

## **Report on Legal Issues from Kenya 2017 Presidential Election**

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





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

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

In effect, the proposed amendment closed a gap in the IEBC Act to allow for the temporary replacement of the chairperson when they are unavailable or resign, allowing the IEBC to function when the chair i004 Tcd.4B-3 (o)2 (mma)6 ,u,o4al282 ( f)3 -12 (ae)-2 (u-6 t)-2 (he).(f)-1 (u)-4tion0 Td(





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

The courts found that all elections must "strictly"

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

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

The High Court concluded that:

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



election, as evidenced from

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

Interestingly, in determining whether a violation was substantial, some courts emphasized the margin of victory and whether or not the violation would have affected the results, reasoning that a minor violation could be substantial in a close election. Others focused on whether the declared

interrogated matters that had not been raised in the petition and

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

### Kilgoris Constituency

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

When examining the same evidence, the Court of Appeal reversed the High Court ruling and annulled the election. The court found that a previous ruling by the High Court in which the IEBC had failed to secure the election material violated Article 86 of the constitution. This article mandates that the IEBC conduct elections in a secure and accountable manner, including

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

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

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

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

### **Machakos Constituency**

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

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

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

On the basis of this determination, the Supreme Court found that the provision in the election regulations requiring Form 37

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

### Embakasi South Constituency

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

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

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

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

### Ugenya Constituency

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

Whereas the Court of Appeal faulted the High Court for failing to take the scrutiny report into account, the Court of Appeal dismissed this as a matter that was not under its jurisdiction, before

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