

Deciding Elections in Africa: Comparative Role of the Courts and the Ballot Box in Nigeria and Kenya

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ABSTRACT

Democratic sustenance is critical to democratic stability and the conduct of free, fair and credible elections is logically instrumental to institutionalizing the democratic culture in Africa. Post election peace is an obvious sign of this libertarian competitive process to power. There are signs of resilient progress along this continuum in Africa and a necessary facilitator of this process is the court system because democratic elections represent a contest that its outcome could be subject to legal challenges. This paper argues that shifting to the courts to decide election outcomes is not to substitute the ballot box with the judiciary as the principal mechanism for conferring victory but to underscore the relevance of the rule of law in the institutional process of post-election peace building. Contemporary electoral experiences in Kenya and Nigeria offer useful insights into the role of the courts in affirming democratic principles and mechanisms for entrenching democratic peace through merit based judicial outcomes rather than the resort to technicalities that seek to uphold 'injustice' rather than the triumph of the ballot choice already established through the sanctity of elections. Electoral laws of evidence should be amended to shift the burden of proof to the respondent so that substantive justice can be achieved rather than seeking refuge in technicalities that should not be the prime issues in dispute.

Keywords: democratic peace, elections, judiciary

INTRODUCTION

Sustainable democracy is crucial to democratic stability. At the Centre of this nexus are elections which fundamental qualities of free and fairness enhance their credibility as a mechanism for mediating competition for elective office. Thus free, fair and credible election forms the cornerstone of institutionalizing a democratic culture that upholds transparent and accountable electoral process, within the framework of the rule law. Free and fair elections are therefore the cornerstone of liberal democracy and the primary mechanism for activating the principle of sovereignty of the electorate. Through elections citizens also actively participate in the governance process by deciding who earns their consent to rule. Elections are therefore an indispensable attribute of liberal democracy (Iwejuo, 2011) and institutionalizing the peaceful conduct of free and fair election is essential toward democratic sustenance and stability

The African continent has continued to grapple with the challenges of conducting credible election given that election outcomes in different countries have been very contentions. The experience of Nigeria and Kenya are very illustrative as the 2007 and 2011 elections in Kenya and Nigeria respectively indicate. This contention arises from the way in which elections are conducted and which are usually characterized by obvious irregularities. Electoral misdemeanor is common place in Africa and the examples of elections in Nigeria and Kenya have revealed malpractices such as rigging and violence. Ballot stuffing and snatching,

underage voting, violence and intimidation of voters, over voting and in extreme cases voting does not occur at all yet results are declared (ICG, 2002)

Electoral outcomes are declared as decided by the electoral body or the judiciary. While it is theoretically fashionable to attribute electoral outcome to the ballot box as the basis for declaration of results by an electoral umpire, where such outcomes are disputed, the judiciary is called upon to adjudicate thereby underscoring the centrality of the principle of the rule of law in mitigating electoral competition. The role of the judiciary is contextual and considered as the last resort, otherwise the ballot box should be the ultimate arbiter between contestants.

The primary purpose of the judiciary is to serve the ends of justice in matters that are being disputed. In election cases, the judiciary should ensure that contestants and the electoral umpire operate on the basis of the rules of the game so that no one is short changed. In dividing electoral disputes the judiciary is expected to uphold both the spirit and the letters of the law with emphasis on serving the ends of justice. This is not to substitute the ballot box with the judiciary. The examples of disputed electoral outcomes in both Kenya and Nigeria reveal the context of the role of the judiciary in deciding electoral outcomes. To enhance post-election peace, and reduce chances of acrimony over election outcomes, it is expected that a free and fair election should be characterized at a minimum by the existence of an independent and none partisan electoral organization to conduct the election. Such a process should have a mechanism for the enforcement of the rights and protection of basic freedoms of citizens as provided by the constitution. In addition, the process must be guided by rules and regulations outlined in subsisting electoral laws. For equal access to the public, a balanced reporting in the media is emphasized. To achieve credibility, the process is expected to be transparent and open especially regarding the ballot counting procedures. With the end of peace in consideration, an electoral process should not be disrupted by coercion, violence or intimidation of candidates or voters (Warsame, 2008).

Whether in Nigeria or Kenya, post-election peace building is connected to the quality of judicial outcome on electoral disputes. In Nigeria as in Kenya, public trust in the judiciary had waned in the last two decades especially in relation to courts decisions on election and corruption matters. For example, when the judiciary fails to serve the end of justice by resulting to technicalities then post-election peace building is in danger as much as democratic sustenance and stability. This is the thesis of this paper which begins with an introductory comment on the role of the judiciary in mitigating electoral competition. The context of electoral disputes in both countries and a review of the essence of the principle of the rule of law in a democracy and the overall impact of judicial decisions on post-election peace-building are examined in succeeding sub-sections. The nuances and influential dynamics of the judiciary and electoral competition shall be tied in the conclusion with policy options.

Exemplars of Electoral Disputes in Kenya and Nigeria

Minimum standard violation of electoral rules by an electoral umpire or contestants that lead to declaration of questionable election results naturally provides the basis for disputation that may end up in courts. For example the general elections in Kenya have been characterized by impunity and chaos especially in the last twenty years. Nigeria's electoral experiences since 2003 are also cast in similar mould. The 2007 general election in Kenya in particular was the most contested in the country's recent electoral history. There are over 70 ethnic groups in Kenya. They range in sizes. The Kikuyu constitute 20% of the country's population. The Kikuyu, Luo, Luhya, Kamba and Kalenjin all account for 70% of Kenya's population and are considered as the country's ethnic majorities. The Masai, Meru, Kisii, Mijikenda and the rest are minorities

in Kenya including EL Molo 500 population (African Study Centre, 2012). Kenya's 2007 general elections were mired in this complex and acrimonious ethnic polarization. Against the background of this ethnic tension, what followed the declaration of the 2007 election results was nearly two months of ethnic driven killings and destruction of property. The violence caused the death of over 1,200 and 600,000 displaced persons (Ngege, 2015). With this outcome, Kenya's 2007 election was considered the darkest moments in Kenya's history. The violence was precipitated by the claim that the presidential election was rigged and the aggrieved parties refrained from going to court to resolve their dispute because they did not trust the judiciary as a neutral arbiter (Warsame, 2008). Afterwards though, the opposition headed to the constitutional court for litigation.

Similarly, Nigeria's 2007 election were, recorded as the worst in terms of electoral irregularities. The elections were massively rigged, poorly organized and characterized by violence (ICG, 2007). The 2011 elections were an improvement but the outcome resulted in the worse post-election violence in Nigeria's troubled electoral history. When the result of the elections were declared in favour of the People's Democratic Party, the opposition Congress for Progressive Change (CPC) supporters took to the streets in protest of the result alleging widespread rigging. The violence that ensued led to the spontaneous killing of over 1000 people, displacements and wide spread destruction of public and private property (Orji and Uzodi, 2012, ICG, 2011, Genyi, 2015). The opposition CPC challenged the results in the courts again expecting the judiciary to decide the elections rather than the ballot box.

The Rule of Law in a Democracy

The right to vote and be voted for is fundamental to liberal democracy. This entitlement as an expression of constitutionalism is not guaranteed by the provision for regular elections. It is guaranteed by the independence of the courts to uphold the rule of law. Democracy and the rule of law are therefore desirable attributes of a stable political system in which basic rights can flourish including the right to vote and be voted for.

Minimally, democracy requires that government be constituted through the consent of the majority of the people given through election of representatives on a broad franchise (Genyi, 2010). In addition to effective functioning of representative institutions, democracy upholds the efficacy of fundamental principles of the rule of law and respect for fundamental human rights. The right to vote and be voted for is a key aspect of the rule of law as it resonates with the notion of equality before the law. This is the foundation upon which democracy rests (Annan, 2004). Thus, democratic rule ensures peaceful articulation of demands and resolution of competing claims between individuals and groups on the basis of equality before the law (Genyi, 2010). These are democratic values that can only be realized where an independent judiciary is functional. The independence of the judiciary is fundamental to an effective democracy. The justiceable resolution of electoral claims is therefore possible only where the judiciary is separated from the other arms of government. Where this is practicable, the judiciary ensures the subordination of government to citizens so that voters can claim ownership of their government. Put differently, the ability of an independent judiciary to ensure that democracy subordinates government to the citizens aptly expresses the notion of the electorate as a sovereign. Judicial independence is critical to the extent that in its absence it is difficult for individuals and groups to prevent the state from infringing on their rights. It is to this extent that judicial independence is considered the lifeblood of constitutionalism (Abuya, 2014). It is the independence of the judiciary that allows the courts to play a pivotal role in the protection and promotion of voting rights. Courts do this when they exercise the responsibility to determine the validity of an election. Where rights are violated remedy is granted. The

decision by aggrieved parties in an electoral dispute to approach the courts for redress is based on the confidence that judges have the independence to determine cases based on well-established principles and provisions of law. Confidence in the judiciary is critical hence public perception of bias by the judiciary must be reduced to the barest minimum if not totally eliminated altogether in the event of an electoral dispute. The implication of a lack of confidence in the judiciary for a democracy has been emphasized by Justice Katju of the Indian Supreme Court cited in Abuya, (2014, p.6) thus;

It is of utmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action.

This reality is the recognition that the judiciary has a key role to play in the democratization process, respect for the rule of law by guaranteeing people's rights and enhancing respect for democratic institutions and processes (Ngenge, 2015).

To achieve peace after an election, it is important to have in place a robust electoral justice system to ensure that all election-related matters are addressed in accordance with the law and the constitution. The survival of a democracy is heavily predicated on this premise without which post-election peace building will be difficult.

Electoral Justice System in Kenya and Nigeria

Since the return of multi-party democracy in Kenya in 1992 and Nigeria in 1998, the democratic process has been guided by law. The independent Electoral and Boundary Commission (IEBC) of Kenya and Nigeria's Independent National Electoral Commission (INEC) are guided by the constitution and various electoral laws. The constitutions of both countries have been variously amended to accommodate electoral issues. In Kenya for example, constitutional reforms were passed in 2010 while in Nigeria, the 1999 constitution was amended in 2009 while the electoral law was also amended in 2010. These amendments formed part of the broader framework for electoral reform in Nigeria. These reforms were designed to improve the integrity of elections and the democratic system.

Suffice to note that Nigeria's 2003 and 2007 general elections raised a lot of questions on the integrity of the country's democracy. There was then the urgent need to evolve a comprehensive legal framework that would henceforth guarantee the "independence and integrity of the electoral process, promotes consistency and equality in electoral management" (Report of the Electoral Reform Committee, 2008, p.112). To this extent the country's constitution and the electoral Act needed amendments.

Amendments in the Constitution and the Electoral Act that related to the role of the judiciary in elections bordered fundamentally on election petitions. Between 2003 and 2007 Election Petition Tribunals have been inundated with petitions by 'defeated' candidates. For example, the 2003 and 2007 elections recorded 574 and 1475 petitions respectively. It became difficult to dispose all these petitions in record time without compromising justice. To compound matters, after judgment, parties that lose at the Tribunal usually would choose to go on appeal. In an analysis of 426 judgments in 2007 across the country, 96 petitions were successful, 222 failed for lack of merit while 108 were dismissed on technicalities (FGN, 2007).

To expedite the dispensation of justice in election petitions the 1999 Constitution was amended to provide for filing of petitions within 21 days after elections were declared. The lower Tribunal was given 180 days to conclude petitions and 60 days for appeal at the appellate courts. In addition, the number of judges sitting on cases at the tribunal was reduced from 5 to 3 (Ojo, 2010). However, by saddling the burden of proof on the petitioner and swearing-in of executive office holders and legislators before the conclusion of cases against them, Nigeria's democracy risked being by court order awarding victories rather than the ballot box. Timelines in election petitions address expedition in proceedings without compromising justice. But as the situation in Nigeria has shown, they represent a major technicality exploited by Tribunals to award victories in elections rather than the ballot box. Deciding elections by the courts or the ballot box is at the heart of the critical question of whether aggrieved candidates at elections would invoke the court process in seeking justice in a perceived flawed election. In Kenya two issues influence the decision to go to court.

First, it takes between 1 – 4 years for election cases to be disposed at first or second instance. Like in Nigeria, candidates declared winners by the electoral umpire are sworn in while cases against them are still in courts giving them advantages of financial stability in funding cases against them. Second, there is a general lack of confidence in the Kenyan judiciary to resolve satisfactorily election petitions independently and impartially (Abuya, 2014). The opposition, the Orange Democratic Movement (ODM) in 2007 believed that it was not possible to obtain justice against the ruling party in Kenyan Courts seen as instruments of the State. It was this lack of confidence in the judiciary by the ODM led by Raila Odinga that resorted to public protest against the results of the 2007 election in which the party lost. What followed were ethnic based killings that led to the death of over 1000 persons (Kakwanja, 2008). In Nigeria, Zimbabwe and Kenya and other African countries, the judiciary is heavily challenged by the loss of public trust. The passage of the referendum for amendment of Kenya's constitution in 2010 shored up the confidence in the judiciary as reflected in the 2013 general elections. The simplification of the procedure of removing judges and the involvement of the parliament in appointment are amendments that sought to improve the independence and impartiality of the judiciary.

With the return of confidence in the judiciary due largely to the judicial reforms, the ODM headed for the courts after its defeat at the 2013 polls. The decision by defeated Presidential Candidate Raila Odinga to challenge the result of the election in court was a major shift from 2007; when he lost in another disputed election and rather called for protest because the courts could not be trusted (Lough, 2013). The result of the 2013 Presidential election in Kenya awarded victory to Uhuru Kenyatta with 50.07% of votes against Raila Odinga's 43.31% (Nyenge, 2015). Following his defeat, Odinga headed for the Supreme Court to Challenge the results in the face of the absence of a valid voter registration process and the failure of the electronic system that was hacked. In other words, the entire elections were challenged for not been free, fair, transparent and credible. The court was to also determine whether the rejected votes ought to have been included in determining the final tally of votes. The Supreme Court ruled that while the elections were imperfect, they were not heavily devoid of merit or so distorted as not to reflect the will of the people of Kenya therefore the results were upheld. While the case was not decided on technical grounds, the burden of proof of flawed elections was beyond the petitioner. In Kenya, at any time, it would be difficult to prove on a scale of probability against a sworn-in President in matters of flawed elections (Maina, 2013). Raila Odinga rejected the Supreme Court ruling and stated that it was compromised and that IEBC had successfully orchestrated massive rigging and in collaboration with the Supreme Court had stolen his mandate (Miguna, 2013). Few low scale protests trailed the court's ruling

underscoring the ethnic tension between the Kikuyu and the Luo majority groups. Post-election peace building in Kenya in 2013 was possible though because the court avoided technicalities except where necessary and examined the issues in fact, law and principles of the constitution. Kenyans accepted the court ruling and looked forward to a new beginning in the spirit of constitutional reforms.

The issues of timelines and other technicalities have also dogged election petitions in Kenya. A total of 188 election petitions were filed after the 2013 general elections on March 4. These Petitions challenged election of governors, Senators, members of the National Assembly and county women representatives. Very few of these petitions were successful. While 17 cases were withdrawn where parties amicably resolved, 31 cases were struck out on technical grounds with timelines as the major reason. A huge percentage of those cases struck out did not meet those deadlines (Kiplagat, 2013). Election petitions were to be filed within 28 days after declaration of results and concluded within 6 months in the first instance. Many of the petitions were disposed of relying on mere technicalities rather than the facts of the cases (Kiplagat, 2013). In this sense, rather than the ends of justice, the courts served to activate democracy by court orders awarding victory in the place of the ballot box and perpetuating injustice.

In Nigeria, election petitions have inundated electoral tribunals since 2003. The 2011 general elections in Nigeria recorded 733 election petitions down from 1475 recorded in 2007 (Adebowale, 2015). The reduction in the number of petitions may be attributed to the improved quality of elections in 2011 or decline in public trust in the judiciary on account its reliance on technicalities rather than consideration of cases on their merit. Where cases are decided on technicalities, justice is often not served, a recipe for violence and instability hence the enormous challenge to post election peace building.

The overwhelming use of technicalities in disposing election petitions in Nigeria's Fourth Republic has been obvious. In many of these cases, the petitioner hardly obtains justice. It was to address this fallacy that the Supreme Court ruled in *Nwobodo V. Onoh* in 1984 that "election petitions are peculiar and different from other proceedings and also very important from the point of view of public policy". Thus, Courts are expected to hear election petitions "without allowing technicalities to unduly falter their jurisdiction" (SC, 1984). In 2008, the Supreme Court reiterated this fact in *Abubakar V. Yar'Adua* when it noted that election petitions are *Sui generis* and therefore should not be influenced by "unnecessary adherence to technicalities" (Okpeseyi, 2012). The Court of Appeal in *Prince Nwole V. Iwuagwu* in 2004 re-emphasized this position that;

In all election matters, the use of technicalities should be avoided. It merely helps to shut the opponent out. It never resolves the basic issues in controversy. Once it is agreed election petitions are in a class of their own, the handling of the matter too must take a form devoid of legal technicalities that tend to leave the litigant more confused.

Despite these established authorities on the way in which technicalities need not be overwhelmingly relied upon in election petitions several election cases have been decided based on technicalities designed to assist a judge in dispensing justice and establishing the truth as election tribunals are meant to do. For instance, the Lagos Governorship election petition in *Agbaje V. Fashola* was dismissed on the question of use of a colour of ink for accreditation of voters other than the one prescribed by the manual for conduct of elections. In this case, the Court of Appeal saw colour as inconsequential. But in *Fayemi V. Oni*, the Court of

Appeal in 2010 nullified Ekiti State governorship elections in 63 out of 177 wards merely because red ink was used for accreditation rather than blue as stipulated in the manual for conduct of elections. It is rather curious that the colour of ink has any influence on loosing or winning election in Nigeria. It is obvious that the decisions in these cases did not serve the end of justice for the petitioner and indeed would have created more confusion and tension.

The governorship election petition tribunals in Benue and Akwa-Ibom States in 2011 also decided cases overwhelmingly on technicalities as well. In both states tension was high and the Courts offered petitioners the opportunity of ventilating their cases. In both cases the elections were challenged on ground of fraud and electoral irregularities. In Benue State for instance, Steve Ugba of ACN challenged the election of Gabriel Suswam alleging that the elections were marred by irregularities and were therefore fraudulent. The ACN candidate in Akwa Ibom state, John Akpanudoedehe also challenged the election of Godswill Akpabio alleging irregularities. In both cases the Court of Appeal had dismissed them based on a technicality that notices of pre-hearing were not properly filed (Soniya and Adedapo, 2011). On appeal to the Supreme Court, the Election Petition Tribunals were ordered to take cases on their merit as they should not have been dismissed on mere technicalities. It appears that judges use technicalities as an easy way out not minding the consequences of such decisions on the course of justice. Rather than painstakingly examine the cases on their merit, the tribunals indulge counsels to respondents in both cases to use all sorts of delay tactics until the cases were dismissed again on another timeline technicality following the expiration of 180days provided by the electoral law (Emeka, 2012).

The preponderant use of technicalities in deciding electoral disputes point to democracy by court orders that awards electoral victories rather than the ballot box. This development certainly does not serve or guarantee electoral justice. Court decisions in electoral matters especially on high profile cases fuel the tendency to resort to other means including violence to achieve justice as the post-election violence in Kenya's 2007 elections and Nigeria's 2011 elections illustrates. The judiciary must consider election petitions based on their merit as cases in their peculiar context for justice to be achieved and peace to reign in a post-election period. This is the way the judiciary can lend support to building a democracy and earn public trust in its role to defend peoples' rights to vote and to be voted for.

CONCLUSION

Elections in Africa are considered a high staked event. The reasons are steeped in material gains and ethnic representation. Winners have guaranteed access to state resources for a steady period and can use their positions to maintain patronage of their client by dispensing favours. It is critical for the political elites to maintain this link of patronage to remain relevant. In the winner takes all form of politics predominant in Africa, losing an election is never an option. So far, elections in Africa as the examples in Kenya and Nigeria have shown are contested using ethnicity as a mobilizing ideology. This ethnic driven contestation looms larger over economic and welfare issues. Winners are portrayed as ethnic champions representing their groups. In complex multi-ethnic societies like Kenya and Nigeria elections are therefore much tensed events which outcome may not be easily accepted by those seen to have lost out at the polls. This fact should not be lost on the judiciary in these countries in ensuring that peace is not only achieved but democratic electoral outcomes that are contested are decided in a manner that that does not disturb peace but consolidate it.

When the ballot box is unable to produce a clear uncontestable winner, the judiciary is called to amicably settle the electoral dispute drawing on evidence in the field during elections. Since

elections are guided by rules and regulations, judges are then expected to be guided by law to establish the truth on the basis of evidential merit of each case. When parties head for the court the tension contestants and their supporters bear during election is carried forward to the post-election period hoping to be assuaged by the outcome of electoral petition. When the judiciary leans far too much on technicalities to dispose petitions, very often justice is not served and the tension that election had generated may explode into violent protest. In both countries, the tendency to use technicalities in settling electoral disputes has been high and the threat to post-election peace-building has been felt.

Electoral disputes are unique and deserve special attention with an eye on their policy implications. Electoral laws and laws of evidence should be amended to shift the burden of proof to the respondent so that substantive justice can be achieved instead of merely observing technicalities. To further enhance the course of justice, no elected person should be sworn in before the determination of an electoral case subsisting against such an individual. This will eliminate the remote or immediate possibility of influence on the court process. These measures promise to enhance post-election dispute settlement and consolidate democracy through the ballot box rather than by court orders.

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