



By Apollo Mboya



If there is a jurisdiction that the Justices of the Supreme Court of Kenya curse is the court's exclusive original jurisdiction to hear and determine presidential election petitions. It is both legal and political but politics reign supreme.

In a highly divided country, the court will be doomed whichever way it rules. Former Chief Justice Dr. Willy Mutunga, conscious of the impact of "political jurisdiction" on the courts, expressed his frustrations in a public forum that courts ought not handle election disputes but instead politicians should "deal with their own shit" elsewhere.

In his dissenting opinion in *Bush v. Gore*, Justice Stevens, underscoring CJ Mutunga's thinking sympathized with the Supreme Court of the United States and indeed the judiciary following the highly disputed 2001 election dispute between George Bush and Al Gore opining as follows:

Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Although SCOTUS does not have exclusive jurisdiction on presidential election dispute as Kenya's, *Bush v. Gore* has been the court's sore thumb that is thought to have led to a "court generated president". Erwin Chemerinsky in his book *The Case Against the Supreme Court* notes:

Bush v. Gore obviously cost the Supreme Court in terms of credibility. More than forty-nine million people who voted for Al Gore, and likely almost all of them regard the Court's decision as a partisan

ruling by a Republican majority [judges] in favour of the Republican candidate. Few cases, if any, in American history have been more widely perceived as partisan than Bush v. Gore.

Raila Odinga took President Uhuru Kenyatta and the Independent Electoral and Boundaries Commission to the Supreme Court claiming that he did not fairly lose the 8 August 2017 presidential election to the incumbent. Raila Odinga had similarly petitioned the court following 2013 presidential election and the court dismissed his case. He had no kind words for the court following the infamous 2013 decision and in fact he had indicated that he would not challenge this year's election outcome in the Court. However, in an interesting about turn, he has filed a petition which, in his own words, gives the Court a chance to "redeem itself".

In May 2015, the Judicial Service Commission concluded that the three were guilty of conduct unbecoming of them as Judges of the Supreme Court which amounted to misconduct. However, JSC decided that the misconduct did not warrant a recommendation to President Kenyatta to appoint a Tribunal for their removal as prescribed by the Constitution.

The crux of Raila Odinga's petition is that the election was just but a fraud. He argues that the election was incapable of being verified, the technology was interfered with to give a constant lead to President Uhuru Kenyatta from the onset, the election results do not tally and the Uhuru Kenyatta used the forceful hand of state to steal victory. The Petition also asked the court to depart from its 2013 decision, more particularly on the issue of rejected votes; that the rejected votes, which in this election amount to over 2% of the total votes cast ought to be included in computation of whether the winning candidate attained the 50% plus one vote threshold. The petition was vigorously opposed by the IEBC and President Kenyatta.

The court's composition has not significantly changed since 2013 election petition- four out of the seven justices and therefore the majority, sat in the 2013 election petition which rendered unanimous decision validating the election of President Uhuru Kenyatta. On 9th October 2015 I lodged a petition with the JSC accusing three of these judges -Honourable Justice Mohammed Ibrahim, Honourable Justice Jackton B. Ojwang and Honourable Justice Njoki Susanna Ndungu- of misconduct by withdrawing their services to the people of Kenya by imposing a moratorium on all the judicial operations seemingly in protest over decision of JSC to retire Justice Kalpana Rawal (Deputy Chief Justice) and Justice Philip Tunoi. In May 2015, the Judicial Service Commission concluded that the three were guilty of conduct unbecoming of them as Judges of the Supreme Court which amounted to misconduct. However, JSC decided that the misconduct did not warrant a recommendation to President Kenyatta to appoint a Tribunal for their removal as prescribed by the Constitution. The JSC only resolved to admonish them, which decision is currently being challenged in the courts over whether the JSC has powers to admonish a judge in such circumstances.

Following the Presidential Elections conducted on 8th August 2017, Hon. Raila Odinga and the National Super Alliance (NASA) Coalition lodged a petition against the declaration by Independent and Boundaries Commission (IEBC) declaration of Uhuru Kenyatta as the duly elected president. The hearing of the Petition was concluded on Tuesday, 29th August 2017 well after 9.00 p.m. The Judges thereafter retreated to deliberate on the following issues for determination as crafted by the court:

- Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.
- Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election.

- If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?
- What consequential orders, declarations and reliefs, if any, should be granted by the court?

In a majority decision of the six-judge bench delivered on 1st September 2017, with two Judges (Ojwang and Ndung'u) dissenting, the court ruled in favor of the petition as follows:

- As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections, upon considering *inter alia* Articles 10, 38, 81 and 86 of the Constitution as well as, Sections 39(1C), 44, 44A and 83 of the Elections Act, the decision of the court is that the IEBC failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the Constitution and *inter alia* the Elections Act, Chapter 7 of the Laws of Kenya.
- As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the IEBC committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgment of the court. The court however found no evidence of misconduct on the part of Uhuru Kenyatta.
- As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire Presidential Election.

Consequent upon the above findings, the Court, pursuant to Article 140(2) and (3) of the Constitution and Rule 22 of the Supreme Court (Presidential Election) Rules , issued Declarations and the Orders as follows:

- *that the Presidential Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;*
- *that Uhuru Kenyatta was not validly declared as the President elect and that the declaration is invalid, null and void;*
- *That IEBC to organize and conduct a fresh Presidential Election in strict conformity with the Constitution and the applicable election laws within 60 days of this determination under Article 140(3) of the Constitution.*
- *That each party to bear their own costs of the petition.*

The Court also indicated that detailed Judgment containing the reasons for its decision and the dissents will be issued within 21 days of the decision in conformity with Rule 23(1) of the Supreme Court (Presidential Elections) Rules, 2017 as it was impossible with the limited time the court has, to do so.

Over the course of the next few weeks, much ink will be poured to try and understand this decision. And while facts, evidence and law are what judges are trained to pay attention to, a particular judge's prejudices, biases, jurisprudential leanings, political associations and philosophy and even religious or cultural convictions will also influence their decisions. The Court is, however, fairly young and hasn't rendered enough decisions to enable a keen follower to meaningfully discern each particular judge's reasoning or the general court's leaning. Below I will attempt to analyze each of the seven justices in the hope of contributing to the understanding of this decision and what it portends for the future.

However, it is also to be hoped that, unlike in 2013, each judge -or at least most of them, given Justice Ibrahim's illness- will write their own separate opinions. That would help to enrich our election law jurisprudence and enable scrutiny of particular judge's jurisprudential bias.

Chief Justice David Maraga

David Maraga is the Chief Justice and President of the Supreme Court, he will preside over the petition. He comes with solid understanding of and experience in the law both in the bar and the bench. His most remarkable election petition decision is the often cited *Joho vs. Nyange*. He also chaired the Judiciary Committee on Elections immediately before his appointment as Chief Justice. His knowledge on electoral disputes is therefore undoubted.

Maraga CJ is therefore the quintessential High Priest of the Court. He can be equated to Pontius Pilate and he wouldn't convict without sufficient and cogent evidence.

Maraga an ultra-conservative in his persuasion and leaning. Raila will have tabled cogent evidence to convince him to overturn the presidential election. He is a new vote and voice in the court having taken over from Honourable Justice Dr. Willy Mutunga who presided over the 2013 petition.

He is also unapologetic Adventist. In his interview for the position of Chief Justice, he said that if a presidential election petition runs into Saturday, he will excuse himself and attend to his religious obligation. Even in his judgments, he doesn't shy away from showing his pious side. For example, in a troubling 2007/2008 Post Election Violence murder case of *Republic v. Stephen Kiprotich Lelei & 3 Others* (2009) where he was a trial judge, he invoked his responsibility as a judge of evidence, facts and law even though he sympathized with the victims of the case given that the prosecution mismanaged the case. He proceeded to declare that "it is a responsibility that my family and I have prayed over for divine guidance". Before the Judges and Magistrates' Vetting Board where he had been accused of nepotism and corruption, he dramatically swore by the bible that he had never taken and would never take a bribe.

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Deputy Chief Justice Philomena Mwilu

Like Maraga CJ, Justice Philomena Mwilu is a new vote to the Court having been elevated to the apex court at the same time. She has risen through the ranks from High Court judge through the Court of Appeal although her rise to the Supreme Court almost hit a snag when Kandara legislator Hon. Alice Wahome made scandalous but unfounded corruption allegation against her in an election petition where she, Hon. Alice Wahome was a party with Justice Mwilu presiding.

Because of her position and little known history, Justice Mwilu can safely be said to be a centrist who was always likely to vote with the majority the Court.

As the Deputy Chief Justice, she is the *de facto* leader in the judiciary. She is also a diplomat and operates efficiently within the ranks. Justice Mwilu is also young and able to succeed Justice Maraga who is due to retire in less than four years.

While she is a good case manager, she has not authored a zinger of an opinion that can make one attribute her inclinations in jurisprudence. Because of her position and little known history, Justice Mwilu can safely be said to be a centrist who was always likely to vote with the majority the Court.

Justice Mohammed Ibrahim

Justice Mohammed Ibrahim is the third-ranking member of the Supreme Court being the senior most jurist. Before joining the bench, Judge Ibrahim was a successful practitioner and he suffered in the second liberation struggle when he was detained for activism. His comrades in arms include his former law partner Paul Muite SC, Gibson Kamau Kuria SC, Dr. John Khaminwa and Raila Odinga.

His most famous decision was the anti-piracy case while serving in the High Court at Mombasa when he declared that the state had no powers to charge pirates who had been arrested beyond Kenya's territorial waters. The case would later be overturned in the Court of Appeal where interestingly Justice Maraga wrote the lead judgment.

In the Supreme Court, he has authored progressive opinions, both concurring and dissenting. For example, in the case of *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate & 4 Others* (2013) where the Court was invited to depart from or review its earlier decision in *S.K. Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* on the constitutionality of section 14 of the Supreme Court Act, Justice Ibrahim was the sole dissenting voice of the court who thought that the court should depart from its earlier decision. Though he was taken ill during the Raila Odinga petition, the request for the Court to depart from its 2013 decision on the issue of rejected votes may have found favor with him.

In the same case, he wrote an illuminating concurring opinion on the issue of recusal of Hon. Justice Tunoi from the matter on account of bias and conflict of interest. Justice Ibrahim profoundly wrote about the doctrine of necessity, that due to the numerical limitation of the Supreme Court, it would not be appropriate for a judge to recuse himself. He however flipped when confronted with the same issue in *Lady Justice Kalpana H. Rawal & 2 others v Judicial Service Commission & 6 others* [2016] eKLR, the retirement age case, a self-preservation decision.

When there was a crisis in the post Mutunga hand over, Justice Ibrahim temporarily acted as the Chief Justice. Although he sat in 2013 petition, Justice Ibrahim is a liberal. If convinced with sufficient evidence to overturn a presidential election, he would have had little difficulty doing so.

Justice Prof. J.B Ojwang

Justice J.B Ojwang is the fourth-ranking member of the Supreme Court, with possibly the highest ranking academic title in laws. He earned the accolades on merit and was consequently awarded with the title Doctor of Laws.

Justice Prof. Ojwang has authored a book titled *Constitutional Development in Kenya: Institutional Adaptation and Social Change*. In the book, he developed an argument that constitutional development in Kenya should adapt to "development needs and its practice should be flexible enough to allow for appropriate institutional innovations to take root". Such innovations would include "charisma" by the presidency as legitimate source of extra-legal legitimacy. While the good professor of law had freedom of intellectual and scholarly expression, this work did not sit well with his colleagues in the academia such as Prof. Kivutha Kibwana, the current Governor of Makueni County and others. He was seen as an apologist to the state excesses and he has not proved otherwise.

Outside the text of the law, Justice Prof. Ojwang has been accused of a bad temperament not befitting a judge.

Although he began his career in the bench as a progressive, Justice Prof. J.B. Ojwang is now an entrenched conservative. He sat in the infamous 2013 petition and that he was one of the dissenting

judges in the 2017 petition comes as no surprise. He would not have been expected to depart from his earlier opinion unless a legal miracle happened.

Outside the text of the law, Justice Prof. Ojwang has been accused of a bad temperament not befitting a judge. This was evident during the retirement age case and his interview before the Judicial Service Commission for the position of Chief Justice. The good judge is unapologetic about his views, he regards himself highly and rightfully so just like the lizard that jumped from the high Iroko tree in Chinua Achebe's *Things Fall Apart*.

Justice Suzanna Njoki Ndungu

Justice Njoki Susanna Ndungu is the fifth member of the Supreme Court and the other judge to pen a dissent. She has served in all the three branches of government. Before joining the court, she had served a term as a nominated Member of Parliament through former President Mwai Kibaki's led NARC after a stint of activism. While in Parliament, she sponsored the acclaimed Sexual Offences Bill which was subsequently supported by government and later became law. This is her signature legislative achievement.

Justice Ndungu was also a member of Committee of Experts which crafted the Constitution of Kenya 2010. In the Supreme Court, she has distinguished herself as a patron saint of dissenting opinions having authored the highest number of persuasive dissenting decisions thus far including Advisory Opinion No. 2 of 2013, *Speaker of the Senate & another v. Hon. Attorney General & Others* (2013) eKLR on the role of senate and *Evans Odhiambo Kidero v. Ferdinand Waititu & Others* (2014) eKLR on timelines on filing an appeal on an election dispute from the High Court to the Court of Appeal. Her dissenting credentials were on show there.

Justice Ndungu stayed a decision of Court of Appeal on retirement of former Deputy Chief Justice Kalpana Rawal and Justice Philip Tunoi which highly divided the Mutunga Court. Together with Justice Prof. J.B Ojwang, she dissented in the retirement age case. Despite her activism background and young age, she is widely perceived as loyal to the system. She sat in the 2013 petition and would not have been expected to easily overturn a presidential election.

Justice Dr. Smokin Wanjala

Justice Dr. Smokin Wanjala is the sixth member of the Supreme Court. He joined the court after his stint as a director of the defunct Kenya Anti Corruption Authority, the predecessor of Ethics and Anti-Corruption Commission. He was also active in civil society and had a distinguished academic career.

In examining Justice Dr. Wanjala against high achievements in the academia, civil society and government, we apply the biblical doctrine of "for those that much is given, much is expected." Justice Dr. Wanjala sat in the Mutunga Court's 2013 petition where he did not pen his own opinion. He should therefore be judged with the others in that case and other decisions of the Court including the *Munya* case which recreated the constitutional doctrine of jurisdiction in the name of "normative derivative" and opened wide the Supreme Court door to limitless jurisdiction to preside in all electoral disputes.

In his last interview for the position of Chief Justice, Justice Dr. Wanjala stated that he does not wish to sit in another presidential petition and yet found himself in the same spot. Justice Dr. Wanjala is young and has possibly three more presidential petitions ahead of him. He is an over-cautious liberal and would have been a significant vote on the outcome of the petition.

Justice Isaac Lenaola

Justice Isaac Lenaola is the youngest member of the Court and has at least another twenty years ahead in the Court, should he be granted long life and choose not to retire early. He is likeable and he may be the Chief Justice someday.

He comes with solid credentials and is a first among equals. Justice Lenaola has been a judge in the High court where he made his mark, the East African Court of Justice and the Sierra Leone Special Tribunal. There are numerous bold decisions that he has delivered and worthy of note is the judgment delivered by the East African Court of Justice which barred the Tanzanian government from constructing a road through the Serengeti national park and therefore interfering with the East African ecosystem. He recently ruled against the state in the case of Hon. Kenneth Matiba as an indictment against torture and awarded his family the sum of Kshs. 504 Million.

In his interview for the position, he says he is a pragmatic liberal. Justice Lenaola can be persuaded depending on the evidence presented by either side.

He is therefore a true jurist in the form of Justice Warren Burger. He is a practical liberal with a pinch of common sense. In his interview for the position, he says he is a pragmatic liberal. Justice Lenaola can be persuaded depending on the evidence presented by either side.

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