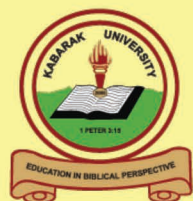


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Protecting the Integrity of the Electoral Process, or, Obfuscating the Electoral Process?

A Response to Walter Khobe Ochieng's "The Promise of the *Maina Kiai* Judgement" in Light of the Subsequent Supreme Court Jurisprudence in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & Others*

Elisha Zebedee Ongoya*

Abstract

This paper is a reply to Walter Khobe's article which interrogates the *Maina Kiai* judgment and its promise in relation to safeguarding the integrity of the presidential election result. Whereas Khobe holds the view that the *Maina Kiai* decision resulted in creating a positive perception on the fairness of the elections and the legitimacy of electoral outcomes, this paper questions this optimism and argues that rather than creating clarity on the role of the Chairman in verification of presidential election results, the Supreme Court succeeded in further obfuscating the law on this important issue.

1.0 Introduction

I have interrogated the challenges that confront courts that exercise jurisdiction over constitutional cases in a previous writing. In the said work titled *The Law, the*

* Senior Lecturer, Department of Public Law, Kabarak University.

Procedures and trends in Jurisprudence in Constitutional and Fundamental Rights Litigation in Kenya, I make elaborate observations which are reproduced below:

Courts, in the course of addressing their judicial minds to controversies and disputes in Constitutional cases, face issues that are inescapably “political” in that they entail a choice between competing values and desires, a choice reflected in the legislative or executive action in question which the court must either condemn or condone¹.

When courts decide Constitutional cases, they do more than interpret a statute. The Constitution is a charter containing the pact that is the “social contract”² and therefore, by its very nature a political document. Controversies that rage over the proper canons of interpreting the Constitution, therefore, conceal vital ideological, socio-political and economic views³.

In the words of Robert A Kagan,

Decisions of Constitutional courts often are like volcanic eruptions, reshaping the landscape of political and administrative action, usually in small ways but occasionally in large ones...Constitutional litigation has also become a well-established form of political action... Political groups, having failed to get their way in legislatures or administrative agencies frequently ask courts to overturn legislative or administrative policies on the grounds that they violate principles inferred from Constitutional provisions. Judges sometimes agree and ask governments to take remedial measures.⁴

Professor Githu Muigai has captured the challenge of Constitutional interpretation in the words that:

First, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Second, the court’s interpretation of the Constitution by way of judicial review is equally controversial as it is essentially counter-majoritarian.

¹ Wechster, H., 1959/60. Towards Neutral Principles of Constitutional Law, Harvard Law Review Vol 73 p 15. See also Githu Muigai, The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication, in, The International Commission of Jurists, Constitutional Law Case Digest Vol II, Nairobi, 2005 P 159.

² For a detailed discussion of the social contractarian theory as a basis of the Constitution, see Kangu, J.M., 2007. The Social Contractarian Conceptualization of the Theory and Institution of Governance, Moi University Law Journal Vol 1 No 2, p 1.

³ Githu Muigai, supra note 1.

⁴ Kagan, R.A., Constitutional Litigation in the United States, in Rogowski, R., Gawron, T (Eds) Constitutional Courts in Comparison: The U.S Supreme Court and the German Federal Constitutional Court at pp 25, 26.

A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-meaning people. Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part.⁵

The above character of the Constitution makes the jurisprudence of the courts that exercise jurisdiction over Constitutional matters, and, therefore, the interpretation of the Constitution, to be of specific concern to a student of the judiciary and the judicial process.

The capacity of courts to evolve a coherent and principled approach to the interpretation of the Constitution is essential for the legitimacy of the Constitutional democracy.⁶ Some scholars have championed the application of “neutral principles” in Constitutional adjudication. This approach opines that courts, in exercising their power of invalidation of laws on Constitutional grounds do not decide cases on general grounds of public policy or legislative criteria of importance. Courts are subject to a discipline of reasoning to which legislators are not bound: the disposition of Constitutional questions must be formulable in terms of some Constitutional principle that transcends the case at hand and is applicable to all comparable cases. Decisions cannot be *ad hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant fact situation.⁷

2.0 The *Maina Kiai* Case: Walter Khobe's dissection

In his article under reply, Walter Khobe in a nutshell, does three things. First, restates the overarching principles governing Kenya's electoral system. Thereafter, he identifies the role of the judiciary (the courts) in the electoral process which

⁵ Muigai, G., 2004. Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol 1 p 1.

⁶ See Generally Githu Muigai, *ibid*.

⁷ See Wechsler, H., 1959. Towards Neutral Principles of Constitutional Law, Vol 73 Harvard Law Review p 1. See also Richards, D.A.J., 1977. Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication Georgia Law Review Vol 11 p 1069.

he presents as twofold, namely, *rule evaluation*, and, *rule enforcement*. Finally, he restates and gives a thumb of approval to the manner in which the High Court and the Court of Appeal discharged its *rule evaluation* role in the *Maina Kiai* case.

In this reply, I opine that Walter Khobe in his article is right in his re-statement of the overarching constitutional principles governing elections and the electoral process in Kenya. He is also right in his conceptual identification of the twin roles of the courts in the electoral process, namely rule evaluation and rule enforcement. It is the *unqualified* imprimatur of the manner in which the High Court and the Court of Appeal applied these principles that this response takes issue with. This article invites Walter Khobe to consider the practical challenges that were caused in the context of the subsequent elections, being the 2017 presidential elections in Kenya, in assessing the jurisprudential purity of the *Maina Kiai* decisions by the High Court and the Court of Appeal. A part of the tests for the jurisprudential soundness of a court's decision is its capacity for practical application in real *flesh and blood* situations.

3.0 The *Maina Kiai* case and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* – the Nullification Decision

In annulling the presidential election outcome as declared by the Independent Electoral and Boundaries Commission in Supreme Court Presidential Election Petition Number 1 of 2017 following the August 8, 2017 general elections in Kenya, the Supreme Court had to interrogate the impact of the Court of Appeal decision in the *Maina Kiai* case to the process of tallying, verification and declaration of presidential election results. The court observed, and rightly so in my view as follows:

Be that as it may, Mr. Nyamodi persistently argued that the conduct by the 1st and 2nd respondents, to wit; of declaring results solely based on Forms 34B without reference to Forms 34A; of not scanning all Forms 34A and simultaneously transmitting them to the NTC; of reconfiguring Form 34C to exclude the Form 34A tally and only include the Forms 34B tally; of introducing the language of “statistics” as opposed to “results”; that all these actions, were necessitated, nay, required by the decision of the Court of Appeal in the *Maina Kiai* decision.

We were at pains to understand how the Court of Appeal decision in that case, could have provided a judicial justification for the conduct of the 1st and 2nd respondents. The Attorney General, appearing as *amicus curiae*, having been so

admitted, and despite having been clearly restrained from submitting on the so called impact of the *Maina Kiai* decision, also appeared to suggest, in his closing remarks that somehow, the Appellate Court's decision in that case, had changed the landscape of the conduct of elections in the Country.

...

Given this very clear elucidation of the law regarding the imperative for electronic transmission of results from the polling station to the NTC, how could the Court of Appeals' decision in *Maina Kiai* have provided a justification for declaring the results of the election of the president without reference to Forms 34A? How was it a basis for the reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the results? But most critically, how did the Court of Appeal's decision relieve the 1st respondent from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the president from a polling station to the CTC and to the NTC in accordance with Section 39(1C) of the Elections Act?

...

At the end of the day, neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the NTC as required by Section 39 (1C) of the Elections Act. What remained uncontroverted however, was the admission by Ezra Chiloba, that as of 14th August 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the "final results" for the election of the president

It is self-evident from the foregoing excerpt from the Supreme Court judgment that the Independent Electoral and Boundaries Commission misunderstood the dictates of the *Maina Kiai* decision in the process of conducting elections in a major way. In all fairness, the position taken by the IEBC before the Supreme Court in explaining its errors of omission while hiding under the shield of the jurisprudence in the *Maina Kiai* decision was, with respect, for dismissal.

4.0 The *Maina Kiai* case and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & Others* – the Clarification of Judgment Ruling

Following the nullification of the results of the presidential elections conducted on August 8, 2017, and prior to the conduct of the fresh presidential elections on October 26, 2017, the Independent Electoral and Boundaries Commission moved the Supreme Court for clarifications on certain aspects of the practical applicability of the *Maina Kiai* case in tallying and declaration of presidential election results.

In determining the motion, the court discerned two questions for determination, namely: Which results as between the tallies contained in Forms 34B submitted by the Returning Officers to the National Tally Centre and the totals of Forms 34A as verified by 1st and 2nd respondents, the 2nd respondent should use in declaring the results of the presidential election as envisaged under Article 138 (10) (a) of the Constitution; and whether the Independent Electoral and Boundaries Commission and its Chairman can correct errors identified in the Constituency results declaration forms (Forms 34B) or amend the Forms 34B where the same differ with results contained in the relevant polling station results declaration forms (Forms 34A) after the verification exercise envisaged by Article 138 (3) (c) of the Constitution.

To the first question above, the court's response to this issue was as follows:

[60] With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the Constitution, the Elections Act, and the Judgment of this Court, not to mention the Judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent to verify, accurately tally, and transmit the results of a presidential election coupled with the duty of the 2nd respondent to verify, accurately tally, and declare the results of the election of the President.

[61] These stages and concomitant responsibilities are so elaborately explained in the Judgment of this Court, that it confounds the mind, that the 2nd respondent would pose such a question. The way in which the question is framed appears to be based on the assumption that the results in Forms 34A and those in Forms 34B are mutually exclusive. Is it not a rudimentary fact, that the latter, is the aggregate of the former" And if this is so, how would it be a matter of choice as to which results between Forms 34A and Forms 34B, the 2nd respondent is to declare" Who aggregates what into what" Again, is it not an established fact that the Constituency Returning Officer, aggregates Forms 34A from the polling stations into Form 34B" Before generating Form 34B, doesn't the Returning Officer verify the figures in

Forms 34A” Is it not a fact that the 2nd respondent as the National Returning Officer aggregates the results from forms 34B into form 34C” Did this Court not categorically state that before declaring the final aggregated results in Form 34C, the 1st respondent on behalf of the 2nd respondent must verify the said results against those in the transmitted Forms 34A” Is this not why Form 34A is considered the “primary document” in the verification process” Is the verification exercise not meant to establish the accuracy or otherwise of the results, which is a basic tenet of the Constitution” ***If the 2nd respondent notices some inaccuracies as brought to his attention by the 1st respondent, what is his duty” Is he not supposed to simply bring those to the attention of the candidates, the public and election observers, even as he declares the final result as aggregated from Forms 34B” What did this Court say about the effect of inaccuracies that may be unearthed by the verification exercise on an election”***

To the second question the response by the Supreme Court was thus:

... the answer is rather obvious. The issue was dealt with in the *Maina Kiai* decision by the Court of Appeal. But for whatever it may be worth, we hereby reiterate that the 1st and 2nd respondents cannot correct errors identified in Forms 34B or amend the Forms 34B where the same differ with the results contained in the relevant Forms 34A. ***Theirs, is to expose such discrepancies and leave the resolution of such issues to the election Court, in this case, the Supreme Court.***

There is no doubt that even with all the safeguards anticipated by the Constitution, the Elections Act and the Regulations, human errors may occur in the posting, computation, transmission and declaration of election results. Some errors may be deliberate and even criminal. Others may be genuine human errors which, nevertheless, impact the election outcome. There is also no doubt that these errors may be discovered at any stage of the electoral process. What the Motion by the Independent Electoral and Boundaries Commission and its Chairman to the Supreme Court identified was a situation where the duo discover discrepancies between the results as declared at the polling station on the one hand and the corresponding results as transposed, and declared, at the constituency tallying centre.

The Supreme Court’s response to this challenge was not fully satisfactory. It was in the terms that “***theirs, is to expose such discrepancies and leave the resolution of such issues to the election Court, in this case, the Supreme Court.***” Essentially, the Independent Electoral and Boundaries Commission will acknowledge existence of the errors, then proceed to *knowingly* declare the erroneous results and leave it to Supreme Court to resolve the issue.

It is noteworthy that Section 6 (a) of the Election Offences Act⁸ makes it an offence for a member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election to make, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true.

It would follow that the Chairman of the Independent Electoral and Boundaries Commission, having received both forms 34A duly filled by the Presiding Officer and 34B filled by the Returning Officer, thereby proceeds to create form 34C.

In the *Maina Kiai* case, the Court of appeal declared that “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.”

Where the Chairman of the Independent Electoral and Boundaries Commission posts in Form 34C results from Form 34B which are at variance with the results in form 34A (and these ones are clothed with finality) is simply illogical. It borders on binding the Chairman to commit a crime within the meaning of section 6(a) of the Election Offences Act.

Similarly, to tell the Chairman of the Independent Electoral and Boundaries Commission to expose discrepancies and leave it for the court to deal with them in a subsequent dispute where the said Chairman will be the respondent also presents an illogical scenario.

5.0 Conclusion

Electoral processes generate so much heat and dust. Election disputes are resolved within this environment of heat and dust. It can be a tricky environment for reasoned resolution of disputes. The *Maina Kiai* case was presented and resolved

⁸ Act 37 of 2016.

by the High Court and the Court of Appeal as an abstraction. The case presented abstract questions on what should generally happen in the counting, tallying and declaration of election results. Whereas the court identified one facet of the problem and rendered answers to this facet, the court clearly did not have its attention on other facets of the same problem. The Raila Odinga case, on the other hand, was presented as a real case with actual occurrences. The facets of the problem that were unanticipated in the abstract *Maina Kiai* case presented themselves. The Supreme Court did not render fully satisfactory answers. There may be need to tamper with the absolutism of approach in the *Maina Kiai* jurisprudence to address the practical absurdities discernible from the *Raila Odinga* jurisprudence regarding verification, tallying and declaration of presidential election results.