

Report on Legal Issues from Kenya 2017 Presidential Election

This report reviews legal issues that emerged after the 2017 presidential elections in Kenya. The first section reviews the High Court's decision striking down most of the provisions of the Elections Act amendments passed by the National Assembly between the two presidential elections held in 2017. It examines the court's decision and its potential impact on future electoral reform. The second section reviews the decisions of the High Court, the Court of Appeal, and the Supreme Court regarding challenges to election results in races for governor, senator, county assembly, and women's representatives.

Executive Summary

The Election Laws Amendment Bill was passed on Oct. 11, 2017, despite strong opposition from civil society and opposition political parties. The bill introduced significant changes in the management of election results, declaration of results, and annulment of elections. The majority party in the National Assembly introduced the amendments for the stated purpose of addressing several deficiencies pointed out by the Supreme Court in its decision annulling the August 2017 presidential election (Odinga 2017) before the re-run election on Oct. 26. However, because the amendments became effective after the date of the re-run, the Supreme Court ruled that they could not be applied retroactively.

The amendments introduced several important changes, including changing the definition of "chairperson" in the Independent Electoral and Boundaries Commission (IEBC) Act 2011 to include a vice chairperson or member acting in the capacity of the appointed chairperson, reducing the quorum for IEBC meetings and decisions from five to three, deleting the requirement that presidential election results be electronically transmitted in the prescribed form from the polling station to the tallying centers, and adding a requirement that results be physically delivered to the constituency and national tally centers.

As passed, the legislation also amended Article 83 of the Elections Act to change the threshold for annulling elections in Kenya so that a court could only annul the results of an election if it was proven that there was both substantial non-compliance with the principles laid down in the constitution and the law, and that the non-compliance affected the result of the election.

In April 2018, the High Court struck down all of the amendments as unconstitutional, specifically citing articles 10, 81 and 86, which require that all elections be verifiable, transparent, and accountable. According to the court, these principles, which were introduced in the 2010 Constitution, were a reaction to past election irregularities in Kenya, and therefore any amendment to the election law or procedures had to be examined in light of compliance with the enunciated constitutional principles.

The High Court found that the amendments in the 2017 bill obviously reversed the gains the country had made through electoral reforms by violating the transparency, impartiality, neutrality, efficiency, accuracy, and accountability of elections. The court said that this was especially true when considering Kenya's history of elections and its challenges to maintain free and fair elections. The decision of the court and the fact that neither the petitioners nor the government appealed the decision means that any amendment to the electoral law or procedures that in any way lessens or reduces the transparency, verifiability, and/or accountability of elections must be declared unconstitutional. Adherence to this strict standard may complicate changes in electoral procedures going forward, as almost any change would need to be accomplished through a constitutional amendment.

Following the 2017 elections, several hundred election petitions were filed. By Aug. 10, 2018, 388 election petitions had been filed in relation to down-ballot races, including 35 challenging the results of elections for governor; 15 challenging the results of elections for senator; 12 challenging the results of elections for women representatives; and 98 challenging the results of elections to the National Assembly. In addition, there were 139 petitions challenging results in elections for members of county assemblies and 89 petitions pertaining to party top-up lists.

The Center monitored and assessed the adjudication of several electoral complaints through the High Court and the Court of Appeal and found that the courts interpreted and applied the Supreme Court's September 2017 ruling annulling the August 2017 election (Odinga 2017) in an inconsistent fashion. In the reviewed cases, the courts, looking at the exact same evidence, interpreted the ruling in diametrically opposing ways. Some courts interpreted the ruling to mean that any non-compliance with the constitutional requirements of transparent, verifiable, and accountable elections should result in annulment, while other courts reasoned that violations of non-compliance must be "substantial."

In its analysis, the Center found no agreement among the lower courts as to what constitutes a "substantial" versus a "non-substantial" violation of the principles in the constitution and the law so as to justify annulling an election on that basis alone. Some courts took a strict view that any violation of the principles in the constitution is sufficient to annul an election, while other courts considered other factors, including the margin of victory and whether or not the declared winner encouraged or managed the irregularities and who benefited from them.

Twenty-six of the lower-court cases went to the Supreme Court – nine involving elections for governor, 14 for member of the national assembly, one involving an election for senator, one involving an election for county woman representative, and one involving a nomination for a member of a County Assembly.¹ All of these appeals concerned cases where the High Court and the Court of Appeal reached different decisions on whether or not to annul an election based on Article 83 of the Elections Act.

The Carter Center analyzed several of the electoral challenges through their final adjudication by the Supreme Court and found that the court's decisions contradicted its own legal precedent. While the court consistently reaffirmed the standard established in the Odinga ruling – i.e., if the conduct of the election in question *substantially* violated the principles for transparency, verifiability, and accountability laid down in the constitution or in law, the election could, on that ground alone, be voided – very few rulings resulted in an annulment of an election, even when those elections were marred by seemingly clear violations of the constitution or law. Only three of the 299 cases resulted in a by-election.

While some had expressed concern that the Odinga ruling lowered the standard for the conduct of elections, these recent Supreme Court decisions suggest the opposite. In spite of the High Court's decision upholding the Odinga ruling and reaffirming that election results could be annulled without demonstrating an impact on the results, the Court's posture in these recent cases appears to align with international best practices in which a petitioner must prove that the irregularities or non-compliance with the law or constitution must also impact the electoral results.

¹ The total number of appeals filed was 29. Six of these are from three elections and were consolidated into three files.

Regrettably, the Supreme Court did not take this opportunity to offer a clear set of guidelines for settling similar electoral disputes in the future. While the electoral results and margin of victory appeared to weigh in the court's consideration in certain cases, its decisions did not offer a definition of a "substantial" vs. "non-substantial" violation or what factors a lower court should consider in making this determination. Likewise, the Supreme Court did not clarify what factors a lower court should consider when determining whether a "human" or "administrative" error is of such a magnitude that it can be said to have affected the results. The Carter Center encourages the court to consider and resolve these issues of law in future decisions.

I. Effect of *Katiba Institute, Africa Center for Open Governance and two others v. attorney general and National Assembly on Electoral Reform in Kenya*²

The petitioners in this case challenged the constitutionality of various sections of the Election Laws Amendment Bill 2017, which, despite strong objection from civil society and opposition political parties, was passed on Oct. 11, 2017. The legislation became effective on Nov. 2, 2017, without the assent of the president. The bill introduced significant changes in the management of election results, declaration of results, and annulment of elections. It was introduced by the majority party in the National Assembly for the stated purpose of addressing several deficiencies identified by the Supreme Court in its decision annulling the August 2017 presidential election (Odinga 2017).

The majority party's stated goal was to pass the bill before the Oct. 26 re-run election so that it would apply to that election. However, because the bill became effective after the date of the re-run, the Supreme Court ruled that it could not be applied retroactively. Neither the attorney general nor the National Assembly appealed the decision, thus its ruling on the constitutionality of the law is final.

In April 2018, several sections of the Election Laws Amendment Bill 2017 were declared unconstitutional by the High Court, including altering the definition of "chairperson" in the IEBC Act 2011; reducing the quorum for IEBC meetings and decisions from five to three; introducing amendments to the Elections Act 2011 that would lift the requirement that results of a presidential election be electronically transmitted in the prescribed form from the polling station to the tallying centers; and adding a requirement that results also be physically delivered to the constituency and national tally centers.

The bill was also intended to amend Article 83 of the Elections Act, raising the threshold test for annulling elections in Kenya. The bill required a court to prove that there was not only substantial non-compliance with the principles laid down in the constitution and the law, but also that the non-compliance affected the result of the election before it could annul the results of an election.

Sections 2 and 3 of the bill changed the definition of "chairperson" of the IEBC in the IEBC Act of 2011 from "the chairperson of the Commission appointed in accordance with Article 250(2) of the constitution" to "the Chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the Vice chairperson or a member of the Commission when discharging the functions of the chairperson."

² <http://kenyalaw.org/caselaw/cases/view/150723/>

The court ruled that there can only be one chairperson appointed in accordance with the constitution, and therefore attempting to redefine chairperson to include any other person is unconstitutional. Anyone else, whether in acting capacity, or not, cannot be defined as a chairperson. Effectively, this means that neither the vice-chair nor any other commission members can assume the duties of the chair laid out in the constitution when the chair is absent.

The court stated that “Where the Constitution provides the manner of appointment and goes further to state in a plain and unambiguous language that the qualification contained in the national legislation that one must meet to be appointed to a particular position, must be strictly followed. Parliament, as the legislative organ of state, has only one option – to obey and observe that constitutional decree. It cannot, and must not, in the exercise of its legislative authority, enact a law whose effect is to circumvent that constitutional command.”

In effect, the proposed amendment closed a gap in the IEBC Act to allow for the temporary replacement of the chairperson when they are unavailable or resign, allowing the IEBC to function when the chair is absent for whatever reason. However, because the term “chairperson” is defined in the constitution rather than in the Election Act or in a regulation, the only mechanism available to close the gap is through a constitutional amendment.

The bill intended to reduce the quorum for the conduct of IEBC business from five members to “at least half of the existing members of the commission provided that the quorum shall not be less than three members.” In addition, Section 4 amended Paragraph 7 of the Second Schedule to read that “unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of the members present and voting.” Prior to the amendment, any decision made by the IEBC had to be by concurrence of the majority of all members, not just those present.

The court reasoned that because the commission’s decisions have far-reaching consequences on democratic elections, which are the foundation of democracy and the rule of law, only decisions made by a majority of the commissioners should be valid. If the amendments were allowed to stand, it could result in decisions being made by a minority of two commissioners, encouraging divisions within the commission. Further, the court reasoned that such divisions were not beneficial for an independent constitutional body. As a result, the amendments could not stand when taking a holistic view of the constitution, as it was clear that they would have a negative and unconstitutional effect on the functioning of the commission.

The bill also amended the Elections Act 2011 by deleting the requirement that results of a presidential election be electronically transmitted in the “prescribed form” from the polling station to the constituency tallying center and to the national tally center. It also added the requirement that results also be physically delivered to the constituency and national tally centers.

The court ruled that the deletion of the requirement that the results be transmitted in the “prescribed form” was a problem, as it was an essential safeguard that guaranteed the constitutionally mandated verifiability, transparency, and accountability of election results transmitted from polling centers to the constituency and national tallying centers. The problem was compounded by the fact that results would also be physically delivered to the tallying centers in no particular prescribed form, which not only opens the results to possible adulteration and manipulation but also mischief. The court stated that the “amendment obviously reverses the

gains the country had made in electoral reforms including results transmitted in a particular form.”

Speaking about the gains brought by the electoral law reform, before its amendment, the Court of Appeal observed that “pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy, and accountability and... bearing in mind the history of elections in Kenya and the past issues with accuracy of results transmitted to the tallying centers,” the court was convinced that the reform of the Electoral Act was intended “to cure the mischief identified by the then chairperson” of the IEBC and other stakeholders during previous elections, and should not be amended.³

The mischief in question was identified by the court as “the spectacle of all 290 returning officers from each constituency and 47 county returning officers traveling to Nairobi by whatever means of transport, carrying in hard copy the presidential results, which they had announced at their respective constituency tallying centers. The other fear was that some returning officers would in the process tamper with the announced results.”

The Supreme Court, commenting on the same electoral reforms in Odinga 2017, observed, “...these changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the Constitution and the electoral jurisprudence that had been developed by the Courts.”

The High Court reasoned from the above decisions that the changes had been introduced in line with the dictates of the constitution and that a law allowing election officials once again to travel to the constituency and national tallying centers with hard copies of election results in no particular form was a regressive step away from the progress the country had made to guarantee free, fair, and transparent elections in conformity with the constitution. The court concluded that the amendment was clearly against the spirit of articles 10, 81, and 86 of the constitution and could not pass the constitutional test of validity.⁴

The proposed amendments to Article 39 of the Elections Act added the requirement that results be transmitted to the national tally center both electronically and physically. Further, the amendments provided that “where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.”

The court reasoned that this created potential challenges between physically transmitted results and those transmitted electronically. The court found that because the results stem from the same process, they should have been counted, tallied, and verified before being transmitted. Therefore, the results ought to be the same using either transmission method. According to the court, this

³ *Independent Electoral and Boundaries Commission & another v Maina Kiai & 5 others* [2017].

⁴ Article 10(2)(C) states that the national values and principles of governance are good governance, integrity, transparency, and accountability. Article 81 mandates that the electoral system comply with the principles of transparency and be administered in an impartial, neutral, efficient, accurate, and accountable manner. Article 86 mandates that the IEBC ensure that in all elections the system of voting be simple, accurate, verifiable, secure, accountable, and transparent; that votes cast be counted and tabulated, and results be announced promptly at each polling station; that results from each polling station be openly and accurately collated and promptly announced; and that appropriate structures and mechanisms to eliminate electoral malpractice be put in place, including the safekeeping of election materials.

created a conflict between the two modes of transmission of results and thus opened a window for tinkering with election results.

As the court stated, “the constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. The new sections are vague and ambiguous on which results are the accurate records of the election as tallied, verified, and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election, thus opening room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society.”

The amendments also guaranteed that any failure to transmit or publish the election results in an electronic format would not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying center, respectively. The court found that this would absolve presiding or returning officers who, without justification, failed to transmit or publish election results in an electronic format.

As the court stated, “The enactment of the amendment is clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in the Constitution. Free and fair election is the process towards electoral democracy and the highway to a democratic state. Rather than a move forward, section 39(1F) is a backward step in so far as the requirements for free and fair elections are concerned. Juxtaposed against Articles 10, 81 and 86 of the Constitution, it is obvious that section 39(1F) strikes at the heart of the principles of our electoral system in the Constitution, for saving results that have not been transmitted as required by law. This violates constitutional principles and is invalid.”

Finally, the amendments to Article 39 would have provided that “the Commission shall, to facilitate public information, establish mechanisms for the live streaming of results as announced at polling stations, and the results so streamed shall be for purposes of public information only, and shall not be the basis for a declaration by the Commission.”

The court concluded that if the intention of the legislature was that results streamed live from the primary source did not matter when it came to the final tally, there was no reason for the country to invest heavily in technology to have results streamed live from polling stations. Livestreaming of election results is one way of conforming to the constitutional principles of transparency and accountability. Citizens should be able to compare the live transmitted results with the final declared results to confirm the accuracy of the election results.

“When parliament enacts a law that significantly erodes the element of transparency and accountability in the electoral process, such a law overrides constitutional principles of the electoral system. Live streamed results play a significant role in determining the final results. Those results should be as much correct as those finally declared.”

The court interpreted the amendment as a mockery of the requirements for free, fair, and credible elections. The court found the amendment to have the effect of weakening rather than strengthening the electoral process and that any amendment that would have the effect of circumventing constitutional principles is unconstitutional.

The court's ruling says that any attempt at electoral reform must strictly comply with the principles laid out in articles 10, 81, and 86 of the constitution and the Supreme Court's ruling in the 2017 Odinga case. The principles articulated in the constitution were enacted as a consequence of issues that arose in prior elections. The 2017 Odinga case and this ruling make it clear that the courts will scrutinize any attempt to amend the election laws to protect the principles contained in articles 10, 81, and 86 of the 2010 Constitution.

The courts found that all elections must "strictly" comply with the principles in the constitution and any attempt by parliament to pass legislation that would lessen this strict compliance will result in the annulment of an election if the results, conducted under new electoral amendments, are challenged in court. At first reading, this seems to be an impossible standard for any election to meet, as all elections are flawed in some way. The focus of courts should not only be on compliance with the electoral process but also on how procedural irregularities affect the results, to the extent that the will of the people, as expressed through the ballots, cannot be determined.

Article 83 of the Election Act 2011 reads as follows before the proposed amendment:

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

As interpreted by the Supreme Court in the Odinga 2017 case, Article 83 allows courts to measure from either a qualitative or a quantitative perspective, meaning that elections in Kenya can be annulled either for non-compliance with the principles of the constitution and the law regardless of the actual results (the qualitative test) or because non-compliance with the law affected the results (the quantitative test).

As the court also noted, the threshold set in Article 83 is different from that in most countries, where best practices require that a petitioner prove that the election did not substantially comply with the principles of the law and the constitution, and also that the non-compliance led to a different result.

As stated by then Justice Maraga, "The result of an election is therefore affected when the violations of qualitative factors fundamentally undermine the integrity of the electoral process. That is to say, apart from the figures, the result of an election is affected when the irregularities and malpractices committed render the legitimacy or reliability on the numerical result and the sanctity of the ballot questionable."⁵

The amendments to Article 83 would have changed the threshold test for annulling elections in Kenya, requiring petitioners to prove that both the quantitative and qualitative conditions had been met. This would have meant that a court could only annul the results of an election if it was proven that there was substantial non-compliance with the principles laid down in the constitution and the law, and that the non-compliance affected the result of the election.

⁵ "Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective," by Justice David Maraga, p. 243, *Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI), 2016.

The High Court struck down the amendment to Article 83, ruling that it did not comply with the principles of the constitution. As the Supreme Court stated in Odinga 2017, "... our Elections Act, 2011 including Section 83 of the Act, had been harmonized with the Constitution. It was the Majority's opinion that for elections to be valid, they had to be conducted in strict compliance with the principles laid down in the Constitution, given that the retired Constitution did not contain any constitutional principles relating to elections. The majority emphasized that in interpreting Section 83, it had to pay due regard to the meaning and import of the envisaged constitutional principles."

The above language from the Odinga ruling highlights the Supreme Court's determination that Section 83 was in harmony with the 2010 Constitution and that it was different from the previous election laws. The amendment to Section 83, which removed the disjunctive word "or" and introduced the conjunctive word "and" together with the word "substantially," represents a departure from the constitutional requirements for free, fair, and transparent elections and a step back in electoral reforms.

The High Court concluded that:

"The amendment now means that for an election to be annulled there must not only be failure to comply with the Constitutional principles and election laws but also the failures must substantially affect the result of the election. The essence of this amendment is to allow violation of constitutional principles and election laws as long as they do not substantially affect the result. Any amendments must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process. It is my holding that there was no constitutional compulsion or rational in amending Section 83 of the Act to remove the disjunctive word 'or' and introduce the conjunctive word 'and' so that only where there are failures in complying with the constitution and election laws, and they substantially affected the results should an election be annulled. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections."

The ruling by the High Court and its reading of the Supreme Court decision in the Odinga 2017 case holds that any attempt to amend Article 83 to make it conjunctive instead of disjunctive will be struck down as unconstitutional. Until such time, the standard for annulling elections in Kenya will continue to be that announced by the Supreme Court in Odinga 2017.

Effectively then, the court ruling means that an election could be annulled if it was conducted so poorly that it was not substantially in accordance with the principles in the 2010 Constitution or the election law, irrespective of whether the result was affected.

However, if the election was conducted in accordance with the principles in the 2010 Constitution and the election law, it could be annulled if it can be proven that the irregularities affected the result of the election.

This standard is difficult to apply and depends on each individual judge's definition of strict or substantial compliance with the principles of the constitution when applied to the facts of a given

election, as evidenced from numerous court decisions on challenges to lower-level races in the 2017 elections.

II. Analysis of Court Rulings on Election Petitions Challenging Down-Ballot Races from the 2017 General Elections

On Aug. 8, 2017, Kenya held general elections, which included races for president, governor, senator, member of the National Assembly (MP), member of county assemblies, and county women's representative. By Aug. 10, 2018, 388 election petitions had been filed in relation to down-ballot races, including 35 challenging the results of elections for governor; 15 challenging the results of elections for senator; 12 challenging the results of elections for women representatives; and 98 challenging the results of elections to the National Assembly. There were 139 petitions challenging results in elections for members of county assemblies and 89 petitions concerning party top-up lists.

Twenty-six of these cases were appealed to the Supreme Court: nine involving elections for governor, 14 for member of the national assembly, one involving an election for senator, one involving an election for county woman representative, and one involving a nomination for a member of a county assembly.⁶ All of these appeals concern cases where the High Court and the Court of Appeal reached different decisions on whether or not to annul an election based on Article 83 of the Elections Act.

Although the High Court and the Court of Appeal have a six-month deadline to resolve election petitions, there is no such deadline for the Supreme Court to resolve election appeals. However, as of the final editing of this brief, the Supreme Court had heard and delivered judgments in all but one of these cases.⁷

The Carter Center examined six cases from the 2017 elections in which either the High Court had annulled an election and the Court of Appeal overturned that decision, or the High Court had upheld an election and the Court of Appeal annulled it. The Center analyzed the High Court and Court of Appeal rulings to determine whether the lower courts were interpreting and applying in a consistent fashion the Supreme Court's September 2017 ruling, which annulled the results of the presidential election held on Aug. 8, 2017 (Odinga 2017). The Center then followed the cases through the appeals process to the Supreme Court, examining the Court's rulings to determine how the Supreme Court applied the Odinga 2017 case and whether it established clear guidelines for lower courts analyzing electoral petitions.

The six cases analyzed were:

1. The Gatundu North Constituency election for MP, where the declared winner was Annie Kibe, and the runner-up, Clement Waibara, filed a petition challenging the results. The High Court annulled the election, and the Court of Appeal overturned that decision and reinstated Kibeh as the winner. The declared results showed that Kibeh received 39,447 votes and Waibara 9,314.

⁶ A total of 29 appeals were filed; however, six cases from the same three elections were consolidated into three files.

⁷ As of the final editing of this report, a hearing in the final case was yet to be scheduled, as the court was dealing with a preliminary question to its jurisdiction.

2. The Lamu election for senator, where the declared winner was Anuar Loitiptip, with 14,432 votes, and the runner-up was Albeity Hassan, with 14,374 votes. Hassan filed a petition challenging the results. The High Court upheld the election, and the Court of Appeal annulled it.
3. The Kilgoris Constituency election for MP, where Gideon Konchellah won with 23,812 votes and runner-up Julius Sunkuli received 17,160 votes. Sunkuli challenged the results. The High Court upheld the election, and the Court of Appeal annulled it.
4. The Marakwet East Constituency election for MP, where the declared winner was David Bowen, with 14,812 votes, and the runner-up, Linah Kilimo, received 13,845 votes. Kipkeu, a registered voter in the constituency, filed an election petition challenging the results. The High Court annulled the election, and the Court of Appeal overturned that decision and re-instated Bowen as the winner.
5. The Embakasi East Constituency election for MP, where Paul Ongili Babu Owino was declared the winner, with 46,587 votes, and the runner-up, Francis Wambugu Mureithi, received 42,253 votes. The runner-up filed an election petition challenging the results. The High Court annulled the election, and the Court of Appeal overturned that decision and re-instated the declared results.
6. The Machakos County election for governor, where the declared winner was Alfred Nganga Mutua, with 249,603 votes, and the runner-up, Wavinya Ndeti, received 209,141 votes. The runner-up filed an election petition challenging the results. The High Court upheld the election, and the Court of Appeal annulled it.

All of the examined cases revolved around the interpretation and application of the Odinga 2017 ruling and its interpretation of Article 83 of the Elections Act. All of the lower courts agreed that the applicable standard when deciding whether or not to annul an election in Kenya was articulated by the Supreme Court in Odinga 2017:

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

In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election.

In other words, a petitioner who is able to prove that the conduct of the election in question *substantially* violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. (the qualitative test)

He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, but it was fraught with irregularities or illegalities that affected the result of the election. (the quantitative test)

When applying this test to the facts of each case, the courts struggled to define what qualified as a “substantial” violation of the principles of the constitution or the law and would therefore require the annulment of an election without consideration of the results. Some of the lower courts took the position that any violation of the principles laid out in the constitution was

substantial and therefore would require annulment of an election. Others took the position that not all violations of the principles amounted to substantial violations.

Interestingly, in determining whether a violation was substantial, some courts emphasized the margin of victory and whether or not the violation would have affected the results, reasoning that a minor violation could be substantial in a close election. Others focused on whether the declared winner or the IEBC benefited from the alleged irregularity/illegality or whether the behavior complained of was deliberate to determine if a violation was substantial.

Examples from the Reviewed Cases

Gatundu North Constituency

The High Court in the Gatundu North Constituency case noted that while much emphasis has been put on Section 83 of the Elections Act as the legislative enunciation of the constitutional threshold that must be met in order to void an election, articles 81 and 86 of the constitution provide the initial *per se* standard for determining the validity of an election. The court stated that if a party aggrieved by the outcome of an election proves that any of the principles or values specifically mentioned in the constitution has been violated, the threshold for invalidating the election would have been reached –without the need to test the case against the scheme provided under Section 83 of the Elections Act.

The High Court therefore fashioned a three-pronged test for the validity of elections – the constitutional or *per se* test, which examines compliance with articles 81 and 86 of the constitution; the qualitative test, which examines *substantial* compliance with the written law; and the quantitative test, which interrogates irregularities and their impact on the outcome of the election. The last two tests rested upon Section 83 of the Elections Act.

The court dismissed 28 of the allegations made in the petition for lack of evidence but ruled that there was sufficient evidence that ballot boxes were left unsecured and that ballots from the election were found scattered in several market centers across the constituency. The court also found that several anomalies with the results forms (35As) were revealed by partial scrutiny of the ballot boxes. Based on this evidence, the High Court framed the question as follows:

Can a reasonable tribunal, faced with this kind of evidence, proceed to make a conclusion that the IEBC conducted the elections substantially in accordance with the law on elections? Can any reasonable tribunal find the explanation that these errors, anomalies, failures and irregularities are simply a product of characteristic human proneness to error which should be excused because it has not been demonstrated to breach the vast chasm (30,000 vote margin of victory) between the declared winner and the petitioner?

The High Court answered these questions in the negative and found that the election was conducted so badly by the IEBC that it was not substantially in accordance with the law.

The Court of Appeal faulted the High Court for developing a new standard for voiding elections, noting that this was a much lower standard than that which had been set in Odinga 2017. The Court of Appeal also faulted the High Court judge for permitting vote scrutiny without specific wishes from the parties, for undertaking an independent forensic audit of the election material without the participation of the parties, and for using the results of this audit to determine the petition. It was this audit that unearthed a majority of the findings that led the High Court to annul the election. The Court of Appeal also found that in this forensic audit, the High Court

interrogated matters that had not been raised in the petition and then made adverse findings on those issues.

With regard to the issues that had been specifically pleaded – that is, that some forms lacked the official IEBC stamps, that some of the agents did not sign the forms, and that some Forms 35A had several cancellations and wrong entries – the court took the view that these were administrative or procedural errors that were not of the severity or substantive illegality to be significant enough to void an election. In other words, after removing the errors that emerged following the unlawful scrutiny and forensic audit that responded to issues that had not been raised in the petition, what remained were mere administrative and procedural errors that were not significant enough to void the election.

The court also found it significant that the High Court never established that it was the IEBC or the declared winner who was deliberately involved in the disappearance of election materials to manipulate the election results for the winning candidate's benefit. It also noted that the scattered ballot papers did not in any way affect the election process or the result, given the margin between the candidates.

The court concluded that by nullifying the election in the manner that it did, the High Court failed to appreciate that the overwhelming majority of votes attained by the declared winner was an explicit manifestation of the will of the people.

The Supreme Court upheld the decision of the Court of Appeal, finding that the High Court had erroneously fashioned a new test for voiding elections and that the scrutiny and the forensic audit conducted by the High Court fell outside the law and the scope of the proceedings, including the analysis of the audit findings, which introduced matters that had not been pleaded. The Supreme Court ruled that when these findings were omitted, the remaining irregularities, which had been properly pleaded and proved, did not affect the results.

Lamu Constituency

In the Lamu senate case, the High Court upheld the election results, finding that the petitioner had failed to produce any evidence to support his allegations and that his request for scrutiny was denied for not specifying any irregularity or malpractice that would justify the request. However, the court did find that the petitioner's allegation concerning the polling station results of Kiangwe Primary School, which showed that 216 valid votes were cast when the register contained only 213 names, was significant. However, the court found that this could not be the basis upon which to grant relief, as the petitioner had not raised it in his initial petition. This allegation was never denied or explained by the IEBC.

The Court of Appeal reversed the High Court decision and annulled the election. It based its decision on the fact that results from the Kiangwe Primary School should have been disregarded by the returning officer under the Consolidated Election Regulations Section 83(1)(b) because the total valid votes exceeded the number of voters on the register. The court found that the failure to disregard the results from the polling station was substantial non-compliance with the law that ultimately affected the integrity of the elections. They further reasoned that had the results been disregarded, the 58-vote margin would have disappeared, leaving no clear certainty of the winner.

The Supreme Court reversed the Court of Appeal decision, agreeing with the High Court's position that the question of the 216 votes should not have been considered in the petition

because it had not been raised in the original pleadings. The Supreme Court shifted focus from Section 83 of the Elections Act and did not consider whether the inclusion of the 216 votes affected the election. Instead, it noted that the issue had only come up in the final submissions, which were filed late, thereby denying the other side the opportunity to respond. As such, the Supreme Court upheld the election.

Kilgoris Constituency

In the Kilgoris Constituency MP case, the High Court upheld the election, finding that the petitioner had failed to prove that the election did not meet the qualitative or quantitative test articulated in Odinga 2017. The High Court made this finding despite the fact that the IEBC failed to secure the election material from one polling station and that several IEBC poll workers were arrested and charged for diverting the election material to a private residence, and the results were disregarded. The High Court reasoned that even if the results from the affected polling station were factored into final tally, it would not have changed the results.

When examining the same evidence, the Court of Appeal reversed the High Court ruling and annulled the election. The court found that a previous ruling by the High Court in which the IEBC had failed to secure the election material violated Article 86 of the constitution. This article mandates that the IEBC conduct elections in a secure and accountable manner, including by safekeeping election materials. As the court stated, “a violation of an article of the constitution is just that – a violation. It was therefore an error and completely untenable for the judge to have found that the election substantially breached Article 86 of the Constitution and fail to annul the election on that ground alone.”

The Supreme Court faulted the Court of Appeal for not applying the binding test in Odinga 2017 regarding the import of Section 83 of the Elections Act. While confirming the election, the Supreme Court found, in view of the fact that the election went on smoothly in all 165 polling stations save one, that the alleged violation of Article 86(a) of the constitution did not substantially affect the outcome of the election.

Marakwet East Constituency

In the Marakwet East Constituency MP case, the High Court annulled the election based on anomalies in forms 35A and B, which led the court to conclude that the Form 35B, which was used to announce the results, was inaccurate. The court identified other irregularities, including that forms 35A from one polling station not being signed by either the presiding officer or the deputy; errors in transposing the results from Form 35A to Form 35B; and the inclusion of two ungazetted polling stations and the exclusion of two gazetted polling stations. The court also found that, given a margin of 967 votes and the other irregularities that cast doubt on the numbers, the election was not verifiable and credible as required by the constitution.

The Court of Appeal disagreed with this conclusion, finding that the anomalies in forms 35A and B were not of enough magnitude to have any impact on the elections. The court also found that any errors in transposing the results to Form 35B were insignificant and did not justify the finding made by the High Court that “a sizeable number of votes were unaccounted for.”

On the issue of the inaccuracy of Form 35B, the Court of Appeal found that it was basically a math error that should have been addressed by the High Court. The court reasoned that the conclusion by the High Court that the results were opaque and unverifiable was unsubstantiated by the evidence, especially in light of the fact that the results of the two leading candidates were unaffected. The issue of the non-gazetting of two polling stations was equally without

consequence, as the petitioner failed to show that that it caused confusion or that any voter failed to vote because of the change in polling stations.

At the Supreme Court, a preliminary objection was raised, questioning the jurisdiction of the Supreme Court to handle the appeal. The court allowed the objection, holding that the appeal did not involve any question of the interpretation and application of the constitution because the Court of Appeal did not undertake any interpretation of the constitution when determining the appeal. As such, the Supreme Court confirmed the decision of the Court of Appeal and the election itself without delving into the substance of the appeal.

Embakasi East Constituency

In the Embakasi East Constituency MP case, the High Court annulled the election on the basis of discrepancies in several forms 35A.⁸ A recount revealed different vote counts from 93 polling stations; there were mathematical errors that affected 68 forms 35A, and, in one station, Form 35A recorded that the petitioner had zero votes when he had 326 votes (283 upon recount). The High Court pronounced it “a grave error which creates doubt on the credibility of the election process in Embakasi East.” The High Court also found that some results in Form 35B did not match those announced at the tallying center and that, in many instances, the results in forms 35A were different from those in Form 35B.

Although the Court observed that these errors affected other candidates than the two leading contestants, it found that the errors were relevant and material to the validity of the election because the role of the election court was not merely to check the returns but the entire process. Based on these findings, the court found the results in the forms were not reliable, and therefore the legitimacy of some of the results forms could not be verified.

The High Court also nullified the election on the grounds that violence in one polling station affected the credibility of the election.

The Court of Appeal disagreed with the findings of the High Court and reversed its decision. In doing so, the court ruled that the High Court had erred in ruling that the errors in forms 35As and 35B affected the validity of the election. The appeals court found that the errors occurred in the summation of results that affected only four candidates but not the declared winner or the runner-up and that, when discovered, they were corrected by the returning officer. In addition, the scrutiny ordered by the High Court showed that the declared winner actually gained votes, a fact that was not considered by the High Court. In such a situation, the appeals court declared that the error was innocuous.

Additionally, the appeals court ruled that by nullifying the election on account of mathematical irregularities, the trial judge gave very little regard to the results of the scrutiny and recount exercise. The recount revealed that the declared winner garnered 46,817 votes – 230 more than the results as shown in Form 35B, while the petitioner had 42,501, an increase of 248 votes. The winning margin was 4,316 votes. The petitioner did not dispute the results in any of the polling stations during and after the scrutiny exercise was completed and, according to the court, this was *prima facie* evidence that the petitioner was satisfied with the actual results across the entire constituency.

⁸ In four polling stations, with a total of 1,953 votes, forms 35A did not bear the signature of the presiding officers; in one of these four, Form 35A was altered without being countersigned by the presiding officer. While the court initially listed these concerns as an issue for determination, it did not rule on whether the forms were signed by the presiding officers and whether this affected the validity of the election.

On the question of violence in one polling station, the appellate court took the view that it is not enough to find that there was some form of violence in a given station and then proceed to nullify the result of an election. The court ruled that the violence must affect not only the voting but the final result of the election; for example, that the violence disfranchised some voters and/or gave an undue advantage to one of the parties.

The court concluded by saying: “We believe the will of the people of Embakasi East Constituency was clear beyond peradventure. It follows, therefore, that the nullification of the election on account of the aforesaid irregularities was not well founded in law.”

On further appeal, the Supreme Court took the same position as the Court of Appeal, holding on the basis of its decision in Odinga 2017 that, despite the discrepancies and irregularities as well as the violence in one polling station, it could not be said that there was such non-compliance with the articles 81(e) and 86 principles or that the results were affected in such a manner as to render the election a sham or not credible.

Machakos Constituency

In the Machakos governor’s election, the High Court dismissed the petition and confirmed the election, holding that the petitioners did not provide adequate evidence to prove a number of allegations, including whether public officers were engaged as polling officials and as agents of the candidates. The High Court also found that questions regarding the validity of Form 37C were not pleaded and could not therefore be raised in the hearing.

The Court of Appeal disagreed with the High Court and overturned the election, holding that there was evidence that one employee of the Machakos County government had been employed as an agent in violation of the electoral code. Regarding Form 37C, the Court of Appeal held not only that the issue of Form 37C was pleaded but also that the form used to declare the result did not comply with the statutory form because there was no room on the form for results from each polling station. Additionally, the court found that there was evidence that when compiling results onto Form 37C, the returning officer failed to verify the results from the primary source – Form 37A. The appeal court found that in light of these omissions, the election failed the constitutional test of verifiability and proceeded to nullify the election.

The Supreme Court took a different view from the Court of Appeal, holding that unlike the national returning officer – who is to verify results from each polling station – county returning officers are only required to compile results on the basis of constituency tallies in Forms 37B. The court held that there was no requirement for county returning officers to verify the results against polling-station forms when tallying the results for the election of the county governor, senator, and county woman representative.

On the basis of this determination, the Supreme Court found that the provision in the election regulations requiring Form 37C to have a column for polling-station results was beyond the legal requirements and the county returning officer could not be faulted for failing to include the column in the results form.

The Supreme Court additionally held that even if the law required the form to carry a column for polling-station results, the failure to include that column did not go to the root or verifiability of the results since, *firstly*, there were other ways of verifying the results; *secondly*, the agents of the

candidates signed the form as confirmation of their approval of the contents; and *thirdly*, there was a large margin of more than 40,000 votes not affected by this omission.

Embakasi South Constituency

There are only two cases in which the Supreme Court ordered that by-elections be held – Ugenya and Embakasi South parliamentary election petitions. In both instances, the margin of victory was extremely narrow. The margin in Ugenya was 347, while that in Embakasi South was only 165 votes.

In Embakasi South, the High Court found that the election ought to stand despite the absence of Form 34B by which the final result was declared. The High Court also ignored evidence that pointed to five sets of results, holding instead that in all five sets of results, one candidate was always ahead. The High Court took the view that the illegalities did not affect the result because one candidate remained ahead in all instances.

The Court of Appeal reversed the decision of the High Court on the grounds that the absence of Form 34B meant the results were not verifiable as demanded by the constitution.

The Supreme Court took the same position as the Court of Appeal, holding that the election in question was not conducted substantially in accordance with the Constitution and other electoral statutes.

Ugenya Constituency

In the petition challenging the results of the Ugenya parliamentary election, where the winner garnered 23,765 against the 23,418 votes of the runner-up, the High Court – having dismissed responses filed by the winning candidate who filed his replies out of time without good cause – proceeded to nullify the election on the grounds that the ODM candidate ran a dirty campaign, linking the opponent to witchcraft and the death of IEBC’s head of ICT Chris Msando, and also with the Jubilee Party in an area that was predominantly pro-ODM.

The court also cited other grounds for nullifying the election, including that the IEBC failed to account for the assisted voters and the reasons for which they were assisted, which created a doubt in the mind of the court as to whether the election was free and fair; that campaigns were conducted by and on behalf of the winning candidate outside the campaign period that ends 48 hours before the election day; and, finally, that presiding officers were coerced, intimidated, and bullied by the winning candidate and ODM agents, who demanded that they allow voters who asked to vote six piece to vote for a straight ODM ticket only – without giving the electors a chance to select a candidate of their choice for each office.

The court found these infractions to be material because the difference between the two leading candidates was only 347 votes.

The court took the view that the electoral malpractices, irregularities, and illegalities witnessed in the election were such that it could not be said that the elections had been conducted substantially in accordance with the constitution and the relevant electoral laws, and the results therefore did not pass the test of being transparent, accountable, verifiable, and credible.

Both the Court of Appeal and the Supreme Court agreed with this finding, holding that the electoral malpractices proved before the High Court affected the very core of the constitutional principles of the electoral system - that of free expression of the will of electors through a free

and fair election. The Court of Appeal also found that the malpractices were of a fundamental nature and put the narrow victory of the appellant in doubt.

Recount reports and jurisdictional questions

The Carter Center also reviewed two judgments in which the Supreme Court made significant pronouncements on the importance of recount reports in election petitions and the jurisdiction of electoral courts vis-à-vis the IEBC, which has jurisdiction to handle pre-election disputes.

In the Wajir governor's petition, the winning candidate was challenged on the grounds – among others – that he did not possess a university degree, which was a mandatory requirement to run for office of governor.

Both the High Court and the Court of Appeal dismissed a jurisdictional objection raised by the governor, who argued that questions regarding his qualifications to run for office ought to have been raised ahead of the elections before the IEBC Disputes Resolution Tribunal and that anyone who failed to raise the issue at that time was barred from raising it in an election petition.

Having dismissed this preliminary objection, both the High Court and the Court of Appeal found, on the basis of the evidence presented, that the governor did not possess a university degree and was therefore unqualified to run for office. Both courts nullified his win on this basis.

At the Supreme Court, a majority of the judges (4-2) overruled both lower courts, holding that the electoral courts had no jurisdiction to take up a question that ought to have been raised before the IEBC's dispute panel. The Supreme Court made this ruling despite the fact that it had, in an unprecedented move, permitted the governor to provide fresh evidence about his academic qualifications.

The chief justice wrote a dissent, joined by one other judge, in which he opined that the electoral courts had the jurisdiction to audit the entire election, including questions about the qualification of candidates that also could have been raised before the IEBC dispute panel. This was the position taken by the High Court and the Court of Appeal, which held that an election is a process that begins before voting day, and therefore, an election petition can be based on any part of the entire process and not just on events that arise from voting day onward.

The chief justice also found, on the basis of the evidence presented, including the fresh evidence provided by the governor, that the candidate did not possess a university degree, which was mandatory to run for office of governor.

The decision of the majority in this petition places a premium on pre-election dispute-resolution mechanisms and sounds a warning to all candidates and voters that they must take advantage of all pre-election dispute-resolution mechanisms before they can file election petitions.

The Homabay governor petition turned on the role of recount and scrutiny reports in electoral proceedings. Upon challenging the results of the election at the High Court, the petitioners applied for a scrutiny of the results, and the court permitted a recount in 91 of the 1,022 polling stations.

However, the High Court failed to consider the scrutiny report and proceeded instead to overturn the election on the basis of other allegations. The scrutiny report showed that there were only

minor or immaterial irregularities at the polling stations that had been audited, and that there were no alterations or improprieties on the forms 37A, or any other forms.

Whereas the Court of Appeal faulted the High Court for failing to take the scrutiny report into account, the Court of Appeal dismissed this as a matter that was not under its jurisdiction, before affirming the High Court's final decision to overturn the election.

According to the Supreme Court, a scrutiny report is one of the devices for enabling the court to ascertain whether an election has been conducted in accordance with constitutional principles and to establish that the declared result was a reflection of the electorate's will at the time of voting.

The Supreme Court took the view that, in the absence of the findings of the scrutiny report, the trial court had no reference point upon which to judge the magnitude of the impact of any electoral irregularity on the electoral outcome. As such, the Supreme Court reversed the decisions of the High Court and the Court of Appeal and upheld the Homabay election.

Conclusion

The decision of the High Court in the case of Katiba Institute, Africa Center for Open Governance and two others v. Attorney General and National Assembly, and the fact that neither the petitioners nor the government appealed the decision means that any amendment to the electoral law or procedures that in any way lessens or reduces the transparency, verifiability, and/or accountability of elections must be declared unconstitutional.

The Supreme Court found in Odinga that Section 83 was in harmony with the 2010 Constitution and that it was different from the previous election laws. Therefore, the High Court found the amendment to Section 83, which removed the disjunctive word "or" and introduced the conjunctive word "and" together with the word "substantially," represented a departure from the constitutional requirements for free, fair, and transparent election and a step back in electoral reforms.

As a result, the standard for annulling elections in Kenya remains that which was annunciated by the Supreme Court in its decision in Odinga 2017. Unfortunately, as this analysis has shown, this standard is difficult to apply and depends on each individual judge's interpretation of what is strict or substantial compliance with the principles of the constitution when applied to the facts of a given election.

As demonstrated, the High Court and the Court of Appeal reached vastly different conclusions on the meaning of the Odinga 2017 ruling in the context of annulling election results in Kenya. In the cases scrutinized, there was no agreement among the lower courts as to what constitutes a "substantial" versus a "non-substantial" violation of the principles in the constitution and the law that would justify annulling an election on that basis alone. In the cases reviewed, some courts took a strict view that any violation of the principles in the constitution was sufficient to annul an election while others considered other factors such as the margin of victory and whether or not the declared winner encouraged or managed the irregularities and who benefited from them.

While the Supreme Court did not explicitly define the factors that lower courts should consider when assessing electoral challenges under Odinga 2017, the rulings in the cases analyzed by the Center provide preliminary indications as to its application of the legal precedence.

In the 26 cases that reached the Supreme Court, the body reaffirmed its decision in *Odinga* 2017, which held that for an election to be nullified on the grounds of non-compliance as enshrined in Section 83 of the Elections Act, a party must meet either the qualitative test, demonstrating that the election was not conducted in accordance to the electoral laws and constitutional principles, or the quantitative test, in which the non-compliance affected the results of the election.

Despite this affirmation, the Supreme Court demonstrated a reluctance to nullify election results, as evidenced by its decision to confirm elections in which evidence pointed to non-compliance with the law, arguing that the non-compliance did not affect the outcome of the election. Despite fears that the court's decision in *Odinga* 2017 had set a low threshold to nullify an election, only two of 299 petitions filed nationally to challenge elections of governor, senator, MP, county woman representative, and member of county assembly resulted in a by-election.⁹ In the cases analyzed, the Supreme Court considered whether the election was conducted in accordance with the legal principles, as well as whether the magnitude of irregularities was large enough to affect the election results from a quantitative perspective.

The court unfortunately did not take this opportunity to introduce guidelines as to what factors a lower court should consider when applying the *Odinga* standard to address this ambiguity. The Center encourages the court to provide guidance on how lower courts should define a “substantial” versus a “non-substantial” violation of the principles in the constitution and the law so as to justify annulling an election on that basis. In addition, the Center urges the Court to provide insight into whether a “human” or “administrative” error could be of such a magnitude that it can be said to have affected the results.

⁹ Another 89 petitions were filed from party top-up lists, bringing the total to 388 petitions.