60 Days of Independence

Kenya's judiciary through three presidential election petitions

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Journalists for Justice (JFJ) works to promote a balanced discussion of national and international criminal justice systems in the media and to advocate justice and reparations for victims.

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Aluta Continua!

Foreword

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

-- Constitution of Kenya 2010

This right is loaded. It demands that every dispute be resolved. That resolution must be by application of the law. That every hearing be fair. That every court be independent. That every court be impartial. But this has often been a bridge too far for our courts.

Since the Constitution of Kenya 2010 came into force, the judiciary has continued to be the bulwark against executive excess and legislative tyranny, thanks to the independence it enjoys. Yet, the greatest test of the judiciary's independence has come from its adjudication of election disputes – especially the presidential ones – because its decisions have either reduced the courts' public support or provoked frontal attacks from powerful interests. For the first time in Kenya's history, a president publicly attacked the country's highest court and named the judges he was displeased with in the aftermath of the September 1, 2017 decision to annul the results of the August 8 election.

The annulment of the presidential election, the first on the African continent, is this report's take-off point in assessing judicial independence in Kenya, while also exploring factors undermining it over time.

Several ongoing intrigues – among them the May 2015 to 2016 retirement age disputes, the post-September 1 petitions to the JSC and the petitions for the removal of five Supreme Court judges – have not only tested the integrity of the judiciary but also presented accountability moments for the institution.

The Judicial Service Commission's handling of integrity deficits in the judiciary has not been always consistent. The judiciary went through an elaborate and extended vetting process – but still, there have been individuals moving up the ranks in the institution who should not have been serving in the judicial system.

The timelines for the Supreme Court to determine presidential election petitions continue to present a significant challenge. Disputes over lower level elections settled in the High Court, which has more time to supervise recounts and scrutiny, are ending up in the Supreme Court and destabilizing jurisprudence.

More significantly, the institution's social utility is in crisis: despite the Supreme Court noting significant problems with the electoral management body in 2013 and again 2017, little has occurred to suggest that desired change is on the way.

"I believe that the more you know about the past, the better you are prepared for the future." Theodore Roosevelt

Time for reforms is nigh. Electoral reform. Political reform. Judicial reform. Institutional reform. All-round reform!

Samwel Mohochi
Executive Director, ICJ Kenya

List of Abbreviations and Acronyms

AG	Attorney General
CJ	Chief Justice
DCJ	Deputy Chief Justice
EACC	Ethics and Anti-Corruption Commission
FIDA	Federation of Women Lawyers in Kenya
ICT	Information and Communication Technology
IEBC	Independent Electoral and Boundaries Commission
JCE	Judiciary Committee on Elections
JSC	Judicial Service Commission
JWCEP	Judiciary Working Committee on Elections Preparation
KIMS	Kenya Integrated Election Management System
KMJA	Kenya Magistrates and Judges Association
KYSY	Kura Yangu Sauti Yangu
LSK	Law Society of Kenya
MPs	Members of Parliament
NASA	National Super Alliance
TNA	The National Alliance

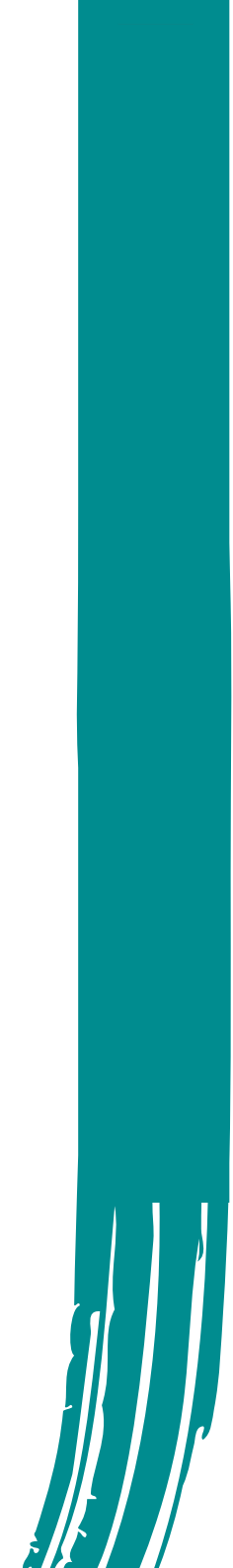
List of Cases

1. In the Matter of Interim Independent Electoral Commission [2011] eKLR: Federation of Women Lawyers Kenya Article 50: fair hearing (FIDA-K) & 5 Others v the Attorney General & Another [2011] eKLR
2. John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR
3. Centre for Rights Education and Awareness & 2 others v John Harun Mwau & 6 Others [2012] eKLR
4. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR
5. International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others [2013] eKLR
6. Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR
7. Philip K Tunoi & Another v Judicial Service Commission & Another [2014] eKLR
8. Kalpana H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR
9. Justice Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR
10. Maina Kiai & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR
11. Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) e KLR
12. Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another [2017] e KLR
13. John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR
14. Njonjo Mue & Another v Chairperson of the Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR

Timeline

August 18, 2017: Raila Odinga and Kalonzo Musyoka file a petition seeking to nullify the results of the August 8, 2017 presidential election.
August 25, 2017: Supreme Court convenes pre-trial conference and subsequently grants orders for scrutiny.
September 1, 2017: Supreme Court votes 4-2 to annul results of the August 8, 2017 presidential election and orders the Independent Electoral and Boundaries Commission to conduct a fresh election within 60 days.
September 1, 2017: Uhuru Kenyatta addresses the nation saying he disagrees with the court's decision but will respect and uphold the rule of law. Later at a rally at Burma Market in Nairobi, he verbally attacks judges of the Supreme Court and calls them crooks.
September 2, 2017: Kenyatta meets Governors and Members of County Assemblies affiliated to the Jubilee Party at State House where he declares that he had a problem with the judiciary and he would revisit that agenda.
September 3, 2017: The Kenya Judges and Magistrates Association and the Kenya Judiciary Staff Association warn politicians against threatening judicial officers.
September 14, 2017: Nyeri Town MP Ngunjiri Wambugu files a petition to remove Chief Justice Maraga from office for gross misconduct.
September 15, 2017: Kenyatta asks MP Wambugu to withdraw the petition against CJ Maraga
September 19, 2017: Jubilee supporters hold demonstrations outside the Supreme Court while accompanying the delivery of a petition by Angaza Empowerment Network's Derrick Malika Ngumu seeking the removal from office of Deputy Chief Justice Philomena Mwilu and Judge Isaac Lenaola for alleged gross misconduct and breach of judicial code of conduct. They also burn an effigy of the Chief Justice.
September 19, 2017: CJ Maraga, flanked by members of the Judicial Service Commission, addresses the media on aggression against the judiciary culminating in demonstrations outside the Supreme Court. These demonstrations bordered on violence and were meant to intimidate the judiciary and individual judges, he says. Senior political leaders, he adds, had also threatened the judiciary, promising to cut it down to size and teach its leaders a lesson. "On our part, we are prepared to pay the ultimate price to protect the Constitution and the rule of law," he says.
September 20, 2017: Supreme Court delivers its full judgment on the nullification of the August 8, 2017 presidential election, together with two dissenting opinions by Justices JB Ojwang and Njoki Ndungu.
October 5, 2017: IEBC chairman Wafula Chebukati files a petition at the Supreme Court seeking clarity on his role in election results verification.
October 9, 2017: High Court Judge John Mativo dismisses a petition seeking to restrain

IEBC from overseeing the fresh presidential election.
October 17, 2017: Supreme Court issues an advisory opinion as sought by Chebukati re-stating that he cannot correct errors in the election results forms.
October 17, 2017: IEBC commissioner Roselyn Akombe flees to New York.
October 18, 2017: Akombe resigns from IEBC saying: "The Commission in its current state can surely not guarantee a credible election on October 26, 2017."
October 23, 2017: Samwel Mohochi, Khelef Khalifa and Gacheke Gachihi file a petition in the Supreme Court seeking to postpone the fresh presidential election. CJ Maraga certifies the matter as urgent and orders the petitioners to serve all the parties, which includes the IEBC and all the presidential candidates. He sets the full hearing for October 25, 2017 before all the seven judges of the Supreme Court.
October 24, 2017: Cabinet Secretary for Interior and Coordination of National Government declares October 25, 2017 a public holiday to allow people to travel to where they usually vote.
October 24, 2017: Deputy Chief Justice's police bodyguard is shot and wounded.
October 25, 2017: CJ Maraga announces that the Supreme Court is not able to raise the quorum of five judges – one judge had been taken ill; another travelled out of the country; the Deputy CJ was unable to come because of the attack on her bodyguard the previous day; another judge could not find a flight back to Nairobi; and yet another could not be traced. That left only the CJ and Justice Lenaola.
October 25, 2017: High Court judge George Odunga, sitting with the CJ's permission since it was a public holiday, declares the appointment of returning officers for the fresh election illegal but suspends his own order indefinitely.
October 25, 2017: President of the Court of Appeal constitutes a three-judge bench to review Judge Odunga's decision that the appointment of returning officers for the fresh election was not legal. Judges Erastus Githinji, Fatuma Sichale and Martha Koome set aside the judgment and declare that the appointment of the returning officers and their deputies is not invalid.
October 26, 2017: Fresh presidential election is held.
October 30, 2017: IEBC chair Wafula Chebukati declares Kenyatta elected as president
November 6, 2017: Njonjo Mue and Khelef Khalifa – alongside John Harun Mwau -- file a petition to annul the results of the fresh presidential election.
November 20, 2017: Supreme Court upholds the results from the October 26, 2017 fresh presidential election.
December 11, 2017: Supreme Court issues reasoning for its decision upholding the results of the October 26, 2017 presidential election.



Prologue

Chief Justice David Kenani Maraga cut a lonely figure on the morning of October 25, 2017, as he sat in Court No. 4 at the Supreme Court building. It was the eve of the repeat presidential election ordered by the Supreme Court after nullifying the results of the August 8, 2017 vote.

That fresh election would have to occur within 60 days of nullifying the results of the previous one as provided for in the Constitution. After October 30 when the 60 days elapsed, the country would enter uncharted territory if the election was not held.

A day earlier, the Cabinet Secretary for Interior and Coordination of National Government, Dr Fred Matiang'i, had suddenly declared October 25, 2017, a public holiday to allow people to travel to their voting areas. The Chief Justice had already set October 25 as the hearing date for Petition 17 seeking to postpone the repeat presidential election, and he was not walking back on that. The public holiday created another problem. There were judgments scheduled for delivery in the High Court – especially one a petition questioning the legality of gazetting returning officers for the repeat election.

The Chief Justice not only gave special dispensation for the courts to sit on the new public holiday but also decreed that the Supreme Court would hear Petition 17 seeking to postpone the fresh election.

Outside the courthouse on Nairobi's Wabera Street, the sun glinted off anti-riot trucks blockading the entrance to the Supreme Court and police in combat gear waiting inside for a confrontation.

Chief Justice Maraga began to speak slowly, explaining that other than himself, Justice Isaac Lenaola was the only other Supreme Court judge in the building. One judge could not be accounted for and another could not find a flight back to Nairobi. Justice Mohamed Ibrahim who had been taken ill during the August hearings was back in hospital. The Supreme Court was unable to raise the quorum of five judges to hear the matter, even though it was listed for hearing before the seven justices.

The night before, two gunmen on a motorcycle had stopped next to Deputy Chief Justice Philomena Mwilu's official car. One man peered inside and saw the passenger seat was empty. He then walked round to the police driver in the car who had just picked up a bouquet of flowers for the DCJ and began shooting. The florist nearby claimed the gunman's accomplice had urged him to kill the police driver after the first shot, which was followed by two more.

The Chief Justice looked tired as he spoke in court on October 25, 2017. He and his deputy had been at the hospital by the police driver's bed until 1.30 am. The 37-page petition seeking to postpone the fresh election was still unread.

The shooting denied the court time to prepare for the hearing. The petition by Khelef Khalifa, Samwel Mohochi and Gacheke Gachihi had been filed the previous afternoon, on October 24, 2017, when the petitioners were ordered to serve the other parties. Although no formal investigation has been conducted into why the court could not raise quorum on October 25, 2017,

it has been claimed that some of the judges received threats that prevented them from spending the night in their homes. Kenya's excitable social media scene was rife with unverified rumours on the whereabouts of judges.[1]

The shooting incident occurred at the end of a dramatic day that had seen the Internal Security minister declare October 25 a public holiday, but still, the Chief Justice allowed Justice George Odunga to read his judgment in the case challenging the legality of how returning officers had been appointed. Judge Odunga's judgment declared that the gazettement of the returning officers was illegal but held the effect of his judgment in abeyance, meaning that it would not affect the following day's repeat election.[2] Still, the Attorney General managed to appeal the judgment on the same day and obtain orders.

Even though the Supreme Court had been unable to quorate in the morning, the President of the Court of Appeal assembled a three-judge bench after official hours on a public holiday to receive the appeal, hear it and issue orders. Lawyer Apollo Mboya filed a petition with the Judicial Service Commission seeking to establish if the conduct of the judges had been above reproach. It is one of 12 petitions against judges at the JSC.

After Raila Odinga withdrew his candidature from the repeat election, a petition was filed in court seeking orders to start the process anew. The petition flowed from the 2013 Supreme Court judgment in which the judges had opined that the death or withdrawal of a candidate after the nullification of a presidential election would reset the calendar and trigger a new electoral cycle. Although this was not an issue any of the petitioners had raised in 2013, the Supreme Court had offered its opinion at the urging of Attorney General Githu Muigai, who had been admitted to the case as amicus curiae (friend of the court).[3]

The state had made it clear that the October 26, 2017 repeat election would go ahead as planned. The Independent Electoral and Boundaries Commission (IEBC) was trundling along, trying to scrape together an election after the Supreme Court's rebuke, and the security services were on high alert for any disruptions on account of the opposition's call for boycotts.

Beneath the bluster, there was a great deal of restlessness – especially within the international community, most of whose representatives in Kenya had burnt their fingers by casting their lot with observer missions that gave the August 8 election a clean bill of health. Anxious not to have their noses bloodied a second time, they spent considerable effort trying to obtain a reading of the Supreme Court in terms of whether or not it was minded to stop the repeat election. United States ambassador to Kenya Robert Godec paid a courtesy call on the Chief Justice in an effort to get a reading of what would come.

1 https://twitter.com/robertalai/status/911148241470857217

2 Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another [2017] e KLR

3 Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR

Even the usually reticent Chief of Defence Forces, Samson Mwathethe, came forward four days to polling to say that the country would have an election on October 26 despite that very question still pending before the court. Remarkably, the military had been mentioned adversely in the 2013 election in connection with the deployment of 150,000 troops to 'maintain peace' or suppress protests against electoral fraud. In the run-up to the August 8, 2017 elections, the opposition National Super Alliance (NASA) released documents detailing military plans to cut off water supply and transport voting materials. Although the official military spokesperson confirmed the authenticity of the documents, he claimed that they had been quoted out of context. Against this backdrop, Mwathethe's statement and the police unresponsiveness to the judges' concerns about personal security signalled the likely sinister involvement of the security services in the country's elections. Matters were not helped by the failure to conclusively investigate the targeting of Justice Mwilu's bodyguard.

Another question about the repeat election confronted the Chief Justice: to vote or not to vote. One candidate had withdrawn; another candidate had pushed on regardless.

Sitting out the vote could be disastrous. It could tip public perception of the Chief Justice's leanings and open up a new front for his detractors to attack him. If he voted, it might seem like fidelity to the majority decision to have the election done over. How do you call for an election then sit it out? It seemed like the easier option.

Social media meanwhile was awash with scenarios of how the Chief Justice was trying to foment a political crisis in the hopes of ascending to the presidency. One influential blogger painted an apocalyptic scenario, which started with a nullified election and ended with a judicial coup with Maraga as caretaker president. The YouTube video had been viewed more than 100,000 times a few weeks after its publication.

On October 26, 2017, at 1.55 pm, the Chief Justice, accompanied by his wife Yucabeth Nyaboke, was in his rural constituency at Bosose polling station in West Mugirango – 304 kilometres from the Supreme Court in Nairobi and two hours' drive from Kisumu Airport – to cast his vote in the repeat election.

Although the public took note of the judges' absence on October 25, the Judicial Service Commission, which is responsible for protecting the independence and promoting the accountability of the judiciary, has not taken any action to help the judges to explain themselves. Given the stream of threats directed at the judges, the public was largely sympathetic to their circumstances and created a blind spot that allowed for threats to be successfully employed, or for those judges who might have absconded duty to do so.

Anti-corruption crusader John Githongo, who leads the civil society organisation, Inuka Kenya, wrote to the Chief Justice seeking an explanation. "I don't think they understood why we were doing it back then but now the knives are out for them," he says.

Although there may be good reasons for the judges' absence, they have not been made available to the public. The risk remains that voluntary or enforced absence from court to frustrate quorum could become an institutionalised practice.

1. Independence Day

Fifty-five days earlier, Chief Justice Maraga had strode into Office No. 17 at the Supreme Court building, past his two secretaries and into the oak-paneled room the size of a volleyball court.

His gangly six-foot-three frame towered briefly over his oath of office, mounted on the same eye-line as the picture of his swearing-in by President Uhuru Kenyatta behind his high-backed chair, then he began to disrobe — wig first and then gown, but only loosened the bib as he sat down.

Deputy Chief Justice Philomena Mwilu, who had followed him into the office, sat on the visitor's chair opposite him as he began to sign some papers.

She soaked in his praise: "This lady is a brave woman," the Chief Justice repeated a second time in reference to her outspokenness during judges' conferencing on the just concluded presidential election petition.

The strains of celebration wafted through the Chief Justice's open window, but there was also silent grief as the red robes of one judge billowed in the wind and disappeared into the soundproofed silence of a waiting limousine. Kenya had that September 1, 2017 morning entered the annals of history as only the fourth country in the world to annul a presidential election. Before that, courts in only Ukraine, Maldives and Austria had annulled presidential elections. No opposition party in Africa had ever successfully petitioned a court to overturn an election, and the decision would be praised globally as striking a blow for democracy and the rule of law.

Even the World Bank in Washington DC was basking in the glow of the court's decision, highlighting its funding for the Sh16 billion Judiciary Performance Improvement Project.

"Look, in view of all that evidence, and in good conscience, what other decision would I have made and how would I have looked?" the Chief Justice remarked.

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Before the Supreme Court announced its decision, Justice Maraga's phone rang as he walked to his car. It was mere minutes after the judges' conference deciding four-to-two to annul the results of the August 8, 2017, presidential election at the squat Crowne Plaza Hotel in Nairobi. Someone among the bevy of six judges had already called State House with the news to come -- long before it was delivered in open court.

It was not the only information State House had from the judges' deliberations.

Blow by blow descriptions of the discussions had reached State House all week, complete with details of how Deputy Chief Justice Mwilu was reportedly jumping on tables and banging furniture. Once the issues were clear, she would emphasise a point by hitting the table. No sooner had she said something in conference, than an informant would get back to her saying that she was being maligned in State House for her comments.

Outside the courtroom, as the majority decision and the two dissenting opinions were read out and broadcast live on the public screens, there had been a loud explosion of celebration.[4] From inside the building and the institution, it almost felt like a bomb had gone off.

The judiciary had finally come of age –- it was dreamland judicial independence. In the days that followed, judicial officers discussed on their social media pages how they were retaking their oaths of office. Erstwhile critics in the Internet fever swamps were suddenly gushing with praise for the judiciary.

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President Uhuru Kenyatta was visibly angry. He had expected the court challenge on his victory to be a routine ritual that would suffer the fate of the 2013 one, and plans were already in top gear for his swearing in. A day to the 2013 decision, Kenyatta made a disparaging remark about waiting for what some six people would decide in relation to the election, and a false news alert on the Kenyatta family-owned K24 TV suggested that the case was lost even before the judgment came in. The 2017 petition was expected to follow the same path.

Then it went horribly wrong.

Just what had changed in four short years? The answers would become clear from the actions undertaken in response to the petition decision.

Kenyatta's first response to the Supreme Court annulling the election was to make a televised address from State House pledging adherence to the rule of law (sic). Later on the same day, he let rip at a rally of his supporters at Burma Market in Nairobi. He called the judges crooks and warned the Chief Justice that now that his victory had been invalidated, he would be dealing with a President and not a mere president-elect.

Still smarting, Kenyatta told a State House meeting the following day that the country had a problem in the judiciary and vowed he would fix it.

"Maraga thinks he can overturn the will of the people," Kenyatta said. "We shall show you in 60 days that the will of the people cannot be overturned by one or two individuals. Tutarudi na tukishamaliza tuta-revisit hii mambo yenu …Tunafanya kazi hii, unakuja unablock, unaweka injunction. Kwani unafikiria wewe umechaguliwa na nani? [After we return from the repeat election, we shall revisit your issues. We cannot be working only for you to frustrate us with injunctions. Who do you think elected you?]"

The tirade signalled the beginning of a political onslaught that would manifestly challenge the judiciary's claim to independence.

In contrast, when the decision to annul the election results came in, Raila Odinga and Kalonzo Musyoka were in court.

4 Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) e KLR

From the court steps, Odinga declared that the decision had vindicated him and pressed his advantage by demanding resignations at the electoral commission as well as irreducible minimum reforms to guarantee a free fresh election. He would later withdraw from the fresh election and call on his supporters to boycott it.

Born to the country's founding president, Jomo Kenyatta, Uhuru had waged many battles in courts at home and abroad, and each time, he had prevailed.

Ranked on Forbes as one of the wealthiest individuals on the African continent, Kenyatta had defeated petitions seeking to stop his candidacy for president, neutered efforts to invalidate his shocking 2013 victory in the presidential election, and watched with amusement as a crimes against humanity case against him at the International Criminal Court (ICC) floundered with witnesses withdrawing or recanting their testimony. He had won every court battle that mattered -- until then.

Among Kenyatta's supporters, the anger was palpable. And it quickly turned into action – Member of Parliament for Nyeri Town Ngunjiri Wambugu petitioned the Judicial Service Commission (JSC) to remove Chief Justice Maraga from office for alleged gross misconduct. He accused the Chief Justice of instituting a 'judicial coup' with a view to seizing political power. The petition to the JSC came only a day after Members of Parliament (MP) from Kenyatta's Jubilee Party announced during a Senate debate that they planned to pass a series of laws to limit the powers of the judiciary on elections. Kenyatta prevailed on Ngunjiri to withdraw the petition.

Within a week, a loud demonstration by Jubilee Party supporters was accompanying Derrick Malika Ngumu to the Supreme Court as he lodged a petition with the JSC to remove Justices Mwilu and Lenaola from office. The petition accused the two judges of gross misconduct and breach of the judicial code of conduct for allegedly being in contact with the petitioner's lawyers during the hearing of the August 8 presidential election petition.

As it were, cell data from a mobile phone mast had shown that the numbers of some of the judges who live in the area were in the same radius as those of politicians who patronised a popular bar in the area.

Although social media trolls in the run-up to the petition had focused on a picture of Justice Njoki Ndungu enjoying a drink with Jubilee Party officials, it was apparent that the judges who had joined the Supreme Court in 2016 -- Maraga, Mwilu and Lenaola -- were seen as providing the bulwark that upset the 2013 jurisprudence. Justice Lenaola had threatened to sue over the allegations, but JSC dismissed the petition for lack of merit.

Kenyatta and Odinga's reactions to the nullification appeared to be knee-jerk and tactical rather than strategic. The nullification appears to have surprised both protagonists, with the result that they were grappling with how to deal with loss and victory, respectively. As the court drank in praise for its courage and independence, the attacks against some of its judges began to crystallise in coherence.

The opposition began to expect more decisions along the same lines, and the angry government saw the court as a stalking horse for the opposition that might well issue more damaging decisions if not checked.

The majority judges had not thought that they were in any danger. They were convinced of the soundness of their decisions and how they arrived at them; they felt that they could defend them. After all, they had not cited Kenyatta for anything untoward. Although the judges understood the President's anger for what it was — a normal human reaction, they took comfort in the public support that they received. Yet, that public goodwill lulled them into underestimating the hostility they were going to face.

They had also not found anyone in IEBC culpable for any wrongdoing. The decision to annul the election results was a huge rebuke to electoral commission's conduct, but it stopped short of finding the commissioners and staff culpable. The commission's chairman invited the director of public prosecutions to investigate any of his staff found to have done wrong. Save for a few low-level officials at the polling station and constituency level who allegedly tampered with the elections, no charges have been preferred for illegal acts committed in the August 8, 2017 polls. Because the judges had not faulted individuals at the IEBC or the President for wrongdoing despite acknowledging the existence of "irregularities and illegalities", they felt safe because they had not crossed the invisible line of power.

The electoral commission had admitted that it declared a winner before receiving all the results forms. Five days after the announcement of the election winner, the petitioners had only received 5,105 forms, with a promise from the electoral commission to send over the rest as soon as they were received.

Still, there was a surge of attacks on the judiciary. Public demonstrations against the Supreme Court judges were held in Nyeri, Eldoret and Nairobi. The demonstrations targeted the Chief Justice in particular, with some protestors burning his effigy. Within the public sphere, an explosion of coordinated fake news, hash tags, videos and social media postings targeted the judges and the courts. The most enduring was a play on Kenyatta's reference to the judges as wakora [crooks], hence the hash tag, #WakoraNetwork. Although Kenyatta has not repeated that reference to the judges as crooks, the term took on a life of its own.

On September 19, 2017, a day before the judges were due to deliver the reasons for the determination in the petition, the Chief Justice stood on the steps of the Supreme Court flanked by members of the Judicial Service Commission.

He pointedly criticised the Inspector General of Police, who he said was not taking judges' calls. Judges had requested increased security but they were being ignored. "If leaders are tired of having a strong and independent judiciary, they should call a referendum and abolish it altogether. Before that happens the judiciary will continue to discharge its mandate in accordance with the Constitution and individual oaths of office," he said.

The judges had never faced as much pressure as they did in the aftermath of the decision; they had no experience dealing with the Executive at close range, and nothing could have prepared them for the backlash.

It was a sobering moment as the Chief Justice said that he was willing to pay the ultimate price to protect the Constitution. Maraga was considered an insider, beloved by entrenched interests who hoped that he would apply brakes on the reforms train but he had little experience in playing the long game with the Executive and the Legislature.

The constant attacks were eroding whatever social capital the Supreme Court had built up with the September 1 decision. As public support for the Supreme Court grew lukewarm dampened by politician's criticism of the judges as having gone rogue, so too did the spirit that had imbued the court before the election nullification begin to wither.

By October 1, when Supplementary Budget Estimates were published to accommodate the costs of the fresh presidential election, the Judiciary budget had been slashed by Sh1.95 billion or 11.1 per cent.

The judiciary's budget had previously been increasing progressively from Sh3 billion in 2009/10 to Sh7.5 billion in 2011/12 before reaching a high of Sh16 billion in 2015/16. As other sectors continued to receive increased budgetary allocations, the judiciary's Sh31 billion but was instead allocated Sh17.3 billion.

At the height of emotions over the Supreme Court's annulment decision, the ruling coalition demanded to make changes to the Judicial Service Act to change the procedures involved in the appointment of judges. The National Assembly passed amendments to the Election Act barring the courts from opening up ballot boxes to scrutinise voting tallies.

A shaken IEBC was so uncertain of itself that it filed a petition seeking the Supreme Court's advice on its role in verifying election results. The court ruled in its October 17, 2017 advisory opinion on what it had said in its September judgment, that the IEBC chairman could not correct errors on the vote tallying forms.

Kenyatta's anger became manifest on an evening of carousing in September 2017 when his long left hand cut the air towards the cheek of a senior aide, producing a loud report. His security detail stepped in to prevent the Sagana State Lodge from turning into a scene of crime. Kenyatta has never since repeated his reference to the judges as crooks.

There had been rumours of an attempt to compromise the Chief Justice with a Sh500 million bank transfer ahead of the petition had failed, but it seemed spurious and farfetched.

As the year wound down, the Kenyan Section of the International Commission of Jurists named CJ Maraga as Jurist of the Year in 2017, celebrating his courage in leading the Supreme Court to the majority decision to annul the presidential election result.

In the aftermath of the fresh election, the dismantling of the president's legal team would give an indication of the depth of Kenyatta's disappointment in those handling his legal affairs. Solicitor General Njee Muturi was demoted to Deputy Chief of Staff at State House; AG Githu

Muigai would suddenly resign in January 2019, and the president's advisor on constitutional affairs, Abdikadir Mohamed, would decline a posting to South Korea as ambassador. Abdikadir had led the parliamentary select committee on the constitution between 2008 and 2012, and surprised many when he opted out of elective politics at a young age to serve as a bureaucrat when his star appeared to be on the rise. For good measure, the president also accepted the resignation of Keriako Tobiko as Director of Public Prosecutions and offered him the position of Cabinet Secretary for the Environment.

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Within the judiciary, there was a collective sigh of relief that the institution's dented prestige and honour had been restored. The joyous mood at the Supreme Court sharply contrasted with the ugly scenes in the aftermath of the 2013 decision on the presidential election petition. As soon as Chief Justice Willy Mutunga had read out the two-minute decision on March 30, 2013, the motley crowd in the streets was dispersed with teargas. Each judge swiftly left the building under the escort of the paramilitary General Service Unit (GSU). And then the Easter rains began to pour in torrents.

What had began as a globally watched court battle ended in silent ignominy. So much hope had hung on the Supreme Court in 2013, so the disappointment in its decision significantly injured the public standing of the judiciary.

Just what had happened to change the Supreme Court in four years?

The 60-day period the Supreme Court gave for a fresh election provided a snapshot of the judiciary's highest moment as an independent institution. Beyond this period, however, the judiciary had been engaged in a years-long struggle to claim its independence by dint of evolution in a volatile political environment. The interplay of internal institutional politics -- involving appointments, personality clashes, conflict of interests and opposing judicial philosophies -- and the external politics around how wielders of political power related with the institution likely influenced how the court decided the presidential election petitions in 2013 and 2017.

What the three election petitions were all about

March 2013	August 2017	November 2017
▪ Petitioners were Denis Itumbi, Florence Sergon and Moses Kuria sought to determine what constituted a rejected vote, and whether rejected (spoilt) votes should have been counted when determining the total number of votes cast. ▪ Gladwell Otieno and Zahid Rajan sought to invalidate the results of the election on the basis that there were numerous irregularities in voter registration, electronic voter identification and tallying. ▪ Raila Odinga sought to invalidate the results of the presidential election, alleging massive electoral fraud and malpractices that helped Uhuru Kenyatta to win.	▪ Raila Odinga claimed that the conduct of the presidential election violated the principles of a free and fair election; and that there were errors in the voting, counting and tabulation of results. ▪ There were irregularities and improprieties that significantly affected the election result ▪ Votes illegally declared as rejected unprecedented and contradicted the total number of votes ▪ IEBC failed to relay and transmit election results as required by law	▪ Njonjo Mue and Khelef Khalifa claimed IEBC had failed to conduct fresh nominations. ▪ The election failed to meet the general principles set out in the Constitution ▪ The election failed to meet the general principles set out in the Constitution of a free and fair election. ▪ The fresh election was further marred by illegalities and irregularities. ▪ They further claimed that IEBC should not have conducted the election given the prevailing conditions and circumstances.

2. Court in A New Mould

Kenya's first Supreme Court was cobbled together from the old judiciary, academia, and civil society: It was instructive that the Court of Appeal contributed only one judge to the new apex court that would topple it in the judicial hierarchy. It was a clean break from the insularity of the Court of Appeal, its arrogance and slavish loyalty to rules.

Until 2013, presidential election petitions in Kenya had never got off the ground. Petitions challenging the election of the president in the 1992 and 1997 contests did not go beyond the preliminary stage and were dismissed on technicalities at the Court of Appeal – which was the highest court at that time. The requirements on the petitioners, such as personally serving a sitting president with court papers, were so onerous as to make litigation moot. Opposition politicians refused to take the dispute over the 2007 presidential election to the courts, arguing that their opponent controlled the judiciary, and thus fomented a 60-day violent crisis only ended through international mediation that brokered a coalition government.

This history was part of the case establishing the Supreme Court as a special forum to hear and determine presidential election petitions, which had to be decided within 14 days of the announcement of the result. A president-elect could only be sworn in office if there was no court challenge. This constitutional design of the Supreme Court being the forum to settle presidential election disputes was in the September 2002 draft prepared by the Constitution of Kenya Review Commission. This draft was the basis of successive proposed constitutions culminating in Kenya adopting a new constitution in 2010.

Although the first Supreme Court was considered difficult to read in terms of how it would rule in presidential election petitions, a series of micro-aggressions were launched to stimulate behaviour that certain political actors desired. On the surface, the court seemed to have the right mix of insider experience and outsider mavericks. More significantly, the court was a subconscious assembly of the country's Big Five – the largest ethnic groups: Kamba, Kalenjin, Luo, Luyia, and Kikuyu were represented.

This ethnic mix presented an optics challenge for the new Chief Justice, who was anxious that coming out of a post-election ethnic conflagration, the court might be similarly divided along ethnic formations. At the helm as Chief Justice and Supreme Court President was Dr Willy Mutunga, who had taught law at the university, been detained as a political prisoner, pioneered the establishment of Kenya's vibrant civil society movement, and been part of the push for a new constitution. He had been in charge of the East Africa regional office of the Ford Foundation. After the return of multi-partyism in Kenya in 1991, he became one of the public faces demanding constitutional change.

In early 2002, he successfully mediated between opposition leaders Mwai Kibaki, Charity Ngilu and Michael Kijana Wamalwa to form a political alliance and support a single candidate for the presidency in the 2002 elections. When Kibaki was elected President and appointed him to the council of Jomo Kenyatta University of Agriculture and Technology, Dr Mutunga declined

the position saying the institution specialized in fields of study he had limited knowledge of. As Chief Justice, Dr Mutunga spoke often about his desire to have a united court – whatever the decision – even though he wrote the lone dissent in the advisory opinion on when to implement the two-thirds gender representation rule in elective offices in December 2012.

Although each of the Supreme Court judges had been through public interviews and those already serving on the bench had additionally been vetted for suitability to continue serving, there were questions about whether they were up to the task of adjudicating a political dispute purely on the basis of evidence and facts. Only three judges had judicial experience. The other three were drawn from academia and civil society.

The Supreme Court is composed of seven judges but by the time of the 2013 presidential election petition, one judge had been removed from office. Deputy Chief Justice, Nancy Makokha Baraza, who left office after only six months, following a public furore over her altercation with a female security guard performing checks at a Nairobi shopping mall. A tribunal found Baraza unsuitable to serve on Kenya's apex court and although she appealed the decision at the Supreme Court, it was not heard because she later withdrew it. Her vacancy would not be filled until after the petition had been decided.

Dr Mutunga had had no role in interviewing or selecting any of the first Supreme Court justices. He and Deputy Chief Justice Baraza were awaiting parliamentary vetting and approval at the time. The JSC thus gazetted the names of five judges without his input. A court challenge seeking to make the Supreme Court conform to the principle that no institution should have more than two thirds of one gender failed.

The other judges who would make up the bench for the 2013 presidential election petition were Justices Philip Kiptoo Tunoi; Jackton Boma Ojwang; Mohamed Khadar Ibrahim; Smokin Charles Wanjala; and Njoki Susanna Ndungu. By pure chance, they had all been Dr Mutunga's students at the University of Nairobi.

Justice Tunoi was the most seasoned of them all, having served for 24 years in the High Court and Court of Appeal before donning the emerald robes of the Supreme Court in 2011. During his tenure on the Court of Appeal in 2001, Justice Richard Kwach had publicly questioned his integrity and that of Justice AB Shah after he changed his mind on an agreed judgment. The three judges later publicly reconciled after then Chief Justice Bernard Chunga called them in for a meeting.

Remarkably, the Judges and Magistrates Vetting Board found him suitable to continue serving in 2012 without providing further explanation. At the tail end of his service, the judge was embroiled in a $2 million bribery scandal. The tribunal appointed to investigate his conduct did not conclude its work in part because Tunoi ceased to be a judge on account of reaching the retirement age.

Still, no criminal investigations were started in respect to the allegations of bribery despite the possibility they held for revealing the truth about a libel case filed by six Supreme Court judges protesting against a newspaper story that insinuated that a governor had provided Sh49 million -- an easily divisible by the number of judges on the court -- to be shared out among them for a favourable election petition appeal.

An ultra-conservative law professor, Judge Ojwang had taught for 27 years at the university before his appointment to the High Court. One of his more curious scholarship positions was the focus on charisma as a source of extra-constitutional power. His former university law student, Ndungu, also joined the court as the youngest judge after serving as a high profile nominated Member of Parliament who was also credited with crafting the deal that merged opposition parties ahead of their 2002 election victory. She had sponsored and shepherded the signature Sexual Offences Act through Parliament and was a member of the Committee of Experts that harmonised proposals to produce the Constitution of Kenya, 2010.

Justice Ibrahim was a former political prisoner who topped his law school class for three years running, and was highly regarded for his sound judgments and integrity but was severely damaged by the Judges and Magistrates Vetting Board's decision finding him unsuitable to continue serving for delaying the delivery of 264 judgments. He spent the better part of 2012 battling to retain his job through appeals and reviews.

Although Justice Ojwang faced similar issues because of health challenges, he completed his backlog of cases and was declared fit to continue serving. The vetting board failed to clear Justice Ibrahim twice because of delays in his judgments before finally clearing him.

Dr Wanjala had also taught law at the University of Nairobi for 15 years, co-founded a civil society organisation to fight graft, and resigned as one of the assistant directors at the Kenya Anti-Corruption Authority before being appointed a judge.

In the lead up to the 2013 presidential election petition Dr Mutunga's stint as a political prisoner and history as a pro-democracy activist fed fears that he would be in the tank for Prime Minister Raila Odinga, who was also a former political prisoner and was contesting the presidency a third time. Justice Ibrahim, though similarly a former political detainee, was believed to owe debts from the long, drawn-out vetting uncertainty. The smart money was on Justice Wanjala's stint in activism putting him in the same corner with Dr Mutunga and Justice Ibrahim.

Yet, ahead of the 2013 presidential election petition, the Supreme Court had cultivated a character of dodging legal bullets. Its excessive caution was sometimes seen as bordering on cowardice: for example, when the Independent Electoral and Boundaries Commission (IEBC) sought an advisory opinion on the election date under the new Constitution, the Supreme Court kicked the can down the road, and sent the matter to the High Court.[5]

5 In the Matter of Interim Independent Electoral Commission [2011] eKLR

In the end, the High Court decided the matter,6 a decision that was subsequently affirmed by a five-judge bench of the Court of Appeal by a majority of four to one.[7]

The Supreme Court's aloofness discouraged litigants from approaching it to settle the question of Uhuru Kenyatta and William Ruto's eligibility to contest the 2013 elections given their crimes against humanity cases at the International Criminal Court. "Any question on the qualification or disqualification of a person who has been duly nominated to run for president can only be dealt [with] by the Supreme Court,"[8] said Judge Helen Omondi, reading out the decision of a five-judge High Court bench, 17 days to the March 4, 2013, General Election. To date, the Supreme Court has not made any determination on the leadership and integrity standards a candidate for president should satisfy to be allowed to contest.

By the time the 2013 presidential election petition arrived at the Supreme Court, police were dispersing the petitioners' supporters with teargas. Until then, the court had made many right administrative decisions.

Six senior jurists from the Commonwealth Judges Association were on hand to watch the hearing. Once the petition was filed the court opened up the proceedings to live broadcasting and web streaming on its website, with 157 law schools following the feed. The pre-trial conferencing, an innovation of the new Supreme Court, was fascinating, giving the public a rare inside view of how the wheels of justice turn.

The judges declined an audit of the IEBC's Information and Communication Technology (ICT) system, saying that the petitioners had not indicated who should conduct it, and expressing fear that the exercise could spill beyond the constitutional deadline for determining the petition.

Remarkably, the Carter Center, in a report after the election put the failure of the ICT system at 41 per cent of all biometric identification kits.

Another application sought leave for Odinga's lawyers to formally file an 839-page bundle of affidavits and other evidence — necessitated by what the IEBC filed in response to the petition. The court ordered the material expunged from the record since the Constitution imposed a deadline on them.[9]

Civil society activists Gladwell Otieno and Zahid Rajan filed a separate petition seeking to argue that IEBC did not maintain a constant voter register, with the result that the number of people who voted was higher than those who were registered. The petitioners claimed that it was unclear which register was used to confirm the identities of voters at polling stations across Kenya.[10]

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6 John Harun Mwau & 3 others v Attorney General & 2 Others [2012] eKLR

7 Centre for Rights Education and Awareness & 2 others v John Harun Mwau & 6 Others [2012] eKLR

8 International Centre for Policy and Conflict & 5 others v Attorney General & 5 Others [2013] eKLR at paragraph 89 of the Judgment.

9 Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR, Ruling dated March 26, 2013

10 Presidential Petition No. 4 of 2013 (Consolidated with Presidential Petitions 5 and 3 of 2013)

A third set of petitioners, Moses Kiarie Kuria, Dennis Njue Itumbi and Florence Jematia Sergon filed their petition before the March 16, 2013 deadline seeking a declaration that spoilt votes should not be considered when computing valid votes cast.[11]

The court, on its own motion, ordered the scrutiny of all votes cast in all the 33,400 polling stations to gain insight into whether the winning candidate had indeed met the threshold of garnering a majority of all votes cast. But it soon became clear that notwithstanding the availability and use of nearly 50 legal researchers, the court was woefully unprepared to manage the scrutiny or to understand how the Sh10 billion ICT infrastructure had helped or undermined the election.

It also ordered the re-tallying at 22 polling stations cited by the petitioners as being problematic, a decision that the respondents' lawyers were not too happy with. Dr Mutunga and Dr Wanjala were convinced that a scrutiny would provide a snapshot of the election. The Supreme Court's lack of experience in managing an election scrutiny would prove to be its undoing as it ceded control to the court administrators who actively sabotaged it through administrative delays and systems failure.

Although the team completed the scrutiny, they misled the judges that they had only examined 18,000 polling stations and the data were inconclusive.

The court also ordered a re-tallying of the results of 22 polling stations that Odinga had highlighted in his petition. The court released the results of that exercise on Friday, March 29, 2013, and all lawyers were allowed to comment on them. Kethi Kilonzo, who represented Gladwell Otieno and Zahid Rajan, said the fact that the report found some forms missing from some polling stations was a serious omission.

"This report confirms that the returning officer of the presidential election made a declaration without completing the tally from all the polling stations," she said.

Without acknowledging that the scrutiny it ordered was only half done and inconclusive, the court upheld the election for lack of evidence of rigging. The decision provoked brutal criticism, including open accusations of bribery. Dr Mutunga was forced to publish an agonised post on Facebook asking that if anyone knew of judges being bribed, she or he should come forward with the evidence.

Long before it gave its final decision, the manner in which the court had handled a number of applications made during the hearing had already foretold the decision that the court would make. The essence of the court's procedural unfairness has been addressed many times over.[12]

When the final decision, including reasons, was published 16 days later, it still had errors and had to be reissued twice with corrections.

11 Presidential Petition No. 3 of 2013 (Consolidated with Presidential Petitions 5 and 4 of 2013)

12 https://www.nation.co.ke/oped/opinion/Supreme-Court--and-not-lawyers--should-be-in-control-/440808-4072104-s4p0rb/index.html

The final judgment was brief on matters such as the failure of the polling kits (worth only seven paragraphs) while lengthy on far less important ones such why rejected votes should not be considered in the final tally (27 paragraphs).[13]

Although there were recriminations about the inadequate preparations by advocates for the petitioners, who declined offers of help at the time from the United States, the Supreme Court came for severe criticism for its proceduralist reading of the rules and could have influenced its approach in 2017.

In their book on the 2013 General Election, New Constitution Same Old Challenges, James Gondi and Iqbal Basant point out that public confidence in the Supreme Court declined after the decision, which was roundly criticised in academic and legal circles. A Judiciary Perception Survey in 2015 found that the approval rating of the judiciary plummeted from a stratospheric 78 per cent to just under 50 per cent in the year after the ruling.

So harsh was the backlash from the decision that when interviewing for the Chief Justice's position in 2016, Justice Smokin Wanjala, who had been on the Supreme Court bench since its establishment said he would not be happy to be part of another presidential election petition, if only to avoid unfair criticism.

As it were, he was one of the four judges that formed the Supreme Court majority that annulled the August 8, 2017 presidential election and also sat on the petition challenging the validity of the October 26, 2017 fresh election.

Odinga issued a statement soon after the Supreme Court decision in March 2013 and before the judges had given their detailed reasoning. Odinga said he and his running mate, Kalonzo Musyoka, disagreed with some of the court's findings and there were some anomalies in the way the hearings were conducted but added: "Our belief in constitutionalism remains supreme.

"Casting doubt on the judgment of the court could lead to higher political and economic uncertainty and make it difficult for our country to move forward," Odinga said.

There would be an inchoate attempt to reform the Supreme Court in the through the initiative for referendum on the constitution in 2015, but it did not materialize. Still, attempts to bring the judiciary to heel had begun as early as when Dr Mutunga was Chief Justice. Decisions by the High Court striking down various laws and executive actions as unconstitutional or illegal had grown into a source of regular annoyance. The Executive oscillated between quailing impotence and blinding anger in response to court decisions around corruption, the amendment of security laws to deal with terrorism, as well as, the president's desire to participate in the appointment of judges.

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13 Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR

3. A New Soul for the Supreme Court?

As the six Supreme Court judges were adjudicating Kenya's first presidential election petition, Justice Kalpana Hasmukhrai Rawal was waiting for a new President to take office and the newly elected National Assembly to convene so that her nomination as Deputy Chief Justice could move forward. The Judicial Service Commission had settled on her appointment after interviewing a shortlist of applicants in February 2013. The Judges and Magistrates Vetting Board had earlier found her to be suitable to continue serving as a Court of Appeal judge. Justice Rawal eventually joined the Supreme Court on June 3, 2013.

Two years later, Justice Rawal would become the second Deputy Chief Justice to be embroiled in controversy. In 2015, Rawal would challenge a notice that she retires at 70 years of age. Around the same time, Dr Mutunga would announce that he wanted to retire early so that the next Chief Justice would be appointed well ahead of the next election.

What seemed like a simple question about the retirement age of judges led to an unprecedented breakdown in the collegiate working atmosphere among Supreme Court judges that had been maintained during the proceedings of the presidential election petition. During the two years it took the judiciary to address the question of whether judges should retire at 70 years as decreed by the new Constitution, or at 74 years as was the case under the old constitution, three Supreme Court judges openly challenged the authority of the Judicial Service Commission in handling the age issue. When the matter reached the Supreme Court, the intrigues that emerged brought the country's highest court to its lowest point in its short history.

In May of 2014, Justice Tunoi and High Court judge David Onyancha challenged the JSC's decision to retire them at the age of 70 years, arguing that they were entitled to serve until they reached 74 because they had been first appointed judges under the old constitution. Justice Onyancha suddenly abandoned his cause and resigned quietly.14

Justice Rawal filed a similar petition in September 2015 when the JSC issued her notice of retirement.15 The following month, Dr Mutunga announced that he would retire before reaching 70 years.

A September 24, 2015 letter sent to the JSC by Justices Ojwang, Ibrahim and Ndungu threatened a solidarity strike by the three if the commission continued to insist that judges retire once they reached 70 years. The letter triggered a petition by the chief executive officer of the Law Society of Kenya, Mr Apollo Mboya, seeking the removal of the three judges from office for insubordination. A JSC committee investigated the allegations against the three judges and elected to reprimand them – but Justice Ndungu contested the decision in court where it is pending determination.[16]

14 Philip K Tunoi & Another v Judicial Service Commission & Another [2014] eKLR

15 Kalpana H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR and Justice Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR

16 Petitions 204 and 218 of 2016 before the Constitutional and Human Rights Division of the High Court of Kenya.

On December 11, 2015 the High Court unanimously decided that Justices Rawal and Tunoi should retire at 70 – a judgment affirmed by a seven-judge bench of the Court of Appeal on May 28, 2016.[17]

On the same day, Justice Rawal sent an application to the Supreme Court seeking the decision's suspension. She also asked the court to set a date for hearing her appeal. Justice Ndungu, sitting alone, received the application and granted her requests. She set the hearing date for June 24, 2016 eight days after Dr Mutunga's planned retirement as Chief Justice.

Dr Mutunga, who was meant to be abroad but had not travelled because of illness, called the file and brought the hearing date set by Justice Ndungu forward since she had certified the matter as urgent.

On June 14, 2016 three judges recused themselves from hearing the appeal to avoid perceptions of bias. Dr Mutunga and Dr Wanjala said they did so because they were members of the JSC when the commission determined the retirement age for judges was 70 years. Justice Ibrahim apologized for his conduct in threatening a strike earlier and voted with the two. Prof Ojwang and Justice Ndungu took the opposite view, arguing in their dissenting opinions that the different positions the judges had taken on the matter did not mean they would be biased when hearing the appeals. In effect, the Court of Appeal's judgment on the matter became the final decision on the issue of the retirement age.[18] Rawal and Tunoi retired. Dr Mutunga, too, retired as Chief Justice two days later, thus opening up three vacancies in the top court, but the rift in the Supreme Court would persist until the 2017 presidential election petition.

A last-ditch effort was proposed to save the two judges, and it entailed waiting until Dr Mutunga had left office to have President Kenyatta name Justice Ojwang as CJ in an acting capacity, according to Platform publisher Gitobu Imanyara. With Justice Ojwang at the helm of the Supreme Court, albeit temporarily, it was expected that Justices Rawal and Tunoi would apply for a review of the recusal decision. A full bench was subsequently expected to hear the case, reverse the Court of Appeal judgment, and allow judges appointed before the new constitution the right to serve until the age of 74.

It was Kenyatta who, reportedly, fearing the embarrassment of having another of his decisions struck down by the court, declined to go along with the plan to appoint an acting Chief Justice. When the matter formally came up at the JSC, introduced by acting chair Prof Margaret Kobia, there was uproar. It is against this background that the JSC began its search for a new CJ and two Supreme Court judges.

Competing interests had already begun to play out in the race to replace the Chief Justice – and the departing Supreme Court justices. The departures would significantly change the composition of the court, and with it, its posture and prudence.

17 Justice Kalpana H. Rawal v Judicial Service Commission & 3 Others [2016] eKLR

18 See 'In the Supreme Court of Kenya, Nairobi, Orders and Judgments of the Court issued on June 15, 2016' available at https://www.judiciary.go.ke/download/in-the-supreme-court-of-kenya-nairobi-orders-and-judgments-of-the-court-issued-on-june-15-2016/

It was no longer in doubt that the pitched battles around the departure of the two judges had demolished any pretence of collegiality in the Supreme Court with judges openly differing with each other. Lawyer Wachira Maina wrote in The EastAfrican that the way in which the retirement case played out left Justice Ndungu 'dangerously exposed'.

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David Maraga would emerge as the dark horse in the Chief Justice's succession race ahead of law professor Makau Mutua and Supreme Court Judge Smokin Wanjala. With a combined 13 years as High Court and Court of Appeal judge, Maraga's public posture was that of deeply religious and conscientious man – an elder of the Seventh Day Adventists Church who would not work on Sabbath before sunset. During his vetting as a previously serving judge, he offered to swear on the Bible that he had never taken a bribe. He also famously said during his interview that he would never work on the Sabbath even if an election petition were in progress.

He had served as an inaugural member of the Judicial Working Committee on Elections Preparations (JWCEP) before taking over as chairman.

Justice Maraga is regarded as one of the foremost authorities on electoral law, not just because he has written on the subject, but more so because his decisions have never been overturned on appeal. He beat a field of nine finalists to be nominated CJ as a compromise between institutional insiders who wanted stability and the executive who wanted a pliable person.

In contrast to his predecessor, Justice Maraga appeared to be a safe choice for the establishment. He was as a conservative, unlike Dr Mutunga. He had not been involved in politics and was a judicial insider. The new Chief Justice would also have the 2013 precedent of the Supreme Court to rely on. So safe was he considered that Uhuru Kenyatta, while giving a campaign stump speech, deigned to mention Justice Maraga's appointment as one of the political favours extended to the Kisii community, drawing the Chief Justice's rebuke.

Just like Dr Mutunga before him, Justice Maraga had no hand in selecting the six judges he was going to lead as President of the Supreme Court. Three were already in place, appointed in 2011 and therefore outranking him in experience on the court, and the two new ones were appointed at the same time as he. The filing of the August 2017 petition guaranteed Justice Maraga the one case he was certain would be his legacy as a jurist. Regardless of how he was going to rule, the opportunity and chance to do it was a moment that conferred great personal prestige.

Chosen as Deputy Chief Justice was Philomena Mbete Mwilu. She had 32 years of experience in law, serving as a member of the Electricity Regulatory Board and the Energy Tribunal before being appointed a judge of the High Court and the Court of Appeal. She had also spent considerable time as a legal officer at Jubilee Insurance Company.

Justice Mwilu was notably one of the three High Court judges who declined to declare the composition of the 2011 Supreme Court as being unconstitutional for not meeting the requirement that no one gender should constitute more than one-third of any electoral or appointive body.[19] At the time, lawyers for the Federation of Women Lawyers in Kenya (Fida Kenya) would raise the issue of her relationship with then-Attorney General Amos Wako as a ground for her recusal. She declined to recuse herself, but her relationship with the former AG would be front-page news in the alternative press during the hearing of the presidential election petition – especially given that he was one of the lawyers on record for the petitioner.

The third was the slightly graying Isaac Lenaola, whose solid 13 years experience in the High Court, and as deputy president of the East African Court of Justice, enabled him to leapfrog his seniors in the Court of Appeal to the apex court as its youngest member. At the High Court, the judge had distinguished himself as a hard working head of the Constitutional and Human Rights Division, renowned for its landmark decisions.

Lenaola had also served on the 28-member Constitution of Kenya Review Commission, which collected public views and produced a draft in September 2002, forming the basis for the new Constitution adopted in August 2010. He had been instrumental in negotiating the adoption of vetting of judges and magistrates as a lustration measure to usher in the new constitutional changes in 2010, and had served as the High Court's first representative to the Judicial Service Commission until 2014. Before joining the bench, he had worked in civil society promoting minority rights.

While Kenyatta's team was working to change the court's composition, his rival Odinga had forced a negotiation in Parliament of the electoral law. Through legislation and subsequent litigation, the landscape on which elections would be held was significantly altered. The Independent Electoral and Boundaries Commission was disbanded and reconstituted; the electoral law was amended and set out in greater detail. Litigation also settled questions around the audit of the voters' roll, the printing and procurement of election materials, and the transmission of results.

A case filed by human rights advocate Maina Kiai produced decisions at the High Court and Court of Appeal that made the polling station central in determining election results.[20] Lawyer Ahmednasir Abdullahi, who had signed up as one of Kenyatta's advocates during the hearing of the 2017 petitions, remarked that election-related litigation had been conducted on "an industrial scale". He had boisterously defended the chairman of the IEBC during the 2013 petition, when he pejoratively referred to it Supreme Court as a young court that was 'still crawling'.

19 Federation of Women Lawyers in Kenya (FIDA-K) & 5 Others v the Attorney General & Another [2011] eKLR

20 Maina Kiai & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] and Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR

"It is good, especially for a young court – which is crawling – it is good for it to show judicial restraint. You will find opportunities later in life where you can express yourself more," he said, to the roar of laughter in the courtroom.

Ahmednasir's words at the time carried great weight considering that he was not only a Senior Counsel and former chairman of the Law Society of Kenya, but had also been chairman of the Kenya Anti-Corruption Authority, the precursor to the Ethics and Anti-Corruption Commission, and had played a starring role in forcing a Court of Appeal judge to resign over corruption allegations by providing closed-circuit television evidence of him receiving a bribe in a city hotel parking lot. His anti-corruption credentials saw the LSK elect him as their representative to the new Judicial Service Commission that would interview and nominate judges in 2011, including the Chief Justice and the Deputy Chief Justice. His abrasive questioning of applicants won him admirers and foes in equal measure, but it also implanted in the public psyche the possibility that he had an unhealthy stranglehold on the inaugural Supreme Court. The spell he had over the judges in 2013 was definitely broken in 2017. Although, and he had lost the election to continue representing the LSK on the Judicial Service Commission, he was still treated with great deference. When he rose to speak as Kenyatta's lawyer in the August 2017 petition, his full crop of hair was graying in the middle, and he did not seem to have the same leeway he had enjoyed four years earlier.

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After that 2013 Supreme Court disappointment, three-time presidential contender Odinga had publicly declared in the run-up to the 2017 election that he would not petition the courts if his fourth run did not succeed.

When the opposition decided to head to court after Uhuru Kenyatta was declared winner of the presidential election, they found a prepared bench. On Saturday, August 26, 2017, when the sun had gone down and the Sabbath observed by Seventh Day Adventists formally ended, the court convened its pre-trial conference to accommodate the Chief Justice's religious practice.

Justice Maraga had found a Supreme Court that did not wig and only robed in green gowns once described as prisons choir, but as the seven justices made their appearance in August 2017 in red robes, white bibs and wigs, it was a clear signal that the conservatives were back in the saddle. Contrasted with Justice Mutunga, the cool CJ with an earring who presided over the court with an iPad, and enjoyed meeting young people, his successor was reticent and retiring. He was an old school judge who placed a great premium on rules and traditions – or was he?

The Supreme Court had to decide the petition before the expiry of the 14-day constitutionally prescribed deadline, which fell on another Sabbath — the following Saturday. Before the hearing began, the Supreme Court gave the petitioners access to the IEBC servers to verify the results

transmitted from the polling station to the national tallying centre. It also granted the application for a court-supervised scrutiny of the forms used to collate the presidential votes.

The petitioners assembled a veritable team of veteran lawyers, among them Senators James Orengo, Okong'o Omogeni and Amos Wako (former AG), Member of Parliament Otiende Amollo, and law professors Mutakha Kangu, Ben Sihanya, veteran litigator, Pheroze Nowrojee and 28 others.

Kenyatta's team was led by Fred Ngatia, Ahmednasir Abdullahi, and PLO Lumumba. IEBC relied on Senior Counsel Paul Muite, Lucy Kambuni, Paul Nyamodi and Tom Macharia. A good number of judges – Justices Ojwang, Wanjala, Ibrahim and Ndungu – had done their pupilage at Waruhiu, Muite and Company Advocates, Paul Muite's firm.

Just as had been the case during the 2013 petition, the proceedings were broadcast on live television – a practice repeated in the November petition.

Meanwhile, the Judiciary Working Committee on Election Preparations had become a permanent fixture and had been transformed into the Judiciary Committee on Elections (JCE). In 2015, it had been renamed the Judiciary Committee on Elections and a chief executive was appointed for JCE, along with research staff. It was mandated to build on the experience judges had gained in arbitrating the electoral disputes of 2013 and preparing the institution for the next election. The scaffolding for handling electoral disputes had been put in place.

In 2013, the court was totally unprepared for the management of electoral disputes, which undermined its ability to interrogate IEBC's failures on ICT and the voter register. Its naivety also exposed it to deception by its own administrative staff. Perhaps it was the new Chief Justice's four years of heading the JCE that nudged him towards additional vigilance. The court had even organised a retreat in Mombasa to undergo training on the ICT systems used by IEBC to enable it to make better decisions.

Additionally, although Odinga was not optimistic about a favourable court decision, his legal team was much better prepared in 2017 than it had been in 2013. He had approached the court, offering it on the one hand an opportunity to 'redeem itself' from its 2013 decision, but also ready to delegitimize it on the other. Unlike in 2013, his lawyers were conscientious, diligent and fully involved in the scrutiny and document review. IEBC, on the other hand, was cavalier and poorly prepared in 2017 compared to the case in 2013.

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4. Scrutiny as the Petition

Lawyer Julie Aullo Soweto glanced at her wristwatch and realised she was running late for the 11 am pre-trial conference scheduled for November 14, 2017. She robed quickly and mentally debated whether or not to wear her advocate's wig. In the end, she chose to leave behind the wig as she made her way from her Biblica House office to the Supreme Court building. She had filed an application at the Supreme Court for scrutiny of the materials from the October 26, 2017 repeat presidential election, and had a good feeling about its chances.

Almost single-handedly – over three days with little sleep in between – she had drafted the application for scrutiny of election materials from the August 8, 2017 poll in the Raila Odinga petition. The success of that application, in which 19 of the 26 prayers were granted, enabled the petitioners to not only discover anomalies in the election results filed in the Supreme Court but also exposed the IEBC's suspicious refusal to grant access to the computer servers used to receive, transmit and collate results. It likely played a significant role in persuading four of the six judges to nullify the election of Uhuru Kenyatta as president.

Despite playing a critical role in the first petition, Soweto didn't seek the public's attention from the murderers' row of seasoned litigators assembled for the case. The petition challenging the repeat presidential election, brought by civil society activists Njonjo Mue and Khelef Khalifa, would thrust Soweto to the fore. Soweto was determined to bring her experience from the first successful petition to bear on the second one. She had gone over the application she had drafted which had been allowed in August, tightening loose ends and closing gaps. She whittled down her original 26 prayers to a round figure of 20. It was the same bench of judges; she was certain they would allow it. They did not.21

The petitioners hoped to use the scrutiny to prove that the results published on the portal were not the same as what was on the official paper documents. IEBC's lawyers embarked on painting a picture of the information overload that the court would be forced to bear by accepting the request. The judges were buried in frightful claims about information in terabytes that would take two years to work through – while conveniently neglecting to mention that, in fact, these were photographic images of results forms that occupy substantial space on databases.

Also, the question raised by this response was how IEBC itself sifted through the entire stack of information in a week to find out who had won the vote. The petitioners were granted the order for the original voters' register, but IEBC demanded Sh80 million to photocopy it. Even if the petitioners could afford the price of photocopying the register, it would take several weeks to produce one. The petitioners would simply be given a soft copy of the register. The incident, with its shades of jinxes, served to illustrate the needless hurdles that would be thrown in the petitioners' way. This time around, Kenyatta's lawyer Ahmednasir likened a scrutiny to an organ transplant that would give the petition new life.

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21 Njonjo Mue & Another v Chairperson of the Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR, Ruling dated November 14, 2017

SCRUTINY IS THE PETITION ISSUE	2013 PETITION	2017 AUGUST PETITION	2017 NOVEMBER PETITION
ICT AUDIT	Supreme Court denied: petitioner request to audit IEBC ICT system stating that there wasn't enough time and that the petitioners had not indicated who would conduct the scrutiny. Petition dismissed	Supreme Court allowed an audit on report on the number of servers, the computer operating systems, the passwords policy and the levels of access granted to the users into the IEBC system. Supreme Court appointed external experts and its own ICT experts to conduct the audit alongside experts from the petitioner and respondents. Audit partially complied with. Court overturns elections.	Supreme Court denies access to IEBC servers for unspecified reasons. Petition dismissed.
AUDIT OF TALLYING FORMS	Court ordered scrutiny of sample of tallying forms from more than half the polling stations to be conducted by its registrar. Instead activity is taken over by the Judiciary Registrar and conducted in absence of petitioners lawyers. Audit not completed in time and finds that the results were "inconclusive." Petition dismissed.	Court ordered scrutiny of sample of tallying forms to be conducted by its registrar. Scrutiny raised questions about the veracity of forms from 63 constituencies. 30 of them did were unsigned while 33 lacked security features. The court votes to annul the presidential election.	Court ordered a review of the tallying forms conducted by the petitioners and not under its supervision. IEBC was slow to comply with the orders and impeded the process, Petitioners report dismissed by the court. Petition dismissed.

Once the dispute was limited to numbers in an election contested by Kenyatta but boycotted by the opposition, the petitioners' case was dead on arrival.

The court granted only two out of the 20 requests around the scrutiny – allowing access to results declaration forms for the constituency, county and national tallying centre; and permitting access to the voters' register at the petitioner's cost. The court's ruling said: "Some of the prayers have been declined due to the sheer impracticability of their implementation given the short time left for the determination of the petitions at hand. Others have been declined because they were not pleaded with sufficient particularity in the Petition. Yet others, were declined on grounds that they are couched in such general terms as to be no more than fishing expeditions,"[22] the judges said.

The court had explained that the prayers had been "declined on the basis of very clear grounds, which will be elaborated in a detailed version of this ruling to be issued by the Court at a later date". More than 18 months since that ruling was read out in open court, those reasons are yet to be made public.

Scrutiny is intended to demonstrate openness of the electoral process, wrote Justice Maraga in a 2016 paper, adding that it was one of the tools courts used to ascertain the integrity of an election. It is a court-supervised forensic investigation into the validity of votes cast and the subsequent determination of who ought to have returned as the winning candidate.

The decision to allow scrutiny of the servers in the August 2017 petition was notable in its provisions — showing a court that had a firm grasp of ICT matters — a far cry from what happened in 2013. The orders on ICT were detailed and authoritative, indicating that the court's ICT literacy was higher than it was in 2013 when arguments about Kenyatta's The National Alliance (TNA) party sharing a results platform with the IEBC seemed to fly over the judges' heads. There was a certain burden that the court understood it needed to discharge to command respect in the wider judiciary.

The scrutiny in 2017 was a marked departure from what had transpired when the Supreme Court, suo motu, ordered one in 2013. In 2013, the Supreme Court ordered its registrar to take charge of the exercise, but instead, the Chief Registrar of the Judiciary became the focal point. In fits and starts, characterised by systems collapse, poor coordination and unequal representation of the various parties, the scrutiny got under way more than 24 hours after it was ordered. Mr Davis Chirchir and Ms Winnie Guchu, who had been members of IEBC's predecessor, the Interim Independent Electoral Commission, and were now working for The National Alliance Party, were present throughout.

In contrast, lawyers for Odinga showed up one evening at 8 pm, milled around the hall at the Kenyatta International Conference Centre for an hour, and left.

22 Njonjo Mue & Another v Chairperson of the Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR at Paragraph 2 (ii)

By the time the court was being informed that the scrutiny had not been completed, Odinga's lawyers had no report of their own to file.

Although the 2013 scrutiny showed appalling errors, with some polling stations recording turnouts as high 203 per cent, and numerous discrepancies in votes announced from those written down in the official result forms, the lawyers for Odinga were unable to create a coherent narrative that would force the judges to confront what had happened in the election.

During the August 2017 petition, the petitioners sought to make the scrutiny produce the smoking gun that would prove their case. They alleged that not all the records of the vote count in the presidential election had been received at the national tallying centre when the results were announced. Thousands of polling station results documents and scores of constituency results were missing, a claim acknowledged by IEBC.

Their lawyers asked the court to order a scrutiny of these documents. They also sought an audit of the servers alleging that the IEBC's system of electronically transmitting results from polling stations and constituencies had been compromised.

The judges not only allowed the scrutiny and the audit, but also ordered that the registrar of the Supreme Court supervise it, and ICT staff member of the court and two independent experts, respectively. Petitioners and respondents were allowed two agents each, and the lawyers for each side would be granted 15 minutes to make submissions. The court ordered the registrar to produce reports of the scrutiny and audit by 5 pm in two days.[23]

The registrar of the Supreme Court supervised the scrutiny of results forms, which took place at the Milimani Ceremonial Hall in Nairobi. A staff member of the court's ICT department and two independent, court-appointed ICT experts oversaw the audit of the IEBC servers at the commission's headquarters at Anniversary Towers in Nairobi.

There had been disquiet at the commission, especially around the information communication technology system – and with good reason. Chris Msando, the commission's head of ICT had been found brutally murdered only a week to the election.

At noon on Tuesday, August 29, 2017, James Orengo, Odinga's lead advocate, reported to the court that the audit of the servers had not yet begun.

IEBC lawyers claimed that the delay in allowing access to the servers was due to the high level of security provided by the system based in France – a two-hour time difference with Kenya – because their suppliers were still asleep 9 am Kenya time when the audit was supposed to have begun. Justice Maraga asked the parties to work together to comply with the order so that the court could receive a report by 5 pm, or reasons for the failure would have to be provided. "If some of your clients' agents are in Europe, or wherever, they must have been told yesterday.

23 Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) e KLR, Ruling dated August 28, 2017.

Wake them up and get the order complied with," he said.

The stonewalling hid a major flaw in the system. The server simply wasn't there. A report by the Auditor General later revealed that most of the equipment used to transmit and interpret results had not been delivered. Some of the equipment for the data centre meant to process the results was delivered five months after the August 8, 2017 election. The country had gone to the election without a backup database for transmitting results and IEBC did not have the capacity to analyse the data it received from polling kits.

The reports on the scrutiny and audit were ready when the court reconvened just after 9 pm on Tuesday, August 29, 2017. Orengo, said there was only partial compliance with the court's order. The GPS locations for each Kenya Integrated Election Management System (KIEMS) device used at the polling stations were not released. The read-only access to the servers the court had ordered was not granted. Agents were only given live access. They could not view or access the logs or see the log-in trail of users.

The 20-hour court-ordered scrutiny of results from the August 8 presidential election raised red flags on documents from at least 63 constituencies — 30 of which did not have a serial number and another 33 did not have a security watermark.

Some were unsigned and others had typographical errors. Some forms were printed in landscape layout instead of the standard portrait layout of the original forms. Some forms had candidates' first names printed ahead of the second name when the standard form started with the surname.

The 30 constituencies that filed results forms without a serial number accounted for 1,407,746 valid votes, while documents for the 33 constituencies holding 1,850,706 valid votes failed the ultra-violet test because they did not have a watermark.

Orengo, in his comments about the audit said that the scrutiny of the forms showed that some did not have security features, others did not have serial numbers, and close to two-thirds of them did not have the handover section filled out. He said that the report indicated that the court audit had revealed the election as "shambolic."

"Our case has been proven that forgery, trickery and alteration of documents has been used in various ways. We pray you should declare the election of the third respondent as not valid and not in accordance with the constitution," he added.

"It is a fair report. It is our submission that this report fortifies what we have said all along that this election was a fair election," said lawyer Fred Ngatia, who represented Kenyatta.

Justices Maraga, Mwilu, Wanjala and Lenaola constituted the majority that voted to annul the election of Uhuru Kenyatta for not having been done in accordance with the Constitution and the law. Dr Willy Mutunga's students at university – Justices Maraga, Wanjala, Ibrahim and Lenaola – appeared to improve on the errors and record of their teacher.

Justices Ojwang and Ndungu disagreed. Justice Ibrahim, who had been taken ill on the second day of hearings, did not vote.

Justice Ndungu, in her September 1, 2017, dissenting opinion, questioned the results of the scrutiny and wrote in detail about her own private examination of the documents in question, which produced different results.[24] Justice Maraga felt compelled to repeat his opening statement after the dissenting opinions had been read out in open court: "The greatness of a nation lies in its adherence and its fidelity to its Constitution, and its strict adherence to the rule of law …"

Days later, Kenyatta's Jubilee Party accused Supreme Court registrar Esther Nyaiyaki of doctoring the scrutiny and insinuated that she had colluded with the petitioners to massage the results. For good measure, the Ethics and Anti-Corruption Commission (EACC) began an inquiry into the allegations of impropriety on the part of the registrar. It remained an open question, and during the petition against the repeat presidential election the Supreme Court granted limited access for scrutiny, the registrar kept a low profile.

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All presidential election petitions in Kenya have been filed on the deadline day – hinting at the pressure under which they are prepared. They have also been decided within the constitutional deadline of 14 days after filing.

In the run-up to the repeat election, police officers had attempted to forcibly enter the Africa Centre for Open Governance offices to shut it down for alleged tax transgressions. Its Executive Director, Gladwell Otieno, had been one of the petitioners challenging Kenyatta's 2013 petition. The Kenya Human Rights Commission, another critical civil society actor, was being threatened with closure over alleged financial impropriety.

The data centre at InformAction offices, where some of the evidence for the civil society-backed petition was being assembled, had to be shifted several times when staff and volunteers noticed a military helicopter circling the compound for hours. Katiba Institute suffered a major power outage in the week before the deadline for filing a petition. All these organisations were working together under the Kura Yangu Sauti Yangu (KYSY) initiative to support free, fair and credible elections.

With threats and physical attacks on civil society organisations escalating as the deadline for filing the November 2017 petition drew near, the team preparing the case for civil society activists Njonjo Mue and Khelef Khalifa worked discreetly from a secret location through the nights.

They had up to midnight of the last day to file the petition. The court required eight copies for itself and several others for the different parties. The main challenge was ensuring that everything was filed on time. Some important documents had to be couriered by motorcycle to get to the registry on time.

Though they had hastily put together a strong petition, the petitioners' lawyers felt the deck was stacked against them right from the start. There was hostility even at the registry, with court staff providing untrue statements about the time of filing papers.

24 Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) e KLR, Full Judgments with reasons dated September 20, 2017

The respondents had assembled an impressive assembly of legal talent to represent them — mostly senior lawyers and household names in Kenya. The petitioners' lawyers were a team of experienced but younger lawyers. Kenyatta and IEBC's lawyers then used their seniority to obtain better treatment from the court. The lawyers for the petitioners felt that they were before a court that had already made up its mind. They appeared to be looking for reason and justification not to entertain the petition in spite of the strict standards they had set for the IEBC when they overturned the first election.

There were no friendly faces on the bench, but some judges were egregious. Judges appeared to take pleasure in demolishing the evidence and the manner in which it was introduced. One lawyer noticed that Justice Ojwang was being particularly hostile towards Soweto. He appeared to be cross-examining Soweto when she began reading the resignation statement by former IEBC commissioner Roselyn Akombe.

"He descended into the arena of litigation. Of all the judges, he was the one that was hardest on us," says one of the lawyers on the team. "It was like we were litigating against them."

Lawyer Jane Odiya, an experienced advocate, led the team that went to access the election results forms but she was accompanied by young data entry professionals and university students. Even though they were working under a tight deadline, the scrutiny team was initially stonewalled and then given the run-around at the IEBC's Anniversary Towers offices.

"The IEBC officials slow-walked the scrutiny even though we had the court order in hand," recalls Haron Ndubi, co-counsel for the Mue-Khalifa petition.

Although IEBC lawyers accompanied the scrutiny team to the commission's offices, they quickly left after giving assurances that the process would go on smoothly. That was not to be. IEBC officials took a long time to supply files. The scrutiny team wandered the halls of Anniversary Towers with no one to assist them. The corridors at the IEBC offices were teeming with people who looked like plainclothes police officers. The officers followed the scrutiny team's every movement -- onto elevators and out of the building. A lawyer said she believed some of the officers trailed them in a vehicle as they went home.

The sense of frustration among the scrutiny team was palpable. After tempers flared, the team was led to a cozy office at Anniversary Towers where they found lawyers for the commission and a senior IEBC official, who assured them that the conference room for examining the results documents was ready. Once inside the conference room, the reason for the delay became quickly apparent: the Jubilee team, consisting of lawyers and party officials, like lawyer Faith Waigwa, was already present, before them.

The files would not be copied during the scrutiny. The team could not enter the boardroom with their phones or stationery of any sort. The ban on any writing material was enforced with the help of plainclothes police officers posted at the door. The head of the scrutiny team was forced back

to the Supreme Court to seek clarification on the order they had received. It was only after the judges stressed that the team could write down their findings that the exercise resumed.

"We felt tortured," admitted one of the petitioners' advocates.

After the scrutiny, the team quickly put together its report, and the advocates fought to admit it into the record. The court declined, defeating the purpose for which the orders were sought and issued. The court said the scrutiny report was merely one party's view as opposed to a rigorous finding arrived at by all parties to the petition. Kenyatta and IEBC's representatives had been present when the petitioners scrutinized the results documents but they were there more to impede the process rather than participate in it. The scrutiny fell short of the legal definition of one — it was, to be generous, a review of the documents.

The petitioners asked why the forms used to collate the presidential results differed from those IEBC brought to court. They further pointed out that the numbers shown in the election portal differed from the ones on the collation forms.

The rejection of the report and the limitation of its scope "broke all of us," admitted another advocate who worked on the petition.

They believed that a proper scrutiny would have made plain the far greater illegalities in the October 26 election than even those found in the August 8 one that the Supreme Court had nullified. The lawyers point to the fact that the judges had not entertained the scrutiny gave away the endgame. The petition would be thrown out.

Yet, what the Supreme Court was being asked to do in the November petition was not easy. Even if there was merit in the case, it would be very difficult for a president to accept that he had lost the election, petitioned by a group of civil society activists. Privately, some of the judges felt that Odinga should have come back to court. Still, nullifying one election and paying such a heavy price had blunted the appetite for a repeat performance, unless a senior political player was asking for it.

After Odinga withdrew from the fresh election, a mere fortnight to Polling Day, it seemed he had thrown the contest for Kenyatta, and the Supreme Court felt that it did need not to enter a political dispute. Perhaps the judges would have been less irritable if they had felt that the political contestants were taking them more seriously. The judges treated the petitioners as if they had brought the petition as proxies for Odinga's National Super Alliance (NASA).

The judges decided, in unanimity, that Kenyatta had been validly elected. They found no fault with anything that the electoral commission had done in the fresh election.

From the outset, the court's attitude had betrayed the judges' reluctance to entertain the petition. At decision time, they dismissed it. NASA expressed sympathy with the court, saying the judiciary had been intimidated but the judges too felt abandoned by the political players.

Kenyatta would be sworn in as president on November 28, 2017 at a stately but sparsely populated inauguration presided over by the Chief Justice. Would this judicial mea culpa suffice to repair the broken dam between the judiciary and the Executive?

When the full judgment was released on December 11, 2017, it read: "The … petitioners have not discharged the burden of proof to the standard established by this Court. At no time, in our view, did the burden shift to the [first] and [second] respondents."[25]

Given the fact that the Supreme Court rules enable judges to set page limits for filings, it was curious that in summarising the petition, the judgment expended 35 paragraphs on the petitioners' case against the 160 on the respondents' response. It was an echo to how much gravity the Supreme Court had given to submissions on behalf of civil society activists Gladwell Otieno and Zahid Rajan in the 2013 petition.

The court tipped its hand by blaming the petitioners for the shortcomings of IEBC. Though the petitioners made serious allegations against the IEBC and its capacity to conduct an election, in their ruling, the judges blamed the petitioners for not providing the proof of the allegations.

Law scholar Muthomi Thiankolu has faulted the Supreme Court for failing to appreciate the informational asymmetry between the IEBC and potential petitioners. He argues that given this imbalance, the court ought to adopt an inquisitorial rather than an adversarial approach in proceedings.

The judges pointed to the disenfranchisement of a huge section of the country that did not vote on October 26 and curiously blamed it on the petitioners. This again shows that judges seemed to treat the petitioners as if they had brought the petition as proxies of NASA. The judgment noted that the violence in certain areas, where the election could not be held, was promoted by the petitioners. The court's judgment failed to create future disincentives for electoral fraud and malpractice.

In the 2013 petition, the Supreme Court had pronounced on the effect of a candidate withdrawing from a fresh election or dying after the nullification of the first election, then a new election would have to be held. This would include all the characteristics of a new election such as fresh nominations by the parties. In the November 2017 decision, the court walked away from that observation.

As Kenya marked its 55th anniversary of independence on December 12, 2017, the judiciary was silently marking the end of its 60 days of independence.

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25 John Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR at Paragraph 376

5. Moments of Accountability

Blue klaxons flash from the top of four cars, their sirens blaring as they sped out of the Supreme Court parking lot with full lights in glare. A daylong confrontation in the Chief Justice's boardroom had just been defused when Deputy Chief Justice Mwilu volunteered to accompany detectives to the Directorate of Criminal Investigations headquarters on Kiambu Road on the rim of Karura Forest.

"Who do you think you are?" the Director of Criminal Investigations, Mr George Kinoti, had challenged the Chief Justice when he attempted to dissuade him from arresting Justice Mwilu and instead advised that allegations against her be referred to the JSC, whose members were meeting on the first floor of the Supreme Court building. Justice Mwilu reportedly felt that the affront to her boss was unnecessary and offered to go with the detectives.

Since July 2018, investigators had periodically visited the DCJ to interview her on private bank transactions surrounding the purchase and sale of prime property in Nairobi and the circumstances under which she had obtained a loan facility from Imperial Bank, which was placed under receivership.

When Justice Mwilu was presented in the chief magistrate's court, it was 6 pm, way past official sitting hours. The magistrate granted her a personal bond of Sh5 million to appear the following day to face charges of corruption, abuse of office and failing to pay taxes surrounding the acquisition and sale of a commercial property using a loan from Imperial Bank, which is under receivership.

It would mark the beginning of a months-long battle in the courts over whether the DCJ should take plea while serving as a judge. Matters were not helped by the fact that the 11-member JSC, where she was a member representing the Supreme Court, barely had the quorum of six commissioners.

In February 2018, the President had attempted to rejig the composition of the JSC, perhaps in a belated realisation that controlling the judiciary was well-nigh impossible if he had no levers on the body that protects it and promotes its accountability. He tapped the President of the Court of Appeal and judiciary insider Justice Paul Kihara Kariuki as the new Attorney General to sit in the JSC by virtue of his office together with new members Patrick Gichohi — to replace Margaret Kobia who had joined the Cabinet, former Cabinet Secretary Felix Kosgei and Prof Olive Mugenda. The Attorney General is an automatic member of the JSC by virtue of his office. With four presidential appointees in the JSC, the Executive needed just two more seats to command a majority in the 11-member commission. Two positions were beckoning as the terms of their members were soon coming to an end.

When Justice Mohammed Warsame's term as the representative for the Court of Appeal ended in March 2018, he was re-elected to his position with 15 votes to four against Justice Wanjiru Karanja. After his reelection, he was not able to take his seat because Kenyatta failed to gazette his appointment. The President, on the advice of the new attorney general,

insisted that Justice Warsame be vetted by the National Assembly, but the Law Society of Kenya petitioned the courts to overrule him. In the end, the court decided that Justice Warsame's vetting was not necessary and that he should be facilitated to take his place in the JSC.26 The other three commissioners were sworn into office. Notably, a petition has been filed seeking to remove Justice Warsame from office.

High Court judges and magistrates elected Justice David Majanja to replace Justice Aggrey Muchelule as the male representative to the JSC. Meanwhile, a vacancy in the JSC is expected to open up in April 2019 when Law Society of Kenya representative Prof Tom Ojienda's tenure ends. The membership of the LSK elects a male and a female representative every three years. So far, none of the previous representatives have been re-elected – lawyers Ahmednasir Abdullahi and Florence Mwangangi served one term each, and so too, did Judges Isaac Lenaola and Muchelule as representatives of the High Court.

The re-election of Mrs Emily Ominde as the magistrate's representative to the JSC had attracted a powerful challenger who exposed her connections with big money by flying around the country in a helicopter for her campaigns. It had been a polarizing election, and came after the High Court picked Justice Muchelule to represent it on the JSC. Before that, there had been a bruising battle between Abdullahi and Prof Tom Ojienda for the LSK slot on the commission. Ahmednasir had lost.

At the Supreme Court, Justice Maraga is expected to leave in January 2021, six months after Justice Ojwang reaches retirement age. Kenyatta had already appointed a tribunal on the advice of the JSC to determine whether or not he should be removed from office after a complaint lodged alleged that he failed to disclose his relationship with Migori Governor Okoth Obado when hearing a case involving him.

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On Saturday, March 8, 2019, lawyer Omwanza Ombati tweeted as follows: At 16:55 hrs this evening a Petition was filed before the Judicial Service Commission on behalf of the Kenyan people against Hons. Ibrahim, Njoki, Ojwang and Wanjala, for gross misconduct and violation of the constitution."

The petition alleges that at least two judges received bribes and had improper contact with appellants in the case on the election of the Wajir Governor, Mohamed Abdi.

According to the petition, sometime in September 2018, Sheikh Yunis Ibrahim drove to Jomo Kenyatta International Airport in a Toyota Land Cruiser V8 with a box packed with Sh75 million [in United States dollars] in the trunk, and pulled up alongside a Prado with tinted windows. The driver of the Prado picked the money box from the Land Cruiser and took it back towards the Prado. When he opened the door of the vehicle to pass the box to the occupant, Justice Wanjala was reportedly seated inside.

26 Law Society of Kenya v Attorney General & Another; Mohamed Abdulahi Warsame & Another; (Interested Parties) [2019] eKLR

Early January 2019, Mohamed Abdi reportedly instructed his lawyers to urgently sell a property for Sh60 million in an effort to raise money for bribes to Supreme Court judges. A series of money transfers allegedly carried out by the law firm between February 4 and 7, were allegedly meant to seal the deal. On February 11, 2019 at between 3 pm and 4 pm at a bank in Eastleigh, the petitioner's son withdrew Sh15 million and gave it to Adan Keynan to pass on to Justice Wanjala for sharing with another judge. Additionally, another litigant sent a petition to the JSC alleging that the Chief Justice's nephew argued the governor's election case before him in the Supreme Court, and wants him removed from office for misconduct.

Stung by criticism about the pace at which it processes complaints against judges, the commission announced on March 12, 2019, that by January 2019, it was processing 69 complaints against judges. Of these complaints, 13 were admitted to hearing while another 18 other petitions were still being considered. The commission found no merit with the 38 other petitions.

The JSC has directed that the petitions be served on the named judges, who would have 14 days to respond to the issues raised. Because all the judges of the Supreme Court participated in the hearing and determination of the case, it would present a conflict of interest for the Chief Justice and the Deputy Chief Justice, who sit in JSC as chairman and Supreme Court representative respectively, to take part in the deliberations on the petition. This reduces the number of eligible commissioners to just nine.

JSC is only required to recommend the formation of a tribunal. Should such a tribunal recommend the removal of Supreme Court judges, an appeal only lies with the Supreme Court. Should the tribunal find that removal from office is warranted, the justices cannot be judges in their own cause – and therefore, there would be no Supreme Court to hear the case. It is not unlikely that the entire Supreme Court could be disbanded.

Accountability moments have presented themselves regularly to the judiciary, but the manner of its response to them has not been consistent. Having written the template for conducting public interviews for public office during the selection of the Chief Justice, Deputy Chief Justice and judges of the Supreme Court, the Judicial Service Commission established itself as the greatest defender of judiciary independence. Although the JSC seemed to set standards in processing the allegations of misconduct against Deputy Chief Justice Nancy Baraza, recommending the appointment of a tribunal to determine her suitability for office in two weeks, its conduct of subsequent accountability challenges has not been as speedy.

When confronted with the Sh2.2 billion procurement scandal, the JSC took nearly three months to remove the Chief Registrar of the Judiciary from office in 2013, during which the institution was exposed to a damaging public relations war. Notably, it was the Executive and the Legislature that stood in the way of the JSC's efforts to confront bureaucratic corruption in the judiciary. Parliament inserted itself into the controversy, launched an investigation, and ended up agreeing with the JSC two years later. In the meantime, a tribunal constituted to look into the conduct of JSC

commissioners Ahmednasir, Rev Sam Kobia, Prof Christine Mango and Mrs Emily Ominde was scuttled by a five-judge bench of the High Court order.

Similarly, when Judge Tunoi was alleged to have been involved in receiving a $2 million bribe, the Executive stalled the tribunal and never followed up with investigations to establish the veracity of the allegations made. The Executive's fumbling over the Tunoi investigation, with the head of intelligence refusing to sign the letter forwarding the investigative report, and the glaring failure by the Director of Public Prosecutions to take an interest in whether indeed such a bribe was paid and the reach of its influence, raises important questions about commitment to confront corruption.

Although JSC was hesitant in recommending the formation of a tribunal to determine the suitability of Justice James Mutava following complaints that he had inserted himself in a corruption case in 2012 and clearing Kamlesh Pattni of any wrongdoing in the Sh5.8 billion Goldenberg export compensation scandal, it finally did. Justice Mutava was ultimately removed from office by a tribunal and his appeal at the Supreme Court failed in 2019.

The petition for the removal of the four Supreme Court judges on the one hand and the Chief Justice on the other highlights the dangers the apex court has been exposed to accusations of improper conduct for acquiring jurisdiction over election petitions for governors and Members of Parliament.

These petitions have also exposed the court's accountability deficits in the face of increased demands for independence. The Supreme Court's decision to entertain appeals in election petitions, while probably intended to align its jurisprudence from presidential election petitions with the lower courts, has opened its judges to accusations of bribery. The jurisprudence emerging is unstable, and that instability has been attracting all accusations about influence peddling.

The petitions for the removal of the CJ and four Supreme Court judges present conflict of interest challenges for the JSC. A critical flaw in the power matrix was for the Supreme Court judges to elect Justice Mwilu to represent them in the JSC.

The CJ and his deputy sit in the JSC as chairman and Supreme Court representative, respectively. Were there to be petitions for the removal of the CJ and DCJ, they would have to recuse themselves because they judged the case in question. The commissioners deciding whether or not to form tribunals would be nine, with five forming the majority. Should a tribunal formed to look into the matter recommend the removal of the Supreme Court, it would be the end of the road for all the judges. An appeal only lies with the Supreme Court justices but they cannot be judges in their own case.

A strategy of appeasement through acknowledging gaps in the fight against corruption, on the one hand, and transferring judges seen as repeatedly ruling against the Executive, one the other, has done little to demobilize narratives that the judiciary condones corruption.

Lawyer Ahmednasir believes that judiciary independence is at its nadir: "We are back in the 80s and 90s … the judiciary is now a department in the [Office of the President]."

A picture published on social media and circulated widely showed the Chief Justice clasping his hands as he listened to the Deputy President address a crowd from a car rooftop in Nyamira County. Far from being read as a sign of humility, the obsequiousness was seen as being emblematic of the judiciary's surrender. Subsequently, it was notable that Deputy Chief Justice was absent from the formal ceremony for the launch of the annual State of the Judiciary and Administration of Justice report, which was attended by President Kenyatta and Deputy President William Ruto. It is understood that the CJ and Justice Mwilu failed to agree on the appropriateness of her presence at the ceremony, given the charges facing her in court.

Although solidarity in the institution has been strong, accountability has been weak.

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6. Conclusions and Recommendations

Without a doubt, the nullification of the presidential election of August 8, 2017 produced huge institutional impacts and political reprisals. Although the nullification decision was a high point for judiciary independence, it is only the visible part of a continuing struggle to entrench democratic institutions with implications for the personal security of judges, political polarization in courts and budget cutbacks.

The nullification continues to have ramifications in the political sphere in Kenya. It is arguably the basis for the evolution of the country's politics, including the détente between Kenyatta and Odinga in the 'Handshake'. Beyond that, the three presidential election petitions have highlighted important lessons for the country and its governance institutions. The country needs to ask itself if the court has the capacity to face off with political players who interfere with and pollute elections.

Much has been made of the tight deadline within which the Supreme Court must determine the presidential election petition, but there are deeper questions that warrant consideration. The difficulties the Supreme Court is forced to confront when exercising its electoral dispute mandate call into question the assumptions that went into the establishment of this forum. The assumptions that went into the establishment of the Supreme Court had to do with the exercise of that mandate. That mandate has come under political question from two opposing sides: in 2013 the court was pulverized when it dismissed the Odinga petition. In 2017 the court was vilified when it upheld the Odinga petition, a fact that contributed to the court swinging back to its conservative 2013 stance. Without an election petition mandate, the Supreme Court is not needed as all cases can end at the Court of Appeal.

The three presidential election petitions raise important questions about whether or not the expectations set out in the court's mandate have been met. Given the manner in which the Supreme Court has dealt with the three petitions, what does the future of election petition litigation look like? However, What is to be expected in future, in view of the highly vacillating behaviour of the court, and what should be done to ensure that the court behaves more predictably?

Although the Supreme Court did recommend the investigation of IEBC and its officials following illegality witnessed in the 2013 election, it did not do so in 2017 either from the August election or the October one. Although the commission and its officials were found to have been on contempt of court orders in August 2017, no sanction was imposed.

Even though the Supreme Court found that IEBC was not criminally culpable in the 2017 fresh election, especially around how it 'handicapped' access to essential documents and other efforts at greater scrutiny, it is clear that their actions did not meet the constitutional standards of openness and transparency. These actions constitute wrong-doing, even though they do not amount to crime. In addition, subsequent events at IEBC including adverse audit findings; resignations by three commissioners and the dismissal of its chief executive office is a deep

issue the petitions left unaddressed. There is a clear case for stronger treatment of the IEBC by the courts.

There is need to relook at the role the Executive plays in the appointment of judges and debate whether or not the insulations in place are sufficient to guarantee independence. It continues to be a sticking point in relations between the two institutions and has coloured relations between them. The National Council on the Administration of Justice is an important forum for dialogue but it needs to be scaled up to the highest political echelons of the executive and the legislature.

The differentiated treatment of petitions against judges in the absence of transparency undermines accountability and suggests that the Judicial Service Commission needs to establish a clear and predictable pathway for processing complaints and petitions against judges and judicial officers.

Finally, the judiciary generally, and the Supreme Court in particular, needs to review its posture towards civil society. The court's attitude towards civil society has not been even-handed. There appears to be an institutionalized bias against civil society, which is societal in the Kenyan context. Civil society organisations have played an important role in Kenya's constitutional discourse in terms of origin and its institutionalization. It is a contradiction that civil society is treated dismissively and with suspicion – not just in the November 2017 petition, but also in the Supreme Court's handling of the application by Katiba Institute's Prof Yash Pal Ghai for joinder as amicus curiae in the 2013 petition as well as of its case in that petition.

Notably, the matter of whether or not the Supreme Court could adjudicate on the question of the retirement of judges was resolved by determining an application filed by Okiya Omtatah. The Constitution, in laying out the requirements for qualification to join the judiciary has made opportunity for non-career judicial officers to join the institution. In other jurisdictions, constitutional courts and Supreme Courts treat civil society and public interest litigation like natural partners instead of irritants. In adjusting its posture, the judiciary should also recalibrate its image to embrace the public, which it serves, rather than privileging political players.

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