

Judicial proceduralism: the application and exploitation of the substantiality rule in presidential election petitions in Africa

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Abstract

Presidential candidates who have faith in judicial supremacy often turn to the courts for redress when they lose presidential elections, because the courts often rely on technicalities and the substantiality test to determine the elections. One such technicality is the substantiality test. This paper examines, with the use of selected examples, the application and exploitation of the materiality, otherwise known as the substantiality test, by courts while adjudicating presidential election petitions in Africa. The paper first examines the meaning and origin of the substantiality test before venturing into the legal and constitutional provisions for this rule in selected countries. The paper then turns to the key Supreme Court decisions on presidential election petitions in Africa, focusing on evaluating how the substantiality test has been applied or misapplied. Finally, the paper examines legal and policy implications before making the concluding remarks.

Key words: Electoral democracy, Presidential elections, Petitions, Court decisions, Substantiality test, Africa

Introduction

The hope of achieving good governance calls for improvements in all aspects of the public sector (Grindle, 2002:1). There are however critical state institutions and structures embodying the governance process that must be functioning well and effectively if this desire is to be achieved (Basheka, 2020). One such state structure, whose role is to promote good governance and democratic ideals, is the judiciary and how it adjudicates disputes. It is undeniable that the African continent has seen exponential growth in the number of elections due to the increase in multiparty political dispensations that characterised the continent since the 1990s because of the donor-driven liberal democratic and economic agenda. Political and economic liberalisation were considered as the minimum benchmarks by the development partners such as the World Bank, the IMF, and western countries before any economic aid could be advanced to developing countries, especially in the sub-Saharan Africa region.

Electoral results contestation is not a phenomenon limited to the African continent. The “*Bush v. Gore, legal case*” on 12 December 2000 is just one example of elections that have been decided by a court in western democracies. In this case, ‘the Supreme Court of the United States reversed an order by the Florida Supreme Court for a selective manual recount of that state’s U.S. presidential election ballots’ (Britannica, T. Editors of Encyclopaedia, 2021:1). It is argued that ‘the five to four per curiam (i.e., unsigned) decision effectively awarded Florida’s 25 Electoral College votes to Republican candidate George W. Bush, thereby ensuring his victory over Democratic candidate Al Gore’ (Britannica, T. Editors of Encyclopaedia 2021:1).

The increase in multiparty democracy in less developed and aid dependent countries have resulted in increased political contestations and disputed election results, which end up being challenged in these countries’ courts. Political parties, especially those of the incumbent candidates, have used many tricks to steal the elections in the past. It is worth noting that lately there has been an increase in the use of technologies to tamper with election outcomes around the world. According to Kaaba and Fombad (2021:1), ‘in the last ten years, almost all presidential election disputes in Africa have revolved around failure or alleged tampering with the ICT facilities during the election process’. The consequences of manipulating the election results have been catastrophic. In some cases, as Kaaba and Fombad (2021:1) put it, ‘challenging the results of presidential elections in courts in many African countries is largely a phenomenon that accompanied the fall of dictatorships and one-party regimes across Africa in the late 1980s and early 1990s.’

The role of the judiciary in election adjudication is summed up into two main functions: 1) resolving disputes over rules; and 2) ensuring that the rules create ‘a level playing field – they are rule-evaluating’ (Gloppen, 2007:2). The rules governing the conduct of elections should be in line with the dictates of the constitution. In *Ashby v. White* (1703)¹, Lord Holt laid down the important principle that, where there is injury in the absence of financial loss, the law makes the presumption of damage and that it is sufficient to demonstrate that a right has been infringed. The petitions have only succeeded in some countries, including the Ukraine, Kenya, and Malawi for example. In other countries like Ghana, Nigeria, Sierra Leone, the DRC, Uganda², Zambia, and Zimbabwe petitions have failed. Where presidential election petitions have been unsuccessful, the courts declined to invalidate the election results based on the substantiality test (Azu, 2015:151).

Whenever a country organises presidential elections, five likely outcomes are possible. The first likely outcome is for the losers of the elections to congratulate the winner and concede defeat (acceptance outcome). The second outcome which is likely to occur is for the losers to resort to the vigorous mobilisation of supporters for violent street protests the decisions of the electoral body (the protest outcome). The third possible outcome of presidential election results is the decision of petitioning the courts of law (the court petition outcome). The fourth outcome of presidential election petitions is waging full-scale war against the government (the civil war outcome). The likely fifth outcome has been the military takeover of government especially when protests or the waging of war has proved disastrous. The African continent has lived through all the above possible outcomes. However, for this paper, the focus is only on the court petition outcome.

¹92 ER 126

²*Besigye v Electoral Commission, Yoweri Museveni* (2007) UGSC 24; *Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission* (2001) UGSC 3.

In recent decades, the African continent has witnessed an increase in the number of presidential elections and ultimately in the increase in the number of electoral petitions (Murison, 2013)⁴.

Candidates in several countries who have lost presidential elections have dashed to courts with several electoral offenses and malpractice claims seeking the intervention of courts. They have exploited provisions in the Presidential Election Acts and the provisions of their countries' constitutions. On this subject, Azu (2015:151)⁵, reminds us of how approximately 58% of presidential and parliamentary elections' losing political parties have failed to accept electoral results and have moved to the courts for redress, although most of these election petitions have not been successful. While the petitioners have often coherently provided, what they call, sufficient evidence in relation to failure to respect and comply with election laws, the judiciary has always ruled that the malpractices have not been substantial enough to have had any adverse impact on the validity of disputed presidential election results (Kanyehamba, 2012:333). Legal minds have teased out weaknesses in the decisions of judges in presidential elections, especially regarding the application or exploitation of the substantiality rule.

Peaceful resolutions of electoral disputes enhance democracy (Adams and Asante, 2020) and the independence of the judiciary. In addition, the decisions made equally support the growth and functionality of a constitutional state. While the increase in election petitions has been considered a democratic boom because it signals the losers' willingness to work within the constitutional framework to resolve election-related conflict (Adams and Asante, 2020)⁶. The decisions made by courts, whenever they have been seized with such rare opportunities of adjudicating a political contest, appears to have had unintended consequences of undermining democracy. This is because of the wrongs that have been committed by the courts themselves. For example, there are alleged instances where judges have been manipulated to rule in a particular way, and often against the democratic and constitutional parameters (Onapajo and Uzodike, 2014)⁷. In other instances, courts have assumed roles that were not intended for them, and this has fundamentally affected a '*credible and competent electoral administration*' (Suberu, 2007:104)⁸. In the 2022 Presidential Elections in Kenya, for example, an appellant court made a ruling on the eve of elections on not using manual election registers alongside the electronic election technologies (Mosero, 2022).

Constitutional theories and the origins and principles of the substantiality test

Judicial adjudication may be invoked at any stage of the electoral process (Nkansah, 2017:99)⁹. Electoral laws of several African countries make room for dispute resolution of election complaints and appeals (Fall, Hounkpe, Jinadu, & Kambale, 2011). The judiciary's involvement comes under the judicial review doctrine, whose debates took place in the early stages of the American Republic in the State of Kentucky. The Kentucky judicial review saga evoked the augment as to where the ultimate decision making should be posited in a body polity.

³Amama Mbabazi V Museveni, 2016

⁴Murison J (2013) *Judicial Politics: Election Petitions and Electoral Fraud in Uganda*. *Journal of Eastern African studies* 7(3), 492–508.

⁵M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 150–166 <http://dx.doi.org/10.17159/1996-2096/2015/v15n1a7>

⁶Adams S and Asante W (2020) *The Judiciary and Post-Election Conflict Resolution and Democratic Consolidation in Ghana's Fourth Republic*. *Journal of Contemporary African Studies* 38(2), 243–256.

⁷Onapajo H and Uzodike UO (2014) *Rigging through the Courts: The Judiciary and Electoral Fraud in Nigeria*. *Journal of African Elections* 13(2), 137–168.

⁸Suberu RT (2007) *Nigeria's Muddled Elections*. *Journal of Democracy* 18(4), 95–110.

⁹Lydia Apori Nkansah, *Dispute Resolution and Electoral Justice in Africa: The Way Forward*, *Africa Development / Afrique et Development*, Vol. 41, No. 2 (2016), pp. 97–131

The Supreme Court of the United States of America, in *Marbury and Madison* in 1803¹⁰, attempted to resolve this question. The case is judiciously regarded as a landmark U.S. Supreme Court case that established the principle of judicial review in the United States. The principle meant that American courts had the power to strike down laws and statutes that were found to violate the Constitution of the United States (Ruger, 2004)¹¹.

Constitutional theories

The substantiality test: The substantiality test is also called the **materiality test**, and is connected to what some authors have labelled judicial proceduralism. The rule provides that elections should not be nullified for minor irregularities or infractions of rules, and it originates with the court's decision in the *Medhurst v Lough Casquet* (1901)¹² case. J. Kennedy, in his decision, observed that election results should not be declared void just because there had been inadvertent breaches of the law by Election Management Board (EMB) officials, provided that, in spite of the breaches, the court is satisfied that the elections were conducted in compliance with the electoral laws, and that the breaches could not adversely impact the success of one candidate over the other(s). These views by J. Kennedy have been adopted by several African courts in determining presidential election petitions.

Since the introduction of the substantiality rule and the earliest decision of the court, the idea behind the rule has been that flimsy mistakes, omissions, and commissions should not lead to the annulment of an election, provided that, overall, the fairness of the election was not vitiated. In later years, Lord Denning in *Morgan and Simpson* (1975)¹³, identified the following three strands to the substantiality rule:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
2. If the election was conducted in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the results of the election.
3. Even if the election was conducted in accordance with the law as to elections, if there was a breach of the rules or a mistake at the polls – and it affected the results– then the election is vitiated.

The above are regarded as the ingredients of the rule. Other countries have also applied the rule in their decisions. The position applied in the case of *Shri Kirpal Singh v Shri VV Giri* (1970)¹⁴, where the court, on invitation by petitioners, held that allegations of corrupt practices had to be proven beyond any reasonable doubt. In *M Narayan Rao v G Venkata Reddy & Another*¹⁵, the Indian Supreme Court also explained that this requirement was necessary because allegations of corrupt practices are quasi-criminal in nature and, accordingly, they must be proven according to the criminal standard.

The known position of the standard of proof in a criminal proceeding is historically associated with the *Woolmington v. D.P.P* (1935)¹⁶ case, where Viscount Sankey made his famous “*Golden thread*” speech as follows:

¹⁰5 U.S. 137 (1803)x.

¹¹Ruger, T.W., 2004, *A question, which convulses a nation', The early republics greatest debate about the judicial review power, Harvard Law Review, 117(3), pp. 827-897.*

¹²[1901] 17 LTR 230.

¹³*Morgan v Simpson* [1975] 1 QB 151.

¹⁴1970 (2) SCC 567

¹⁵1977 (AIR) (SC) 208.

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”.

He spent much time contrasting the position under the criminal law at the time when the decisions relied upon in Foster’s Crown Law were handed down, and the latest precedent. The argument at the time was that an accused person was not even entitled to be represented in court if charged with a misdemeanour. Moreover, it was not until 1898, in the post-Civil War system, that the accused who was not a peer or barrister was permitted to give evidence on their own behalf. Lord Justice Avory had earlier refused leave to appeal, relying on a passage of *Foster’s Crown Law* (1762):

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them.

A lower standard, that of the balance of probability is applied in civil litigation. Even though the standard of proof is lower in civil cases, it is no reflection of the seriousness of the allegations in question. The rationale behind the use of such a standard is that, in some cases, the question of the probability or the improbability of a happening is an imperative matter to be considered in deciding whether that event has actually taken place or not. Whereas in Kenya a presidential election dispute must be established to a degree between the civil and criminal standard. In Ghana, the correct position of the law is proof on the preponderance of probabilities, except when a crime is alleged (Anin Yeboah JSC in *Azu* 2015)¹⁷.

The applicability of the substantiality rule-selected countries in Africa

Periodic elections which are regulated by laws made by the legislative body appear to be a fundamental element of a functioning democracy (Nkansah, 2017)¹⁸. Elections in Africa have not been flawless, let alone perfect since the democratic wave of the 1980s and 1990s (Davis-Roberts, 2009). Where results have been disputed, aggrieved parties have looked to the judiciary as a last resort for redress (Kaaba, 2015)¹⁹. Electoral Dispute Resolution mechanisms have however not received much analysis and attention (Davis-Roberts, 2009:3)²⁰. Voter registration and the actual voting alongside the counting of votes tend to attract much more analysis and interest. In countries like Nigeria, it is estimated that a presidential election petition takes about two years to finalize, which is actually half of the presidential tenure²¹. In other countries, the petitions are resolved within a few months.

This is the case with Uganda where the period has been extended from one month to now three months. What appears consistent across the board in all the petitions is the presence of judicial politics.

¹⁷Nana Akufo-Addo (n 1 above) 62 459-460.

¹⁸Lydia Apori Nkansah, *Dispute Resolution and Electoral Justice in Africa: The Way Forward, Africa Development / Afrique et Développement*, Vol. 41, No. 2 (2016), pp. 97-131

¹⁹O Kaaba ‘The challenges of adjudicating presidential election disputes in domestic courts in Africa’ (2015) 15 *African Human Rights Law Journal* 329-354 <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a5>.

²⁰Davis-Roberts, A., (2009), *Electoral Dispute Resolution Discussion Paper for Experts Meeting, Atlanta GA - February 2009*.

Murrison (2013), reports incidences of judicial politics in Uganda after the 2001 and 2006 presidential elections, where the Forum for Democratic Change (FDC) presidential candidate, Kizza Besigye, lodged an election petition with the Supreme Court against President Museveni.

There are few selected cases where the substantiality test has been used by courts to nullify presidential elections. This is what we considered to be the genuine applicability of the rule. The Kenyan Supreme Court's decision of 2017, and that of Malawi illustrate this class of countries. In 2020 constitutional court in Malawi nullified the election President, Peter Mutharika, who won last May, citing massive irregularities during the process (Voice of America, 2020).

The court called for fresh elections within 150 days. Evidential value is what courts should rely upon to make decisions. The substantiality rule thus relates to the quality and quantity of the evidence presented to the court. Courts are swayed by what petitioners submit during the pleadings and evidence, the burden of proof of corrupt practices/electoral malpractices, and the standard of proof as required for the petitioner to succeed in an election petition, with a view to ascertaining whether the evidence required affords electoral justice (Okolie, 2019:25)²². Compliance with election rules determines the magnitude of the substantiality rule. Following are the brief facts relating to each of the two cases above.

In August 2017, Kenya's Supreme Court made a ground-breaking decision when it annulled the election of Uhuru Kenyatta by a majority of four to two justices. The court on invitation by the petitioners held that the presidential poll was not conducted in accordance with the constitution and the applicable laws, rendering the declared result invalid, null, and void. The Court also ruled that the irregularities and illegalities in the election were substantial and affected the legitimacy of the elections. The country's elections management body-the Independent Elections and Boundaries Committee (IEBC) was directed by the court to conduct fresh presidential elections in strict conformity with the constitution and applicable electoral laws within 60 days.

President Kenyatta, had been re-elected with 54% of the vote, easily surpassing the 50% threshold needed to avoid a runoff. Raila Odinga, the opposition candidate who had petitioned the Supreme Court to nullify the election, had received about 44%, a difference of about 1.4 million votes. The Independent Electoral and Boundaries Commission, which was in charge of the vote was ruled by court to have 'failed, neglected, or refused to conduct the presidential election in a manner consistent with the dictates of the Constitution'. The six-judge Supreme Court found no misconduct on the part of the president, but it found that the commission 'committed irregularities and illegalities in the transmission of results and unspecified other issues. These irregularities were confirmed by court to have affected the integrity of the poll in a substantial manner.

The same issues were repeated after the 2022 elections where former Deputy President William Ruto and Raila Odinga contested Presidential elections and Odinga once again petitioned the Supreme Court to nullify the election 2022 elections claiming that they were not free and fair. Once again, The Supreme Court found no misconduct on the part of the president elect William Ruto and Raila Odinga lost both the court case and the elections. In the words of Walsh & Dahir, 2022:1) 'in a lengthy judgment that rejected accusations by Mr. Ruto's rival, Raila Odinga, that the vote had been rigged, Chief Justice Martha

²¹*Buhari v Obasanjo Suit SC 133/2003 17 NWLR 587*

²²*E. Q. Okolie Esq, Evidential Imperatives in Election Petitions in Nigeria, World Journal of Innovative Research (WJIR), Volume-6, Issue-4, April 2019 Pages 25-34.*

Koome swept aside claims of stuffed ballots, hacked computers, and falsified results that she variously described ‘*sensationalism*’, ‘*hot air*’ and ‘*a wild-goose chase that yielded nothing of value.*’

Following the jurisprudence set by the Kenyan example on the African continent, a similar presidential election petition against Malawi’s 2019 presidential election results was lodged in court. The court in this country found that election results forms, which were used to tabulate national figures, were pervasively altered unlawfully and based on adduced evidence, court again applying the substantiality rule concluded that a substantial number of the official result sheets had results altered using a correction fluid, known as Tippex (Gewde, 2022). The court found that the country’s electoral commission had failed to preside over a free and fair election and that the electoral process was compromised and was conducted in a manner that violated electoral laws and the constitution. The court subsequently nullified the election and ordered a new election to be held within 150 days. In Malawi, the re-run saw opposition candidate Lazarus Chakwera win 58.6% of the vote to comprehensively defeat incumbent, and winner of the 2019 poll, President Peter Mutharika (Gwede, 2020).

Some incumbents in Africa have attempted to divert the will of the people whenever it has dawned on them that they have lost elections. In the presidential election of Malawi in 2014, the then President, Joyce Banda, announced that she was exercising her constitutional powers to nullify the presidential election that she had contested because of irregularities for a fresh election to be conducted in 90 days (Gwede, 2020). The rival in that election had won 40% of the 30% votes that had at the time been counted, while the incumbent appeared with 23%. The head of the Electoral Commission rejected the announcement by the incumbent president as she did not have the power to annul the election. The Electoral Commission proceeded with the counting despite the problems associated with it. The High Court of Malawi also rejected the decision of the president.

In the same country, in February 2010, the Malawi High Court upheld its original decision to nullify the country’s May 2019 presidential election and decreed that the poll must be rerun within 150 days. Malawi followed the footsteps of Kenya to be the second African country to have annulled presidential elections by the courts. In this election, the incumbent Peter Mutharika won Malawi’s one-round presidential election with 38.6% of the vote. The result prompted widespread protests and a nine-month court case led by the opposition, which alleged that there had been massive irregularities, including the use of Tipp-Ex correction fluid to alter the results sheets. The Malawi High Court also recommended that the new election takes place under a 50%-plus-one majority system.

From the above cases, there are some lessons to draw:

1. Chief Justice Role. The Chief Justices and heads of appellant courts have a critical role in defending the integrity of the courts.
2. Democratic considerations. The Judiciary weights and balances the interests of the country and democracy against the wishes of politicians
3. Jurisprudence. The decisions of courts and justices are influenced by their jurisprudential values
4. Evidential value. Election petitions require evidential value of a high standard to move courts make appropriate decisions.

The exploitation of the substantiality test by courts in Africa – Selected examples

The exploitation of the substantiality test by courts in Africa is where the authors of this paper believe procedural technicalities have been relied upon to make decisions regarding the presidential election petitions. While the researchers of this paper concur with Ndulo (2011) that to safeguard democracy, the judiciary must be competent, honest, learned, and independent²³, we also argue that such judicial independence connotes that power should not be concentrated at any point in the political sphere (Nkansah, 2017)²⁴. Decisions made by the executive, legislature (parliament), and judiciary should be independent of one another, and decisions by one branch are respected and upheld by the others (Murrison, 2013)²⁵.

Courts have sometimes been seen to refrain from making any meaningful decisions. In some cases, they have even deferred the actual decision to the executive (Kaaba, 2015). In the **Nigerian case of Buhari**²⁶, the losing candidate, Muhammadu Buhari, sought and was granted an injunction by the court restraining Obasanjo and his running mate from presenting themselves for swearing-in into office pending the determination of the main election petition. The respondents, in violation of the court order, went ahead and were sworn in. An appeal to the Supreme Court was then lodged by the applicants for a determination on whether the president had been validly sworn in when it was done in violation of a valid court order. The Supreme Court instead held that the appeal was no longer of any relevance since the respondents had already been sworn in and, therefore, the injunction would only be an academic exercise. The Court felt that the injunction was not directed at the Chief Justice not to swear in the respondents and the court argued that the applicants would not suffer any loss as the courts would still go ahead and determine the main election petition objectively and on its merits.

In Côte d'Ivoire, the country had held elections in 2010 where the first round failed to produce an outright winner hence a run-off election according to the country's constitution. The run-off pitted incumbent Laurent Gbagbo and main opposition candidate Alassane Dramane Ouattara. As an outcome of the run-off, the Chairperson of the Independent Electoral Commission, announced Ouattara as the winner, with 54,1 % while Gbagbo's obtained 45,9 %. Gbagbo made a prompt appeal to the Constitutional Council to annul the election of Ouattara based on claims that the elections had been rigged in the northern stronghold of Ouattara. Without giving audience to the other party, the Constitutional Council hastily invalidated about 600 000 votes from Ouattara's stronghold and declared Gbagbo the winner of the election with 51,45 %. Some of the grounds on which the Constitutional Council based its decision to annul the election of Ouattara included that the results were announced from a hotel instead of the offices of the Independent Election Commission and that the results were not announced within the prescribed time of three days. There was actually no evidence presented to the Council in support of the serious claims of ballot-stuffing and tampering with results.

The Côte d'Ivoire story appears to have recently reappeared in legal circles and become even more complex. In mid-September, the **Ivorian Constitutional Council rejected Gbagbo's presidential candidacy**, which was submitted by his supporters, as Gbagbo himself refrained from making a pronouncement

²³M Ndulo *Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system* (2011) 2 *Zambia Social Science Journal* 1-27.

²⁴Lydia Apori Nkansah

²⁵Jude Murrison (2013) *Judicial politics: election petitions and electoral fraud in Uganda*, *Journal of Eastern African Studies*, 7:3, 492-508, DOI: 10.1080/17531055.2013.811026

²⁶*Muhammadu Buhari & Others v Olusegun Obasanjo & Others SC 133/2003 17 NWLR (2003).*

on the subject. According to the Ivorian authorities, the Council's ruling was in keeping with Gbagbo's 20-year prison sentence handed down by an Ivorian court in the case involving the "robbery" of funds from the Central Bank of West African States (BCEAO) during the 2010-2011 post-electoral crisis. The Constitutional Council also justified its decision by arguing that Gbagbo's presidential candidacy application had not contained a statement bearing his signature. In addition, the Council said he was unable to stand for election since he had failed to relinquish his position as ex-officio member of the Constitutional Council by virtue of his status as former president of the Republic. Gbagbo subsequently filed an application instituting proceeding with the African Court on Human and Peoples' Rights, based in Arusha, Tanzania, which has since made orders to the Ivorian State to 'suspend the reference to the criminal conviction from the criminal record'. **The African Court on Human and Peoples' Rights** ordered Côte d'Ivoire to reinstate the ex-president on the electoral roll for the 31st October presidential election, thus disavowing the country's position on the matter.

Following the election in Kenya in 2013, the Independent Electoral and Boundaries Commission (IEBC) announced Uhuru Kenyatta as the outright winner, with 6 173 433 out of a total of 12 338 667 votes (50,07%), while Raila Odinga, had received 5 340 546 votes (43,31%). The percentage by which Uhuru was declared the winner was based on the number of valid votes, contrary to the constitutional provision that required it to be based on 'all votes cast in the election'. The importance of the difference was that, if the computation was based on the percentage of all votes cast, then that would consider all votes, including the invalid. The consequence would have been that Uhuru would have had less than 50% of overall votes to prevent a run-off and that, therefore, he would not have been declared the winner of the election.

The Supreme Court stated that it was interpreting the Constitution purposefully and held that 'all votes cast in the election' actually 'refers only to valid votes cast', and does not include rejected votes. The historical source of purposive interpretation is the mischief rule established in **Heydon's Case (1584)**²⁷. This is considered a landmark case as it was the first case to use what would come to be called **the mischief rule for statutory interpretation**. The ruling was based on an important discussion of the relationship of a statute to the pre-existing common law. The court concluded that the purpose of the statute was to cure mischief resulting from a defect in the common law. Therefore, the court concluded, that the remedy of the statute was limited to curing that defect.

From another African Country, in **Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others (2010)**²⁸ the petition concerned an election brought by the opposition following the 2009 presidential and parliamentary elections in Namibia. The petition sought to void the presidential election for non-compliance with electoral laws. Section 10 of the Electoral Act, 1992 of Namibia required that election petitions could only be presented within 30 days of the results being announced. The petitioners presented their petition on the thirtieth day at 16:30 and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of the court did not allow the filing of a process on any day after 15:00. Because the petition was filed after 15:00, the Court held that the petition was invalid for being filed out of time. This is another classic example of how courts in Africa have relied on technicalities to subvert the wishes of the people and in the process maintain the status coup of the incumbents.

27(1584) 76 ER 637

28[High Court] Case A01/2010.

John Opong Benjamin & Others v National Electoral Commission & Others (2012)²⁹ is yet another case in the African continent to demonstrate the extent to which courts have attempted to maintain the status quo of the incumbents by relying on technicalities to throw out election petitions. In this case, the petition was brought by the losing opposition leader, John Opong Benjamin, and other opposition leaders against the election of Ernest Bai Koroma during the Sierra Leone elections of 2012. Article 55(1) of the Constitution of Sierra Leone provided that anyone with a grievance in a presidential election should petition the Supreme Court within seven days of the results being declared. The election was held on 17 November 2012 and the results were declared only on 23 November 2017. The petitioners filed their petition on 30 November, the seventh day after the declaration of results. There were rules of court that required that petitioners leave the names of the advocates acting for them at the court registry in a separate notice, and that, within five days of filing the election petition, the petitioners were to make payment for the security of costs. The petitioners' lawyers had indicated their contact details by endorsing these on the petition, but not in a separate notice, and made the security of cost payments on 5 December 2012. The Court, however, struck out the petition, holding that it had been filed out of time due to a delay in payment for costs and for not complying with the requirement of lawyers' contact details to be in a separate notice.

In **Atiku Abubakar & Others v Umaru Musa Yar'adua & Others (2008)**³⁰ in The Supreme Court of Nigeria, the presidential election dispute was also dismissed by court because of procedural technicalities without consideration of the merits of the case. The petition arose from the 21 April 2007 Nigerian elections. The petitioner, Atiku Abubakar, had polled 2637848 votes against the winner, Umaru Musa Yarsa Ya, who had received 24638638 votes. Prior to the election, the Independent Electoral Commission of Nigeria (INEC) had disqualified the petitioner from the election and his name had been excluded from the ballot papers. This was based on the INEC's erroneous view that the petitioner had been indicted for corruption and embezzlement-related criminal offenses and was therefore unsuited for presidential office. His name was finally printed on the ballot papers, only four days before the election, through a ruling to that effect by the Supreme Court. In the view of the majority, the use of the word 'or' meant that the petitioner had to choose between the alternatives and could, therefore, only plead one set of grounds. Having considered the fact that the petitioner's name was on the ballot paper, the Court declined the invitation to consider whether his initial disqualification may have constituted constructive exclusion from the election as it had left him with barely four days to campaign.

Fred Sekindi (2017)³¹ has argued that the post-1995 constitutional reforms in Uganda were aimed at averting violent struggles for political power and the introduction of direct presidential elections was one of the significant features of the Constitution of 1995. Uganda has had numerous Supreme Court decisions on Presidential election results. The state called Uganda did not exist before 1894 (Kanyeihamba, 2002) and Britain organised the first general elections in Uganda in 1962 to prepare the country for self-rule. The elections were contested by the Democratic Party (DP), Kabaka Yeka (KY) and the Uganda People's Congress (UPC). Although the DP received a majority in the National Assembly, the KY and UPC merged to become the KY-UPC and became a majority. The transfer of power from the Colonial Governor, Sir Walter Coutts, to President Mutesa II after the 1962 general elections is the only non-violent and undisputed transfer of government in the country's history (Sekindi, 2017).

²⁹SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013].

³⁰SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008.

³¹PRESIDENTIAL ELECTION DISPUTES IN UGANDA: A Critical Analysis of the Supreme Court Decisions

Uganda later witnessed another election in 1980. The 1980 elections were contested by the Conservative Party (CP), DP, Uganda Patriotic Movement (UPM) and UPC. The election was characterised by several malpractices. For example, Sekindi (2017) reports how it was a common occurrence during election campaigns for the armed forces to harass, torture and kill UPC's political opponents, and to disperse political rallies organised by its political opponents. By this time, Obote had distorted the ethnic composition of the armed forces in favour of members of his own tribe, the Langis (Mukasa, 1980). Events before, during and after the elections suggest that the elections were neither free nor fair. During the elections the chairman of the military commission, Paulo Muwanga, usurped the powers of the electoral commission by decree, Legal Notice No. 10 1980, which authorised him to assume responsibility for announcing the results. Mudola claims that this decree was issued for Muwanga to reverse the DP's victory once it became apparent that they were on the verge of winning the majority of seats in the National Assembly (Mudola, 1980:291). The same decree removed from the courts the authority to adjudicate any disputes arising out of the elections.

The credibility of the 1980 elections was tainted with numerous illegalities and has been described by Perrot; Makara; Lafargue; and Fouéré (2014) to have been nothing but sham elections. The UPC under Obote took power while the DP, which had garnered the most votes but lacked military might, formed the opposition. Yoweri Museveni, then the UPM party leader, declared that the elections were fraudulent and unacceptable. Museveni formed a political organisation, the National Resistance Movement (NRM), which contested the validity of the elections through a popular and bloody armed conflict. In an armed coup, Obote was removed from power in 1985 by Tito Okello Lutwa. In 1986, Museveni's NRM seized power from Lutwa following a bloody civil war. Thus, since independence, Uganda has had eight heads of state, seven of whom came to power by overthrowing the previous government.

In the Nigerian case of **Obasanya v. Obafemi (2000:324)** the court defined an election petition as a 'complaint about election or the conduct of election'. That they were not to be regarded as ordinary complaints. In **Orubu v. NEC (1988)** and **Abdulahi v. Elayo (1993)**, the Nigerian courts held that election petitions were not ordinary petitions because of the importance of elections for the well-being of democracy. Court warned because of this special nature, they should not be subjected to procedural delays, because the rules of procedure in civil cases will not serve their purpose. This can only be maintained by a truly independent judiciary.

Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others³³ was a case brought before the Supreme Court in Zambia following the 2001 Zambian general elections. Unlike other countries where the substantiality rule is provided for in Presidential election statutes and the Constitution, in Zambia, this was effectively legislated into existence by the Supreme Court in the first-ever presidential election petition that followed the 1996 general election. The Supreme Court then admitted that there had been many flaws in the electoral process, which included the use of the national intelligence service in a partisan way, the unlawful use of public resources by the incumbent party, and the abuse of resources from para-statal companies. The Supreme Court held that it could not grant any remedy or interfere with the result of the election because, considering the national character of the presidential election, 'where the whole country formed a single electoral college', it could not be said that the proven 'defects were such that the majority of the voters were prevented from electing the candidate whom they preferred'.

³²Uganda had as a British colony, earlier held its first indirect elections in 1958 and first direct elections in 1961 that ushered in Democratic Party as the ruling party with Benedicto Kiwanuka as the Chief Minister.

³³SCZ/EP/01/02/03/2002

In **Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others**³⁴, the case arose from the 2012 Ghanaian elections. Ghana is variously regarded as an African democracy that has steadily reached some maturity, especially when compared to other countries on the same continent as far as elections and change of presidency is concerned. The main issue raised by the petitioners' included allegations of over-voting; voting without biometric verification as required by law; absence of signatures of presiding officers on some results sheets, contrary to the law; and the occurrence of the same serial numbers for different polling stations. The argument was that had it not been for the election anomalies, then the president-elect, Mahama, would not have had the 50% +1 vote constitutionally required majority to be considered the elected President. Although the majority of the justices gave various reasons for upholding the election, the common theme was that, even if there were these noted anomalies, the election itself was 'conducted substantially by the Constitution and other laws. Adinyira, JSC, for example, made it clear that in her view, 'public policy favours salvaging the election and giving effect to the voter's intention'. The decision is in sharp contrast with the guidance of Lord Denning, to the effect that even if an election is substantially held by the law but is assailed with minor infractions that affect the result, the election is vitiated and voidable.

Movement of Democratic Change (MDC) v. The Chairperson of the Zimbabwe Electoral Commission (2008) is a Zimbabwean Presidential election petition where the main opposition party-the MDC instituted an action to the effect that the Zimbabwe Electoral Commission had delayed in releasing the results of the presidential election and applied to the High Court to release the presidential results. The Court admitted that the EC had inordinately delayed in releasing the results, but that the Court did not have jurisdiction in the matter because the decision of the EC was not to be subjected to appeal by Section 67A (7) of the Electoral Act of that country. Court had been invited to use its judicial review power and the argument that it did not have jurisdiction raises concerns as far as the independence of the judiciary is concerned. If we compare it with Uganda, every court is vested with jurisdiction to construe, apply and enforce provisions of the constitution regarding any dispute before it (**Ssekana, 2019:463**). This position was also stated by the country's supreme court in the case of **Kyamanywa Simon V Uganda, SC Criminal Appeal No.16 of 1999 (UR)** in a dissenting judgment of Justice Kanyeihamba.

In the case of **Rtd. Cl. Kizza Besigye v. The EC Yoweri Kaguta Museveni (2006)**³⁵, the incumbent Museveni was declared the winner by the Electoral Commission body with 59% against Besigye who got 37%. Besigye filed a petition on 7 March which was heard from 22-30 March and a decision was given by the Supreme Court on 6 April 2006 within 30 days from the filing of the petition, as required by Article 104 of the Constitution and Section 59 of the Presidential Elections Act. In his petition, Besigye had alleged that Museveni was not validly elected and asked the court to order a re-run or a recount of the vote. The grounds of the petition were:

- That the conduct of the elections contravened provisions of the constitution, Electoral Commission Act, and the Presidential Elections Act;
- Non-compliance with the principles of the Presidential Elections Act substantially affected the results;
- Section 59(6)(a) of the Presidential Election Act, says that an election can be nullified if it is inconsistent with Article 104(1) of the constitution providing that 'any aggrieved candidate can

³⁴J1/6/2013.

³⁵Presidential Election Petition 01 of 2006

- petition the Supreme Court for an order that a candidate was not validly elected;
- Museveni personally committed electoral offences by making ‘malicious, abusive, insulting, misjudging, derogatory and defamatory statements against Besigye, the FDC, and other candidates.

The Supreme Court of Uganda found that the Electoral Commission failed to comply with the Presidential Elections Act and the Electoral Commission Act in the conduct of the elections, in that people were disenfranchised; and serious issues emerged in the counting and the tallying of the results. The Supreme Court also found that the election was not conducted on a free and fair basis because of the incidents of intimidation etc. A definition of a free and fair election in the case of Uganda had been given in an earlier case. The principles of a free and fair election were laid down by Chief Justice Odoki in his judgment of the Presidential election petition number 1 of 2001 (**Rtd. Col. Dr. Kizza Besigye V Yoweri Museveni and Electoral commission**). He stated that the principles of the act can be summarised as follows: -

- i. The election must be free and fair.
- ii. The election must be universal adult suffrage, which underpins the right to register and vote.
- iii. The election must be conducted by the law and procedure laid down by parliament.
- iv. There must be transparency in the conduct of the elections.
- v. The result of the election must be based on the majority of the votes cast.

While these were clear principles laid down and the court found problems with the election which were being challenged, the court in a majority of four against three ruled that ‘it was not proved to the satisfaction of the court that the failure to comply with the provisions and principles affected the results of the presidential election in a substantial manner. The claim against Museveni and his agent’s impropriety in conduct during the campaigns were dismissed by a majority of five against two. But it is worthy to note that in holding out its decision, the Court criticized the conduct of the election and expressed concern for the continued involvement of the security forces in the conduct of elections where they have committed acts of intimidation, violence, and partisan harassment; the massive disenfranchisement of voters by deleting their names from the voters’ register, without their knowledge or being heard: the apparent partisan and partial conduct by some electoral officials; and the apparent inadequacy of voter education (Gloppen, 2007:16). The court further expressed disappointment at the EC’S inability to provide reports from returning officers to the court on the basis that the EC did not have them. These were mandated by law to be submitted to the EC. Again, it came out that the laws on elections were contradictory and inadequate (Gloppen, 2007).

Legal and policy implications

The substantiality test that is applied all over the commonwealth in resolving election disputes is founded on British colonial law. ³⁶It can therefore be argued when this rule is applied on the African continent, the courts must be alive to the fact that this test must be adapted to suit the governance circumstances of Africa.

The courts’ misapplication of the substantiality test can cause social and political instability in society. If electoral candidates who lose presidential elections lose trust and confidence in the court system due to

³⁶Nyane H “A critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho” *Journal of African Elections* 1 DOI: 10.29040/JAE/2018/v17i2a1., also see *Morgan v Simpson* [1974] 3 *All England Law Reports* 722.

the misapplication of the substantiality test, they will not file their electoral petitions in the courts. They will instead vent their anger through street protests and possibly armed rebellion³⁷.

To avert a situation where the country is plunged into social and political instability, substantive electoral justice must be upheld by the courts, to enable petitioners to have confidence in the court system. This confidence in the courts will enable the petitioners enthusiastically file their electoral petitions before the courts. Unlike other countries on the continent, Uganda has constitutional guarantees for the administration of substantive justice³⁸. This administration of substantive justice should include presidential election petitions, to avert social and political instability³⁹. This approach to resolving presidential election petitions resonates with the doctrine of legal realism. Legal realism rejects the legal formalism of relying on technicalities to thwart the administration of substantive justice by the courts⁴⁰.

The other recommendation to resolve the misapplication of the substantiality test is for courts handling presidential election petitions to adopt an inquisitorial approach rather than an adversarial approach given what is at stake – the social and political stability of a country. The inquisitorial approach enables the courts to resolve the presidential electoral petitions on their merits and not merely based on procedural formalism and technicalities. For example, while gathering evidence to present in a petition, the petitioners face difficulties in obtaining the evidence that can prove electoral malpractices because the evidence is in the possession of the electoral management body, who are the respondents. If the courts adopt an inquisitorial approach, they will order the respondents to provide the required evidence to the courts. This would include used ballot papers and electoral forms. If the courts adopted the adversarial approach, the burden would be on the petitioner, which may present significant challenges.

Conclusion

The paper has discussed the effect of the exploitation of the substantiality test in resolving election disputes in Africa. One of the challenges that may be presented, is the petitioners losing confidence in the court system and resorting to street protests or worse, to armed rebellion, if presidential petitions are resolved based on procedural formalism and technicalities. This can cause significant social and political instability in a transitional democracy in Africa. To ameliorate those challenges, the paper suggests that the courts should abandon legal formalism and administer substantial electoral justice. This should include the courts adopting an inquisitorial posture in presidential election petitions given what is at stake, the social and political stability of a country.

³⁷Nyane H (2018) "A critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho" *Journal of African Elections* 17(2) 20., 1 DOI: 10.29040/JAE/2018/v17i2a1.

³⁸Countries like Lesotho do not provide for this constitutional guarantee. Countries like Zambia and Kenya that provided for this constitutional guarantee.

³⁹Section 59 (6) (a) of the Presidential Elections Act, Laws of Uganda provides for the substantiality test in resolving presidential petitions.

⁴⁰The persuasive case of *National University of Lesotho v Motlatsi Thabane C of A (CIV) No.3/2008*.

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