



**FACULTY OF LAW**

**HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA**

# Standard of proof in adjudicating election petitions: A case for a rights-centric approach in Kenya

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by

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## Dedication

To those whose election petitions have been defeated due to the intermediate standard of proof,

To those who are struggling for electoral justice,

To those who dream of the full democratisation of Africa,

Your cries have not gone unheard and your suffering shall not be in vain,

This is for you!

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*Nyungu ya maji haiwezi kusimama bila cha kuishikilia*

*(A water pot cannot stand on its own without support)*

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To my family, who have offered me unfaltering support and prayers. To my father, Thomas Nyawa, Mum, Alice Kakuti Kagunia and my siblings, Patience Mlongo, Joseph Mwanzanje, Evelyn Mjeni and John Mramba, *Mulungu amurinde*

To my friends, I am sorry for turning you into peer reviewers of this work. I am grateful for your encouragement, criticisms and comments. Thank you!

**List of abbreviations**

| | | |
|---|---|---|
| ACDEG | - | African Charter on Democracy, Elections and Governance |
| ACHPR | - | African Commission on Human and People's Rights |
| CoK | - | Constitution of Kenya |
| GoK | - | Government of Kenya |
| ICCPR | - | International Covenant on Civil and Political Rights |
| IEBC | - | Independent Electoral and Boundaries Commission |
| KANU | - | Kenya African National Union |
| IREC | - | Independent Review Commission |
| TJRC | - | Truth, Justice and Reconciliation Commission |
| UDHR | - | Universal Declaration of Human Rights |

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# CHAPTER ONE

## Introduction

> In the majority cases, fundamentally flawed elections are legitimised by courts under the guise of substantial effect doctrine. Judiciaries, pretty much to the chagrin of everybody, use the substantial effect doctrine to validate elections even in cases that are palpably conducted in violation of the electoral laws.[1]

### 1.1 Brief background

Kenya promulgated its transformative constitution on 27 August 2010 which gave its people a clean bill of constitutional health and a 'New Kenya.'[2] It is a story of ordinary Kenyans seeking to re-engineer their social order by retaining from the past that is defensible and rejecting all practices that were authoritarian and undemocratic.[3] The 2010 Constitution was expected to revolutionise and transform every sector of their lives, including the way that they would be governed and how they would elect those who would govern them. It was a dream to transform Kenya into a more democratic, accountable, and just society.

It is for this reason that the constitution is unusually preoccupied with the concept of electoral justice. Therefore, Kenyans earmarked the judiciary as one of the key institutions to enable them realise this dream. However, this, was not without a historical context. Kenyan history is replete with examples of when the judiciary promoted the 'jurisprudence of executive supremacy'[4] by demonstrating extreme subservience to the executive.[5]

In a bid to sustain those in power, the judiciary adopted a technical, formalistic and rule-bound approach to constitutional interpretation as opposed to a more teleological, purposive and human rights-centric approach.[6] Consequently, the electoral jurisprudence was characterised by

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1 H Nyane 'The role of judiciaries in presidential electoral disputes resolution in Africa: The Cases of Zambia and Zimbabwe' http://ulspace.ul.ac.za/handle/10386/2687 (accessed 30 June 2023).

2 B Ackerman *We the People: Foundations* (1991) 3.

3 W Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2015) 1 *Speculum Juris* 6.

4 HK Prempeh 'Presidential power in comparative perspective: The puzzling persistence of Imperial Presidency in post-authoritarian Africa', (2008)35 *Hastings Constitutional law* 761; HK Prempeh 'A new jurisprudence for Africa' in L Diamond & MF Plattner (eds) *The global divergence of democracies* (2001) at 260, 266.

5 SBO Gutto 'Constitutional law and politics in Kenya since independence: A study in class and power in a neo-colonial state in Africa' (1987) (5) *Zimbabwe Law Review* 15.

6 GM Musila 'Realizing the transformative promise of the 2010 constitution and new electoral laws' in GM Musila (ed) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence* (2013) 11.

'the elevation of legal and procedural technicalities over substantive justice.'[7] For instance, in the case of *Matiba v Moi*, the court dismissed a presidential petition on the basis that the petitioner had not personally signed the petition.[8] This is despite the fact that the petitioner had suffered a stroke after being tortured by the state. In the case of *Kibaki v Moi*, the court dismissed a presidential petition on the basis that a sitting president had not been personally served despite the fact the law allowed alternative ways of service.[9]

As a result, Kenyans lost confidence in the judiciary as an independent umpire. The loss of confidence was one of the reasons for the post-election violence in 2007 after the opposition candidate refused to refer the presidential election dispute to what he termed the Kibaki's Courts.[10] At the time, Kibaki was the sitting president. A majority of Kenyans believed that the judiciary was unwilling to sanction electoral malpractice. Courts would then rely on legal and procedural technicalities to reach decisions that invariably favoured incumbents and election winners. Kenyans in a clever way sought to cure this problem by requiring that the judiciary does not pay undue regard to procedural technicalities but promote substantial justice.[11] Put differently, the preoccupation of the 2010 Constitution with electoral justice is a manifestation of the people's will to root off the long culture of electoral lawlessness.[12]

Commentators such as Azu,[13] Kaaba[14] and Nyane[15] while considering the electoral jurisprudence of presidential elections across Africa, note a common pattern. The pattern is that election petitions filed in court have been unsuccessful even though petitioners adduce evidence showing non-compliance with election laws. They make the central argument that these decisions are influenced by extra-legal considerations, and that is why courts seem to create higher

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7 D Majanja 'Judiciary's quest for a speedy and just electoral dispute resolution mechanism: Lessons from Kenya's 2013 elections' in C Odote & L Musumba (eds) *Balancing the scales of electoral justice: Resolving disputes from the 2013 elections in Kenya and the emerging jurisprudence* (2016) 19, 20.

8 *Matiba v Moi* Election petition 27 of 1993.

9 *Kibaki v Moi* Election petition 1 of 1998.

10 M Laibuta 'Electoral dispute resolution: Kenya's jump from street justice to judicial institutions' https://constitutionnet.org/news/electoral-dispute-resolution-kenyas-jump-street-justice-judicial-institutions (accessed 17 October 2023).

11 Constitution of Kenya, 2010 Art 159(2)(d); *Samwel Kazungu Kambi & Another Vs Independent Electoral and Boundaries Commission and 3 Others* (2017) eKLR; *William Kinyanyi Onyango V Independent Electoral & Boundaries Commission & 2 Others* (2013) eKLR.

12 Report of the International Review Commission on the General Elections held in Kenya on 27 December 2007 https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general (accessed 20 October 2023) at 10.

13 M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 150 at 155.

14 O Kaaba 'The challenges of adjudicating presidential election disputes in domestic Courts in Africa' (2015) 15 *African Human Rights Law Journal* 329 at 354.

15 Nyane (n 1).

thresholds of standard of proof. This is evident in Kenya's electoral jurisprudence where the Supreme Court, leading the way, has decided that the standard of proof in election petitions is the intermediate test. The test is slightly above the balance of probabilities but below the beyond reasonable doubt test.[16]

The justification for this unknown standard in law is that elections are sui generis and that elections consist of special circumstances.[17] It is the use of these adjectives that demonstrate a judicial reluctance to overturn elections. The sole aim of these adjectives that have been used to justify the intermediate test is simple, to ensure that the incumbents or declared winners remain in power. The available data supports this argument. For instance, Muthomi reviews the electoral jurisprudence from Kenya in 2013 and 2017. [18] He reports that the Judiciary dismissed a total of 87% of parliamentary and county elections filed in 2013 and 90% of those filed in 2017.[19] Following the 2022 general elections, the judiciary has so far dismissed majority of the election petitions save for a few member of county assembly election petitions. Therefore, the study advances the argument that the intermediate standard is a high evidentiary rule that is being used 'as a convenient mechanism to prevent or deter challenges to elections.'[20]

This study will, however, demonstrate that there is nothing special with election petitions. Election petitions are purely constitutional petitions adjudicating human rights claims and enforcement of constitutional values and principles. As purely civil claims, the standard of proof for election petitions should be on a balance of probabilities. Further, the study adopts a human rights-centric approach which places the right to vote and the will of the people at the centre of the dispute rather than a result-oriented approach which is simply focused on the votes garnered. In doing so, the study relies on the recent jurisprudence from Malawi,[21] Zimbabwe,[22] Mauritius,[23] Ghana,[24] and Nigeria that have dismissed the intermediate test by upholding that the test is anti-

16 *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR; *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR; *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others* (2022) eKLR.

17 *Odinga* 2013 (n 16) para 230.

18 M Thiankolu 'The case for an inquisitorial approach to electoral dispute resolution in Kenya' LSK Annual Conference 2022.

19 As above.

20 H Nyane 'A critique of proceduralism in the adjudication of electoral disputes in Lesotho' (2018) *Journal of African Elections* 1.

21 *Chilima & Another v Mutharika and Another* Constitutional Reference No 1 of 2019*; Mutharika & Another v Chilima & Another* (MSCA Constitutional Appeal 1 of 2020) [2020] MWSC 1.

22 *Chamisa v Mnangagwa* (CCZ 42/18) [2018] ZWCC 42 (24 August 2018).

23 *Jugnauth v. Ringadoo and Others* [2008] UKPC 50.

24 *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others (Writ J1/6/2013).*

human rights and unnecessarily fails to put the rights and the will of the people at the centre of democratic rights. The study will demonstrate that it is the conservative and formalistic legal culture that is responsible for the non-realisation of transformative ideals in Kenya's electoral jurisprudence.

**1.2 Problem statement**

The judicialisation of mega-politics is considered one of the 'fruits of the third wave of democratisation.'[25] Hirschl conceives the term judicialisation of mega politics as the continual increase in reliance on the judiciary to determine political controversies, such as the determination of electoral disputes.[26] Courts have, therefore, been thrown into the murky waters of democratic processes by being required to act as referees.[27] The 2010 Constitution judicialises mega politics in various ways; First, it entrenches an expansive bill of rights and provides an avenue for victims of human rights violations to enforce these rights. Second, the courts are empowered to grant appropriate reliefs for violation of the rights. Third, the constitution provides for political rights and principles to govern elections. Lastly, the constitution empowers the courts by giving them the jurisdiction to handle election disputes.[28] Consequently, the courts operate both as human rights courts and election courts.

The judicialisation of politics has, however, not been without challenges. In a bid to avoid attacks from the executive and other political agents, the judiciary (and judges) have abdicated their role as vanguards of the constitution by adopting what Alexander Bickel called 'passive virtues.'[29] By passive virtues, Alexander referred to doctrines that judges can rely on to avoid hearing difficult cases such as the doctrine of locus standi and political question doctrine. This study argues that the adoption of a higher standard of proof in election petitions is one of the examples of these passive virtues.

The electoral jurisprudence emanating from the Kenyan Courts from 2013 to 2022 demonstrates that petitioners have very weak prospects of success due to the courts' approach to

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25 HK Prempeh 'Comparative perspectives on Kenya's post-2013 election dispute resolution process and emerging jurisprudence' in C Odote and L Musumba (eds) *Balancing the scales of electoral justice: Resolving Disputes from the 2013 elections in kenya and the emerging jurisprudence* (2016) at 150.

26 R Hirschl 'The judicialisation of mega-politics and the rise of political courts' (2008) 11 *Annual Review of Political Science* 93-118.

27 DO Munabi 'Judicialisation of "mega" politics in Kenya: Contributor to democratization or mere recipe for backlash?' in J Gondi(ed) *Reflections on the 2017 elections in kenya: Paper series on emerging judicial philosophy in kenya* (2018)51.

28 Constitution of Kenya, 2010 Chapter four, Arts 19, 22, 23, 38, 81, 86, 87, 105, 144, 163 and 165.

29 A Bickel 'The Supreme Court 1960 term: Foreword: The passive virtues' (1961) 75 *Harvard Law Review* 40.

election dispute resolution. In particular, the intermediate test standard of proof saddles the petitioner with an onerous standard of proof and fails to put the right to vote, access to justice and the sovereignty of the people at the centre of the dispute. Further, the intermediate test is an example of the judiciary's timidity to upset elections because these petitions are purely constitutional and there is nothing unique about them to justify the adoption of a standard of proof that is unknown in law.

Additionally, the approach ignores an explicit constitutional requirement under Article 20(3)(b) requiring courts to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. This study calls for the adoption of a rights-centric approach that puts the rights and the will of the people at the centre and avoids relegating the rights to the periphery as the courts have been doing. This approach cannot countenance the higher standard of proof that has resulted in a chilling effect on the capacity of normal citizens to attain electoral justice.

## 1.3 Research Questions

### 1.3.1 Main question

Given the transformative nature of the Kenyan Constitution, what is the appropriate standard of proof in election disputes that will give full effect to the leitmotifs of the Constitution of a free and fair election?

### 1.3.2 Sub questions

1. What is the national, regional and international normative framework for standard of proof in election disputes?
2. How has the Kenyan Judiciary interpreted the normative framework?
3. What is the standard of proof in election petitions that is consistent with the ethos and spirit of the transformative Constitution of Kenya?
4. What lessons can the Kenyan Judiciary learn from Zimbabwe, Malawi, Ghana, Mauritius and Nigeria?

## 1.4 Literature review

### 1.4.1 Judicialisation of politics

The judicialisation of politics has led to a more active role of the judiciary. Although this was the dream of many Kenyans, it has been faced with many challenges, especially from the executive. This, however, is not a unique experience to Kenya alone. Alexander Bickel, for instance, asked

judges to adopt passive virtues to avoid considering disputes.[30] Other authors have exhorted courts to adopt a *weak-form review;*[31] a standard which would mean that judges should adopt a less confrontational approach and in turn reduce political attacks on their judicial independence.

Additionally, this would mean that for these courts to maintain their independence, they should exercise restraint and only limit themselves to what has been referred to as 'safe cases.'[32] Roznai has also called courts to be less confrontational by going 'down the bunker.'[33] This study views this literature as being problematic and ill-bent on stopping the transformative ideals of the constitution and the realisation of electoral justice. The study will make the case that this literature seems to support a judicially sanctioned dictatorship. Additionally, by going down the bunker, the Kenyan Judiciary risks soiling its reputation and this will only return Kenya to the dark moments of history. The study, therefore, uses this literature to call for a stronger judiciary that is ready to perform its constitutionally mandated role.

### 1.4.2 Nature of election petitions

Tarisai Mutangi[34] and Hatchard[35] review the electoral jurisprudence emanating from African courts and note that courts classify election petitions as *sui generis* or in a class of their own, different from civil suits. Tarisai notes that these adjectives are used as scapegoats for courts to adopt a narrow interpretation of their powers and to allow indulging non-compliance with express provisions of law. In rejecting these adjectives, the authors show that there is nothing *sui generis* about election petitions. First, no law has imposed this higher standard but rather it has arisen from judicial interpretation. Second, there is nothing unique about election petitions. If courts state that election petitions have a public interest or are more community-oriented, this is primarily the nature of constitutional petitions, and even the remedies in constitutional petitions are meant to vindicate the constitution as a whole.[36]

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30 Bickel (n 29) 40.

31 S Gardbaum, 'Are strong constitutional courts always a thing for new democracies?' (2015) 53 *Columbia Journal of Transnational Law* 286.

32 L Epstein& others 'The role of constitutional courts in the establishment and maintenance of democratic systems of government' (2001)35 *Law & Society Review* 117.

33 Y Roznai, 'Who will save the Redheads? Towards an anti-bully theory of judicial review and protection of democracy' (2020) 29 *William Mary Bill Rights* 28.

34 T Mutangi 'Nullification of election results and the standard of proof: Emerging jurisprudence in selected sub-Saharan Africa countries' in C Mbazira (ed) *Budding democracy of judicialisation: lessons from Africa's emerging electoral jurisprudence* (2021).

35 J Hatchard 'Election petitions and the standard of proof' (2015) 27 *Denning Law Journal* 291.

36 I Curie & JD Waal *The Bill of Rights Handbook* (2005) 196.

Further, if the public nature of election petitions is what justifies the intermediate test, then why is it not being applied to other constitutional petitions? This study builds on these arguments to justify that election petitions are mere human rights and constitutional petitions and the same standard of proof that is imposed on other constitutional petitions should similarly apply to election petitions.

### 1.4.3 Appropriate standard of proof in election petitions

Legal commentators such as Hatchard,[37] Harrington,[38] Musiga,[39] Nkansah[40] and Murison[41] have argued that the newfound ground of dismissing election petitions today is the unduly high standards of proof. Although the majority of elections are fundamentally flawed, these elections are legitimised by courts under the guise of a high threshold standard of proof. Through comparative studies, these scholars have demonstrated that the adoption of intermediate tests or beyond reasonable doubt standards of proof is unjustifiable. This is on the basis that the intermediate test is anti-human rights and ignores the place of human rights and the will of the people in election disputes. The intermediate test creates an additional hurdle on the way towards access to justice. This study uses the available literature to develop a human-centric theory in the adjudication of electoral disputes.

### 1.4.4 Transformative adjudication

The concept of transformative adjudication[42] is closely linked to the idea of transformative constitutionalism.[43] Transformative constitutionalism as advanced by various authors sees the law as a tool of transformation or engineer of change.[44] These constitutions, therefore, embody transformative ideals. The Kenyan Constitution has been described along these terms, with the

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37 Hatchard (n 35) 291.

38 J Harrington & A Manji 'Restoring Leviathan? The Kenyan Supreme Court constitutional transformation and the presidential election of 2013' (2015) 9(2) *Journal of Eastern African Studies* 175-192.

39 T Musiga 'Effects of judicial restraint in the resolution of presidential election disputes in Kenya (2016) 5(2) *Kenya Law Review* 66-90.

40 LA Nkansah 'Dispute resolution and electoral justice in Africa: The way forward' (2016) 41(2) *Africa Development* 97-131.

41 J Murison 'Judicial politics: Election petitions and electoral fraud in Uganda' (2013) 7(3) *Journal of Eastern African Studies* 492-508.

42 D Moseneke 'The Fourth Braam Fischer memorial lecture: Transformative adjudication' (2002) *South African Journal of Human Rights* 309-319.

43 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

44 VK Marle 'Transformative constitutionalism as and critique' (2009) 20 *Stellenbosch Law Review* 286; U Baxi 'Preliminary notes on transformative constitutionalism' in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 20; P Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 352.

Supreme Court describing it as a transformative charter.[45] The concept of transformative adjudication, on the other hand, calls for a shift in how judges interpret transformative constitutions. It calls for judicial creativity and invites judges to avoid judicial restraint. Additionally, it asks judges to reject a formalist legal culture to realise the full potential of transformative constitutions.[46] This research seeks to build on these two concepts in a bid to convince the Kenyan judiciary to depart from the excessive legalistic culture and judicial timidity which sins against the aura of the constitution and is the reason for the survival of jurisprudential conservatism in Kenya's electoral jurisprudence. In so doing, this study relies on the literature on these concepts to call for the adoption of a rights-centric approach in election disputes.

**1.4.5 Interpretation of a transformative constitution**

Transformative constitutions are unique and different from other constitutions. Transformative constitutions unlike the conventional liberal constitutions are devoted to transforming all sectors of the state and not only to allocate powers. At the centre of transformative constitutions, is the use of law for social transformation.[47] As a result, they call for a different manner of interpretation. Various authors affirm this position.[48] For instance, Horn in his *Interpreting the Interpreters* affirms that 'a transformative constitutionalism, or a value judgment, leans more towards a broader interpretation to uphold the spirit of constitutional values.'[49] This is the realisation that these constitutions are thick and therefore have values, principles and rights that must be given effect. Judges are, therefore, given the role of developing the law in the context of constitutional interpretation.[50]

The research builds on these writings to advance the argument that Article 20(3) of the Kenyan Constitution calls for maximization and not minimisation while interpreting rights. Courts are, therefore, called to adopt a pro-rights interpretation and should reject calls to impose higher standards of proof that place an undue burden on petitioners and limit the potential of the

45 *Speaker of The Senate & Another v Hon. Attorney General & Another & 3 Others* [2013] eKLR; *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another* [2017] eKLR.

46 W Khobe 'Transformation and crisis in legal education in Kenya' (2017) 25 *The platform for Law Justice & Society* 66; Mutunga (n 3) 1.

47 Klare (43) 146.

48 Mutunga (n 3) 8.

49 N Horn *Interpreting the interpreters: A critical analysis of the interaction between formalism and transformative adjudication in Namibian constitutional jurisprudence 1990-2004* (2016) 12.

50 S Breyer 'Active liberty interpreting our democratic constitution' (2005)*The tanner lectures on human values* 5; R Mańko ''War of Courts' as a clash of legal cultures: rethinking the conflict between the Polish Constitutional and Supreme Court over 'interpretive judgements' in M Hein, A Geisler & S Hummel *Law, politics, and the Constitution: New Perspectives from Legal and Political Theory* (2014) 82.

constitution. Further, Article 10 of the constitution provides for national values, thereby, calling for substantive reasoning which invites courts to take an inquisitorial role while adjudicating elections. This in turn calls courts to abandon the onerous burden and standard of proof that they have imposed on the petitioners.

### 1.5 Methodology

In answering the research questions in this study, various methods are deployed. Firstly, the study deploys the desk review or library-based research method. It reviews both primary sources including, constitutions, legislations and conventions. Similarly, the study reviews available secondary sources such as books, journal articles, dissertations and theses. Further, since the study is mainly concerned with the trend in electoral jurisprudence, the study examines decisions emanating from the Supreme Court, Court of Appeal and high court of Kenya to demonstrate and interrogate the judicial attitude towards election petitions. The study also analyses the electoral jurisprudence emanating from courts in select countries.

### 1.6 Limitations of study

The research considers only the standard of proof in election petitions. It does not consider other aspects of elections, such as undue regard to technicalities, but will only mention such aspects to illustrate the judicial attitude towards election petitions. The research does not undertake any form of comparative studies, but will only borrow lessons from select jurisdictions. Due to time constraints, word limit and the scope of the study, the researcher acknowledges that he will not be able to cover all the available literature on the subject. Consequently, the research will mainly focus on Kenya.

### 1.7 Chapter Breakdown

This study consists of five chapters:

**Chapter one**

This chapter is the research proposal. It outlines the background of the study, the statement of the problem, the research questions, the research methodology, the limitation of the study, the literature review and the chapter breakdown.

**Chapter two**

This chapter looks at the national, regional and international normative framework for standard of proof in election disputes and how the Kenyan judiciary has interpreted the normative

framework. In particular, the chapter looks at the judicial attitude of the courts and the standard of proof adopted by the Judiciary in election petitions.

**Chapter three**

In this chapter, the study assesses the reasons given by the Judiciary in chapter two justifying the adoption of the intermediate test. The chapter will demonstrate why those reasons are fundamentally flawed and the need for the Court to adopt a human-centric approach in the adjudication of election disputes. Such a human rights-centric approach would require courts to adopt the normal standard of proof used in other constitutional petitions in adjudicating election petitions.

**Chapter four**

Chapter four considers lessons that the Kenyan Judiciary can learn from other jurisdictions. In particular, the chapter looks at the recent jurisprudence in Malawi and Zimbabwe where the Kenyan jurisprudence was considered in detail by the other judiciaries and finally dismissed. The chapter also borrows from Ghana, Mauritius and Nigeria who have equally rejected the intermediate test.

**Chapter five**

This last chapter of this research is a conclusion stating whether the objectives of the study have been met. This chapter also provides conclusions and recommendations.

## CHAPTER TWO

## The normative framework and judicial adjudication of the standard of proof in election disputes in Kenya

> The way is shut.
> It was made by those who are dead, and
> The dead keep it until the time comes
> The way is shut[51]
> Therefore, it is much better, from a legal and tactical point of view, to rig elections, because then, a strategic advantage is gained over other competitors because the "law" gives that evidential advantage. [52]

### 2.1 Introduction

When the democratic and constitutional whistle blew in 2010, it marked a departure from an authoritarian rule to a democratic order and symbolised a new dawn. At the core of this transformation was the attainment of electoral justice. Learning from the past and the 'atavistic blood path of 2007',[53] Kenyans entrenched values, principles, standards and institutions as part of the electoral reform to end the culture of electoral lawlessness as recognised in the Kriegler report[54] and to cure the historical electoral injustices.[55]

Although the dream of electoral justice is easily discernable from the constitution and the entire legal framework, judges, who are referred to as the constitutional foot soldiers have failed to clear up the *Nyayo* (Moi era) legal debris that was left by the old Judiciary and the legal framework. Judges have failed to grasp the meaning of the constitution and adopted a standard of proof that grants judicial blessings to deeply flawed elections. Through an awry judicial interpretation, the Kenyan Judiciary has created a Mount Everest that has proved very difficult for petitioners to climb.[56] This chapter looks at the legal framework governing elections in Kenya and discusses select jurisprudence from the judiciary on the standard of proof in electoral disputes.

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51 JRR Tolkien *Lord of the rings: The return of the King* (2003) at 798.
52 E Nwadioke 'Electoral choices: The task before the Judiciary' https://citylawyermag.com/electoral-choices-the-task-before-the-Judiciary/ (accessed 17 October 2023).
53 *Clement Kungu Waibara v Annie Wanjiku Kibeh & another* [2017] eKLR para 120.
54 Government of Kenya *Report of the Independent Review Commission*(2009) 10.
55 Chief Justice Mutunga in *Gatirau Peter Munya v IEBC & 2 Others* (2014) eKLR para 236.
56 Nwadioke (n 42).

### 2.2 International framework

The normative framework contained in the regional and international instruments applies to Kenya by dint of Articles 2(5) and 2(6) of the Constitution which makes instruments ratified by the state as part of the Kenyan laws without the need for domestication.[57]

#### 2.2.1 Universal Declaration of Human Rights (UDHR)

Despite being a soft law, the UDHR is the grandfather of the international human rights framework. Article 21 recognises the right to vote by providing everyone with the right to take part in the governance of his or her country. Secondly, the declaration recognises that the will of the people shall be the basis of the authority of government which shall be expressed in periodic and genuine elections. The concept of periodic and genuine elections is however undefined.

#### 2.2.2 International Covenant on Civil and Political Rights (ICCPR)

ICCPR is part of the International Bill of Rights. It contains elaborate provisions on human rights. Article 25 guarantees the right of citizens to vote and take part in the conduct of public affairs. Most importantly, ICCPR attempts to provide the electoral standards. It provides that there should be genuine periodic elections which shall be by secret ballot and must guarantee the free expression of the will of the electors. Therefore, in electoral disputes, courts should ask the question of whether the election met this standard: the free expression of the will of the electors.[58]

### 2.3 Regional framework

#### 2.3.1 African Charter on Human and Peoples' Rights (African Charter)

The African Charter is the core text on human rights in Africa. Unfortunately, the charter fails to include the right to vote or electoral standards.[59] The only implied reference of the right to vote is found in Article 13 which provides that every citizen shall have the right to participate freely in the government of his country per the provisions of the law. Although this might be considered to be a clawback clause, the African Commission on Human and Peoples Rights (African Commission) has interpreted similar provisions to mean that the conception of the word law means that the national law must comply with international human rights standards.[60]

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57 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (2021) para 130-131.
58 A Davis-Roberts and DJ Carroll 'Using international law to assess elections' (2010) 17(3) *Democratization* 416.
59 JE Rousellier 'The right to free elections: Norms and enforcement procedures' (1993) 4 *Helsinki Monitor* 27.
60 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

### 2.3.2 African Charter on Democracy, Elections and Governance (ACDEG)

The ACDEG seeks to cure the shortfalls of the African Charter by providing for the right to vote as well as electoral principles. The African Court on Human and Peoples Rights (African Court) has interpreted it as a human rights instrument which gives effect to article 13 of the African Charter.[61] Article 2 and 3 which provide for the objectives and principles requires state governments to promote the holding of regular free and fair elections as well as promote and protect the independence of their judiciaries. These principles are provided in a stand-alone provision in Article 17.

Article 17 requires states to regularly hold transparent, free and fair elections. The provision also imposes specific obligations on the state such as the establishment of independent electoral commissions and strengthening of national mechanisms to redress election disputes. The African Commission has issued a resolution calling on states to ensure that the 'imperative that the objectives and principles set out in the African Charter on democracy should be respected and implemented.'[62]

### 2.3.3 Declaration on the Principles Governing Democratic Elections in Africa (Declaration)

The African Union Heads of state and Government of the organization of African Unity adopted the declaration in 2002. The declaration reaffirms the will of the people as expressed through free and fair elections as the basis of the authority of government. The declaration also laid down principles of democratic elections. It called for the holding of regular free and fair elections under a system of separation of powers that ensures the independence of the judiciary.

### 2.3.4 New Partnership for Africa's development declaration on democracy, political, economic, and corporate governance (Nepad declaration)

In Paragraph 7, the African heads of state and governments reaffirmed their commitment to the promotion of democracy and its core values in their respective countries and undertook to enforce the inalienable right of the individual to participate through free, credible and democratic political processes in periodically electing their leaders. In paragraph 14, they agreed to the establishment of independent judiciaries in the respective countries.

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61 *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire* (Application 001/2014 2016).

62 African Commission on Human and Peoples Rights Resolution 164 on Elections in Africa.

## 2.4 National framework

### 2.4.1 Constitution of Kenya, 2010

In several ways, the Kenyan Constitution symbolises a break from the past to a new dispensation with enough safeguards to 'prevent lapses into an authoritarian or even totalitarian system cloaked with populist trappings.'[63] The promulgation of the 2010 Constitution was therefore seen as a clear statement of vanquishing the 'Reds' and achieving a 'clean bill of constitutional health'[64] after the successful dismantling of the 'oppressive constitutional outlook.'[65] It is this rebirth that is considered below.

***Sovereignty of the people***

Article 1 recognises the people as the sovereign, wielders of the constituent power who have delegated these powers to the three arms of government to exercise these powers on their behalf. The concept is also found in other provisions of the constitution hence the acknowledgement by courts that it is a 'golden thread running through the constitution.'[66] In the recognition of the sovereignty of the people, the constitution mainly acknowledge that a Republic is its people and not 'its mountains, rivers, plains, its flora and fauna or other things and resources within its territory'.[67] Courts' adjudication of election petitions must therefore recognise that an election is the ultimate expression of the sovereignty of the people.[68] This requires that any interpretation of the law must be anchored on the sovereignty of the people. Put simply, the will of the people must be at the centre of the dispute.

***National values***

At the kernel of the 2010 Constitution is the quest to transform Kenyan society from past authoritarian rule to a democratic society. To achieve this, Kenyans identified certain values and principles to guide the process under Article 10. Further, state organs and officers are bound by

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63 WF Murphy 'Constitutions, constitutionalism and democracy' in D Greenberg *Constitutionalism and democracy transitions in the contemporary world* (1993) 3.

64 *Federation of Kenya Women Lawyers (FIDA-K) & Others v Attorney General* [2011] eKLR.

65 W Mutunga 'Developing progressive African jurisprudence: Reflections from Kenya's 2010 transformative constitution' a paper presented at the 2017 Lameck Goma annual lecture held at Lusaka, Zambia on 27 July 2017.

66 *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR.

67 *Timothy M Njoya & 6 others v Attorney General & 3 others* [2004] eKLR.

68 *Richard Kalembe Ndile and another Vs Patrick Musimba Musau* (2013) eKLR.

these values as they apply or interpret the constitution and any law. Essentially, these values are intended to serve as the 'intestinal fluid' that nourishes the Bill of Rights and the constitution.[69]

These values are to 'apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions.'[70] According to the South African Constitutional Court, the values must act as 'a guiding principle and stimulus for the legislature, executive and the Judiciary.'[71] The point is that courts cannot adopt a mechanical interpretation of election laws but must be guided by the spirit and soul of the constitution as ingrained under Article 10.[72]

***The Bill of Rights***

Whereas the retired constitution had a Bill of Rights, its effect was limited by claw back clauses hence earning the term 'bills of exceptions.'[73] The current constitution departs from the past in various aspects. First, it recognises that the Bill of Rights is an integral part of Kenya's democratic state and not merely a peripheral.[74] Second, the recognition of the Bill of Rights is to preserve the dignity of the individuals.[75] Third, the rights are not granted by the state.[76] Fourth, it introduces the principle of horizontal application of the Bill of Rights.[77] Fifth, in applying a provision of the Bill of Rights, courts are required to promote the values, spirit and purport of the Bill of Rights and to develop a law to the extent that it does not give effect to the Bill of Rights.[78] Sixth, it provides for a test for the limitation of rights.[79] The inclusion of this provision was intended to create a human rights state where there is a culture of rights.[80] Importantly, it introduces the culture of justification which requires that the government must justify its actions.[81] Put differently, 'every official act must find its locus in the law and underpin in the constitution.'[82]

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69 *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others* [2012] eKLR para 42.
70 See the German Federal Constitutional Court in *Luth Decision* BVerfGE 7, 198 I. Senate (1 BvR 400/51).
71 *Carmichele vs. Minister of Safety and Security* 2001 SA 938 (CC).
72 *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017*] eKLR para 37.
73 K M'inoti 'Why the Kenyan Bill of Rights has failed' *Expressions Today* (November 1998).
74 Constitution of Kenya, 2010 Article 19(1).
75 Constitution of Kenya, 2010 Article 19(2).
76 Constitution of Kenya, 2010 Article 19(3)(a).
77 Constitution of Kenya, 2010 Article 20; WK Ochieng, 'The Horizontal Application of the Bill of rights', (2014) *The journal for Law and Ethics* at 74.
78 Constitution of Kenya, 2010 Article 20(2), (3) and (4).
79 Constitution of Kenya, 2010 Article 24.
80 M Mutua 'Hope and despair for a new South Africa: The limits of rights discourse' (1997) 10 *Harvard Human Rights Journal* 63; B Gregg *The human rights state: justice within and beyond sovereign nations* (2016)13.
81 E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) *10 SAJHR 32.*
82 *Samura Engineering Ltd & Others v Kenya Revenue Authority Nairobi petition No. 54 of 2011; Justice Kalpana Rawal and Others v Judicial Service Commission and Others* Applications No. 11 and 12 of 2016.

Finally, the Bill of Rights contains many provisions on rights and fundamental freedoms. For purposes of this study, Article 38 provides for political rights. It recognises that 'every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.'[83] Due to the principle of interrelatedness and indivisibility of rights,[84] the right to vote is related to other rights such as equality,[85] human dignity,[86] liberty, [87] freedom of expression,[88] access to information,[89] the right to association[90] and the right to assemble.[91]

***Constitutional rules and principles on elections***

The 2010 Constitution provides for the normative framework to govern elections. Article 81 provides for the guiding principles for the electoral system. It articulates a test for the elections. Firstly, they must be free and fair. Secondly, the constitution identifies some of the elements of this broad concept. It provides that free and fair elections must be by secret ballot, free from violence, intimidation and improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.[92] The second set of election standards is found in Article 86 which imposes obligations on the Independent electoral and boundaries commission (IEBC). The IEBC is required to ensure that the voting method is simple, verifiable, accurate, transparent and accountable.

Article 81 and 86 therefore creates a constitutional test for elections in Kenya. An election that fails to adhere to these electoral standards should be nullified for failing to give effect to the Constitutional values, principles and standards.

***The Independent Electoral and Boundaries Commission (IEBC)***

Learning from their experiences, Kenyans created the IEBC as an independent commission to manage elections.[93] IEBC is also listed as one of the independent commissions in chapter 15 of the Constitution which provides for independent commissions also known as the fourth arm of the

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83 Constitution of Kenya, 2010, Article 38.

84 H Quane 'A further dimension to the interdependence and indivisibility of human rights? Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Human Rights Journal* 49-83.

85 Constitution of Kenya, 2010 Article 27.

86 Constitution of Kenya, 2010 Article 28.

87 Constitution of Kenya, 2010 Article 29.

88 Constitution of Kenya, 2010 Article 33.

89 Constitution of Kenya, 2010 Article 35.

90 Constitution of Kenya, 2010 Article 36.

91 Constitution of Kenya, 2010 Article 37.

92 Constitution of Kenya, 2010 Article 81(e).

93 Constitution of Kenya, 2010 Article 88.

government[94] or the integrity branch, constitutional watchdogs or democracy branch.[95] The object of this fourth arm is to protect the sovereignty of the people, secure the observance of democratic values and principles and promote constitutionalism.[96] Importantly, IEBC is required to be independent and not subject to the direction of control by any person or authority.[97] This has come to be known as the 'independence clause'[98] because it safeguards the commissions from undue interference. IEBC must therefore be seen to act outside the government.[99]

***The Judiciary***

In chapter one, this study observed that in 2010, the Judiciary was earmarked as one of the institutions to be reformed and the chapter laid a historical basis. To reiterate the point albeit differently, Moi's quest to entrench himself as a total man and an imperial president did not spare the Judiciary.[100] The KANU era muzzled the Judiciary and it was excessively subservient to the executive.[101] In essence, the judiciary was simply the executive's court and was marked by what Abebe calls the 'abdication of responsibility.'[102] Kenyans were dissatisfied with this judiciary to the extent that they required judges to undergo fresh vetting.[103]

Chapter ten of the constitution which establishes the judiciary should be understood with this background in mind. First, Article 159 recognises that judicial authority is derived from the people. Article 160 safeguards the independence of the judiciary by recognising that the judiciary is only subject to the constitution and the law. Second, the constitution provides for the operational, functional and financial independence of the judiciary. Third, judicial officers are granted immunity from suits. In sum, the judiciary is protected from the patronage of the executive. The president can no longer appoint or fire a judicial officer on his own volition. Thus the judiciary should stand tall and promote constitutionalism.

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94 Constitution of Kenya, 2010 Article 249 (2); *Kenneth Otieno v Attorney General & another* [2017] eKLR Para 80.

95 B Ackerman 'The new separation of powers' (2000) 113(3) *Harvard Law Review* 633.

96 Constitution of Kenya, 2010 Article 249(1).

97 Constitution of Kenya, 2010 Article 249(2).

98 *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR.

99 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 31.

100 B Ackerman 'The rise of world constitutionalism' (1997) 83 *Virginia Law Review* 771.

101 Gutto (n 5) 149.

102 AK Abebe 'Abdication of responsibility or justifiable fear of illegitimacy? The death penalty, gay rights and the role of public opinion in judicial determinations in Africa' (2012) 60 *The American journal of comparative law* 603.

103 *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR.

In terms of electoral adjudication, the judiciary is granted the jurisdiction to handle election disputes including petitions challenging the election of a member of a county assembly, member of parliament, governor or president.[104] Unlike other jurisdictions such as Benin where there is a specific court outside the normal hierarchy of judiciary that handles electoral disputes, Kenya adopts a decentralised system where the ordinary courts handle these disputes.

### 2.5 Legislation

In various instances, the constitution mandates parliament to enact statutes to give effect to its provisions. It is for this reason that these statutes are referred to as constitutional statutes since they are meant to give effect to the provisions of the constitution and are treated differently from ordinary statutes.[105] The Kenyan Judiciary appropriately described these legislations as normative derivatives of the constitution.[106] These legislations should be seen from this background as seeking to promote not only the substantive content but also the entire aura of the constitution.

### 2.5. 1 Elections Act, 2011 and Regulations

The Election Act was enacted to give effect to the constitution as required under Article 82. It is for this reason that the Supreme Court held that the elections Act and its Regulations 'are normative derivatives of articles 81 and 86 of the constitution.'[107] The Act stipulates how the elections should be conducted and the standards to be adhered to. Importantly, it also provides for the adjudication of electoral disputes.

Section 74 of the Act creates two forms of disputes: pre-election and post-election disputes. First, pre-election disputes are to be resolved by the IEBC with a right of appeal to the judiciary while post-election disputes are vested in the judiciary. Secondly, the Act mandates the courts to handle electoral disputes. A challenge on the election of county governor, senator, member of parliament and woman representative is handled by the high court while that of a member of county assembly is by a resident magistrate.[108] Section 83 creates a threshold for the nullification of the election. However, the Act is silent on the standard of proof in election disputes, and this has been left to the interpretation of courts.

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104 Constitution of Kenya, 2010 Articles 22, 23, 87, 105, 144, 163, 164 and 165.

105 F Ahmed & A Perry 'Constitutional statutes '(2017) 37(2) *Oxford journal of legal studies* 461–481.

106 *SPG v Directors, Sabis International School - Runda & 3 others* [2020] eKLR para 25.

107 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR; *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others* (2014) eKLR.

108 Section 75 of the Elections Act, 2011.

### 2.5.2 IEBC Act 2011

This Act of Parliament gives effect to Article 88 of the constitution by providing for the appointment of commissioners as well as the regulation of the IEBC. As per Article 88 of the Constitution, the Act reiterates the fundamental obligation imposed on the IEBC to conduct and supervise elections. Further, the Act provides for the operational, financial and functional independence of the commission.[109] It is in part IV of the act that the constitutional principles governing elections are reiterated. Section 25 obligates IEBC to ensure that the citizens exercise their political rights under Article 38 of the constitution in free and fair elections which conform to the principles set out in Article 81(e).

### 2.5.3 Evidence Act

Chapter IV of the Evidence Act governs the production and effect of evidence. Section 107 provides that the legal burden of proof is on the party asserting the existence of a certain fact. Section 109 of the Act provides that the evidentiary burden of proof might shift to a respondent once the legal burden is discharged. However, the Act is silent on the standard of proof save for section 111 which provides that an accused person will not be convicted if the defence creates a reasonable doubt as to the guilt of the accused person. However, Kenyan courts while relying on *Miller v Minister of Pensions* have held that the standard of proof for civil disputes is on a balance of probabilities.[110]This discussion is considered in chapter three of this study.

### 2.6 Theatre of drama: Kenyan Judiciary and legal sophistry

The term legal sophistry is borrowed from Muthomi who conceives it as a clever approach by Kenyan Courts to suppress genuine questions on the integrity of elections by relying on discreditable case law.[111] This study proposes that the interpretation of the standard of proof in election petitions is a classic example of legal sophistry. Although the courts mention the leitmotifs of Articles 10 and 81, the meaning of these articles completely escapes them.

As will be shown below, the interpretation of a standard of proof by courts is a theatre of drama but not a legal interpretation. Despite the acceptance by courts that there exists informational asymmetry between IEBC and petitioners and further that the commission must be

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109 See Part II and III of the Act.

110 *Miller v Minister of Pensions* [1942] 2 ALL ER 372.

111 M Thiankolu 'Role of the courts in ensuring free and fair elections in Kenya: A tale of fifty-six years of legal sophistry and intellectual dishonesty' (2019) 4 *Kabarak journal of law and ethics* 53-90.

accountable, the courts have invented a test that makes it impossible to hold the commission accountable.[112] The select jurisprudence below will show a Judiciary that is exceedingly deferring to the IEBC rather than holding the IEBC accountable.

### 2.6.1 Supreme Court

#### *Raila 2013*

This was the first presidential challenge that the Supreme Court handled.[113] The petitioners challenged the election on several grounds including whether the election was conducted in a free, fair, transparent and credible manner in compliance with the constitution and the law. The petitioners pointed out several infractions of the law, to wit, failure of the electronic results transmission system, the inclusion of rejected votes in the computation of thresholds etc. The real legal sophistry started way before the judgment. The Supreme Court dismissed an application by Raila, the petitioner, who sought to adduce more evidence out of the allocated time by holding that the Supreme Court's time was limited. The ruling ignored clear provisions of the constitution that command the court to deliver substantive justice instead of relying on technicalities.[114]

The second incident is on the threshold to nullify elections. The court interpreted section 83 of the Elections Act to mean that even if a party proves irregularities or constitutional violations, a party must show that this affected the results. [115] The third incident was when the court was confronted with the question of the standard of proof in election petitions. It recognised that there are two standards of proof, the civil and criminal tests. However, the court noted three fundamental directions: one, the breach of electoral law takes different approaches; two, the standard of proof should be based on the principles of the constitution to give fulfilment to the electoral rights and national values. It arrived at this position by conducting a study of three different countries;[116] three, judicial practice should not make it 'burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of the franchise.'[117]

This analysis up to this point is commendable but this was before judicial sophistry took charge and the constitution was taken to the back seat. The Court invented an intermediate test and stated that the standard of proof is above the balance of probabilities but below the beyond

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112 *Gatirau Peter Munya v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR paras 251-252.
113 *Odinga* 2013 (n 16).
114 Constitution of Kenya Article 159.
115 *Raila Odinga* 2013 (n 16) para 256.
116 As above para 203.
117 As above.

reasonable doubt. The court does not state how this test is linked up to its earlier statements. This court was prepared to sustain the election on extra-legal considerations as shown in its reasoning in the last part of the judgment as explained below.

The court noted that first, the office of the president is the focal point of political leadership and therefore 'a critical constitutional office'.[118] Second, the whole nation has an interest in the occupancy of this office.[119] Third, it is not for the court to determine who occupies the presidential office.[120] In essence, the constitution, the values and principles, the sovereignty of the people and the right to vote were not at the centre of the court's analysis. They were thrown to the dustbin in the court's quest to sustain the election. Therefore, the Supreme Court squandered its very first opportunity to reestablish constitutionalism, rule of law, respect for human rights and entrench electoral justice in Kenya.

***Raila 2017***

In 2017, the Supreme Court nullified the first presidential election in Africa.[121] Although the court reached the correct decision, its holding on the standard of proof is problematic and unconstitutional. However, to its credit, the court reversed itself on the threshold test by holding that section 83 of the Elections Act is disjunctive and therefore a party can either show that there were irregularities without having to show that they substantially affected the results.[122] Further, the process is as important as the final result. This reasoning is commendable.

In 2017 unlike in 2013, parties formulated the question of standard of proof as an issue for determination. The court was required to deeply engage on this question and offer justifications for the intermediate test or depart from it. Unfortunately, there is nothing jurisprudential or admirable in that decision. The court does not engage in constitutional interpretation or application. It does not consider any law but expresses an opinion based on the wishes of the judges.

In its justification for this standard, the court said that the rationale for the intermediate test is that an election petition is not an ordinary suit concerning two people but it involves the entire

118 *Odinga* 2013 (n 16) para 298.
119 *Odinga* 2013 (n 16) para 298.
120 As above para 299.
121 *Odinga* 2017 (n 16).
122 As above para 211.

electorate in a voting unit.[123] The only justification for this position is an old Tanzanian decision determined in 1970.[124] In completely shutting the way, the court acknowledged the criticisms on the intermediate test but it simply said, it is ours and ours it shall remain.[125] In doing so, the Supreme Court rendered the road to transformation shut. The Supreme Court appears comfortable with its earlier holdings and is either reluctant or unwilling to change its position.

***Raila 2022***

The Supreme Court had another opportunity to reconsider the standard of proof question.[126] Again the petitioners and *amicus curiae* formulated this question as an issue and asked the court to depart from this unknown test. However, the petitioners expected too much from the court. The court did not materially engage in the question posed i.e. whether the intermediate test was constitutionally compliant. Instead, the court held that it was not prepared to depart from that test which in its view is firmly laid and applied in Kenya.[127] An apex and a nascent court worth its salt cannot justify a position by saying it is firmly laid when questions are posed. It is expected to consider the arguments, engage with constitutional principles, breathe fresh oxygen to the bare bones of the constitution and depart from its earlier positions when it is shown that it is wrong. Unfortunately, not the Supreme court of Kenya.

***Alfred Nganga Mutua (2018) and Peter Gatirau Munya (2014)***

In *Alfred Nganga Mutua*, the Court of Appeal nullified the Machakos County gubernatorial election and held that the election was not conducted per constitutional principles and was therefore null and void.[128] In overturning the decision of the Court of Appeal, the Supreme Court held that the standard of proof in election petitions has already been settled in its past jurisprudence. A court should only nullify an election when a petitioner meets the intermediate test.[129] Although the respondent had demonstrated certain illegalities and irregularities, the same did not meet the intermediate test and the Court of Appeal should not have nullified the electoral results.

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123 *Odinga* 2017 (n 16) para 150.
124 *Madundo v Mweshemi & A-G Mwanz*a HCMC No 10 of 1970.
125 *Odinga* 2017 (n 16) paras 152-153.
126 *Odinga* 2022 (n 16).
127 As above para 34.
128 *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another* [2018] eKLR
129 As above para 43.

In *Gatirau Peter Munya,* the Court of Appeal invalidated the election of the appellant as the elected governor of Meru County.[130] In allowing the appeal, the Supreme Court held that an election should not be annulled except on cogent premises. The court proceeded to fault the Court of Appeal on the standard of proof and held that the Court of Appeal had 'misinterpreted and misapplied the electoral law, and overlooked the doctrine of precedent.'[131]

The discussion is, however, worsened by the fact that the Supreme Court does not define what is meant by an intermediate test. It only says that it is above the balance of probabilities. As will be shown in chapter three of this study, such opaqueness is a creative tool by the Supreme Court to deter election petitions rather than give effect to the values and the normative framework of the constitution.[132]

### 2.6.2 Court of Appeal and High Court

The intermediate test was manufactured at the Supreme Court and the lower courts have been forced to swallow it hook, line and sinker, thanks to Article 163(7) of the Constitution which makes the decisions of the Supreme Court binding on the lower courts. This is to mean that the hands of the lower Courts are severely tied. Suppose the high court makes a decision ignoring the binding precedent, the Court of Appeal and the Supreme Court will reverse it as was in *Annie Wanjiku Kibeh v Clement Kungu Waibara* where the Court of Appeal and the Supreme Court vilified the High Court that had stated that the test for nullifying an election is the *per se test* which asks whether the election was conducted in compliance with the principles set out in the Constitution.[133] The Supreme Court and the Court of Appeal agreed with the appellants that the High Court had lowered the standard of proof and ignored binding precedents.

Because decisions of the Supreme Court are binding on the lower cadres of the judiciary and due to limited space, this part will only consider a few of those decisions. The justification for the intermediate test was given by Justice Githua in the often-cited *Sarah Mwangudza Kai v. Mustafa Idd* which has also been quoted with approval by the Supreme Court. [134]

The judge stated that election petitions are not like ordinary civil suits for various reasons. First, they are governed by a special code of electoral laws and they are concerned with the rights

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130 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

131 As above para 225.

132 W Khobe 'The Supreme Court's flawed approach to the standard of proof: A case study of electoral and constitutional causes' (2021) 64 *The Platform for law, justice and society* 9.

133 *Annie Wanjiku Kibeh v Clement Kungu Waibara another* [2018] eKLR.

134 *Sarah Mwangudza Kai v Mustafa Idd & 2 Others* [2013] eKLR para 29.

of voters. As such, those petitions involve not only the parties but also the electorate. Second, they are peculiar because they are matters of great public importance and interest.[135] This decision was recently endorsed by the Court of Appeal to uphold an election where the court stated that although there were illegalities, irregularities and errors in the conduct, the petitioners had not met the standard of proof which is higher than the normal civil test.[136] The Court of Appeal has consistently held that election petition appeals are not civil appeals because electoral adjudication is a special jurisdiction created by the Constitution and statutes.[137]

**2.7 Conclusion**

The chapter has shown that the normative framework does not prescribe a standard of proof in election petitions but lays normative values, principles and standards in adjudicating electoral disputes. The question of the standard of proof in election disputes is purely a matter of judicial interpretation. The Kenyan Judiciary has however adopted an unknown standard of proof without paying attention to the normative framework. This jurisprudence is undefendable and the injustice in this jurisprudence cries for a reversal. The Supreme Court has rendered the road to transformation shut and continues to uphold decisions of the dead past rendering the way shut. Importantly, the test adopted by the Judiciary speaks of a court that has a sweetheart relationship with the respondents and in particular the IEBC which is required to be accountable. In doing so, the Kenyan Judiciary has created an insurmountable mountain making it difficult for petitioners to climb. The reasoning emanating from the jurisprudence will be weighed against the analysed normative legal framework in chapter three which will make a case for the Kenyan Judiciary to look into the mirror and return to basics which is to be faithful to the Constitution of Kenya.

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135 For other High Court decisions see David *Ouma Ochieng v Independent Electoral & Boundaries Commission* [2018] eKLR para 15; *Hassan Mohamed Hassan & another v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR; *Charles Obara Orito & another v Independent Electoral and Boundaries Commission& 2 others* [2018] eKLR.

136 *Kyalo & 2 others v Wanjohi & 7 others (2023)* eKLR; *Dennis Omwanga Ayiera vs Nyaribo Amos Kimwomi and others* (2023) eKLR.

137 *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR; *Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR .

## CHAPTER THREE

## Reinvigorating electoral justice through a human rights-based interpretation of the standard of proof

> An unprincipled, eclectic, vague, pedantic, inconsistent and conservative approach to constitutional interpretation… has haunted Kenyan Courts since independence.[138]

> Our peculiar security is the possession of a written constitution. Let us not make it a blank paper by construction.[139]

### 3.1 Introduction

Kenyan's 2010 Constitution can be described in Justice Sachs's words as a 'pristine constitution representing a complete rapture with the past'[140] a past where the state of the Judiciary 'remained a public scandal and a political football.'[141] Kenyans desired to correct the past where the judiciary failed to uphold electoral justice but promoted what this study terms *incumbency justice*, a scenario where the incumbent always had the last laugh in court. The *incumbency justice* survived due to the technical interpretation of the Constitution and other laws. Justice Njoki gives a glimpse of this type of justice in *Kidero v Waititu* where she asserted that 'for many years, the courts were part of the problems impeding electoral justice.'[142]

In a bid to cure the past, Kenyans entrenched in great detail ways of attaining electoral justice in the constitution.[143] The constitution prohibits the promotion of technicalities at the expense of substantive justice and reforms the judiciary by setting out a theory of interpreting the constitution. However, the *incumbency justice* is rearing its ugly head again courtesy of a narrow and technical interpretation of the constitution. The Kenyan Supreme Court and the judiciary at large have failed to grasp the constitutional chorus of electoral justice but have instead promoted *incumbency justice* by creating a Mount Everest that the petitioners cannot surmount instead of

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138 M Thiankolu 'Landmarks for El Mann to the Saitoti ruling; Searching a philosophy of constitutional interpretation in Kenya' (2007) *Kenya Law Review*.

139 R Paul 'Not blank paper: An excerpt from "the revolution: a manifesto' https://www.rcreader.com/commentary/not-blank-paper-excerpt-revolution-manifesto (accessed 17 October 2023).

140 A Sachs 'A gentle provocation: A reply to Stu Woolman 'in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008).

141 C Hornsby *Kenya: A history since Independence* (2012) 660.

142 *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others* (2014) eKLR para 217.

143 A Hersi and F Otieno 'Elections after reforms: The promise of institutionalism in Kenya's 2013 general elections' in F Otieno (ed) *New constitution, same old challenges: reflections on Kenya's 2013 General elections* (2015) 10, 11.

advancing human rights-oriented jurisprudence. Today, the judiciary must carry the highest blame for the non-attainment of electoral justice in Kenya.

In chapter two, the study explored the normative legal framework and demonstrated that the question of the standard of proof is purely a matter of judicial interpretation. The chapter also illustrated how the Kenyan judiciary has interpreted the constitution and invented the intermediate test. This chapter makes a case for the adoption of a human rights-based approach to the question of the standard of proof in election petitions. It makes the argument that in the field of constitutional horticulture, judges are expected to act as 'horticulturists who guide the work of gardeners in a national garden.'[144] However, by adopting a narrow and legalistic interpretation of the Constitution, Kenyan judges have failed to supervise the gardeners.

### 3.2 Standard of proof in adjudicating disputes

The standard of proof is the weight that a court places on the 'facts that are placed before it.'[145] The Supreme Court has defined the term to be the level of proof needed in case for a party to succeed.[146] There are two traditionally accepted standards of proof in disputes. In a civil dispute, the standard of proof is on a balance of probabilities or on a preponderance of evidence and in a criminal dispute, the standard of proof is beyond reasonable doubt.[147] Courts have however invented a third test and termed it the intermediate test. These three tests are briefly discussed below.

#### 3.2.1 Balance of Probabilities

Balance of probabilities is the accepted test in civil cases. The test is a simple test and a party only needs to adduce evidence to make the tribunal 'think it is more probable than not.'[148] The test is met if the proposition is more likely to be true than not. This standard is easier to discharge and it is lighter than the one in criminal proceedings.

144 WN Eskridge & J Ferejohn 'Constitutional horticulture: Deliberation-respecting judicial review' (2009) 87 *Texas Law Review* 1275.
145 *Nana Addo* 2013 (n 24) 58.
146 Odinga 2017 (n 16) para 143.
147 M Opoku-Agyemang *Law of evidence in Ghana* (2010) 164.
148 *In re H (Minors) (Sexual Abuse: Standard of Proof*) AC 563 at 586.

### 3.2.2 Beyond reasonable doubt

Unlike the civil test, this test is considered technical and 'a bit complex.'[149] The Supreme Court of Nigeria observed that the test is met when a reasonable man does not entertain a reasonable doubt.[150] It defined a reasonable doubt to be 'a doubt which makes the court hesitate as to the correctness of the conclusion which it arrives at.'[151] This means that there should be no other hypothesis, conjecture, proposition, or presumption other than that of the guilt of the accused.[152]

### 3.2.3 Intermediate test

Despite its deployment by the Supreme Court, the court does not define the test beyond saying that it is above the balance of probabilities but somewhere below the beyond reasonable doubt. The test is, however, borrowed from Zambia's *Lewanika* decision of 1998.[153] In that case, the Supreme Court of Zambia noted that the test is one of high 'convincing clarity.' In Kenya, it has been called a very high standard of proof, a fairly high degree of convincing clarity and above the balance of probability.[154]

As will be shown in chapter four of this study, progressive courts have moved away from this position and held that the standard of proof in election petitions is a balance of probabilities. Further, even Britain, which Kenyan legal architecture borrows from heavily, has rejected the application of this intermediate test. For instance, Lord Tucker in *Dingwall v J. Wharton (Shipping) Ltd* held that he was 'unable to accede to the proposition that there is some kind of intermediate onus between that which is required in criminal cases and the balance of probabilities' that is required in civil proceedings. [155]

The intermediate test is however problematic, not only in Kenya, but also in the countries where it has been used. This is because no decision has defined what it means. The interpretation is therefore left to the discretion of individual judges. It is for this reason that Nyane and Mutangi[156] note that the lack of articulation of this standard has resulted in the opaqueness of the

149 Mutangi (n 34) at 93.
150 *Abubakar & Ors v Yar'adua & Others* SC 72/2008.
151 As above.
152 *Jim Nwobodo v. Onoh & 2 Others* (1984) 1 SCNLR
153 *Lewanika and Others v Chiluba* SCZ 14 of 1998.
154 Khobe (n 131) 9.
155 *Dingwall v J. Wharton (Shipping) Ltd* [1961] 2 Lloyds Rep. 213 at 216.
156 Mutangi (n 34) at 100.

high evidentiary rule.[157] The consequence of this opaqueness is that the standard of proof is now being used as 'a convenient mechanism to prevent/deter challenges to presidential elections.'[158]

**3.3 Nature of election petitions**

Chapter two has demonstrated that the Kenyan Judiciary justifies the higher test on the basis that elections are *sui generis,* they involve the entire electorate in an electoral unit and they are, therefore, public disputes and go beyond the interests of the parties. The Kenyan courts do not, however, offer any legal justification for this. This is because there is absolutely no legal leg that their decisions rest on.

To borrow the words of Justice Njoki although uttered in a matter not related to the issue at hand, the study has looked 'under the skirts of pronouncements and layers of reasoning and still could not find a logical constitutionally based explanation for the conclusions and findings of the courts on this question. I can only term it as interpretational misadventure if not judicial overreach or at best judicial invention'.[159] Simply, there exists no law requiring such a higher standard and the judiciary has failed to offer a 'logically constitutionally based explanation' of the intermediate test. The explanations offered are not only unconstitutional but also deeply flawed.

First, if the justification is that election petitions go beyond the parties, is this not the nature of constitutional litigation? In constitutional litigation, the import is to vindicate the constitution and the bill of rights and the remedies granted are public in nature.[160] Secondly, public interest litigation involves matters touching the entire public just like a presidential election petition.[161]

Third, election petitions are purely human rights cases. At the centre of the dispute is whether the actions or omissions of the electoral commission have violated the right to vote and petitioners are exercising their right to access to justice. Fourth, election petitions are also constitutional cases. Petitioners ask the court to determine whether the elections meet the constitutional principle of free and fair elections. Therefore, there is nothing to set them apart. They are just civil matters touching on the interpretation and application of the constitution. Justice Njoki in her dissenting opinion correctly described election petitions as right-centric

157 Nyane (n 20) 1.
158 As above.
159 *Attorney-General & 2 Others v Ndii & 79 Others; Prof. Rosalind Dixon & 7 Others* (2022) eKLR para 1181.
160 I Curie and JD Waal (n 36) 196.
161 Mutangi (n 34) at 101.

causes. She held that 'an election cause is a right-centric cause. At the heart of a petition challenging the results of a presidential election is the right to vote in free and fair elections. This right is at the epicentre of Kenya's democratic character as a Republican state.'[162]

Why then are the other constitutional matters adjudicated on a balance of probabilities and not election disputes which are just like every other constitutional petition? The artificial cleavage created by the Kenyan Judiciary has no legal leg to stand on. It can be argued that it is for this reason that the former Chief Justice, David Maraga, who presided over *Raila 2017* recently had a change of heart and stated that there is no basis 'for [the] categorisation of electoral law requiring that high standard of proof, especially for infractions of a civil nature.'[163]

Having established that election petitions are purely civil disputes with public connotations and that they involve the application and interpretation of the Constitution and Bill of Rights, the next section considers how best to interpret the Constitution to realise its leitmotifs.

### 3.4 Interpreting an autochthonous Constitution

The constitution contains a complete inbuilt theory of interpretation.[164] Article 259 requires that the Constitution be interpreted in a manner that (i) promotes its purposes, values and principles; (ii) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and (iii) in a manner that permits the development of the law and contributes to good governance.[165] Moreover, every provision of the constitution shall be construed according to the doctrine of interpretation that the law is always speaking.[166] Other constitutional directives are found in Articles 10 and 20 of the constitution. Article 10 binds judges to the values and national interests when they apply or interpret the constitution. Article 20, on the other hand, is specific on the interpretation of the Bill of Rights. It obligates judges to develop the law to the extent that it does not give effect to a right and to adopt an interpretation that most favours the enforcement of a right.[167] Secondly, in interpreting the Bill of Rights, a court is required to promote

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162 *Odinga* 2017 (n 16) Dissenting opinion of Justice Njoki para 17.

163 D Maraga 'Africa's emerging constitutionalism and democracy in Africa from the prism of presidential election disputes' https://www.youtube.com/watch?v=WcJzt1109YQ (accessed 17 October 2023) ; D Maraga 'Common mistakes made by advocates in election petitions' Speech at the Law Society of Kenya and Law Society of Kenya Nairobi Branch colloquium on electoral laws and practice, Leopard Beach Resort Malindi on 9 and 10 December 2021.

164 *In the Matter of the Principles of Gender Representation in the National Assembly and Senate* Advisory Opinion No. 2 of 2012.

165 Constitution of Kenya, 2010 Article 259(1).

166 Constitution of Kenya, 2010 Article 259(3).

167 Constitution of Kenya, 2010 art 20(3).

the values that underlie an open and democratic society and the spirit, purport and objects of the Bill of Rights. These constitutional commandments can be simplified into three modes of interpretation as shown below:

### 3.4.1 Purposive interpretation

Purposive interpretation requires judges to 'get under the skin of the constitution' and promote the purpose and underlying spirit of the constitution.[168] This canon requires courts to go beyond the words of the constitution and consider the historical context of the provisions, the spirit underlying the constitution as well as the aspirations of the citizens. It must be an interpretation that 'advances its purposes, gives effect to its intents, and illuminates its contents.'[169] The theme as held by the Court of Appeal is that of 'maximisation and not minimisation; expansion, not constriction; when it comes to enjoyment and concomitantly facilitation and interpretation.'[170]

The Supreme Court has referred to this interpretation as a holistic interpretation by holding that an interpretation must take into account the historical context, the values, the purpose and the spirit of the constitution.[171] This in effect means that the constitution must be interpreted broadly and liberally. The curtains of 'austerity of tabulated legalism' and word worship were violently torn apart on 27 August 2010 and in their place, they were replaced with purposive interpretation. In construing electoral provisions, courts are called upon to embrace a purposive interpretation.

### 3.4.2 Teleological interpretation

Apart from providing for rights and the structure of governance, the constitution also provides for values and principles hence earning the name a *thick* constitution.[172] Unlike legalistic and minimalistic constitutions, the Constitution establishes a value-based system.[173] In chapter two, this study showed that the Constitution of Kenya embodies a value system that nourishes the constitution and the Bill of Rights. This value system introduces a teleological interpretation of the constitution. Simply, a teleological interpretation is a 'realist-cum-value-oriented approach'

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168 S Guest *Jurisprudence and Legal Theory* (2004) 176.

169 *In the Matter of the Speaker of the Senate & another* [2013] eKLR para 156.

170 *Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR.

171 i*n the Matter of the Kenya National Human Rights Commission* [2014] eKLR para 26.

172 WK Ochieng 'The jurisdictional remit of the supreme court of kenya over questions involving the "interpretation and application" of the constitution' *Kabarak journal of law and ethics* 1.

173 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR para 54.

that 'aspires in the interpretation of individual constitutional (and statutory) provisions, to realise the scheme of values on which the constitutional order is premised.'[174] A court therefore is required to give effect to the values by promoting the 'soul and consciousness of the constitution.'[175] This is because the values signify a break from our unwanted past. A court is not only a guardian of the constitution but also the values and aspirations espoused therein.[176]

A teleological interpretation disfavors a structural minimalist approach.[177] Applied in the context of electoral disputes, this approach calls upon to enforce the values in the constitution. They are obligated to promote the values rather than undermine them. Every interpretation of the constitution must be with the intent of making the values a reality.[178] These values have been identified in article 10 as well as the electoral principles in articles 81 and 86 of the constitution.

**3.4.3 The law is always speaking canon**

The constitution is to be interpreted as a living thing but not a document that is frozen in time. It is a 'living organism in a condition of perpetual growth and change.'[179] Its interpretation must, therefore, be forward-looking. The Kenyan Supreme Court correctly grasped this approach in *Re Senate* where the court held that constitutional making does not end with promulgation but continues with its interpretation.[180] Further 'the constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people.'[181] This means that the interpretation of the constitution is not tied to the history or wording of the constitution but the court must illuminate the constitution.

Further, this interpretation gives credence to the accepted position that the Kenyan constitution is backward and forward-looking.[182] Courts are bound to recognise that the constitution is not a lifeless museum and any interpretation should not 'stultify the living constitution in its growth.'[183] Recently, the Supreme Court has held that the constitution is always

174 LD Plessis 'Interpretation' in S Wolman and M Bishop (eds) *Constitutional Law of South Africa* (2008) 32-1.
175 *Timothy Njoya and others v Attorney General, and others* (2004) eKLR.
176 *M W K v another v Attorney General & 3 others* [2017] eKLR.
177 *Pharmaceutical Society of Kenya v National Assembly & 3 others [2017]* eKLR paras 95-99; *Samura Engineering Limited & 10 Others v Kenya Revenue Authority* [2012] eKLR para 57.
178 Justice Otieno Odek in *Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal* [2015] eKLR para 86.
179 G Marshall and G Moodie *Some Problems of the Constitution* (1968) 18.
180 *In the Matter of the Speaker of the Senate & another* [2013] eKLR.
181 As above para 156.
182 As above para 156.
183 *Dow v Attorney General, Supreme Court of Botswana* [1992] LRC (Const) 623 at 668.

speaking to the present and future generations and in their interpretation courts must breathe life into the provisions.[184]

This inbuilt interpretation theory also revolutionises the role of judges in society. Judges are no longer passive partners but are expected to be active partners in the democratisation process. Put differently, courts have been transformed into a 'co-ordinate' and 'co-equal 'arm of government.[185] Once, the Supreme Court restated the new role of the Judiciary correctly by holding that '[t]he Judiciary has been granted a pivotal role in midwifing transformative Constitutionalism and the new rule of law in Kenya.'[186]

The task however requires judges to be faithful to the demands of the constitution.[187] Judges are asked to stop being timorous by deferring to the incumbents and the electoral body. Further, judges are injuncted to search for substantive justice which is to be found in the foundational values of the constitution.[188] Judges are called upon to grab the nettle and deliver justice. Unfortunately, in electoral disputes, the Kenyan Judiciary has not lived up to the task. By adopting a higher standard of proof, the judiciary has ended up legitimising deeply flawed elections. Put differently, by imposing a higher standard of proof, the judges silently run away from adjudicating highly contentious cases.

**3.5 A right-centric compliant standard of proof in election petitions**

The correct question that should be posed in every electoral dispute was best captured by the South African Constitutional Court in *Electoral Commission of South Africa v Speaker of the National Assembly and others*: [189]

> Behind the complexities of precedent and the intricate statutory machinery, lies a question of importance for every South African. How can this Court best ensure that the 2019 elections fulfil the promises the Bill of Rights makes about the franchise? These are, first, that every citizen is "free to make political choices," and second, that every citizen "has the right to free, fair and regular elections."

184 Ndii (n 148) para 4.
185 *Trusted Society of Human Rights Alliance v Attorney-General & 2 Others* [2012] eKLR.
186 *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* (2014) eKLR.
187 D Moseneke 'Transformative adjudication in post-apartheid South Africa – taking stock after a decade' (2007) 1 *Speculum Juris* 6.
188 Moseneke (n 42) 316.
189 *Electoral Commission of South Africa v Speaker of the National Assembly and Others* 2019 (3) BCLR 289 (CC).

Two concepts should be the controlling factors in every electoral adjudication forum: the right to vote and the sovereignty of the people. Every decision should strive to vindicate the right to vote and uphold the will of the people. In essence, an election petition is a right-centric cause.[190] When understood this way, an election petition cannot be determined without paying attention to not only the letter of Article 38 on the right to vote but also the spirit underpinning the right to vote and the sovereignty of the people. A proper standard of proof puts the right to vote and the will of the people at the centre of the dispute. An interpretation that favours the presumption of accuracy of electoral results and only considers the outcome of the results or the private interests of the litigants merely 'relegates the voter to spectatorship.'[191] Additionally, an interpretation where courts already take a predetermined position on the regularity of elections fails to give effect to constitutional values and the advancement of the Bill of Rights as commanded by the constitution.[192]

Article 20(3) and 259 of the constitution imposes a constitutional command on courts to expand human rights in their interpretation of laws. The constitution demands for maximisation of rights. This constitutional command will only be met if courts properly consider if the right to vote has been infected and the will of the people undermined. This cannot be done when an unnecessary burden is imposed on citizens who are only trying to vindicate the constitution.

A higher standard of proof also violates the right to access to justice. It puts an unnecessary burden on the petitioners and amounts to a chilling effect since citizens will stop challenging electoral disputes out of fear that the judiciary will not overturn the results. This is because there already exist obstacles that petitioners face when disputing electoral results in courts. These obstacles include the high cost of filling cases and the risk of being slapped with costs which may even bankrupt them.[193] It is for this reason that the Court in *Erlam* recognised that private citizens require 'enormous courage' to challenge elections. [194] To add an extra-constitutional burden in the name of a higher standard of proof is to completely shut the door of justice in the face of citizens.

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190 M Wangai, L Mwangi & J Kilonzo 'Developing jurisprudence beyond the horizon: A critique of the Supreme Court of Kenya decision in Raila Amolo Odinga & another v IEBC & others (2017' (2020) 5 *Kabarak journal of law and ethics* 78.

191 M Wangai, L Mwangi & J Kilonzo (n 187) 83.

192 OB Kaaba &CM Fombad 'Adjudication of disputed presidential elections in Africa' in C Fombad & N Steytler (eds) *Democracy, elections, and constitutionalism in Africa* (2021) 286.

193 H John 'Election petitions and the standard of proof' (2015) 27 *Denning Law Journal* 298.

194 *Erlam and Others v Rahman and Others* [2015] EWHC 1215 (QB) at 643-644.

There is also another reason why a higher standard of proof is constitutionally unjustified. The obligation to ensure that the elections are free and fair is on the IEBC. It is IEBC that is publicly funded and can produce all the electoral evidence before the court. The Supreme Court in *Munya* recognised that IEBC is the constitutionally mandated agency for electoral management and it must demonstrate a high sense of accountability to the public and embrace 'high *disclosure standards*, and must avoid conduct such as hoarding of information' since it draws its funding from the public purse.[195]

This recognition by the court means that Kenya has embraced a 'culture of justification' which requires public agencies to justify their positions by giving reasons.[196] The court is, therefore, required to entrench accountability. It cannot entrench accountability when it imposes a lower burden on a body having the monopoly of information on one hand, but imposes an unattainable burden on the petitioners, on the other hand. To put a burdensome obligation on a disenfranchised voter while allowing IEBC to walk scot-free, the court departs from its own finding and fails to discharge its core mandate. Rather, the court turns a blind eye to constitutional violations and demonstrates that it is not sympathetic to the values laid down in the constitution. The higher standard of proof is a demonstration of a clandestine relationship between the judiciary and the electoral body. In effect, the judiciary fails to hold IEBC accountable and paralyses all efforts of building an 'excellent justice system in the country.'[197]

The intermediate test is also problematic on another front. By adopting a higher standard, the judiciary ignores a basic reality. There exists information asymmetry between the parties in an electoral dispute. Whereas the court requires parties to meet such a higher test, it ignores that most of the information to be adduced is in the hands of the electoral body is the respondent. It is the responsibility of courts to maintain a level playing field in the adjudication of disputes. Justice Ibrahim, a judge of the Supreme Court, recently embraced this position in his dissenting opinion in *Muriithi v Moi* appreciating that victims of human rights violations committed by persons utilising state machinery 'have their access to vital information hampered' to defeat the cases.[198] He proceeded to hold that it is time to discuss 'strictly holding petitioners to the burden and

195 *Gatirau Peter Munya v Dickson Kithinji Mwenda* (2014) eKLR para 252.
196 Mureinik (n 81) 32.
197 *Clement Kungu Waibara v Annie Wanjiku Kibeh & another* [2017] eKLR para 132.
198 *Gitonga Mwangi Muriithi vs Hon Daniel Toroitich Arap Moi* (2023) eKLR para 105.

standard of proof' in these types of cases.[199] In holding so, the judge appreciated the imbalance that exists between the parties.

By maintaining a level playing field, courts would be performing an important task of taking 'the courts to the people.'[200] However, by being entrapped in this 'standard of proof technicism', courts fail to deliver electoral justice and take away the courts from the people.[201] Rather, the decisions amount to a 'judicial coup d'état' where courts aid in undermining the principle of free and fair elections.[202]

Most importantly, the judiciary must ask itself why the Constitution of Kenya is preoccupied with electoral justice. The history and spirit behind these provisions would show that Kenyans were running away from electoral authoritarianism.[203] Elections are not supposed to be 'utensils in the toolbox of dictators' but must be real.[204] To uphold people's electoral will and to ensure that elections are not only a ritual, the court's role must be more inquisitorial by shifting the burden from the petitioners to the electoral body. The standard of proof adopted by the judiciary is evidence of misinterpretation of the constitution and a demonstration of a court that is tolerant of electoral illegalities and irregularities. It is this judicial pusillanimity that has prevented the court from delivering the electoral justice dream.

The balance of probabilities test is a proper standard of proof that commends itself from the above discussion. Where there are serious grounds such as fraud, courts should not raise the standard of proof but rather heighten the probabilities.[205] This approach was once advanced by Lord Jonathan Parker in *Grobelaar v News International* that 'the more serious the allegation the more cogent must be the evidence which is required to prove it on the balance of probabilities.'[206] This position was expressed more clearly by Lord Hoffman as follows 'It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not

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199 As above para 106.

200 HK Prempeh 'Marbury in Africa's judicial review and the challenge of constitutionalism in contemporary Africa' (2006) 80 *Tulane Law Review* 65.

201 Nyane (n 1) at 18.

202 V Bugliosi *The betrayal of America: How the Supreme Court undermined the constitution and chose our president* (2001) 8.

203 For a definition, see R Tlemçani 'Electoral Authoritarianism' (2007) *Al- Ahram Weekly*.

204 A Schedler 'Electoral authoritarianism' (2015) 4 *Emerging trends in the social and behavioral sciences* 1; J Gandhi *Political Institutions under Dictatorship* (2008).

205 G Mupanga 'An analysis of the judicial approach to the standard of proof in election petitions in Zimbabwe and a suggestion for reform' in C Mbazira (ed) *Budding democracy of judicialisation: lessons from Africa's emerging electoral jurisprudence* (2021) at 107.

206 *Grobelaar v News International* [2001] 2 All ER 437; [2001] WL 1489 para 239.

to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.'[207] In effect, what ought to change is the cogency of the evidence, not the standard of proof.

**3.6 Role of the Supreme Court in Kenya**

As the apex court, the Supreme Court occupies a special place in a democracy. Its role extends beyond settling legal disputes. Its role should be seen through what Judge Rait Marute noted as 'in a wider perspective through the lenses of ideals such as democracy, the rule of law, and constitutionalism.'[208] Further, in the Kenyan constitutional scheme, the Supreme Court is supposed to lead the role of delivering the democratisation dream. Kaaba and Pamela correctly note that the apex courts need to 'give flesh to the bare bones of the constitution' and demonstrate an 'enduring commitment to constitutionalism.'[209] This description applies to the Kenyan scenario. Section 3 of the Supreme Court Act mandates the court to among others assert the supremacy of the constitution and the sovereignty of the people, provide authoritative and impartial interpretation of the constitution and develop rich jurisprudence. In *Re Senate*, the Supreme Court interpreted this provision to mean that it has been given 'a near-limitless and substantially-elastic interpretive power' and it must seize every 'opportunity to provide high-yielding interpretive guidance on the constitution.'[210]

In Raila 2013, the court noted that it is the superintendent of the 2010 Constitution.[211] However, its jurisprudence falls short of this description. Although in 2013, the court noted that judicial practice should not make it 'burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise', [212] its adoption of the intermediate test goes against its commandment. The intermediate test has made it difficult for petitioners and consequently, the Supreme Court has ended up giving a 'veneer of legitimacy to fraudulent electoral victories.'[213]

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207 *Secretary of State for the Home Department v Rehman* (2003)1 AC 153 para 55.

208 R Marute 'The Role of the constitutional court in democratic society' (2007) 13 *Juridica International* 8 – 13.

209 ST Pamela and OB Kaaba 'Law Association of Zambia and Chapter one foundation limited v Attorney General 2019/CCZ/0013/0014' (2020) 3(1) *Southern Africa Institute for Policy and research Case Review* 17.

210 *In the Matter of the Speaker of the Senate & another* [2013] eKLR at paras 156, 157

211 As above 177

212 *Odinga 2013* (n 16) para 203.

213 OB Kaaba & B Fagbayibo 'Adjudicating presidential election disputes in Africa: The emerging challenge of election technology' in E Fokala & A Rudman *Electoral democracy in Africa: Beyond ensuring free, fair and transparent elections (*2021) at 8.

An important question however is whether this apex court can overrule one of its own decisions. In chapter two, this study indicted the Supreme Court for declaring the road to transformation shut. This is because the Supreme Court has refused to consider fresh arguments and developments across the globe. The study makes the case that there is nothing wrong with the apex court accepting that it was wrong. On the other hand, there is everything wrong when a court mechanically applies its precedents to future disputes. By doing so, the court declares that the 'way is shut.'[214] This practice is not in line with the dictates of Articles 20(3) and 259 which require judges to continuously develop the law to bring it in line with the constitution. The law herein must include its past precedents. The Supreme Court correctly accepted this position in *Jasbir* by holding that it could depart from past precedents stand 'as a constraint to the growth of the law.'[215] Despite this acceptance, the Court has a worrisome record when it comes to departing from past precedents.

From the explicit constitutional commandments, the Supreme Court cannot afford to continue demonstrating a mechanical and unreflective reliance on its precedents if indeed it is to perform the 'midwifing transformative constitutionalism' role that it has accepted to have.[216] It needs to be flexible enough to accept changes that are occurring every day in the constitutional adjudication sphere. The next chapter will seek to provide some lessons from different countries showing a blowing wind of change that the Supreme Court should embrace.

**3.7 Conclusion**

The transformative constitution was meant to achieve through non-violent means what the blood, guns and spears could not achieve. Kenyans chose the means of 'lawfare' to reach their desired destination.[217] The judicialisation of politics in 2010 mandated judges to 'clear the channels of political change' and vindicate the right to vote.[218] In an era when election authoritarianism is on the rise, judges need to be brave and employ a liberal and broad interpretation of the Constitution to ensure that it reaches its fullest sweep. Unfortunately, the Kenyan Judiciary has failed to grasp the nettle. Instead, it has narrowly interpreted the constitution and imposed on the

214 J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional court review* 114.

215 *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR para 46.

216 *Communications Commission of Kenya & Others v Royal Media Services & Others* [2014] eKLR para 377; W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 6.

217 H Corder and C Hoexter 'Lawfare in South Africa and its effects on the Judiciary' (2017) 10 *African journal of legal studies* 106.

218 JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

petitioner an unknown, antihuman right, anti-the people and unconstitutional standard of proof. It is this narrow interpretation that is responsible for the *neonatal death* of the electoral justice dream that Kenyans had in promulgating the 2010 constitution. The chapter has sought to persuade the Kenyan Judiciary to repent of its constitutional sins and fulfil its constitutional mandate. To accept space within its heart and with humility depart from the unconstitutional standard of proof. The next chapter looks at the lessons from select countries.

## CHAPTER FOUR

## Cross-pollination and cross-judging in electoral jurisprudence: Lessons from Malawi, Ghana, Zimbabwe, Mauritius and Nigeria

> Undoubtedly, philosophers are in the right when they tell us that nothing is great or little otherwise than by comparison. [219]

### 4.1 Introduction

One of the gifts of modern constitutional jurisprudence is the idea of cross-pollination or cross-judging.[220] The gift is due to the acceptance of the concept 'global community of courts'[221] which is due to the growing similarities between the issues facing courts around the world.[222] This has led to cross-pollination of judicial thinking where a court in one country cites the jurisprudence of another country or considers the approaches adopted elsewhere about similar legal disputes. The concept of cross-pollination has been expressly endorsed by Justice Kiage of the Court of Appeal of Kenya who appreciated that '[W]e are part of a global community of courts and we definitely can and do benefit from a crosspollination of ideas.'[223]

This chapter advances the central argument that constitutional benchmarks can help the Judiciary learn the interpretation of the electoral laws to adopt a proper and constitutional standard of proof in election petitions that is human-rights and voter-friendly. Due to limited space and time, this chapter does not engage in a full-blown comparative study, it will only consider court decisions from select countries that have engaged on this subject and pick the lessons.

### 4.2 Malawi

Malawi's Judiciary is the other outlier other than the Kenyan Supreme Court that has nullified a presidential election in Africa. Although both courts reached the same position, the Malawian approach is different and this study considers it as the most progressive. In Malawi, both the Civil Procedure Rules and the Parliamentary and Presidential Elections Act do not

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219 As cited in V Vadi 'The migration of constitutional ideas to regional and international economic law: The case of proportionality' (2015) 35 *Northwestern journal of international law and business* 557.

220 H Webb 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law' (1998) 1(2) *Journal of constitutional law 280.*

221 AM Slaughter 'A global community of courts' (2003) 44 *Harvard international law journal* 191–219.

222 D Hoadley and others 'A global community of courts? Modelling the use of persuasive authority as a complex network' (2021) 9 *frontiers in physics 2.*

223 See Justice Kiage in *Independent Electoral and Boundaries Commission & 4 Others V Ndii & 312 Others* (2021) eKLR at 38.

provide for the standard of proof in election petitions. For civil claims brought under the Civil Procedure Rules, the courts have held that the standard of proof is on a balance of probabilities.[224]

While nullifying the presidential election, the High Court of Malawi puts the right to vote, the will of the people and access to justice at the centre of the dispute and uses this analysis to reject the intermediate test. First, the Court finds that a higher standard of proof violates the right to access justice. It holds thus: [225]

> It will be a sad day for justice if Courts in this Republic [Malawi] were to impose a higher standard of proof on the Constitutional rights as to do so would stifle the people's right to access justice through the Courts…To demand a petitioner to discharge a higher standard would be closing the door to future litigation.

Second, the Court rejected the Zambian finding in *Lewanika* that held that election petitions are unique because they are brought under constitutional provisions and have an impact on the governance of the country. While putting the will of the people and the right to vote at the centre of the dispute, the court held that: [226]

> However, we are not persuaded by the reasoning in the *Lewanika* case and other cases with similar reasoning that were cited by the Respondents. To demand a higher standard of proof than a balance of probabilities just because the petition was brought under constitutional provisions which would impact upon the governance of the nation and deployment of constitutional powers and authority misses the point. The reasoning focuses more, if not exclusively, on the rights of those wielding the powers of State instead of taking a human rights-based approach that puts the rights and will of the people at the centre of democratic rights. This would have a chilling effect on the capacity of citizens, especially the vulnerable groups in society, such as women, and persons with disability.

Respectable authors have commended this reasoning in various publications. Kaaba and Fombad however capture this moment beautifully as follows:[227]

> This approach is laudable and makes a tremendous contribution in democratizing the resolution of disputed presidential elections by tilting the balance in favour of the people. It is

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224 *Chimungu v Mzuzu University (None)* [2016] MWHC 497 para 7.1

225 *Saulos Klaus Chilima and Another v Arthur Peter Mutharika and Others* Constitutional Reference No. 1 of 2019 para 1058.

226 As above para 1052.

227 O'Brien Kaaba and CM Fombad 'Adjudication of disputed presidential elections in Africa' in C Fombad and N Steytler (eds) *Democracy, elections, and constitutionalism in Africa* (2021) 392.

> a marked departure from the jurisprudence discussed above which is excessively deferential to the interests of the ruling elite.

The holding of the High Court was appealed to the Supreme Court of Appeal of Malawi. The appellants urged the court to adopt a higher standard of proof and relied on the jurisprudence of the Supreme Court of Kenya. In rejecting the position adopted in Kenya, the Appellate Court noted that: [228]

> Whereas other jurisdictions (Kenya) might advocate different levels of standard of proof, in our considered view,…..we do not believe that it could have been the scheme of the law to saddle a petitioner with an onerous burden of proof in the discharge of the initial burden of proof.

The Court proceeded to hold that: [229]

> 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.

The Malawian courts while considering the standard of proof in election disputes have, therefore, given credence to the right to vote and access to justice. By doing so, they have adopted a human rights-centric approach that puts human rights and the sovereignty of the people at the centre of the dispute. Additionally, the courts demonstrate their willingness to strike down any election that is fraught with illegalities and irregularities, unlike the Kenyan Judiciary whose adoption of a higher standard shows its willingness to tolerate any form of electoral illegalities and irregularities.

**4.3 Zimbabwe**

Like in Kenya, the Constitution and electoral laws in Zimbabwe do not provide a standard of proof in electoral disputes. The subject has only been a matter of judicial determination. The courts have accepted the position that electoral disputes are purely civil. In *Mumbamarwo*¸ the electoral court held that election petitions are essential civil proceedings and the court sits as a civil court.[230]

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228 *Mutharika & another v Chilima & another* (MSCA Constitutional Appeal 1 of 2020) [2020] MWSC at 38-39.

229 As above.

230 *Mumbamarwo v Kasukuwere* HH 8/2002 at 6; *Godfrey Don Mumbamarwo v Saviour Kasukuwere* (Mount Darwin South Election Petition) HH – 8 – 2002 - 5 – 6.

In 2019, the newly constituted Constitutional Court had a chance to reconsider this question. The Court rejected the charming intermediate test adopted by the Kenyan Courts and held that 'There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply because of their sui generis nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions.'[231] The point by the Zimbabwean Court is that election petitions are civil and there is no justification for a higher standard of proof. This position follows the finding adopted in Mauritius.

The Privy Council in *Jugnauth v. Ringadoo and Others* reaffirms two central ideas that this study advances.[232] First, the idea that there are only two standards of proof. Second, that election petitions are purely civil. The Council uses these ideas to reject the adoption of an intermediate test. The Council held:[233]

> there is no question of the court applying anything other than the standard of proof on the balance of probabilities. In particular, there is no question of the court applying any kind of intermediate standard. … It follows that the issue for the election court is whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition.

**4.5 Ghana**

In Ghana, the Evidence Act provides that the standard of proof in civil cases is on a balance of probabilities and where a crime is pleaded, the standard of proof is beyond reasonable doubt. courts have held that where no criminal elements are pleaded, a dispute must be determined on a balance of probabilities.[234] The election law is however silent on the standard of proof.

Despite the absence of a legal provision, the Supreme Court of Ghana has held that an election petition is simply 'a civil case by which petitioners are seeking to challenge the validity of the presidential elections and that the standard of proof in civil cases is proof by a

231 Per Malaba CJ in *Nelson Chamisa v Emmerson Dambudzo Mnangagwa & Others* CCZ 21/2019 at 95.
232 *Jugnauth v. Ringadoo and Others* [2008] UKPC 50.
233 As above para 17.
234 Aryeh & Akakpo V Ayaa Iddrisu (2010) SCGLR 891.

preponderance of probabilities.[235] The Court rejected the argument that since elections are brought under constitutional provisions, they acquire a higher status. The Court noted thus: [236]

> … The fact that this petition is brought under article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by a preponderance of probabilities and no more.

In 2021, the Supreme Court yet again reiterated this position in *John Mahama v Electoral Commission* where it held that '[A] petition of this nature is a form of civil litigation and like all civil cases; the standard of proof is one on the balance of probabilities or preponderance of the probabilities.'[237] The position therefore seems to be settled that there is nothing unique with election petitions.

**4.6 Nigeria**

On 7 September 2023, the Nigerian Electoral Court dismissed the presidential election petition that was challenging the results of the presidential election held in February.[238] Although the Court dismissed the petition mostly on technicalities based on an interpretation that is meant to sustain the election rather than rock the boat, the Court got it correct on the standard of proof. In the lead judgment, Justice Tsammani held that the standard of proof of noncompliance is different from that of corrupt practice. That '[W]hile the standard of proof of noncompliance is on the balance of probabilities, that of corrupt practice is beyond reasonable doubt'[239] and that 'On the preponderance of evidence, I am convinced that the petitioners have failed to establish their assertion'.[240] The Nigerian position is the latest electoral jurisprudence in the continent and forms a great case study for the Kenyan Judiciary.

**4.7 Conclusion**

The trend in these analysed courts is the endorsement of the rights of the voters. The courts have ensured that voters are at the centre of the dispute and not at the periphery. A human rights

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235 *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others (Writ J1/6/2013)* at 459-460; See also the separate opinion of Ansah JSC at 62;

236 *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others (Writ J1/6/2013)* at 459-460.

237 *John Dramani Mahama v Electoral Commission and Nana Addo Dankwa Akufo-Addo* (2021) JELR 92199 (SC) at 15.

238 *Peter Gregory Obi and others vs Independent electoral commission and others* Petition No CA/PEPC/03/2023.

239 As above at 25.

240 As above at 252.

and voter-friendly approach that commends itself is the one adopted by the Malawian Courts that emphasises 'the rights of voters as opposed to the rights of the protagonists in the case.'[241] The approach also creates a fair level playing field between the petitioners and the respondents. The approach is based on the realisation that attainment of electoral justice will only be achieved if courts adopt 'a more principled and voter- rights- sensitive approach to deciding election disputes.'[242] In contrast, the Supreme Court of Kenya disregards this human rights-based approach and instead ensures that 'human rights remain in the peripheral of the resolution of election causes.'[243] Consequently, the Kenyan approach gives judicial blessings to electoral illegalities and irregularities by creating an unsurmountable mountain.[244] This chapter uses these lessons which it considers as *constitutional merchandise* that the Kenyan Judiciary can borrow. The next chapter will consider the conclusions arising from the study and propose recommendations.

241 G Mupanga 'An analysis of the judicial approach to the standard of proof in election petitions in Zimbabwe and A Suggestion for Reform' in C Mbazira (ed) *Budding democracy of judicialisation: lessons from Africa's emerging electoral jurisprudence* (2021) at 126.

242 O'Brien Kaaba and CM Fombad 'Adjudication of disputed presidential elections in Africa' in C Fombad and N Steytler (eds) *Democracy, elections and constitutionalism in Africa* (2021) 399.

243 Khobe (n 122) 11.

244 BA Gebeye 'Judicial review and presidential elections in africa' in C Fasone and others (eds) *Judicial review and electoral law in a global perspective* (2023) at 21.

## CHAPTER FIVE

## Conclusion and Recommendations

O dialogo continua! Long may the dialogue continue![245]

### 5.1 Introduction

Electoral authoritarianism has been on the rise in Africa in the recent past and elections have been reduced to a festival of illegalities. Amid this rise, citizens look up to the judiciary as their last hope. Unfortunately, most judiciaries have become the 'lost hope of the common man.'[246] The study has shown that although the Kenyan Supreme Court recognised in 2017 that courts are guarantors of democracy and must intervene to ensure Kenyan's vision of constitutional democracy, the adoption of the intermediate standard shows a court that is willing to sustain an election that is marred with electoral irregularities and illegalities.[247] Importantly, judges through this insurmountable standard of proof, have reduced themselves to incumbents' lap-dogs 'dressed up in judicial robes.'[248] Simply, the adopted standard only offers judicial blessings to the festival of illegalities.

This chapter traces the journey from chapter one to chapter four. The conclusions arising from the study will be divided into five clusters. First, the concept of electoral justice in the Kenyan Constitution. Second the nature of an electoral dispute. Third, how to interpret a transformative constitution. Fourth, a human-based approach to the standard of proof. Fifth, the lessons from select countries. The final part will entail the recommendations.

### 5.2 Conclusion

#### 5.2.1 Concept of electoral justice in the normative framework

Chapters one and two of this study traced the history of electoral justice in Kenya. It considered the infamous 2007 moment that led to bloodshed as Kenyans sought electoral justice. It noted that

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245 A Sachs 'Reply: A gentle provocation: A reply to Stu Woolman' in S Woolman and M Bishop (eds) *Constitutional conversations* (2008) 43.

246 CA Odinkalu 'How Nigeria's Courts became 'the lost hope of the common man' https://www.thecable.ng/how-nigerias-Courts-became-the-lost-hope-of-the-common-man (accessed 17 October 2023).

247 BA Gebeye 'Judicial review and presidential elections in Africa' in C Fasone and others (eds) *Judicial review and electoral law in a global perspective* (2023) at 18.

248 CA Odinkalu 'Counting the costs of electoral impunity in Africa' https://guardian.ng/opinion/columnists/counting-the-costs-of-electoral-impunity-in-africa/ (accessed 17 October 2023).

the promulgation of the constitution was out of the desire of Kenyans to create a new Kenya. At the centre of this new Kenya, was the attainment of the elusive electoral justice. The judiciary was earmarked as one of the institutions to realise this dream. The Kenyan Constitution therefore judicialises politics and puts the judiciary at the center of the quest for electoral justice.

This study concludes that the constitution is preoccupied with the idea of electoral justice in its substantive provisions as well as the spirit behind the provisions. The normative framework set out in the study provides for electoral standards that make an election free and fair. It is the role of the judiciary to enforce this electoral standard during electoral disputes adjudication. This study concludes that courts should not go 'down the bunker' by creating an insurmountable standard of proof.[249] The realisation of electoral justice requires judges who are ready to perform its constitutionally mandated role.

**5.2.2 Nature of electoral disputes**

Chapter two considered the jurisprudence emanating from Kenyan courts on the standard of proof in election petitions. The courts have adopted the intermediate test and justified the adoption on the basis that election petitions are *sui generis* or in a class of their own. Chapter three subjected this justification to constitutional and logic tests.

The study concludes that there is nothing *sui generis* with the election petitions to justify such a higher standard. On the other hand, these adjectives are used as 'scapegoats' for courts to adopt a narrow interpretation of their powers and to allow indulging non-compliance with express provisions of law.[250]

Election petitions are like ordinary constitutional petitions which are adjudged under the civil test. The mere fact that election petitions involve the general public or that they are brought under the constitutional provisions does not justify the imposition of a different standard of proof. This is the nature of constitutional petitions, which are community-oriented. This conclusion also finds support in the dissenting opinion of Justice Njoki of the Supreme Court of Kenya who appreciated that election petitions are a 'rights-centric cause'. The study concludes that election petitions are purely civil disputes with public connotations involving the application and interpretation of the constitution. This conclusion is borrowed from the journey through Nigeria,

249 Y Roznai 'Who will save the redheads? Towards an anti-bully theory of judicial review and protection of democracy' (2020) 29 *William Mary bill rights* 28.

250 Mutangi (n 34).

Ghana Zimbabwe, Mauritius and Malawi where the apex courts have rejected the argument that election Courts are *sui generis* to warrant a higher standard. Indeed, these courts have held that election petitions are purely civil petitions and the standard of proof is on a balance of probabilities.

### 5.2.3 Interpreting a transformative constitution

The study concludes that interpreting a transformative constitution requires judges to be faithful to the letter and spirit of the constitution. Chapter three of this study combed through the Kenyan Constitution and identified a constitutional interpretive theory. The constitution contains what a local musician Ken Wa Maria called fundamentals and as appreciated by the Supreme Court *'these things, these are my things, these are your things, these are our things, these are the fundamentals.'*[251] Described as a thick constitution, the constitution embodies values and principles. Judges are called upon to adopt 'a broader interpretation to uphold the spirit of constitutional values.'[252] Additionally, the Constitution in Articles 20(3) and 259 provides for how it is to be interpreted. The Supreme Court of Kenya has called this a holistic interpretation-promoting the purpose of the constitution as well as appreciating the history and an interpretation that the constitution is always speaking. In sum, the interpretation decreed by the constitution is generous and purposive. Judges are discouraged from crippling the constitution by construing it narrowly and legalistic manner.

Beyond this theory, the study also concludes that judges have a special role in a democracy. Judges are required to reject judicial timidity, and restraint but adopt an interpretation that not only protects the substantive provisions of the constitution but as well as the aura of the constitution. Interpreting a transformative constitution requires the judge's judicial juices to flow continuously without stopping to wipe out the Nyayo debris left behind by the old judiciary. Further, as custodians of the newly created constitutional order, judges are called upon to be pro-human rights and pro-constitution but not reduce themselves to executive or incumbent's courts.

### 5.2.4 A human rights-based approach to the standard of proof in electoral disputes

Chapter three advanced a human rights approach to the standard of proof in electoral disputes. The study concludes that a human rights approach must put the sovereignty, the will of the people, values and principles and the right to vote at the centre of the dispute and not at the

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251 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR para 388.

252 Horn (n 46) at 12.

periphery. The study considered the intermediate test in Kenya and concluded that the same is flawed on three legs.

First, the test is problematic since no one knows what is required for it to be met. The courts have not defined the test save for using words such as high convincing or above probabilities. The opaque nature of this test has been used by courts to sustain elections. Second, setting the test so high violates the right to access justice, ignores the fact that there exists information asymmetry between the petitioners and IEBC, and sidelines the right to vote and the sovereignty of the people. Third, the intermediate test does not maintain a level playing field between the petitioners and the respondents; rather it makes it 'burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise.'[253] It places an undue and unnecessary burden on petitioners while leaving the electoral body to leave scot-free. The end effect of this higher test is that it results in a chilling effect by 'closing the door to future litigation.'[254] Put differently, the adoption of the intermediate test speaks of a court that is merciless to the common citizens and one that is a conduit pipe for electoral injustice.

According to the human rights approach advanced by this study, a proper test in election petitions must be voter-rights sensitive. One that considers the sovereignty of the people, the constitutional values and standards and the entire framework of the constitution. Additionally, such an approach must put more burden on the electoral body in a bid to entrench accountability and the culture of justification. The study identified such a test as the civil test, on a balance of probabilities. Once a petitioner demonstrates the irregularities and illegalities on a balance of probabilities, the burden should shift to the electoral body to show that in conducting the elections, it complied with the constitutional and statutory requirements.

**5.2.5 Lessons from other jurisdictions**

Chapter two noted that although the Supreme Court was pointed out to foreign jurisprudences showing that it is time that the Court changes its position, the Supreme Court has refused to do so. It mechanically relied on its past precedents without answering the questions posed by petitioners as to the constitutionality of the adopted intermediate test. This study concludes that Articles 20(3) and 259 require judges to continuously develop the law to bring it in line with the constitution. The law herein must include its precedents. The Supreme Court

253 *Odinga* 2013 (n 16) para 203.
254 *Saulos Chilima* (n 211) para 1052

therefore is mandatorily required by the constitution to depart from its precedents if they stand 'as a constraint to the growth of the law.'[255]

Chapter four considered the jurisprudence of select countries on the standard of proof. The study concludes that noted that there is nothing wrong when a court considers lessons from other jurisdictions. Where a court rejects to follow the lessons in another country, it should demonstrate why such lessons are not applicable in the country. The study concludes that the standard of proof, the balance of probabilities, adopted by the courts in the select countries is pro-human rights as it takes into account the right to access justice, the right to vote, the will of the people and constitutional values.

### 5.3 Recommendations

#### 5.3.1 Judiciary

The study recommends that the Judiciary, particularly the Supreme Court appreciate the blowing constitutional wind of change across Africa and vide cross-pollination adopt the test adopted by Malawi, Zimbabwe, Mauritius, Ghana and recently Nigeria. The proper standard of proof to be adopted is the balance of probabilities which is the test in ordinary civil disputes. Only by doing so, will the Judiciary live up to the expectations of Kenyans of entrenching electoral justice in Kenya.

#### 5.3.2 Legislature

Whereas the Constitution and the Elections Act provide for electoral standards as well as the threshold under which elections can be nullified, the current legal framework is silent on the standard of proof in adjudicating electoral disputes. Similarly, the Evidence Act does not provide for a standard of proof. Consequently, the judiciary based on their interpretation of the law has invented an unknown standard of proof. The study recommends that the legislature amends the Elections Act to introduce a provision that recognises the standard of proof as the one in civil cases, the balance of probabilities.

#### 5.3.3 IEBC

The constitution obligates IEBC to deliver a free and fair election. It is the responsibility of IEBC to ensure that the elections meet the constitutional and statutory tests. As a result, and based

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255 *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* (2013) eKLR para 46.

on the information asymmetry as shown in chapter three, the study recommends that IEBC changes its mindset and be ready to demonstrate that the elections meet such a test. The shift of the burden of proof from the petitioners to the IEBC would help lower the mountain that petitioners have to climb to invalidate an election.

**5.4 Conclusion**

The study has shown that the electoral justice dream in Kenya's pristine Constitution has been thwarted courtesy of technical and narrow reading of its provisions by the judiciary. The Kenyan Judiciary has failed to grasp the constitutional chorus of electoral justice but has instead promoted *incumbency justice* by creating a Mount Everest (an artificial insurmountable obstacle) that petitioners cannot surmount instead of advancing human rights-oriented jurisprudence.

The study calls upon the judiciary to humble itself, accept that it was wrong, appreciate the lessons from recent jurisprudence across Africa and reverse itself. At the earliest opportunity, the Kenyan Judiciary should find that the intermediate standard of proof is anti-human rights, anti-sovereignty of the people and declare that the appropriate standard of proof in election petitions is the civil test, a balance of probabilities. Only by doing so, will the Kenyan Judiciary live up to the expectation of being the last hope of the common citizen, commonly referred to as wanjiku.

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