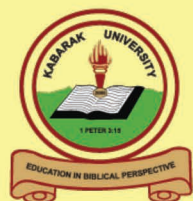


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Protecting the Integrity of the Electoral Process: The Promise of the *Maina Kiai* Judgement

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Abstract

This article interrogates the rationale and promise of the judgment by the Court of Appeal in the *Maina Kiai* judgment. It is argued that by the *Maina Kiai* court affirming the finality of results at the polling station, the *Maina Kiai* judgment has the impact of imbuing a positive perception on fairness of elections and the legitimacy of electoral outcomes. This has been achieved by doing away with the historic perception that electoral officials tamper with electoral results at the National Tallying Centre.

1.0 Introduction

Electoral reform was one of a large number of changes required in the transition to a post-authoritarian era in Kenya.¹ The necessity for electoral reform was borne by the fact that open, free, and fair elections are the *sine qua non* of democracy. The crucial place occupied by elections in consolidation of a democracy follows from the fact that the electoral regime affects democratic performance by influencing

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¹ G.M. Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws,' in G.M. Musila (ed.) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence*, (Nairobi: Law Society of Kenya, 2013) 1.

popular perceptions of the political process, by shaping the party system, and by determining the composition of governing organs. Thus, elections are an integral part of democracies as instruments for delegation of authority from citizens to representatives.

A distinctive feature of the design of the electoral system in the 2010 Constitution is the constitutional entrenchment of an array of electoral principles that form the normative foundation for the conduct of elections in Kenya. Article 81 of the Constitution establishes the principle of “free and fair elections” as the cornerstone of the electoral system in Kenya. This provision constitutionalizes and describes the environment in which elections are to be conducted. The other constitutional provision with implication for the electoral system is Article 86 of the Constitution, which makes provision for the means through which elections are conducted on the voting day - whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent. These broad principles are aimed at protecting the integrity of the electoral process and are expected to shape and influence the rules, decisions, and institutions in the electoral process.

This paper interrogates the impact of these laudable principles and whether they have had the salutary effect of improving the integrity of the Kenyan electoral process through the looking glass of the decision by the Kenya Court of Appeal in the *Maina Kiai Case*.² By integrity of the electoral process, this paper speaks to electoral accountability, the sanctity of the vote, and the giving of effect to the will of the people in elections.

2.0 How the Court of Appeal Plotted its Course: The Case and the Determination

The Petitioners in the *Maina Kiai Case* moved the High Court for the Court to make declarations whose effect were: first, that the constituency presidential elections results once declared and announced by respective constituency returning officers are final results for the purposes of that election. Second, that constituency returning officers possess the mandate to announce and declare the final results of a presidential election at constituency level and that such declaration is final and is not subject to alteration, confirmation or adulteration by any person or authority,

² *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR (hereafter: *Maina Kiai Case*).

other than an election court, pursuant to Articles 86 and 138 (2) of the Constitution of Kenya. Third, that section 39(2) and (3) of the Elections Act and regulations 83(2) and 87(2) (c) made thereunder, to the extent that these granted the Electoral Commission powers to confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in a particular constituency, were contrary to Articles 86 and 138(2) of the Constitution and were therefore null and void.

The High Court granted the three declarations as outlined and this prompted the Independent Electoral and Boundaries Commission (IEBC) to appeal this finding to the Court of Appeal. The Court of Appeal affirmed the findings by the High Court.

The Court of Appeal in affirming the findings by the High Court concluded that the determination of the electoral results at the polling station is final and cannot be altered at the National Tallying Centre by the Chairperson of the IEBC. To quote the Court:³

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

In coming to this conclusion, the Court of Appeal anchored its decision on two bases: textually-driven purposive interpretation of the Constitution, and the principles of the electoral system as entrenched in the Constitution.

On the first approach by the Court, textually-driven purposive interpretation of the Constitution, the Court of Appeal found support in Article 86(c) of the Constitution that enjoins the IEBC to ensure that “*the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.*” The Court buttressed this position by invoking Article 138(3)(c) of the Constitution which stipulates that “*in a presidential election, after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.*” The Court proceeded to hold that:⁴

³ *Maina Kiai* Case.

⁴ *Maina Kiai* Case.

Our interpretation of this Article is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the **result** of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification.

To support this textually-driven purposive conclusion, the Court of Appeal drew jurisprudential ballast from the decision by the Supreme Court in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*,⁵ where the Supreme Court held that declaration of the electoral results takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority.

What is at play in this argument by the Court of Appeal is that the Court is applying the text of the Constitution purposively to give expression to the commitment to free and fair elections contained in the Constitution. In adopting a purposive approach, while anchoring the same on textual pointers from the Constitution, the Court brought to the interpretive equation the animating idea that it should further the realization of the goal of a free and fair election regime. Thus, the emphasis on attainment of a free and fair electoral regime is not free-wheeling but is anchored on textual provisions of the Constitution, particularly articles 86(c) and 138(3)(c).

With respect to the second approach by the Court of Appeal, the Court drew from the values and principles of the Constitution, the Court of Appeal held that:⁶

It is, in our view fallacious and flies in the face of the clear principles and values of the Constitution to claim that the chairperson of the appellant can alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process as we have already set out.It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability. ..To suggest that there is some law that empowers the chairperson of the appellant, as an individual to alone correct, vary, confirm, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency tallying centres, is to donate an

⁵ *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014]eKLR.

⁶ *Maina Kiai* Case.

illegitimate power. Such a suggestion would introduce opaqueness and arbitrariness to the electoral process - the very mischief the Constitution seeks to remedy.

As is evident from the except, the Court emphasized constitutional principles like transparency, impartiality, neutrality, efficiency, accuracy, and accountability as factors that compel its finding that the results declared at the polling station are final. The principle-based interpretive approach is, thus, used by the court to “excavate and give expression to the values which underpin particular constitutional guarantees”.⁷ As Ronald Dworkin puts it, “the process of interpretation is designed to discover the fundamental principles on which the character of society is predicated”.⁸ It is the constitutionally articulated values and principles which the Court of Appeal used to define the democratic basis of the post-2010 constitutional order.

3.0 The Ramifications of the Maina Kiai Case for Electoral Integrity in Kenya

The intervention by the High Court, and subsequently the Court of Appeal, in the *Maina Kiai* Case was normatively justified given that in a democratic system, courts are vested with the mandate to clear the channels of political change⁹ and to ensure protection of minorities as envisaged in the Bill of Rights. John H. Ely famously developed the argument that the constitutional role of judges is defined by what he calls “representative –reinforcing”. The judges should try to ensure that the democratic process functions as envisaged in the Constitution. Malfunctions occur, Ely says, when: “the elected representatives are choking off the channels of political change to ensure that they will stay in and the outs will stay out”.¹⁰ Thus, the judiciary ought to play an oversight role over the democratic process, by affirming the principles of the electoral system and sealing possible loophole

⁷ J. Kentridge and D. Spitz, ‘Interpretation’ in S. Woolman, *et al* (eds) *Constitutional Law of South Africa* (Cape Town: Juta, 1999) at 11-23.

⁸ R. Dworkin, *Life’s Dominion* (1993), quoted in D. Davis, ‘Democracy - Its Influence on the Process of Constitutional Interpretation’ (1994) 10 *South African Journal of Human Rights* 103 at 107.

⁹ By “clearing the channels of political change”, I mean: to fend off attempts to acquire/hold power by illegitimate means such as through opportunistic amendment of the constitution, amendment and replacement of electoral laws, gerrymandering, censorship, restriction of political rights, rigging of votes, *e.t.c.*

¹⁰ J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); See also S. Issacharoff, and R.H. Pildes, ‘Politics as Markets: Partisan Lockups of the Democratic Process,’ (1998) 50 *Stanford Law Review* 643, 668.

for rigging of elections. This role of the judiciary is particularly important in the context of a democracy that is still in transition from an authoritarian legacy like Kenya. Judges should in this view be viewed as the guardians of the democratic process.¹¹

In constitutional democracies, the judiciary carries an important responsibility for securing the integrity of elections as the main channel of democratic change. They do so in two ways: by resolving disputes over the rules (that is, whether the legal framework creates an even playing field for the electoral contest) and by overseeing that the parties stick to the rules throughout the election process. When courts exercise the first function – *securing a level playing field* – they are *rule-evaluating*. They decide whether the rules regulating the election process are in accordance with the superior norms and principles laid down in the constitution. When they exercise the second function – *securing fair play* – they are *rule enforcing*. They act as referees of the electoral competition with a mandate to decide complaints and sanction violations of laws and regulations in the course of the election process, and ultimately nullify the election results. In the *Maina Kiai* Case, the courts were engaged in *rule evaluation*. This is so far as the High Court and the Court of Appeal were involved in the process of establishing the rules to regulate elections and also playing a role in the levelling of the electoral playing field.

Given that the quality and impartiality of electoral administration is central to whether an election is seen as a legitimate process for delegation of authority from citizens to representatives, the legal framework regulating the election process and the election administration structures tasked with organising the process and securing a level playing field for the contestants are crucial. This implicates the fairness and quality of the electoral rules, which are the centerpiece of electoral management. In the context of the *Maina Kiai* Case, the electoral rules on verification, variation, and alteration of results of presidential elections at the National Tallying Centre implicates the fairness of elections as well as perceptions of whether the election is free and fair and the outcome legitimate.

From a normative perspective, the *Maina Kiai* Case presented an opportunity for judicial intervention given the judicial role in policing the process of political representation. It should be underscored that, historically, disputes over presidential results in Kenya have always arisen at the point of tallying the results at the National Tallying Centre where allegations have arisen that the Commissioners

¹¹ See in this regard: C. Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1997).

of the Electoral Commission have varied the results that are submitted by the Constituency Returning Officers.¹² Taking into account this historical background, judges as the last and most fundamental protectors of the democratic process were under an obligation to scrutinize whether the old practice of verification, variation, and alteration of results at the National Tallying Centre hampers the realization of the constitutional goal of electoral integrity.

In affirming the finality of the results declared at the Polling Station and Constituency, the Court was alive to the participatory nature of counting of ballots at the polling stations. Generally, the counting of ballots at the polling station is expected to be transparent and participatory. The presiding officers at the polling stations show each ballot paper to the party agents, observers, polling clerks, and spectators (often voters) and announce the candidate whose name had been ticked off. Once the ballots have been sorted by candidate, each batch is counted and the results announced in the presence of party agents, observers, polling clerks, and voters. Allowing ballots to be reviewed and inspected publicly, permits voters to audit elections and determine if the election results are, in fact, as accurate as the election officials have declared them. Such measures increase public confidence in the election process.

After the counting process is completed and the relevant forms signed by the election officials, the party agents, the documents, and the ballot boxes with the ballots papers bundled inside them are then transported to the constituency tallying centres. In many places, voters and party agents escort these materials all the way to the constituency tallying centres. The tallying of the constituency results also involves verification of the results from the polling stations in the presence of party agents, and spectators (voters). Thus, the tallying and declaration of results at the constituency level is viewed to be impartial. The electoral officials are deemed to be fair at the polling station and constituency level given the open and transparent nature of the tallying and declaration of results as both party agents and the voters witness the tallying exercise. Moreover, the decentralization of declaration of results in the hands of many electoral officials has the effect of denying one group the advantage of manipulating the electoral results at the National Tallying Centre based on a desired voting pattern. As James Gardner argues, electoral decentralization can be argued to be a structural means of

¹² See generally F.A. Aywa, 'Kenya', in A. B. Makulilo, et al, (eds) *Election Management Bodies in East Africa: A Comparative Study of Electoral Commissions to the Strengthening of Democracy* (Johannesburg: Open Society Foundations, 2015) 67-125.

hindering a single set of partisan forces from gaining unified control over the electoral process.¹³

By affirming the finality of results at the polling station, the *Maina Kiai* judgment had the impact of imbuing a positive perception on fairness of elections and the legitimacy of electoral outcomes. This is so because, at the polling station and constituency levels, the voters witness and are involved in ensuring that the voting process proceeds in an unbiased manner, is transparent, and open to scrutiny. Having cast their votes, the voters ensure that each vote is counted, counted only once, that votes are counted for the alternatives they were intended and that no votes except those dropped in the ballot boxes were included in the tally. This participation by voters in the electoral process has the effect of constraining abuse of power by electoral officials. Such an oversight mechanism is lacking at the National Tallying Centre.

The role of the courts in *rule evaluation* imposes on the courts an obligation akin to the function by antitrust regulators in the economic market to ensure that the political market remains competitive. Incumbents must be prevented from self-interestedly frustrating the proper formation of democratic majorities or restricting the political power of minorities. The normative thrust of this approach is to ensure that incumbents are not able to insulate themselves from political and legal accountability. Accountability is preserved when political actors are prevented from reducing competition. It is arguable that the courts in the *Maina Kiai* Case were grappling with the problem of a manipulated democratic process, in this case, the historical claim that the Electoral Commissions in Kenya alter, vary, subvert, or rig elections in favour of the incumbent government at the National Tallying Centre. Thus, the courts were expected to grapple with the problem of an electoral system that works to the advantage of the incumbent regime and to reverse this legacy to the constitutionally-envisaged level electoral playing field.

It is arguable that by the *Maina Kiai* Court attributing an improper and unconstitutional purpose to sections 39(2) and (3) of the Elections Act and regulations 83(2) and 87(2)(c) of the Electoral Regulations, the court viewed these provisions as aimed at the diminishment of political accountability through the manipulation of elections laws. This follows from the fact that electoral accountability can exist only when effective political competition generates genuine political choices. To the extent that the impugned legislative provisions can be said

¹³ J. A. Gardner, The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections, (2001)29 *Florida State University Law Review* 625, 651-58.

to have had an aim of distorting the democratic process, the *Maina Kiai* Court was justified in breaking up such distortion.¹⁴

4.0 Conclusion

Elections are at the core of the democratic process. Nevertheless, elections are vulnerable to errors, fraud, or perceptions thereof, because they involve massive mobilization and coordination of citizens, and because of their divisive nature and technical complexity. Having independent and efficient institutions to handle these troublesome situations becomes crucial for attaining people's trust in elections. The Judiciary as one such institution plays a crucial role in not only correcting problems in the elections but also providing a mechanism to keep political parties and electoral authorities accountable for their actions. The Court of Appeal in the *Maina Kiai* Case discharged its role of rule evaluation by ensuring that the electoral laws and rules in place are not used to distort the electoral process but are geared towards the realization of the constitutional aspiration of a free and fair electoral regime.

¹⁴ See R. H. Pildes, 'Commentary, "The Theory of Political Competition"', (1999) 85(8) *Virginia Law Review* 1605 at 1619-22; E. C. Guy-Uriel, 'Democracy and Distortion' (2007) 92(4) *Cornell Law Review* 601 at 650-55; See also S. Issacharoff, *et al* (eds.), *The Law of Democracy: Legal Structure of the Political Process*, 5th ed., (St. Paul, MN: Foundation Press, 2016) 3.