



By Nelson Havi



Confronted on his excesses, abuses and disregard of rights of the people of France, Louis XVI responded, "*L'etat c'est moi*", "I am the State". That was in 1715. Louis was tried by the people and executed. Four centuries later, Zaire's Mobutu Seseko repeated Louis' "royal liturgy" to a French journalist. Mobutu went further; he pronounced himself God. Mobutu fled and died in exile.

Entitlement is a malaise that afflicts absolute rulers. It thrives where law is what the ruler decrees it is; not the people, through their Courts. Where the peoples' sovereign franchise prevails, and truth, justice and the rule of law governs the affairs of man, there is tranquility.

World attention today focuses on the Supreme Court of Kenya. The Court will, for the second time in a row, hear and rule on whether President Uhuru Kenyatta was validly elected for a second term. Just as in 2013, the suitor is former Prime Minister Raila Amolo Odinga. Raila says he has "*given the Court a second chance to redeem itself.*"

On 13<sup>th</sup> August, Raila protested the declaration of Uhuru as winner, accusing the Independent Electoral and Boundaries Commission (IEBC) of subverting the will of the people, not once, but for the third consecutive time and substituting it with the dictate of a minority ruling elite.

Having initially vowed not to contest it in Court, but rather through other means, he claims that a crackdown on human rights organizations expected to do that necessitated the change of tact.

What is Raila's case? How did Kenya end up here? Is there cause for concern or alarm on the Court? Will the Court decide otherwise than before and with what consequences?

## Case summary

The petition claims that *“the Presidential Election was so badly conducted and marred with irregularities that it does not matter who won or was declared as the winner of the Presidential Election...Instead of giving effect to the sovereign will of the Kenyan people, the IEBC delivered preconceived and predetermined computer generated leaders.”*

The IEBC is accused of interfering with the Kenya Integrated Elections Management System (KIEMS) and unilaterally disbanding the Elections Technology Advisory Committee (ETAC).

Whereas people voted, the IEBC did not count and tally the results. It adopted Joseph Stalin’s principle, *“It is enough that the people know there was an election. The people who cast the votes decide nothing. The people who count the votes decide everything.”*

Evidence in support of the case is contained in a voluminous record of over 25,000 pages. The evidence supports 12 main issues.

The IEBC is accused of interfering with the Kenya Integrated Elections Management System (KIEMS) and unilaterally disbanding the Elections Technology Advisory Committee (ETAC).

KIEMS is a single unit electronic platform. It was intended to ensure that voters are biometrically identified, and polling results transmitted and declared in a simple, accurate, verifiable, secure, accountable and transparent manner. These tenets of a free and fair election are anchored in the Constitution and the 2017 amendments to the Elections Act.

It is alleged that the IEBC had, through a proxy, sought to declare unconstitutional the law that requires biometric voter identification and electronic transmission of results from polling stations to the Constituency Tallying Center and the National Tallying Center. The case was filed by a third party against the IEBC but through a lawyer who is on the advisory panel of the IEBC.

Though not determined at the time of the elections, Raila believes that the case was filed with the connivance of the IEBC to sabotage the integrated, electronic electoral management system. He claims that the manipulation of the system resulted in a permanent pre-set 11% margin between him and Uhuru. It is Raila’s position that the outcome of the case would, as did the manipulation of the system, countermand the requirement for finality of results declared at 290 Constituencies established under the Constitution.

The finality of Constituency results was affirmed by the Court of Appeal. It would remove the risk of rigging at the National Tallying Center as recommended by Judge Johann Kriegler in his report following the disputed 2007 elections.

The ETAC’s function was to advise on adoption and implementation of election technology. It entailed the participation of stakeholders, in this case, candidates and political parties in the elections. In a Judgement made on 15<sup>th</sup> June, 2017, the High Court held that the requirement for a professional audit of the voter register 6 months before the election was overtaken by events. The Court further declared unconstitutional, the law establishing ETAC.

It is Raila’s complaint that being a stakeholder he ought to have been notified of the proceedings leading to the disbandment of the ETAC and that the IEBC intentionally failed to defend the case properly. As a result, the disbandment compromised the transparency of IEBC’s preparation for the

elections. The IEBC then monopolized the management of the electronic voter system to the exclusion of other players. This, it is claimed, enabled manipulation in the transmission of results that could not be independently verified.

The IEBC is also accused of intentionally supplementing its server on a private cloud. The decision was made contrary to advice from the Communications Authority of Kenya. KIEMS became vulnerable to intrusion and manipulation.

Raila claims that 2 days to the elections, the IEBC designated 11,000 polling stations outside 3-4 G network coverage. There was not sufficient notice or time for Raila to appoint his agents in those stations. Results from those stations account for over 7.7 million votes and cannot be verified in the manner prescribed by law and intended by KIEMS.

The IEBC is also accused of intentionally supplementing its server on a private cloud. The decision was made contrary to advice from the Communications Authority of Kenya. KIEMS became vulnerable to intrusion and manipulation. The murder of IEBC's ICT Manager Chris Msando a few days to the election is claimed to have been planned. His password or information obtained from him were used to infiltrate KIEMS, create and relay computer generated results.

Uhuru is accused of unduly influencing and inducing voters with 2007/2008 post-election reparation payments, hurriedly launched projects and advertisement of his administration's achievements. He is said to have intimidated voters in his campaigns with military deployments and outright threats on public servants. A widely publicized incident in Makueni where Chiefs were threatened is cited. Uhuru is alleged to have used state resources and State Officers, in particular Cabinet Secretaries, to actively solicit for votes contrary to law.

Raila's agents are also said to have been ejected from polling stations in Central Kenya and Rift Valley. It is claimed that they were replaced by those procured by Uhuru's Jubilee Party. Massive manipulation of results is claimed to have ensued as a result.

KIEMS was designed to transmit results from polling stations to the Constituency and the National Tallying Centers simultaneously with electronic images of Forms 34As. It would also enable electronic transmission of final results from the Constituency level to the National Tallying Center. Form 34A is the official declaration at the polling stations whilst Form 34B is for the Constituency declaration.

However, provisional results are alleged to have been transmitted from polling stations to the National Tallying Center, bypassing the Constituency Tallying Centers. The results were not accompanied by Forms 34A and 34B. The results were said to be provisional, again, in disregard of the Court of Appeal decision. 10,000 stations with 5 million votes were affected. The complaint by Raila is that this was a precursor to the rigging of the election in favour of Uhuru.

Further, the petition claims that scrutiny of spoilt and rejected votes would reveal that nearly 400,000 votes were deducted from Raila and added to Uhuru. It is alleged that the manipulation and doctoring of Forms 34A and 34B means another 7 million votes cannot be authenticated.

Raila states that the declaration of a winner was made prematurely in the absence of 11,883 supporting Forms 34A and 187 Forms 34B. 3.5 million votes are affected. He also wants the Supreme Court to go against the precedent it set in 2013 and have rejected votes, this time numbering 477,196 or 2.6% of votes cast, considered when ascertaining whether the Constitutional threshold of 50% plus 1 has been crossed.

## **The great trek**

Kenya gained internal self-rule and political independence from the then British Empire 5 decades ago. The Union Jack quickly came down. The Kenyan flag was hoisted. Jomo Kenyatta was appointed Prime Minister by the colonial Governor-General and one year later declared President by parliament. The Lancaster Constitution did not provide a term limit for the Presidency. The leader of the dominant political party was appointed President by acclamation in periodic parliamentary elections, whose occurrence he controlled. Kenyatta being the leader of the Kenya National African National Union (KANU) party would rule for life, for 15 years. Kenyatta was succeeded by Daniel Arap Moi. Moi ruled for 24 years; 14 for life and 10 on a 5 year term.

In 2013, Raila challenged the election of Uhuru. The Supreme Court jettisoned all evidence before it. It then proceeded to dismiss the Petition, in reliance upon decisions from Nigeria, Gabon and Uganda.

The British had an elaborate law for periodic election of their Prime Minister back at home. They saw no need for the same in Kenya, or any of their former colonies which did not have established political systems in place. With the exception of India, which embraced democratic rule at inception, former British colonies suffered absolute leadership until after the collapse of the Soviet Union and the second liberation in the 1990s.

In the intervening period, a change in government in the Commonwealth was effected in two ways only; a coup or the natural or unnatural death of the President. Determinations by Courts on the legitimacy of the regimes were unheard of.

In Uganda, Judges declared unconstitutional the government of Idi Amin upon the overthrow of Milton Obote. They were killed on the same day. Whitehall often supported similar governments in the entire Commonwealth. Without periodic elections, there was no precedent for a Presidential Election Petition.

The clamor for change saw to the re-introduction of multi-party politics in 1992. Moi won the Presidential Election despite a determined opposition wave. A Petition by Kenneth Matiba was dismissed by the High Court and Court of Appeal without a hearing. The requirement for personal service upon Moi and signature of the Petition by Matiba, who could not because he was ill, were technical considerations relied upon by the Courts. A petition by Mwai Kibaki upon Moi's re-election in 1997 suffered the same fate. The Courts had no semblance of independence. The President controlled the Courts. A Petition against his election was doomed to fail.

The 2003 election of Kibaki was not challenged in Court; it was not even disputed. Kibaki had defeated Uhuru with a landslide victory. Uhuru had largely been viewed as Moi's project. The people had resolved to overrule Moi's prophesy that the independence party, KANU, would rule Kenya for 100 years.

Kibaki's re-election in 2007 was highly disputed. It is widely believed to have been stolen from Raila. Raila did not go to the Courts as they were controlled by the President. The post-election violence that ensued resulted in the unhappy marriage between Kibaki and Raila. One outstanding achievement of the Grand Coalition Government was the promulgation of the 2010 Constitution. An elaborate process for the period election of the President and determination of a dispute arising from the election was put in place. The Supreme Court was created specifically for this function, with a minimum of 5 and maximum of 7 Judges as quorum.

In the aftermath, radical changes in the Judiciary sent packing Court of Appeal Judges who presided over the Petitions by Matiba and Kibaki. This was a pointer to the Supreme Court that the issue of election of the President was not that simplistic and legalistic. It is one that must be considered on the wider public interest, to uphold the popular will of the people and the Constitution.

In 2013, Raila challenged the election of Uhuru. The Supreme Court jettisoned all evidence before it. It then proceeded to dismiss the Petition, in reliance upon decisions from Nigeria, Gabon and Uganda. These countries, unlike Kenya, had experienced the full brunt of authoritarian military rule. Their Courts could not be objective. In fact, this was the first time a Kenyan Court took refuge in decisions from such countries.

The 2013 decision set an unreasonably high standard and burden of proof. It was not different from Matiba and Kibaki earlier decisions. The legal fraternity in Kenya and worldwide has condemned, trashed and shelved it as bad law. The Supreme Court could be forgiven for arriving at the decision since the Constitution was nascent and barely 2 years old. The Court itself was only a year old. Though composed of highly learned minds, three of the Judges, including the President of the Court, were in their novitiate, having been appointed from outside of the Judiciary and with limited or no courtroom experience at all. This was their first election petition they were handling and were confounded by the magnitude of the exercise and perhaps scared of the consequences of their decision. They may have played safe and sacrificed truth, justice and the law.

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The Supreme Court's image has since then been dented by credibility concerns. Unconcluded investigations for bribery involving one of the Supreme Court Judges demonstrated that the Court was susceptible to manipulation and compromise. It does not better the case when two Senior Counsel who accused the Judge, as well as an Advocate who was alleged to have conveyed the bribe as well as the Judge's Advocate, a senior counsel, will act together for some of the parties in the current Petition.

That thwarted attempts by President Kenyatta to have a final say in the appointment of the Chief Justice, who is the President of the Court, publicly played out during the retirement case for two of its Judges, both matters again involving the three Senior Counsel cannot be overlooked. In his election campaigns in Kisii, Uhuru recently stated that he had appointed their son the Chief Justice. The Judicial Service Commission quickly refuted this claim and reiterated its independence from the Presidency. It was too little too late. The damage had already been done and aspersions cast. There is therefore, profound merit in Raila's call for redemption.

### **Collective success or failure of the Court**

The 2017 Petition will be decided in a polarized setting. Both parties are on record, attacking the judiciary whenever a decision goes against them. Several Judges of the High Court and Court of Appeal recused themselves from pre-election cases. They did so out of fear or to escape the badge of bias.

A bench to hear the case by Raila's coalition, seeking that the election be conducted solely on an electronic basis, the IEBC having failed to make regulations for a manual back was constituted of Judges outside the Constitutional Division of the High Court. The Presiding Judge, Odunga had been accused by Jubilee Party of being compromised to rule in favour of the opposition. The Judge and his

other two colleagues in the Division would not feature in subsequent benches set up by the Chief Justice. At the Court of Appeal, three Judges recused themselves on account of their handling of previous electoral cases, real or perceived relations with some of the Advocates or the parties. The outcome is the same. It is an indicator that Courts could still be subject to accusations of manipulation from litigants.

The Supreme Court suffers a numerical disadvantage. It has 7 Judges, all of whom may sit, going by the precedent of 2013. Whereas 5 Judges constitute quorum, it is unlikely that the earlier precedent will be departed from. None can be recused on account of bias, compromise, relations or affiliations with the parties or their advocates. It is, however, troubling that most of these Judges share Advocates with the parties appearing in the petition. It is very untidy. Suspicions of possible bias and compromise cannot be dismissed. This calls for extra caution and vigilance.

There is a popular view that the Judges should declare their interests if any and possible conflict. The Judges should write their individual decisions. Indeed, that is the practice in the Commonwealth. It was the practice adopted by the Court of Appeal until recently, when it appears to have been abandoned. The only way to ensure judicial fidelity and interrogate judges' Jurisprudential Quotient, is to test their individual decision-making abilities. They should not hide in the cocoon of collective success or failure. This conduct amounts to judicial laziness.

### **Repeat performance or improvement?**

Approval and dismissal of merits of the petition is as varied as is the public support for Raila and Uhuru. Raila's side perceive a strong case, better than the first one. Uhuru's team consider the case much weaker. Viewed objectively, it is a case of desire for justice on the part of Raila and one of a sure win on the part of Uhuru. This is likely to play out in Court.

The 2017 Petition will be decided in a polarized setting. Both parties are on record, attacking the judiciary whenever a decision goes against them.

The only difference between a Presidential Election Petition and a National Assembly Election Petition is the volume. A Presidential Election is held in all 290 Constituencies. Intriguingly, the Petition must be heard and determined in 14 days. The other Petitions are heard and determined within 6 months.

The Supreme Court does not have the luxury of the High Court. It cannot recount, scrutinize and audit results from all 290 Constituencies. A decision must be based on pillars of "a free and a fair election". International and national public policy must play a role also. The Supreme Court is empowered to depart from its previous decisions depending on the circumstances of the case or change in public policy. It is a delicate balance, but one that can be attained with a National Assembly Election Petition as a simulator.

Interference with KIEMS to transmit and project provisional results or to generate results contravened the Constitution. Such action would have gone against the decision of the Court of Appeal, in respect to the finality of results declared at the Constituency Tally Center. Publication of achievements, use of state resources and threats by a party to an election are election offences. Some of the State Officers are being investigated for possible prosecution. Uhuru's election could be nullified on account of the election offences by his administration.

Massive inconsistencies and discrepancies of results in Forms 34A and 34B and in the IEBC portal could be indicative of manipulation towards a flawed electoral process. The 5 to 7 million votes

claimed to have been affected is such a huge number that cannot be ignored. This limb of the case may be very strong on the fidelity of the electoral process. The demanded forensic examination of IEBC's server and portal would establish whether there is a case. It remains to be seen how the Court will undertake a detailed examination of evidence within 14 days and order scrutiny and recount of votes to verify the numbers. If it does, the truth or falsity of Raila's claim will unfold. The hasty announcement of the winner without the benefit of Forms 34B and before the completion of the tally, affecting over 3.5 million votes is a grave violation. The case seems to be strong on this limb.

The Supreme Court is not handicapped on precedent in the decision to be made. Resort to decisions from other countries alone is unnecessary. There are many locally decided cases that may be of guidance to the Court. Being a Court of law as well as public policy, numerous cases, not necessarily in respect to Presidential Election Petitions are available internationally and locally.

For example, the election of the Member of Parliament for Juja Constituency was challenged in the disputed 2007 General Election. The declared winner was the Chief Government whip for Kibaki's wing in the Grand Coalition Government. Malpractices in the election mirrored those leveled against the election of Kibaki. The then Electoral Commission of Kenya was accused of subverting the popular will of the people and replacing it with a pre-determined choice of the ruling elite. The inconsistencies and manipulation of the declaration of results was so monumental that the election could not be sanitized by either a scrutiny or recount of the votes. The entire process was flawed. The election was therefore annulled.

The High Court pronounced itself thus; *"One may ask why courts should hold an electoral body to a high standard in the performance of its duties. I think if there is any statutory body whose actions should be considered to be above the board and which should perform its duties to the required standard of integrity and probity, it should be the electoral commission. The electoral commission has a duty to inculcate and imbue confidence in the electorate that its process is transparent, free and fair."* Raila's claim of manipulation of the entire electoral process would be based on principles set out in this decision. If the process is flawed, numbers or margin of difference between two candidates does not matter. The election may be invalidated without the need for scrutiny or recount of the votes.

Of the election petitions subsequent to the 2013 elections that of Mathare Constituency attained distinction, in electoral law. The winner was from Raila's Orange Democratic Movement. The loser, from Uhuru's The National Alliance had been awarded the certificate. The High Court dismissed the petition. It held that results declared at the Constituency are not final and may be altered by the Chairman of the IEBC.

When called upon to review the issue, the Court of Appeal affirmed the finality of the declaration at the Constituency as the will of the people. The Court of Appeal held that it could not declare the claimant winner and directed that fresh election be held.

The dispute found its way to the Supreme Court. The decision by the Court came fast, crisp and sharp; *"Apart from the priority attaching to the political and constitutional scheme for the election of representatives in governance agencies, the weight of the people's franchise-interest is far too substantial to permit one official, or a couple of them, including the Returning Officer, unilaterally to undo the voters' verdict, without having the matter resolved according to law, by the judicial organ of State."* The case supports Raila's plea on finality of results declared at the Constituency level and fidelity of the process attendant to the declaration. It also buttresses the position in law that the IEBC cannot subvert the popular will of the people and replace it with that of a ruling elite.

That the petitioners in the two cases referred to won the by-elections that followed goes a long way to demonstrate how the electoral process can be subverted to defeat justice.

The complaint of use of State Officers and resources for campaign is one that Uhuru will be hard put to defend. It is well documented and publicly known. There is evidence in the Petition that the entire Government machinery from top bottom was deployed to campaign for Uhuru with threats to those perceived to rally behind the opposition. These events were concentrated within the campaign period and cannot be said to have been part and parcel of normal Government administrative duties.

The Public Officer Ethics Act and the Election Offences Act prohibit State Officers from engaging in politics, yet these Officers actively campaigned for Uhuru and defended their actions as part of Government business. Prohibited also is the advertisement of achievements for political gain. Raila has a strong case on this ground, supported by precedent.

The election of Moses Wetang'ula as Senator for Bungoma in 2013 was invalidated by the High Court. The decision was upheld by the Court of Appeal and the Supreme Court. The Courts found that the offences of bribery and voter treating had been proved and were sufficient to warrant the annulment of the election. In the words of the Supreme Court, *"Moreover, we take judicial notice of the centrality of elections in the functioning of established governance bodies, as signaled by the Constitution in both general and specific terms. On that principle alone, a party found on fact to have befouled the electoral process, cannot maintain an argument that his or her offence may not be declared, save alongside that of other parties."* If Raila convinces the Court that Uhuru breached the law on the campaign trail, the Court could invalidate the election on the basis of this decision.

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The case by Raila will have to be examined on the basis of these principles. If established, the Supreme Court would order a fresh election. The case could be dismissed if the evidence does not support the complaints before the Court.

The Austrian Court overturned results of election in which Alexander Van der Bellen narrowly beat far-right candidate Norbert Hofer for electoral malpractice. A South Korean court removed the President from office for abuse of office. The *Brazilian senate impeached Brazilian President Dilma Rousseff* for illegally manipulating government accounts. The Pakistan Supreme Court stripped the Prime Minister of his office, for corruption. Here in Kenya, former Deputy Chief Justice Nancy Baraza was removed from office for misbehaviour for merely pinching the nose of a security guard. The bar on integrity has been set high locally and internationally. The Court may be persuaded to use these out of court processes in arriving at a decision.

A majority of Kenyans feel that a minority ruling elite has since independence, acting through unlawful means, denied other regional and ethnic communities the legitimate opportunity to rule. That feeling may prevail, irrespective of whatever legally acceptable or meritorious outcome is to be made by the Court. It may be high time that a rotational presidency, on the basis of the 8 main regions or provinces Kenya was demarcated and administered from independence, is considered, if the law of winner takes it all will forever be used or abused.

The Supreme Court has many references for direction in determining whether the popular will of the people of Kenya was ousted. Its decision must be based, not only upon evidence and the law, but international and national public policy. *"Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws"*, said Plato. The Court must ensure



that leaders act responsibly, without circumventing the law.

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