

**ELECTION VIOLENCE IN MULTIPARTY KENYA AND THE COURTS'
JURISPRUDENCE ON ELECTION MATTERS: INTERROGATING THE RULE
OF LAW AND FREE AND FAIR ELECTIONS**

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DECLARATION

I, **Ongoya Zebedee Elisha**, do hereby declare that this Thesis is my original work and has not been submitted to any other University or Institution for any award. I hereby now submit the same for the award of Master of Laws Degree of the University of Nairobi.

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DEDICATION

To the LLM class of 2005/2006 and the teaching and non-teaching staff of the School of Law at the University of Nairobi during the said academic year who provided good and interactive company.

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This work is a direct result of the efforts of a number of bodies and individuals without whom, and left to my own devices, it would have remained an unfulfilled ambition – a pipe dream. Not every contributor may be expressly mentioned here and this is purely due to limitations of space and shortcomings attributable to my memory - the same is not an underestimation of the respective contributions. The Board of Post Graduate Studies, University of Nairobi, thank you for the scholarship you offered me that made it possible for me to undertake my LLM Programme. My supervisor, Mr Wambua Musili, your guidance throughout this assignment is responsible for the shape and colour of the work. My corrections supervisor, Mrs Joy K. Asiema for ensuring that the warps identified during my defence of this thesis were well sealed. Thank you so much and may you live to offer guidance to others too. My parents Jael Ayuma Ongoya and Zebedee Light Ongoya, this work is traceable to your introductory lessons that hard work actually pays. To my siblings, Indosio, Ondiso, Simwa, Oriedo, Inyangala and Olemo, your inspiration and encouragement cannot be summarized on this page alone. Jael Madanji, yes, you were very helpful and understanding throughout the research, authorship and defence stage. Advera Nsiima of the United Nations University for Peace in Costa Rica, your encouragement cannot be taken for granted. Wairu Kinyori and Evelyne Asaala, as research assistants, you demonstrated unrivalled accomplishment in research skills. Solomon Wasia Masitsa, your proofreading input was invaluablely handy. Thank you so much. Professor Githu Muigai, who encouraged me to apply for the Scholarship at the University of Nairobi and recommended me for admission into the course, thanks. Mr Tom Chavangi, thank you for acquiring and making available some of the course material for me when I commenced by postgraduate studies. My friends Majanja, Imende, Wetang'ula, Alubala, Ambani and Nyongesa, you never derailed me in the course of the research.

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5. The Penal Code, Chapter 63 Laws of Kenya
6. The Police Act, Chapter 84 Laws of Kenya
7. The Societies Act, Chapter 108 Laws of Kenya

CHAPTER 1

1.0 INTRODUCTION: A BROAD OVERVIEW AND LAYOUT OF THE RESEARCH

Elections are essential to democracy, and public confidence in the institutions and processes surrounding elections is essential to establishing the basis of authority for any democratic government¹

1.1 Background to the Study

The purpose of this research is twofold, to wit; (a) to study the reasons for, and, (b) to propose legal solutions to the prevalence of violence that has characterized Kenya's election periods since the re-advent of multi-party politics in spite of the existence of laws that, by and large, prohibit the vice.

Since the re-advent of multi-party politics in Kenya in the early 1990s, the country has had three General Elections², several by-elections and a referendum on the Draft Constitution³. At the time of concluding this research, the country was in the heat of the political campaigns for the 2007 General Elections⁴. All these electoral occasions have invariably been characterized by incidents of violence as shall be demonstrated later in this study.

From a legal perspective, the following questions emerge as deserving answers: Is there something inherently wrong with Kenya's electoral law that creates or leaves room for election violence? Has something gone awry with the institutional structures and enforcement mechanisms set up under Kenya's electoral laws? Has the Kenyan judiciary performed its duties beyond reproach in shaping Kenya's election culture? And, what has been the degree of consistency of the jurisprudence emanating from Kenya's courts on electoral matters generally and matters to do with election violence in particular?

¹ Klein, R.L. and Merlobe, P., Building Confidence in the Voter Registration Process: An NDI Monitoring Guide for Political Parties and Civic Organizations, Nairobi, National Democratic Institute, 2001.

² These General Elections were conducted 29th December 1992, 29th December 1997 and 27th December 2002.

³ The referendum of the proposed new constitution for Kenya was held on November 21, 2005.

⁴ The General Elections are due to be held on December 27, 2007 whereas this study is concluded on November 14, 2007.

A student of electoral democracy, electoral processes and electoral law would consider that these questions deserve a detailed academic inquiry. These are the questions that will generally inform the research under this study.

1.2 Statement of the Problem

Electoral occasions in Kenya have invariably been characterized by incidents of violence. Such electoral violence has adverse effects on the enhancement of democracy and the promotion of the ideals of the rule of law and free and fair elections. The problem under consideration is the continued prevalence of electoral violence in spite of the existence of electoral laws, electoral institutions and law enforcement agencies in Kenya.

1.3 Objectives of the Study

The primary objective of this study is to mirror election (mal) practices, specifically the question of election related violence, against the law governing elections in the country and the courts' and other administrative application of that law. At the end of the study, it is intended to respond to the issue whether the conduct of elections in Kenya since the re-advent of multiparty politics has fostered the celebrated ideals of the Rule of Law and free and fair elections.

Another objective of the study is to examine and respond to the issue as to whether the conduct of elections in Kenya, since the re-advent of multi-party politics, reflects adherence to the celebrated ideals of the rule of law and free and fair elections.

Further, this study intends to interrogate the issue as to whether the judiciary has championed the promotion of the rule of law and free and fair elections in the context of its exercise of jurisdiction over electoral matters.

1.4 Justification of the Study

Kenya is a country that subscribes to electoral democracy. This contention is borne out of the fact that since independence in 1963, Kenya has held, and Kenyans have been involved in, regular and periodic elections at the parliamentary and civic levels. Since the re-introduction of multi-party elections, Kenyans have been involved in Presidential, Parliamentary and Civic elections every after five years. Such political involvement of

the citizens is, by and large, a good thing. However, as an emerging democracy, it is critical to ensure that electoral democracy is not reduced to a mere ballot box ritual. Circumstances surrounding the electoral process should be such as to enhance the confidence of the citizens in the electoral process. One of the most teething problems facing Kenya's electoral process is the problem associated with violence during electoral times. This study attempts to unravel the institutional mal-functions that could be rectified to deal with the problem of election violence. The study, therefore, is very relevant considering that it address a concern that is of practical concern to an important governance process to Kenya as a country.

1.5 Literature Review

This study does not claim pioneer authorship on questions of election law, election practices and courts' electoral jurisprudence generally, or even with specific reference to Kenya. Consequently, the study has been inspired and shall be enriched by a number of writings in the area. There are a number of decisions of courts both in Kenya and beyond whose analysis shall give dimension to this study. The literature is categorized into books (including chapters in books and journal articles), and case law.

(i) Books

*Mutahi Patrick*⁵ analyses the trends and nuances of electoral violence in Kenya since 1992 to 2002. Using available data, author "attempts to dissect electoral violence that contributed to the (already discussed) figures during the 2002 General Elections." The work concludes that the 2002 General Elections in Kenya resulted into Kenya being cited as a role model for other countries in the continent and the world "to emulate for undergoing a peaceful transition. This analysis shall provide invaluable basis for interrogating whether, it is, in fact, true that incidents of election violence in 2002 went down. This shall be by testing the data provided in the chapter as against data obtained from other reports. Changes in law, including enforcement of the same, during the 2002 General Election shall be examined to see whether, strict enforcement of the law can aid

⁵ Political Violence in the Election in Herve Maupeu et al(ed). The Moi Succession Elections 2002, Transafrica Press, Nairobi, 2005 P. 69

in ameliorating incidents of election violence and their inevitable effect on free and fair elections.

The assumption by the author that due to low incidents of violence in the 2002 General Elections, as compared to the preceding elections of 1992 and 1997, then the elections were free and fair is controversial and, therefore, contested in this research. To the extent that violence characterized part of the 2002 General Elections, this study shall contend that the said election failed to meet the “free and fair” standard.

Gichira Kibara⁶ examines, among other things, the constraints to free and fair elections in Kenya. Under the rubric “constraints to free and fair elections,” the author interrogates the question of election violence. The data supplied by the author through highlights of incidents of election violence in the 1992 and 1997 General Elections shall be used in this study to verify data from other sources for accuracy. The author’s indicators of what constitutes free and fair elections shall be used to examine whether there is a settled or emerging general consensus on the constituent elements of the concept.

In the article *Electoral Trends in the Light of Recent African Elections (2001) AHRLJ 127*, Morne Van der Linde presents recent developments in respect of elections in selected African countries. Of particular interest in the work is the author’s exposition of the significance of a proper electoral system to a functioning democracy. In bringing to the fore the performance of institutional framework governing the conduct of elections under Kenyan law, this study will employ some of the standards established by der Linde to assess whether institutions under Kenya’s legal framework qualify as “a proper electoral system”.

In the run up to the 1997 General Election, Winnie Mitullah edited a publication entitled *The People’s Voice: What Kenyans say, Claripress Limited, 1997*. This publication carries writings from various newspapers and magazines by a cross section of Kenyans expressing their opinion on the electoral system and particularly the then pending 1997 General Elections. The general perception in respect of the question of election violence as captured in the publication shall be utilized by this study in analyzing the real effects of election violence on free and fair elections in Kenya.

⁶ The Challenges to and Efficacy of Election Monitoring in Walter O. Oyugi et al. (eds) *The Politics of Transition in Kenya from KANU to NARC*, Heinrich Boll Foundation, Nairobi, 2003 P. 280

Dr Smokin C Wanjala⁷ has interrogated the concept of free and fair elections and its significance in democratic practice. His article further examines the prerequisite environment for free and fair elections and concludes by examining aspects of electoral law in Kenya particularly as they relate to Presidential elections, nomination of candidates for parliamentary seats in Kenya and the existing electoral institutions in Kenya as well as their capacity to uphold free and fair elections. This study will endeavour to unpack the normative content of the concepts of free and fair elections and the rule of law and thereby interrogate the author's analysis of the concept of free and fair elections.

Dr Willy Mutunga and Prof Kivutha Kibwana⁸ are the other authors who have sought to highlight some defining characteristics of a free and fair election. They adopt the postulates by the Zanzibar Elections Monitor and Observe Group (ZEMOG). Their article attempts to forecast on the possibility of the then pending 1997 General Election being free and fair. This study will interrogate the soundness of the standards set by ZEMOG and apply them to the Kenyan situation. Of particular importance is how the standards treat the question of election violence. This study, while noting that the ZEMOG standards were by and large fashioned to cater for the situation in Tanzania finds the postulates to be of universal application. They form critical benchmarks of judging the Kenyan situation to reach a conclusion as to whether the Kenyan electoral process have passed the free and fair test in light of the reported incidents of election related violence. Smoking Wanjala, in another piece⁹ deals with the challenge of offering civic education. The author notes that there is a deficiency in the civic education curriculum on the real meaning of election. The author questions the capacity of civic educators to reach a vast majority of Kenyans. A people's knowledge about the significance of having free and fair elections and how violence during election period is likely to compromise the credibility of the elections is important in the evolution of a mature democracy. The study will rely

⁷ Politics and Electoral Law in Kenya in Smokin Wanjala et al (ed) *Yearning for Democracy: Kenya at the Dawn of a New Century*. Claripress Limited, 2002

⁸ It is possible for Kenya's 1997 General Elections to be Free and Fair in Smokin Wanjala et al (ed) *Yearning for Democracy: Kenya at the Dawn of a New Century*, Claripress Limited, 2002

⁹ What Civic Educators Ought to Tell the Electorate in Smokin Wanjala et al (ed) *Yearning for Democracy: Kenya at the Dawn of New Century*, Claripress Limited, 2002

on the proposal for strengthening civic education by the author in making a case for reform in the electoral system to deal with the question of election related violence.

The other writing by the same author in the same volume entitled *The Young and Elections in Kenya* discussed the (mis)use of young people during the electoral process. The emergence of the “youth winger” philosophy is interrogated with focus on such groups as ‘Operation Moi Out’ and ‘Youth for KANU 92’ which emerged prior to the 1992 General Elections. The distortionist agenda of these groups and their contribution to absence of free and fair elections is an issue that the author gives an erudite inquiry. The study intends to examine the negative use of the energies of young people to perpetuate acts of violence during election periods.

On 29th April 1993, a body calling itself National Election Monitoring Unit (NEMU) released a report entitled “Courting Disaster: A Report on the Terror, Violence and Destruction in the Rift Valley, Nyanza and Western Provinces of Kenya. The said report is published¹⁰. The report chronicles the nature and impact of violence that had preceded the 1992 General Elections in the geographical areas under the study. The report gives the various dimensions to the violence and the election dimension is one of them.

Ongoya Z.E. and Masitsa S.W,¹¹ have engaged in a critical evaluation of the law governing service of election petitions in Kenya. The article puts in the spotlight the reasoning of the Court of Appeal in the case of Emilio Mwai Kibaki Vs Daniel Toroitich Arap Moi & Others¹² as the said court interpreted the relevant parts of the National Assembly and Presidential Elections Act¹³. The article takes the position that the judges in this ‘historic’ case were caught in the muddles of political expediency as they engaged in blatant disregard of the basic tenets of statutory interpretation and far-fetched emotional reasoning, totally indefensible on legal and logical grounds, in reaching their findings that personal service was the only mode of service recognized under Kenya’s election law. Although not based on the question of election violence, the analysis highlights the technicality-minded character of the enforcement of election law by

¹⁰ See Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa: A Case Study of Kenya*, Claripress, Nairobi, 1998

¹¹ *The Law of Politics or the Politics of the Law?: An Evaluation of the Mwai vs Moi Rule as to personal Service of Election Petitions*, www.kenyalawreports.or.ke

¹² Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999.

¹³ Chapter 7 of the Laws of Kenya.

Kenya's judicial institutions. It is this attitude on the part of the judiciary that this study will be putting in the spotlight in seeking ways of change. This study will be emphasizing that with the judicial attitude akin to what was encountered in the Kibaki Vs Moi case, election malpractices, including election violence, remain the least risky ventures.

(ii) Case law

A robust, independent, and, jurisprudentially purposeful judiciary is a necessity for the evolution of a democracy. One of the areas where these characteristics of a judiciary are tested is with regard to the manner in which election petitions are handled. A number of decisions from the courts in Kenya have informed this study's perception of the judicial attitudes as it handles election causes. The case of *Emilio Mwai Kibaki Vs Daniel Toroitich Arap Moi & 2 Others*, Civil Appeal NO. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999 involved the issue of the proper service of an election petition. The judges observed that the two appeals, apart from the undeniable fact that they involved persons of no mean status in the country, they did raise issues very crucial to the jurisprudence of our legal system as hitherto understood. The court then went ahead to conclude that:

In the event, we are satisfied that the three judges of the High Court were fully justified in holding that as the law now stands only personal service in respect of election petitions filed under Section 20(1)(a) of the Act is proper service.

This case has occasioned untold injustices in the process of redressing election malpractices in the sense that nearly all election petitions coming after this judgment turned on the technicality of the mode of service. The image of the judiciary as a bastion of a democratic society has, to this extent, been severely tainted. It is worth of emphasis that the issue of election violence was not in issue in this case. However, the manner in which the judiciary resorted to totally unjustified technicalities to avoid giving redress of alleged substantive electoral mal-practices has had deleterious effects that would foment increased mal-practices, including election violence.

The Ugandan case may be no better than the Kenyan situation at least if the case of Rtd Col. Dr. Kizza Besigye Vs Electoral Commission & Yoweri Kaguta Museveni¹⁴, is anything to go by. The case presents a classical scenario of the manner in which judicial institutions may interpret the law in a way that fosters political indiscipline. This misapplication of the law is discernible from the findings of the court where the court found thus:

- (a) On issue number 1, we find that there was non-compliance with the provisions of the Constitution, Presidential Elections Act and the Electoral Commission Act in the conduct by the 1st Respondent in the following instances:
 - i. The disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote;
 - ii. In the counting and tallying of votes.
- (b) On issue number 2, we find that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act, the Electoral Commission Act in the following areas:
 - i. The principle of free and fair election was compromised by bribery, intimidation or violence in some areas of the country;
 - ii. The principle of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas.
- (c) On issue number 3, by a majority of four to three, we find that it was not proved to the satisfaction of the court, that the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner (emphasis supplied).

The inconsistency inherent in the findings of the court is manifest. If any acts violated the constitution, the Presidential Elections Act and the Electoral Commissions Act, what further evidence did the court require to prove that the beneficiary of those mal-practices has not been validly elected to office? How did it emerge that acts of disenfranchisement of voters, intimidation of voters, multiple voting and vote stuffing did not affect the result of the election in a substantial manner? The judiciary, in this case, made election mal-practices a least risky affair. This case will be employed in this study to demonstrate how judicial institutions can be an impediment to the realization of the ideal of free and fair elections through abdication of responsibility as bastions of the rule of law.

¹⁴ Supreme Court of Uganda, Presidential Election Petition No. 1 of 2006.

1.6 Hypothesis

The continued prevalence of election related violence, as a concern of the law, since the re-advent of multi-party politics in Kenya has been caused, by and large, not by non-existence of good laws, but a failure of enforcement institutions to uphold the law with a consequence that the ideals of the rule of law and free and fair elections have been compromised.

A courageous judiciary that adheres to and upholds the rule of law in its judicial decisions is crucial to the fostering of public confidence in the ability and willingness of the state to address and curb election violence.

1.7 Research Questions

The electoral process is a very important component of democratic governance. This research, therefore, attempts to evaluate the extent to which confidence in the electoral process through fidelity to the law and the concept of free and fair elections have been secured in Kenya's post-multiparty period. The problem that the study grapples with can be captured by the following questions:

- a) Is there a lacuna in the law relating to elections that breeds ground for acts of violence during the electoral period? and,
- b) If yes, does the lacunae exist in the prescriptive provisions of the law, the enforcement machinery or is the lacunae to be found outside the legal framework?
- c) Has the Kenyan judiciary contributed in any way to the culture of election violence by failing to make election violence high risk behaviour?

1.8 Methodology to be used

The study is library-based and, principally, the data collection method is secondary. There has also been substantial use of the cyberspace for purposes of gathering data on the conceptual foundations of free and fair elections and the rule of law.

This approach of data collection is justified on the grounds of the time available for data collection and the cost element, both of which are acutely limited. Further, the risk of inaccuracy of data that this study relies upon is minimized by the existence of a large body of literature on various aspects of elections in Kenya, the principle of the rule of law

and free and fair elections. Since part of the data used comprises reports from election observers and monitoring groups that were on the ground during the electoral process, the study has been afforded ample opportunity to compare the sources of data for accuracy.

1.9 Limitations of the Study

Political processes such as the electoral process are influenced by many legal and non-legal factors. Most of these factors, particularly the non-legal ones, are outside the scope of this study. In Kenya, for instance, the role of ethnicity in the electoral process at this point in history cannot be gainsaid. Needless to emphasize, it is not very easy to legislate or propose efficacious legislation on ethnicity. Other factors that are likely to defeat the concepts of free and fair election and the rule of law but which are not within the scope of this study include clanism, racism, poverty etc. To the extent that this study does not have at its core the non-legal factors that have a bearing on electoral democracy, then it is limited in scope.

1.10. Chapter Breakdown

The study is divided for purposes of good order, into the introduction, four substantive chapters and a chapter on conclusions and recommendations. A breakdown of what each of these chapters contain is as follows:

Chapter 1: Introduction: A Broad Overview and Layout of the Research

The introduction outlines the research project. This is necessary in order to provide an overview, at a glance, of the essence of the research. It covers the background to the research, the statement of the problem, the theoretical framework and literature review, objectives of the research, hypothesis, research question sought to be answered, methodology to be used and the chapter breakdown.

Chapter 2: Conceptual and Theoretical Framework

This chapter takes a general theoretical inquiry into the concepts of the Rule of Law and Free and Fair Elections. The chapter also interrogates the significance of these two concepts in the democratic governance of any country. This chapter shall make out a

case that although the concepts of free and fair elections and the rule of law in their pure sense are not easy to achieve in practice, they should form the deliberate aspiration of every state that proclaims itself to be a democratic state. The research in this chapter shall, therefore, lay down the benchmarks against which the situation in Kenya shall be measured and the proposals for reform made.

Chapter 3: The Legal and Regulatory Framework on Election Violence in Kenya

This chapter lays down the body of constitutional, statutory and delegated legislation governing elections in Kenya. Particular emphasis in the chapter is placed on the law governing issues of election violence and election petitions in Kenya. The research under this chapter is intended to contribute in two cardinal respects to the study, namely:

- a) Examine whether the text of the law as it is in Kenya creates an environment within which free and fair elections can be experienced; and
- b) Provide a mirror against which the actual practices can be reflected to test the hypothesis that it is a failure by the administrative bodies and judicial institutions to enforce an otherwise good law that has bred ground for election violence in Kenya's multi-party history.

Chapter 4: Chronology of Election Violence in Kenya: 1990 - 2007

This chapter takes a broad look into the incidents of election violence in Kenya during the post 1990 multi-party era. For data source, the research under this chapter shall take advantage of contemporaneous newspaper reports, reports of election observer groups, reports by the Electoral Commission of Kenya and academic writings that have focused on the 1992, 1997 and 2002 General Elections and the by-elections that have been held in Kenya during this period.. The response by administrative bodies, namely, the Electoral Commission of Kenya and the Kenya Police on the incidents shall be examined. Under this chapter, answers to the following questions are sought: was the law upheld? Were the perpetrators of the violent incidents brought to book and was this done expeditiously? What was the potential impact of the incidents on the electoral exercise? Did the violent occurrences contribute to the absence of free and fair elections within the meaning of chapter 1 above?

Chapter 5: Case Law and Election Jurisprudence in Kenya: 1992-2007

This chapter puts the Judiciary, the time honoured arbiter of social disputes, under scrutiny. Aspects of election petitions and election offences are examined. What are the frequencies at which people are charged with election offences in Kenya? Which election petitions have been based on the grounds of election violence? On how many occasions have election petitions been won on the question of election related violence? How long, on average, does it take to complete the hearing of an election petition in Kenya? What are the rules of practice and procedure governing election petitions in Kenya? Have these rules been upheld during the period under study? Have election petitions been handled in such a manner as to render election violence a very costly exercise on the part of the mal-practitioners?

Chapter 6: Conclusion and Recommendations

This chapter shall be divided into two parts, the conclusion part and the recommendations part. The conclusion part shall test whether the hypothesis of the study has been proved or otherwise.

The recommendations part shall delve into the legislative and institutional reforms, if any, that are necessary to deal with the question of election related violence which is a dent to the democratization process in Kenya.

CHAPTER 2

2.0 CONCEPTUAL AND THEORETICAL FRAMEWORK

The rule of law ensures that conditions exist whereby a citizen or resident of a country can enjoy his rights. It is only if such an atmosphere exists that a person can go about his business feeling secure and can also address the issues of life generally¹⁵.

[...]Moreover, like democracy, 'free and fair' is a standard of achievement, and what is or is considered to be free and fair today, may not be so tomorrow. This means neither that everything is relative, nor that 'free and fair' is unattainable; from the point of view of any community at any particular time, what matters is that any found discrepancies are both identifiable against a known background of law and principle, and remediable, within the realm of political dialogue and the rule of law. Although analysis and experience over time will surely give concrete form to free and fair standards, and while some usages of the free and fair label have been less scrupulous than others, criticism of the free and fair approach to elections is often off target. After confessing difficulty in assessing whether an election has satisfied the relevant criteria, Bjornlund's judgment that 'the phrase "free and fair" has tended to obscure rather than clarify' reflects a common misapprehension of what is actually involved, and that the conception of a free and fair election derives from *established* legal rules and principles.¹⁶

2.1 Introduction

Free and fair elections are important indicators of the democratic culture of a country. They are a necessary condition for a successful consolidation of democracy. To achieve a free and fair election, the electoral environment must be one that enables the voter to make informed choices¹⁷. The most objective standard of ensuring that such an environment exists is the use of the instrument of the law. The foregoing presupposes that the rule of law – as contradistinguished from the rule of whims or arbitrariness – is critical to the realization of free and fair elections and by extension democratic consolidation. Przeworski and his colleagues define democracy simply as "a regime in which governmental offices are filled as a consequence of contested elections"¹⁸. This definition may sound to be an oversimplification of the otherwise wider concept of democracy. However, it points to the centrality of elections to democratic processes.

¹⁵ Rukwaro G.K., *The Rule of Law and Development*, in Yash Vyas *et al*, *Law and Development in the Third World*, Faculty of Law, University of Nairobi, Nairobi, 1994.

¹⁶ Guy S. Goodwin-Gill, *Free and Fair Elections*, New Expanded Edition (Inter-Parliamentary Union, Geneva, 2006) 74.

¹⁷ Electoral Commission of Kenya, *2002 General Elections Report*, Electoral Commission of Kenya, 2004, Nairobi, P.37.

¹⁸ Przeworski, A., *et al*, *What Makes Democracies Endure?* *Journal of Democracy* Vol. 7 no. 1 (1996): 50-51

Taking cue, Larry Diamond defines *electoral* democracy as a civilian, constitutional system in which the legislative and chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage¹⁹. Electoral democracy is but one of the key elements of liberal democracy. In a ten-point summary of the essentials of a liberal democracy, Diamond highlights the following components:

- i. Control of state and its key decisions and allocations lies, in fact as well as in constitutional theory, with elected officials (and not democratically unaccountable actors or foreign powers); in particular, the military is subordinate to the authority of elected civilian officials.
- ii. Executive power is constrained, constitutionally and, in fact, by autonomous power of other government institutions (such as an independent judiciary, parliament, and other mechanisms of horizontal accountability).
- iii. Not only are electoral outcomes uncertain, with a significant opposition vote and the presumption of party alternation in government, but no group that adheres to constitutional principles is denied the right to form a party and contest (even if electoral thresholds and other rules exclude small parties from winning representation in Parliament).
- iv. Cultural, ethnic, religious and other minority groups (as well as historically disadvantaged majorities) are prohibited (legally or in practice) from expressing their interests in the political process or from speaking their language or practising their culture.
- v. Beyond parties and elections, citizens have multiple, ongoing channels for expression and representation of their interests and values, including diverse, independent associations and movements, which they have freedom to form and join.
- vi. There are alternative sources of information (including independent media) to which citizens have (politically) unfettered access.
- vii. Individuals also have substantial freedom of belief, opinion, discussion, speech, publication, assembly, demonstration, and petition.

¹⁹ Diamond, L., *Developing Democracy: Towards Consolidation*, John Hopkins University Press, Baltimore and London, 1999, P.10.

- viii. Citizens are politically equal under the law (even though they are invariably unequal in their political resources).
- ix. Individual and group liberties are effectively protected by an independent, non discriminatory judiciary, whose decisions are enforced and respected by other centres of power.
- x. The rule of law protects citizens from unjustified detention, exile, terror, torture, and undue interference in their personal lives not only by the state but also by organized non state or antistate forces.²⁰

In the same breath, Nasong'o and Murunga²¹ recently restated that the concrete realization of liberal democracy is premised in a number of institutional guarantees which they have identified as; (1) freedom to form and join organisations, be they political parties, social movements, or civic, professional and welfare associations; (2) freedom of expression and movement; (3) universal adult suffrage; (4) eligibility, in principle, of any citizen to seek public office; (5) right of political leaders to compete freely for support and votes; (6) existence of alternative sources of information; (7) free, fair and competitive elections; (8) accountable governmental decision-making institutions; (9) freedom of elected officials from overriding opposition from unelected officials. The two authors argue that the more a country approximates these institutional guarantees, the more democratic it is. Such democracy has such affinities as the notion of government by the consent of the governed, formal political equality, inalienable human rights including the right to political participation, accountability of power to the governed and the rule of law.

It is discernible from the foregoing that thinkers in the realm of liberal democracy have put at its core the practice of universal adult suffrage.

While contributing to the theoretical foundation of universal adult suffrage, John Stuart Mills asserted that:

- (i) It is a personal injustice to withhold from anyone, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has

²⁰ See Diamond L, *ibid.*

²¹ Nasong'o W.S., and Murunga R.G., *Prospects for Democracy in Kenya*, in Nasong'o W.S., and Murunga R.G (ed.) *Kenya: The Struggle for Democracy*, Council for Development of Social Science Research in Africa (CODESRIA), Dakar, 2007 P. 3.

the same interest as other people. If he is compelled to pay, if he may be compelled to fight if he is required implicitly to obey, he should legally be entitled to be told what for; to have his consent asked, and his opinion counted as its worth. (ii) Political equality is a basic principle of democracy; and form of restricted franchise necessarily infringes the principle of equality between individuals in some degree. (iii) if the right to vote is denied to some, their interest may be overlooked by the legislature²².

On his part, Kapur Chand holds the opinion that democracy demands a spirit of tolerance. Tolerance is necessary as democracy involves the rule of the majority and “submission of the minority of minorities to the decision of the majority.” He writes:

The majority should not be prompted in its public actions by sectional interests and ruthlessly disregard the interest of minorities and frustrate their aspirations. A rational majority is the prerequisite of tolerance and tolerance is the basis of democracy. Exactly the same rational role of the minority is expected to play. It must not act in an irresponsible manner and play a constructive role in opposing and proposing to the party in office. It must not always suspect the *bona fides* of the majority and remain at perpetual political animosity with it. There should prevail a sense of give and take; the habit of tolerance and spirit of compromise. The more there are cleavages and party squabbles in society the more difficult it is to make democracy operative and enthuse democratic spirit among citizens. The differences in majority and minority opinion prove beneficial only when they are directed towards the common good and are free from partisan considerations. Each part should have full and fair opportunity to express its opinion and influence government’s policy by reasoning and persuasion. But once the decision has been taken, it is the duty of the minority parties to abide by it and perform the well-recognized functions of a responsible opposition. This is true resignation and true service; the real meaning of fellowship. A democratic system envisages alteration in government and both the victors and the vanquished should accept at some future date their positions may be reversed and, as such, there should be wide agreement on the benefits of playing the game of politics according to rules. Democracy is participation²³.

Another dimension from which free participation in the process of governance of one’s country is appreciable is from the human rights front.

²² Mills, J.S., Representative Government, Ch viii cited in Appadorai A., The Substance of Politics, Oxford University Press, New Delhi, 2000, P.524.

²³ Kapur A.C., Principles of Political Science, S. Chand & Company Ltd, Ram Nagar, Naw Delhi, 1996 (12th ed.).

It is now recognized as a human right that citizens of every country are entitled to participate in the governance of their country either directly or through freely elected representatives.²⁴ Underlying this study is the normative perspective and assumption that democratization is generally a good thing and that a democracy is the best form of government.²⁵ In cases where the electoral process is determined by the whims of physical might as opposed to defined legal processes, chances of entrenching a democratic culture become remote. Further, the ensuing government may fail the test of legitimacy. From a human rights angle, failure to institutionalize and make effective mechanisms that would guarantee a free and fair electoral process (together with effective systems of redress in cases of lack of freedom and fairness) automatically renders the right of the people to participate in the governance of their country through freely elected representatives hollow.

This study contends that any aspect of an electoral process that makes it difficult for the citizens to freely participate in the political process robs them of the ownership of their government. The legitimacy of the resultant government may thus be put to question.

An examination of the dual concepts of the rule of law and free and fair elections in the context of election violence would be virtually impossible without first unpacking the normative content of the two concepts.

²⁴ Article 13 of the African Charter on Human and Peoples' Rights provides that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law (emphasis supplied). While interpreting Article 13 of the African Charter on Human Peoples' Rights in the case of *Constitutional Rights Project Vs Nigeria, Communication 102/93* held that "To participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In light of this, the annulment of the election results, which reflected the free choice of the voters, is in violation of Article 13(1). Article 25 of the International Covenant on Civil and Political Rights provides that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restriction: to take part in the conduct of public affairs, directly or through freely chosen representatives, and, to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors. Article 21 of the Universal Declaration of Human Rights guarantees everyone the right to participate in the government of his country directly or through freely chosen representatives. The same article provides that the will of the people shall be basis of the authority of government and this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

²⁵ This is the very position that underlies Larry Diamond's work *Developing Democracy: Toward Consolidation*", John Hopkins University Press, Baltimore and London, 1999.

Legal scholars and political scientists have grappled with the various facets of the concepts of the rule of law and free and fair elections. This chapter seeks to identify the defining characteristics of the two concepts and their respective significance in the democratic governance of any country.

The purpose of this enquiry is to set the benchmarks against which the implications of election violence in Kenya to the two concepts in the period under study shall be measured and the proposals for reform made in the concluding chapter.

2.2 The concept of the Rule of Law

At the peril of sounding simplistic, the rule of law is not a “rule” in the sense that it binds anyone but rather it is merely a ‘collection of ideas and principles propagated in the so called free societies to guide lawmakers, administrators, judges and law-enforcement agencies²⁶. The overriding consideration in the concept of the rule of law is the idea that both the rulers and the governed are equally subjected to the same law of the land.

The rule of law means that the ordinary law should be supreme and every person be subject to ordinary law courts. There should be nothing that may be characterized as arbitrary power. Every action of government must be authorized by law. The cardinal test is that all actions of government can be appealed against in the ordinary law courts.

Indeed, the concept of the rule of law traces its ancestry to ancient civilizations. Aristotle, for instance, is reputed to have observed that “the rule of law is preferable to that of any individual²⁷,” while Bracton, an English man, as far back as the 13th Century is famed to have said:

The king himself ought not to be subject to man but to God and the law since the law makes him king. Therefore, let the king render to the law what the law has rendered to the king viz – dominion and power, for there is no king where will rules and not law.

One of the end results of the rule of law has been the realization of justice. Justice has been defined by Emperor Justinian²⁸ as:

²⁶ See generally Elton G.R. *Studies in Tudor and Stuart Politics and Government*, VOL. 1 P 260 and : Awson, F.H. (1959) 7 *Political Studies*. Both works have been cited with approval in Kanyeihamba G.W., *Constitutional and Political History of Uganda: From 1894 to the Present*, Centenary Publishing House Ltd, Kampala, 2002 at P. 301.

²⁷ D’Entrievies A.P., *The notion of the state*.

²⁸ Cited in Lloyd, Dennis’s *Introduction to Jurisprudence*, 4th ed. 1979 Ch.7.

The set and constant purpose which gives every man his due. The law is the practical expression of justice, for the precepts of law are these: to live honestly, to injure no-one and to give every man his due.

The most enduring enunciation of the normative content of the concept of the rule of law, in its classical sense, is repositied in the thoughts of Professor AV Dicey in his work *The Law of the Constitution*²⁹. The essence of the work is that even rulers should be subject to some sort of higher law and should govern in accordance with that higher law. While submitting that the rule of law was one of the main features of the constitution of the United Kingdom, Dicey took the view that the phrase embraced ‘at least three distinct though kindred concepts’ which he listed, in summary, as the absolute supremacy of regular law over arbitrary power, equality of all citizens before the law, and, protection of constitutional rights by ordinary law³⁰.

Dicey's first concept – absolute supremacy of regular law over arbitrary power

That no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide arbitrary or discretionary powers of constraint

This first concept has been interpreted to be about the content of the law in society where the rule of law obtains – that the law does not give those in authority wide, discretionary powers to interfere with the personal freedom or property of subjects³¹.

Therefore, according to Dicey, those in authority could only interfere with the personal freedom or property of a subject if the subject had breached a specific law of the land and the breach had been established ‘in the ordinary legal manner before the ordinary courts of the land.’ Trial must be held in an open court with a free access to the public. The accused person has the right of being represented and defended by a counsel and in all serious criminal cases he should be tried by jury. Judgment is rendered in an open court

²⁹ (1959) ed at 89 to 199.

³⁰ See generally Michael T. Molan, *Constitutional Law Textbook*, 17th ed, HLT Publications, London, 1995 P. 20 *et seq.*

³¹ Jennings, *The Law and the Constitution*

with a right to appeal to higher court. The presence of these reduces to the minimum the possibilities of executive arbitrariness and oppression.

Dicey's second concept – equality of all citizens before the law

We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals... with us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

There are two implications in this second concept. First, equality of every citizen irrespective of his official or social status, before the law. Second, there is only one type of law to which all citizens are amenable. All public officials, high or low, are under the same responsibility for every act done by them. If public officials do any wrong to an individual or exceed power vested in them by law, they can be sued in the ordinary courts and tried in the ordinary manner, and are subject to the provisions of ordinary law. The equality of all in the eyes of law minimizes the tyranny and irresponsibility of the executive.

Dicey's third concept – the protection of rights by ordinary law

The general principles of the constitution (as for example the right to personal liberty, or the right to public meeting) are with us as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individual results, or appears to result from the general principles of the constitution.

It is noteworthy that in writing about the rule of law, Dicey concentrated on the situation and circumstances prevailing in the United Kingdom at the time of his writing. Indeed, the Diceyan conception of the Rule of Law has been a subject of much academic criticism. According to Shadrack Gutto,³² some of the shortcomings of the Diceyan conception of the rule of law include; Dicey's conception favours judicial legislation which makes the law *less*, and not more, certain; the conception failed to take into account social differentiation and legally sanctioned inequalities that existed both in

³² Gutto B.O.S, The Rule of Law, Democracy and Human Rights: Whither Africa? East African Journal of Peace and Human Rights, Vol 3 No. 1 1996 P. 130 et seq.

substantive and procedural law between men and women; the model has a narrow conception of state power with the judicial branch of the government being the passive branch in the sense that its operation depended primarily on mobilization of the law by private citizens which mobilization remains largely dependent on their power to hire legal services, and partly on the executive branch of the government – especially the overt and covert police and other security agencies.

Appadorai³³ opines that on all hands³⁴, Dicey's analysis is defective; in particular, he argues, it tended to unduly exaggerate 'the merits of the rule of law' whereas it is now seen that the rule of law as it prevails in Britain is subject to one limitation. The limitation is, with the extension of governmental activities into new fields such as education, public health, town planning, the protection of the unemployed etc, it has become common to entrust to executive authorities judicial duties which, if the rule of law prevailed without exception, would have been entrusted to the ordinary courts³⁵.

Kapur A.C. categorically states that "the 'rule of law' as enunciated by Dicey is now subject to serious limitations." He cites the great increase in the activities of the state during the past sixty years or so as having limited the 'rule of law' far more seriously. When Dicey, in 1885, wrote the first edition of his *Law of the Constitution*, the primary functions of the state were the preservation of law and order, defence and foreign relations. Today, the functions of the state are more positive and they regulate the national life in multifarious ways. Discretionary authority is, thus, in every detail inevitable. Emphasis has, however, been placed upon the distinction between discretionary power and arbitrary power, that is, power exercised by an agent responsible to none and subject to no control³⁶.

The International Commission of Jurists (I.C.J) convened a number of conferences for purposes of agreeing upon an adaptation of Dicey's rule of law that could be made

³³ See generally Appadorai A., *The Substance of Politics*, Oxford University Press, New Delhi, 1968

³⁴ Appadorai makes reference to the writings of Wade ECS, in his introduction to Dicey, *Introduction to the study of the Law of the Constitution* (9th ed) p cxx; Jennings, *The Law of the Constitution* ch ii, and Robson WA, *Justice and Administrative Law*.

³⁵ The administrative quasi judicial organs do not always observe the essentials of judicial procedure such as publicity, oral hearing, the taking of evidence, known and impartial judges, and reasoned judgment hence there is a possibility of arbitrariness with the consequent danger to the liberty of the individual.

³⁶ Kapur A.C., *Principles of Political Science*, S. Chand & Company Ltd, Ram Nagar, New Delhi, 1996, P.632.

universal. The most notable result of these conference was the Declaration of Delhi of 1959 that resulted from a congress by the I.C.J in New Delhi and was attended by jurists from over 50 countries. The Declaration stated that the rule of law involved:

- a) The right to representative and responsive government – that is the right to be governed by a representative body answerable to the people;
- b) The citizen who is wronged by the government should have a remedy;
- c) Certain minimum standards or principles for the law – those contained in the Universal Declaration of Human Rights 1948 and the European Convention on Human Rights 1953 – including freedom of religion, freedom of assembly and association, the absence of retroactive penal laws;
- d) The right to a fair trial which involves;
 - i. Certainty of criminal law;
 - ii. The presumption of innocence;
 - iii. Reasonable rules relating to arrest, accusation and detention pending trial;
 - iv. The right to legal advice;
 - v. Public trial;
 - vi. The right to appeal; the absence of cruel and unusual punishment
- e) The independence of the judiciary including proper grounds and procedure for the removal of judges

A striking feature of this Declaration is the fact that it recognizes elements of liberal democracy – representative and responsive government answerable to the people – as a fundamental feature of the rule of law.

It further recognizes the existence of a remedy, by which this study contends, can only be guaranteed by functional and effective institutions as a fundamental feature of the rule of law.

It follows from this declaration that political and social elements that tamper with the realization of a truly representative and responsive government answerable to the people, existence of institutions of redress in case of wrongs and fundamental freedoms such as assembly and association, of necessity, tamper with the existence of the rule of law.

Contributing to this discourse, Ibrahim J. Wani has observed thus:

The rule of law is a highly contested concept but at the margins there is a broad consensus on its basic tenets. These include: 1) the basic ideal of democracy that the powers possessed by government are limited and should be exercised in a non-arbitrary manner, 2) the requirement that government authority be based on predetermined, non-retroactive rules of law which would form the parameters of the government's power, and safeguard against arbitrariness, 3) the distribution of powers and functions of government among its various organs, namely the legislature, the executive and the judiciary. This is necessary to ensure the viability of rules as the bases of the government authority and to check against abuse of government power – concentration of the

legislative, executive and judicial powers in any one organ would undermine the rule of law and foster arbitrariness as the repository of those powers could easily substitute its arbitrary will for preconceived rules; 4) the existence of an independent and effective judiciary to interpret and apply the rules that form the basis of government authority, and to check against abuse of power and to provide redress for aggrieved individuals; and finally, 5) respect for individual rights and protection of individual property interests.³⁷

According to Professor Kanyaihamba GW³⁸, the rule of law, therefore, precludes arbitrary action on the part of those who run and control government. A government which performs an act which is not supported by law is guilty of violating the Rule of Law just as an individual or a group that takes the law into their own hands.

The foregoing leads this study to conclude that at the core of the respect for the rule of law are, first, clear and certain rules (the normative framework), the effective institutional framework to enforce the law in accordance with the law, and, the absence of arbitrariness. It is these critical components of the rule of law that shall inform this study's interrogation of the situation that is precipitated by the phenomenon of election violence in Kenya.

2.3 The Concept of Free and Fair Elections

What constitutes free and fair elections? Is this a legal question or a political question? Or, is it both a legal and a political question? The question whether a particular election has been free and fair is to a certain, and indeed a large, extent a value-laden question. To that extent, it is a highly political question depending substantially on the political ideology of the person evaluating the particular election.

From another perspective, the question whether an election has been free and fair depends on whether the strict legal requirements on the conduct of an election have been observed. To this extent, that question becomes a legal question. It, therefore, follows that the criteria for determining whether an election has been free and fair is both a legal and political question. Put differently, the legal criterion is a necessary though not a sufficient criterion for determining whether a particular election has been free and fair.

³⁷ Ibrahim J. Wani, *The Rule of Law and Economic Development in Africa*, *East African Journal of Peace and Human Rights* Vol I NO. 1(1993) P. 52

³⁸ *Constitutional and Political History of Uganda: From 1894 to the Present*, Centenary Publishing House Ltd, Kampala, 2002 at P. 301.

To lend credence to these concerns, Guy S. Godwin-Gill takes the position in the terms that:

Still, there is a pressing need for clear criteria by which to judge whether elections are free and fair. In part, this will serve the interests of election monitors by enabling them to move beyond overly simplified gestures of approval or condemnation; but more importantly, such criteria are likely to increase national and international confidence in the electoral process, by reducing the necessity for challenge, limiting the possibilities for the arbitrary rejection of election results, and facilitating the transfer of power. Terms like 'periodic', 'free', 'fair', and 'genuine', have no easily verifiable content, often being used subjectively, in an appeal to those assumed to share basic values and outlooks. In practice, it may be easier to identify what is not a free, fair or genuine election, by focusing on evidence of overt external influence, the lack of meaningful choice in single candidate and single party systems, or terrorism of the electorate.³⁹

There is no single international or municipal legal instrument that spells out the normative content of free and fair elections with finality. However, a number of researchers in electoral matters have proposed certain tests that could be employed to guarantee the freedom and fairness of an election. In terms of legislative prescriptions at the international front, there has been an evolution of "soft law" on the subject. In 1994, the Inter-Parliamentary Council⁴⁰ (hereinafter referred to as the "IPU") at its 154th session unanimously adopted the Declaration on Criteria for Free and Fair Elections. The Declaration, in setting out the operating principles in the quest for a free and fair election re-affirmed that in any state the authority of the government can only derive from the will of the people as expressed in a genuine, free and fair elections held at regular intervals on the basis of universal, equal suffrage.

According to the Declaration, free and fair elections can only be guaranteed in an environment where voting rights are guaranteed, and voting right are so guaranteed where:

Every adult citizen has the right to vote in elections on a non-discriminatory basis; every adult citizen has the right to access an effective, impartial and non-discriminatory procedure for the registration of voters; no eligible citizen is denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the state's obligations under international law; every individual who is denied the right to

³⁹ Supra note 16, page 93.

⁴⁰ An international organization of parliaments. The Inter-Parliamentary Council has a membership of 129 member parliaments.

vote or be registered as a voter is entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively; every voter has the right to equal and effective access to a polling station in order to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others; the right to vote in secret is absolute and is not restricted in any manner whatsoever.

In addition to guaranteeing the right to vote, the Declaration also recognized the freedom and fairness of elections to be guaranteed where certain conditions on candidature, party and campaign rights and responsibilities are respected. On this aspects, the Declaration underscores the following: everyone must have the right to take part in the government of their country which includes equal opportunity to become a candidate for election; the criteria for participation in government should be determined in accordance with national constitutions and laws and should be consistent with the state's international obligations; everyone should have the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election; everyone individually and together with others should have the right to express political opinions without interference, seek, receive and impart information and to make informed choice, move freely within the country in order to campaign for election, campaign on an equal basis with other political parties, including the party forming the existing government; every candidate for election and every political party should have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views; the right of candidates to security with respect to their lives and property should be recognized and protected; every individual and every political party should have the right to the protection of the law and to a remedy for violation of political and election rights.

Although the Declaration acknowledged that the above rights, like any other rights, are subject to certain limitations, it emphasized that such restrictions should only be those of an exceptional nature and should be in accordance with the law. They should also be reasonably necessary in a democratic society in the interests of national security or public order and may also be necessitated by the protection of public health or morals or the protection of the rights and interests of others. Such restrictions should also be in accordance with the states' obligations under international law. According to the Declaration, every individual or political party whose candidature, party or campaign

rights are denied or restricted should be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively (emphasis supplied). Further, candidature, party and campaign rights carry responsibilities to the community and, in particular, political parties and candidates should be prohibited from engaging in violence.

The Declaration finally sets out what it describes as ‘the obligations of states in guaranteeing free and fair elections. The obligations set out include the taking of the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. For purposes of fulfilling this obligation, the state is expected to establish an effective, impartial and non-discriminatory procedure for the registration of voters; establish criteria for the registration of voters such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind; provide for the formation and free functioning of political parties, possibly regulate the funding of political parties and electoral campaigns, ensure the separation of party and state, and establish the conditions for competition in legislative elections on an equitable basis; initiate or facilitate national programmes of civic education to ensure that the population are familiar with election procedures and issues.

Other obligations of the state under the Declaration include taking necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals through; the establishment of a neutral, impartial or balanced mechanism for the management of elections, ensure that those responsible for various aspects of the election are trained and act impartially; ensure the registration of voters, updating of electoral rolls and balloting procedures with the assistance of national and international observers as appropriate; encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period; ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto and, ensure the integrity of the process of counting for votes. States are also obligated to respect and ensure respect for the human rights of all individuals within their territory and subject to their jurisdiction. States should also take the necessary

measures to ensure that parties and their candidates and supporters enjoy equal security and that state authorities take the necessary steps to prevent electoral violence. Finally states are obligated to ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

Although, undoubtedly, these aspirations are noble, a question that begs to be answered relates to the legal thrust of the prescriptions by the Inter-Parliamentary Council's Declaration. As a corollary to this question, it is also important to ascertain whether the prescriptions have held any sway among the international community of states. In response to these issues Guy S. Goodwin-Gill has opined thus:

The Inter-Parliamentary Union, of course, is not a "legislative" body, and its declarations are resolutions are not directly attributable to states. However, the 'authority' of the criteria set out in the IPU Declaration derives not so much from their endorsement by the Inter Parliamentary Council, though the nature and membership of that body is significant, as from their foundation in international law and in the practice of states and international organizations. What the IPU did was to translate, not to legislate, those principles into a single set of applicable criteria, showing clearly where particular electoral 'moments' are governed by a rule, subject to a principle, or to be managed in the light of crystallizing practice and the principle of effectiveness of obligations. The authority of the criteria declared in 1994 has since been repeatedly confirmed. The UN General Assembly took note of the Declaration (in resolution 49/190, 23 December 1994) and the criteria have been incorporated into the practice of the international organizations (including the UN's Electoral Assistance Division, UNDP, and regional organizations, such as OSCE, the Council of Europe and the Organization of African Unity/African Union). In addition, the Declaration and the study have been translated into a dozen languages, often with the financial support of national and international non-governmental organizations engaged in the provision of electoral assistance. Over the years, they have become very much a handbook, *vade mecum*, or at least a primer on basic electoral standards. The international community of states, both through the United Nations General Assembly and in the multiple regional organizations, has recognized repeatedly that, while the choice of the electoral system must satisfy certain international standards; among the most commonly accepted, for example, are the general principle of non-discrimination and the more specific norms confirmed and set out in universal and regional human rights instruments.⁴¹

⁴¹ Guy S. Goodwin-Gill, *supra* note 16 page 4.

The International Institute for Democracy and Electoral Assistance (International IDEA), on its part, sets out the standards that ought to guide an election as follows⁴²:

Elections are a means to translate the general will of the electorate into representative government. To achieve this objective, it is necessary that all parties and candidates be able to put out their manifestos – the political issues and their proposed solutions – freely to the electorate during the electoral campaign. The electoral campaign period should normally be well defined and should commence after the valid nomination of parties and candidates, ending one or two days polling. ...All contesting parties and candidates should be afforded an opportunity to reach out to the electorate at large and to put forth their views, policies and programmes. The legal framework should ensure that:

- There are no unreasonable restrictions on the right to freedom of expression and whatever restriction there are set out in the law.
- Every party and candidate has equitable access to the media, especially the electronic media, to undertake their campaign.
- Where state or private funding is permissible, every party and candidate has equitable access to resources to undertake a credible election campaign.
- No party or candidate (especially the ruling party) is favoured financially or otherwise through the availability or use of state resources, over the other parties and all stakeholders in the election process have an equal chance of success.
- No party or candidate threatens or does violence or otherwise impedes the freedom to campaign.
- All parties and candidates should normally cease active campaigning one or two days prior to polling day, allowing the electorate to weigh the options and to exercise their franchise freely and without undue pressure.

Earlier, the Zanzibar Elections Monitor and Observer Group (ZEMOG)⁴³ had identified certain defining elements of a free and fair election⁴⁴. It is worth of note that not all the elements identified are within the scope of this study. Indeed, most of the elements, as shall be demonstrated shortly, would appear to have been tailor made for Tanzania. The elements are ascertainable from the following issues about the election:

- a) Whether the voters were, during the entire election process, free to make their decisions without fear, harassment and other coercive and intimidating acts.

⁴² International Institute for Democracy and Electoral Assistance (International IDEA), International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, 2002. the publication can also be found at www.edea.int/publications/pub_electoral_main.html last accessed on August 13, 2006.

⁴³ This was a group constituting thirty election observers who included scholars from Tanzania, South Africa, Lesotho, Malawi, Jamaica, Great Britain and Kenya. The observers from Kenya were Grace Githu who was the Executive Director of the Institute of Education in Democracy (IED), Ahmed Muhidin the renowned Professor of political science who has taught at Makerere, Nairobi and Carleton Universities, Professor Kivutha Kibwana and Dr Willy Mutunga.

⁴⁴ *Uchaguzi wa Zanzibar 1995 Ripoti ya Zanzibar Elections Monitor and Observer Group (ZEMOG)*, Zanzibar, October 1995.

- b) Whether there have been any deliberate efforts by the government of the former single ruling party to drop the practice of many years of using its state organs to influence the conduct of elections (this criterion includes the manipulating of constituency boundaries, the use of provincial administration and security apparatus and the utilization of government resources by the ruling party for electoral purposes).
- c) Whatever ruling party has sufficiently separated itself from the state to ensure that it does not have an advantage over other parties.
- d) Whether the government provides subsidies and other assistance to all parties equally.
- e) Whether there was any discrimination in the registration of political parties which would have hindered new parties from competing fairly with other parties in disseminating their policies. This criterion can include the hindrance of political parties, by the ruling party, from presenting their candidates for nominations to the election.
- f) Whether there has been a solid constitutional and legal basis which enhances democracy and reinforces the concept of free and fair elections. This criterion also addresses a free and independent judiciary which can be relied upon to ensure that the process, including the hearing of election petitions, is free, fair and impartial.
- g) Whether the people generally and the parties are satisfied with the Electoral Commission and other officials appointed by the government to oversee the electoral process, considering especially the composition of the Commission and the ability of its officers to make free, fair and impartial decisions.
- h) Whether all eligible voters have been given an opportunity to register as voters.
- i) Whether the procedure within the parties for choosing their candidates have been fair, transparent, democratic and impartial.
- j) Whether there has been appropriate gender balance and sensitivity reflected in the registration of voters, voting, electoral candidacy and administration of voters.
- k) Whether there have been equal opportunities for political parties, candidates, NGOs dealing with civic education to have access to people countrywide without hindrance.

- l) Whether all political parties and their candidates had equal access to the media.
- m) Whether there has been sufficient education on the elections for the voters, election officials and the candidates.
- n) Whether all political parties have openly declared their sources of funding for party and election campaign activities.
- o) Whether the secrecy of the ballot has been sustained.
- p) Whether the voters have been allowed to participate freely in the elections.
- q) Whether there has been a reliable procedure in the entire vote counting and the announcement of results.
- r) Whether there has been a reliable procedure for getting solutions to any problems that may arise during the entire voting process.
- s) Whether there was any violence during any part of the election process or whether the whole election was conducted in a peaceful and calm manner.
- t) Whether there were any problems in the entire election process caused by the non-observance of any of these criteria which seriously affected the election results.
- u) Whether the election results have been accepted by the people generally, the candidates, the contesting parties and the international community.

This study holds the view that the above itemized elements are fairly comprehensive and ought to form an aspiration of every democratic state that employs electoral processes as the measure of its democracy. To the extent that the practice of the above elements culminates in free and fair election, it follows that failure to observe the same would, inevitably, lead to a failure of the free and fair test of an election. The elements numbered (a), (f), (h), (i), (k), (p), (r), (s), (t) and (u) are of direct relevance to the theme of this study, namely; election violence. It is imperative to note that these criteria are highly value laden and are largely political considerations for a free and fair election. As the next chapter of this study shall demonstrate, a number of these elements are captured in statutory and other legal regimes governing elections. Only to this extent do they become legal criteria for free and fair elections. Nonetheless, even where they have not crystallized into a legal criteria for free and fair elections, these elements should remain an integral item on the lawmaking/law reform agenda with a view to converting them from political considerations to legal considerations.

To pay homage to some of the defining characteristics of a free and fair election, Kibara G. has noted that⁴⁵:

There seems to be a general consensus that for an election to be certified as democratic, it should be free and fair. Some attempts have been made to define what constitutes free and fair elections.

Some of the conditions that must be met for an election to be certified as free and fair are:

- The entire electorate should have the right to vote for candidates for office.
- Elections should take place regularly at prescribed periods.
- No substantial group should be denied the right to form a political party and field candidates.
- Campaigns must be conducted with reasonable fairness in that neither law nor violence nor intimidation bars candidates from presenting their views and qualifications or prevents voters from learning about the candidates and discussing them.
- Votes should be cast freely and secretly, counted and reported honestly and the candidates who receive the proportion required by law must be duly installed in office.

The fairness of the election depends on several factors including: (a) the proper application of criteria for qualification and disqualification of voters; (b) the fair delimitation of constituencies; (c) prevention of corruption and intimidation of voters; (d) the equitable use of public media; (e) respect for freedoms of assembly, association and speech; (f) refraining from the use of public resources by the party in power; and (g) independence of the public service. All these determinants are crucial in assessing whether a free and fair election is possible in a given context. They are interrelated and mutually reinforcing or undermining as the case may be.

The meeting of the minds between the prescription by ZEMOG and Mr. Kibara need not be overemphasized. Equally, the value laden character of the prescriptions need not be overemphasized. To this extent, the prescription constitutes the political criterion of determining a free and fair election. As shall be demonstrated in the next chapter, some of the elements in the criteria coincide perfectly with what the law prescribes. The political criterion and the legal criterion on what constitutes a free and fair election, therefore, do sometimes overlap. In terms of the desire to emphasize the significance of the rule of law, it is imperative that when elements of the political criterion, which have not yet crystallized into legal prescriptions, gain overwhelming consensus, the said elements ought to be legislated into law for purposes of democratic consolidation.

⁴⁵ Kibara G., *The Challenges to and Efficacy of Election Monitoring*, in Walter Oyugi *et al* *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi, 2003P.283 *et seq.*

The Electoral Commission of Kenya, the body charged with the task of superintending over presidential, parliamentary and civil elections in Kenya, has remained part of this norm-proposing and norm-setting function. In one of its guidelines, it noted that:

A very wide and equal suffrage loses its value if political bosses are able to gerrymander constituencies so as to suit their own interests; there is no point in having elaborate system of proportional representation if the electors are all driven in one direction by a preponderance of bribes or threats; legal provisions mean nothing if enforcement of law is left wholly in the hands of those who profit by breaking it⁴⁶.

The emphasis of the significance of the rule of law for purposes of securing free and fair elections is clear from the Electoral Commission of Kenya's sentiment.

2.4 Conclusion

Although controversy still persists regarding the precise scope of what constitutes the rule of law and free and fair elections, there appears to be a general consensus on cardinal aspects that are at the core of this study, namely; first, that the rule of law and the concept of free and fair elections have been accepted as good to democratic governance. It is widely held that the rule of law presupposes that conditions exist whereby citizens or residents of a country can enjoy their rights and can go about their business feeling secure and address issues of life generally. It fosters the spirit of free enterprise and frees the energy of the nation. The rule of law is not only a legal necessity, it is also a developmental imperative.⁴⁷ Second, that there is uniformity of opinion that violence, threats and intimidation compromise the fairness and freedom of an electoral process. It is common knowledge that elections that are not free and fair come along with lots of uncertainty as to whether people will accept the resultant government. Such an atmosphere is not investor friendly. It follows that absence of investor friendliness is a recipe for developmental retardation.

⁴⁶ Electoral Commission of Kenya, Official Statement at the Seminar on Free and Fair Elections through Wider Electoral Democracy, 14th – 16th June 2000 at Mombasa, Kenya.

⁴⁷ Rukwaro G.K. *supra* note 14, page 72.

CHAPTER 3

3.0 THE LEGAL AND REGULATORY FRAME WORK ON ELECTION VIOLENCE IN KENYA

The term "legal framework for elections" generally refers to all legislation and pertinent legal and quasi-legal material or documents related to the elections. Specifically, the "legal framework for elections" includes the applicable constitutional provisions, the electoral law as passed by the legislature and all other laws that impact on the elections. It also includes any and all regulations attached to the electoral law and other relevant laws promulgated by government. It encompasses relevant directives and/or instructions related to the electoral law and regulations issued by the responsible EMB (Electoral Management Body), as well as related codes of conduct, voluntary or otherwise, which may have a direct or indirect impact on the electoral process.⁴⁸

3.1 Introduction

It was indicated in the introduction section of this research that the purpose of this study is to examine the prevalence of violence that has characterized Kenya's election periods since the re-advent of multi-party politics in spite of the existence of laws prohibiting the vice.

There exists an underlying assumption in the above assertion that, as a matter of fact, there are laws in Kenya prohibiting election violence. The purpose of this chapter is to test the above proposition. The objective of this chapter is, therefore, to address the questions; what are the laws that govern elections in Kenya? What do these laws prescribe with specific reference to election violence and the freedom and fairness of elections? How adequate are the prescriptions of the laws in dealing with the challenge of election violence?

There is a multiplicity of laws that in various ways relate to elections in Kenya⁴⁹. For purposes of this chapter, the study shall examine the legal framework on elections in Kenya as encapsulated in the following laws: The Constitution of Kenya, the National

⁴⁸ International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, 2002 P. 11. The publication can also be found at www.idea.int/publications/pub_electoral_main.html last accessed on August 13, 2006.

⁴⁹ These laws include; The Constitution of Kenya, The National Assembly and Presidential Elections Act, The Local Government Act, The Election Offences Act, The Societies Act, The Penal Code, The Police Act, The Interpretations and General Provisions Act, The Electoral Code of Conduct, and The Constitutions and Manifestos of Political Parties

Assembly and Presidential Elections Act⁵⁰, the Election Offences Act⁵¹, the Police Act⁵² and the Public Order Act⁵³.

3.2 The Constitution of the Republic of Kenya

The Constitution of the Republic of Kenya (hereinafter referred to as “the Constitution”) declares itself⁵⁴, and is declared⁵⁵, to be the supreme law of the land. On the electoral theme, the Constitution establishes the Electoral Commission of Kenya (hereinafter referred to as “the Commission”)⁵⁶. The Commission is charged with the following constitutional responsibilities⁵⁷:

- a) The registration of voters and maintenance and revision of the register of voters;
- b) Directing and supervising the Presidential, National Assembly and local government elections;
- c) Promoting free and fair elections;
- d) Promoting voter education throughout Kenya, and
- e) Such other functions as may be prescribed by law⁵⁸

The Commission has routinely performed, within an existing and fairly elaborate legal framework, the roles of registration of voters and maintenance and revision of the register of voters, subject to availability of funds for the purpose. The Commission has also periodically directed and supervised the Presidential, National Assembly and local government elections.

The function of promoting of free and fair election, as shall be examined later in this study has been performed amidst controversy. With respect to the function of promotion of voter education throughout Kenya, except for the luncheons that the chairman to the Commission has addressed with zeal and the pamphlets and posters that the Commission

⁵⁰ Chapter 7 of the Laws of Kenya

⁵¹ Chapter 66 of Laws of Kenya

⁵² Chapter 84 of the Laws of Kenya

⁵³ Chapter 56 of the Laws of Kenya

⁵⁴ See Section 3 of the Constitution of the Republic of Kenya.

⁵⁵ See Section 3(1) of the Judicature Act, Chapter 8 of the Laws of Kenya.

⁵⁶ Section 41 of the Constitution of the Republic of Kenya provides that there shall be an Electoral Commission of Kenya which shall consist of the Chairman and not less than four and not more than twenty-one members appointed by the president.

⁵⁷ Section 42A of the Constitution of the Republic of Kenya.

⁵⁸ This last function cited above was first tested when the Commission was mandated to preside over the national referendum on the proposed new constitution for Kenya on November 21, 2005. The Commission executed the mandate to preside over the referendum without a comprehensive legal framework on the referendum process.

keeps producing during election time, and lastly the radio advertisements during voter registration and electoral periods, the Commission is not known to have a clearly defined systematic voter education programme that runs continuously with a view to creating a culture of continuing voter awareness in Kenya.

To ring-fence the Commission from external influence, the Constitution provides that the Commission shall not be under the control of any other person or authority in the performance of its duties⁵⁹. This shield is intriguing in practice considering that the Commission relies on the government of the day for the financing of its programmes.

The High Court⁶⁰ is equally expressly given jurisdiction over election matters under the Constitution of the Republic of Kenya⁶¹. There are two questions relating to elections over which the High Court is given jurisdiction by the Constitution, namely;

- a) The question whether a person has been validly elected as a member of the National Assembly⁶², and
- b) The question whether the seat in the National Assembly of a member thereof has become vacant⁶³.

The *locus standi* to commence proceedings for determination of the question whether a person has been validly elected as a member of the National Assembly is vested in either any person who was entitled to vote in the election to which the application relates, or the Attorney General⁶⁴.

It is worthy of note that none of the remedies prescribed by the Constitution are futuristic in nature. The question whether an election in the waiting is likely to be free and fair is not one of the questions that an election court is mandated to determine constitutionally.

⁵⁹ Section 41(9) of the Constitution of the Republic of Kenya.

⁶⁰ An institution that is later established at Section 60 of the Constitution of the Republic of Kenya as a superior court of record with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.

⁶¹ Section 44 of the Constitution of the Republic of Kenya.

⁶² Section 44(1)(a) of the Constitution of the Republic of Kenya.

⁶³ Section 44(1)(b) of the Constitution of the Republic of Kenya.

⁶⁴ Section 44(2) of the Constitution of the Republic of Kenya. Section 44(3) of the Constitution prescribes that an application to the High Court on the question whether the seat in the National Assembly of a Member thereof has become vacant may be made where the speaker has declared that the seat in the National Assembly of a member has by reason of a provision of the Constitution become vacant, by that member, or, in any other case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney General.

The only remedy available to an aggrieved party is, therefore, a post-mortem exercise of scrutinizing the election process.

The Constitution vests in Parliament the discretionary power to make provisions with respect to:

- a) The circumstances and manner in which, the time within which and conditions upon which an application may be made to the High Court for the determination of the two questions referred to above, and
- b) The powers, practice and procedure of the High Court in relation to the application.

The above mentioned constitutional provisions vest in a number of persons, bodies and/or institutions the duty to monitor and guarantee that a particular election has been free and fair.

The bodies vested with such a duty are:

- a) The Electoral Commission of Kenya,
- b) The Attorney General
- c) The Registered voter
- d) The High Court.

This study interrogates the practical performance of each of these persons, bodies and or institutions during the era under study in light of their respective mandates.

3.3 The National Assembly and Presidential Elections Act,

This Act came into force on August 21, 1969. The purpose of the Act is to provide for registration of electors and the procedures of holding of elections for the office of president and to the National Assembly, the conduct of Electoral Commission and of political parties participating in elections in Kenya and various matters connected with and incidental to the foregoing.⁶⁵

The Act empowers the Electoral Commission of Kenya to make regulations generally for the better carrying out of the purposes and provisions of the Act⁶⁶. The Act further provides for an Electoral Code of Conduct (hereinafter referred interchangeably as “the

⁶⁵ See the Preamble to the Act.

⁶⁶ Section 34 of the Act.

Code of Conduct” or “the Code”) which is to be subscribed to in a manner determined by the Electoral Commission of Kenya.⁶⁷

The code of Conduct was enacted in 1997 as the Fourth Schedule to the National Assembly and Presidential Elections Act.

As a matter of law, the Code is subscribed to and is to be observed by every political party and every person who participates in any election under the Constitution and under the Act.⁶⁸

The Act requires and makes it mandatory for the political party and members of the party seeking nomination of such a party to subscribe to the Code .⁶⁹ It is a criminal offence for every officer of a political party which, and every person nominated as a candidate who, attempts to participate in or participates in any election without subscribing to the Code of Conduct.⁷⁰ The Electoral Commission of Kenya is empowered, subject to the Criminal Procedure Code⁷¹, to designate any of its officers to conduct any prosecution for the offences relating to failure to subscribe to the Code of Conduct and such officer is conferred with all the powers conferred upon the public prosecutor by the Criminal Procedure Code.⁷² On the question of election violence, the Code of Conduct obliges all those bound by the Code to:⁷³

- a) Publicly and repeatedly condemn violence and intimidation, and to avoid the use of language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage or for any other reason;
- b) Refrain from any action involving violence or intimidation;
- c) Ensure that no arms or weapons are carried or displayed at political meetings or in the course of any march, demonstration or other events of a political nature;
- d) Refrain from publishing or repeating false defamatory or inflammatory allegations concerning any person or party connected with the election;

⁶⁷ The Code is to be found at the Fourth Schedule of the Act.

⁶⁸ Section 34A(1) of the Act.

⁶⁹ Section 34A(2) of the Act.

⁷⁰ Section 34A(3) of the Act. This subsection further provides for penalties for such offenders which are a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding three years or both.

⁷¹ Chapter 75 of the Laws of Kenya.

⁷² Section 34A(5) of the Act.

⁷³ See generally Regulation number 6 of the Code of Conduct for all the duties of those bound by the Code.

- e) Subject to the Public Order Act, to co-operate and liaise in good faith with other parties to avoid, in so far as possible, arrangements involving public meetings, demonstrations, rallies or marches taking place at the same time and venue as similar political events organized by other parties;
- f) To do nothing to impede the right of any party, through its candidates, canvassers and representatives, to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership and soliciting support;
- g) Acknowledge the authority of the Electoral Commission of Kenya to conduct the election;
- h) Implement the orders and directions of the Electoral Commission of Kenya.

With all the attendant shortcomings of delegated legislation, it is not immediately clear why these prescriptions had to be codified in the form of a code of ethics as opposed to being enacted as a statute.

The Code prescribes procedures and penalties for any infringing party. For instance, if in the opinion of the Commission, any political party participating in any election or the leader or any office bearer, member, supporter of such political party or any candidates at any election, in any way infringes any provision of the Code, the Commission is empowered to⁷⁴:

- (a) In case of any political party and, subject to subparagraph (b) also in case of the leader or any office bearer, member or supporter of such political party or candidate, impose upon that party one or more of the following penalties or sanctions of which any or all may be suspended on specific conditions-
 - i. A formal warning;
 - ii. A fine determined by the Commission;
 - iii. Notwithstanding the provisions of any other law, an order prohibiting such political party, whether permanently or for a specified period, from utilizing any public media time through the television or radio broadcasting services of such media as has been or may be allocated to the political party for electoral purposes;
 - iv. An order prohibiting the political party-
 - aa. From holding particular public meetings, demonstrations or matches or any other kind of such meetings, demonstrations or matches;
 - bb. From entering any specified electoral area for purposes of canvassing for membership, or for any other electoral purpose;
 - cc. From erecting placards or banners, or from publishing or distributing campaign literature;

⁷⁴ See Regulation number 8 of the Code of Regulations.

- dd. From publishing or distributing campaign literature or electoral advertising, or limiting the rights of the political party to do so and such prohibition or limitation shall be notified to the relevant regulating officers under the Public Order Act in the affected places of the electoral areas for the purposes of that Act.
- (b) In the case of the leader or candidate or any office bearer member or supporter of such political party, impose any one or more of the penalties or sanctions referred to in subparagraph a(i) or (ii) of this paragraph.

To a casual observer, these sanctions might appear deterrent enough. However, this study identifies inherent weaknesses in the prescriptions, among them; the lack of effective powers by the commission over those who default to meet these penalties. Furthermore, the prescriptions presuppose a cordial working relationship between the Commissions on the one hand the Kenya police and the national broadcaster on the other. For instance, due to lack of an independent policing arm, the Commission cannot restrain an individual from holding meetings, demonstrations or marches without the aid of the police force. In this era of liberalized airwaves, the effectiveness of limiting someone from use of the public media is also highly questionable.

Other penalties against individuals and parties who violate the Code are to be found at paragraph 9 of the Code. This paragraph deals specifically with the question of violence and it provides that:

Without prejudice to the provisions of paragraph 8, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court in its unlimited original civil jurisdiction as may be appropriate in the case of any alleged infringement of the Code by a political party or by the leader or any office bearer, member or supporter of the political party or any candidate and where such court finds the infringement of the provisions of this Code-

- (a) in case of a political party, any act or omission involving violence or intimidation or gross or systematic violation of the rights of any political party, candidate or voter, such court may in addition to or in substitution for any other penalty specified in sub-paragraph (a) of paragraph 8 make an order canceling the right of such party to participate in the election concerned; or
- (b) in the case of a leader or any office bearer, member or supporter of such political party or of any candidate, that any actor omission involving violence or intimidation or gross or systematic violation of the rights of any political party candidate or voter, such court may in addition to or in substitution for any other penalty or sanction specified in paragraph (8)(a)(i) and (ii) make an order disqualifying, in the case of a person who is a candidate from the list or lists of candidates concerned.

On the face of it, these prescriptions appear sound. What happens in practice, however, demonstrates that they may not be of much practical value in dealing with the real

situation of election violence. The prescriptions envisage a situation where the judicial process aids in deterring election violence. The judicial process, as shall be demonstrated in the Chapter 4, is an extremely slow process. Incidents of election violence occur in Kenya up to and including the Election Day (including during the tallying process of the votes and even immediately after announcement of the results). The practicality of using the ordinary judicial process to deal with such a situation is wanting.

Secondly, canceling the right of any party to participate in an election or deleting the name of a candidate from the list of election candidates is a harsh measure with far reaching consequences that may not be undertaken without due regard to the rules of natural justice. Due process is at times extremely time consuming and costly. Further, the Code does not prescribe the manner in which the High Court shall be approached in search for these penalties leaving room for procedural technicalities that may just serve to delay the process of determination of the questions presented to the court for determination.

This study takes the position that it would have been more practical for the Regulations to have provided for special *ad hoc* tribunals of eminent jurists and election experts to be established specifically to deal with the disciplinary questions under regulations 8 and 9 of the Code. In the alternative, a power could be vested in the Commission to call off an election in the constituency or ward that has been marred by violence. This would make violence a high risk behavior on the part of the perpetrators. Strangely though, in spite of the ever present acts of election violence, the Commission has never taken a test case to the High Court for purposes of testing the efficacy of regulations 8 and 9 of the Code. This is an institutional failure on the part of the Commission.

The other challenge is to identify how much force of law is possessed by the Code. The Interpretations and General Provisions Act⁷⁵ at Section 33 provides that acts done under subsidiary legislation shall be deemed done under the Act which authorizes the delegated legislation.

It should follow from the plain language of the statutory stipulation of the Interpretations and General Provisions Act that, those disciplinary measures that may be undertaken by

⁷⁵ Chapter 2 of the Laws of Kenya.

virtue of the provisions of the Code have the force of law within the framework of the General Assembly and Presidential Elections Act.

In addition to the Code, the other material provisions of the Act relate to the conduct of election petitions. Some of the said provisions have been highlighted in Chapter 4 of this study. Generally, as pointed out earlier while interrogating the constitutional provisions relating to remedies against election mal practices, these remedies are of a futuristic character. The legal exception to this is in respect of the powers vested in the Electoral Commission of Kenya under the Electoral Code of Conduct. In other situations, one must wait for the election to be concluded before moving the court to challenge the process and the results. Election petitions are governed by Part V of the National Assembly and Presidential Elections Act. The Court is mandated to determine the questions whether:

- a) a person has been validly elected as president;
- b) a person has been validly elected as a member of the National Assembly
- c) a seat in the National Assembly of a member thereof has become vacant⁷⁶.

Under the Constitution, Parliament may make provision with respect to:

- (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
- (b) the powers, practice and procedure of the High Court in relation to the application⁷⁷.

The law requires the Election Court to decide all matters that come before it without undue regard to technicalities⁷⁸. The law, further, requires that a petition presented at the election court together with any appeal arising therefrom be heard and determined on priority basis.⁷⁹

3.4 The Election Offences Act

The Election Offences Act was enacted by Parliament in 1958 to give guidelines that would criminalize certain conduct by candidates, voters and election officials. The Act has undergone amendments in 1958, 1960, 1963, 1971, 1979, 1992 and 1997. The

⁷⁶ See Section 19(1) of the National Assembly and Presidential Elections Act as read with Section 44 of the Constitution of the Republic of Kenya.

⁷⁷ See Section 44(4) of the Constitution of the Republic of Kenya.

⁷⁸ Section 23(1)(d) of the National Assembly and Presidential Elections Act.

⁷⁹ See Sections 19 (4) and 23(6) of the National Assembly and Presidential Elections Act.

objective of the Act is to prevent election offences and corrupt and illegal practices at elections, and for matters incidental thereto and connected therewith.⁸⁰ The Act creates a sum total of twenty seven offences.⁸¹ Out of the twenty seven offences those dealing with election violence are the prohibitions against the following: preventing or obstructing or barring a person from going to vote, and, threatening or causing fear or tricking a voter as to influence the way he/she votes or deterring that person from voting. The main shortcoming of this Act is that so far as it prohibits election violence, the Act preoccupies itself with incidents on the Election Day. Such provisions that are presumptuous of a perfect pre-election day situation only limit the capacity of law enforcement officers to deal with situations that pre-date the Election Day. As a matter of fact, many incidents of electoral violence take place in the period immediately preceding the Election Day.

3.5 The Police Act

The Police Act provides for the functions, organization and discipline of the Kenya Police Service and the Kenya Police Reserve. The Act specifies the functions of the Force as maintenance of law and order, the preservation of peace, the protection of life

⁸⁰ Preamble to the Act.

⁸¹ It is an offence under the Act to: cheat in an application to be registered as a voter; forge or destroy a candidate's nomination papers; deliver to the returning officer a forged nomination paper; abet, aid or counsel or procure the commission of any of the foregoing offences; deal with a ballot paper in a fraudulent manner; sell, or offer for sale, or by or offer to buy a ballot paper; possess a ballot paper that has already been marked or stamped with ECK instruments without official authority; put in a ballot box anything else other than a ballot paper; take out of a polling station or be found with a ballot paper without official authority; print a ballot paper or whatever that purports to be a ballot paper without official authority; for purposes of an election, use or deal in an appliance device or mechanism that can be used to remove or interfere with a ballot paper that is in a ballot box; vote in an election for which one has no authority to do so; make or print a document that resembles a register of voters without official permission; be in possession of another person's voter's card without the owner's or official permission; supply a voter's card to any other person without official permission; destroy, change, deface or make alterations to a voter's card without official permission; sell or offer for sale, or offer to buy a voter's card; prevent or obstruct or bar a person from presenting nomination papers to the returning officer; bribe a voter with money or anything else of value in order to influence her or his decision on how to vote; solicit for or receive a bribe so as to vote in one way or another; prevent or obstruct or bar a person from going to vote;; threaten, or cause fear, or trick a voter so as to influence the way he/she votes or deter that person from voting; cheat as to one's name in order to obtain a ballot paper to vote; vote more than once in the same election; carry out campaign propaganda at a polling station on a polling day; for an employer, deny his/her employees the opportunity to, or make deductions to his/her salary for going to vote; for an election official (including police officers carrying out election duties), to deliberately neglect to perform duties entrusted to him or her for purposes of the election, mislead a voter or act in a manner that leads to the voter failing to vote when he/she was entitled to vote, or fail to make the oath of secrecy.

and property, the prevention and detection of crime, the apprehension of offenders and enforcement of all laws and regulations with which it is charged.⁸²

Section 14(A) of the Police Act was introduced in 1997 under the Statute Law (Repeals and Miscellaneous Amendments) Act NO. 10 of 1997. It provides that the Police must be impartial and objective in political matters and should not accord different treatment to different persons on the basis of their political opinions. The section makes it an offence to breach this provision.

It is instructive to note that the police are deemed to be election officials during elections by instrumentality of section 3(3) of the National Assembly and Presidential Elections Act which provides that:

Notwithstanding the provisions of the Police Act, a police officer assigned duties during the conduct of an election shall be deemed to be an election official and is subject to the direction and instruction of the Commission.

This is perhaps the best that the provisions regarding the law enforcement agency – the police- can get. The effectiveness of such law, however, demands lots of discipline on the individual officers and a harmonious relationship between the command of the police force and the leadership of the Electoral Commission of Kenya. In practice, this may not be so. First, the police command structure is such that they are under the command of the Commissioner of Police. As shall be noted in the course of interrogating the actual dynamics of election violence, the police, being essentially civil servants, are bound by the requirements of loyalty in the public service. As a result, their impartiality in practice is not easily achieved. To that extent, institutional failure has, yet again, let down otherwise robust provisions of the law.

3.6 The Public Order Act.

This statute was enacted in 1950. Its core objective is to make provisions for the maintenance of law and order, and for purposes connected therewith.⁸³ The Act was subjected to some radical reforms by means of the Statute Law (Repeals and Miscellaneous Amendments) Act No. 10 of 1997 to provide for the manner in which

⁸² Section 14(1) of the Police Act.

⁸³ See Preamble to the Public Order Act, chapter 56 Laws of Kenya.

public meetings and public processions are conducted. Under the Act, any person intending to convene a public meeting or a public procession should notify the regulating officer⁸⁴ of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.⁸⁵

The notice so given is supposed to specify the full names and physical address of the organizer of the proposed public meeting or public procession; the proposed date of the meeting or procession and the time thereof which should be between six O'clock in the morning and six O'clock in the afternoon, and, the proposed site of the public meeting or the proposed route in the case of a public procession.⁸⁶ Where, upon receipt of the notice, it is not possible to hold the proposed public meeting or public procession for the reasons that notice of another public meeting or procession on the date, at the time and the venue proposed has already been received by the regulating officer, the regulating officer is duty bound to forthwith notify the organizer.⁸⁷

Any public meeting held contrary to the provisions aforestated constitutes an unlawful assembly and anybody who takes part in any public meeting or public procession deemed to be an unlawful assembly is guilty of an offence punishable by imprisonment for one year.

The efficacy of these provisions of the law is again dependent solely on the impartiality of the police force on the one hand and the discipline of the political players on the other. The latter is much easier to deal with since sanctions attend to non-observance of the prescriptions of the law. The same ease may not be said of the police force particularly considering that the lack of impartiality is more often than not in favour of the political superiors who are supposed to guarantee the discipline of efficiency of the police force.

During the era under scrutiny, cases of authorised officers bluntly and without reason purporting to disallow meetings and processions citing 'orders from above' have been rampant. There have also been cases of authorised officers cancelling proposed meetings and or processions at the last minute to the chagrin of the organisers. Equally, there have

⁸⁴ The term regulating officer for purposes of the Act means the officer in charge of the police station in the area in which a proposed public meeting is proposed to be held, or in the case of public procession, the police officer-in-charge of the police station in the area in which the procession is proposed to start and end.

⁸⁵ Section 5(2) of the Public Order Act.

⁸⁶ Section 5(3) of the Public Order Act.

⁸⁷ Section 5(4) of the Public Order Act.

been cases of political players who have attempted to proceed with meetings and/or processions without the requisite statutory notifications to the police. All these are situations that have reduced to uselessness the statutory prescriptions that are intended to guarantee harmonious conduct of meetings and processions to reduce on opportunities for election related violence.

3.7 Conclusion

From the overview of the statutes, it is clear that incidents of election violence are anticipated and provided for as a matter of law. The highlights have also demonstrated that some of the prescriptions are inherently weak and doomed to lack efficacy. In the whole though, avenues for redress, or at least semblances of such avenues exist. There has been lackluster adherence to the law and or the enforcement mechanisms and perhaps therein lies the answer to the question “what is wrong with the electoral system that allows room for election violence?”

CHAPTER 4

4.0 A CHRONOLOGY OF ELECTION VIOLENCE IN KENYA: 1990 - 2007

Electoral violence is not uncommon in Kenya, and its nature depends on the goals of the political actors using it. It can occur throughout the electoral process, from the registration period to the post-election stage. Violence in the early stage is intended to prevent the registration of groups that are deemed politically undesirable, and is common in arid and semi-arid areas. Groups that are deemed non-indigenous are subject to violence in an effort to stop them from voting. In 1992, for example, more than 500,000 people were displaced in parts of the Rift Valley, Western and Nyanza provinces; in 1997 more than 100,000 were displaced in the coastal regions of Likoni. There was much pre-election violence as parties sought to scout out presidential candidates. The 1997 elections were generally peaceful, but post-election violence erupted as vigilante groups sought to punish those who were believed to have voted against the then ruling party in Nakuru District.⁸⁸

4.1 Introduction

In this chapter, the study attempts to unravel in fairly broad detail the ascertainable causes and nuances of election violence in Kenya. In addition to examining the generally documented causes and dimensions of election violence, the study shall focus on documented studies of political and electoral violence in two areas, namely; Nairobi province and Tigania East Constituency. The choice of these two areas for the study has been guided by a number of considerations: First is the desire to evaluate the situation of electoral violence in the urban *vis a vis* rural areas in the period under study to gauge whether the dimensions of election violence in the two settings, urban and rural, vary. Second, the choice of the two geographical areas of research is informed by the desire to identify the common trends in election violence in Kenya's cosmopolitan and mono-ethnic areas. Finally, the choice of focal geographical areas has been informed by the availability of already existing scientific researches and accounts from the selected areas. The chapter shall also examine the efforts by electoral administrative bodies such as the Electoral Commission of Kenya in trying to deal with the situations of electoral malpractices.

⁸⁸ International Institute for Democracy and Electoral Assistance, Kenya: Country Report Based on Research and Dialogue with Political Parties, 2006. The report can also be found at www.idea_int.org. last accessed on April 6, 2007.

4.2 Causes and Dynamics of Election Violence in the Period running 1991 to 2002

Studies have noted that the modern forms of political violence in Kenya began to feature more significantly in 1988. During that period youths were hired by politicians to perpetrate violence against opponents and to provide them with security. This strategy worked well to the advantage of the “sponsors” and has since been internalized in Kenya’s political culture.⁸⁹

The re-introduction of multi-party politics in the early 1990s not only popularized the demand and supply of political violence, it also introduced new dimensions to it. Today, political violence is feared as the single most threat to elections in particular and the democratization process in general. Besides the loss of life that the last one-and-a-half decade has registered, hundred of people have been injured and property of unknown value destroyed as a result of political violence.⁹⁰

S. Kichamu Akivaga and others, commentators on the 2002 General Elections, acknowledged the central character of violence in Kenya’s electoral process particularly following the re-introduction of multi-party politics in Kenya. On the question of election violence, they documented that:

The culture of violence has been another hallmark of Kenya’s electoral process. The use of force against political opponents has characterized the country’s elections especially from the 1970s. Before the multiparty General Elections of 1992 and 1997, violence was sporadic and confined to parliamentary contests. But with the re-introduction of multi-party politics in 1991, electoral violence became a more widespread phenomenon. Since KANU’s hold on power was being seriously challenged for the first time in the political history of the country, violence became state sponsored. It enveloped large parts of the country. The so-called ethnic clashes in which hundreds of people lost their lives and property was destroyed was politically instigated.

Apart from state sponsored violence, voter-to-voter, and candidate-to-candidate violence continued unabated during elections. Although limited both in extent and intensity during the 2002 elections, the phenomenon of violence gravely erodes the element of free choice and generally undermines the electoral process.⁹¹

After Section 2A of the Constitution of Kenya was repealed, more political parties began to form and to engage in the competitive process of mobilizing citizens to win political

⁸⁹ Mwangi M *et al*, Political Violence in Nairobi, September 2001.

⁹⁰ *Ibid*.

⁹¹ S. Kichamu Akivaga *et al* (ed.) A Democratic Landmark? Character of the 2002 General Elections: A Report of the Community Based Election Monitoring Project (Claripress, Nairobi, 2003) P. 192.

power. This process drove political violence to its peak to the extent that the state made relentless efforts to interfere with the political activities of opposition political parties. In Nairobi, opposition party meetings were violently disrupted by the police and KANU youth wingers and hired youths. As a reaction to such rampant disruptions of rallies and intimidation activities of the state, each opposition party found it necessary to recruit their own youth wingers to repel/counter the KANU attacks or just to grant them security as they went about their duties⁹².

A research published by Friedrich Eberg Stiftung and the Centre for Conflict Research has noted that with the advent of multipartyism, there was recognition of political competition and with it incidences of political violence also increased exponentially.⁹³ The research has recorded a finding that political and electoral violence has manifested itself in Kenya in various forms including assassinations, attempted assassinations, confinement, battery, threats of violence, torture, arson, looting, rape, sexual harassment, hate speeches, hijacking, defamation/insults, political thuggery, destruction and damage of property, economic repression/sabotage, eviction/displacement, closure of party/campaign offices or premises and the violent or physical disruption of public meetings and campaign rallies. The research in trying to identify in general terms, the causes of political and electoral violence in Kenya highlights the following:⁹⁴

- a) Reluctance to accept political competition or pluralism. This has resulted into political parties zoning some areas and claiming sole and exclusive right to operate and campaign there;
- b) Ethnic balkanization through political manipulation such as the arbitrary creation of districts and constituencies;
- c) The use of political power to disenfranchise opponents popularly known as *siasa za kumalizana*;
- d) The breakdown of conflict management mechanisms within the executive, legislature and judiciary leading to sharpening of incidences of political and electoral violence;
- e) The dramatic increase in poverty leading to a class of economically disenfranchised people (especially the youth) who can be used to perpetuate political and electoral violence;
- f) Selective use of the law;

⁹² Ibid.

⁹³ Working Paper on Conflict Management No. 2 "Political and Electoral Violence in East Africa" a paper published following a regional conference held in Nairobi on May 10,2001 and attended by representatives of the three electoral commission in East Africa, representatives of both ruling and main opposition parties in the region, Non-Governmental Organizations as well as academics and scholars in the field of conflict research and management.

⁹⁴ Ibid.

- g) Lack of independence of the Electoral Commission of Kenya;
- h) Incitement.

An important aspect of the itemization by the above research is that it does not regard lack of powers in law by electoral monitoring bodies in Kenya as a cause of political and electoral violence. Such position lends much credence to the hypothesis under this study that it is the failure of bodies charged with the task of managing elections to exercise their powers, and not necessarily lack of good laws, that culminates into the state of electoral violence that has been witnessed in Kenya since the dawn of multi-party politics in Kenya in the early 1990s.

Another study in its endeavour to get to the root of the causes of electoral violence in Kenya during the era of multi-partyism expressed itself thus:

It has been noted through research conducted by NGOs like the Kenya Human Rights Commission, journalists and scholars like Mwangi Kagwanja that to prove pluralism would not work, and given the popularity of opposition parties and new leaders, the incumbent government fuelled animosity between communities to split their political affiliations. Violence termed as “ethnic cleansing” or “land clashes” erupted in many parts of the country. Politically “incorrect” people were driven out of specific electoral areas like the coast and parts of the Rift Valley, and opposition supporters were targeted and killed. To ensure the survival of the ruling party and its leaders, this violence has recurred on the run-up to the elections to depopulate and disenfranchise opposition zones. It also happened immediately after elections to “punish” those who voted for the “wrong” party. Multi-ethnic areas with the genuine long standing problems over land (and boundary issues), cattle rustling or competition for scarce environment resources have been manipulated to give the violence an ethnic twist. The complacency of the provincial administration and security forces to respond to reports of violence in spite of enough resources indicates a lack of political will and government complicity in chaos.⁹⁵

This position taken by the study further strengthens the contention that the principle causes of electoral violence lie in areas other than absence of good laws. In fact, a failure to enforce the already existing laws is at the core of the occurrence of the electoral violence and other forms of election violence.

Further justification of the existence of political and electoral violence in Kenya on the strength of state sponsorship and or connivance is to be found in the research by Human Rights Watch which documents that:

⁹⁵ Centre for Conflict Research, Report on Electoral Violence in Tigania East Constituency, research conducted between January 15th – 29th 2001 (Unpublished).

President Moi confidently predicted in 1991 that the introduction of multiparty politics in Kenya would result in ethnic violence. His prediction has been alarmingly fulfilled. However, far from being the spontaneous result of a return to political pluralism, there is clear evidence that the government has been involved in provoking death, displacement, and terror among ethnic groups that are perceived to support the opposition.⁹⁶

An election observation team reporting on the 1997 General Elections in Kenya noted thus on the question of incidents of violence and intimidation and harassment during the electoral period:

Incidents of inter-party violence were less common in 1997 than in 1992. They mainly occurred when different political parties inadvertently scheduled rallies at the same venue or when supporters of one party happened to meet supporters of another on the way to or from rallies. Incidents of inter-party violence were reported in Sirisia, Bumula, Mathira, Kisumu Town, Rangwe, Kuria, and Sotik. In addition, the common borders of Gucha, Transmara, and Migori District remained tense throughout the campaign. However, most incidents of violence were within the individual parties. These incidents tended to be centered in specific constituencies, notably Meru, Malava-Lugari, Shinyalu, Garissa, Konoin, and Tinderet. Under the new Electoral Code, KANU, DP, SDP, FORD-Kenya, and NDP supporters were arraigned before a court for alleged violence and warned. The Shirikisho party was almost deregistered after being accused of inciting its supporters to violence.

Although there was no evidence of a political party being systematically targeted for harassment or intimidation, there were isolated incidents which seriously marred the free conduct of the campaigns. The most notable incidents was in Kisii, where Charity Ngilu was not only barred from addressing her supporters but also tear gassed. In Malava constituency, the chief for South Kabras interfered with opposition rallies by intimidating party agents. In Baringo Central, the opposition candidate, who was challenging President Moi, was harassed and intimidated to such an extent that he was unable to campaign at all. The local KANU leaders, together with the provincial administration, made it impossible for him to conduct his campaign. After presenting his nomination papers, he was forced stay away from Baringo Central because of death threats. Other incidents of harassment were reported in North Eastern Province. For example, the NDP Presidential candidate Raila Odinga was denied landing rights at Hola Airstrip during a campaign tour. The runway was completely barricaded. Cases of intimidation and threats to "outsider" communities in Kericho, Nandi, and Bomet were also reported and resulted in some voters fleeing these areas, effectively barring them from participating in the elections.⁹⁷

The foregoing studies reveal a general consensus in the documentation that electoral violence has been a punctuating feature in Kenya's multi-party era. There is, however, no similarly in the bulk of documentation of disciplinary measures taken by the Electoral

⁹⁶ Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya*, New York. Washington. London. Brussels, 2002. The publication can be found at <http://store.yahoo.com/hrwpubs/index.html> last accessed on April 6, 2007.

⁹⁷ Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections in Kenya 29-30 December* (Nairobi, 1998).

Commission of Kenya and the prosecutorial and judicial institutions against the perpetrators of the above acts of electoral violence. This is in spite of the Electoral Code of Conduct having come into force at the time the 1997 General Elections campaign were hitting top gear. Worse still the use of the provincial administration and the police force, who are public servants, to mete out violence, demonstrates the “official’ nature of Electoral Violence in Kenya. It complicates the situation when the very officialdom that is expected to uphold and ensure the upholding of the law assume the role of violating and facilitating the violation of that very law.

It its report on the 2002 General Elections, the European Union Election Observer Mission observed that:

During the campaign period, the level of political violence and intimidation was significantly below that predicted and below the level of the 1997 elections. There were some serious violent incidents during the period for nominations and in the week before the elections, although these appeared to be isolated incidents.⁹⁸

The European Union Election Observer Mission report noted, relying on media reports, that in the 2002 election campaign period, approximately 20 people died as a result of election related violence, while the same number was higher in the 1992 and 1997 electoral campaign periods.⁹⁹

In the run up to the 2002 General Elections, information collected by the Central Depository Unit (CDU)¹⁰⁰ showed that 325 lives were lost due to electoral violence from January to December 2002.

The apparent disparity in the statistics between the two sets of organizations can be explained by reference to the periods to which the statistics relate. The CDU statistics related to the period running from January 2002 to December 2002. The European Union

⁹⁸ European Union Election Observation Mission Final Report, Kenya General Elections 27 December 2002 P.23.

⁹⁹ Ibid.

¹⁰⁰ The Central Depository Unit was incorporated as a public trust on August 7, 2001. It was a coalition of six Kenyan non-governmental organizations (NGOs) which had previously been involved in monitoring political and electoral violence in Kenya. These NGOs were; the League of Kenya Women Voters, the Centre for Governance and Development, the Kenya Human Rights Commission, the Tawasal Foundation, the Centre for Conflict Resolution, and the National Council of Churches of Kenya. The mission of CDU was expressed as provide a centre with capacity to receive, analyse, compile and disseminate information relating to electoral violence to all stakeholders and other political users of the information in order that the information may be used to prevent, reduce and eliminate electoral violence.

statistics related to the period during which parliament had been dissolved and campaigns officially declared by the Electoral Commission of Kenya.

Either way, there exists a general consensus that the degree and intensity of electoral violence during the 2002 General Elections was much lower than was the case in the 1997 and 1992 General Elections.

As shall be demonstrated later in this chapter, it was during the 2002 General Election campaigns that the Electoral Commission of Kenya put into place a fairly systematic mechanism for enforcement of the Code of Conduct. Owing to the apparent reduction of incidents of electoral violence during that time, there is sufficient justification in the position that a zealous enforcement of all the electoral laws would literally stamp out incidents of electoral mal-practices including electoral violence.

4.3 Documented Causes of Election in Tigania East Constituency

The Centre for Conflict Research (hereinafter referred to as CCR) carried out a research in Tigania East Constituency on various dimensions of election violence.¹⁰¹ The study identified three typologies of causes of election violence in the constituency, namely; Underlying Causes of election violence, proximate causes of election violence, and triggers of election violence.

4.3.1 Underlying Causes of Election Violence in Tigania East Constituency

(a) The fear by some clans of being dominated by Others

Twenty eight decimal three percent (28.3%) of the respondents in the research conducted by CCR cited clan rivalry over issues of wealth and political power as a strong source of conflict among inhabitants of various regions in the Constituency. There was a general belief among the residents that the clan that produces the winner will be developed or benefit more than others. During the 1997 election campaigns, the study revealed that the road to Meru town, which passes through Muthaara was closed down and people from

¹⁰¹ Centre for Conflict Research, Report on Election Violence in Tigania East Constituency, research conducted between January 15th – 29th 2001 (Unpublished).

Mukinduri ambushed and beaten up for supporting the incumbent, who was seen to be from a poor and inferior clan.

(b) Using election time to settle personal scores

Sixty percent of the interviewees in the research by CCR saw this as a major cause of election violence. Campaigns in the constituency entail songs of praise and ridicule of the contenders with the lead singer being paid to compose songs scandalizing and shaming the opponent. If the victim gets too worked up and physically attacks someone, others who had personal grudges take the opportunity to settle scores by “teaching” their opponents, real or imagined, lessons.

(c) Inequitable land adjudication practices

During the time of the research by CCR, Tigania East Constituency was experiencing a politicized land adjudication process. Perceived supporters of the opposition parties were relocated from fertile, well watered areas to stony and dry parts. Well connected people were transferred to more fertile regions or near market centres. The residents of the constituency, therefore, resorted to violence to keep invaders out of their farms. During election time, this was a pet subject of whipping supporters into violence.

(d) General marginalization and economic disempowerment

Tigania East constituency once prided itself of having a vibrant coffee and tea economy, alongside other cash and food crops. With the slump in coffee prices, the situation has changed. Persistent drought has culminated into food insecurity as crops have failed and restocking of livestock has become difficult. Fourteen per cent (14%) of the CCR research respondents believed that the people had become increasingly defiant and violent due to their little faith in the political systems of the day.

(e) Unemployment especially among the youth

The Constituency, CCR research revealed, had a large number of unemployed youths with little alternative sources of income. Due to poverty, the youth tended to accept any kind of work, including violence and theft, to raise money. The more educated were idle

hopeless and extremely dissatisfied with their plight. They were, therefore, easily manipulated, incited and used to create fear of uncertainty among the electorate, and to pit supporters of different candidates against each other.

(f) Illiteracy of the constituents

Only a small number of constituents in Tigania East have gone to school. The constituency, according to the CCR survey had less than 20 graduates. The level of illiteracy was attributed to poverty, cultural practices that encouraged early marriages and the general feeling that with high unemployment education was a waste of time and money. The people in the constituency, being basically rural, it was established that they had little interaction with the rest of the country and, therefore, their understanding of issues relating to electoral democracy is minimal. It is, consequently, very easy for politicians to mislead or manipulate their understanding by “interpreting” things to them. It is easy to convince such people that a certain politician was insulting them when he said this or that.

4.3.2 Proximate Causes of Election Violence in Tigania East Constituency

(a) Increased competition over natural resources

The constituency, it was noted, has both very fertile sections and extremely arid zones, good enough only for animal husbandry. During the dry seasons or drought, the more pastoral constituents move with their animals into the well watered regions, sometimes driving their animals through other people’s farms. During election time, both sides charge that the other “has stolen our land” and as each group tries to reclaim it, violence becomes very intense.

(b) Drug (Miraa) abuse

Increasingly, the CCR survey revealed, the people of Tigania East Constituency have been cutting down coffee plants and replacing it with Miraa (qhat/Khat). As a consequence, more people have been exposed to the drug. Men who chew Miraa also abuse alcohol. Fights over miraa particularly allegations of theft – are particularly brutal,

leading to amputation or maiming. Sometimes, people set up their enemies and have them beaten up or isolated. Grudges related to miraa can lead to violent clashes between individuals, families and entire groups. During election campaigns, bitter enemies take out their frustrations and anger on one another, blaming it on the rowdiness associated with campaign violence.

(c) Influx of small arms

There is frequency of cattle raids and banditry from neighboring Samburu and Isolio. The people are increasingly acquiring guns to protect themselves. For a long time, the government of Kenya encouraged this sort of defence through the arming of home guards. The guns are sometimes misused to kill one's personal enemies for political and other reasons.

(d) Inadequate policing and administration

Twenty per cent of respondents in the CCR survey perceived laxity of security forces to respond to threats or use of violence to lead to conflict. At times, there is complete inaction, either due to police involvement in crime, lack of equipment, or that the police are biased and decide that the problem is not worth their while. At the time of the study, the respondents reported that the police were biased while dealing with opposition supporters causing apathy and little faith in government's willingness to deal with insecurity due to its non-response, use of excessive force on innocent people and partial approach.

4.3.3 Triggers of Election Violence in Tigania East Constituency

(a) Political Incitement of the youth

The CCR study reiterated its findings that most youth in Tigania East were poor, idle and abusing drugs. Genuine grievances like unemployment, poverty, crime, corruption, nepotism, poor infrastructure and the collapse of the coffee industry are sensationalized by politicians who blame certain individuals and urge the youth to do something about it. During the election time, the youth are hired by various leaders who have a direct stake in the outcome of the elections to cause chaos or otherwise defeat the cause of their

opponents. As such, they engage in violent or destructive behavior without caring who wins as long as they are assured of their pay.

(b) Interference in community and church affairs

The research revealed that there was a tendency by the incumbent Member of Parliament and his councilors, at the time of study, to frustrate projects initiated by the church or local development groups if they are not able to make political capital from such projects. Such interference tended to create frustration and resentment as tempers ran high, sometimes culminating in violence. Criticisms, attacks and counter attacks pit individuals and groups against one another.

(c) Loss and destruction of property

The general cases of violence in Tigania East constituency, the research revealed, took the form of fist fights, verbal abuse and heckling, use of machetes and swords and destruction of property through burning and vandalism. In the process, some people lose their lives and limbs. The euphoria during election time offers the best opportunity for revenge.

(d) Internal population displacement in the constituency

The population displacement in Tigania East, the survey identified, could be attributed to skirmishes with Tharaka and insecurity caused by banditry from Samburu and Borana. During election time, each side is accused of grabbing the other's land and fierce battles ensue.

4.4 Documented accounts on the Causes and Dynamics of Election Violence in Nairobi

Nairobi is a fairly cosmopolitan setting. It is, therefore, a conglomeration of diverse political, economic, social and ethnic stratifications. Nairobi too has been a critical city with regard to international peace initiatives. Further, Nairobi serves Kenya as the seat of highest authority in the land and is the headquarters of government ministries and departments. Given its vitality, a security threat to Nairobi is a potential danger to both

regional and international peace. A study at political and specifically electoral violence, therefore, becomes the more necessary.

As noted earlier, the repeal of Section 2A of the Constitution of the Republic of Kenya was followed by a mushrooming of political parties in a bid to win political power. With political competition, more political violence ensued as the state made deliberate efforts to interfere with the activities of the political opposition parties. In Nairobi, opposition party meetings and rallies were violently disrupted by the police, KANU¹⁰² youth wingers and hired youths.¹⁰³ In reaction to rampant disruptions of rallies and intimidation activities, the main opposition parties recruited their own youth wingers to counter the KANU attacks. A rally organized at Nairobi's Kamukunji grounds in late 1991 by the joint opposition parties recorded an unprecedented incidence of violence where people were killed and others injured in the battle that ensued between the police, GSU and KANU youth wingers on one side against a combined opposition party supporters, sympathizers and youth wingers who attended the meeting. Property worth millions of Kenya shilling was also reported to have been looted in the ensuing melee.

As the 1992 General Elections drew closer, confrontations within and between parties emerged causing splits. Noteworthy was the split of the original Forum for the Restoration of Democracy (Ford) into Ford-Kenya and Ford-Asili. This resulted into tension between the two factions with each regarding the other as the traitor.¹⁰⁴

There were also occasional fights over campaign money especially among the youth wingers of various political parties. The 1992 General Elections were, therefore, held in an atmosphere of tension, suspicion and violence in, among other areas, Nairobi.

An important observation made by previous researches points out certain cross-cutting characteristics of perpetrators of political thuggery; they live in low income estates, the actual and potential recruits live among other citizens and it becomes fairly difficult to identify them because they do not have any distinct peculiarities that may at once distinguish them from other citizens. The majority of the actual or potential political thugs have moderate education which ranges between class eight to form four. A majority

¹⁰² KANU – Kenya African National Union was the ruling political party at the time.

¹⁰³ *See generally*, Wahome Mutahi (ed), *Facts about Majeshi ya Wazee*, Fredrich Eberg Stiftung and Centre for Conflict Research, Nairobi, 2002.

¹⁰⁴ At a Ford-Kenya/Ford-Asili meeting at Ufungamano House, hired youths disrupted the function and seriously beat up selected politicians who were suspected to have betrayed the opposition cause.

of political thugs are men. Perpetrators and sponsors of political violence are not drawn from any specific ethnic group. Instead, each ward in Nairobi has ethnic peculiarities that influence their chances of getting involved in violence. Kangemi, for instance, has a big population of Luhyas, which makes them the majority of the actual and potential perpetrators of violence in the ward or area. The same trend applies in Kibera, which is widely settled by the Luo and Dandora/Kariobangi South region which houses many Kikuyus. The known or potential perpetrators of political violence are jobless youths who spend most of their time idling around the city, shopping centres or in estates. The main sponsors of political violence in Nairobi are politicians vying for civic, parliamentary, presidential or political party seats.¹⁰⁵

4.5 Brief overview of Election violence in the run-up to the 2007 General Elections

In the penultimate stages of this research an event of election violence that has a bearing on this study occurred. The date was Friday 21, September 2007, and the venue was in South Mugirango constituency at a fund raising event organized by the Minister for Roads and Public Works, Mr Simeon Nyachae. Mr Nyachae was the leader of the Ford People Party and he supported the re-election of president Kibaki as president of the Republic of Kenya at the General elections that were due at the end of the year 2007. President Kibaki was running for the seat on an umbrella coalition of parties known as Party of National Unity (P.N.U/PANU). Ford People was a constituent party of this coalition. At the fund raiser, to top luminaries of the opposition party Orange Democratic Movement Party of Kenya (ODM) Mr Omingo Magara (in whose constituency the funds drive was being held) and Mr. William Ruto attended. Before they could fully disembark from the aircraft that carried them, they were attacked by a group of armed youth that were wielding bows and arrows to the extent of being hospitalized. It is instructive that the armed youth who were uniformed had earlier made a parade of honour for Minister Nyachae. The vicious attack to the two was widely reported in the print and electronic

¹⁰⁵ See generally supra note 14.

media.¹⁰⁶ In addition to the presence of a government Minister at the event and his apparent involvement in the violence arising from his inflammatory sentiments, the attack was also witnessed by police officers who, paradoxically, did not effect a single arrest of the perpetrators of violence.

As set out earlier, the police force is an important institution that is expected to make election violence a very high risk behaviour.

4.6 Where was the Electoral Code when all these incidents were happening?

As noted in the last chapter, the Electoral Code of Conduct was enacted in 1997. It, therefore, does not form an important reference point in judging the responsiveness of the law to the pre-1997 election occurrences. The effectiveness of the administrative framework in enforcing the electoral code shall be judged against the situation attending to the 1997 and 2002 General Elections and the by-elections falling within that period.

In the entire corpus of the legal framework regulating elections in Kenya, no piece of legislation defines electoral mal-practices more precisely and elaborately than the Electoral Code of Conduct. Arguments have been raised regarding the efficacy of the precise prescriptions of the Code of Conduct¹⁰⁷. That, however, does not dent the precision of the prescriptions. In the run up to the 2002 General Elections, the Electoral Commission of Kenya campaigned vigorously to have violence-free elections in Kenya by calling upon Kenyans to observe peace during the elections and holding consultative meetings with political parties and stakeholders in the electoral field. The Electoral Commission of Kenya, further, engaged in a media campaign that heavily castigated violence by negatively portraying politicians who engaged in violence as unworthy of

¹⁰⁶ “Return of Poll Chaos” Saturday Standard, September 22, 2007 and “Orange Team Ejected from Nyachae Rally, Saturday Nation, September 22, 2007, were some of the press headlines that carried stories and commentaries on the vicious attack.

¹⁰⁷ Some of the arguments relate to the requirement that the Electoral Commission seeks the intervention of the High Court to enforce the prescriptions of the Code. The argument factors in the reality that court proceedings by their very nature in Kenya take a very long period of time to conclude and, therefore, mal-practices taking place in the very last days to the election day may not be adequately dealt with by the court process.

being leaders and also warning the electorate that they would suffer by engaging in political violence.¹⁰⁸

The Electoral Commission of Kenya announced at the beginning of the campaign period that it would promptly take appropriate action on breaches of the Code of Conduct. For the first time, the Electoral Commission of Kenya took disciplinary measures against those reported to be engaging in violence and other electoral mal-practices. The Electoral Commission of Kenya disciplinary committee was headed by its vice chairman, Commissioner Gabriel Mukele. The cases pertained to electoral offences including violence, intimidation, abusive language, civil servants campaigning for candidates or parties, and bribery. Five days to the elections, 16 candidates had been questioned by the committee. In 14 of the cases, a formal warning was issued while in two of the cases a fine was imposed. KANU was fined Ksh.100,000 for failing to stop violence in Gachoka constituency, Embu district where NARC Candidate Joseph Nyaga and his supporters were shot at with arrows by people suspected to be KANU supporters.¹⁰⁹ Budalangi constituency NARC candidate Raphael Wanjala was fined Ksh. 50,000 for assaulting a returning officer.¹¹⁰

KANU paid the fine of Ksh. 100,000 but Raphael Wanjala did not pay Ksh. 50,000. There is no documented evidence that the Commission has made any efforts to enforce its verdict against Hon. Wanjala necessitating the question, is the Electoral Commission of Kenya's disciplinary machinery a toothless bull dog?

4.7 Conclusion

The data relating to incidents of election violence above indicate that the direct loss of lives, limbs and property possess a real and present threat to the freedom and fairness of elections. It implies that those who cannot afford the brutality of might of physical force cannot have the liberty to market their manifesto to the electorate. Further, consigning

¹⁰⁸ Some of the advertisements read "*who has there lives shattered by election violence? Not the leaders who incite it,*" "*A vote for a leader who engages in violence is a vote for murder*".

¹⁰⁹ Electoral Commission of Kenya, Committee Complaint no. 4 of 2002. The verdict was also reported in the Daily Nation of December 23, 2002. see also European Union Election Observation Mission Final Report, Kenya General Elections 27 December 2002 P.24

¹¹⁰ Electoral Commission of Kenya, Committee Complaint no. 2 of 2002. The verdict was also reported in the Daily Nation of December 23, 2002 European Union Election Observation Mission Final Report, Kenya General Elections 27 December 2002 P.24

part of the electorate to the graves and hospital beds causes voter apathy whereupon they shy away from or totally fear to participate in the electoral process.

The recorded reduction in incidents of election violence during the 2002 electoral period, which coincided with a period when the Electoral Commission of Kenya attempted to flex its muscles and enforce the Electoral Code of Conduct is probably a pointer to the fact that if the existing laws that are intended to curb election violence and to consequently guarantee free and fair elections were enforced with reasonable zeal, election violence would be a thing of the past in Kenya's election history.

CHAPTER 5

5.0 CASE LAW AND ELECTION JURISPRUDENCE IN KENYA: 1992-2007

Judges are liars. They routinely engage in delusions. They occupy a paradoxical position in this world, one in which their functions require them to make law, while their legitimacy depends on the fiction that they interpret the law. It is a strange fiction but a necessary one.¹¹¹

5.1 Introduction

The judiciary is an important institution in providing an oversight over the electoral process as indeed over any other governance process in a civilized society. It, therefore, follows that an evaluation of institutional successes and failures in the enforcement of electoral law would be incomplete without an evaluation of the role of the judiciary. An important indicator of free and fair elections, as noted by the Zanzibar Elections Monitor and Observer Group (ZEMOG) criteria in Chapter One above¹¹², is the existence of a solid constitutional and legal basis which enhances democracy and reinforces the concept of free and fair elections, including a free and independent judiciary which can be relied upon to ensure that the process, including the hearing of election petitions, is free, fair and impartial.

A number of disputes relating to the conduct of elections have been brought before judicial institutions in Kenya during the period that followed the re-introduction of multi-partyism in Kenya. Therefore, the judiciary in Kenya has been given an opportunity to contribute to a culture of free and fair elections in Kenya in the period under study. The judiciary has been afforded an opportunity to render election malpractices to be high risk and less rewarding practices. Some of the matters that have found their way into the corridors of justice have touched on the question of election violence.

This chapter examines some selected leading cases that have been handled by the Courts in Kenya on election related matters. However, the chapter does not limit itself to matters that have come before the courts specifically on the issue of election violence. The chapter looks at other matters that tend to point to the general attitude of the judiciary in

¹¹¹ Pintip Homphen Dunn, How Judges overrule: Speech Act Theory and the Doctrine of *Stare Decisis*, The Yale Law Journal, Vol 113, Nov. 2003, No. 2 Page 493.

¹¹² See supra notes 32 and 33 above.

dealing with electoral matters and how this attitude has impacted on the aspiration to liberate Kenya of election mal-practices, including election violence.

Among the aspects of judicial practice, attitude and approach on electoral matters that this chapter interrogates are; (a) the inconsistency of the judicial position in its application (including mis-application) of election law and general departure from the doctrine of judicial precedent by the Kenyan judiciary, (b) mischievous over-reading of non-existent provisions into the provisions of election law that finally defeats substantive justice, (c) over reliance on technicalities by the Kenyan courts to settle electoral disputes, and, (d) the delay in determining and handing down verdicts in electoral disputes.

5.2 Misinterpretation of the Law and Destruction of Precedent

The doctrine of precedent presents the rule that every court binds lower courts and the same courts bind even themselves.¹¹³ The doctrine of *stare decisis* has been celebrated in common law jurisdictions due to its guarantee for certainty in the decisions of the courts.

In the absence of an adherence to this doctrine, chances are that judicial decisions will be inconsistent and parties cannot approach the courts to settle their disputes with certainty.

In the era marking the re-introduction of multi-party democracy in Kenya, as shall be demonstrated by case analysis shortly, courts of law have demonstrated conspicuously notable inconsistency in the manner in which they have handled electoral matters.

In evaluating the degree of disrespect that courts of law in Kenya, presiding over disputes of an electoral character, have shown towards the doctrine of precedent, this study shall focus on the matters in which the issue of service of election petitions has been handled by courts of law in Kenya. Statutorily, issues relating to service of election petitions have been provided for under Section 20 of the General Assembly and Presidential Elections Act and Rule 14 of the Election Petitions Rules made under the same Act.

For purposes of realizing the full tenor and meaning of the two statutory prescriptions, this study shall set out the full text of the material parts of the two provisions of law as follows:

¹¹³ Glenville Williams, *Learning the Law*, Stevens & Sons Limited, 1982, 11th Ed. 84

Section 20(1) of the National Assembly and Presidential Elections Act provides in its material parts thus:

20(1) A Petition-

(a) to question the validity of an election, shall be presented **and served** within twenty-eight days after the date of publication of the result of the election in the Gazette

On the other hand, Rule 14 of the National Assembly Elections (Election Petition) Rules provides as follows:

14(1) Notice of presentation of a petition, accompanied by a copy of the petition, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent.

(2) Service may be effected either by delivering the notice and copy to the advocates appointed by the respondent under Rule 10 or by posting them by a registered letter to the address given under rule 10 so that, in the ordinary course of post, the letter would be delivered within the time ordinary course of post, the letter would be delivered within the time above mentioned, if no advocate has been appointed, or no such address has been given, by a notice in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the Respondent on application at the office of the Registrar.

Rule 10 of the National Assembly Elections (Election Petition) Rules entitles a person elected to, at any time after election, send or leave at the office of the Registrar a notice in writing signed by him or on his behalf appointing an advocate to act as his advocate in case there should be a petition against him or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left. The Rule further provides that if no such notice in writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar.

It is most apparent from the textual reading of Section 20 of the Act and Rule 14 that the former deals primarily with the time of presentation and service of election petitions whereas the latter deals with both the time and mode of service of election petitions.

In the cases of **Alicen J.R. Chelaite Vs David Manyara Njuki & 2 Others**¹¹⁴, (hereinafter referred to as the “Chelaite case”) and **David Kairu Murathe Vs Samuel Kamau Macharia**¹¹⁵ (hereinafter referred to as the “Murathe case”) the issues in contention revolved around the interpretation of Section 20 of the General Assembly and

¹¹⁴ Nairobi Court of Appeal, Civil Appeal Number 150 of 1998

¹¹⁵ Nairobi Court of Appeal Civil Appeal Number 171 of 1998

Presidential Elections Act and Rule 14 of the Election Petitions Rules. Section 20 of the Act requires that a petition to question the validity of an election must be presented and served within twenty-eight days after the date of publication of the result of the election in the Gazette. On the other hand, rule 14 requires two distinct aspects, namely; that election petitions must be served within 10 days from the date of presentation and further, it sets out the mode of service of election petitions.

In both the *Chelaite* and *Murathe* cases, presentation of relevant election petition documents had been done within the 28 days period following the publication of the election results as prescribed under Section 20(1) of the General Assembly and Presidential Elections Act. However, service thereof had been effected outside the said period. The said documents had, nonetheless, been served within ten days from the respective dates of their presentation as provided by Rule 14(1) of the Election Petition Rules. The High Court dismissed both petitions on the grounds of non-compliance with the law. The Court of Appeal, in dealing with the appeals that followed the dismissal of the two petitions observed that there was no irreconcilable conflict between section 20(1) of the Act and Rule 14(1) and, that since Section 20(1)(a), being a part of the parent statute, provided for both presentation and service within 28 days, the section reconciled with Rule 14(1) by prevailing upon the Rule in case of any possible disharmony. The Court of Appeal further agreed with the High Court in both cases that any petition which was served outside the 28-days period from the date of presentation of the petition was incompetent and must be struck out. It is worth of emphasis that the borne of contention in both cases was the time as opposed to the mode of service of election petitions.

It was in so deciding the question of service effected outside the statutorily prescribed period that the Court of Appeal observed that there was no conflict between Section 20 of the Act and Rule 14 of the Rules. It is also worth of emphasis that the election petitions in question were dealing with the results of the 1997 General Elections.

While still dealing with the petitions arising out of the same 1997 General Elections, the Court of Appeal was confronted with the same question of the relationship between Section 20 of the General Assembly and Presidential Elections Act and Rule 14 of the Election Petition Rules in the case of **Mwai Emilio Kibaki Vs Daniel Toroitich Arap**

Moi & 2 Others¹¹⁶ (hereinafter referred to interchangeably as “Mwai Vs Moi” or “Kibaki Vs Moi”). This study deems the factual background of these two appeals to be very necessary in order to bring out the actual nature of the issues in controversy.

Following the General Elections of December 29, 1997 D.T. Moi was declared by the Electoral Commission of Kenya as having been elected president of the Republic of Kenya by 2,445,801 votes. The Declaration was by way of Gazette Notice No.79 of 1998 published on January 5, 1998.

Pursuant to the provisions of Section 44 of the Constitution of the Republic of Kenya, Emilio Mwai Kibaki, (the petitioner) who was one of the presidential contestants and the runner-up in the elections, who had polled 1, 895, 527 votes filed in the High Court at Nairobi Election Petition Number 1 of 1998 challenging the validity of Moi’s election as the president of the Republic of Kenya.

The Petitioner, on January 29, 1998, through his lawyers, published in the Kenya Gazette Notice No. 395 of 1998, a notification of his petition against Moi’s election as president. The petition named D.T. Moi, S.M. Kivuitu (who at all material times was the chairman of the Electoral Commission of Kenya) and the Electoral Commission of Kenya itself, as the three respondents. In the same notice, the petitioner informed the respondents that a true copy of the said petition was obtainable on the respondents’ application at the office of the Registrar/Deputy Registrar, High Court of Kenya, law courts at P.O. Box 30014, Nairobi. This was the only mode adopted by the petitioner in serving all the respondents with the petition lodged in the High Court on January 22, 1998.

On February 2nd 1998, the First Respondent appointed a firm of advocates to act for him in the said election case. Inevitably, we can deduce from this that the First Respondent had not, pursuant to Rule 10 of the National Assembly and Presidential Elections [Election Petition] Rules, left at the Registrar’s office, a writing signed by him or stating that he intended to act in person and, in either case, giving an address in Kenya at which notices addressed to him may be left.

It is noteworthy that under the said Rules, where no such writing is left with the Registrar by an elected person, all notices and proceedings may be given or served by leaving them at the office of the Registrar.¹¹⁷

¹¹⁶ Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal Number 173 of 1999.

On January 25, 1999, the First Respondent moved the court under Section 20 of the Act for Orders that the petition against him be struck out on the ground of bad service and that all proceedings be stayed pending the hearing and determination of the application. As if taking cue from the First Respondent, the Second and Third Respondents on January 26, 1999, moved the court seeking similar orders as those sought by the First Respondent. The only difference between the two motions was that in addition to being grounded on Section 20 of the Act, the 2nd Motion was also premised on Rule 14 of the Rules.

The Petitioner opposed the two Motions by way of Grounds of Opposition and a Replying Affidavit hence the two applications were heard together. By a ruling delivered on July 22, 1999, the Judges of the election court struck out the petition on the ground that the same had not been properly served upon the Respondents. It was that ruling that culminated into the appeal under study. The grounds of Appeal as set out by the Appellant were the following:

- a) The High Court overruled the Court of Appeal.
- b) The High Court erred in flouting the first principles of precedent and the doctrine of *stare decisis*.
- c) The High Court has no power or status to determine whether the decision, reasoning or words of the Court of Appeal judgments are or are not “rather wide”.
- d) The High Court accordingly erred in denying on that basis the Appellant of his lawful rights and dues in the High Court.
- e) The High Court cannot deny a party a decision in accordance with the Court of Appeal’s existing judgments or conclusions on the basis that it disagrees with those conclusions of judgments.
- f) The High Court was bound by the numerous Court of Appeal judgments and decisions cited and its refusal to follow them has damaged our legal system and has brought it into disrepute.
- g) The High Court was bound by each of the said Court of Appeal judgments and decisions and erred in allowing the Respondents’ application to strike out the Election Petition in the face of those judgments and decisions.
- h) In the High Court, the Respondents submitted that the Court of Appeal was wrong in several parts of its said judgments and decisions and the High Court erred and was unprofessional in entertaining and eventually upholding such flawed and unprofessional submissions.
- i) The High Court had no jurisdiction to do so.
- j) The High Court has acted without and/or in excess of its jurisdiction and powers.

¹¹⁷ Rule 14(2) of the National Assembly and Presidential Elections [Election Petition] Rules

It is most apparent from the grounds of appeal as preferred by the appellant that the major grievance from the ruling of the High Court was that the said superior court, in arriving at its findings had purported to destroy existing judicial precedent as set by the Court of Appeal. In dealing with these issues on appeal, the Court of Appeal commenced by stating thus:

These two appeals, apart from the undeniable fact that they involve persons of no mean status in our country, raise issues very crucial to the jurisprudence of our legal system as we have hitherto understood it to be.

The foregoing declaration by the judges presupposes that they knew that there existed a particular understanding by election law practitioners, including the judges touching on the matters before them. It is this prior understanding that they sought, and indeed (mis)managed, to radically depart from. The First Respondent had in the affidavit supporting the striking out the petition before the superior court deposed thus:

3. That I have not been served personally with the petition in this case, either within 28 days after the date of the said publication as required by Section 20(1) of the National Assembly and Presidential Elections Act or at all.

The Superior Court in expressing its concurrence with the First Respondent held that Section 20(1) of the Act provided for personal service and struck out the petition for bad service. In so doing, the High Court declared that Section 20(1)(a) of the Act was in irreconcilable conflict with Rule 14 and, as a result, service of summons under the guidance of Rule 14(2) was no service at all since the Rule conflicted with Section 20(1) of the Act.

The “Court of Appeal judgments and decisions” that the appellant contended that the High Court had failed to follow were, in fact the *Chelaite* and the *Murathe* cases (discussed above).

It is worth of memory that the Court of Appeal in the *Chelaite* and *Murathe* cases dealt with the time and not mode of service of Election Petitions. It was in so deciding the fate of an election petition served outside the 28 days period from the date of publication of the election results that the Court of Appeal in the two cases held that there was no conflict between Section 20 of the Act and Rule 14 of the Rules. On the contrary, the High Court in the case of **Emilio Mwai Kibaki Vs D.T. Moi and Others** held that an

irreconcilable conflict did exist between Section 20 of the Act and Rule 14. This declaration was the basis of the appellant's contention that the High Court had purported to overrule the Court of Appeal.

After hearing of the appeals as consolidated, the Court of Appeal reached a conclusion that the High Court had not overruled the Court of Appeal by its declaration of a conflict between Section 20(1) of the Act and Rule 14 of the Rules. The Court of Appeal reasoned that in the *Chelaite* and *Murathe* cases, the core issue for determination was the fate of a petition served outside the prescribed period. The other issues as to the existence of a conflict between Section 20 of the Act and Rule 14 of the Rules was, according to the Court of Appeal judges, mere *obiter* that the High Court had not been bound to take.

The question that immediately lent itself for answers was whether the fact that a point is expressed *obiter* was *per se* a ground for departing from it notwithstanding that it was expressed by a court of higher jurisdiction in the judicial hierarchy.

To sum up their reasoning, the Court of Appeal judges declared thus:

We accordingly agree with the High Court that Section 20(1)(a) of the Act is in direct conflict with Rule 14 and that being so Rule 14 must give way to the plain words of Section 20(1)(a) of the Act. Accordingly, Rule 14 of the Rules can no longer apply to petitions which concern Section 20(1)(a) of the Act. ... Parliament in its wisdom, and it is forever wise, can and often does decree certain things which may not seem wise to persons unschooled in its way of doing things. But the courts must accept the wisdom of Parliament, unless of course, they are contrary to the provisions of the Constitution. It has decreed in section 20(1)(a) that service of the election petitions must be personal and whatever problems may arise from that, the court must enforce that law until Parliament should itself be minded to change.

Needless to say, a plain reading of Section 20 of the Act and Rule 14 of the Rules reveals that the only disharmony that subsisted between the two was to do with the time of service of election petitions. The same had been dealt with in the *Chelaite* and *Murathe* cases and it was not an issue in the case before the judges.

There was no conflict in any sense between Section 20 of the Act and Rule 14 of the Rules with regard to the mode of service of election petitions. Be that as it may, the Court of Appeal had departed from its position in the *Murathe* and *Chelaite* cases arguing that the same had only dealt with the issue of mode of service of election petition as *obiter dicta*.

The *Murathe* and *Chelait* cases together with the *Mwai Vs Moi* case all related to the 1997 General Elections. It is instructive to note that there was no amendment to the law on mode and time of service of elections in the run up to the 2002 General Elections.¹¹⁸ Following the 2002 General Election, some election petitions were preferred and the question of service of petitions arose. In the case of **Muiya Vs Nyaga & Others**¹¹⁹ (hereinafter referred to as “Muiya Vs Nyaga case”) the High Court had occasion to grapple with the issue of service effected by way of newspaper advertisement after the 28 day statutory period but with leave of court. The court while declaring the entire service a nullity made the following observations:

This Court was not asked to say something about personal service as the basis to strike out the petition but Mr Kilonzo did comment on this in a serious way. That his client tried to serve the 1st Respondent but was unsuccessful. That it went by Rule 14 of the Election Petition Rules and published a gazette notice otherwise his client’s rights and those of the constituents were doomed....Much as this court maybe of the view that alternative modes of service under Rule 14 were not done away with ... assuming that the alternative modes of service under Rule 14 are still intact, they do not include substituted service... Section 20 of the Act as well as rule 14 of the Election Petition Rules do not contain any provision by which a court can either enlarge the time within which to serve a petition or order other modes of service.

By observing that “Much as this court maybe of the view that alternative modes of service under Rule 14 were not done away with” it is most apparent that the High Court was casting strong doubts about the position taken by the Court of Appeal in the case of *Mwai Vs Moi*.

Before the heat and dust of *Muiya Vs Nyaga* case could cool and settle, the High Court of Kenya sitting in Mombasa was confronted with the similar question on the mode of service of election petitions in the case of **Mohammed Bwana Bakari Vs Abu Chiaba Mohamed & 2 Others** (hereinafter referred to as the Mohammed Bwana Bakari case).¹²⁰

In this case, whose material facts were *in pari materia* with the case of *Mwai Vs Moi*, election results were published in the Kenya Gazette on January 3, 2003. The Petitioner filed an election petition in respect of the same results and had it published in the Kenya

¹¹⁸ For a detailed analysis of the *Mwai Vs Moi* case see Ongoya Z.E. and Masitsa S.W, The Law of Politics or the Politics of the Law?: An Evaluation of the Mwai vs Moi Rule as to personal Service of Election Petitions, www.kenyalawreports.or.ke last accessed on August 13, 2006

¹¹⁹ Nairobi High Court Election Petition Number 7 of 2003 (unreported)

¹²⁰ Mombasa High Court Election Petition Number 3 of 2003 (unreported).

Gazette Volume CV –No. 10 dated January 31, 2003 being Gazette Notice number 687. On January 30, 2003, the Petitioner's process server pasted a copy of the Petition on the 1st Respondent's gate. The 1st Respondent moved the court pursuant to Section 20(1)(a) of the National Assembly and Presidential Elections Act for orders that:

The petition herein be struck out on the ground that the same was not personally served on the 1st Respondent within 28 days after the date of publication of the results of parliamentary election in the Gazette on the 3rd January 2003.

In determining the motion, the learned trial judge correctly set out the precise issue before her by noting that the petition in issue had been presented within 28 days after publication of election results. It was also not a disputed fact that it was served within the time limited. The dispute was that the service was not personal. It was at this juncture that the learned judge posed the question whether the law regarding election petitions required personal service. On this issue, the court took into consideration the fact that the same had occupied our election courts on several occasions. The High Court acknowledged but that it ought to find itself bound by the holding of the Court of Appeal in the case of *Mwai Vs Moi* but to feel so bound citing errors in the reasoning of the Court of Appeal in *Mwai Vs Moi*. In questioning the position taken by the Court stated that:

With greatest respect the court failed to comment on the second limb of the Rule that is rule 14(2), which deals with the mode of service. This rule simply provides the manner of service and is not in conflict with Section 20(1)(a) of the Act. Its provisions are to be read together with rule 10 referred to therein which rule provides for address for service in case there should be a petition against the respondent, granted the rule is not mandatory. However, rule 14(2) indicates that where a party has failed to comply with rule 10 service may be effected by advertisement in the Gazette.

Having presented the foregoing well reasoned analysis of the interplay between section 20(1)(a) of the Act and Rule 14 of the Rules, the High Court found itself at the centre of a quandary on whether to pay due homage to the doctrine of precedent or to uphold the proper position of the law. To get over the dilemma, the court stated thus:

The doctrine of *stare decisis* was discussed at length in the Kibaki-Moi decision. The judges of appeal went to great lengths to examine the relevant authorities and I totally agree with their conclusion on that issue. However, in this issue, in considering the legal effect of the Act and the Rules and particularly Rules 14(1) (a) and 14(2), the provisions of the Interpretations and General Provisions Act, Cap 2 set out, namely, section 24 and section 33 were not considered. The authorities cited to me indicated that in the

circumstances the court acted “in ignorance or forgetfulness” of these provisions and therefore the decision is *per incurium*.... I agree that this court is bound by decisions of the Court of Appeal except where there is strong argument against the application of the doctrine of *stare decisis*. I am convinced, however, that the expression of the decision of the Court of Appeal in Kibaki-Moi as to the validity of Rule 14(2) was made *per incurium*.... I, therefore, do not find that I am bound by that decision.

A question immediately arises whether the High Court had the discretion to declare a decision of the Court of Appeal to have been made *per incurium*. The House of Lords had dealt with this issue in the case of **Cassell & Co Ltd Vs Broome and Another**¹²¹ where Lord Hailsham of Marylebone LC eruditely set out the principle of precedent as follows:

The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exist in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young Vs Bristol Aeroplane Co Ltd* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered opinions in the upper tiers with the same freedom. Even this House, since it has taken liberty to review its own decisions, will do so cautiously.

Taking cue from Lord Hailsham, Lord Wilberforce put it more succinctly in the following terms:

The Court of Appeal found themselves able to disregard the decision of this House in *Rookes VS Bernard* by applying to it the label *per incurium*. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of the judge of the High Court to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label *per incurium* would have been misused.

In Kenya, the High Court had already re-stated its subservience to the Court of Appeal by the following dictum of Ringera J (as he then was)¹²²:

Be that as it may, in *Mwathi Vs Imanene* [1982] KLR323 (a decision which, I confess, was not brought to my attention by either advocate), the Court of Appeal took a different view. ... Under the doctrine of *stare decisis* I am bound by the decision of the Court of Appeal regardless of whether I agree with it or not.

¹²¹ [1972] 1 ALL ER801

¹²² *Deposit Protection Fund Board Vs Sunbeam Supermarket Limited & 2 Others*, Nairobi [Milimani] High Court Civil Case Number 3099 of 1996.

Although the High Court in the *Mohammed Bwana Bakari* case would appear to have been right in its interpretation of the relationship between Section 20(1)(a) of the National Assembly and Presidential Elections Act and Rule 14 of the Election Petition Rules, it nevertheless contributed to the destruction of precedent by declaring that the Court of Appeal position in *Kibaki-Moi* was made *per incurium*. As shall be demonstrated shortly, this radical departure from the doctrine of precedent earned the learned puisne judge a reprimand from the Court of Appeal when her decision was subjected to appeal.

Subsequent upon the decision of the High Court, the Court of Appeal had to deal with the appeal arising from the *Mohammed Bwana Bakari* case in the case of **Abu Chiaba Mohammed Vs Mohammed Bwana Bakari & 2 Others**¹²³ (hereinafter referred to as the Abu Chiaba case). The ghost of *Mwai Vs Moi* had returned to hound the Court of Appeal. The Court of Appeal commenced dealing with this ghost with the averment that:

Perhaps this is now an appropriate place for me to set out the issue of personal service of an election petition which the appellant made the basis for his motion to strike out the 1st Respondent's petition. **In the case of *Mwai Kibaki Vs Daniel Toroitich Arap Moi, Civil Appeal No. 172 of 1999 (unreported)* this court consisting of a bench of five judges held that following the amendments to section 20 of the Act, which amendments were brought in by the Statute Law (Repeals and Miscellaneous Amendments) Act 1997, i.e., Act No. 10 of 1997, the only way of serving an election petition was by way of personal service.** The basis of that decision was fully set out in the judgment and I need not repeat them. In the present appeal, we were asked to overrule the decision in *Kibaki Vs Moi*, supra. I will answer that contention in due course (emphasis supplied).

The rest of the decision in this case, for purposes of this study, is mere detail. What is material is how the court then dealt with the request that it departs from its reasoning of 1999 in *Mwai Vs Moi* considering that there had been no change to the text of the statute and the Rules. The Court of Appeal in this appeal comprised five judges. Four of the judges gave a concurrent verdict whereas one of them gave a dissenting ruling. The majority of the court began by reprimanding the trial High Court judge for having purported to distinguish the decision in *Mwai Vs Moi* in terms that:

Of course the learned judge of the High Court would have no jurisdiction to over-rule a decision of this court even if she disagrees with the decision and the comments in her

¹²³ Nairobi Court of Appeal No 238 of 2003 (unreported)

judgment must be ignored as having been made without jurisdiction and in violation of the well known doctrine of precedent. I would respectfully point out to the learned judge that like all other judges in her position, under the doctrine of precedent, she is bound by the decisions of this court even if she may not approve of a particular decision and any attempts to over-rule or sidestep the court's decision can only result in unnecessary costs to the parties involved in the litigation.

This position taken by the court of appeal on the doctrine of precedent would appear to be unassailable. However, where the Court of Appeal engages in a deliberate mis-interpretation of the law, as it did in the Mwai Vs Moi case, its moral justification to reprimand a judge of the High Court for shying away from following such precedent becomes highly compromised.

The court then had to grapple with the position of personal service in election petitions. In a thinly veiled departure from its earlier holding in Mwai Vs Moi, the majority decision of the court proceeded to deny that it established anything of the kind that personal service was the only mode of service of election petitions. This it did in the following dictum:

Did Kibaki Vs Moi establish any proposition that even when it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind... The decision clearly recognized that if personal service, which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to.

This study opines that the position that the Court of Appeal was taking in Abu Chiaba case could not be reconciled with the *ratio* in Mwai Vs Moi that:

Parliament in its wisdom, and it is forever wise, can and often does decree certain things which may not seem wise to persons unschooled in its way of doing things. But the courts must accept the wisdom of parliament, unless of course, they are contrary to the provisions of the constitution. It has decreed in section20(1)(a) that service of the election petitions must be personal and whatever problems may arise from that the court must enforce that law until parliament should itself be minded to change.(emphasis supplied)

In fact, the position could not be reconciled with the introductory declaration in the same majority decision in the Abu Chiaba case itself where the majority judges declared that:

Perhaps this is now an appropriate place for me to set out the issue of personal service of an election petition which the appellant made the basis for his motion to strike out the 1st Respondent's petition. **In the case of Mwai Kibaki Vs Daniel Toroitich Arap Moi, Civil Appeal No. 172 of 1999 (unreported) this court consisting of a bench of five**

judges held that following the amendments to section 20 of the Act, which amendments were brought in by the Statute Law (Repeals and Miscellaneous Amendments) Act 1997, ie Act No. 10 of 1997, the only way of serving an election petition was by way of personal service.(emphasis supplied)

The majority of the Court of Appeal went ahead to hold that it found no reason to overrule the decision in *Mwai Vs Moi*. It is of importance to consider that the learned judge whose judgment was concurred with by the other judges had sat in the case of *Mwai Vs Moi*.¹²⁴ One of the judges sitting at the Court of Appeal had been a High Court judge and had sat as such in the *Mwai Vs Moi* case.¹²⁵ A question that begs the answer is why the meaning attached to the text had to vary without any change in the text. This study opines that it is a natural consequence of lack of a philosophy of law in election petition matters on the part of the members of the Kenyan judiciary. In the absence of such a philosophy, the whims of the moment take the part of the juridical minds.

However, as stated above one of the judges¹²⁶ in the *Abu Chiaba* case wrote a dissenting decision agreeing with the majority decision on the issue of the lack of merit in the appeal but dissenting on the issue of reprimanding the superior court judge and on the issue whether the decision in *Mwai Vs Moi* deserved to be over-ruled. Reading the law as a whole, it is most apparent that this judge, whose decision on the latter two issues was the minority, expressed some form of boldness and a better understanding of the law. He noted thus:

The law is the same as it was when *Kibaki Vs Moi* was decided. Section 20(1)(a) of the Act does not decree as the Court in *Kibaki Vs Moi* erroneously, in my view, said, that service of Election Petitions must be personal. The section does not indeed deal with the mode of service. It merely prescribes the time of service. The Court of Appeal did not in *Kibaki Vs Moi* construe Rule 14(2) which is a subsidiary legislation having the same status as an Act of Parliament. That rule prescribes three statutory modes of service of election petitions which do not include personal service. The prescribed mode of service include service by notice published in the Gazette which was one of the three modes used in this case. In *Ferrel Vs Alexander* [1976] 1 ALLER 129, Lord Denning MR said in part at page 137 paragraph d “no court is entitled to throw over the plain words of a statute by referring to a previous judicial decision. When there is a conflict between a plain statute and a previous decision the statute must prevail... In my humble view, the decision in *Kibaki Vs Moi* was given per incurium. I would further hold that the decision does not establish any discernible precedent as the court did not in fact construe any specific provisions of the Act or the Rules, in particular, Rule 14(2). ... It follows that what the

¹²⁴ This was justice R.S.C.Omolo

¹²⁵ This was justice O’kubasu.

¹²⁶ Githinji JA

court said in *Kibaki Vs Moi* about personal service, which was not connected with any provision of the statute, was merely a dictum. In the circumstances, the superior court, was, in my view, free to construe the specific provisions of the statute particularly rule 14(2) as it understood them. I am satisfied that the superior court made a valiant and correct construction of the statute particularly rule 14(2). The learned judge deserves due tribute.

It must be emphasized here that the minority decision in the *Abu Chiaba* case, although espousing a more sound appreciation of the law, remains just that – a minority decision. Its precedent value is, therefore, questionable.

On the other hand, the double speak of the majority decision on whether or not the court in *Mwai Vs Moi* ever espoused a jurisprudential position that service of election petitions must be personal, does not add much value to the clarity, hence certainty, of the law.

The second situation in which the Court of Appeal of Kenya has engaged in contradictory restatement of the law relates to the proper mode of approach to court on election matters. In the case of **Richard Chirchir and Another Vs Henry Cheboiwo & Another**¹²⁷ the Court of Appeal consisting of Gachuhi, Kwach & Cockar JJ.A, rejected the argument that the only way to come to court in regard to matters arising under the National Assembly and Presidential Elections Act was through an election petition. In the case of **Kimani Wa Nyoike Vs The Electoral Commission of Kenya and Another**¹²⁸ the Court of Appeal did point out that in the case of *Chirchir Vs Cheboiwo* the court did not at all refer to its earlier remarks made in the case of **The Speaker of the National Assembly Vs Hon James Njenga Karume**¹²⁹ where the court¹³⁰, did state that there was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. In the *Kimani wa Nyoike* case (supra) the Court of Appeal rejected the argument in the *Chirchir Vs Cheboiwo* case in the words that:

We think the procedure for addressing grievances arising from elections is through an election petition and that is exactly what the court was saying in Karume's case. ... We would unhesitatingly prefer to base our decision on the Karume's case rather than the Cheboiwo case

¹²⁷ Case cited for purposes of distinguishing in the case of *Kipkalya Kones VS Republic & Another Ex parte Kimani wa Nyoike*, Civil Appeal No. 94 of 2005.

¹²⁸ Civil Application Number Nai 213 of 1995 (unreported)

¹²⁹ Civil Application Number Nai 92 of 1992.

¹³⁰ consisting of Kwach, Cockar & Muli JJA

In the case of **Republic Vs The Electoral Commission of Kenya Ex Parte Kimani Wa Nyoike & Others**¹³¹, the applicants moved the High Court by way of a Judicial Review application challenging the decision of the Electoral Commission of Kenya to accept the Hon Kipkalya Kiprono Kones as the Ford People party nominee among the twelve nominated members of parliament. The High Court found for the applicants and quashed the decision of the Electoral Commission of Kenya and subsequently ordered the Speaker of the National Assembly to declare the seat of the Hon Kipkalya Kones in the National Assembly vacant. In the subsequent appeal¹³², the Court of Appeal reversed the said finding of the High Court on the primary ground that the only procedural mechanism of challenging someone's membership to the National Assembly was by way of Election Petition and, therefore, the High Court had been improperly moved by way of Judicial Review.

It is apparent that courts of law in Kenya, particularly the ones that grace the higher tiers of judicial hierarchy have demonstrated inconsistency in reasoning that renders election law a very uncertain branch of law.

With such inconsistency, mischief makers have ended up getting away with their mal-practices and those who would have wished to challenge election mal-practices have ended up shying away for fear that what they perceive to be the position in law arising from the previous holding by the courts may be erroneous after all.

5.3 Mischievous Over reading

The greatest undoing of the jurisprudence by the *Mwai Vs Moi* case lies in the manner in which the Court of Appeal interpreted section 20 of the National Assembly and Presidential Elections Act. It is instructive to note, as was done by the minority decision of the Court of Appeal decision in *Chiaba Bakari* case, that throughout their judgment, the judges of appeal in *Mwai Vs Moi* did not make any reference to Rule 14(2) of the Election Petition Rules which specifically deals with the question of the mode of service. It is apparent that in declaring the entire Rule 14 of the Act to have been inconsistent with Section 20(1)(a) of the Act, the judges were reading strange and non-existent words in

¹³¹ High Court Misc Appln No. 129 of 2003

¹³² Supra note 16

the language of the statute which is something that should not be allowed. Indeed in the case of **Stock Vs Frank Jones (Tipton) Ltd**¹³³, Lord Edmund cautioned against reading into statutory provisions non-existent words. He said:

But dislike of the effect of a statute has never been an accepted reason for departing from its plain language... 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of a clear necessity it is a wrong thing to do' said Lord Mersey in *Thompson Vs Goold & Co.* 'we are not entitled to read words into an Act of Parliament unless clear reason of it is to be found within the four corners of the Act itself' said Lord Loreburn L.C in *Vickers, Sons & Maim Ltd Vs Evans.*

Against the foregoing sentiments of principle, this study reasserts that there was no basis for the Court of Appeal in the *Mwai Vs Moi* case to read personal service in the text of Section 20 of the National Assembly and Presidential Elections Act when clear and unambiguous modes of service for election petitions had been provided for in Rule 14(2) of the Election Petition Rules. More absurdly, the majority decision in the *Abu Chiaba* case (*supra*) continued reading personal service as one of the modes of service required in the same statute.

5.4 Technicality of Law rather than substantial justice

As can be discerned from the decisions analyzed above, the High Court and the Court of Appeal have pre-occupied themselves with legal technicalities in settling election disputes. Indeed, the bulk of election disputes in Kenya have turned on the question of the mode of service of election petitions even when the Respondents themselves have turned up in court and even filed replying papers to the petitions. If at all the purpose of service of election petitions is to ensure that the Respondent has notice of the petition and has an opportunity to make representations in defence, how can it be that the very respondents before court have time and against been permitted to avoid facing the substance of the allegations facing them on a simple account of the mode of service adopted. The situation becomes even gloomier when it turns out that the same court purporting to enforce the law on service commands a suspect understanding of the law on service of election petitions in Kenya.

¹³³ [1978] 1 ALLER 948

It is imperative to note that under Section 44 of the Constitution of the Republic of Kenya, the High Court is given the mandate to determine three primary questions, namely; (a) whether a person has been validly elected a president, (b) whether a person has been validly elected as a member of the National Assembly, and, (c) whether the seat in the National Assembly of a member thereof has become vacant. A reading of this mandate presupposes that the constitution envisages a determination of matters on merits. Procedural provisions, as enacted by parliament or other subsidiary organs, can only be a handmaiden of the substance and not a master of the same.

What prejudice does a Respondent, for instance, who has filed a Replying Affidavit to an election petition, instructed counsel to act for him at the hearing, and even appeared to argue his case, suffer when the service was published in the official government Gazette?

5.5 Justice delayed

Conventional wisdom teaches that justice delayed is justice denied. Nothing can illustrate a case of delay more than a parliamentary term expiring before the conclusion of an election petition to challenge the tenure of the incumbent in office. Strangely, such has been the rule in the handling of election petitions since the advent of multi party politics in Kenya.

It is noteworthy that following the 2002 General Elections, by June 2007, barely 5 months to another General Election, there were ten election petitions pending unresolved. This raises the question whether it makes any political and economical sense for defeated politicians to even file election petitions. Previous records of the length to time taken in the determination of election petitions does not give much hope either. The case of **Ramadhan Seif Kajembe Vs Jothan Nyange & 3 Others**¹³⁴ was commenced on January 29, 1993 and determined on March 23, 1995, approximately taking two years and 2 months. This was almost half of the parliamentary term to which the election related. The petition was allowed by the High Court. In the case of **Joseph Muliro Vs Brig R. Musonye & Another**¹³⁵, the petition was filed on February 2, 1993. The same was concluded on October 26, 1995. This was after the lapse of two years and 8 months of the

¹³⁴ Nairobi High Court Election Petition Number 38 of 1993

¹³⁵ Nairobi High Court Election Petition Number 57 of 1993

parliamentary term to which the election petition related. The case of **Julius Daraka Mbuji Vs Harrison Garama Kombe & Others**¹³⁶ the High Court delivered its verdict allowing the petition on February 10, 2007, barely 9 months to the end of the parliamentary tenure to which the election related. Both the Electoral Commission of Kenya and the winner in the nullified election, Harrison Garama Kombe preferred separate appeals from the verdict of the High Court.¹³⁷ The first appeal was heard and determined on October 27, 2006 and the 2nd appeal was determined on March 6, 2007 in both cases the appeals were dismissed forcing the Electoral Commission of Kenya to hold a By-Election during the election year, 2007. In the course of hearing the two appeals, one of the judges¹³⁸ lamented concerning the delay in determination of election disputes in Kenya that “it is an embarrassment to the administration of justice in Kenya”. The judges concurred with this concern in Civil Appeal No. 52 of 2006 when they noted that “before we dismiss this appeal, as we must, we deprecate the activities resulting into the delay in finalizing this matter which for all intents and purposes ended with our decision in Civil Appeal No. 50 of 2006. The consequence of such a delay as happened here are clearly unfair to the country, this being an election matter.”

The consistency of the delay in determination of election disputes in Kenya need not be overemphasized. Indeed the Court of Appeal did recognize such delay in resolving electoral disputes in Kenya in the following terms:

That the courts take such a long time to hear and determine election petitions is a serious blot upon the judicial system. But that blot must find its solution elsewhere and the solution does not lie in employing other methods except those provided for in the constitution.¹³⁹

Other jurisdictions in Africa have dealt with the issues of expeditious disposal of election disputes in fairly admirable detail. A case in point is Uganda where both Article 104 of the Constitution of Uganda and Section 59 of the Presidential Elections Act dictate that election disputes must be determined within 30 days of the filing of the petition. This was exemplified in the case of **Rtd Col Dr Kizza Besigye Vs Electoral Commission and**

¹³⁶ Mombasa High Court Election Petition Number 1 of 2003

¹³⁷ These were Civil Appeal No.s 50 of 2006 and 52 of 2006.

¹³⁸ Justice E.O.O’kubasu

¹³⁹ This was in the case of Kipkalya Kones VS Republic & Another *Ex parte* Kimani wa Nyoike, Civil Appeal No. 94 of 2005

Yoweri Kaguta Museveni¹⁴⁰ (herein after referred to as the Besigye case). This petition was lodged in court on March 7, 2006 and hearing commenced on March 22, 2006 and ended on March 30, 2006. Judgment was reserved and given on April 6, 2006 being 30 days of the filing of the petition.

5.6 A general attitude towards retaining the political status quo

This study is reluctant to attribute the skewed reasoning in the case of *Mwai Vs Moi* to inadequacy in the understanding of the law of the specific individuals holding the office of judges at that point in time. Rather, it strongly points to a case of judges that are extremely reluctant to confront the political establishment of the day with the true position of the law.

This was even clearer in the case of **Kipkalya Kones Vs Republic**¹⁴¹ where the court bluntly pointed out that “the framers of the Constitution must have had these considerations in mind when dealing with the issue of election petitions and came to the conclusion that it would be far much better to have even a defective election than no election at all... The same considerations must apply to nominated members. (emphasis supplied).

The impressive nature of the lessons to be learnt from Uganda with regard to expeditious disposal of electoral disputes cannot be said of the general attitude leaning towards retaining the status quo. In the *Besigye* case, the court aptly captured one of the grounds raised by the Petitioner as follows:

The petitioner complained further that the entire electoral process in the 2006 Presidential Elections, beginning with the campaign period up to polling day was characterized by acts of intimidation, lack of freedom and transparency, unfairness and violence and the commission of numerous offences and illegal practices contrary to the provisions of the Presidential Elections Act, the Electoral Commission Act and the Constitution.

In dealing with these issues, the court made findings that there had been non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act in the conduct by the 1st Respondent (the Electoral Commission of Uganda) in the instances specified as; disenfranchisement of voters by deleting their

¹⁴⁰ Supreme Court of Uganda at Mengo, Presidential Election Petition Number 1 of 2006.

¹⁴¹ Supra note 16

names from the voters register or denying them the right to vote, and, in the counting and tallying of results. The court further found that there had been non-compliance with the principles laid down in the Constitution, the Presidential Elections Act and the Electoral Commission Act in the instances specified as; the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country, and, the principle of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas. Finally, the court made a curious finding by a majority of four to three that it had not been proved to the satisfaction of the court, that failure to comply with the provisions and principles, as found in the first and second set of instances, affected the results of the presidential election in a substantial manner.

The rule of law would dictate that violations of the law and the principles of law ought, *ipso facto*, to be met by some consequences.

It is clear that the Supreme Court of Uganda in the *Besigye* case ran scared of interfering with the political status quo in the face of proven violations of fundamental provisions of the law.

This study takes the view that such tendencies on the part of the judiciaries in Kenya, and in Uganda (if the *Besigye* case is anything to go by) have a tendency of rendering electoral mal-practices the least risky investments. This does not encourage the development of electoral democracies governed by the rule of law.

5.7 Conclusion

The above analysis exposes the lack of preparedness on the part of our courts to militate against election mal-practices in general and election violence in particular. By rendering the jurisprudence, on election petitions, to be as uncertain and unpredictable as it can be, courts of law have mystified the procedure for determination of election disputes. It comes as no surprise that the incidents of violence in the public domain during the electioneering period in Kenya, ever since multi-party politics was re-introduced, have remained inversely proportional to the election results nullified by courts of law in Kenya during the same period. This state of affairs presents a perception that courts of law are sympathetic to the architects and perpetrators of election violence in such a manner that

the burden vested upon the petitioner to prove the violence would appear insurmountable. Further, there is the concern relating to the time taken to complete determination of election disputes. As demonstrated by the Ugandan example, time may be ripe for legislative intervention to prescribe fixed timeframes within which election disputes ought to be concluded following the end of the election exercise.

CHAPTER 6

6.0 CONCLUSION AND RECOMMENDATIONS

A country has discretion in its choice of an appropriate electoral system. However, such discretion in choosing an electoral system is not unlimited and should be consistent with international standards. Given the past tendency of many countries to adopt electoral systems which applied during their colonial periods or for other historical reasons, the review of a country's legal framework should usefully reflect on current cultural, political, social or other factors and realities. A question to pose is: which is the electoral system most likely to promote democratic elections today?¹⁴²

6.1 Conclusion

Whichever way one answers the question posed above, it is unlikely that the answer would recognize an electoral system that is unable to deal with the question of election violence as an example of “an electoral system most likely to promote democratic elections today”.

The Kenyan electoral system, therefore, to the extent that it has been unable to decisively deal with the question of election violence in the period following the re-introduction of multi-party political system of governance, has failed the test of promotion of democracy. The primary issue before pronouncing a way out of the quagmire is the identification of where the problem lies. This issue takes us back to the question posed in the introductory chapter of this study as underlying the study. The question is: Is there a lacuna in the law relating to elections that breeds ground for acts of violence during electoral periods and, if yes, does the lacunae exist in the prescriptive provisions of the law, the enforcement machinery or is the lacunae to be found outside the legal framework.

In its preambular phase, this study acknowledged the fact that like all other political processes, the electoral process is influenced by many factors, legal and non-legal. This study has also acknowledged from the very outset that the non-legal elements that ordinarily attend to and influence electoral processes are outside the scope of its coverage.

¹⁴² International Institute for Democracy and Electoral Assistance (International IDEA), International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, 2002. The publication can also be accessed on www.idea.int/publications/pub_electoral_main.html.

It is worthy emphasizing that the legal regime governing elections in Kenya as captured in Chapter 3 of this study, in its prescriptions, frowns upon election malpractices generally and particularly the issue of election violence.

To the extent that electoral processes constitute a legal phenomenon, then, this study concludes that there is by and large no lacuna in the prescriptive elements of the law that would justify the continued prevalence of election violence in Kenya. It is acknowledged that legislative reform ought to be a continuing process for purposes of ensuring that emerging challenges that circumvent the existing law are dealt with.

The study further concludes that to the extent that there is a lacuna in the legal system governing elections in Kenya which contributes to the continued prevalence of election violence in Kenya, then such a lacuna is to be traced to the enforcement machinery in the system.

Having concluded that election violence has continued to prevail due to institutional failure, this study opines that responsibility must be apportioned to the various institutions as they contribute to the problem. Particular responsibility is leveled against institutions that constitute the enforcement machinery under Kenya's electoral laws. The Electoral Commission of Kenya is a body that is vested with immense powers under the Constitution to "promote free and fair elections" and more precisely, under the Electoral Code of Conduct that was promulgated pursuant to the National Assembly and Presidential Elections Act. This study established that if the Commission were to flex its muscles and enforce the provisions of Regulations 8 and 9 of the Code of Conduct, indulgence in election violence would have been an expensive affair to those who engage in it. Political participants would find it difficult to take such expensive risks.

This study also apportions blame to the office of The Honourable Attorney General that has never, in documented multi-party electoral history, exercised its powers under Section 44(2) of the Constitution of the Republic of Kenya to commence proceedings in the High Court of Kenya to determine the question whether a person has been validly elected as a Member of the National Assembly. Such omission in an era where election periods have been punctuated by documented incidents of election mal-practices points at institutional inertia on the part of the office of the Honourable Attorney General. It is a

failure to utilize the institutional powers and mandate to contribute to a culture of free and fair elections.

The third enforcement institution that has been a major hindrance to the realization of violence-free elections is the judiciary. Both the High Court and the Court of Appeal have espoused suspect jurisprudence and handled electoral matters in a manner that elevates technicality of the law to the level of fetish. The failure to speed up the rate at which electoral disputes are resolved also minimizes the risk of sponsoring and even outrightly participating in electoral malpractices and electoral violence.

The fourth enforcement institution that also must share in the blame is the Kenya police. The Kenya police is the primary body that is charged with the responsibility of maintaining law and order. The existence of violence during electoral periods is the very anti-thesis of order. In the premises the fact that the many documented incidents of electoral violence is not matched with a corresponding number of persons arraigned before courts for involvement in such crimes reflects institutional failure on the part of the police force.

It is common knowledge that the nuances of election malpractices vary from time to time. In future, therefore, reform of the existing law may be necessary to guarantee free and fair election. However, this study confirms the hypothesis that as things stand now, the continued prevalence of election related violence has been caused, not by non-existence of good laws, but a failure of the enforcement institutions to uphold the law with the consequence that the ideals of the rule of law and free and fair elections have been compromised.

6.2 Recommendations

Having come to the above conclusions, this study proposes a number of practical measures as away of institutional and other reform within the framework of the existing laws.

6.2.1 Recommendations for reform at the Electoral Commission of Kenya

The Electoral Commission of Kenya, in addition to setting up disciplinary committees as it did during the 2002 General Elections, should exploit and utilize its powers under the Electoral Code to make it very risky and expensive for any political player, participant or

fanatic apprehensive of the immediate consequences of engaging in acts of violence. This study recommends that, as a matter of urgency, The Electoral Commission of Kenya should seek to cancel the right of the offending candidates or political parties to participate in the elections in question or to disqualify the offending candidates from the list of candidates in the election in question.

6.2.2 Recommendations for Judicial Reform on electoral matters.

As a matter of legislative reform that is geared to enhance judicial participation in securing free and fair elections, the National Assembly and Presidential Elections Act ought to be amended to set limited and defined timeframes within which Election Petitions and the appeals arising therefrom ought to be heard and determined following the conclusion of the election exercise. This would be in consonance with the practice in other neighboring jurisdictions like Uganda. This study proposes that a time frame of six months to complete the whole process of petition and appeal would be reasonable for Kenya.

Since securing legislative reform in Kenya in the post-multi-party Kenya has proved a difficult venture, it may be advisable for the Chief Justice to set up special divisions of the High Court to perform the functions of election courts immediately following the conclusion of electoral exercises. Such divisions may operate on *ad hoc* basis immediately following the conclusion of a General Election.

It may also be necessary to create workshops and other training for judicial personnel on the significance of the judiciary in the democratic process so that judicial officers handle electoral disputes with the democratic philosophy in mind.

6.2.3 Recommendations on Police reform

It is emerging as a commendable administrative practice that whenever there is notorious conduct that touches on issues of law and order, special units are set up in the police force with a specific mandate to deal with the specific crime. This is done either on permanent or *ad hoc* basis. In the same spirit, it is recommended that special units in the police force be established during electoral periods to deal with matters of electoral mal-practices. To avoid creating administrative impasses in the flow of commands, the unit will remain

under the overall command of the Commissioner of Police. The Commissioner of Police may through an administrative understanding with the Electoral Commission of Kenya procure specialized 'in-service' training of the officers under the unit on the electoral process and electoral laws. This will create special expertise in investigating trends of election violence and the persons involved.

It is also advisable that the entire police force be trained on electoral matters so that the law enforcement agencies get imbued with their impartial role in handling issues of a political character.

6.2.4 Recommendations for reforms at the State Law Office

This study proposes that the State Law Office should set up a special unit for handling electoral matters and equip it technically, by way of in service training, with special knowledge on electoral matters. Such officers should be able to work in harmony with the Electoral Commission of Kenya and the police force with a view to utilizing collective public resources to stamp out electoral violence.

6.2.5 Recommendation for continuous civic education on electoral matters

Creating a culture of respect for the rule of law and free and fair elections cannot be a one season affair- it cannot be brewed like instant coffee. Paradoxically, in Kenya, civic education on electoral matters only becomes a theme in the public domain during electoral seasons.

To evolve the above ideal culture, it is recommended that both the Electoral Commission of Kenya and civil society organizations should make civic education on electoral malpractices a continuous exercise.

6.2.6 Recommendations for a strong election observation culture

Election observation has the capacity to appeal to the conscience and political participants who will not want to be perceived as illegitimate leaders. Proper election observation can also provide credible and independent evidence on the question whether a person has been validly elected as a Member of the National Assembly or any other electable office. If a culture of election observation is entrenched in the electoral

management system by the Electoral Commission coming up with standardized criteria of ascertaining the impartiality of observers and, further, of ensuring that there are as many observers in the field as possible, this may make it risky for anyone who wishes to create violence.

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