed from Westminster which cannot really be said to be a constitution because non-exists in England. Then it was given the Independence Constitution that saw the creation of Independent Kenya. The third was The One-Party State Constitution and then finally the Multiparty Constitution. Much can be said about each phase but for the purposes of this research the study begins with the reforms of 2009.

The Constitution reforms of 2009 had been preceded by previous reform[iv] the idea was to craft a constitution which was *'fully responsive to expectations'* of the people of Kenya (Ojwang 2012)[48]. Following various reform processes, Kenyans become skeptical about their Constitution and began to resign themselves to the possibility that the document was a tool designed by the ruling party who once in power sought to consolidate and retain power by including articles in the Constitution to make it near impossible to remove a seating head of state. Some of the notable amendments to the Constitution was the legislated creation of a single party state which increased the power and hold by the President, such that challenging a Presidential result was impossible.

This remained the case until the Presidential race between Mwai Kibaki and Raila Odinga (Ronoh 2015)[49].

When the election results were announced, Kenya experienced post-election violence that had never been seen before. With assistance from the International Community the two main political opponents signed off a negotiated agreement[v]. One of the crucial clauses in the agreement was to amend the Constitution further so that some of the issues that had led to the impasse could be addressed to avoid future failings. As a result, following national wide debate and a referendum the 2010 Constitution was enacted and it included various amendments to the Elections Act. These documents would be cited during the matter of *Raila Odinga & another v Uhuru Kenyatta & another 2017* [50].

[48] Ojwang 2012 ibid
[49] Faith Ronoh 'How Mwai Kibaki, Raila Odinga Power Sharing Deal was Struck' in The Standard 16 August 2015
[50] *Odinga v Kenyatta* 2017 supra

Given that the first successful Presidential Petition was decided using that Constitution one would have expected that the Constitution would stand the test of time.

However, in 2018, President Uhuru Kenyatta and the main opposition leader Raila Odinga decided the Constitution needed further amending (Mathenge 2020)[51]. This resulted in the creation of a reform process called the Building Bridges Initiative (BBI). The BBI tabled fifty-eight (58) proposed amendments to the 2010 Constitution. Of interest to this research were the proposals for electoral reform.

These were largely found in three main clauses:

First, was Article 87(1) which relates to the establishment of '*mechanisms*' for timely settling of electoral disputes. The proposal was to include settlement of '*disputes*' on the nomination of candidates by a political party. Second, was on service of a petition in Article 87(3) which states that good service includes '*advertisement in a newspaper with wide national circulation*'. The proposal was to include '*or through electronic media'*. Lastly, was a proposal to amend Article 88 which relates to the *composition of the Independent Electoral and Boundaries Commission* (IEBC) arguing that this amendment would lead to gender equality.

When tabled by the ruling Government, skeptics argued that the amendments were a personal arrangement between Kenyatta and Odinga and that it was an attempt to mutilate the 2010 Constitution. They argued further that it was a clandestine process designed to re-introduce articles previously rejected by the Kenyans.

In essence when the bill came before Parliament it was rejected and the 2010 Constitution remained unchanged.

The next paragraph explores the case of Malawi which has had its fair share of difficulties with its Constitution reform process as well that are worth examining.

2.1.5 Constitutional Reforms in Malawi

[51] Oliver Mathenge 'How BBI proposes to Change Kenya's Constitution' in The Star 26 October 2020

Malawi like Kenya had a Colonial Constitution, an Independence Constitution, a One-Party State Dictatorship and then a Multiparty Constitution of 1993. For the purposes of this study the Constitution reform of 1993 are of some significance.

In 1993, Malawi held a referendum that led to the adoption of the creation of a multiparty system of governance. A year later a hastily written Constitution was adopted to operate 'provisionally' for a year and was subsequently enacted in 1995 (The Law Commission of Malawi)[52]. The first reviews of the process were that the amendments were for political expediency and as such the electorate persistently called for further reform.

One notable analysis of the process was done by Chigawa (2006)[53] who at a Constitutional Review Conference gave a detailed outline of the development of the Malawian Constitution and argued that the 1994 Constitution of Malawi embodied various fundamental values of Constitutional law. These included respect for the rule of law and human rights. The Judiciary, in his view, was more independent than it had been under the 1966 Constitution or any other and therefore the Courts had an opportunity to defend human rights and fundamental freedoms. He augmented his position by stating that the survival of democracy and good governance depended on supporting and improving upon the values enshrined in the 1994 Constitution.

Further another scholar who undertook some elaborate work on the constitutional making process in Malawi is Nkhata (2013)[54]. He argued that the Constitutions of Malawi from Independence to 1994 were hardly reflective of a fair representation of the people and pointed out that the 1994 Constitution for instance was a highly elitist document given that most submissions were from Urban areas thus to the exclusion of most Malawians who reside in the rural parts of the Country. The result, in his view, led to a technical review of the document to try and improve it yet it failed the test of a

[52] 'Review of the Constitution of Malawi' The Law Commission of Malawi Report No.18 August 2007

[53] Msaiwale Chigawa 'The Fundamental Values of the Republic of Malawi Constitution of 1994'at The Law Commission Constitutional Review Conference, 2006 Capital Hotel Lilongwe 28-31 March 2006

[54] Mwiza Jo Nkhata 'Popular involvement and Constitution-Making: The Struggle Towards Constitutionalism in Malawi' in Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa Morris Kiwinda Mbondenyi et la Pretoria University Press, 2013

constitution by the people. By pointing out the two different perspectives the former curving out the positives of the document and the later exposing some of the weakness in the process points back to the difficulties with African Constitutions.

Notwithstanding this seemingly flawed Constitution in the matter of *Saulous Chilima & another v Peter Mutharika & another 2019* it was cited by the Judiciary as an authority when they heard the *Saulous Chilima* petition and referred to it to during the ruling and this resulted in the nullification of the results. This lays premium on the importance of a constitution when a presidential petition is heard albeit for those nations that have a written constitution.

Kenya and Malawi are both Constitutional democracies. Their Constitutions, therefore, are the highest source of authority in any matter including Election Petitions. Faced with a petition the courts will not look at the process alone, but they will consistently refer to provisions in the Constitution that are relevant and provide direction on how to rule in the petition.

This thesis therefore adopts the definition of a constitution as adapted by the then Chief Justice of the Republic of South Africa who said:

'*The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between government and the governed, it is a 'mirror of the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government'* (Mohammed 2001)[55]

Having stated the above as this thesis focuses on presidential election petitions the next concept to be examined is the concept of a president.

2.1.6 President

The Office of President has become one of the most keenly contested positions in most of Africa. So attractive has it become that not only are the numbers of prospective candidates increasing but even when successful candidates serve their term some of them either through legal engineering or political

[55] Ismail Mohammed 'Some Lessons on Constitution-Making from Zimbabwe' Hatchard J in Journal of African Law Vol.45 2001 p.210-216

manipulation manage to extend their stay in office[56]. Often candidates for the position incur huge personal costs that any feeling that an election was stolen causes discontentment.

Discontentment has thus led to results being petitioned and part of the issue is how certain candidates, often the incumbent, ran in the race when they had already served their full term. The position has further been complicated because Presidential government is still the preferred form of African States. During the political reforms that saw a shift from authoritarian rule to more democratic politics none of the African Nations opted for a parliamentary form of Governance (Prempeh 2007)[57]. Though this preference is not unacceptable, it creates a powerful being given that immense power reposes in an individual. Part of the problem is that in the Commonwealth, the colonialists had a monarch system of governance and as such the drafters of the Lancaster documents simply replaced the monarch with a President.

The question that arises then in looking at the concepts of this study is who is a President?

In the Kenyan Constitution, the President is described as the '*Head of State and Government, who exercises executive authority of the Republic. He is the Commander in Chief of the Defence Forces, Chair of the National Security Council, and a symbol of National Unity*' (Constitution of Kenya 2010)[58].

In the Constitution for Malawi, it reads that '*the President is the President of the Republic and Head of State and Government. He is also the Commander in Chief of the Defence Force of Malawi and provides Executive Leadership in the interest of National Unity. He has a wide range of powers including committing the Country to International Treaties amongst other powers* (Constitution of Malawi 1977)[59].

[56] Ouattara, Ivory Coast 2019, Alpha Conde, Guinea 2019, Paul Biya Cameroon 2016, Museveni Uganda 2015, and Paul Kagame Rwanda 2014

[57] Kwasi H. Prempeh 'Africas Constitutional Revival: False Start or New Dawn?' in International Journal of Constitutional Law Vol. 5 Issue 3 July 2007 p. 469-506

[58] 'Authority of the President' in The Constitution of Kenya Part 2 Article 131(1) (a-e) 2010

[59] 'The Executive' in The Constitution of Malawi Chapter VIII Article 78,88,89 1994 rev 1997

The Office of President therefore for the purposes of this study is an Institution. The Institution is personified by the one who heads the state or government, and holds authority vested in him/her by the sovereign[vi]. He/she is a person placed in a position of trust with wide powers that include overseeing the security of a nation.

It would be inconclusive however to discuss the office of president without examining the notion of presidentialism and what that system of governance entails.

2.1.7 Presidentialism

Various scholars who subscribe to a Presidential system argue that there are advantages in having one head as opposed to subjecting him or her to share power with parliament. They further state that the power of a President comes from most citizens and not merely from those in a particular constituency (Linz 2017)[60].

Thus, this type of governance system ensures that the President is in complete control of affairs and that per the Constitution wields authority with minimal intervention. In addressing concerns such as a candidate ascending to office with a narrow margin some nations have adopted the fifty plus one rule in essence shifting away from the first past the post rule. This ingenious provision saves nations from choosing a person who wins by a minority margin because this can result in a crisis in the legitimacy of the presidency as the citizens may feel such a person is not representative of the nations' desire.

However, to ascend to the office of president one needs to be chosen through an election. What then is the function of an election in democracies?

2.1.8 Election

Elections in a democratic state are viewed as an institutionalized method of realizing the mantra of '*rule of the people by the people'*. Elections are the only democratically legitimate procedure for

[60] Jaun Linz, 'Democracy: Presidential or Parliamentary System does it make a difference?' in The Perils of Presidentialism 50-69 2017

translating popular sovereignty into workable executive and legislative powers (Lindberg 2006)[61]. It is further argued that they may be many views on what a democracy ought to be but a common denominator among modern democracy theories is an 'election'[62].

Hobbs, Spinoza, Rosseau and Bentham in their work on the 'State of Nature' long acknowledged the significant role elections play in democracies. Their argument was that man needed control otherwise left to their own desires this would lead to chaos (Curtis 1970)[63]. They further argued that without a compelling authority over society, life would become '*solitary, poor, nasty, brutish and short'* (Hobbs)[64]. Therefore, to avoid anarchy and warfare it is imperative that humans agree to institute a common authority to preside over public affairs.

To this end Paine and Locke (Locke)[65] in augmenting this theory argue that the vote of the people is the basis of authority in a state. They contended that the people through elections collectively grant power to a person to govern, and that the person does so for the common interests of the people. The powers granted are not absolute but are constrained so that those in power respect basic human and property rights.

In electing a President there are various elements that must exist for the election to be considered legitimate. These elements include, a President is elected to a fixed term of office, he is unipersonal, and members of his cabinet serve at his/her pleasure (Spiro 2000)[66]. Elections through a ballot makes the Presidents' powers more legitimate and as such they are the foundation of any government (Boyd 1950)[67]. There is a presumption that for the presidency to have a semblance of power from the people, elections need to be held periodically and that the process ought to be free and fair. The Universal Declaration of Human Rights augments this point when it provides,

[61] Lindberg 'Democracy and Elections in Africa' 1-2 2016
[62] 'Democracy and Elections in Africa' Staff and Lindberg John Hopkins University Press, Baltimore 2006 p.1
[63] 'The Great Political Theories: From Greeks to the Enlightenment' Curtis ed. Vol 1 326-350 1970
[64] Leviathan Hobbs in Jurisprudence and Legal Theory Guest et la 30
[65] John Locke 'The Second Treatise of Civil Government' in 'The Great Political Theories: from the Greeks to The Enlightenment' vol.1 326-350 Curtis ed.
[66] Herbert John Spiro 'Constitutional Politics and Law' in The Encyclopedia Britannica 15 September 2000
[67] 'The Papers of Thomas Jefferson' Julian P. Boyd ed. Vol.1 1760-1766 Princeton University Press 1950

'*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives…this right 'shall be expressed in periodic and genuine elections which shall be through universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'* (Universal Declaration of Human Rights, 1948)[68].

Therefore, elections are held to give citizens an opportunity to select a person who will either continue to serve for a mandate or to elect a person to replace the incumbent. It is envisaged that elections enable voters to express their wish and be able to replace those who have proved ineffective and to function as a check against attempts at illegal succession (Webb 2020)[69]. Elections are also designed to be free and fair so that they epitomize good governance.

Against the above for the purposes of this research the definition of the concept of an election is adapted from the Judges in the Supreme Court of Zambia who in their ruling cited:

'*Elections it goes without saying, are the sole lawful, Constitutional and legitimate method for a peaceful and legal acquisition of political power…those in power should govern with the consent and will of the governed expressed in periodic, genuine, open, free and fair elections where the results reflect the exercise of free choice*' (*Mbikusita Lewanika v Fredick Chiluba* 1998)[70].

One might then wonder how elections are reflected in a constitution and the importance of having them placed in the supreme law of the land.

2.1.9 Elections and the Constitution

An election is not an exercise that is undertaken in a vacuum, it is often prescribed for in the Constitution and supported by other legislation such as an Electoral Act. In the Constitution for Kenya for instance, elections are provided for as follows,

[68] 'The Universal Declaration of Human Rights' UDHR A proclamation by the United Nations General Assembly Resolution 217A Paris 10 December 1948 Article 21

[69] Paul David Webb 'Election' in The Britannica Nov 2, 2020

[70] *Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba* in The Supreme Court of Zambia Judgment No.14 of 1998

'*The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating Presidential Elections'*. (The Constitution of Kenya 2010)[71].

On the other hand, in the election for President in Malawi its Constitution provides that,

'*The election of the President shall be through direct, universal and equal suffrage'* (The Constitution of Malawi 2006)[72].

It is interesting to note that though both Constitutions speak to an election for President, the words used are different and could form a legal basis to challenge an election result if not followed. For instance, phrases such as '*in accordance with the Constitution and any Act of Parliament'*, '*through direct, universal and equal suffrage'* all provide areas for plausible contention of a result.

It follows therefore that the Constitution provides a broad road map of an election and subordinated legislation provides a legal framework with guidelines on how a person dissatisfied with an election result can challenge it.

2.1.10 Election Petition

It is envisaged that after an election, a dispute may arise. Given this probability, systems have been built in the electoral process. The thought is that it will help address grievances resulting from an election which if left unresolved have the potential to undermine the integrity of an electoral process and lead to overt or covert conflict (SADC 29)[73]. In both legal-electoral theory and political science, the system for the resolution of electoral disputes refers to the process for appeals through which any electoral action or procedure can be legally challenged.

Having an ideal system for the resolution of electoral disputes in modern democracies is fundamental for building a stable political environment and contributes to enhancing the reliability of the legal system as well. The legal framework should therefore ordinarily enable an aggrieved party the right

[71] 'Election of the President' in The Constitution of Kenya Article 136(1) 2010
[72] 'Election of the President' in The Constitution of Malawi Chapter VIII Article 80 2006
[73] 'Principles for Election Management, Monitoring and Observation' Southern African Development Community no.29

to lodge a complaint before a competent court and expect a fair ruling. It must be a system that is transparent, understandable, and free of unnecessary obstacles (Petit 2000)[74].

An Election Petition is the formal procedure of challenging the process or the results of an electoral contest. It is an application as to the validity of the process, the outcome, or any aspect of an election. It may be filed by a candidate or indeed any person who wishes to challenge the process (Mwananchi 2013)[75]. Given the unique nature of the petition it is treated as a contest in which the interests and rights of the voters are in issue.

When a petition is filed there are four possible outcomes,

(a) The election is declared void, the result quashed and a writ is issued for a new election.

(b) The election is held to have been undue, the original return is quashed, and another candidate declared to have been elected.

(c) The election is upheld, and the member returned is declared duly elected and

(d) The Petition is withdrawn (Colin 2006)[76]

In Africa for a long time all Presidential Petitions failed as the elections results as announced were upheld and the candidate declared successfully retained office. However, in 2017 and in 2019 the elections were declared void.

To focus this study a Presidential Election Petition for the purposes of the dissertation is a process of challenging the outcome of an election for President following the relevant laws. Yet even as one challenges an election they must do so before a panel of Judges. It is thus necessary to turn to the key players in a petition.

2.1.11 The Judiciary

At the centre of a Presidential Petition is the judiciary which must be seen as a system of courts that interpret and apply the law in the petition. Under the doctrine of the separation of powers, the judiciary

[74] Denis Petit 'Resolving Election Disputes in Organization for Security and Cooperation in Europe Area: Towards a Standard Election Dispute Monitoring System' Democratic Institutions for Human Rights (ODHIR) Warsaw 10-11 2000

[75] Mwananchi 'The Presidential Petition' Kenya National Council for Law 25 April 2013

[76] Rallings Colins and Thrasher Micheal 'British Electoral Facts' in Total Politics 2006 p.246

is viewed to generally consider the evidence, facts, and law to arrive at a ruling. This logical yet simplistic role of the judiciary had long been settled on how Judges ought to perform their duties (Haines 1989)[77].

However, in *Marbury v Madison*[78] when the court was faced with the question of whether the judiciary could overturn an Act of Parliament as being repugnant to the Constitution, Marshall argued that the supreme court was not only the final interpreter of the Constitution but also the guardian of the Constitution. That case introduced the power of judicial review. With this new power the actions of the executive and the legislature would, if outside statute, be subject to review by the court. This included the conduct of elections.

In augmenting this position various scholars argue that,

'*Increasingly, the credibility of elections and the stability of the election environment hinge on an effective remedy of disputes throughout the electoral cycle. Mechanisms for election disputes must withstand sophisticated political manipulation or attempts to use the courts to legitimatize staying in power (the so called 'third termism) and must address the impunity of violence, intimidation and harassment associated with elections'* (Sweeny 2016)[79] .

From the above citations, the Judiciary in exercising its power ought to rely on provisions of the Constitution and must be the defender of the Constitution. In Kenya[80] the Constitution provides that the powers inherent in the judiciary are drawn from the will of the people. It is thus incumbent upon the Judges in the exercise of their duty to uphold the peoples' will.

A senior member of the Zambian Bar has more than elaborated this point when he recited that,

'*The Judiciary are not the buildings, but the people in whom the Constitution has vested the adjudicative authority of the Republic. The judicial tone of any country is set by its highest and final*

[77] Charles G Haines 'Political Theories of the Supreme Court 1835-1989' in The American Political Science Review Feb. 1908 Vol.12 No.2 Cambridge University Press P.222

[78] *Marbury v Madison* 1 Cranch 137 1944 at http://jstor .com/stable/44

[79] William Sweeny, Chad Vickery, and Katherine Ellena 'Yes the Presidential Election Could be Manipulated' in The Washington Post 2 September 2016

[80] The Constitution of Kenya opcit Article 159(1)

court. An even greater responsibility lies on the shoulders of people who sit as Judges of the Supreme Court…set in motion the judicial process is still the only civilized way for resolving disputes. However, the continued relevance of the Judiciary …is largely dependent on the soundness of the decisions that are delivered by Judges' (Sangwa 2018)[81].

In matters of Presidential Petitions, the electorate turn to Judges hoping they will be less passive and more responsive to arguments made for election results to be nullified. Thus, when election results are disputed, petitioners look to the judiciary as an institution of hope to remedy the wrong. The Judges ought then to assume the burden of proving the authenticity of the election results. To ensure that the right to vote is protected, the Judiciary must be seen to be competent, honest, learned, and independent (Ndulo 2018)[82].

In this dissertation, therefore, the Judiciary is seen as persons constitutionally empowered to figure out Presidential Election Petitions. They perform a distinct role in matters intertwined with both legal and political nuances disguised as submissions. The creation of Constitutional courts to hear Constitutional matters gives the Judges an added opportunity to defend the Constitution. As the Judges sit in a specialized court to hear a petition one can only expect that landmark rulings, even if to uphold an election, ought to be the general order of the day and not the exception as was the case in 2017 and again in 2019/20.

It is argued that judges have one cardinal duty which is to uphold the will of the people. It is thus imperative to discuss albeit briefly what the will of a people is.

2.1.12 The Will of the People

The concept of the will of the people has been a subject of corridor debate either philosophical, political, or legal. Suffice that it is important to place it in context for one to understand the vital role it plays when Judges hear a matter. It is best explored by looking at the philosophy behind the will of

[81] John Sangwa 'Brief to the Chief Justice on the Need for a Conversation on Writing of Court Judgments' A Letter to the Chief Justice 12 April 2018 p.12

[82] Muna Ndulo 'Rule of law, Judicial Reform, Development and Post Conflict Societies '1-27

the people to grasp how it has over time been translated into a legal menu. And this will be achieved by considering the following philosophers:

2.1.12.1 Thomas Hobbes

Hobbes[83], a 17th Century Philosopher was one of the early writers on the concept. He wrote on the *natural condition of humanity*. His argument was that in the state of nature every man was free do what they could to survive. He argued that life in that state is *solitary, poor, nasty brutish and short*. He on referring to the will of the people argued that '*a man be willing, when others are so too, as far forth for peace and defense of himself he shall find it necessary to lay down his rights to all things…as he would allow other men against himself*[84]*'*. In other words, he argued that society was better when a mutual contract or an understanding to give up certain rights was in place as this allowed for peace to prevail.

When considering African Presidential Elections one argument has been that this 'mutual contract' as envisaged by Hobbes has not always been respected. In Kenya for instance the 1963 Constitution served largely to ensure Jomo Kenyatta would be president with no evidence that the citizens had had a say in his ascending to the position. This was to be the position such that elections were held in 1963 and 1967 devoid of the will of the people. It was not until the Ghai Commission[85] of 2000, that input from the citizens was invited. Similarly, in Malawi, in 1964 the Constitution was drafted primarily to usher in an African Order with Hastings Kamuzu Banda as President regardless of whether the will of the people was captured.

With time various authors tried to explain the importance of the will of the in society and why it had to be respected. One such philosopher was John Locke.

2.1.12.2 John Locke

[83] Hobbes Leviathan Thomas in Guest and other Jurisprudence and Legal Theory Chapters xii-xiv p.30
[84] Ibid Chapter xiv
[85] Kenya: Key Historical and Constitutional Developments see Kituochakatiba.org.

Locke in his treatise wrote in the 1680s during the Exclusion Crisis in England that in the state of nature all men are free, '*to order their actions and dispose of their possession and persons as they think fit with the bounds of the law of nature…the state of nature has the law of nature to govern it.*[86]'. Locke considered 'consent' as the basis for government and that if the people did not allow government to look after their common interests, they would be no government, and no one could impose themselves on the people. In another part of Europe Rousseau was grappling with the concept as well.

2.1.12.3 Jean- Jacques Rousseau

Rousseau, a French philosopher is credited with defining the '*general will as the will of the people* as a whole'. His position was that the law is the expression of the general will, and that all citizens have the right to contribute personally or through representatives 'as a whole'87. He contended that the law was a public and solemn declaration of the general will on an object of common interest. Given the various definitions of the will of the people, its very nature and interpretations can at times be best described as abstract.

Cranston (1968)[88] in discussing the concept argued that as used by Rousseau the general will is considered by some to be identical to the rule of law. This in effect served to create more fodder for figuring out what the will of the people was. It laid the foundation for the drafting of documents that were people driven and later referred to as constitutions. Rosseau appeared to take the front page on this when he argued that people had powerful rights and that of their own free will give up certain functions to a few individuals but place a duty on the individuals to do good for the people[89].

Jean Paul Gagnon (2014)[90] argues that the will of the people cannot really be found or known. He argues that this is because it has been overly simplified such that people are only allowed to speak

[86] Locke John in Second Treatise on Civil Government 4 1680
[87] Swenson John On Jean- Jacques Rousseau Stanford University Press 2001 p.163
[88] Cranston Maurice Introduction to the Social Contract Penguin Classics 1968 p.22
[89] Leigh R.A Unsolved Problems in the Bibliography of Jean- Jaques Rousseau Cambridge Press 1990 p.22
[90] Gagnon Jean-Paul & Mark Chou 'The Will of the people?' It's bastardisation of democracy' in The Conversation September 2014

after an extended period. He contends that because the elections are heavily mediated with the result that there is ordinarily little speaking when people cast their votes. He concludes that the will of the people is simply a bastardisation of democracy as it often results in injustices.

Thus, as various theories were advanced on the concept another philosopher John Milton gave the concept a broader dimension of what he thought it ought to mean.

2.1.12.4 John Milton

It was not until Milton that it became clearer that the will of the people was the basis for government, as he wrote:

"*The power of Kings… is nothing else, but what is derivative, transferred and committed to them in trust of the people, to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken away from them…"*[91].

These thoughts were augmented and developed further by Sabine (1937) when he argued that:

"Even the most powerful and the most despotic government cannot hold society together by sheer force; to the extent there was a limited truth to the old belief that governments are produced by consent"[92].

Critiques of the will of the people argue that the problem with the will of the people as a basis for government is undermined by voting. The argument is that the electing of politicians to office is an age-old practice that was chosen to exert elite control over the political process. They contend that it is the elite or those willing to stand for their interests who are more likely to have time and resources to ensure they are elected. This thought process is developed further because when individual politicians belong to a political party they are largely under the control of the party and since parties have their agendas the elected administer that agenda once in power. This they argue is a process that

[91] John Milton Works v.10 in A History of Political Theory Holt, Rinehart, and Winston
[92] George Sabine ib. id 1937

excludes *'the ordinary citizen from ascending to office and hence does not reflect the will of the people'*[93].

With time the concept of the will of the people became a concern of the universe and was finally meshed into an international instrument now worth examining to further understand this fluid concept called the will of the people.

2.1.12.5 The Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights[94] is an International Document that was adopted by the United Nations in 1948. It enshrines the rights and freedoms of all human beings and is often considered the foundational text in the history of human and civil rights. Though not legally binding, its contents have been incorporated and elaborated in national constitutions and even cited in judicial decisions. Of interest to this thesis is Article 21(3) of the Declaration which reads as follows:

"The will of the people shall be the basis of authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be by secret vote or by equivalent free voting procedure"[95].

When transposed to an election petition this declaration it is argued becomes a duty placed on the court to recognize the sovereignty of the people who elect to challenge an election result. This is more so because a constitution defines what constitutes a genuine election. The Courts therefore must uphold a result if it was an outcome from a free and fair election that was credibly administered.

Weinburg in his work sums up this position better when he advocates for a mechanism that upholds the citizens right to vote which also guarantees the people the right to participate in their government. He argues that *'proper elections not only guarantee the right of the people to speak but more importantly they guarantee the people's right to be heard'*[96].

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[93] Dunlop Tim '*Voting undermines the will of the people it's time to replace it with sortition.'* in The Guardian Saturday 13 October 2018 an excerpt from his book The future of Everything: Big audacious ideas for a better world.

[94] UDHR UN General Assembly 10 December 1948 Paris France Article 21(3)

[95] Article 21(3) of the UDHR ibid

[96] Weinberg H. Barry *Forward* in Guidelines for Understanding Adjudicating and Resolving Disputes in Elections 2011 IFES NW Washington p. xvi

Perhaps one of the most elucidated works on the will of the people is a treatise written by Milacic (2010) who states that the will of the electorate is ultimately the core of any electoral process, and it should be jealously guarded by the Courts to maintain public confidence in the electoral process he argues as follows:

"The importance, in a democracy, of a transparent and fair electoral process for both individual and collective rights to be respected at once takes on real shape if one but thinks of electoral crisis. The guiding principle in the exercise of constitutional authority is that the function of the court is ultimately to ensure the prevalence of the will of the electorate. If this were not so, public confidence in the election process would be heavily compromised. It is important that the public belief stays throughout that it is the decision of the electorate that has prevailed" [97].

It is therefore the position of this thesis, that the will of the people as a concept and for the purposes of this research is entrenched in an electoral system or process which can lead to the removal or an endorsement of a candidate. Therefore, when people cast their ballot, they express their intentions and when the polls are tallied and the results announced, should any party to the process feel aggrieved they should have the grievance addressed.

It is thus argued in this thesis that during a presidential election petition even though the Judges do not accompany voters into the voting booth, Judges have the added task to disentangle what the will of the people is as provisioned for in the Constitution. They must in their minds as they hear evidence seek to determine if the will of the people was suppressed or lost during the filing of candidates, the campaign period, in the casting of ballots, in the tallying of the polls or indeed in the announcement of the results more so when evidence is abounded that the process or system was flawed. They must, at the back of their minds as they receive the evidence, ask the question as to whether the elections were free and fair as by law prescribed and if the answer is yes, then uphold the results. If the answer is no, then nullify the pronounced results.

[97] Milacic Slobodan 'Justice coming face to face with electoral norms' in The Cancellation of Election Results: The Science and Technique of Democracy No.46 Council of Europe 2010 p.25-67

2.1.13 Summary

The second chapter looks at the main concepts that underpin this study. The concepts include the Constitution, Elections, President, Presidential Elections, Dispute Resolution the Judiciary, and the Will of the People. These concepts are intertwined as they are the foundation framework for an ideal democratic electoral process. Given the probability that disputes may arise after Presidential elections, systems have been built within the electoral process to address electoral grievances thereof. Having an ideal system for the resolution of electoral disputes in modern democracies is fundamental for building a stable political environment and contributes to enhancing the reliability of the legal system as well. It follows then that at the center of a Presidential Petition is the judiciary which must be seen as a system of courts that interpret and apply the law in the petition.

Under the doctrine of the separation of powers, the judiciary is viewed to generally consider the evidence, facts, and law to arrive at a ruling, and in exercising its powers the Judiciary ought to rely on the provisions of the Constitution and defend the Constitution.

The Constitution provides that the powers inherent in the judiciary are drawn from the will of the people. It is thus incumbent upon the Judges in the exercise of their duty to uphold the peoples' will. Therefore, in matters of Presidential Petitions, the electorate will hope that the Judges will be less passive and more responsive to arguments made for election results to be nullified. When election results are disputed, petitioners look to the judiciary as an institution of hope where they can get redress for any flaws with the elections. The expectations are that Judges will examine in some detail if the elections are authentic or not and pronounce themselves on the election petition.

CHAPTER THREE

LITERATURE REVIEW:

A SELECTIVE HISTORICAL VIEW OF THE PRESIDENTIAL ELECTION PETITIONS IN KENYA AND MALAWI PRIOR TO 2017 AND 2019: THE PLACE OF THE SUBSTANTIVE EFFECT RULE.

3.0 Introduction

To get an understanding of the significance of these landmark decisions it is important to review rulings though not all of them previously passed when the courts were faced with a Presidential Petition. In effect, research shows that only Ukraine and Cote d' Ivoire have ever had an election reversed but even then, that was not before the courts of law but other judicial organs (Awour 2013)[98]. Therefore, in this chapter the focus is solely on matters that went to court prior to 2017 and 2019 to get a flavor of how the courts elected to deal with election petitions.

3.1 The History of Presidential Election Petitions in Kenya

Historically they have been nine major Presidential election petitions in Kenya[vii]. It is worth noting that prior to the 2010 Constitution, there were no time limits within which a Presidential Election Petition had to be heard and decided. Thus, petitioners could drag matters out such that whilst a petition lay before the courts a person challenged could still be inaugurated and this often-rendered petitions an academic exercise. It was not uncommon that the final ruling was that the results as announced were upheld. Without being too negative one could argue that even if the courts had overturned a result, it would not make judicial sense to do so when a would Respondent had been serving as president for say four years and then the judgement is passed in the fifth year, but that is not the focus of this historical review.

The following then are historical petitions that previously challenged the election of a person to the office of President as heard and decided upon by the courts of Kenya.

[98] Awour and Achode opcit p.1

3.1.1 *Kenneth Stanley Nsindo Matiba v Daniel Toroitich Arap Moi 1993* [99]

In 1992, soon after the resumption of multi-party democracy in Kenya, an election was held between Matiba and Moi. Indeed, there were other candidates that looked to challenge for the presidency, but Matiba was the most notable and he garnered a sizeable number of votes. When the election results were announced Moi was declared the winner and Matiba, after alleging wide-spread rigging went ahead to file a petition before the court.

The questions before the Election Court[viii] were two-fold,

(1) "*Whether Daniel Toroitich Arap Moi was qualified to be nominated for election as President;* and

(2) *Whether Daniel Toroitich Arap Moi had been validly elected as President*" [100].

Matiba, in challenging the election of Moi first filed his petition in the High Court. The petition, however, was signed on his behalf by his wife, Edith Matiba. This was on the grounds that Matiba, the applicant, due to ill-health[ix] was unable to sign the petition himself. He thus assigned the power to sign by way of a power of attorney to his spouse who then went ahead to file the petition. Seeing that the applicant had not signed the petition himself, the Respondents moved the Court to strike out the petition on grounds that the Notice of Motion was void as it had been filed contrary to the Rules. The rule cited read:

"*The petition shall conclude with a prayer as for instance, that some specified persons should be duly elected or that the election should be declared void and shall be signed by all the petitioners"*[101].

In response, the Parties challenged this position and on 1 July 1993 the High Court ruled that the Applicants Petition was valid because in this circumstance despite the Applicants' inability to write

[99] *Kenneth Stanley Nsindo Matiba v Daniel Toroitich Arap Moi* Civil Application No.241 of 1993 'Application to Strike out a notice of Appeal in an Intended Appeal from a decision of the High Court of Kenya at Nairobi dated 1 July 1993' in the High Court of Elections, Petition No. 27 of 1993

[100] *Kenneth Stanley Nsindo Matiba v Daniel Toroitich Arap* Moi High Court of Kenya at Nairobi in the High Court of Elections Petition No.27 of 1993 1 July 1993

[101] Rule 4(3) of the National Assembly Elections (Elections Petitions) Rules, 1993 as read with Section 23(3) of The National Assembly and Presidential Elections Act

or sign, the spouses' signature was a valid and sufficient signature for the purposes of the rule. They further recognized that the signature on the petition was the same as the one used for his nomination, and it had been accepted by the Electoral Commission of Kenya. The Court therefore ruled that the signature fulfilled the requirements of rule 4(3) and it thus dismissed with costs the Notice of Motion Moi, aggrieved by the ruling, proceeded to file a Notice of Appeal on 2 July 1993 saying he sought to appeal against the whole decision of the Election Court. The question on appeal then became whether the words used in Rule 4(3) as to signature were mandatory or if they were merely directory to allow a donee of a power of attorney to sign a petition on behalf of a petitioner.

Matiba on 5 October 1993 responded and filed a Notice of Motion with a Certificate of Urgency praying,

(1) That the Notice of Appeal dated and filed in Court on 2 July 1993, by Moi through Kilonzo and Company be stuck out as no appeal lies against the decision of the Election Court and

(2) *That the Respondent be condemned to pay costs for the proceedings*.

Having heard the appeal, the Court ruled as follows,

(1) *The Constitution (Sections 10-44) had given a right to any person who was entitled to vote in an election to challenge an election and the correct procedure to do so was prescribed in the National Assembly and Presidential Elections Act. The Constitution and the Act imposed an obligation on a prospective petitioner to observe the rules prescribed in the procedure to be able to enjoy the rights to which he is entitled under the Constitution*.

(2) *The words such as 'signed by the party' or 'signed by him' in a statutory provision must be given their natural meaning and that the party must personally affix his signature*.

(3) The words used in Rule 4(3) were mandatory and the subrule did not allow the petition to be signed by anyone else apart from the petitioner himself.

(4) *The action of the Electoral Commission to accept the power of attorney signature was not a judicial decision of a competent court and it was wrong for the Election Court to rely on the decision of the Commission*.

The Appeal was allowed, and the petition struck out with costs.

This ruling focused on a preliminary question of the validity of a signature, and not on the substance of the matter, and it was argued that once the signature was invalidated it followed that the main petition was void.

It must be said that part of the reforms to the Constitution of Kenya would later address the issue of authority for Election Petitions, which was one of the many issues raised as an obstacle to free and fair hearing during a petition. One could argue that perhaps the nature of the Constitution at the time made it difficult or indeed gave leeway for Judges to avoid pronouncing themselves on a flawed election. As such they could escape from their duties by simply focusing on the question before them or indeed by rendering classic interpretation to the provisions of the law.

An opportunity to go beyond a preliminary issue was lost. The next matter was even more interesting to say the least. It was the case of Orengo and Moi.

3.1.2 James Aggrey Orengo v Daniel Toroitich Arap Moi 1993[102]

In 1992, the then sitting President Daniel Moi had served two five-year terms. When a call for Presidential Candidates was made, Arap Moi filed his nomination papers to contest the said elections. Orengo seized the court with a petition where he argued that Moi had already served three terms[x] by the time of the 1992 elections and therefore he cited Section 9(2) of the Constitution of Kenya which he argued disqualified Moi to contest the election[103]. The Section cited by Orengo provided that a

[102] *James Aggrey Orengo v Daniel Toroitich Arap Moi & 12* Election Petition No. 8 of 1993 in The High Court of Kenya, Nairobi

[103] Benedict Wandeto Wachira 'Nullification of the Presidential Elections in Kenya: Addressing the Lacuna in The Elections Act 24 of 2011" Submitted to the Faculty of Law, University of Pretoria, 29 October 2021 p. 31.

person shall not be elected to the office of President for more than two terms each term lasting for five years[104].

In reaching a decision the Court held[105]:

1. *The courts' duty was to interpret the law and therefore the plain words of a statue, when precise and unambiguous were to be given their ordinary and natural meaning.*
2. *It was not the courts' duty to bring out what parliament ought to have legislated but to construe the intention of Parliament as expressed in the statute in question*.
3. *That Act No.6 of 1992 amended the Kenyan Constitution to give a fresh look to elections and the holding of the office of President. Thus, from the language of the entire Act, the drafting of the sections and the flow of the language it was clear that Parliament was forward looking to the amendment there*.
4. *The court was further of the view that, the ordinary and natural of meaning of the words in Section 9 of the Constitution were ones attaching to future elections of the office of President.*
5. *That from the plain language of the statutes the words were to be interpreted to run prospectively*.
6. *The statute did not have words to the effect that the contents would run retrospectively.*
7. *Section 9(2) of the Constitution was not meant to run retrospectively.*

The court then decided that the case be dismissed, and they declined to hear that matter as it was in their considered view not based on a claim that the elections were fraudulent. Moi's candidacy attracted further litigation when Mwau petitioned both Moi the Electoral Commission of Kenya to dispute the result and now discussed below.

3.1.3 *Daniel Arap Moi v John Harun Mwau 1993* [106]

[104]L Awour & M Achode opcit
[105] Adapted from the work of L Awour and M Achode ibid p.4.
[106] *Mwau v Electoral Commission of Kenya & 2 Others* High court at Nairobi, Election Petition No.22 of 1993 EKLR

In this matter, the petitioner cited Moi and the Electoral Commission of Kenya as respondents. He raised two issues, first was as to the validity of the success of Moi arguing he had not been duly nominated and second that the respondents' nomination forms were at the time of filing presented in a manner contrary to the provisions of the Constitution.

His argument was based on the provisions of Section 5(3)(b)[107] of the Constitution which he argued stated that a nominee for election was required to present '*40 standard sheets of foolscap papers to the Commission*'[108] He argued that the respondent had not done so, and this was contrary to the law. The petitioner further alleged that during the process of filing he had raised the issue in writing with the Electoral Commission and raised the complaint at the time when he himself was presenting and filing his own papers in the prescribed manner per regulation. He prayed that since the respondent had not met the required threshold his nomination should have in effect been invalidated and that he was calling upon the court to invalidate the nomination.

In response the respondent opposed the application on the grounds that there was nothing known at law as '*a standard foolscap'* and despite all, should it exist it was not a ground to invalidate a nomination.

Awour and Achode[109] posit that the issues for determination before the courts were twofold. First, whether the provisions of the Constitution as read with Section 12 of the Regulations were breached: and second, whether the requirement breached was mandatory such that a breach should lead to the invalidation of a nomination.

The High Court dismissed the petition on the grounds that the court had to approach the matter of the nomination forms substantively rather than in a restrictive manner as was being suggested by the petitioner.

[107] Constitution of Kenya 2010 opcit
[108] Wachira opcit p.32
[109] Awour and Achode opcit p.7

Aggrieved by what the petitioner considered a flawed ruling he appealed the matter. On appeal the court upheld the ruling of the lower court but went further to cite a 'legal technicality'[xi] namely that the matter before it was not appealable[110].

With Moi firmly as president in 1997 he again run in the election when was declared the winner. This time his main rival in the election Kibaki went to court to challenge the results.

3.1.4 *Mwai Kibaki v Daniel Toroitichi Arap Moi 1997* [111]

In 1997, President Moi was declared winner of the elections and one of the losing candidates Mwai Kibaki filed a petition in the High Court praying for the elections to be nullified on grounds that it was marred by many irregularities such that the will of the people was not reflected in the results[112].

In hearing the matter in the main cause and on appeal a preliminary issue was raised. That of service of process on the Respondent. It was evident that Kibaki had looked to serve process on Moi using the publication of a Gazette Notice. President Moi objected to this claiming contrary to the provisions of the law he had not been personally served and had only become aware of the petition from newspaper reports[113]. Kibaki argued that it had not been possible to personally serve Moi as he was inaccessible being the President of Kenya and as such, Kibaki opted to serve the petition through a Kenya Gazette Notice which in ordinary circumstances would be considered as alternative and good service. Though the courts dwelt with other issues in the matter they resolved that the mode of service was not good service and stated Kibaki should have served the President personally as required by the law.

They argued that the only mode of service under rule 14(1), if the rule still applied to a petition under Section 20(1)(a), was personal service. As such, good service had not been affected, and indeed there was no suggestion that personal service was tried and repulsed as such the petition was a nullity[114].

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[110] In the Court of Appeal of Kenya of Nairobi Civil application 131 0f 1994 *Moi v Mwau* Election Petition No.22 of 1993

[111] *Mwai Kibaki v Daniel Toroitichi Arap Moi & 2 others* No.3 of 2008 High Court of Kenya at Nairobi Election Petition No.1 of 1998

[112] Wachira opcit p.34

[113] Rule 14(1) of the National Assembly and Presidential Election Act requires that a petitioner be serves a respondent personally.

[114] Awour & Achode opcit p.5

Yet again the courts elect to dwell on a preliminary issue of proper service of petition. Yet in doing so they ignored all other aspects such as the reality and the possibility of serving process on a sitting president in person or indeed on his lawyers if they were not known.

In 2008, after an election between the front runners Odinga and Kibaki, Kibaki was pronounced the winner. The post-election violence that followed led to the death of close to one thousand (1000) persons, over six-hundred thousand (600,000) displaced persons and a general breakdown of good order[115]. The above events from the post-election aftermath led to an international intervention and resulted in a full-fledged reform process to the Constitution and Election Law in Kenya. It was the 2010 Constitution that would be tested after the elections in 2013.

3.1.5 Raila Odinga & 5 Others v Uhuru Kenyatta and the Independent Electoral Commission & Others 2013[116]

On 4 March 2013, Kenya held its first general election under the Constitution of Kenya of 2010. The election was conducted by the Independent Electoral and Boundaries Commission (IEBC. Under Article 138(4) it was provided that a candidate shall be declared elected President if the candidate receives more than half of the votes cast in an election and at least twenty five percent of the votes cast in each of more than half the counties[117].

During the tallying process by the IEBC, there was a failure of the electronic results transmission system which left the IEBC with no option but to resort to a manual tallying of the results this in turn led to the inability of the Commission to declare results as and when they were available or in real time[118]. In its computation of the total votes cast the Commission included the rejected votes in calculating the threshold percentages in tallying of the Presidential elections vote and the IEBC Chair declared that the rejected votes would count towards the final tally and that the votes for each candidate would be updated to include the rejected votes.

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[115] Faith Ronoh 'How Mwai Kibaki, Raila Odinga power sharing deal was struck' in The Standard 2016

[116] *Odinga and 5 others v Independent Electoral and Boundaries Commission & 3 Others* (Petition 5,3, &4 of 2013 Consolidated) (2013) KESC 6 (KLR) 16 April 2013 (Judgement) in The Supreme Court of Kenya

[117] *Odinga* [2103] KESC 6 (KLR)

[118] *Odinga* ibid

After this decision, the results were announced on 9 March 2013 and Kenyatta was declared the President- Elect[119].

Odinga petitioned the results and prayed for their nullification on various grounds including that, the IEBC relied on manual tallying when it had put in place an automated mechanism that should have been used for electronic voter identification and transmission of the results both of which failed in most polling stations across the country and therefore giving leeway for interference with the results[120].

The Supreme Court on its own volition ordered for a comparison and re-tallying of randomly sampled results from different regions of the country and found that there were indeed discrepancies that would have been avoided had technology been used successfully. However, despite these findings the Court dismissed the petition arguing that the irregularities committed did not have a substantial effect on the outcome of the elections[121].

It is clear from the foregoing cases that historically in Kenya any petition before 2017 upheld the election results as announced. In some extreme cases the decision not to hear any of substantive issues in the matters left scholars and the electorate at loss if not frustrated with the electoral system.

One can then argue on whether the situation was historically any different in Malawi and this is the focus of the next paragraphs.

3.2 A Historical View of Presidential Election Petitions in Malawi

The jurisprudence on the electoral law in Malawi is not as expansive as that of Kenya. However, there are a few cases that constitute part of the history of Presidential Petitions of that country, that are worth considering. In the 1999 elections Chakuamba participated in an election against Muluzi. When the results were declared Chakuamba, and three others sought legal redress.

3.2.1 *Gwanda Chakuamba & 3 Others v The Attorney General & 2 Others 1999* [122]

[119] Awour & Achode opcit P.8
[120] *Odinga* ibid
[121] Wachira opcit p.37
[122] *Gwanda Chakuamba & 3 Others v The Attorney General* in the Malawi Supreme Court of Appeal Blantyre (MSCA Civil Appeal No.20 of 2000) (Being Lilongwe District Registry Civil Cause No.1B of 1999)

After the June 1999 elections in Malawi four petitioners filed a petition on the ground generally that by reason of irregularities there was undue return or an undue election of a certain candidate to the Office of President. They argued before the High Court that:

'*The Commission unlawfully declared that they had been elected President a candidate who obtained a majority of the votes at the poll instead of a majority of the votes from the electorate'*[123].

The question before the court concerned the interpretation of S.80(2) of the Constitution of the Republic of Malawi which read with 'subparagraphs as follows.

"80(1) *The President shall be elected in accordance with provisions of this Constitution in such a manner as may be prescribed by an Act of Parliament*

(2) The President shall be elected by a majority of the electorate through direct, universal, and equal suffrage"

In its ruling the High Court said that the word '*majority*' as used in the Constitution meant votes greater than the number secured by any other candidates. The Court went further to argue that electorate meant all the qualified electors considered as a group. They ruled that the words direct, universal, and equal were placed in the Constitution to qualify the word suffrage[124].

The judges then said that in the true and proper construction of Section 80(2) of the Constitution, the requirement of the election of the President by a majority of the electorate through suffrage is satisfied by a candidate who obtains more votes of the votes cast at the poll than any other candidate[125]. Against the above they then found for the respondents and ruled the election of the President lawful.

Not satisfied with the ruling the Applicant appealed. In the Supreme Court. After receiving and hearing submissions from both parties the Court ruled,

'The meaning to be ascribed to Section 80(2) as presently stated and the context in which the word is used…majority means a number greater than a number achieved by any other candidate…and it can

[123] *Gwanda Chakuamba and 3 others v The Attorney General and 2 others* in the High Court of Malawi Lilongwe Civil Cause No.1 B of 1999 In the Matter of the Parliamentary and Presidential Elections Act 1993 and In the Matter of The Electoral Commission Act

[124] *Gwanda v Attorney General* ib.id

[125] *Gwanda v Attorney General* per Judge I.J Mutambo SC. Pronounced on 19 May 2000 Lilongwe

only mean the greater number of those electors who voted in the elections… The Electoral Commission was therefore right in declaring Dr. Bakili Muluzi as duly elected'[126].

Thus, the historical trend in the courts of law showed that Judges were 'reluctant' to overturn election results because of an unwritten norm and because there were no timelines in which the courts had to make a ruling. The challenged President would have ruled for up to two years or more before a matter was settled. This rendered the process moot or merely academic, much to the chagrin of petitioners. Scholars alike argued that some of the rulings were not decided on their merits but on a technical or remote issue and as such the Judges had failed to protect the Constitution[127].

It becomes imperative at this point to consider a specific rule that was earlier referred supra when the Supreme Court of Ghana had pronounced itself on the position of the courts vis-à-vis election petitions. This is what is called the substantive effect rule now briefly discussed below.

3.3 The place of the Substantive Effect Rule

When Azu (2015)[128] wrote on why Presidential elections usually failed, she argued that the *'judiciary had hardly been persuaded that the alleged infractions against electoral laws had an adverse impact on the validity of disputed Presidential election results.*

This was the reason courts sought not to invalidate election results. Indeed, it is all too easy to sum up the apparent lackluster approach of the judiciary in hearing petitions to a reluctance on their part to delve into the process further.

However, in hindsight the historical approach to matters notwithstanding the often-unpleasing rulings appeared steeped in the substantive effect rule. Its genesis resides in a particular case law of England and Wales.

On 3 May 2007, in Leicester City elections for 22 Wards for the Local Government were held[129]. Fitch, a losing candidate in the elections filed a petition to challenge the results. In ruling on the

[126](MSCA Civil Appeal No.20 of 2000) delivered on 23 October 2000
[127] Awour & Achode (2013) O Kaaba (2021) Ogetti (2000) Azu (2015) supra
[128] Azu supra p.151
[129] *John Fitch v Tom Stephenson & Others* (2008) EWHC 502 (QB) England and Wales

matter, the Court relied on an English Statute, 'The Representation of the People Act of 1800'. This Act is cited as authoritative on when an election can be invalidated. In the main it provides as follows: *"No parliamentary election shall be declared invalid for the reason of any act or omission by the returning officer or any other person in b reach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognizance of the question that:*

(a) The election was conducted as to be substantially in accordance with the laws as the elections and

(b) The act or omission did not affect its results"[130]

Scholars[131] and practitioners argued that the sum effect of this rule was that trivial mistakes, omissions, and commissions would not lead to the annulment of an election, provided the overall fairness of the election was not vitiated.

In the Leicester case the court also referred to the review of the history of the Section 37 of the Representation of the Peoples Act 1949[xii] as recited by Lord Denning MR in the matter of *Morgan v Simpson* (1975)[132] who summed up the law as follows.

1) *If an election was conducted so badly that it was not sustainably in accordance with the law as to the elections, the election is vitiated, irrespective of whether the result was affected or not*[xiii]
2) *If the elections were conducted that is substantially in accordance with the law as to elections, it is vitiated by a breach of the rules or a mistake at the polls if it did not affect the result of the election*[xiv]
3) *However, if the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it affected the results then the election is vitiated*[xv]

[130] Representation of the Peoples Act 1983, Section 23(3) Section (43)
[131] O'Brien Kaaba in '*Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission & Others'* Presidential Petition No.1 2017
[132] *Morgan v Simpson* (1975) 1 QB 151

The above case law as read together with Statute is the foundation of what is commonly known as the substantive effect rule or the substantive effective doctrine. However, functional as the doctrine is scholars who wrote about failed Election Petitions viewed it as detrimental to Election Petitions in Africa.

Kaaba (2017) in his work argued,

"In Africa, the substantial effect rule has worked in the most disingenuous ways to uphold elections fraught with major irregularities and fraud."[133]

He cited three cases where the doctrine was applied, and the petitions were not only rejected but led to many legal questions remaining unanswered. He referred to the case of *Besigye v Museveni* (2017)[134] a Ugandan case where the court by a majority decision dismissed a petition holding that in determining if the irregularities and malpractices affected the results in a substantial manner, numbers were the sole measuring yardstick. Further he observed that in the case of *Mazoka v Mwanawasa* (2002)[135] a Zambian case, the Supreme Court rejected the nullification of the results because they had considered what they called 'the national character' of the Presidential elections with the conclusion that the identified flaws had not seriously affected the results. Lastly, he cited the Ghanaian case of *Akufo-Addo v Mahama* where the court despite the identified anomalies the elections in their view were 'conducted substantially in accordance with the Constitution and the law'. His conclusion therein was,

"*Africa has become known for flawed elections…even when elections are held routinely it has been less about choosing a government but as a form of legitimization of political choices which had already been predetermined"*[136].

[133] Kaaba opcit

[134] *Kissa Besigye v Yoweri Kaguta Museveni* Presidential Petition No. 11 of 2016

[135] *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others* Supreme Court of Zambia 2002 SCZ/EP/01023/2002

[136] O'Brien Kaaba 'The Challenges of Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing an African Supranational Elections Tribunal' University of South Africa, June 2015 p.1

Hoolo (2019)[137] in his presentation like many before him studied the 'Role of the Judiciary in Presidential Election Petitions in Africa'. He based his research on two questions: The first was whether the judiciary in Africa plays a role in electoral processes and second whether African Judiciaries make a meaningful contribution to electoral democracy[138]. After detailed discourse he established that the substantial effect doctrine was often invoked to uphold results and as such justice was not rendered. Based on this finding he concluded that the judiciary whilst having a role in the electoral process were not making any meaningful contributions.

It has been argued that given the strange application of the doctrine, the law in Kenya was amended. The most notable change lay in Section 83 of the Elections Act (2011)[139]. The purpose of this amendment was designed to ensure that for a court to nullify an election a petitioner would have to prove that there was non-compliance with the Constitutional principles and subordinate law, and that the non-compliance had an impact on the election result.

Wachira (2021) in his work refers to this as the statutory introduction of the substantive effect rule. He argues.

"*The Constitution of Kenya 2010 along with the Elections Act of 2011 were born from a history where Presidential elections used to be marred with election malpractices, and a complicit and non-independent judiciary which would decide cases in favor of the incumbent even when the irregularities were glaring*[xvi]*. It is because of this that the Constitution of Kenya dedicates a whole chapter to elections and the modalities…and protects the independence of the Judiciary from interference from other arms of the government*"[140].

Thus, historically the paradox lay in the fact that even though most Constitutions provided remedies to petition an election result, petitions were still lost in the face of huge Constitutional and electoral

[137] Nyane Hoolo 'The Role of Judiciaries in Presidential Electoral Disputes Resolution in Africa: The Cases of Zambia and Zimbabwe' University of Limpopo delivered at the 4th Annual International Conference on Public Administration and Development Alternatives 3-5 July 2019 Southern Sun Hotel OR Tambo International Airport Johannesburg South Africa
[138] Hoolo ib.id p.18
[139] Election Act of Kenya Act 24 of 2011
[140] Benedict Wandeto Wachira supra p.10

breaches. As this paradox grew the spotlight was shifted on to the judiciary. The Carter Centre argued, '*a failure to create and implement and effective mechanism for the resolution of elections disputes, can undermine the legitimacy of an entire electoral process'*[141].

Could it then be that until 2016 no effective mechanism existed in Africa? Could it be that the hypnosis cast by the doctrine of substantive effective rule established so many years ago had so captivated the judiciary that they continuously upheld all election results despite their flaws? Was public interest manifest in all past case law?

3.3 Chapter Summary

Fair and representative government is the bedrock for the constitutional politics of free government. It is the basis for political struggles over governmental accountability, majority rule versus minority rights. The maxim that every person qualified to vote has a right to one vote in the choice of representatives regardless of standing in society. Nations have gone to war to enable people to have the right to vote and as such it takes some sense of freedom away when people are denied a free choice as to who leads them. It is for this reason that legislation has been put in place to enable those who may feel aggrieved with an election result to petition, and that the Court shall in their wisdom challenge and nullify flawed elections once petitioned.

The history of Presidential election petitions in Kenya and Malawi exhibit a skewed approach to the protection of a constitution, the seemingly unwritten pact not to nullify elections appears to lie in two fields. The first is that because of the lack of a timeframe within which to hear a matter enabled the Courts and the Executive to escape unscathed poorly managed elections. The second is that the Courts were reluctant to delve into the intriguing terrain of the management of an election opting instead to stop at whether the candidates themselves participated in rendering the election flawed and once that hurdle was scaled the matter was not perused further.

[141] The Carter Centre 'Guide to Electoral Dispute Resolution' seen at www.catercentre

The ingenuity with which some rulings were rendered included glossing over the most important aspects of the election and in the process segmenting the elections into, the campaign, casting of votes, tallying of votes and the eventual announcing of the results. All these aspects taken wholesome left a sense that free and fair elections in Africa were not possible.

Yet at the centre of the growing jurisprudence was the faulty application of the substantive effective rule which all resulted in poor judgements and in the process, justice was denied the electorate. Even in the realm of an 'improved' legal environment as was the case in Kenya the historical unspoken decision not to annul a result was the order of the day rather than the exception.

The situation persisted much to the dismay of the electorate. The citizens lost faith in the system and some scholars even advocated for a Supranational Court to be established to hear Presidential Election Petitions. One scholar went further to demonstrate that the Courts had in effect no role to play in Presidential Election Petitions as they had been reduced to courts that rubber stamped the election results. It must also be stated that historically no court sought to question the actions of those entrusted with managing an election.

However, in 2017 that changed when a losing candidate in an election filed a petition. The next chapter seeks to discuss what transpired in that matter.

CHAPTER FOUR

DATA AND METHODOLOGY:

THE RULING IN THE KENYAN SUPREME COURT:

ODINGA V KENYATTA 2017[142] DECISION

4.0 Introduction

When the rulings in *Raila Odinga and another v Uhuru Kenyatta and another 2017 and Peter Mutharika and another v Saulous Chilima and another 2019* were delivered, the earlier researchers who had written on why Presidential elections fail in Africa sought to understand what had changed. Indeed, like the proverbial tale of blind men who each held a different part of an elephant and described it, until now the approach has been piecemeal. It is argued in this thesis that apart from annulling the election results the Courts in both jurisdictions clarified aspects of the law that had long challenged Judges when dealing with Presidential Election Petitions including those matters that were litigated upon during the time the election results were upheld.

This chapter therefore goes beyond merely stating that the election results were annulled, it also provides an analysis of some of the legal, precedence, procedural aspects, and substantive issues that the court addressed. In essence this analysis in total sums up the uniqueness of *Raila Odinga and another v Uhuru Kenyatta and another 2019 ruling.*

4.1 An Analysis of the Ruling in the Kenyan Supreme Court in 2017

On August 8, 2017, Kenya held her second general election under the Constitution of 2010 and Kenyans from all walks of life trooped to forty thousand eight hundred and eighty-three (40,883) polling stations across the country to exercise their right to free, fair, and regular elections[143]. It was also the first time that the general elections were being held pursuant to a Constitutional provision[144] which decrees the holding of elections every second Tuesday of August after five years. On August

[142] *Raila Amolo Odinga & Others v Independent Electoral and Boundaries* Commission and Others, Presidential Petition No.1 of 2017 in the Supreme Court of Kenya Nairobi
[143] *Odinga* (2) 2017
[144] Article 101(1) of the Constitution of Kenya

11, 2017, the Returning Officer [xvii]for the Presidential elections declared Uhuru Muigai Kenyatta winner with eight million, two hundred and three thousand, two hundred and ninety (8,203,290) votes and Raila Amollo Odinga runner up with six million, seven hundred and sixty-two thousand, two hundred and twenty-four (6,762,224) votes[145].

Odinga felt aggrieved and filed a petition and now discussed below.

4.1.1 *Raila Odinga and another v Uhuru Kenyatta and another 2017*

On August 18, 2017, Odinga and Stephen Kalonzo Musyoka, who were Presidential, and deputy Presidential candidates filed a petition challenging the results of the Presidential elections. However, as soon as the petition became eminent the court was faced with the task of determining certain applications before the court or at best interlocutory applications. For the purposes of this thesis these are now referred to as the requisite judicial scrutiny in a Presidential Election Petition.

4.2 Judicial Scrutiny in an Election Petition

Snider (2014)[146] argues in his work that Judicial scrutiny falls in three main phases. The first is what he refers to as *strict scrutiny*, the second *intermediate scrutiny* and the third is *the rotational basis review*. The first level is the highest because it often deals with issues that affect human rights or indeed a right at law which has been denied citizens.

For the purposes of this dissertation, it is argued that in a Presidential Petition the courts must apply all three scrutinizes interchangeably to get to the final ruling if it is to be just. Indeed, the Court in the Odinga case was called upon to do just that. One of the preliminary issues was to address the question of who has the right of audience in a presidential election petition. This might initially seem like an easy question to respond to, yet it took on a legal dimension once posed. Thus, the question who has *locus standi* was debated at some length.

4.3. Locus Standi in a Presidential Petition

[145] *Odinga* 2017 paragraph 4

[146] Brett Snider esq. 'Challenging Laws:3 Levels of Scrutiny Explained' January 27, 2014, updated May 12, 2020

At law *locus standi* is a condition that a party seeking a legal remedy must show they have, by demonstrating to the Court, sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

One of the questions the Court in 2017 had to address was who the litigants in the case would be. Indeed, though little has been written to address this it is the argument in this paper that the Court set the threshold on who could be a litigant in a Presidential Petition. This arose because the case had attracted a lot of interest and many would-be litigants sought to be enjoined.

In response the Court set out a four prone test on when a party could qualify as a litigant. It established that one qualified as a party to a Presidential Petition if they satisfied the following:

(a) A candidate 'declared winner' against the foremost runner.

(b) Those Institutions that by law are mandated to manage the elections.

(c) The allegedly loser and petitioning candidate and

(d) A Returning Officer.

Once the Court had established who the parties to a petition could be it went further and clarified who in their wisdom met the criteria set above in the matter before them and stated as follows:

"*The IEBC is an Independent Commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya and under the IEBC Act No. 9 of 2011..it is charged with the mandate of …conducting elections as prescribed by the Elections Act…the 2nd Respondent …the Returning Officer for the Presidential Election…is …mandated under Article 138(10) of the Constitution to declare the results of the Presidential election and deliver a written notification of the result to the Chief Justice and the incumbent President … the 3rd Respondent …was the Presidential candidate of the Jubilee Party in the August 2017…elections and was declared the winner of the said elections…on 11 August 2017…*[147]".

[147] *Odinga v Kenyatta'* Interlocutory Applications 'in Presidential Election Petition No.1 of 2017

Taking cognizance of the above, various applicants then sought to be enjoined in the matter even though they did not meet the criteria of locus standi as pronounced by the Court. Hence ingenious legal applications were filed as interlocutory pleadings so that the applicants could either be admitted as a friend of the court or enjoined as an interested Party to the pleadings[148].

These applications though appearing routine were in effect a direct affirmation to the newfound authority by Kenyans on how to ensure judgments were enriched by data, evidence or research that might not have been available to the applicants or indeed the Judges.

The applications were also based upon the rules promogulated by the then Chief Justice Mutunga and had become known as the Mutunga Rules[149]. In those Rules, Chief Justice Willy Mutunga defined a 'friend of the court' as an independent and impartial expert on an issue which was the subject matter of the proceedings but was not party to the case and served to benefit the court with their expertise[150]. A person may be admitted as a friend of the court when, either on application or on the courts own motion, the person has expertise that may benefit the court in determining the proceedings before it[151].

It is worth delving into some detail in this law, and its application as is related to the decisions the court was made to pronounce itself on in 2017.

4.4 Admitting a Person as Amicus Curiae in *Raila Odinga and another V Uhuru Kenyatta and another in 2017.*

Admission as amicus curiae had prior to the 2017 elections been a subject of debate in Kenya. It was previously thought that applying to be amicus was an academic exercise because the applications either did not have clear guidelines or the courts had inherent power to decide who they enjoined often erroneously [152] and applicants felt that the state had a say on the outcome of such applications.

[149] The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(The Mutunga Rules)
[150] Constitution of Kenya ibid 2013 (n7) s7
[151] Constitution of Kenya ibid 2013 (n7) s 6
[152] Friend of the Court & The 2010 Constitution: The Kenyan Experience and Comparative State Practice on amicus curiae Christopher Kererking and Christopher Mbazira editors Nairobi p. xiii

It is worth going over the historical cases that the courts had previously ruled upon to develop the law on admission.

4.4.1 *Re Law Society of Kenya* [153]

The brief facts of this matter are that the Government set up a Judicial Commission of Inquiry into Tribal Clashes in Kenya. The then Attorney General represented the Commission as Counsel and then applied to be admitted as amicus. The Law Society of Kenya objected to his application for admission on grounds that the Attorney General was in effect playing a dual role in the matter. In making a ruling the Court stated that it was "*understandable*" for the government to participate both as "*state counsel*" as well as amicus curie because the "*subject requires deeper debate and perhaps legislation*"[154].

This ruling by the court raised various concerns and were no better raised than by Kerkering (2017)[155] who argued that because the rules behind amicus were not properly developed the government's amicus role was at that time muddled and caused the government to appear both as counsel and as an amicus. Furthermore, even the reason given by the court did not explain how this *dual role* granted to the Attorney General would create deeper debate or affect potential or existing legislation[156]. It confused and muddied the process and procedure for amicus. The lack of standards or threshold meant that each application was dealt with by the courts as they saw fit.

This non-prescription by the law would lead to even more interesting rulings.

4.4.2 *Republic v David Makali & 3 Others 1994*[157]

The brief facts of the matter are that Makali, and three others were journalists who, whilst a matter was in court, published an article in a newspaper where they alleged that the executive was interfering in the courts' decisions. They were arrested and charged with contempt of court. The Law Society of

[153] *Re Law Society of Kenya* (1988) High Court Misc Civ App 141 of 1998, eKLR
[154] *In re Law Society of Kenya* (n6)4
[155] Christopher Kerkering "Friend of the Court: An Assessment of its Role in the Kenya's Judicial Process" p.25 in The Kenyan Experience and Comparative opcit
[156] Kerkering ibid p.25
[157] Republic v David Makali & 3 Ors (1994) Court of Appeal Crim Appl Nai 4&5 (Consolidated) eKLR

Kenya then intended to participate as amicus but since the law had not developed proper guidelines on how to apply, a lawyer representing the Society, during the hearing stood up and requested to be admitted as amicus curiae.

The Court expressed disdain about the conduct of Counsel for the Law Society and went further to state that the lawyer had attempted to "*gate crush*" the proceedings because counsel "*suddenly shot up from a back row in the court room and attempted to address the Court as if he was addressing a villagers' baraza and not the highest Court of the Country*"[158].

It has been argued that the lack of standards enabled the Court to rule as they wished when it involved an amicus application. The Law Society's position was that holding journalists with contempt was a violation of their right to free speech. This did not sit well with the court. They granted leave to the Law Society to be heard and at the end of the hearing the Court described the Law Society's efforts as "*abortive*" and "*attempted but unsuccessful*"[159].

Scholars on the matter argued that the respond by the Court was a result of a veiled long-standing dual between the Court and the Law Society and as such the Court tried to portray the Society '*as treating the Court as an enemy…which must be fought and subdued'*[160]. Hence the conduct of the Society led to the Court not reading an application for amicus but rather it used the occasion to chastise the Law Society and its Counsel with "*extremely dire consequences*" for its impertinence[161].

It has been argued[162] that this 'standoff' was because the Court viewed itself as the fountain of knowledge and that the Law Society was impugning the Courts 'independence and attempting to politicize the hearing and as such the grounds for admission was a '*spurious ground*' used as pretext to politicize the case[163].

[158] Makali &3 Others (n8)5-6 ibid
[159] Makali & 3 Others (n8)6,23-24
[160] Makali & 3 Others (n8)24
[161] Makali & 3 others (n8)6
[162] Christopher Kerkering opcit p.26
[163] *Makali &3 Others* (n8)23

The lack of protocol on how to apply for amicus and indeed the desire by the court to preserve its apparent power to admit or reject led to continued court warfare much to the dismay of those seeking justice. When the matter of amicus was once again the subject of debate in 1999 it led to even more interesting rulings.

4.4.3 Republic v Tony Gachoka & another 1999*[164]*

This matter once again involved publications. A journalist and a newspaper director published articles which allegedly impugned the judiciary's credibility. The Attorney General proceeded to file contempt of court proceedings against the duet. In the High Court the two were convicted and on appeal the Court upheld the conviction.

Of interest to many a scholar was the narrative from the court in which it was stated that even though the Attorney General had filed and prosecuted the criminal case he was not really a prosecutor representing the public but that he was an amicus curia that was defending the courts integrity[165].

The question that begged an answer was whether amicus curiae meant one who defended the court's credibility rather than one who assisted the court to arrive at an informed ruling. Or indeed whether admission in contempt proceedings were a special type such that they required that the applicants' side with the court.

With this growing confusion about what it meant to be an amicus, neither the courts nor scholars alike provided direction. It was not until 2004 in the case of *Timothy M Njoya & 6 Others V. Attorney General* that some headway appeared to have been made.

4.4.4 Timothy M Njoya & 6 Others v Attorney General 2004 *[166]*

Timothy Njoya is considered an important case on how one could on application be admitted as amicus curiae. The brief facts of the matter are that the Kenyan parliament enacted the Constitution

[164] *Republic v Tony Gachoka & Another* Court of Appeal Crim APP 4 of 1999. eKLR
[165] *Republic v Tony Gachoka* ibid (n15)22
[166] *Timothy M Njoya & 6 others v Attorney General & 3 others* (2004) HC Misc Civ App 82 of 2004, eKLR

of Kenya Review Act, 2008 which laid the foundation towards Constitutional reforms. The Act gave Parliament, not the people, the right to approve and adopt a new Constitution.

Njoya in filing a motion sought the courts intervention, to determine whether the Act violated the 1969 Constitution by cutting the people out of the Constitution making process. The Petitioners argued that it did because the constituent powers lay with the people and not parliament and that any new Constitution needed to be ratified by the people through a referendum.

The Respondents on the other hand argued that the Act did not violate the existing Constitution and that Parliament did have the power to vote on whether to ratify a new Constitution.

The Law Society of Kenya once again applied to appear as amicus curiae and were admitted wherein they supported the respondents position arguing that the Constitution of the Kenya Review Act did not violate the existing Constitution as it had established a valid procedure for the implementation of a new Constitution[167].

Upon hearing the matter, the Court ruled that the Act did indeed violate the existing Constitution and held that the proposed Constitution needed to be subjected to a referendum. Though the Society appeared to be partisan in its submissions they were still admitted.

Scholars like Kererking[168] argue that *"the decision reflects a watershed moment in Constitutional reform in Kenya and is a primer on the development of a post-colonial Constitutional democracy. If the Njoya decision had come out differently, Kenya would likely have had a different Constitution"*.

With the above position when the Constitution of Kenya was passed in 2010 it stipulated that *'an organization or individual with particular expertise may with the leave of the court, appear as a friend of the court'*[169].

What this in effect meant was that the ability to apply for admission as amicus curiae was now appearing as a Constitutional right. Therefore, in 2013 the law on amicus curiae was again addressed

[167] Constitution of Kenya Review Act, 2008 (Cap 3A)
[168] Christopher Kerkering Friend of The Court & The 2010 Constitution p.30 op cit
[169] Constitution of Kenya 2010 Article 22(3)(c)

in the matter between a Trust Society and a person called Matemo. This would prove significant given that the genesis of any application was now resident in the supreme law of the land. It is worth considering what the Courts ruled.

4.4.5 Trusted Society of Human Rights Alliance v Mumo Matemu & others 2013 [170]

The brief facts are that in 2013 the Court of Appeal reversed a decision of the High Court of Kenya that had annulled the appointment of Mumo Matemu as Chairperson of the Ethics and Anti-Corruption Commission. Upon institution of a petition, the Law Society of Kenya aware that it could not be a litigant to the case as defined at law, filed an application seeking to be enjoined to the matter as an interested party. It is this cited case that led the courts to lay the principles and the law on admitting a person as amicus curiae or otherwise.

4.5 What then is the Law on Admission as Amicus Curiea?

In Matemu the courts ruled that for one to be admitted as amicus curiae they needed to meet three criteria as follows:

(i) That the applicant has expertise in the law under dispute

(ii) That the applicant has no particular interest to serve other than to assist the Court by providing clarity as they arrive at a decision

(iii) That the applicant has not taken sides with any party to the dispute

They went further to guide that apart from the three criteria, the Courts could also look to two other requirements namely:

(i) Whether admitting the applicant would be in the interest of the public and,

(ii) *Any other issue that could influence the court to accept as a requirement*.

The courts went further in that matter and guided on the brief of the amicus curiae as follows.

4.6 The Amicus Curiae Brief

[170] *Trusted Society of Human Rights Alliance v Mumo Matemu & 5ors* (2014) Supreme Court of Kenya

The Court went to great lengths to give guidance on the contents of the brief expected from an applicant namely[171]:

(i) An amicus brief should be limited to legal arguments.

(ii) The relationship between the amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of the direction of the amicus intervention, ought to be governed by the principles of neutrality and fidelity to the law.

(iii) An amicus brief ought to be made timeously and presented within a reasonable time.

(iv) *The brief should address points of law not already addressed by the parties to the suit or by other amici to introduce only novel aspects of the legal issue in question that aid the development of the law*.

The law as laid out in *Matemu* appeared to have settled the matter. However, in 2013 further developments were made in the matter of *Raila Odinga v Independent Elections and Boundaries Commission*[172]. The Court in that matter after referring to *Matemu* stated the law on how to object to an amicus curiae application by stating the following:

"*Where in adversarial proceedings parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue*."

The Court thus stated that for one to oppose an application outside the criteria the Court set out on enjoining a party as amicus curiae, an application could be made to challenge the enjoining of a party if at least one of the following could be established:

1) That the person seeking to be enjoined as amicus curiae was biased.

2) That a person was hostile towards one of the parties to the proceedings.

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[171] *Trust Society of Human Rights Alliance v Mumo Matemu & 5 ors* cited [2015} EKLR cited in The Supreme Court Petition No12 of 2013 paragraph 42 opcit.

[172] *Raila Odinga & Others v IEBC & Others* S.C Petition No. 5 of 2013 Katiba Institute application to appear as amicus.

3) *That pervious conduct suggests that the person would be partisan*.

It must be recalled that in earlier applications the Attorney General had appeared biased and or partisan in matters where he had appeared both as counsel and amicus. This position was revisited in *Matemu* to establish the law.

4.7 The Law when The Attorney General can be enjoined as Amicus Curiae

The Judges in *Trust Society of Human Rights Alliance v Mumo Matemu & 5 others* with regards admission of the Attorney General as amicus curiae stated as follows:

"*The Court may call upon the Attorney General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney General is not defeated solely by the subsistence of a State Interest in a matter of public interest*"[173].

The Court in effect established that there are two ways in which the Attorney can be admitted as amicus curiae. First the Court could of its own volition call upon the Attorney General or second, the Attorney General could make an application to be enjoined.

This distinction was relevant because the Court pointed out that the 'greater public interest' attached to the appearance of the Attorney General went beyond a matter lacking what could narrowly be referred to as the lack of state interest.

Therefore, the test applicable to the admitting of the Attorney General is that his appearance is for a '*greater public interest'*.

The question perhaps not answered by the Court was if a party opposed the enjoinment of the Attorney General as amicus curia and could prove one or more of the above would the Court disqualify the Attorney General? Or would the overriding public interest mentioned by the Court still allow the Attorney General to qualify as *an amicus*? Or could it be stated that the law had once and for all been pronounced?

[173] Supreme Court Petition No.12 of 2013 opcit

In *Raila Odinga and another v Uhuru Kenyatta and another in 2017* the Courts would provide further clarity.

4.8 The law on Amicus as developed in *Raila Odinga and another v Uhuru Kenyatta and another 2017.*

When the matter of Raila *Odinga and another v Uhuru Kenyatta and another* was filed in 2017, the court received applications for parties to be enjoined as *amicus curiae* to the matter. These included Charles Kanjama, an Advocate whose application included the Information Communication Technology Association, Benjamin Afula Barsa, and Isaac Aluoch Aluochier seeking to be enjoined[174].

The brief facts are that the applicant stated that he sought to assist the court with the *interpretation and application of relevant Constitutional principles, electoral law, computer information systems, accounting and governance auditing* and any other area his expertise would be required. He submitted that he had previously been enjoined as *amicus curiae*[175].

The Court in making a ruling on their application began by reading over both case law and statute. They cited Rule 4(2) of the Supreme Court and Rule 25 of the Election rules[176] which provides:

(1) A person may at any time on any proceedings before the Court apply for leave to be enjoined as an interested party.

(2) An application under this rule shall include:

(a) A description of the interested party

(b) Any prejudice the party would suffer if the intervention was denied, and

(c) The grounds or submissions to be advanced by the person, their relevance, and the reasons for believing that their reasons will be different from those of the other parties.

[174] *Odinga & another v Independent Electoral and Boundaries Commission & 2 Others*: *Kanjama (Intended Amicus Curiae)* (Election Petition 1 of 2017) KESC 27(KLR 27 August 2017

[175] Supreme Court Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate (2012) eKLR

[176] The Supreme Court (Presidential Election Petition) Rules 2017 and Rule 25 of the Supreme Court Rules 2012 Interventions.

Having quoted the above, the Court then referred to the matter of *Muruatetu v The Republic* (2016) and then collated the principles that apply when one seeks to be enjoined as an interested party as follows:

(1) That enjoinment is not a right and a party seeking to be heard must make a formal application and lay sufficient grounds on the following elements:

(a) The interest should be laid out clearly and must be approximate to stand apart and not peripheral.

(b) That the prejudice to be suffered must not be remote but clear and accurate.

(c) The party must set out the skeleton submissions that they wish to argue and that the submissions should not be mere recitals of what other parties are making before the court.

On applying the above test, the Court ruled that the applications of Charles Kanjama an Advocate, The Information Communication Technology Association, Benjamin Afula Barasa, and Issac Aluoch Aluochier had failed to meet the threshold set out above and as such the applications were disallowed[177] they went further to state that previous admission as amicus did not necessarily lead or translate to admission as each application was decided on a case-by-case basis.

This case-by-case approach was evident when the court dealt with further applications in the matter of *Raila Odinga and another v Uhuru Kenyatta and another 2017.*

4.8.1 ***Aukot (Applicant) 2017 KESC 34 (KLR)[178] From an application to be admitted as amicus curiae but being admitted as an Interested Party***

Ekuru Aukot[179] was a Presidential candidate on a Third-Way Alliance Kenya Party ticket who applied to be enjoined as *amicus,* but he was unsuccessful. Given the developments of the law as he understood them, he then applied to be enjoined as an interested party. His actions during the elections

[177] *Odinga v Kenyatta* 2017 'Interlocutory Applications' C (11)
[178] *Odinga &Others v IEBC & Others Aukot (Applicant*) 2917 KESC 34(KLR)
[179] An application for joinder as an Interested Party under Rule 25 of the SCR 2102 as Read with Rule4(2) of the SC (Presidential Elections Petitions) Rules 2017

were near ingenious. He had placed several agents to monitor the electoral process and then compiled his own independent audit of the electoral process with a view to establish its transparency, credibility, verifiability, and accountability.

He therefore by relying upon his actions above, applied to be enjoined to the petition arguing that his submissions would assist the court reach a judicious and fair determination of the matter at hand and that he would suffer prejudice if he was not so admitted[180].

In opposing the application, the first respondents argued that the applicant ought not to be enjoined as amicus curiae because he intended to pursue a partisan position and therefore could not be joined as an intervener as this was contrary to the law[181] and precedence[182]. Further the third respondent averred that the applicant had failed to meet the legal threshold as set by law as he had already conceded defeat after the General Election results and as such, if he were not admitted he would not suffer any prejudice, nor would he be directly affected by the outcome of the ruling.

The court in making their ruling recalled precedence set in the *Francis Karioki Muruatetu & Or v Republic & 5 Ors* [183] case and pointed out that the Court could exercise a certain amount of discretion when considering an application for enjoinment. In this case the court, upon considering the application, the court decided in its wisdom that the applicant had indeed laid out a clear interest that he had in the matter as well as the prejudice he would suffer if not admitted. They ruled that he had demonstrated the relevance of his submissions, and these were nouvelle and not merely a replication of what the other parties were submitting before the court.

They therefore held that *'the application conformed with the principles laid out in law and because the applicant was a Presidential candidate in the August 8, 2017, general elections, that entrenched his identifiable stake in the matter. Thus, if he were not enjoined, he would suffer prejudice and be*

[180] *Odinga & Ors v Independent EBC & 2 Ors*, Aukot (Applicant) 2017 KESC 34(KLR)
[181] Rule 25 of the Supreme Court Rules 2012
[182] *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Ors* (2014) eKLR
[183] *Francis Karioki Muruatetu & Or v Republic & 5 Ors* Supreme Court Petition No.15 &16 of 2015 (consolidated); [2016] eKLR.

directly affected by the outcome of the Presidential Election Petition'[184]. They therefore allowed the application.

Once this had been seemingly settled, that Court was faced with a ruling to make on how the court would deal with applications objecting to the enjoinment of parties to a presidential election petition. This issue was raised in the application of *Mwaura Wainaina in 2017* now referred to below.

4.8.2 *Raila Odinga &Ors V IEBC Micheal Wainaina Mwaura (Intended Amicus Curiae) 2017*[185]

Micheal Wainaina Mwaura was an independent candidate in the August 8, 2017, Presidential Elections who sought to be enjoined to the proceedings in the matter of *Raila Odinga and others v IBEC and others* 2017. He applied to be enjoined either as an interested respondent, amicus curiae or in any other capacity the court would direct.

In making his application Mwaura amongst other averments argued that he had perused all the evidence presented by the petitioners and was unable to find merit in the preposition that the elections held in 2017 and the results in which he participated should be annulled.

In opposing his application, the petitioner averred that the applicant had not demonstrated any identifiable stake or legal interest in the proceedings and that the reason he was seeking to be enjoined was to advance his own interest in the matter. Further that he had not demonstrated what prejudice he would suffer if the application were denied. It was also alleged by the first and second respondents that the application fell short of the law as the applicant was neither independent nor impartial.

The Court, after citing the law on amicus curiae, ruled that the applicant did not meet the criteria set out at law and in precedent. They observed that since he was opposing the application, he was biased, and this rendered him partisan and therefore he could not be expected to be neutral. As such his application as amicus curiae was dismissed.

[184] *Odinga & Ors* opcit
[185] *Odinga & Ors* ibid Michael Wainaina Mwaura (Intended amicus Curiae) 2017 38 eKLR.

However, it must be recalled that the applicant in his application had left the possibility to be enjoined through various avenues and indeed, the Court despite dismissing his primary application went further and argued that the applicant met the conditions set out in law, on joinder of interested parties to a suit. They observed that because the applicant was a candidate in the disputed general elections results this bestowed upon him a personal stake or interest in the matter. They further ruled that his stake was relevant to the proceedings and thus, they enjoined him to the proceedings[186].

It is therefore the position of this thesis that the Courts discretion to accept or reject an application is dependent upon the Courts interpretation and rigorous considerations which if applied ordinarily the court would readily disqualify most applicants. It would appear the court probe further to establish what disadvantage(s) a party would suffer if the Courts did not exercise their discretion. It appeared almost as if the matter of when to enjoin a party to proceedings to a larger extent depend on the courts reading of the likely prejudice the applicant would suffer. Once that was resolved the court would be inclined to rule to enjoin the party.

The interlocutory pleadings of 2017 enabled the court to pronounce itself on the law previously not fully explored. Indeed, on the face of it *Mumo Matemu 2013* ought to have settled the law, yet despite attempts by respondents to oppose applications using excerpts from *Mumo Matemu 2013* the court appeared to seize the occasion to refine and expand on what the earlier rulings meant.

For instance, it will be recalled that as stated earlier applications for amicus curiae by the Attorney General were received with much skepticism as to the actual role the applicant intended to play. Thus, it was that in 2017 the court once again had occasion to address an application for amicus involving the Attorney General of Kenya. It shed some light on the role of the Attorney General in a presidential election petition and it is worth exploring further below.

[186] *Odinga & ors* opcit per Maraga 27 August 2017

4.8.3 Raila Odinga & Another v IEBC & 2 Others: Attorney General (Intended Amicus Curiae) 2017[187]

When *Raila Odinga & Others 2017* filed a petition against the election results, the Attorney General applied to be enjoined to the proceedings as amicus curiae on the basis that he had both a Constitutional and Statutory obligation to assist the court in matters involving complex and legal questions and to place materials and expert research that would aid in fair, just and impartial adjudication of the issues in dispute[188].

In citing the case of *Trust Society of Human Rights Alliance v Matemu & 5 Others*[189] as one of the authorities that buffered his application, he argued that his joinder to the proceedings would enhance the right of access to justice in terms of the qualitative normative content of political rights. This would open positive lines of development in electoral law jurisprudence.

He further argued that the Presidential Election Petition raised questions of great public interest revolving around the application and interpretation of the Constitution[190] and that he had the necessary expertise in electoral law reform both through appearance before courts of law and participation in the legal reform process.

The petitioners in opposing the application argued that the applicant having been admitted as amicus in the 2013 Presidential Petition took a partisan view that led to him to support the 1st and 2nd respondents in that case[191]. Further that the applicant did not disclose any distinctive or novel aspects of the legal issues he sought to address that were not already covered by the Parties, and that there were no complex constitutional issues requiring his intervention. Consequently, they prayed for the application to be dismissed[192].

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[187] *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others and Attorney General (Intended Amicus Curiae)* 2017) KESC 36 eKLR.
[188] *Odinga v IEBC* p.2 ibid
[189] *Trust Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No.12 of 2013 opcit.
[190] *Odinga v IEBC* 2017 at para.4,5 op cit
[191] *Odinga v IEBC* ibid para.2
[192] *Odinga v IEBC* ibid para 6

The Court in responding to the application took judicial notice of both the Constitution provisions and case law regarding the Attorney General and his office in totality. They specifically examined the provisions in Article 156 (1)[193] of The Office of the Attorney General Act of 2012[194], the Supreme Court Act of 2012[195], The Supreme Court Rules 2012[196] and The Supreme Court (Presidential Election Petition) Rules, 2017[197].

The Court concluded that the proceedings before the court involved issues of great public interest and that notwithstanding the Attorney General being an integral part of the National Executive, he had a duty to the court and the Constitution to '*satisfy the court…of the public interest or public property involved*'[198].

They then proceeded to rule that even though the issues before the court were of public interest, *since* the Attorney General had elected to be enjoined as a *friend* of the Court, his mandate would therefore be assessed against the principles[xviii] of *Mumo Matemu* which included what is acceptable in the amicus curiae brief to the court.

Upon reading over the principles in Matemu, the court in their wisdom applied the following principle.

'*Where, in adversarial proceedings, parties allege that a proposed amicus is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court, the court will consider such an objection by allowing the respective parties to be heard'*[199].

However, the Court went further and argued that given the strict timeframe provided by law in which it had to pronounce itself on the main petition the application in question would not be subjected to

[193] Constitution of Kenya Article 156 (1) On the office of the Attorney General
[194] Office of the Attorney General Act, 2012 (Section 7) Audience by the Attorney-General in matters of public interest
[195] Section 24(1) of The Supreme Court Act 2012
[196][196] Rules 23,54(1)(a), (2) of The Supreme Court Rules of 2012
[197] Rule 17(1) & (2) of The Supreme Court (Presidential Election Petition) Rules 2017
[198] *Odinga and Others v IEBC* paragraph 11
[199] *Odinga and Others* ibid para 17

litigation. The Court then addressed the ruling it made in a 2013 application specifically on what matters the Attorney General could address. They recited as follows,

"*The Court, which is the custodian of the rules of validity, propriety and fair play under the Constitution and the Law, remains in charge, in regulating such precise role as the Attorney General may play if admitted as amicus curiae"*[200].

They concluded that despite admitting the Attorney General as amicus curiae his brief would not include matters which he had litigated in an earlier matter in the case of *Maina Kiai*[201] as doing so would have enabled him to re-litigate an issue. Thus, all references to *Kiai* were expunged from the brief.

It is the position of this thesis that the Court of Kenya developed the law on *amicus* through clarification that when faced with an *amicus* application the courts ought to apply five main tests and these are:

(1) The *Expertise Test* i.e. is the applicant conversant with the subject matter.

(2) The *Independence Test* i.e. is the applicant serving any particular interest.

(3) The *Impartiality Test* i.e. is the applicant neutral.

(4) The *Public Interest Test* i.e. when the applicant is the Attorney General.

(5) The *Discretion Test* i.e. when the court should regulate what the *friend* ought to submit on.

Subjecting each application to the above tests is to ensure that those applicants to *amicus* seeking to make submissions before the court do so to enrich the material placed before the court and in the process enable the courts to make a better ruling. Applicants to *amicus* should not be those who seek to lecture or seem to want to belittle the process as the court ponders dealing with the finer details of a Presidential Election Petition.

[200] *Raila Odinga & Others v IEBC & Others* No.5 2013 opcit

Having exhausted the debate on the preliminary issues the court then turned to the substantive issues of the petition now discussed below.

4.9. Dealing with the Substantive Issues in 2017

The parties that had petitioned the election results made various allegations as to why the election results were not a true reflection of the will of the people. Some bordered on alleged unconstitutional acts from the respondents and some bordered on an omission or commission by the persons declared winners of the election. The Court then proceeded as follows.

At the commencement of the hearing the Court decided that the matter comprised four main issues for determination[202]. These constituted the areas the Court would pronounce itself upon:

(1) Whether the 2017 Presidential elections were conducted in accordance with the provisions of the Constitution and the election law.

(2) Whether they were irregularities and illegalities in the conduct of the 2017 Presidential elections.

(3) If there were irregularities and illegalities what impact if any these had on the integrity of the election and,

(4) What consequential orders, declarations, and relief the Court should grant if any.

To resolve the issues before it the Supreme Court sought to explain the substantive grounds upon which an election could be annulled. It therefore laid down two prepositions.

The first preposition was that an election could be annulled if it were held outside the Constitutional requirements and that this was based on a principle that the '*electoral process and results should be simple yet accurate and verifiable*'[203]. The second preposition was that if an election was held

[202] O'Brien Kaaba '*Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others'* Presidential Petition No1. Of 2017, SAIPAR Case Review: Vol.1: Issue 2, Article 6

[203] *Raila Odinga* 2017 para.379

contrary to the Constitutional provisions and it was so proven, '*whether there were inherent illegalities and or irregularities committed in the conduct of the elections'*[204].

To progress the thought pattern of the Court it is justifiable to now consider each preposition as laid out by the court. This is necessary as it lays foundation on why and how the 2017 election results were nullified for this to be considered a landmark ruling.

When the Judges pronounced themselves on the above propositions, they did so with the eye of a hawk and precision of a surgeon. Details that had historically escaped mention, narration or indeed dissection were laid bare in the ruling. They took into consideration the parties involved, the administrators of the elections, the petitioners and what was acceptable as a proper completion of an election. In effect they cast the net wide.

It is imperative to examine in some detail the courts' approach more so when setting out the parameters that could lead to an election result being annulled.

4.9.1 Illegality in a Petition (Improper Conduct or Undue Influence)

The general rule is that improper conduct or undue influence can amount to illegality in an election and as such lead to a petition of the result. It is imperative to understand what constitutes illegality and what constitutes undue influence.

The court in setting out what constitutes illegality began by guiding that any election that was not free from violence, intimidation, improper influence, or corruption would be considered illegal. They argued that if a petitioner sought to prove illegality in a petition the task would include being able to establish that there had been the use of inducements and compulsions. To augment this position, the court argued that such actions would be contrary to Article 81 of the Constitution[205] all such acts would be deemed as having had an improper influence on an election rending it illegal.

This simple yet enlightening view goes to the core of how election results should be viewed. There appeared to have been under currents that suggested that an Election Petition should only focus on

[204] *Raila Odinga* 2017 para.125
[205] Article 81(e)(ii) of the 2010 Constitution of Kenya

the results. However, the Judges were dispelling that notion to suggest that to arrive at an informed decision an Election Petition needed to be seen as a process. Therefore, for the court to arrive at an informed decision about the legality of an election it needed to examine the conduct of parties, prior to the casting of ballots, during the election and when the results of that election are released to determine whether any illegal act or acts had occurred that would warrant their rejecting the results.

Mutuma (2021)[206] argues in his paper that the rationale behind determining if there was improper conduct or undue influence '*was to prevent a sitting government leveraging achievements, that were the result of the expenditure of public resources as a campaign tool'*.

Indeed, the Court in adopting a similar position referenced the Election Act[xix] clearly confirming that actions that fell afoul of the provisions of the Act would constitute an illegality. It must however be stated that the courts did not find the respondents culpable of any of the above actions, but it was now clear that had they engaged in such practices they would if proven have satisfied the threshold of what constitutes an election illegality.

They then shifted to deal with the other aspect of a probable cause for nullification of an election namely what constitutes 'undue influence'.

In arriving at a 'definition' the courts cited the provisions of Section 10 of the Election Office Act 37 of 2016[xx]. They concluded that the test for *undue influence* is whether one's conduct created an impression in the mind of a voter that adverse consequences would follow if one exercised their right to elect a candidate other than the one who was the perpetrator of such actions. The question they stated for the court to answer would be whether there was interference or an attempted interference with the free exercise of a persons' right to choose.

[206] Ken Mutuma 'Kenya's Annulled Presidential Election: A step in the Right Direction?' Special Issue on African Courts and Contemporary Constitutional Developments Speculum Juris Vol.35 No1. of March 2021 p.98

It is thus the position of this research that one of the tests that a court ought to consider in deciding whether an election result ought to be annulled is whether they have been irregularities or undue influence by the actors in an election that are contrary to the Constitution or electoral act.

However, should respondents to a petition pass the first test, should the court then uphold the result? The answer to this question lies in the ability of the Courts in 2017 who made a distinction between illegality and irregularity. In essence establishing that there were irregularities in an election once petitioned and such irregularities surface this may lead to nullification of a result. It is worth considering how the Court dealt with the notion of irregularities in an election.

4.9.2 Irregularity in an Election

It is evident that the legal appetite of the Judiciary in this matter drove the desire of the bench to render justice. The evidence, the exposition of what was at stake compelled the Court to pull in a particular direction.

The petitioners in 2017 alleged at trial that it was a given that the elections of Kenya would include specific forms that at prescribed features that would distinguish them from ordinary forms and reduce the plausibility of rigging. Thus, they argued that to their horror during the elections many samples of what was referred to as Forms 34A, 34B and 34C used during the elections did not have security features which in their view was contrary to the requirements[207]. They further referred to Regulation 82 of the Elections (General) Regulations 2012 (Elections Regulations)[208]which in their view prescribed the acceptable format of the forms.

The court in considering the position concluded that allegations of discrepancies such as the ones alluded to by the petitioners if proven amounted to irregularities.

To augment this position and in an unprecedented move the Court granted interim orders authorizing the scrutiny of the forms and requested the registrar of the court to draft a report on the outcome of

[207] *Odinga 2017* para 93
[208] *Odinga 2017* paragraph 360

the scrutiny. The report revealed the existence of all the discrepancies alleged[xxi]. Based on the revelations the Court ruled that the discrepancies cast doubt on the credibility of the election process. Therefore, in determining if there has been irregularity the Courts established a new approach which was to go beyond merely receiving a complaint but to go further and request for the examination of the alleged point of irregularity, in this case the forms whose prescribed features were provided for by the law.

The Court was in essence looking at factors that could give credence to an election and in the event of deviation if deemed irregular lead to the conclusion that the results were in effect not credible.

Mutuma aptly states this in his paper as follows and he is quoted:

'*Considering the question of irregularities, the Supreme Court examined whether electoral officials had handled the prescribed forms in accordance with the law…the Elections Regulations mandate each polling officer to physically deliver all Forms 34Bs to the returning officer, who in turn delivers these to the chair of the IEBC…In the courts opinion the regulations were clear on the duties of the officials and on the purpose for including the requirements for indicating the number of forms received by various officers so as to ensure accountability and transparency*'[209].

What was established was that before nullifying an election result, the court may at times have to examine both the acts of the participating candidates during the election process and the omissions if any of those entrusted to administer the elections. This thesis argues then that this approach was a new approach in petition, prior to the petition of 2017 no court had sought to consider the actions of the electoral commission and their effect on the integrity of an election.

It is not uncommon for a losing candidate to flirtingly wonder if electoral commissions live up to the prescribed and expected standard of managing an election. In his seminal work, Lekorwe (2006) in his writing on Election Management Bodies argues that:

[209] Mutuma opcit at p.99

"Election management become more complex in the 1980s and 1990s when more countries entered the wave of democratization and held multiparty elections. A well-managed election depended on the quality of the election management body…an election commission that is truly autonomous…that ensure even the least privileged men and women can exercise their franchise freely without fear…aware of its rights and responsibilities"[210].

The Court in Raila *Odinga & another v Uhuru Kenyatta & another 2017* restated the position that persons whose duty it is to administer an election fairly, should not abrogate those duties, or indeed conduct themselves contrary to the provisions of the law. If it is proven that an official fails to uphold the standards of duty entrusted upon him and he proceeds to conduct an election, then such an election may be annulled for want of accountability.

However, this finding of irregularities and their reliance upon thereafter was not without caution and in this the Court was explicit. They ruled that generally an election tainted with illegality or irregularity should be annulled, yet to arrive at that conclusion the court must establish how the two have affected the outcome of the election. In its landmark judgment it stated as follows:

'*At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach, therefore, is for a court of law, to not only determine whether the election was characterized by irregularities but whether those irregularities were of such a nature or such magnitude as to have either affected the result of the election or to have so negatively impacted the integrity of the election that no reasonable tribunal would uphold it'*[211].

This position is elating because the Court made it clear that not every irregularity would lead to nullification but rather the nature and degree the impact has on an election result would be taken into

[210] Lekorwe H Mogopodi 'The role and status of the Independent Electoral Commission' 2006 in Journal of African Elections Vol. 5 No.2 p.63-64

[211] *Raila Odinga v Kenyatta 2017* paragraph 373

consideration. Of course, the question of how one can determine the nature and magnitude to conclude to nullify was addressed under the substantive effects doctrine which is now considered below.

4.9.3 Establishing the Substantive Effects in a Petition

As concluded elsewhere the substantive effects rule or doctrine had long been one that had haunted the corridors of the law. The ever-unending question of when irregularity was irregular enough to lead to the nullification of an election persisted in the minds of many people. Or indeed put differently was the issue of when an irregularity was minute enough to cause the court to look the other way and nullify the election results in totality.

Thus, in *Raila Odinga and another v Uhuru Kenyatta and another in 2017* the Courts in setting the threshold subjected their elections to four questions namely:

1) *Was there compliance with the Constitution, Presidential Elections Act and Electoral Commission Act?*
2) *Was the election conducted in accordance with the law*?
3) *If either the first or second issues were answered in the affirmative, did such non-compliance with the said laws and principles affect the results in a substantive manner and*
4) *Who committed the illegalities, the respondents, agents, or those charged with administering the election*.

It is submitted therefore that a reading of the judgment suggests that the Substantive Effect Rule has four tenants which when a court is faced with a petition ought to examine broadly before passing its judgment.

The converse of this is that petitioners as well may in making a case have to lay out their grievances based on these four tests. It is now proposed to consider each point in turn. In summary the four tests before the court it is submitted are:

(1) The Process Test
(2) Illegality and Irregularity Test
(3) The Election Integrity Test

(4) Relief and Declaration Test.

4.9.3.1 The Process Test

Under this test it is the argument of this thesis that the court must address a broad question which is whether the elections were free and fair. It must consider if there was compliance with the law, and this includes commissions, omissions, negligence, or deliberate attempts to disenfranchise the voters. Free and fair here entails events that surrounded an entire election and not selected segments of the election.

The fundamental nexus between the voter and their right to vote takes practical shape in a free and fair election. On the one hand is a willing voter and on other is system that should facilitate the election.

In addressing the process test[212] The Court began by recognizing the place of an election which is a way by which people express their sovereign will to choose a person from a host of candidates. The will of the people is founded on the principles of most Constitutions. The people exercise their will through representatives who they democratically elect in free, fair transparent and credible elections. What their Lordships were arguing was that an election is a whole process and that each part of the process is a link leading to the result of the election. As such any attempts to derail the link will become the subject of scrutiny once a petition is filed.

Mutuma (2021)[213] in his work supplements this position by arguing that,

"*The majority decision (in Odinga v Kenyatta [xxii]) is revolutionary in the sense that it demonstrates that its sole focus is not what transpires on Election Day only, but the entire process. In this sense the court faulted the IEBC's reliance on the conclusion of international observers to the election who in its view were limited to making observations on what had occurred on the material day of the election. As the court observed, 'elections are not events but a process and fidelity to the rule of law in this*

[212] *Odinga v Kenyatta 2017* opcit paragraph 371
[213] Mutuma 2021 opcit at page 100

context requires one to respect the entire process as established under the new electoral management'[214]*".*

This subject is dealt with in legal encyclopedia on the Halsbury's Laws of England[215] In that work the question of when an election begins was discussed and they state:

'*It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is 'reasonably imminent.' Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when the elections begin from this point of view'.*

They argued further that not even nomination day can be said to give a definitive answer but that:

'*The question of when the election begins must be carefully distinguished from that as to when the conduct and management of an election may be said to begin…*'

The above cited passage establishes that an election consists of several stages and steps, which have an important bearing on the result of the process'. The process test therefore looks to examine each stage that leads up to the final step, namely a petition before the court to challenge a result.

This is the principle that was established by the Court when it took the decision to rule as they did.

Stacey and Miyandazi (2021)[216] argue that when considering submissions in a petition the court should bear two crosses. The first is the *prescriptive perspective* where the court, to avoid making questionable rulings, must decide when to closely scrutinize the work of institutions protecting democracy (IPDs).

The second is that it must consider the *descriptive perspective* wherein the electoral management bodies conduct must be interrogated before a decision can be arrived at. In drawing this allusion Stacey and Miyandazi (2021)[217] argue that when this approach is not properly applied the result is

[214] *Odinga 2017* paragraph 162
[215] Halsbury's Laws of England Halsbury-law-online see 'Commencement of an Election.'
[216] Richard Stacey and Victoria Miyandazi "Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in the 2010s" Asian Journal of Comparative Law 193, 2021 online www.cambridge .org/core/journals/Asian-journal-of-comparative-law. P.4
[217] Stacey and Miyandazi opcit p.2

that a court may dismiss a petition alleging electoral irregularities in one case and affirm the petitioners' complaints of electoral irregularity in another even if the facts appear similar. The authors in essence argue that the court may at times be called upon to consider the actions of what they call the 'fourth branch of institutions protecting democracy' namely the Electoral Commission.

It is submitted that in 2017 the courts scrutinized the management of the elections, in other words including the commission and omissions of the electoral commission therein and established irregularities.

It would be an injustice not to explore further what this paper calls the conduct test, though not explicitly called a test by the courts, it is imperative to examine how the court dealt with this aspect.

4.9.3.2 Illegality and Irregularity

In the main in teasing out whether the conduct of a party to a petition was illegal or irregular the Court shifts through the allegations matched against the evidence to establish if the petitioner(s) have a substantial case to show and for the court to consider whether the petitioned election was held in such a manner that it widely departed for the law and that the departure warrants nullification.

The legal foundations erected in the matter of *Raila Odinga & another v Uhuru Kenyatta & another heard in 2017* led the Court to not only consider the allegations and evidence tendered but to arrive at an informed decision the Court navigated these waters by perusing through both the Constitution and the Elections Act to guide their decision. However, as stated before the Court in undertaking this task though noting if need be trivial mistakes, omissions, or commissions those could not necessarily be grounds for nullifying an election result. It required the discovery of something graver.

In deciding if a mistake, omission, or commission is indeed not trivial the Court applies a realistic measure to determine the gravity or the triviality or otherwise of a 'mistake'. The way to decipher this is to consider case law from another jurisdiction namely in this case from the Supreme Court of India.

The celebrated case of *N.P Ponnuswami v The Returning Officer Namakkal Constituency (1951)*[218] addressed this issue eloquently where the Court of India guided on the issue of triviality:

"*In conformity with the principle (to hold free and fair elections), the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election", and if any irregularities are committed whilst it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in to question, they should be brought before… any Court while the election is in progress'*

Therefore, in applying the above test the courts should take into consideration whether an election has been conducted so badly that it is not substantially in accordance with the law as to elections, and if that is the position then such an election is vitiated regardless of whether the result was affected or not[219].

The law as was being developed in the petition of the presidential election in Kenya was that the nature of a presidential election was of great significance to any country such that challenges as to the result warranted scrutiny by a Court. It is the position of this thesis that the sum of the judicial expedition by the court was culminating in determining whether the elections were credible. In essence the Court was called upon to apply the integrity test to these elections which is now discussed in the preceding paragraph. Once the courts have examined the two tests, they can then venture to consider the third arm of consideration, namely the integrity test and when it should apply.

4.9.3.3 The Electoral Integrity Test

An election as discussed above is the result of a process involving the participation of many actors. There are genuine winners and losers in any election unless it is flawed. The stakes are high and there is a great temptation by some actors to seek to ensure victory through illegal or ethically questionable

[218] *N.P Ponnuswami v The Returning Officer Namakkal Constituency & Four others* in The Supreme Court of India (Civil Appellate Jurisdiction) Case No. 351 of 1951 (21 January 1952)
[219] Adapted from the case of *Morgan vs Simpson* [1975] 1 QB 151 supra.

means. Election results can be disrupted or predetermined to influence who should win or who should lose and when that happens it casts doubt on the legitimacy of the process.

Mechanisms for promoting and maintaining integrity in every aspect of the electoral process are often established within the official bodies that administer or support the management of elections. Consistent, legitimate electoral standards and practices help detect, deter, and prevent electoral improprieties and help ensure integrity[220].

In applying this test, the court is expected to enquire whether the failure by a party to comply with the provisions and principles in the statutes affected the election in a substantive manner. As alluded to above this test lies in the 'substantial effect rule' that had for a long time been one that scholars grappled with and were left at a loss of how this rule was being applied[221].

Courts had argued before that in applying this test where some irregularities and illegalities existed the substantive effect rule would then be decided by considering the number of votes garnered by the declared winner and that if the gap between the candidates could not be bridged even after the anomalies were taken into consideration in that event the court would not tamper with the result[222].

The way in which this rule was being applied seemed to be at par with the test of majority or numerical strength often with disastrous results.

Thus, in *Raila Odinga & another v Uhuru Kenyatta & another 2017* the Court clarified this and held that if the above test was applied unilaterally then perhaps all past decisions from Courts would be upheld and adhered to. To add substance to this argument the Court first recognized that in the Kenyan Elections the collation and tallying of votes had a prescribed electronic system for doing so. One of the fourth democratic institutions assigned with the task of those duties argued that during the tallying process the system failed hence the process was done manually contrary to the provisions of the Elections Act.

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[220] ACEProject.org 'The Electoral Knowledge Network' seen on 11.3.2023.

[221] Mariam Azu (2015) supra p.152

[222] *Kizza Besigye v Yoweri Kaguta Museveni* majority judgment by Odoki CJ Presidential Election Petition of No.1 of 2006, *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & others* in Zambia Law Report (2005) adapted from Kaaba SAIPAR Case Review (2018) at p.11.12,13.

Noting this failing the Court was persuaded to assess the entire process including gaining access to the server of the IEBC. Though the Commission declined to grant access to the server the sample from the Court appointed IT experts revealed glaring anomalies.

In ruling on the failing to adhere to a Court Order for the server to be availed to the IT experts the Court had this to say:

"*It is trite law that failure to comply with a lawful demand…let alone a Specific Court Order leaves the Court with no option but to draw an adverse inference against the party refusing to comply*"[223]

The Courts laid down how the interrogation of an election process could be done, the reading of the evidence, the actions of all actors and above all not to be swayed from upholding the will of a people as prescribed in a constitution.

In dismissing the assertion that some International Election Observers had certified the 2017 elections credible the Court stated '*hardly any of the observers interrogated the process beyond counting and tallying at the poll stations…their interim report cannot be used to authenticate transmission and eventual declaration of results'.*

The integrity test therefore draws upon the entire electoral process It considers all alleged abrogation of Constitutional duties if any and matched against the evidence before it a court can then draw a conclusion as to the validity and authenticity of the election results as announced.

Having reached a conclusion following the three-pronged test the Court is duty bound to pronounce itself on the election.

4.9.3.4 Relief and Declaration Test

The final test in a Presidential Petition is a declaration of the results. This test it is argued in this paper that when petitioners make their case and courts apply the above tests, it is incumbent upon the Court to either uphold the results, nullify it, or even disqualify a party to the proceedings if need be. This

[223] *Odinga 2017* supra para. 280

position assists all parties in finding closure to the election. Where this final step is not adhered to it leaves parties to the petition aggrieved.

For instance, on September 5, 2016, the Constitutional Court of Zambia in the matter of *Hakainde Hichilema & another v Edgar Chagwa Lungu & another* [224] dismissed the petitioners on the grounds that the time allocated within which to hear the petition had lapsed. The issue dividing the court was whether the provisions that the petition hearing could not exceed fourteen (14) days meant the petition should be dismissed.

The point of contention when the matter was dismissed was what then had the Court to say about the petitioned election results? Indeed, it would be moot to suggest that because of the dismissal it followed the election was upheld. However, the petitioners at the end of the sessions felt that the silence on the results meant the matter had not been closed and now no one knew who the winner of that election was.

To lay emphasis on this argument similarly, in *Raila Odinga & another v Uhuru Kenyatta & another in 2017* the Courts could easily have concluded their ruling once they had applied the Presidential election test rules relayed above and left it to the parties to decide whether the election result was upheld or vitiated. Yet court orders, judgments or rulings are not and should not be delivered to leave parties guessing or arriving at their own conclusions. This not only negates what constitutes justice but also would reinforce the notion that Judges abrogate their duties during Presidential Petitions.

Therefore, on 1 September 2017 the Supreme Court delivered a majority decision and observed that there were substantial failures in the transmission of the results from the designated polling stations to the tallying centers and to the national tallying centre which affected the integrity of the election. They further clarified that the IEBC did not comply with the Constitutional and statutory provisions on conducting credible elections and that their violations went contrary to Article 81(e) of the

[224] *Hakainde Sammy Hichilema & Godfrey Chilekwa Mwamba v Edgar Chagwa Lungu & Inonge Wina & Others* (2016) Constitutional Court 0031

Constitution which required free, fair, transparent, verifiable, accountable, accurate, secure, efficient, and credible elections.

To this end they cited Article 86(a) and that the failings led to the election not being simple, accurate, verifiable nor transparent because the Returning Officer had failed in upholding Section 39(1)(i) of the Elections Act and reasoned that he did not have sufficient evidence to support his declaration as it was based on incomplete and unverified results[225].

Once they had made their observations the Court rendered a ruling.

4.9.3.5 The Decision

Thus, on 20 September 2017, in a ruling of over four hundred and five (405) paragraphs, the Supreme Court of Kenya by a majority of four (4) out of six (6) judges ruled amongst other orders that:

"*A declaration is hereby issued that the Presidential Election held on 8 August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void" (Odinga v. Kenyatta 2017)*[226].

The Court once it nullified the Presidential elections under Article 140(2)(a) of the Constitution, went further to order the IEBC to conduct fresh Presidential elections within 60 days in accordance with Article140(3)(a) of the Constitution and applicable laws. The Court also censored and ordered the IEBC to comply with the Constitutional principles and statutory provisions in conducting the fresh elections[227].

In satisfying the relief and declaration test the Court not only pronounced itself on the election but prescribed how the election was to be administered and set a time frame within which the fresh elections were to be held. They pointed out which law they had relied upon to make the majority ruling as such even though certain parties were aggrieved by the decision the election results were nullified.

[225] Freyus Tamura Kimko de "Kenya Supreme Court Nullifies Presidential Elections" in The New York Times (1 September 2017)

[226] Presidential Petition No1. of 2017 Odinga v. Kenyatta op.cit

[227] "Kenyan Supreme Court nullifies Kenyatta's re-election orders new vote." France 24 1 September 2017

4.10 Chapter Summary

This Chapter has been a synthesis of some of the key aspects that arose from the ruling in *Raila Odinga and & v Uhuru Kenyatta* and another in 2017. This was the first general election under the Constitution of Kenya adopted in 2010. As such the petition stood out because it was filed under a 'new' Constitution and legal regime and the first test for the reconfigured Supreme Court. The Constitution of Kenya[228] provides that Presidential Election Petitions are a preserve of the Supreme Court meaning that no other court has power to hear such a dispute as it is exclusive to the Supreme Court and does not originate by way of appeal.

Indeed, it has been established that despite the court having a limited time within which to hear and pronounce itself on a Presidential Election Petition namely fourteen (14) days[229], the Court succeeded in addressing both the preliminary applications and the substantive matters of the petition and the law and rendered a ruling.

The other aspects established is that unlike previous rulings in presidential petitions this was the first matter to be heard and determined on its merits. It was a clear departure from past rulings that restricted themselves to legal technicalities and procedures. The length and depth that the Judges went to understand the petition before them was commendable to state the least and as established they despite not branding them tests the research does establish that a legal framework was developed inorder for the court to render its judgment.

It would be remiss also not to mention that the quality of the judgment was enriched by the admission of amicus curiae where for instance the Attorney General and the Law Society of Kenya were tasked to research on specific issues that further enabled the Court to determine the matter. Through the process the Court developed the law, clarified the law and at times guided on the correct interpretation of the law.

[228] Constitution of Kenya 2010 Article 163 (3)
[229] Constitution of Kenya Article 140(1) and (2)

Lastly, by taking much time to question the actions of the Members of the Independent Electoral Commission and Boundaries of Kenya the Judges went out of their way to interrogate, establish, and uphold the will of the Kenyan People as envisaged by the new Constitution. They in essence underscored the position adapted by Winston Churchill when he said:

"At the bottom of all tributes paid to democracy is the little man, walking into a little booth with a little pencil making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussions can possibly diminish the overwhelming importance of the point"[230].

The Judges looked to determine if the elections had been simple, free, and fair to the extent that the vote cast reflected the will of the people and those by law assigned with the duty to manage the law had executed those duties and the findings suggested otherwise.

The next chapter examines the case in Malawi to determine how and why the Judges in 2019 elected to rule as they did.

[230] Justice Krishna VR Iyer 'The Indian System of Elections Some Reflections" in Law & Life Universal Printing Co. Pvt p.125 1979

CHAPTER FIVE

CONTENTS AND RESULTS:

THE RULING IN THE MALAWIAN SUPREME COURT:

CHAKWERA V MUTHARIKA 2019[231] DECISION

5.0 Introduction

The Malawi Presidential petition unlike that of Kenya and some jurisdictions has an inbuilt appellate process[232]. A petitioner not satisfied with the results of a presidential election first petitions the High Court and then if still not satisfied or indeed if the respondent is not satisfied with the ruling, they are free to petition the Supreme Court which then constitutes as the Appellate Court. The Chief Justice who is the first recipient of a petition plays a crucial role in establishing if indeed the matters before him warrant a constitutional hearing and if he is so convicted then he authorizes the High Court to constitute and convene as a Constitutional Court of first instance in a presidential election petition and indeed any other constitutional question.

Although the Constitution has provisioned for the place and role of the Judiciary, it was soon after the 2004 Constitution that a clear outline on how to petition was evolved. The Statute of interest in this thesis is Section 9(2)(3) of the Courts Act[233] which provides as follows:

"*Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution shall be heard and disposed of by or before not less than three judges*."

Further that,

"*The Chief Justice shall certify that a proceeding is one which comes within the ambit of subsection (2) and the certification by the Chief Justice shall be conclusive evidence of that fact*".

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[231] *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera* Constitutional Appeal No.1 of 2020 MSCA

[232] Mwiza Jo Nkhata 'The High Court of Malawi as a Constitutional Court: Constitutional Adjudication the Malawi Way' in Law Democracy and Development Vol 24 Cape Town 2020 Chapter 4.3

[233] Cap 3 :02 Court Act of the Laws of Malawi

On 21st May 2019, the people of Malawi went to the polls in the Presidential, Parliamentary and Local Government elections held in that Country[234]. On 27 May 2019, the Electoral Commission declared Professor Arthur Peter Mutharika duly elected President of the Republic of Malawi. Thus, two losing candidates filed petitions before the high court alleging irregularities.

5.1 ***Saulos Klaus Chilima & Lazarus McCarthy Chakwera v Arthur Peter Mutharika & Electoral Commission 2019[235]***

Per the provisions of the law cited above, the petitioners filed their matter in the High Court. It must be stated that given the very nature of the matter Chilima and Chakwera both petitioned the High Court alleging similar or near similar grievances. The petitions were then referred to the Chief Justice for him to issue a certificate or otherwise to enable the Court to convene as a Constitutional Court of first hearing. It was upon receipt of the petitions that the Chief Justice deemed it legally prudent to consolidate the petitions and have the matter heard as one. Once done the petition was cause listed for hearing. Five (5) High Court Judges were empaneled to sit and hear the petition after their consolidation and certification as a constitutional dispute [236].

The petition before the High court was for it to determine three constitutional issues:

(a) Whether the Electoral Commission Breached its duties under Section 76 and 77[237] of the Constitution[xxiii]

(b) Whether the Electoral Commission's conduct infringed the petitioners' rights under Section 40[238] of the Constitution[xxiv]

(c) *Whether the Electoral Commission committed infractions in the conduct of the elections tantamount to a dereliction of its duties under Section* 76[239].

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[234] *Saulous Klaus Chilima & Lazarus McCarthy Chakwera v Prof. Arthur Peter Mutharika & Electoral Commission* Constitutional Reference No. 1 of 2019 High Court of Malawi.
[235] *Chilima v Chakwera* 2019 opcit
[236] Section 9 of the Malawi Courts Act
[237] The 2014 Constitution of Malawi
[238] The 2014 Constitution of Malawi
[239] The 2014 Constitution of Malawi

The petitioners also requested the High Court to determine some substantive and procedural issues as follows:

(a) The burden and standard of proof applicable in electoral petitions in Malawi

(b) To substantively determine whether the Elections were marred with irregularities including the alleged use of white-out fluid on tally sheets, fake tally sheets and duplicate result sheets.

Upon considering the evidence before it the Constitutional Court on 3 February 2020[240] nullified the May 2019 presidential election and ordered a fresh election. Aggrieved by this ruling, the respondents in the matter proceeded to appeal the judgment.

5.2 *Peter Mutharika & Another v Saulous Chilima & another 2020*[241]

On appeal the Supreme Court affirmed[xxv] the High Court ruling though its reasoning was not always in synch with that from the lower court it did in effect clarify the effect of some of the decisions taken by the lower court. It must also be noted that despite being passed as a unanimous decision one of the judges[242] sitting to hear the matter read a separate opinion.

To progress this thesis further it is now proposed to look in some detail at what made this a landmark decision and, in the process, develop a preposition on how the courts ruled as they did. It must from the outset be stated that the judgments both upon petition and appeal mainly brought out the following six main issues that add to the jurisprudence on African Electoral Law as follows:

(a) *Who bears the Burden of Proof in Electoral Disputes*?

(b) What is the Standard of Proof in Electoral Matters?

(c) What is the meaning of a Majority of the Electorate?

(d) What is the effect of nullification and transitional matters?

(e) What is the Status of the Presidency upon Declaration of Undue Return in an Election

(f) Concurrent Holding of Presidential and Parliamentary Elections

[240] *Chilima & another v Mutharika & another* Constitutional Reference No. 1 of 2019
[241] *Andrew Peter Mutharika & Electoral Commission v Saulous Klaus Chilima & Lazarus McCarthy Chakwera* MSCA Constitutional Appeal No.1 2020
[242] Justice of Appeal Twea SC (Twea JA) 2020

5.2.1 Who bears The Burden of Proof in Electoral Disputes?

In most common law jurisdictions, it is generally stated that he who avers must prove the allegations. Indeed, there is a distinction between the standard of proof required in a criminal matter as opposed to a civil matter. Notwithstanding that, the general principle recited above remains[243]. Before the High Court of Malawi, the burden of proof in electoral disputes was an issue the court was called to pronounce itself upon.

The parties in the matter made legal capital on the clarity between legal burden and evidential burden. The petitioners namely in *Chilima & another v Chakwera & another 2019* argued that they were only required to raise a *prima facie* case and that at that stage the evidential burden then shifted to the respondents.

The Court in pronouncing itself on this matter referred to a plethora of case law that had previously stated who bore the burden of proof in an electoral dispute. However, of importance were three main cases wherein the Courts in Malawi had pronounced themselves on the issue as follows.

5.2.1.1 *Gondwe & Another v Gotani-Nyahara 2005*[244]

In this matter the Appellants appealed against a decision of a court to vitiate an election result for Mazimba West Constituency. The Petitioner had made several claims as to why the election results in those polls should be nullified. The lower court accepted some of the allegations as proven but rejected some of the allegations. In pronouncing itself on the who bears the burden of proof the court stated.

"*The burden would be on the respondent as petitioner to establish that the alleged irregularity affected the election results, especially, as happened in this case the irregularity could not be blamed on the 1st Appellant. That burden has not been discharged by the respondent*."

Thus, the Court in *Peter Mutharika v Saulous Chilima 2019* referred to the above ruling to guide on the issue of 'the burden of proof' or indeed who bears the said burden. It observed,

[243] Crump Ben "What is the burden of proof and why is it important?" Trial Lawyer of Justice Washington D.C
[244] *Loveness Gondwe & Another v Catherine Gotani-Nyahara 2005 MLR 121 SCA p.131*

"*From the above statement, the Court recognized that primarily the burden of proof lies on the petitioners. However, the Court indicated that to discharge the burden the petitioner must give evidence that will 'establish' the petition. No mention was made about whether the burden of proof then shifts"*[245].

They developed this line of thought further by referring to another case.

5.2.1.2 *Electoral Commission & another v Mkandawire 2011*[246]

In this matter the petitioner alleged amongst other grievances that he had observed irregularities with some of the voters having cast their ballots despite not being registered. Thus, the Court was drawn into guiding on who bore the burden of proof and when such burden shifted. In citing this matter as an authority, the Court in *Peter Mutharika v Saulous Chilima* stated,

"*It was up to the respondent to establish what is wrong with voting at a polling station where the person voting is not registered. The respondent would probably allege, for example, that the persons did not have registration certificates or proper voter transfer and proceed to prove the allegation. The respondent appears to take the position that it is for the 1st appellant to prove on a balance of probabilities that the 300 persons had proper voter transfers. That is not the way you prove your case in court. You do not just allege, and the other party then be compelled to prove its innocence"*[247].

The Court thus established that one cannot merely make allegations in its petition and then expect the respondents to begin to defend themselves and produce evidence in defence despite not being clear on what the petitioner is aggrieved about. They then referred to a third case.

5.2.1.3 Bentley *Namasasu v Ulemu Masungama & another 2016*[248]In reference to this matter the court noted that this case affirmed the position that the petitioner bares the initial burden of proof and

[245] *Peter Mutharika v Saulous Chilima 2019 supra at paragraph 9*
[246] The Electoral Commission & Another v Mkandawire 2011 MLR 47
[247] Peter Mutharika v Saulous Chilima 2019 supra p.37 para.20
[248] Bentley Namasasu v Ulemu Msungama & The Electoral Commission MSCA Civil Appeal No.8 of 2016 (unreported)

that the moment the petitioner gives ample evidence in support of their grievance the burden of proof then shifts to the respondents to give an answer in their defence.

The issue of who bears the burden of proof in an electoral petition appears to have been settled by the Supreme Court providing four main guidelines.

(a) *That the common law position of he who alleges must aver is the correct position at law*

(b) *That an electoral clause is akin to a civil cause*

(c) *That this test meets international standards as verified by case law cited from other jurisdictions*[249] *by the Court*

(d) *That the legal burden lies with the petitioner and that the evidential burden shifts when the petition is 'established'*

Indeed, scholars alike argue that the attempts, albeit ingenious, by the petitioners to argue that theirs was only to raise allegations and then compel the respondents to defend those assertions was a far-fetched position at law.

Nkhata (2021)[250] and others argued that.

"Under the common law norms of civil procedure applicable in Malawi, the respondents' arguments were strange both in theory and practice. In theory the argument proposed a departure from established rules that require the opposing party to respond to the evidence adduced once the petitioner meets the requisite threshold of proof"[251].

It is a breakthrough in the legal electoral landscape for the court to have guided on who bore the burden of proof which was mistakenly presumed to be carte blanche for who one who petitions to make several allegations founded or otherwise and then expect the respondent to defend themselves. This was a tall order but a bridge the Court had to cross. It was categorical in its ruling that the

[249] Amama Mbabazi v Yoweri Kaguta Museveni & two others, Presidential Petition No.1 206, UGSC.3, Chamisa v Mnangagwa & Twenty-four others CCZ42/18, Abubakar v Yar' Adua 2009 All F. wlr PT 457, Raila Amolo Odinga & Another v IEBC & Two others Presidential Petition No.1 of 2017 eKLR see on p.35 para 10 in Peter Mutharika v Saulous Chilima opcit.

[250] Mwiza Jo Nkhata, Anganile Willie Mwenifumbo and Alfred Majamanda '*The nullification of the 2019 Presidential Election in Malawi, A Judicial Coup d 'Etat? DOI: 10.20940/jae/2021/v20 i2a4*

[251] Nkhata and others opcit p.61.

threshold required before the legal burden shifted to the evidential burden for the other party to respond was for the petitioner to provide evidence of their assertation.

Not seeking to be deterred in the application, the Court was then tasked to pronounce itself on the legal threshold required to meet the standard of proof.

5.2.2 What is the standard of proof in an electoral matter?

When reading over this matter one may be tempted to wonder what the motivation was to dwell on issues such as the burden and the standard of proof. This arose as result of a lacuna in the laws of Malawi regarding these two aspects.

Thus, when addressing this issue, one would have expected the Court to recite and off the shelf response or point to an in-depth judicial review of the law or statute if any. To the contrary the genesis is that it is as acknowledged by scholars that The Courts (High Court) (Civil Procedure Rules) of 2017 and the Electoral Law in Malawi do not address the standard of proof in electoral disputes[252]. Hence much elaborate litigation was invested in this argument.

In advancing their position in the High Court the petitioners argued that the standard of proof ought to be on a balance of probabilities. The respondents on their apart argued that the standard of proof was the intermediate level that falls below the criminal standard of proof namely beyond all reasonable doubt[253].

The legal dilemma faced by the parties was the fact that whereas presidential election petitions are civil actions and the standard of proof to meet would no doubt be 'on a balance of probabilities' the question was what standard of proof the Court would require in a petition that in the view of the petitioners was tainted with criminality such as fraud if raised in an albeit civil matter.

The Court perhaps sympathetic to the legal dilemma posed and, in an attempt, to provide guidance came up with an interesting position and ruled as follows,

[252] Nkhata ibid p.62
[253] *Saulous Chilima v Peter Mutharika 2019* supra

"*To demand a higher standard of proof…would have a chilling effect on the capacity of citizens, especially the vulnerable groups in society…to ably vindicate their democratic rights*'[254].

It is the position of this paper that an electoral process tainted with criminality would first warrant that criminality to be proven and there after fall off the radar of a civil election petition and attract sanction under the penal code. It was, however, not an avenue explored by the Judges in their ruling. It is for this reason that it is worth noting that by the Court adopting the position it did, it appeared to have misapplied the notion of 'access to justice' as the common denominator in the equation of an election. Now though not faulting the Court entirely, if as prepositioned under the burden of proof above, this is a civil matter. Would it not therefore be subjected to the balance of probabilities standard? The issue that begs an answer is can both civil and criminal allegations be subjected to one standard of proof.

Not surprisingly dissatisfied with the ruling on the question on the standard of proof, this too become a ground for appeal in the Supreme Court of Malawi.

It is now proposed to shift away from the High Court ruling convening as a Constitutional Court and consider matters on appeal. It is stated that in Law an Appeal does not rehear or reopen a matter it simply deals with those issue brought before it and based on the grievances arising from the ruling. Thus in 2020, almost a year since the matter was filed, the Supreme Court heard the appeal.

5.2.2.1 *Peter Mutharika & another v Saulous Chilima & another 2020*[255]

Once the Supreme Court was seized with the matter it began by acknowledging the lack of a clear authority on the standard of proof in a civil matter tainted with criminal allegations albeit in a presidential election petition. This was important because the appeal would have been difficult to proceed with if these 'preliminary' issues were not laid to rest. Thus, the Court observed and argued that,

[254] *Saulous Chilima v Peter Mutharika* 2019 HC. Paragraph 1052
[255] *Peter Mutharika & another v Saulous Chilima & another 2020* MSCA supra

"*We need to bear in mind elections touch on peoples' human rights as Section 40 of the Constitution serves to demonstrate. Setting the standard too high for a petitioner to substantiate his grievance in such a matter might well impinge on the average Malawian's right to access justice when his constitutionally based rights have been violated*"[256].

To this end, the court on what is the standard of proof guided as follows and may have set out case law that may going forward be subject of further clarity in future electoral petitions. The following is the position regarding the Standard of Proof in an Election Petition in Malawi:

(1) In electoral law the courts will not prosecute a criminal case within a civil case.

(2) In the scheme of the law, it is not designed to saddle the petitioner with the onerous burden of proof per the Constitution.

(3) Once the burden of proof shifts owing to the powers, functions, and duties of the Commission, it ought to discharge the burden in rebuttal.

It must be argued here that the position adopted by the Supreme Court leaves the door wide open to questions. Since this is considered a landmark ruling, one would have expected a much more elaborate position on what the standard of proof ought to be in presidential election petitions that flirts between civil and criminal conduct. This position is fortified by Nkhata (2021) who argues that,

"*The failure by both courts to motivate their findings is patent. One would have expected both courts to at least analyze the case law that supports the position of subjecting allegations of criminality to a balance of probabilities standards*"[257].

For the purposes of this thesis the fact that Nkhata and others could adduce or indeed support their arguments with case law makes a good case for who to admit as *amicus curiae* in presidential petitions. As it stands the Law on standard of proof in electoral petitions in Malawi appears to be fortified purely on the need for 'access to justice'. Indeed, this is cardinal, however it appears the jury

[256] *Peter Mutharika v Saulos Chilima ibid p. 37,38 &39*
[257] Nkhata & others opcit p.63

is still out on what is the acceptable standard of proof when a matter is tainted with criminality if at all.

Notwithstanding, once the thorny issue of burden and standard had been responded to the Court then turned to the substantive issues of the matter. One of the most intriguing arguments in the lower Court was on what the law ought to be when it refers to the majority. The term was not one introduced by the petitioners nor indeed the respondents, the term existed in the Constitution of Malawi. The Section of the Constitution before the Courts was Section 80(2) which touches on the election of a President in Malawi. It read in part that the President of Malawi shall be elected *by a majority of the electorate through direct, universal suffrage*.

The question raised by the petitioners was that the law on what the term majority meant had long been settled and therefore to seek to introduce a new meaning was contrary to good law. Thus, the next paragraphs delve into the arguments.

5.2.3 What is the meaning of majority of the electorate Section 80(2)[258]

The provisions of the Malawian Constitution, specifically Section 80 (2), was a position of contention and perhaps one of the most controversial. In the main this section provides how the president of Malawi shall be elected. It speaks of a majority; it speaks of the process, and it speaks of the electorate. Indeed, it is interesting to note that the focus was on the word majority. Historically since 1994 all presidents had been elected based on the first past-the-post system. This required a candidate to simply get more votes than any other candidate. In 2000 this position was augmented in the Supreme Court of Malawi, and it is worth going over that matter as it was precedence.

5.2.3.1 Chakuamba & others v Attorney General & others 2000[259]

The brief facts in this case were that the petitioners were presidential candidates in an election held in June 1999. Upon the announcement of the results the petitioners appealed the results and challenged the conduct of the election on several grounds. On legal consensus the parties agreed to

[258] The Constitution of Malawi 2014 Section 80(2)
[259] *Gwanda Chakuamba & others v Attorney General & others* MSCA Civil Appeal No.20 of 2000

have one preliminary issue resolved first. This was in the meaning of Section 80(2) of the Constitution. The issue was drafted as follows:

"That the Commission unlawfully declared to have been elected President a candidate who obtained a majority of the votes at poll instead of a majority of the Electorate."

The petitioners prayed for an order to nullify the Presidential election.

The Supreme Court in that matter after considering all the evidence then ruled as follows,

"*It is our judgement that the meaning to be ascribed to Section 80(2) as presently stated and the context in which the word is used in other parts of the Constitution and having regard to the general purpose of the Constitution can only be that the word 'majority' means a 'number greater than' a number achieved by any other candidate…*"[260].

It is legally intriguing that prior to the ruling the Court itself recognized and recorded the fact that the ruling they were about to make would be binding in future presidential elections. It must thus be stated that the respondents in the High Court must have envisaged that the matter of Section 80(2) was a non-legal issue and any attempts to seek an interpretation any different from previous case law would not happen. Yet it did and this was one of the grounds of appeal.

5.2.3.2 The High Court Departing from Precedence [261]

In *Saulous Chilima & another v Peter Mutharika & another 2019* the High sitting as a Constitutional Court pronounced itself on three main issues that would lead to appeal.

(1) They ruled that the first appellant did not obtain a true majority of the votes and was not therefore duly elected the winner in the Presidential Elections on the basis that the first appellant did not obtain 50% + 1 of the votes.

(2) They gave a fresh or new interpretation to the meaning of the word *majority* as perceived by their understanding of Section 80(2) of the Constitution different from what the Supreme Court had ruled in an earlier matter.

[260] *Chakuamba v Attorney General ibid*
[261] *Saulos Chilima v Peter Mutharika 2019 supra-HC of Malawi*

(3) They in effect departed from the ruling in *Chakuamba v Attorney General 2000* despite case law being precedent more so that this departure was from a ruling of a Superior Court.

One can only envisage how the respondents in the matter must have been horrified at the very prospect that at common law a court lower in rank could challenge the ruling of a superior court and follow a different legal path. For the legal mind indeed, precedent is an important aspect of the law as it influences decisions of a court, allows for legal order, and generally enables matters that are on all fours to have a uniform ruling. However, one needs to ask what the value of following a particular precedent is. It is in other words a delicate path to follow, and a court ought to think carefully as to the repercussions of dogmatically following precedence. Whilst not advocating for legal anarchy, it is argued that in a presidential election petition once a court finds itself at a crossroad it should delve into the history, the legal tradition and practice that guided the ruling before endorsing or diverting from a settled position. This was reinforced when the matter came up on appeal.

5.2.3.3 Justification for departing from Precedence*[262]*

The Superior Court began by conceding that Section 80(2) touched on the very heart of Malawi's political and electoral systems. For the purposes of this thesis, it is a reserved position that the meaning or the effect of Section 80(2) in the main made this a landmark decision. There are three main issues that the court dealt with that made this case historic.

(1) The reasoning on the meaning of section 80(2)

(2) Factors that caused the Court not to follow precedence set in *Gwanda Chakuamba & Others v Attorney General & Others 2000*

(3) The drawing on Malawian Parliamentary Practice as a basis for defining what the drafters of the Constitution meant on the term majority.

Lewis (2021)[263] a candid scholar of precedent asks a cardinal question. He first begins by stating that the practice of following precedent is not something to be taken for granted. He advocates that courts

[262] *Peter Mutharika v Saulos Chilima* 2000 MSCA P.94 supra
[263] Lewis Sebastian 'Precedent and the Rule of Law' in Oxford Journal of Legal Studies Vol.41, No 4 (2021) pp.873-898

before adhering to precedence must do so after giving it much thought and paying attention as to whether doing so adds value to their own rights. He concludes by stating that the principles of judicial transparency and good governance strongly militate in favour of courts having to give reasons why they will not follow relevant precedent. Indeed, the Court in Malawi sought to explain their departure. It is noted that the Courts in Malawi are strong advocates for precedence, and this was emphasized in 2000 where the courts stated as follows:

"*This is a matter of great constitutional importance for this country because the interpretation we give to the section will determine the correct procedure that must be followed in future presidential elections…our concern here is to strictly the interpretation of the law…we shall also consider the principles of interpretation which have been cited to us from Benion Statutory Interpretation 3rd Edition including some local and foreign cases*"[264].

Thus, it is imperative to read over how the Court in Malawi dealt with this legal predicament.

5.2.3.4 Dealing with the predicament of legal precedence.

When the lower court elected to depart from precedence its reasoning was that even though they recognized that they had no power to overrule a superior ruling in taking a different path they unlike the previous ruling were not taking the decision *per incuriam*[265].

At law various studies have been undertaken on the *Doctrine of Per Incuriam*[266].The literal meaning of the doctrine when translated is 'through lack of care'. It refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgement which would have been relevant. The significance of a judgment having been decided *per incuriam* is that it does not then have to be followed as precedence by a lower court. In essence a lower court is free to depart from an earlier judgment of a superior court where it can be proven that the earlier judgment was decided *per incuriam*[267].

[264] *Gwanda Chakuamba & others v Attorney General & others* 2000 supra
[265] *Peter Mutharika v Saulous Chilima 2000* MSCA supra p.95
[266] Thapliyal Arvind 'India: The Doctrine of Per Incuriam' S&A Law Offices 05 August 2016
[267] Lord Godard CJ in *Huddersfield Police Authority v Watson* (1947) 2 All ER 193

Therefore, to justify their decision the Lower Court argued that had the Superior Court had the vantage of looking at the definition of what the term 'majority' means in Black Law Dictionary rather than the Oxford English Dictionary that they relied on, they would have deduced that the term means not first-past-the post but rather '50% plus 1"[268].In support of the thought pattern of the High Court the Appellate court then introduced an added dimension on why *Gwanda Chakuamba v Attorney General 2000* was not followed as precedence stating that in their view the shift from '*first-past- the post'* to '*50% plus1'*, added legitimacy to the political leadership level of President[269].

It is the position of this thesis that the 'war of the dictionaries' as a basis for departure from precedence is one worth discussing. What the Court established is that despite the constitution having a political and historical character its interpretation may at times be based on consulting a legal text albeit in this case a specialized dictionary. Alluding to any other interpretation can lead to a ruling being questioned or avoided altogether. The challenge of this position is that when the Malawi High Court sat as a Constitutional Court, and once granted certification to hear a Presidential Petition did it then assume unfettered judicial discretion. This could not be further from the truth and indeed the Supreme Court sought to shed some more light on the matter as follows.

The Supreme Court in justifying the position adopted by the High Court went further to clarify the distinction between the ruling in *Gwanda Chakuamba v Attorney General 2000* and the matter before it. It argued that on the face of it *Mutharika v Chilima 2020* and *Gwanda v Attorney General 2000* appeared to be on all fours. Both where petitions began in a Lower Court after satisfying the legal process and both were appealed to a higher court. Both included the matter of the interpretation of Section 80(2) of the Constitution, however, the point of departure in their view, was that in the *2019*

[268] Mwiza Jo Nkhata & Others supra p.67
[269] *Peter Mutharika v Saulous Chilima 2020* p.102

case the matter before the court was on what 'electorate' meant in Section 80(2) as opposed to the term 'votes at the poll'[270].

Thus, to pronounce themselves on the term 'majority' the Court introduced the provisions of The Parliamentary Presidential Elections Act Section 96(5) which they said were different from the question that lay before the Court in *Gwanda Chakuamba v Attorney General 2000.* To this end the Malawi Supreme Court erased the notion that the Lower Court had neglected or refused to follow precedence or indeed assumed unfettered judicial discretion. This thought pattern was developed further when it was established that majority must mean the same across all elections. They then referred to Parliamentary Practice in Malawi.

5.2.3.5 Drawing on Malawian Parliamentary Practice as a basis for defining what the drafters of the Constitution meant on the term majority.

It is argued by this paper that the law as established in 2000[271] by the Courts of Malawi was that Malawi had a plurality system that was required to elect a President in Malawi. The system, though seemingly effective, had not been without its challenges. Apologists such as Nkhata (2017)[272] argued that the discontentment with the system revolved around its propriety in addressing issues of representation and legitimacy especially when the winning candidate got less than 50% of the vote. This usually led to executive legislative deadlock and a general difficulty in governing.

The above having been stated one of the most ingenious approaches by the Courts was to draw inspiration from parliamentary practice in Malawi to make it applicable to the election of a president, which requires all 'majority' decisions to be made using a 50% + 1 formula unless a special majority is expressly stipulated. Having made observations of the practices of the Malawian Parliament, the court concluded that majority as envisaged in the Constitution should apply when it comes to the election of a President.

[270] *Peter Mutharika v Saulos Chilima 2020 ibid* p.106
[271] *Gwanda Chakuamba v Attorney General* 2000 supra
[272] Nkhata Mwiza Jo "Presidential *Election in Malawi: Towards a Majoritarian Electoral System'* IDEA 30 May 2017

Indeed, what is evident is that parliamentary procedure refers to its business such as voting on bills, whilst Section 80(2) of the Constitution refers to the election of President. The Court in essence by establishing that for the purposes of attaining the majority in a presidential election it be subjected to the parliamentary requirements of 50% + 1 meant a subtle shift from first past the post. It was one can argue an unstated attempt at addressing the concerns of the Malawians with regards the legitimacy of a president who polled more votes than another candidate, but those votes were very few, yet one could still be declared President. The representative nature of such a President would perpetually be in question.

There have been various critiques to the above ruling largely that having a majoritarian system rather than a plurality system does not of itself make one system more democratic than the other (Nkhata 2021)[273]. Further that a majority system has two shades either through at least a two round voting and or alternative/preferential system, this is largely a safety valve that safeguards against continuous voting in the event no candidate attains the required 50% +1 in the first polls. Hence the criticism is that when the requirement for a 50+1 is the preferred democratic leg, in the event of a re-run and no one still met the threshold as the Constitution was silent what would then happen. This perhaps was overlooked by the court, or it was avoiding delving into a legislative procedure. In effect by 'changing' the existing electoral process the Court was compelling the legislature to reform the process.

Against the above the Court then ruled as follows,

"It is observed that even if the meaning of the word 'majority' is taken as was said in Chakuamba case, there is no provision for a situation where two top Presidential contenders get the same number of votes at the polls-a distinct possibility in the current situation…there is real possibility that the highest vote is as little as 10% of the vote at the polls. It would be absurd to imagine that 10% of the

[273] Nkhata Mwiza & Others 2021 supra p.69

polls…would be said to be majority vote…we depart form the meaning assigned to the word by the case of Chakuamba & Others v Attorney General & Others(supra)"[274].

In seeking to define the word 'majority' and its effect of a Presidential election result the Malawi Supreme Court charted new waters. It not only overturned a previous ruling by wading around the legal waters and suggesting that the question before the Court in Gwanda Chakuamba v Attorney General 2000 was significantly different from the one before the courts in Saulous Chilima & Another v Peter Mutharika & another 2019 and as such precedence had not been avoided.

It is the position of this paper that the Court by its very ruling succeeded in having a position where there were two 'settled' rulings on the meaning of 'majority' with the plausible probability that Parties to a petition could then cherry pick which 'majority' they wished the Court to apply. To do this a petitioner need to ask a different question when they appear before the courts.

To depart from this issue one can, argue that two positions arise from this ruling the first was the law is now settled on when the per incuriam rule can apply to avoid a previous ruling and second the law is settled on the meaning of 'majority' in the laws of Malawi which is 50% plus 1 when it relates to the declaration of a candidate as a winner in a Presidential Election. What remains unclear is what happens when no one gets the required majority.

Having stated the above the electorate were then guided on what would happen because of the nullification of an election result.

5.2.4 What is the effect of nullification of an election and transitional matters?

The Court in addressing the parties to the petition made four distinctive orders:

(1) The period in which to hold fresh elections.

(2) How to deal with the office of president upon a finding of an undue election

(3) The appropriate remedy for the successful petitioners

(4) Consequential Directions and Recommendations

[274] *Peter Mutharika & Another v Saulous Chilima & Another* MCSA 2020 supra p.106

It is now proposed to scrutinize in detail some of these orders.

5.2.4.1 The period in which to hold fresh elections.

It must be recalled that Presidential Election Petitions in Malawi commence in the High Court after the petition is referred to the Chief Justice who must satisfy himself that the issues raised warrant a hearing[275]. At that stage the matter becomes a '*certified constitutional referral',* and the Court constitutes. Therefor the main trial is held in the lower Court and unless appealed remains binding.

In the matter of *Saulous Chilima & another v Peter Mutharika & another 2019*[276] the High Court having made a ruling to nullify the presidential election results, it then proceeded to pronounce as follows,

"The Fresh elections herein shall be held within one hundred and fifty (150) days including Sundays, Saturdays and public holidays from the date hereof"[277].

What is of interest is that the 150 days were not anchored in any legal framework, but it would appear the Court exercised its discretion to arrive at such a time frame. It was therefore left to the appellate court in the matter of Peter Mutharika & another v Saulous Chilima & another in 2020[278] to attempt to add a legal dimension to the time frame in which to hold fresh elections.

In the main the Court recognized that the lower court used its discretion to arrive at the days for fresh elections to be held. It however opined that the Court should have advocated for a shorter period within which to hold the elections. It held that a prolonged delay in holding fresh Presidential elections was not only unjustified but undesirable as this flew in the face of democracy. It opined that the 'law' pursuant to section 100 of the Parliamentary and Presidential Elections Act, envisaged that a by-election shall be held in the shortest possible time after the occurrence of the event that necessitates it[279].

[275] Section 9(3) of The Courts Act Cap 3 2002 of The Laws of Malawi
[276] *Saulos Chilima & another v Peter Mutharika* High Court supra
[277] *Saulous Chilima & another v Peter Mutharika & another 2019* supra paragraph 1483 (c)
[278] *Peter Mutharika & another v Saulous Chilima & another* supra MSCA p.120
[279] *Peter Mutharika & another v Saulous Chilima & another 2020* MSCA opcit p.121

It is the position of this paper that the Court in this matter invented a time frame within which to hold fresh Presidential elections when an election had been nullified because originally that timeframe did not exist in the Law of Malawi. Indeed, it is recognized that generally, the Malawian Constitution (2014) addresses the filling of a vacuum created in the presidency[280] in specific circumstances yet, it does not address fully the process when an election is nullified. It would appear this is what prompted the Court to try and develop or invent a legal reason for ruling that the applicable time frame for a by-election ought to be within 60 days.

It to this effect it drew upon and referred to Section 63(2)(b) of the Constitution, yet that section upon scrutiny addresses a vacancy in the seat of a member of the National Assembly and provides that such a vacancy ought to be filled within 60 days or as expeditiously as possible[281], it does not refer to the Presidency. This appears to be the lacuna the court filled. However, one could flip the coin and argue that the Court was in effect suggesting that future Presidential fresh elections when warranted had to be held within 60 days or as expeditiously as possible. If that was the position, then the Judges were saying fresh Presidential elections should for the purposes of dealing with the matter expeditiously be equal to the time frame when there is a by-election for a seat in the National Assembly.

As noted supra despite the judgement having been rendered a majority decision Twea JA gave a different reasoning as to why he agreed with the majority decision. He pointed out that, when a court declared an undue return of a member of the National Assembly, Section 63(2) of the Constitution and Sections 32(2) and 44 of the Parliamentary and Presidential Elections Act of Malawi set out the procedure and the timeframe of 60 days for holding a by-election 'but there is no such procedure in respect of the presidency'[282].

It is the position of this paper that because of the above ruling four important legal positions emerged as follows.

[280] Malawian Constitution 2014 Section 81(4)
[281] The Constitution of Malawi 2014 Section 63(2)(b) opcit
[282] *Peter Mutharika & another v Saulous Chilima & another* supra MSCA per Twea JA page 32

First, not only did the Superior Court not set aside the 150 days as ruled by the lower Court but they in effect made law when they guided that future Presidential by-elections when arising from the nullification of results would have to be held within 60 days and that the 150 days would apply only in the matter of *Peter Mutharika & another v Saulous Chilima & another 2020*.

Second, the Courts in effect guided that the time frame applicable to holding a by-election in the National Assembly to fill a vacancy should be the time frame applied when holding a fresh Presidential election after an undue return. This appears to be cemented in their reliance on Section 85 of the Constitution of Malawi[283]. Section 85[284] refers to the time frame of 60 days within which to hold an election in the event of a vacancy in the office of both president and the first vice president. Indeed, it is plausible to argue as Nkhata (2021) did that 'the scenario in Section 85 where the offices of the president and first vice president become vacant, is peculiar and not of general application'[285]. Yet the converse to that position is that the Court in *Peter Mutharika & another v Saulos Chilima & another 2020* were dealing with a peculiar position and peculiar matter. It is also argued that, despite the law seemingly being silent on the applicable time frame the nearest referral point was some provision in the Constitution, mindful also of the recognition by the court to have the quickest possible timeframe within which to hold a fresh election.

Thirdly by adopting the above position the Courts clarified that a declaration of undue return or election, did in fact create a vacancy within the meaning of Section 85 and as such triggered the application of the timeframe of 60 days pursuant to that provision.

Lastly, given the illustrious industry the Court took to arrive at this ruling and given the position adopted by Twea JA it is evident that the Courts had identified a legislative lacuna vis-à-vis the timeframe within which to hold a fresh election presidential election when an election is nullified and the procedure to be followed.

[283] The Constitution of Malawi Section 85
[284] The Constitution of Malawi ibid
[285] Nkhata Jo Mwiza &Others Supra 2021 p.71

Once the court had settled the above issues the Court then had to guide on what would happen to the Office of President once an election had been nullified. The following paragraphs discuss what the Court said.

5.2.4.2 How to deal with the office of president upon a finding of an undue election.

On the 3rd of February 2020 the High Court of Malawi stated the following,

"For the avoidance of doubt, the declaration that we have made that the 1st Respondent was not duly elected during the 21st of May 2019 presidential elections, and therefore that the said elections were invalid, it is consequentially follows that the status in the presidency, including the status of office of the Vice President, reverts to what it was prior to the declaration of the presidential results on the 27th of May 2019. As per Section 100(5) of the PPEA, the declaration herein does not invalidate anything done by the President [or Vice President] before the declaration of invalidity herein"[286].

It is argued in this paper that the ruling above opened this case to several question and exclamation marks. The reason for this is largely because by ruling that the status quo prior to the election reverted was placing the petitioner and the respondent in an interesting position. It must be recalled that the President prior to the election was Peter Mutharika whilst the Vice President was Saulous Chilima. However, Chilima then formed his own party and merged with Lazarus Chakwera to run against Mutharika. It is small wonder that when the election results were petitioned, Chilima and Chakwera petitioned the Chief Justice separately. It was the Chief Justice who consolidated the two petitions into one after finding constitutional questions to be responded to[287].

Once the petition was heard and the election results nullified, the Court was alive to the fact that the office of President and Vice President could not be vacant thus various parts of the Constitution of Malawi were invoked. These are Section 85, 81(4) 83(1) as read together with Section 100 of the Presidential and Parliamentary Elections Act. It is thus proposed to look in some detail at how the Court invoked the law and its effect.

[286] *Saulous Chilima & another v Peter Mutharika & another* 2019 supra paragraph 1484(a) page 413.
[287] *Saulous Chilima & another v Peter Mutharika & another* 2019 supra paragraphs.17,18,19 p.20

5.2.4.2.1 Section 100 of the Presidential Parliamentary Election Act[288]

The Court drew inspiration from Statute and referred to Section 100 specifically subsection (b)(4) of the law which provides in part as follows:

'Pursuant to an order of the High Court under subsection 3(b) declaring that the member of the National Assembly or the President, as the case may be, was not duly elected, a fresh election for the member of National Assembly, or the Office of President, as the case maybe, shall be held in accordance with this Act'[289].

The Courts in relying on this section argued that an order under the above section when it creates a vacancy in the presidency and vice presidency should trigger the provisions of Section 85 of the Act. Now Section 85 has an interesting provision. This section requires that when a vacancy occurs in the Presidency, Cabinet should convene to elect an acting president and vice president from its members. Of course, the question that lingered in the mind of many is which Cabinet would convene to elect a President and the Vice from its membership? What would the elected persons do in the interim?

The Court once again anticipated this confusion and guided that even though they had relied on Section 85 inorder to define a timeframe within which to hold fresh elections the other provisions of Section 85 were superseded by the ruling in Peter Mutharika v Saulous Chilima to continue serving until their successors were sworn in. Requesting cabinet which had dissolved to reconvene to elect a president and his vice were a redundant exercise. Further fresh ground that the court broke with this ruling was that they in effect extended the presidency of the previous government. Indeed, one could argue that this might on the face of it appear irregular. Yet, it is a finding in this thesis that the 'extension' of the holding of presidency for the purposes of the elections was largely not to create a vacuum in the Presidency which would have led to either political upheaval and or extended anarchy.

[288] Presidential Parliamentary Act of Malawi Chapter 2.01 of The Laws of Malawi Section 100 as Amended by Act 18 of 2020

[289] PPEA ibid

It is worth recalling that much of the weight on why the election results could not be upheld was based on the actions of the Commission and not so much the actions of the Respondents. If the court had found Peter Mutharika as the culprit of the nullified elections and thus disqualified him from participating in fresh elections, it is clear the court would not have ruled for the status quo to revert, but they would probably have ordered that the last cabinet reconvene for the sole purpose of electing a president and his vice until the fresh elections were held. It must be stated that the Supreme Court by navigating Sections 81(4) and 83(1) of the constitution were on firm grounds as these sections mandate the president and his vice president to hold office until their successors are sworn in. In this case the incumbents were Mutharika and Chilima it would therefore would have created an absurdity to suggest cabinet convene to elect a president and a vice president.

The Court also scored a first because by their declaration of an undue election they clarified that this referred strictly to the results of the elections held in May 2019 and not on the mandate enclothed on President Peter Mutharika and Vice-President Saulous Chilima pursuant to Sections 81(4) and Sections 83(1) until they handed over power either to themselves or to their successors.

Lastly by enabling President Mutharika and Vice President Chilima to continue the court clarified that a return of undue election does not render the presidency void, but it becomes *voidable* to enable the presidency to revert to its position before the assailed elections. If this were not the case, then the presidency would have been vacated.

Having gone through most of the allegations and evidence before them the Court then rendered its decision.

5.3 The Decision

Thus, on 3 February 2020, in a decision of four hundred and eighteen pages (418) pages the Supreme Court of Appeal in Malawi unanimously ruled amongst other orders that:

"*The results declared by the 2nd Respondent cannot be trusted as a true reflection of the will of the voters as expressed through their votes duly cast during the 21st May 2019 elections…it is the Courts determination that there was undue return and undue election during the said elections…we hold that*

the 1st Respondent was not duly elected as President of the Republic of Malawi…in the result we hereby order the nullification of the said presidential elections…" (Mutharika v. Chilima 2020)[290]

5.4 Chapter Summary

That the Courts in Malawi made history is an understatement. The Court in effect by ruling as they did set the legal pedestal bar that much higher as a threshold for future elections. Niblett (2022) in recognizing the ruling on behalf of the Chatham house stated:

"This is a historic moment for democratic governance. The ruling by Malawi's constitutional court judges is not only crucial for rebuilding the confidence of Malawi's citizens in their institutions, but also for upholding standards of democracy more widely across the African continent"[291].

The chapter establishes that the courts in Malawi not only overturned previous case law but went further to create a new electoral order. The threshold to meet for one to ascend to the office of president has just been raised higher. It required much legal navigation and thought to craft and come up with a legally tenable position that bound all parties. In that they more than succeeded.

Every little Malawian as envisaged by Churchill supra, finally had a voice, vote, and a franchise for a free and fair opportunity to elect a person of choice. Being alive to the ethnic pattern of voting the first past-the post rule that had fermented the corridors of elections was douched and replaced thus fueling the legal belief that presidential election results going forward would take on a completely new format. Indeed, the icing on the cake was the way the Court ruled on what would happen to the Presidency once the election results had been set aside. No legal reengineering or postulating could have stated it otherwise.

In the chapter it is shown how the Court was able to guide on how allegations made without evidence would have a long day in the courts. This might appear a minute issue, however one need only recall

[290]MSCA Constitutional Appeal No.1 of 2020 Mutharika v. Chilima

[291] Niblett Robin Director of Chatham House 'Chatham House Prize: Malawi Judges win for Election Ruling' 26 Oct 2020

that in 2019 the people of Malawi had taken to the streets to protest the election results. One need only imagine the role wild and baseless allegations would play in reigniting or fueling the disorder.

Having stated the above and noted the various nuances faced by the courts it remains to consider the judgments in the context of legal doctrine. This is a crucial factor to this study as it grounds the hypothesis that the Judiciary in Kenya and Malawi made landmark decisions.

The next chapter considers this aspect of the thesis.

CHAPTER SIX

DISCUSSIONS:

THE TEST FOR A CASE QUALIFYING AS A LANDMARK RULING

6.0 Introduction

A Presidential election petition has consequences, the petition tests an electoral system, process, and results. It primarily explores whether a system has upheld or indeed failed to uphold the tenants of what is expected of a properly conducted election from the campaign period, the casting of ballots to the announcement of the results and this is regardless of the final ruling.

In *Raila Odinga & another v Uhuru Kenyatta & another 2017* and *Peter Mutharik & another v Saulous Chilima & another 2020* the resulting consequences were the ordering of fresh presidential elections. Indeed, this was a first and it is argued the rulings were so unique as to render them a landmark case. However, such an approach is a classical way of arriving at that conclusion. It is argued in this thesis that to conclude that these were indeed landmark rulings it is proposed to develop a framework against which to test the hypothesis before any conclusions that the two rulings were landmark rulings not simply because they both ordered that fresh elections be held but because they two matters should be tested against a standard required for them to qualify as landmark rulings.

This preposition was advanced earlier when the paper sought to justify the need to study the cases in some detail [292] it was proposed, that for a case to be considered a landmark ruling for the purposes of this study, it borrowed from statements of two Judges namely Honorable Kiefel and Honorable Karr who state as follows,

Kiefel recited,

'In our system of precedential law, judgments of the ultimate court may correct an error in past judgements; may develop and extend an aspect of the common law, thus taking it closer to a legal principle. They may identify the direction which the law is taking, ...and judgements have an

[292] Supra p.5

educative role in our system. They form the basis for texts which explain the law and for academic discussions." (Kiefel 2012)[293].

Kerr argues that when looking at a ruling,

"*You should look out for the method (or methods) of reasoning that the court offers to justify its decision. For example, courts may justify their decisions on grounds of public policy…the idea here is that courts believe that the legal rule it adopts is a good rule because it will lead to better results than any other rule. Courts may also justify their decisions based on the courts understanding of the narrow function of the judiciary…other courts will rely on morality, fairness, or notions of justice to justify their decisions." (Kerr 2005)[294].*

It is submitted in this thesis that the preceding five chapters were developed using the preposition that Kerr advances above. The chapter summaries have elaborated on the methods and the reasoning the courts advanced for their rulings. This approach, even though it is acceptable and adopted by many researchers, is said to limit thought patterns, and may simply applaud or critique a ruling without delving into a matter further.

Cross (1997)[295] for instance in his work argues that it is quite common for legal and political researchers to study *the law* in a ruling but not *the legal precedence* being set. Scholars like him argue that a landmark ruling is one that sets a standard and creates a new law. In laying out the importance of legal precedence as a test in a Presidential election petition the reasons given by various scholars resonant and the question one must ask is whether the two judgments rose to the occasion and met the test, or the standard expected of a landmark ruling.

[293] Hon. Justice Susan Kiefel AC High Court of Australia, 'Reasons of judgment: Objects and Observations' Speech delivered at the Sir Harry Gibbs Law Dinner at Emmanuel College, University of Queensland 18 May 2012, p.2 emphasis added.

[294] Prof Kerr S. Orin 'How to read a judicial opinion: A guide for New Law Students 'George Washington University, Law School Washington D.C August 2005 p.4

[295] Cross B. Frank, Political Science, and the New Legal Realism: An Unfortunate Case of Interdisciplinary Ignorance. 92 NW UL REV. 251 1997

Tiller & another (2005)[296] develop this further and consider that landmark rulings develop legal doctrine and provided it arises from a ruling of a superior court it becomes the law. Their work in effect points out the hollowness of subjecting a ruling to the traditional or classical analysis approach which goes only to pointing out the errors of the judgment but being selectively blind to other issues such as the economic and political aspects of the matter.

A landmark ruling for the purposes of this thesis is a court case that is studied because it has historical and legal significance. It is argued that those cases considered significant are those that have had a lasting effect on the application of a certain law often concerning individual rights and liberties[297]. When Superior Courts render a ruling, they assume three distinct roles, first they may in the process of rendering their ruling make a new law, second, they may set precedence that ought to be followed by lower courts or third they may depart from previous or earlier rulings and explain why. It is argued therefore that for a case to qualify as a landmark ruling it must exhibit one if not all three roles.

Tiller and Cross (2005)[298] developed 'theoretical and empirical considerations of analyzing the role of legal doctrine'. It is the argument of this thesis that a landmark ruling must be tested against some theoretical and empirical considerations for it to pass or fail the test of a landmark ruling. For the purposes of this study, it is an adaptation and merger of some aspects from Kiefel that are now employed to analyze the two cases. It is simply called 'The Kiefel Model.' The Model is set against the guide that Justice Kiefel gave on how a matter ought to be read and what this thesis set out to do was to break down her position and convert it into a model it is that model that is discussed in the proceeding paragraphs.

6.1 Developing and utilizing the Kiefel Model as a test for Landmark Rulings

The model developed and proposed by this thesis is largely based on three questions as follows:

[296] Tiller Emerson & Cross Frank B 'What is Legal Doctrine?' Northwestern University School of Law Public Law and Legal Theory Papers 2005 paper 41

[297] The Judicial Learning Centre 'Why study landmark cases' seen on 1/29/2024 JLC website.

[298] Till & Cross ibid p.13

(a) Has the ruling corrected an error in past judgments?

(b) Has the Court developed and/or expanded an aspect(s) of a Legal Principle?

(c) *Has the Court Ruling formed the basis for legal and academic discussions*?

It is now proposed to apply these three questions of this model to determine if the two rulings are indeed landmark rulings. The model is a three-test model namely.

(i) Correcting an error in past Judgements Test.

(ii) Developing and or expanding an aspect of a Legal Principle Test

(iii)Forming the basis for Legal and Academic Discussions Test.

6.1.1. Correcting an error in past Judgements Test.

In a work written by Yude (2021)[299] he speaks to the subject of *judicial error* which is useful to expand the argument in this paper. He pointed out that there were three judicial errors namely,

(1) Clerical Error

(2) Legal Error

(3) Matters of Law

This distinction is important largely because the remedy for each error varies depending on which 'error' is before the court. Yude makes the distinctions as follows,

"Clerical errors encompass the indisputable or incontrovertible mistakes that have been made; these can include but are not limited to computation errors or other matters where both parties agree. These errors can be corrected by the court on its own initiative or when called to the attention of the court by either party".

Errors of the law or mixed errors of law and fact pertain to situations where the court either misinterprets legal precedents in the former or misapplied the precedents to the facts in the latter."

[299] Yudes P James "Correcting Judicial Error Easy as 1,2,3" Springfield New Jersey Feb 19, 2021

Factual errors are the most common type of Judicial Error. They also happen to be the most difficult to correct. If the court made factual findings based on a motion…"

It is argued then in this paper that clerical errors and errors of law do not necessarily translate into a landmark decision. The errors referred to in the proposed test are those errors that arose after litigation and the court made a ruling. This distinction is important to clarify the fact that the standard for 'correcting a past error' is high.

It is now proposed to consider the two cases and seek to test the rulings against the first standard.

6.1.1.1. Did the ruling in Raila Odinga & another v Uhuru Kenyatta & another 2017 correct an error in past Judgments?

It is argued in this paper that when the election results were petitioned in Raila Odinga & another v Uhuru Kenyatta & another 2017 most protagonists must have resigned themselves to the proverbial 'here we go again'. Thus, it is argued, that on trial was the 'democracy', 'constitution' and 'judiciary' of Kenya. The challenge was in what some scholars have described as placing the 2010 Constitution on trial.

It should be recalled that the 2010 Constitution was enacted against a backdrop of extreme violence and a belief that petitioning elections was a mere academic exercise[300]. Since the enactment of the 2010 Constitution, it must be stated that Presidential Election Petitions occurred after every election[301]. It was hailed as a marked shift from the hitherto subjective often narrow approach to rulings in election petitions. As discussed early the court went to some length in going over the petition and was indeed a clear drift from past engagement from the Courts. This paper does not wish to suggest that the court corrected *errors of past judgments but rather an error in past judgments.*

[300] Ongoya Z Elisha and Willis E Otieno, A Handbook on Kenya Electoral Laws and System. Highlights of the Electoral Laws and System Established by and Under the Constitution of Kenya 2010 and Other Statutes (2010)

[301] Ochieng Gerald 'Adjudging a Presidential Petition: Lessons from *Raila Odinga & another v IEBC & 4 others 2018*.

The court was clearly more active in reading over the petition and the evidence submitted with the result that the ruling was grounded as the Constitution had empowered and enabled the Judiciary to be more assertive in their role of defending the rights of the Kenyans. It is argued that for the purposes of emerging as a landmark case the *Raila Odinga & another v Uhuru Kenyatta & another 2017* passed the first test because of the following reasons.

They met this standard by,

a) Delving not only into the *substance* of the case but the *technicalities* of the matter as well. For instance, this is discussed supra when they dealt with the question on the conduct of the Independent Electoral Boundaries Commission during the elections of 2017.
b) They defended the electorate '*rights to free and fair elections'*, by refusing to accept the often inept 'explanations of the Commissioners even when the Commission neglected, omitted, and avoided to surrender the electoral data base for scrutiny.
c) The ruling helped uphold the concept of *democracy and constitutionalism* as envisaged in the 2010 Constitution which had not been the case before.

This standard is nowhere best stated then in the ruling itself where it was held,

"*Where an election is not conducted in accordance with the Constitution and the written Law, then that election is invalidated notwithstanding the fact that the result may not be affected''*[302].

Ezeh (2022) a researcher argued that '*the ruling was an absolutely radical intervention…but also justifiable based on a plausible reading of the applicable constitutional and statutory frameworks… the decision reverberated beyond Kenya's borders and what was most admired about the decision was the courts emphasis on the need to conceptualize elections as a process not just a one-day event but to assess, evaluate the quality of an electoral contest we need to look at the process leading up to our voting day*'[303].

[302] *Raila Odinga & another v IEBC & 4 others 2017* supra para. 171
[303] Ahmed H Ali 'Presidential Election Challenges and Legitimacy of the Cout in Kenya' in Colombia Journal of Transnational Law Nov 21, 2022

Indeed, it can only be stated that the *conceptualization of elections as a process and not just a day's event* enabled the Court to depart from the past and establish a new process to use when dealing with a Presidential Election Petition.

It is proposed now to turn to the other matter heard in the Courts of Malawi and examine if they met this first standard.

6.1.1.2. Did the ruling in *Peter Mutharika and & v Saulous Chilima & another 2020 correct an error in past Judgments?*

When the High Court sitting as a Constitutional Court in Malawi nullified the election results the decision was appealed. One of the grounds of appeal was that the Court below '*never bore in mind the significance of the absence of a runoff election or second election provision in the Constitution or the Parliamentary and Presidential Elections Act in the event of 50% plus 1 vote not being at achieved at the first election'*[304].

In essence the ingenious argument that was advanced was that in jurisdictions that require a candidate to attain 50% plus 1 of the votes cast to be declared a winner there are provisions of what happens when at the first polls no one attains 50% + 1. It was their considered view then that this absence translated in to only one conclusion that the legislature in Malawi envisioned that the winner was anyone who attained more votes than then other candidates even if it be by one vote.

It is submitted that until the 2020 ruling the electoral system in Malawi was that a candidate declared winner only needed to be the first past the post regardless of the number of votes one attained. This position was settled in an earlier case of *Gwanda Chakuamba & others v Electoral Commission 2000*[305]. However, in making their ruling the courts in essence departed from this electoral system and created a new system which hitherto did not exist in the Malawian Electoral system.

[304] *Peter Mutharika & another v Saulos Chilima & another* supra para.20 p.98

[305] *Gwanda Chakuamba & others v Electoral* Commission supra MSCA Appeal No.20 of 2000

Their decision to proceed on this path appears to have been driven by the Courts realization and recognition of the persisting Malawi's political dynamics especially the ethnic and regional voting patterns since 1994[306] which it is argued was a complete shift from the courts approach in the past when they dealt with Presidential Petitions. In the past ethnicity and or the existing external factors were not taken on board when making a ruling.

Further, it must be recalled that there were two previous instances when the Court had been called upon to determine and deal with the meaning of the term *majority*. The first was the in the matter of the *Attorney General v MCP 1997*[307]. This case dealt with the meaning of 'majority' in the context of determining what constituted a parliamentary quorum. The second was *the* matter of *Gwanda Chakuamba & Others v Electoral Commission 2000*. The court gave two different rulings in that in the former they stated that a quorum meant two thirds of the majority whilst in the latter case they argued that majority meant first past the post. In effect the Court was faced with contradictory definitions. To arrive at their final decision, the Courts avoided referring to the former case, opting to focus on the latter case to develop their own definition. They then decided that the term majority ought to mean the same thing throughout statute and that it must pass the test of the new electoral regime that they had created, namely the 50% plus one.

In conclusion then it is argued that the ruling was a landmark decision based on the following reasons,

a) It created a new electoral system that did not previously exist, and, in the process, they set aside the first past the post rule.
b) It took in consideration the voting patterns in Malawi and concluded that the patterns were irregular to the extent that they distorted the meaning of true representation and that there were undemocratic.

[306] Nkhata Mwiza Jo & others supra p.66
[307] *Attorney General v Malawi Congress Party Appeal No.22 of 1996 MSCA*

c) They distinguished the earlier case law on what constituted the term 'majority' for the purposes of declaring a candidate winner as they argued the question in 2000 before the court was not the same as the question in 2019.

d) They prescribed for the term *majority* to carry and bear the same meaning across the constitution unless specifically stated.

e) Perhaps the significance of this landmark decision is that the Court went beyond what it had done in its' past rulings and its impact is best summed up by the reaction of one of the Candidates who upon hearing the verdict stated,

"*I am so happy. I could dance if I had dancing legs and I think our Supreme Court justices have just continued to uphold the bar that was raised by the Constitutional Court, and we believe that Malawi will set an example not just in the African continent and across the world that if you seek justice, you can find it"*[308]

It is argued therefore that a landmark decision as demonstrated in the ruling is one that affects the electorate, the candidates, the political landscape, and the legal foundation of the law. It at times as was the case in *Peter Mutharika & another v Saulos Chilima & another 2020* takes the Court to exercise unique discretion in arriving at a just and fair ruling. It is the position of this paper that the matter met the first standard of the model.

It is now proposed to consider the second test.

6.1.2. Developing and or expanding an aspect of a Legal Principle Test

To begin with, the law is a system of legal rules and principles. Scholars like Marijan (2015) argue that the distinction between them is a relative one. He argues that the basic characteristics of legal principles are that they "*are value measures directing the definition of legal rules as to their contents,*

[308] Lameck Mashina "Malawi Top Court upholds Presidential Election Re-run" VOA May 2020 per Lazarus Chakwera Presidential Candidate.

the understating of the rules, and the manner of their application. Legal principles aim at a goal, have weight, and define the scope of the meaning within which the legal rules move"[309].

Borrowing from the above it is argued in this thesis that a landmark ruling must be one that sets out a legal principle even if it be to clarify an existing principle or creating a fresh principle at law. It is argued that operationalization of legal principles is the ratio decidendi that causes the court to make a reasoned ruling. New cases such as the nullification of an election result can be solved by a 'new' principle either previously ignored and or not closely explored by the courts.

The paper now examines a little closer the proposed second test for a matter to qualify as a landmark ruling.

6.1.2.1. What legal principles if any were developed or expanded upon in the ruling

It has been discussed earlier that in the matter of Raila Odinga v Uhuru Kenyatta 2017 the most prominent legal principle set was that an election *was a process* and *not an event* such that it did not matter who won if *the process was tainted*. This they argued included the process of registration of voters, voting on election day, tallying, transmission, verification, and declaration of results[310]. It is argued that this was the most critical first legal principle that the court expanded upon. The Court in effect was stating that inorder to declare an election free and fair each event could be interrogated not in isolation but as part of the whole inorder to arrive at a ruling. A tainted event could lead to the nullification of the entire election.

In *Peter Mutharika v Saulous Chilima 2020* the Judges expanded on the legal principle of *stare decisis*. The courts did not shy away from recognizing the need for making a ruling when dealing with a similar matter, yet they went further to underscore the beginning of a legal adventure to depart from doctrine. This was crucial because had they opted to adhere to a past ruling perhaps the ruling would not have seen the light of day.

[309] Marijan Pavcink 'The Importance of Legal Principles for the Understanding of Legal Texts' in Archives for Philosophy of Law and Social Philosophy Vol.101. No.1 (2015) pp.52-59 JSTOR Collection

[310] Special series the Oxford Human Rights Hub https://ohrh.law.ox.ac.uk

It is argued therefore that the two cases under analysis both qualify and satisfy the second test of the proposed Kiefel Model. Ordinarily the two tests would be enough to endorse the preposition that the two were landmark rulings. However, such was the significance of those decisions that it is proposed to consider the third test.

6.1.3. Forming the basis for Legal and Academic Discussions Test.

Studying case law holds a central significance for legal practitioners, scholars and even the public as it provides a deeper understanding of the principles that underpin the legal system[311]. A matter that has through a ruling resolved historic debates or shaped the meaning of constitutional provisions will and should attract debate. A landmark ruling may reveal a new or fresh understanding of constitutional principles and provisions, it may even introduce new precedent, tests and standards that will guide the Court's reasoning for years to come. They may even mark substantial changes in the interpretation of the constitution.

It is argued therefore that it is the position of this paper that for scholars to be attracted to study a ruling they will be looking to understand the impact of a ruling on the life of citizens more when the matter before the courts is a presidential election petition.

Alder (2021) expands this point ever more vividly in his write up when he argues,

"*The exploration of landmark cases reveals much about the work of the judiciary…it informs our understanding of the Justices' various methods of constitutional interpretation, their conception of the role and the importance of precedents, how they conceive of the job of judging, their approach to the exercise of judicial power, their conception as well as their perspective on writing majority, concurring and dissenting opinions…*{The} *study of landmark opinions will provide insights into those judicial architects of the supreme law of the land"*[312].

[311] Adler David 'Why we study Landmark Judicial Decisions' in Wyoming Humanities November 27, 2021
[312] Adler David ib.id

Indeed, it cannot be in dispute that the rulings in *Raila Odinga & another v Uhuru Kenyatta & another 2017* and *Peter Mutharika & another v Saulos Chilima & another 2020* shook the foundations of African electoral law as then known or perceived. The Courts explored legal areas that had previously been glossed over. One need only revise, review and analyze the way these two Courts addressed the powers and duties bestowed on their Electoral Commissions, bodies which they recognized were entrusted with the running and managing of the elections. The two courts went to great lengths to hold them accountable for the mismanagement of their elections. The legal navigation of what previously had been said to be the settled law on the term 'majority. This one argues are areas open for research and a need to comprehend better what the Judges in effect did. Which lawyer would not want to understand the reasoning behind expanding further on the will of a people in an election and even on the burden or standard of proof in a presidential petition. Should there really be no questions raised on how much discretion a Court can exercise in its quest to render a just ruling that amplifies a free and fair election? This is the magnitude of what these courts achieved.

Marbury v Madison (1803)[313] is an old American case which involved an issue on whether Marbury qualified to be a Justice of the Peace. However, its real significance lay in the words of Judge Marshall when he argued,

"*The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party. In all other cases the supreme court shall have appellate jurisdiction".*

It became and remained a landmark case because in effect the Court not only made law, but it appeared to have substituted the Executive and relegated what had hitherto been assumed to be a power reserved for the Executive alone. It is for the purposes of this study argued that for the two matters to attain the accolade of a landmark ruling they must reach the levels and heights that cause scholars

[313] Anderson A Jeffery "John Marshalls Opinion in Marbury v Madisson does not Rely on a Misquotation of the Constitution: A Response to Rose" in Political Science and Politics Vol. 37 No. 2 April 2004 pp.199-202

alike to undertake detailed and profound study of the ruling. It is proposed now to turn and look at what transpired in terms of studying the rulings and explore whether the third test applies to the cases.

6.1.3.1. Did the two cases form the basis for Legal and Academic Discussions?

Ogetti[314] in his seminal work distinguished the ruling in the Kenya Presidential Election petition of 2013 from the ruling of 2017. He argued that the 2017 ruling was a better ruling because the courts used a *transformative approach* to render its rulings. In the earlier decision of 2013 the Court, he argued, accepted a reasoning that the question of a presidential election petition was more a political one than a legal one and the court was persuaded by that argument.

However, in 2017 the court rejected that argument, and stated the following:

"*The Constitution recognizes that all power resides in the people and that therefore an election should reflect the will of the people adhering to the principles in the Constitution. It concluded this point by saying that if the Constitution grants the Court powers to overturn an election it will do so in the appropriate situation. This is an example of transformative constitutional interpretation as the court was not sticking to interpretive fidelity rather it was committed to borrow Klare's word to transform the country's political institutions."*

He then expanded his argument using various decisions from the ruling to cement his arguments on the effect of Transformative Constitutional Interpretation all arising from the ruling of the Court.

Machira (2013)[315] in his article argues that in his view the Court ruling fails what he calls the Legal Test for five main reasons as follows,

(1) The Courts reliance on extremely backward Nigerian Authorities.

(2) A tolerance and uncritical acceptance of the IEBC's explanation over the irregularities identified.

(3) The improper reflection of the tallying of votes

[314] Ogetti Ombasa Arnold 'The Effect of Transformative Constitutional Interpretation in Kenya: An Analysis of Presidential Election Petition' Strathmore University unpublished p.15

[315] Machira Maina 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment must fail the Legal Test' in The East African April 20,2013

(4) The use of subsidiary legislation to limit the meaning of 'votes cast.'

(5) The taking of judicial notice of technology failures as opposed to holding the IEBC to account.

It is not the place of this thesis to begin to delve into all the issues that Machira raises, save to state that it is his ability to render commentary on the outcome in this matter that allows not only for a fresh reading of some of the court's decision but also allows for the legal mind to begin to reflect on the ruling. Therefore, this observation is critical because this, it is argued, is the basis for testing the third tenant of what makes this a landmark ruling. Indeed, throughout this thesis various scholars have been referenced to show the effect and impact the ruling had in the legal and academic circles. When the rulings from the Malawian Court were rendered much legal commentary and academic resulted from the ruling. It will be recalled that the decision was in 2019 on appeal it was upheld, in 2020 and attracted many accolades and discernment. One of the works worth citing was one done by Nkhata & others (2022)[316]. In analyzing the ruling, they considered three main aspects namely:

(i) The Courts treatment of the burden and standard of proof in electoral disputes

(ii) The interpretation of 'majority' to mean 50% + 1.

(iii) The effect of the nullification of the 2019 presidential election and consequential transitional issues

In their conclusion they stated that although the ruling was monumental and unprecedented the reasoning of the Judges in their view were not wholly persuasive. Their position does not remove the tag of a landmark ruling what it is does it is argued, is that it augments the fact that a landmark judgement will attract critics, it will be subjected to scrutiny, but the bottom line is that it remains a 'monumental and unprecedent' judgment that not only creates new law or clarifies old law, but it sets precedence.

Harding (2020) in his article when he contributed to the reason why he felt the ruling of the courts in Malawi was critical observed that:

[316] Nkhata Jo Mwiza & Others 'The Nullification of the 2019 Presidential Election in Malawi: A Judicial Coup d' Etat? 12 January 2022 Electoral Institute for Sustainable Democracy in Africa (EISA)

"*The judges could easily have played safe and succumbed to intimidation or self-censorship. They could have concluded that there was serious electoral fraud, but no proof that it changed the results, therefore no need for drastic measures. They could have given the electoral commission the benefit of doubt…instead Malawi's highest court seized this opportunity not only to shake up their country's political and electoral infrastructure but send a message of judicial strength and independence to other African countries still wrestling with the shift from one-party rule to true multi-party democracy"*[317].

Citing this writing is a stark reminder of how much progress was garnered by the decision in the matter. It revokes the dark days of research on why election petitions fail even in the face of grave allegations. Indeed, *Peter Mutharika & another v Saulous Chilima & another 2020* provokes much legal debate, research and resonates with the model for testing a landmark ruling.

6.2 Chapter Summary

The Chapter tests the model that has been advanced on how a matter can be examined to determine if it qualifies to be considered a landmark decision or not. It has been established that legal analysis can be either critical or resonate with the rulings. As such, the important thing is that the legal wheels of analysis ought to be set in motion to raise the matter to the level of a landmark ruling. Various strands of the proposed model will look at the matter to see if it breaks new ground, interrogates a legal principle or principles, corrects or ratifies an error of law. By rescuing the law from what may be called bad precedence the legal landmark is entrenched.

Indeed, whereas the Court did not state that they were guided by a model, they simply developed theories and tested them against the evidence before them. The theories were not in the minds of the Judges but had residence in Statute, Constitution, Case Law, and Legal Commentary. These two rulings modified African Electoral Law and its Jurisprudence. They are landmark ruling even when tested against a the Kiefel Model.

[317] Harding Andrew 'Malawi Election What the annulment means for democracy across Africa' Africa Correspondent 5 February 2020.

The next chapter looks at the conclusion and general recommendations of the thesis.

CHAPTER SEVEN

CONCLUSIONS

7.0 Introduction

Until 2017, African petitioners struggled to get an election result overturned. Numerous studies carried out painted a dismal picture of defective or flawed election results used to declare one candidate a winner over another. The routine inability for Courts failing to resolve disputes in a fair, transparent, and just manner seemed to be forever etched in the libraries of many Courts and filled space in various Law Reports. The scourge was arrested in 2017 and again in 2019. This research set off with a preposition that the two cases were indeed landmark rulings and went further to establish why the cases should be branded as such. To this end the research has proposed a legal framework that could be used to uphold or dispel the notion that a case is a landmark ruling at the very least in Presidential Election Petitions.

The purpose of this final chapter of the thesis is to harness what has been discussed in the preceding chapters. It does this by giving a summary of some of the key findings of the research and makes recommendations proportionate to the proposed threshold that a petitioner ought to meet to succeed in a presidential election petition and the threshold that a judgement ought to meet for it to be considered a landmark ruling.

7.1 Summary of Key Findings

This research began with a statement that the 2017 and 2019 rulings were landmark decisions. Yet it argued that most persons who subscribed to the statement did so for the more obvious reason that no Presidential Election Result had ever been nullified or overturned after a Judicial hearing. The departure from old research was a shift from the paradox of why presidential election results are upheld regardless of the evidence to a question as to why the two landmark decisions nullified the election results. This was done by teasing out a legal model that could be used to categorize cases such as these.

The thesis laid out five main key concepts that underpin the entire study. These are the concepts of constitution, presidential elections, dispute resolution, the judiciary, and the will of the people. A constitution in the African context is the supreme legal document that provides guidance on the entire event of the election of a president, the process of challenging the results and indeed the role of the judiciary during a petition.

At the cornerstone of the research were the discussions on elections in general as the democratically legitimate procedure for translating popular sovereignty into workable executive and legislative powers[318]. Indeed, even though there are many elections petitions this thesis focused was on the election for the office of president as this was the basis for the two landmark rulings.

The discussion of the concepts was followed by a historical overview on how constitutional reforms have continued to plague most African countries as the first constitutions were 'borrowed' or drafted for the Africans by their Colonial Masters hence making them lack the 'will' of a people. Attempts at reforms by the Africans themselves were often mere entrenchment of the people in power and sadly slumbered into 'one-party state' Constitutions. Indeed, after the fall of one-party states, the euphoria that accompanied the 1980s and 1990s appeared to have resolved very little as defective elections and violence soon reared their vices. As established by the research the response from the affected Countries was to either make piecemeal amendments or cosmetic amendments to their Constitutions or in the case of Malawi adopt a highly elitist approach to the drafting of the Constitution which resulted in a document highly unrepresentative of most of the electorate. In Kenya it took extreme and unprecedented violence for them to be brought to the table and after negotiations brokered by international observers agreed to draft a constitution that introduced new legislation in relation to the election of President and the petition of the election results.

[318] Lindberg Democracy and Elections in Africa 1-2

Chapter two further established that there are other actors in the election process. These include the judiciary, electoral commission, the candidates, and the voters and that each plays a role when an election result is petitioned. It was established that the Constitution in both Kenya and Malawi laid out the processes, procedures and role of the judiciary, election of the president, the elections, and the process during the petition of an election result.

The third chapter gave a historical overview of the presidential election petitions in Kenya and Malawi. It looked at the challenges associated with previous rulings that upheld election results. It showed that allegations of defective elections were common and yet despite election results being disputed the results were not nullified. It established that whereas there were great expectations from the electorate that the judiciary would assist in correcting the defective results, the record showed that they failed to protect the right of people to choose their leadership in a free and transparent manner.

It was established that the judiciary routinely upheld clearly defective elections without setting any threshold that a party had to meet for an election result to be nullified. It was as if the judiciary felt duty bound to resurrect moribund election results under the guise of what they deemed 'a matter of public policy'. There were three common traits of these rulings that were identified, first, was that the Courts relied on procedural technicalities as a reason not to nullify the results and at times the technicality was one that was minute to the expense of the merits of the petition. The other was that the Courts sought refuge behind the doctrine of substantive effect rule in the face of serious violations of Constitutional and Statutory provisions. This was either by wrongly applying the rule or indeed simply reciting the rule. The third was that the Courts committed themselves not to make an appropriate decision, much to the chagrin of many scholars.

The results of those decisions culminated in allegations of corruption within the judiciary and a lack of judicial independence. The public in some cases lost confidence in the entire process to such an extent that some of the disenchanted voters took to the streets and caused mayhem with the consequential loss of lives and damage to property.

The fourth chapter explored the ruling in *Raila Odinga & another v Uhuru Kenyatta & another 2017,* it considered what moved the Court in this matter to shift from the hither then norm of upholding presidential election results. It established that the Court took time to hear interlocutory applications as to who should be enjoined as a party to the matter notwithstanding the main petitioners. It was noted that the Court was by law constrained by time as they had to conclude the hearings within a specific timeframe and pronounce themselves on the matter. In the process of determining the applications the Court made some clarity on a long existing law on the matter of amicus curiae and clarified the enjoining of the Attorney General to proceedings. It raised issues as to the role of judges in a trial and it this was fortified by the quotation below,

*The Judges job at a civil trial, it is often said, is first to decide what happened then to identify the relevant rules or principles of law then to apply the law to the facts as he has found them (*Bingham 2000)[319].

It was clear from the outset that the Judiciary of Kenya in this matter were intent on exploring the issue of 'what happened?'. No more were they content to dwell on the technicalities of the matter as a basis for dismissal, but they were now delving into the substance of the law. The question of why presidential election results were upheld in Africa regardless of the evidence before the courts was not on the menu of the judges.

The Court in effect established new rules that touch on what is acceptable for an election to be credible. They did not state that this was the framework for a credible election but looked at the Constitutional provisions and accompanying Acts such as the Election Act which laid out the conduct expected of parties in an election. Of no lean measure was the aspect that an election is an event. They largely probed those charged with the affairs of an election and to a greater extent found them wanting and it was established this turned the election results on their head. Two crucial aspects arose from this examination, the first was that the parties to an election need not have done much wrong for an

[319] Bingham Tom The Business of Judging: Selected Essays and Speeches 1985-1999 Part 1 Oxford University Press: Oxford 2011 Paperback

election result to be overturned but the management of the election if done outside the law ceased to have credibility. Second, that the numerical figures garnered from a flawed process could not count for the supposed victor.

Chapter four further established that the courts in passing judgment were guided by their statutory duty to protect the rights of the voters in an election. This translates into what is commonly referred to as the will of the people. The will though not tangible can be determined through the omission or commissions of those entrusted with administering elections.

The fifth Chapter examined the case of Malawi, and it was established that this was a two-tier system in which a Presidential Election Petition commenced with an application to the Chief Justice for him to determine if a matter is one that merits litigation. Most of the respondents' arguments were anchored on the argument that there must be certainty at law such that matters previously settled could only be revisited exceptionally. They seemed intent on arguing that this was a crucial element in a legal system.

Yet as was established a dogmatic adherence to precedence would have been to render an injustice as was the case prior to 2017. The court in this matter took into consideration the ethnic voting patterns, the realization that some rules were simply applied arbitrary, led to a tentative artificial legal device at times created by the imperfect mind of man and his failure to comprehend legal facts. Thus, by applying a Judicial comb through the fallacy created not only by those who had originally recited what the law was or indeed by those responsible to conduct elections the Court ruled to set aside the results and, in the process, put to rest the hitherto unfocused positions on presidential election petitions.

Peter Mutharika & another v Saulous Chilima & another 2019 did not only expose the flaws of an election but also placed on a pedestal the approach to matters that affect the will of a people as enshrined in the Constitution. The chapter espouses the crucial role Judges play in shaping the law and their contribution to the jurisprudence on African Electoral Law. This position is best summed up by Goble (1934) who states as follows and is quoted:

"My analysis of the judicial process comes then to this, and little more; logic, history, custom, utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these shall be dominate in any case, must largely depend upon the comparative importance or value of the social interests that will be promoted or impaired…"[320].

By shifting away from embracing bad precedence the courts offered a new lease of life to elections in Malawi more so when those who participate in an election consider that the law has not been followed. The Chapter established that not only did the Court revisit one of its own decisions, albeit at times via legal construction, they also interpreted provisions from the Constitution and the Elections Act to cement most of their findings.

The Sixth Chapter explored the crucial question of why the two cases must be rendered landmark rulings aside simply stating that they were the first and second cases to nullify election results after a judicial hearing. To do this it was proposed to develop a model as a test against which to assess this hypothesis namely "the two are landmark ruling". It is evident that after reading over the judgments that the model could be used as a test of the standards expected when a judgement is passed in a presidential election petition. In effect the proposed model going forward it is suggested could be used to test other matters that may be adjudged to be landmark cases. The constitutional role of the courts in the test is for judges to without hindrance do what is just and not what is convenient. Indeed, it must be done within the law, and it is a crucial aspect of judges deciding when to step into the vacuum created by an ambiguous law and exercise discretion. Here the model is merely calling on scholars to consider not only the law of the constitution and subsidiary legislation as it is but also as to what the law of statute might be.

7.2 Key Recommendations

[320] Goble W. George "Law as a Science" in Indiana Law Journal: Vol 9 Iss 5, Article 2 p.313

From the foregoing discussions, this section pools together four recommendations deemed necessary to establish that these cases are indeed landmark rulings.

7.2.1 The Substantive Effect Rule

It has been established that the decisions in 2017 and 2019 both shifted from applying the substantive effective rule dogmatically. In effect it has been established that contrary to the mundane way of thinking and reciting some unseen public policy in the cases examined, the Judges took time to exercise their duties as provided for in their Constitutions and in the process came up with reasoned and binding decisions. This included enjoining identified experts to guide the Court on select aspects of the law to enrich the rulings.

It is recommended therefore that other Courts faced with a Presidential Election Petition should not shy away from interrogating and applying the substantive effect rule with equal or better measure if only for them to make a sound ruling. One of the ways to augment or enrich the rulings on the application of this rule should be for the Courts to extend an invitation or by enjoining people knowledgeable about the rule so that when the Court delivers its ruling it takes on board the input of these identified experts and this will result in a well-informed decision.

7.2.2 The Credibility of an Election

It has been shown that the nullification of an election result can be rendered even if the candidate who is a respondent may not have done anything that could be said to be against the law. However, to render an election credible even those whose duty it is to manage an election ought to do so within the confines of the law. A departure, deviation, omission, or commission will, after considering the relevant laws, result in the nullification of the results.

It is recommended therefore that in receiving evidence of malpractice or failure to adhere to the Constitution and the Electoral Laws, the Court needs to take into consideration the actions or non-actions of the Electoral Commissions. Their conduct or misconduct needs to be examined and their actions can result in an election being nullified. This is fortified by the fact that in both petitions the petitioners not only cited the opposing candidates but also the electoral commissions. It is argued that

their citation is not an accident of the court process but more that they too should be subject to the rigors of judicial review.

7.2.3 The Elections as a Process

Perhaps a keynote from the cases was that an election is a process and not an event. For had the elections been thought of as an event which appears to have been the position prior to 2017, these landmark rulings would not have come to pass.

It is recommended that Courts in rending a ruling ought to consider and determine if there are any grave flaws in the nomination process, campaign period, casting of ballots, tallying of votes and the declaration of the winner. In this way the notion of a democratic election will always be upheld.

7.2.4 The Will of the People

The task of the Court as it has been established is to try as much as possible to protect the wishes of those who cast their vote. Though they may not have the privilege of those who manage the elections, or those who seek to be elected the Constitution at the very least is crafted to provide assurance that the ballots cast and tallied is the vote that reflects the desire of the electorate. In essence the question to the Courts on what constitutes a free and fair election extends beyond the parties before it, but also to those waiting in the court room to hear the ruling.

It is therefore recommended that the Judiciary ought to play their role in ensuring that they protect the interests of the voters and indeed all parties whose only interest in an election may be to select their leaders. In essence they should not gloss over this duty which is bestowed upon them by the constitution.

7.3 Contribution to Practice

Although this research has predominantly applied legal analysis skills, it has integrated skills from other related disciplines. Within the field of law, the search has borrowed the approaches of public international law, human rights law, constitutional law, jurisprudence, and legal theory, as well as comparative administrative law. Apart from these legal approaches the research drew strength from other disciplines such as history, political science, and political philosophy. This dovetail approach

has enriched the thesis and led to it making findings and propose solutions that would benefit scholars from different disciplines.

While past research focused on disputed presidential elections in Africa and why they failed, this thesis is a shift and considers how two rulings shifted from the hitherto norm. This study has therefore cut a new branch of the law that has demonstrated that disputed elections in Africa can be resolved by the Courts of law. The findings show that these two rulings advance electoral democracy on the continent.

The research has not only brought out the strengths and opportunities of the Judiciary in making sound judgments but has proposed a radical model aptly named the '*Kiefel Model'* as a plausible lens through which to consider future cases and in the process establish or dispel whether a matter ought to be considered a landmark ruling. This model resonates with the immortal words of Bingham (2011) who stated:

"*Frequently when dealing with well-publicized cases likely to attract media attention, judges go out of their way to assert that they are in no way concerned with the policy merits of the decision under review, but only with its lawfulness*[321]."

It is hoped that this study will not only bring new ideas into scholarly discussions, but it will also stimulate further debate and research on how two Courts broke the barriers of the rigidity in declaring flawed elections upheld and the reasons they brought forth for their decisions. It is thus thought that further research could be undertaken in (i) Adding or subtracting to the proposed Kiefel Model for testing landmark cases (ii) A closer look at Judicial Independence in the face of the Executive during petitions (iii) Developing further the framework for a credible election (iv) The Discretion of Judges in a Presidential Election Petition and (v) The Electoral Commissions in Presidential Elections Petitions.

[321] Bingham Tom op cit p.233

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[i] "Measuring Democracy and Good Governance in Africa: A Critique of Assumptions and Methods" Victor A. Adetula in Africa Focus; Governance and the 21st Century) (The Economic Commission for Africa: African Governance Report (AGRII) since the foundational elections of the 1980s there have been numerous elections In Africa, but many countries have not had quality elections…on a balance the progress on political governance has been marginal 2009 at P.17

[ii] Daniel Mumbere 'Malawi's post-election aftermath in 10 highlights' in Africanews 8 July 2019 'Police on Sunday said nearly 70 people have been arrested after criminal acts including looting and stoning of cars and buildings during demonstrations.

[iii] Emphasis by the researcher

[iv] '1963,1964,1966,1969,1976,1982,1991,2000,2005,2008,2009' in History of Reform Constitutional Reform in Kenya

[v] Kibaki and Raila were under pressure to reach a solution following post-election clashes a preposition not provisioned for in the Constitution.

[vi] The sovereign here refers to the citizens.

[vii] Kenya witnessed similar cases after the general elections of 1992,1997,2013, 2017 and 2023.

[viii] The Election under the provisions of the Constitution at the time referred to the High Court when it sat to hear Election Matters

[ix] Matiba blamed Moi for his ill-health

[x] Moi had served in 1979-1983, 1983-1988 and 1988-1993.

[xixi] 'We fear that the foregoing provisions of the Constitution do not grant us jurisdiction to hear the respondents' intended appeal…no appeal lies to this court from the decision of the High Court.'

[xii] This is the predecessor to Section 48 of the 1983 Act

[xiii] The court gave an example in Hackney Case 2 OM&H where 2 out of 19 polling stations were closed all day and 5000 voters were unable to vote.

[xiv] To illustrate this the courts cited the Islington case 17 T.L.R 210 where 14 ballot papers were after 8pm

[xv] The court referred to the case of Gunn v Sharpe (1974) QB where the mistake in not stamping 102 ballot papers did affect the results.

[xvi] Extracted from Kaaba & Fombad 'Report of the Independent Review Commission on the General Elections in Kenya 27 December 2007

[xvii] Article 138(10) of the Constitution provides for who is the Returning Officer of the Presidential elections.
[xviii] There are fifteen principles in total.
[xix] Section 14 of the Election Act limits the publication and advertisement of achievements of the incumbent government during the election period in the print media, electronic media, or by way of banners or hoarding in public places.
[xx] This section makes it an offence for a person to use fraud or violence (including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage, or loss) to compel another on whether to vote register as a voter or become a candidate.'
[xxi] The Petitioners had alleged that the forms had no security features, had different layouts or patterns, had no serial numbers, bar codes, official stamps, and watermarks, anticopying among other concerns…many of the prescribed forms did not contain handover notes, bore no official stamp of the IEBC, were signed by unknown persons…see Odinga 2017 paragraph 338, paragraph 357 paragraph 347.
[xxii] Emphasis is the authors.
[xxiii] This Section provides for the powers and functions of the Electoral Commission of Malawi
[xxiv] This Section amongst other provisions guarantees the right to vote and to stand for election.
[xxv] It must be noted that when one cites *Chilima* first then it is the matter in the lower court and when *Mutharik*a is cited first on appeal.