



Electoral Justice System in East Africa: A Comparative Analysis of Kenya and Tanzania

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Abstract

Electoral justice system forms a key element of democracy that gives voters and candidates a platform to participate in the electoral processes and seek redress in case of infringement of their electoral rights. In East African countries specifically, elections have been characterized by complaints, sometimes resulting in violence. This article comparatively analyses the electoral legal framework of Kenya and Tanzania. A desk review of primary and secondary sources was employed to collect information. The article highlights that the electoral legal framework of Tanzania has a legal gap that compromises the conduct of free and fair democratic elections as compared to Kenya. The study proposes the amendment of the provisions of the electoral law and some articles of the Constitution to allow for the challenge of presidential election results and appeals on voter registration and nomination of candidates.

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1. INTRODUCTION

Electoral justice is at the cornerstone of democracy in that it safeguards both the legality of the process and the political rights of the citizens.¹ It has a continual role of democratization and catalyses the transition from the use of violence as a means of solving political conflict to the use of lawful means to arrive at a fair solution.² An electoral justice that resolves a political conflict through different legal mechanisms, guaranteeing full compliance with the law, enables democracy to thrive. Elections are at the core of a democratic process. The competitive and politically divisive nature of elections and their technical complexity make them vulnerable to abuse, fraud or perception thereof.³ At the same time, elections are able to achieve their key purpose of providing legitimacy to the government only if they are trusted and perceived to be impartial, free, fair and genuine. Hence, the need for an effective mechanism to prevent, mitigate or resolve disputes that are likely to arise in every electoral process, and to preserve and when necessary to restore the real or perceived equality of citizens and their representatives.⁴ An efficient and effective electoral system is fundamental to securing these objectives. Without a system to mitigate and manage inequality or perceptions of inequality, even the best management of an electoral process may lead to mistrust of the legitimacy of a democracy.⁵

Dispensing electoral justice differs across the East African countries. The Tanzania's electoral justice is limited to the election of members of parliament and councilors, registration of voters and nomination of candidates. In registration of voters an appeal

from the decision of the registration officer ends at the primary court. The Constitution of the United Republic of Tanzania of 1977 as amended restricts courts from entertaining petitions against the election of a president.⁶ Unlike Tanzanian electoral legal framework, in Kenya the Constitution of 2010 allows the election of the president to be challenged in the Supreme Court of Kenya.⁷ Voter registration and nomination of parties can be challenged before the courts of law. The presence of a strong electoral system alone does not guarantee the holding of free, fair and credible elections; however, its absence may lead to the developing of annoying conflicts. If elections are held without an appropriate, comprehensive and consensus-based legal framework that is committed to democratic principles and values, or if they are not well organised, or if there are no specific electoral justice mechanisms in place, electoral processes may aggravate existing frictions or may lead to armed or violent conflict as occurred during the presidential election in Kenya in 2007.⁸ In democracies, electoral justice plays a very vital role in political stability and adherence to laws while creating and strengthening democratic governance. Kenya suffered from election violence for decades. However, in the 2013 general elections which were conducted under the newly promulgated constitution and electoral laws managed to settle electoral disputes under the established dispute resolution mechanisms. Instead of resorting to political violence, the candidates and the electorate resorted to election petitions seeking remedy in lieu of taking into the streets as it used to be before the new constitution.

It seems less efforts have been exerted in comparing the way in which the electoral legal framework has been constituted in dispensing

¹ International IDEA, *Electoral Justice: International IDEA Handbook*, Stockholm (2010) at iii.

² Ibid.

³ Ibid.

⁴ Ibid. p. v.

⁵ Ibid.

⁶ Art. 41(7) and 83.

⁷ Art. 159.

⁸ International IDEA (note 1) at 3.

electoral justice in the electoral processes in Kenya and Tanzania. Thus, the objective of this article is to analyse the manner in which the electoral legal framework in Tanzania, compared to Kenya, is devised to peaceful and legitimate election in Tanzania.

This article employs a doctrinal research method to analyse the electoral justice system in East Africa, constitutions, case law and scholarly literature. It also employs a comparative approach to examine electoral laws in Kenya and Tanzania, borrowing leaf from best practices found in international election instruments. Through these methods, the study will identify legal gaps and propose amendments to the constitution and law for aligning East African electoral laws to better conduct of electoral processes and election petitions.

2. THE NOTION OF ELECTORAL JUSTICE SYSTEM

The notion of an electoral justice system encompasses the means and mechanisms for ensuring that electoral processes are not marred by irregularities and for defending electoral rights. Electoral justice involves the intentional inclusion of resources and mechanisms that ensure each action, procedure, and decision related to the electoral process complies with the legal framework, protects or restores the electoral rights of those who have the right to vote, and provides individuals who believe their electoral rights have been violated the opportunity to file a challenge, have their case heard, and receive a ruling.⁹

Together with other elements, the legal framework of a country and electoral justice represent the ultimate guarantee of free, fair, and genuine elections in accordance with

established electoral law. Furthermore, the design of an appropriate electoral justice system is fundamental to the democratic legitimacy and credibility of electoral processes.¹⁰ Thus, electoral justice mechanisms include all the means in place for preventing electoral disputes, as well as formal mechanisms for resolving them through institutional means, and informal or alternative mechanisms for their resolution. Minimizing the risk of electoral irregularities and limiting opportunities for misconduct before they occur will result in a less burdened electoral justice system.¹¹ Efficient electoral dispute mechanisms, including, as necessary, the provision of a fair and a public hearing before a tribunal, are essential to ensure that effective remedies are available for the redress of violations of fundamental rights related to the electoral process.¹² Therefore, effective dispute resolution mechanisms are integral part of ensuring that the will of the people is upheld during an electoral process.¹³

¹⁰ IDEA (note 1) at 1.

¹¹ International IDEA, *Electoral Justice System Assessment Guide* IDEA: Stockholm (2019), at 8.

¹² ICCPR, Art. 2(3) “Each State Party to the present covenant undertakes- (a) to ensure that any person whose rights or freedoms are herein recognized as violated shall have an effective remedy, notwithstanding that the violation has been committed by people acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by legal system of the State, and develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.” UNHRC, General Comment 32, para. 25: “The motion of fair trial includes the guarantee of a fair and public hearing.”

¹³ UN, UDHR, Art. 21, AU, ACHPR, Art. 7 “Every individual shall have the right to have his cause heard. This comprises- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, law, regulations and customs in force” and “the right to be tried within a reasonable time by an impartial court or tribunal”.

⁹ YWCA, Electoral Justice, available at <https://www.ywcamps.org/all-our-voices-blog/electoral-justice-paving-a-path-toward-fair-and-free-elections/> accessed 24 January 2024.

To achieve free, fair and credible elections, the electoral justice system in the electoral legal framework has to allow access to justice for aggrieved voters and candidates. The electoral justice system in Kenya avails applicants, voters and candidates with an opportunity to seek redress from the courts of law. In 2013,¹⁴ 2017¹⁵ and 2022¹⁶ general elections, aggrieved candidates challenged the presidential election results. Although, in 2013 and 2022 the candidates could not manage to prove their claims yet, they received a court decision on their grievances. In Tanzania the electoral legal framework limits the access to electoral justice in courts. In registration an appeal ends at the primary court¹⁷ while the court hierarchy runs up to the Court of Appeal. In nomination of candidates, objections end at the Independent National Electoral Commission (INEC). For presidential candidates cannot challenge the same after elections.¹⁸ Parliamentary candidates and councilors can challenge after election results have declared.¹⁹ The INEC cannot be the final decision-maker of its own actions; an impartial court should be able to verify its decisions. Consequently, the electoral justice system in Tanzania denies voters and candidates the right to hold the INEC accountable for its actions. This is a legal gap that needs to be addressed in the electoral legal framework of Tanzania.

3. LEGAL FRAMEWORK IN THE ELECTORAL JUSTICE IN KENYA

Effective dispute resolution mechanisms are set forth in the legal framework of a country and carried out by an established competent institution. The judiciary of Kenya is the key institution entrusted with dispute resolutions; electoral disputes inclusive.²⁰ From the beginning of the electoral process, the judiciary has to play an active role showing fairness in adjudicating political divisions, so as to renew public confidence in its capacity. This is possible where the court exercises the highest standards of transparency in its hearing of election petitions. It is constitutionally provided that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution.²¹ The Constitution provides that, in exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution, shall be promoted, subject to Clause 3; justice shall be administered without undue procedural technicalities; and the purposes of the principles of the Constitution shall be protected and promoted.

The Constitution further elaborates that, traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with the Constitution or any written law.²² The Constitution provides for simple mechanisms to resolve disputes as much as possible.²³ In

¹⁴ Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others [2013].

¹⁵ Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta (Election Petition 1 of 2017) [2017] KESC 31 (KLR).

¹⁶ Odinga & 16 Others v Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54.

¹⁷ Presidential, Parliamentary and Councilors' Elections Act s 30(1).

¹⁸ Ibid s 37(6).

¹⁹ Ibid s 53(6) & 65(7).

²⁰ Constitution of Kenya art 159.

²¹ Ibid.

²² Ibid art 159(3).

²³ Ibid art 159(2)(d).

Kenya traditional dispute resolution mechanisms is used as one way of reducing piling up of cases in the court.

Elections may be confrontational, and disputes can arise at any stage of the electoral process. During the electoral process, disputes mostly arise from the procurement process, registration, nomination of candidates, voting, vote counting, and declaration of results. The judiciary must be prepared to handle election-related disputes in a timely, effective, and efficient manner.²⁴ Failure of the judiciary to prepare has always resulted into lack of confidence on the institution hence post-election violence. Cumbersome procedures in settling disputes are hurdles which deny timely access to justice. When disputing parties cannot immediately access the courts to address perceived flaws in the election results that they identify during the electoral process, it creates tension between the rivals. If electoral justice is not administered in a timely manner, the parties lose confidence in the independence of the judiciary throughout the process.

To avoid unnecessary delays in the administration of justice, the judiciary must consider the nature of the election cycle when planning, ensuring that resources are allocated in good time to prevent the diminishing of justice during the hearing of election petitions.²⁵ It is important for the judiciary to be proactive, to prepare ahead of the

elections.²⁶ In times when there are amendments to the electoral laws, the judiciary has to familiarize with new enactments and amendments effected prior to the commencement of the electoral processes.²⁷ Having good laws in place without knowledge on the part of the judiciary is fruitless. There has to be a training programme for the efficient and effective management of election disputes for judicial officers and support staff.²⁸

4. LEGAL FRAMEWORK IN THE ELECTORAL JUSTICE IN TANZANIA

In Tanzania, electoral justice traces its source from the Constitution of the United Republic of Tanzania of 1977. It provides for the right to challenge election results in the courts of law.²⁹ The provisions of the Constitution are elaborated under the Presidential, Parliamentary and Councillors Elections Act No. 1 of 2024 (the PPCEA).³⁰ The PPCEA provides for members of parliament and councillor's election petitions. Apart from election petitions, the PPCEA provides for dispute resolution during voter registration, display of the Provisional Voters' Register (PVR), nomination of candidates and violation of electoral code of conduct.

Section 23 of the PPCEA, provides that, where the registration officer or any other staff as directed by the Commission for the purposes of conducting registration of voters, refuses to register an applicant, has to give reasons for the same. The grounds for refusal have to be

²⁴See IEBC Dispute Resolution Committee, 17th September, 2019 available at https://www.iebc.or.ke/news/?IEBC_Dispute_Resolution_Committee#home, accessed 31 March, 2025.

²⁵ Majanja, D, 'Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections' in Odote, C., and Musumba, L (Eds) *Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* International Development Law Organization (IDLO)' Rome, (2016) at 43 and 44.

²⁶ Odote, C., and Musumba, L. (Eds.) *Balancing the Scales of Electoral Justice, Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, International Development Law Organization (IDLO), Rome, 2016 at 23 & 24.

²⁷ Ibid at 118.

²⁸ Ibid at 28.

²⁹ Art 83.

³⁰ PPCEA s 137 to 145.

given in a prescribed form.³¹ If the applicant is aggrieved by the refusal, may within fourteen days after receipt of the statement, appeal to the primary court.³² The Primary Court is required to determine the appeal within fourteen days from the date of submission.³³

During the inspection of the Provisional Voters' Register any person registered in the polling district may object to the retention in that PVR of the name of any other person on the ground that such other person is not qualified or is no longer qualified to be registered.³⁴ The registration officer has to inform the person so objected about the date and place to defend himself.³⁵ Any party who is not satisfied by the decision of the registration officer may appeal to the primary court.³⁶ The PPCEA provides that the decision of the primary court shall be final and conclusive.³⁷ This means that it cannot be appealed against. These circumstances infringe the voter's right to appeal which is constitutional.³⁸ It is a considered view that the registration disputes be allowed to be appealed against as other matters. This is contrary to the electoral legal framework of Kenya which allows appeal on registration to the High Court of Kenya on matters of law.³⁹

Apart from registration disputes, some disputes arise after the nomination of candidates, when returning officers receive and determine objections regarding parliamentary and councillor candidates.⁴⁰ If any party is aggrieved by the decision of the returning officer, they may appeal to the

commission. The decision of the commission is final and conclusive and can only be challenged in court through an election petition.⁴¹ In the case of objections to presidential and vice-presidential candidates, these are lodged with the Independent National Electoral Commission (INEC). INEC receives and determines objections accordingly. The decision of INEC is final and conclusive and cannot be challenged in any court of law.⁴² The restrictions set by the law deny candidates the right to challenge the decisions of INEC. Elections represent the wishes of the electorate through the votes cast. If candidates are denied the right to challenge the decisions of INEC regarding whom they should vote for, it is essentially denying them access to electoral justice.

Together with the courts of law, the PPCEA provides for an Alternative Electoral Dispute Resolution Mechanism (AEDR). It is stipulated under the PPCEA that, in order to ensure an equal playing field for all candidates and political parties, the Independent National Electoral Commission, the government, and political parties should prepare, agree on, and sign an electoral code of conduct.⁴³ All those signatories to the code and candidates, are required to abide to the code.⁴⁴ The code becomes effective one day after nomination of candidates to the declaration of results and byelections.⁴⁵ Whoever violates the code is reported to the electoral code of conduct committee.⁴⁶ A meeting is called, the complainant on the violation of the code and the defendant who violated the code are given an opportunity to present and defend their cases.⁴⁷ The rest of the members listen and

³¹ See section 23 of the PCCEA.

³² Ibid.

³³ Ibid.

³⁴ Ibid s 26.

³⁵ PPCEA s 27(3).

³⁶ PPCEA s 30.

³⁷ Ibid.

³⁸ Art. 13(6)(a).

³⁹ Elections Act of Kenya s 12.

⁴⁰ PPCEA s 53(4), (5) & 65(4), (5) & (6).

⁴¹ PPCEA s 53(6).

⁴² PPCEA s 37(6).

⁴³ Ibid s 62

⁴⁴ Ibid.

⁴⁵ Electoral Code of Conduct reg 1.2.

⁴⁶ Ibid reg 5.4.

⁴⁷ Ibid reg 5.7 (a)

decide on the matter.⁴⁸ The members of the electoral code of conduct committee are from the Government, the INEC and political parties contesting in the election at the level concerned.⁴⁹ The code is meant to speed track election related disputes which arise during the campaign period. It provides for what should be done and what should not be done by the signatories and their followers.⁵⁰

Among the penalties which can be imposed by a committee is to suspend the candidate from campaigning, offer an apology or public rebuke.⁵¹ An aggrieved candidate in a constituency may appeal to the national and referral committees.⁵² Yet the code does not give a room to aggrieved party to further appeal or seek judicial review. Though it is meant to reduce court procedures in the election period but has to give room for the courts of justice to dispense justice in accordance with the provisions of article 107A of the Constitution of the United Republic of Tanzania of 1977. Otherwise, an aggrieved person cannot find redress until the declaration of the election results. Sometimes, the grievance could be solved within the campaign period and proceed with electoral processes fairly.

5. COMPARATIVE ANALYSIS

This article makes a comparative analysis of the electoral justice systems of Kenya and Tanzania. It is anchored on the electoral legal framework of the two countries. The need for the comparison has been necessitated by the fact that, Kenya and Tanzania have some similarities and differences in their electoral legal framework. As a result, a comparative analysis is worthy on the electoral processes

including voter registration, candidate nomination and challenge of election results. Since the electoral justice system of Kenya has an electoral legal framework which responds to most of the political complaints on voter registration, nomination of candidates and election petitions compared to Tanzania, this article will analyse them for better democratic electoral processes to achieve an effective and efficient electoral justice system in Tanzania.

An effective electoral justice system leads to a robust democracy in any jurisdiction. Kenyan electoral system simplified access to electoral justice in various ways. An aggrieved candidate can access the courts while challenging any election results. A petitioner can exhaust remedies available including alternative dispute resolution mechanisms.⁵³ Alternative dispute resolution mechanisms in Kenya derive their legitimacy from the Constitution of Kenya of 2010 whereby the election management body (the EMB) is mandated to hear and determine disputes emanating from the electoral processes.⁵⁴ The Independent Electoral and Boundaries Commission (the IEBC) is not limited to the conduct of elections and referenda but its mandate also includes the peaceful settlement of electoral disputes. The disputes include those relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.⁵⁵ Such disputes are settled within seven days.⁵⁶ They are determined by two categories of dispute resolution mechanisms. The first category handles pre-election disputes includes courts,⁵⁷ the IEBC⁵⁸ and the

⁴⁸ Ibid.

⁴⁹ Electoral Code of Conduct for Presidential, Parliamentary and Councilors, reg 5.2.

⁵⁰ Ibid reg 2, 3 & 4.

⁵¹ Ibid reg 5.11 & 12.

⁵² Ibid reg 5.8.

⁵³ Section 39 of the Political Parties Act, No. 11 of 2011 R.E 2022 (the Political Parties Act) establishes the Political Parties Dispute Resolution Tribunal (PPDT).

⁵⁴ Constitution of Kenya art 87(1).

⁵⁵ Ibid art 88(4) (e).

⁵⁶ Elections Act, s. 74(2).

⁵⁷ International Centre for Policy and Conflict and 5 others v the Attorney General and 4 others of 2013. The

Political Parties Dispute Tribunal (PPDT). The second category determines post-election disputes, which are left exclusively to the courts.⁵⁹ Election disputes in Kenya are resolved under the Constitution of Kenya, 2010, the Elections Act No. 24 of 2011 R.E 2022, the Independent Electoral and Boundaries Commission Act No. 9 of 2011

and the Political Parties Act No. 11 of 2011.

The first legal document in the legal electoral framework in Kenya is the Constitution, which lays the foundation for the electoral dispute resolution (EDR) framework.⁶⁰ Article 81 of the Constitution stipulates the principles of the electoral system which are: freedom of citizens to exercise their political rights under article 38; not more than two-thirds of the members of the elective public bodies shall be of the same gender; fair representation and equality of vote; and free and fair elections which are by secret ballot; free from violence, intimidation, improper influence, or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 87(1) of the Constitution vests the parliament with powers to enact legislation to establish mechanisms for timely settling of electoral disputes. Article 88(4) provides that the IEBC is responsible for resolving electoral disputes except *“election disputes and disputes subsequent to the declaration of*

election results”. The IEBC constituted the Dispute Resolution Committee (DRC) to handle disputes that fall within its mandate.

The Independent Electoral and Boundaries Commission Act (IEBC Act) governs the establishment and operations of the IEBC.⁶¹ It, among others, specifies the process of appointment of commissioners and lists the functions of the IEBC.⁶² It also implements article 88 of the Constitution, which provides for the establishment of the IEBC.⁶³ Apart from the IEBC Act, there is the Elections Act No. 24 of 2011 R.E 2022 which is the substantive legislation governing the electoral process. The Act provides for, among others, registration of voters and elections disputes resolution. Section 71 amplifies the provisions of article 88(4)(e) of the Constitution; the IEBC is responsible for settling “electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”.⁶⁴

The Political Parties Act, is among the legal documents forming the electoral legal framework of Kenya. Section 39 establishes the Political Parties Dispute Tribunal (PPDT) and section 40 vests it with the jurisdiction to determine disputes between the members of a political party; a member of a political party and a political party; political parties; an independent candidate and a political party; and a coalition partner. As a precondition to activating the jurisdiction of the PPDT, a party must have exhausted the internal dispute resolution mechanisms of their respective political parties before they are referred to the Tribunal. The Tribunal also hears appeals of the decisions of the Registrar under the Act.⁶⁵

case concerned the suitability of Honourable Uhuru Kenyatta and his deputy on the grounds on integrity.

⁵⁸ The IEBC Dispute Resolution Committee decided over 2000 disputes revolving around party lists and more than 200 decisions touching on internal political parties' nominations, such as Mathew Adams Karauri v TNA. See Independent Electoral and Boundaries Commission Dispute Resolution Committee Case Digest (2013).

⁵⁹ Ibid (n55) art 159.

⁶⁰ Independent Electoral and Boundaries Commission Dispute Resolution Committee Case Digest (2013), p.2

⁶¹ Independent Electoral and Boundaries Commission Act No. 9 of 2011.

⁶² Ibid s 5.

⁶³ Ibid (n60) at 3.

⁶⁴ Ibid.

⁶⁵ Ibid.

This form of electoral dispute resolution system (EDR) in Kenya attracted significant attention from policymakers, practitioners and other stakeholders in the electoral processes in the past elections. An efficient and effective EDR mechanism is indispensable for the conduct of free and fair elections. Kenya has attempted to formulate key principles underpinning EDR including its conceptual foundation, legal framework, institutional design, and processes.⁶⁶ The term ‘electoral dispute resolution system’ (EDRS) caters for the whole set of institutional and technical-legal means or mechanisms for making a challenge or exercising oversight through court proceedings, tribunals, claims or other remedies of electoral actions, procedures and decisions by administrative, judicial or legislative body or even an international body.⁶⁷

The electoral dispute resolution system aims at ensuring the uprightness of the electoral procedures.⁶⁸ Through their process, irregular electoral actions or resolutions may be cancelled or revised through challenges, or a penalty may be executed on the wrongdoer or person answerable for the irregularity or unfair actions.⁶⁹ Depending on the appropriate law, the same irregularity may cause both types of omission and consequence. The intention of providing for electoral challenges, which are corrective in nature, is to ensure that elections are held in compliance with the law—that is to say, the constitution and statutory principles—that possible errors or irregularities are acknowledged, modified, revoked, or corrected, and that the enjoyment of an electoral right that has been violated is

protected or restored.⁷⁰ The electoral dispute resolution system provides for an administrative challenge before the EMB or judicial challenge. In rare cases, it may also provide for legislative or international. The current study covers the administrative and judicial challenges only.⁷¹ The political rights of every citizen, including the right to participate in public affairs, the right to vote and be elected and access to public service must be protected.⁷²

First, administrative electoral challenges are those which are resolved by the EMB entrusted with the functions of coordination and supervision of the conduct of elections, respectively.⁷³ In this challenge, those affected including political parties, candidates and voters may object an electoral action or decision by following the procedures set forth in the statutes or regulations in which the EMB that issued the action or decision being challenged or another of higher rank decides the disputes.⁷⁴ During the pre-election period there are administrative challenges which arise from the activities carried out during that time. Prior to the commencement of an election process, it is common for challenges to be filed relating to the updating of the voters’ register, delimitation of boundaries and procurement processes which are first determined by the IEBC.⁷⁵

The IEBC is vested with administrative powers to hear and determine administrative challenges during registration of voters.⁷⁶ The Elections Act states that, a person who has duly applied to be registered and whose name is not included in the register of voters may

⁶⁶ Ibid.

⁶⁷ IDEA (n10) at 137.

⁶⁸ Ibid at 2.

⁶⁹ Odek, O, Election Technology Law and the Concept of “did the Irregularity affect the Result of the Elections?” 2017, unpublished paper at 5.

⁷⁰ Ibid (n 67) at 16.

⁷¹ Ibid at.137.

⁷² ICCPR art 25.

⁷³ Ibid (n 71).

⁷⁴ Ibid.

⁷⁵ Ibid (n 60).

⁷⁶ Elections Act of Kenya s. 12.

submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time.⁷⁷ It further provides that, subject to the Constitution, a claim under subsection (1) shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law.⁷⁸ This process shows that, the administrative challenges are appealable to the Principal Magistrates Court and finally to the High Court on matters of law. The law appreciates the use of administrative processes in resolving administrative challenges in the electoral processes. During nomination of candidates, objections are dealt with administratively but election petitions are judicial challenges. Further, where the EMB issues directives can be challenged in the court.

Second, judicial challenges on electoral disputes are those procedural legal instruments provided for by law by which two or more conflicting parties bring before a judicial body, that is, a judge or a court, whether or not part of the judicial branch, a dispute over an alleged error, irregularity, instance of wrongful conduct, deficiency or illegality in a certain electoral action or decision.⁷⁹ The judicial body, in its position as a superior third party and as an organ of state, decides on the dispute in a final and impartial manner.⁸⁰ These are the challenges which are filed in the court seeking an order to command the EMB to perform a certain act.⁸¹ After elections challenges on the election results are filed in the courts. This is a type of strict judicial EDR system which entrusts the final decision on challenges to

election results to regular judges or courts which are not specialized in electoral matters but are part of the judicial branch. In Kenya the powers to entertain presidential election petitions are vested to the Supreme Court.⁸² The Constitution states that, a person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.⁸³ That, within fourteen days after filing of the petition, the Supreme Court shall hear and determine the petition and its decision shall be final. If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.⁸⁴ In the Odinga's case the court held that the failures by the IEBC were a clear abuse of the Constitution and the Elections Act, and caused grave uncertainty as to whether the election results could be said to be a free expression of the will of the people as required by the Constitution.⁸⁵ The court declined to take what has the easy way been out, it nullified the presidential election results and ordered a fresh election to be conducted by the IEBC.⁸⁶

As far as the Kenyan electoral processes is concerned, the pre-election disputes for the 2017 elections were generally related to party primaries and the nomination of candidates, electoral offences, voter registration disputes, and violations of the Electoral Code of Conduct. The IEBC, the PPDT, and the judiciary have jurisdiction to consider election related complaints.⁸⁷ Post-election disputes include the presidential election petitions.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid (n67)

⁸⁰ IDEA (n10) at 138.

⁸¹ Ibid (n 76).

⁸² Constitution of Kenya, article 140.

⁸³ Ibid.

⁸⁴ *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* Presidential Petition No. 1 of 2017.

⁸⁵ Ibid.

⁸⁶ Ibid

⁸⁷ The Carter Center, *Observing Kenya's National Elections*, 2017 at 46.

Such petitions were disputing the legality of the election of the president who was declared a winner. The court stated that, in order to succeed in the petition, the petitioner must lead evidence to prove the substantial non-compliance. In order to vitiate the election results, there must be substantial non-compliance. It is this substantial non-compliance that the Kenyan Supreme Court in *Raila Odinga v IEBC & Others* SC Petition No. 5 of 2013, stated to be an election conducted in a manner devoid of merits and so distorted and being an election in which the evidence discloses profound irregularity in the management of the electoral process which gravely impeach the mode of participation by any of the candidates. Where the petitioner fails to prove illegality and irregularity of the electoral process the court validates the election of the winner.⁸⁸

In Kenya, the electoral legal framework allows aggrieved candidates to challenge presidential elections in the Supreme Court. This was observed in the 2013 general elections where election petitions challenging the presidential election results were filed in the Supreme Court. This was can observed in the consolidated petition of *Odinga & 5 others vs. Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013). Although the candidates did not succeed in the petition, nevertheless it availed the petitioners with an opportunity to vent out their grievances. The judiciary is an impartial institution vested with powers to determine between the petitioners and the respondents. In the 2017 general elections as stated earlier, the Supreme Court of Kenya nullified the presidential election results upon being satisfied that, there were irregularities and illegalities occasioned in the electoral process. In 2022 general elections petitions

were filed and decided by the Supreme Court. They were *Raila Odinga and 11 Others vs. William Ruto*, Presidential Election Petition No. E005 OF 2022 (Consolidated with) Presidential Election Petition Nos. E001, E002, E003, E004, E007 & E008 OF 2022). Equally, the petitions failed before the Supreme Court. Definitely, it availed the candidates and political parties with an opportunity to test the impartiality, independence and professionalism of the electoral commission. Withholding this right, even if the electoral commission was right in declaring a certain candidate a winner, it cannot be justified in exclusion of the courts of law. This is a good lesson Tanzania has to learn from Kenya and improve its electoral legal system.

On the Tanzanian context, the Constitution of the United Republic does not provide for alternative dispute resolution mechanisms in election disputes as the Kenyan Constitution does. It vests authority of dispensing justice to the judiciary.⁸⁹ Alternative dispute resolution mechanisms are provided for under specific Acts of Parliament. Comparing electoral justice system in Kenya and that of Tanzania, the European Union Observer Mission stated that, the legal framework of Tanzania does not provide for the possibility of challenging presidential election results.⁹⁰ Nevertheless, CHADEMA filed a complaint to the INEC on 4th November 2010 requesting the electoral administration to stop the announcement of presidential results, and asking for a re-run of the presidential elections on the ground that in some constituencies such as Hai, Muheza, Same East, Geita, and Ubungu, several irregularities occurred during the aggregation process.⁹¹ In response, the INEC stated that the alleged irregularities should have been

⁸⁸ Ibid.

⁸⁹ Article 107A

⁹⁰ European Union Election Observation Mission, 2010 Tanzania General Elections Final Report at 39.

⁹¹ Ibid.

submitted to the returning officers and, therefore, dismissed the claim and continued to announce the presidential results the following day.⁹² Both international and local observers are of the view that, the constitution currently denies the right to challenge the presidential election results.⁹³ The right to petition presidential election results should be established by law in accordance with international principles for the conduct of democratic elections.⁹⁴ Taking into consideration the observations and recommendations of the election observers it is clear that the right to petition against presidential election results is based on international principles. It is even so provided for under the Constitution of the United Republic of Tanzania of 1977.⁹⁵ Referring to international instruments, justice is a very crucial element in day-to-day activities, elections inclusive. International principles protect the right to be treated fairly and to receive an effective remedy through the efficient and transparent administration of justice.⁹⁶

Contrary to the provisions of the Constitution of Kenya which clearly allow petitions against presidential election results, article 41(7) and 74(12) of the Constitution of the United Republic of Tanzania of 1977 restricts courts from inquiring into anything done by the INEC in accordance with the provisions of the Constitution. Article 74(12) states that, *'No court shall have power to inquire into anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this Constitution'*.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ UN, UDHR, art 21, AU, ACHPR, art 7 "Every individual shall have the right to have his cause heard.

⁹⁵ Article 13(6).

⁹⁶ Katherine E et al, Elections on Trial: The Effective Management of Election Disputes and Violations, 2018 International Foundation for Electoral Systems at 10.

Reading the article holistically, one will recognise that, its wording is conditional. That the courts are restricted from inquiring into anything done by the INEC if it discharges its functions in accordance with the provisions of the constitution. One may argue that, if the INEC does not discharge its functions in accordance with the provisions of the constitution, then one can file a petition to the court. This is supported by the famous 200 meters' case of 2015 against the directives issued by the INEC, *Amy P Kibatala v Attorney General and the Director of Elections*, Miscellaneous Civil Cause No. 37 of 2015 (Unreported). The petitioner as a registered voter filed the petition following the directives of the INEC issued on 9th October 2015 ahead of the national elections scheduled to take place on 25th October 2015. The directives published on the print media, reminding voters and the public at large several acts and conducts prohibited by law relating to smooth conduct of the elections.⁹⁷ Among the prohibitions was the prohibition to any unauthorized person from staying anywhere near the polling stations as well as places where tallying of votes was to be conducted during and immediately after the voting on 25th October 2015.⁹⁸

The petitioner was apprehensive that the INEC's prohibition in her opinion had no force of law. This means that, she was tasting INEC's adherence to the provisions of article 74(12) which restricts the courts from inquiring into anything done by INEC in accordance with the provisions of the constitution. In her opinion she was worried that INEC had no mandate to issue the directives which contained various prohibitions towards the election day. The High Court of Tanzania had to satisfy its jurisdiction on the matter whether article

⁹⁷ National Elections Act s 104 now PPCEA s 134.

⁹⁸ Ibid.

74(12) ousted its jurisdiction to entertain the petition.⁹⁹ It came into a conclusion that it had the jurisdiction to entertain it. The Court stated that:

Having heard the arguments from the learned counsel for the parties and having examined the copy of the second respondent's directives we are in agreement that the crux of the matter before the court does not fall under the matters whose examination falls under within the matters whose examination has been ousted by article 74(12).

This court's decision gives the impression that, the court is not ousted totally from inquiring into anything done by the INEC when discharging its functions. One has to move the court by an application on a matter which he thinks INEC has not conducted itself in accordance with the provisions of the constitution. Given the case cited and the reasoning of the court on its jurisdiction, it is a considered view that the Constitution does not bar the court from entertaining matters arising from the INEC's conduct totally. Councilor's and parliamentary elections are challenged before the courts and sometimes results are nullified. Just to mention a few, Kigoma¹⁰⁰ and Longido Constituencies.¹⁰¹

The position of the High Court in the Amy's case shades a light on the provisions of article 41(7) of the Constitution. From its reasoning, two schools of thought on the interpretation of

the latter may be advanced. The first school of thought is the one which just take the provisions as they are. That article 41(7) states that:

When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate.

Under this school of thought, one would say that the constitution has ousted the courts from inquiring into election of a presidential candidate. In that way even when they are of the view that the INEC has not adhered to the provisions of the constitution as required, they do not bother to approach the courts of law. As a result of this interpretation, there has not been an attempt to approach the courts as it was done in Amy's case.¹⁰² This school of thought has dominated the minds of many candidates and their learned counsel. It has been so and the courts have not been approached to test the provisions of the constitution.¹⁰³ The provisions are not unambiguous as compared to the Constitution of the Kenya which states clearly that the presidential election results may be challenged in the Supreme Court of Kenya.¹⁰⁴

The second school of thought is the one which goes beyond the provisions of article 41(7) of the Constitution of the United Republic of Tanzania (the Constitution). The members of this school read the article holistically, analyse it and compare the functions of the INEC with the provisions of the Constitution. When you read sub-article (7) you realise that there are conditions precedent for a person to challenge the election of a presidential candidate. It is

⁹⁹ *Amy P Kibatala v Attorney General and the Director of Elections*, Miscellaneous Civil Cause No. 37 of 2015 (Unreported).

¹⁰⁰ *Dr. Aman Walid Kabourou v Attorney General and 2 Others Civil Appeal Nos 32 and 42 of 1994, Court of Appeal of Tanzania, at Dar Es Salaam (unreported)*

¹⁰¹ *Stephen Lemomo Kiruswa v Onesmo Koimerek Nangole & Others (Misc. Civil Cause 36 of 2015) [2016] TZHC 2 (29 June 2016) available on TanZLII accessed 31 March, 2025.*

¹⁰² Ibid (n 99).

¹⁰³ Article 41(7).

¹⁰⁴ Article 140.

very clear that, when a candidate is declared by the INEC to have been duly elected in accordance with the article, this means that, the INEC has adhered to the provisions of the Constitution accordingly. The election has to be in accordance with the provisions of the whole article. A considered conditions precedent to challenging election of a presidential candidate are extracted from the provisions of article 41 as per the second school of thought.

In this school of thought, it is observed that, if a person is sure that the provided conditions were not fulfilled then may challenge the election in court. Sub-article (7) states that the candidate shall be declared to have been duly elected in accordance with the provisions of article 41. Given the conditions referred to by this school of thought, one has to adduce evidence that the election of the president was not in accordance with the provisions of article 41 of the Constitution.

The first considered condition for a person to challenge the election of a presidential candidate is found under sub-article (1). It provides that, there has to be a cause for holding election, political parties have to submit names of their proposed candidates to the INEC according to the law. This condition has two limbs. First limb, there has to be a cause for an election and the second limb is that, political parties have to submit names of proposed candidates to INEC. This condition is elaborated hereunder.

The Constitution gave INEC mandate to declare election date. The Parliament enacted the PPCEA, to provide for the procedures of conducting presidential election. Section 41 of the PPCEA, provides that, the Commission shall appoint a day to be the presidential election day, for the holding of a ballot in every constituency for the election of the president. Where the INEC conducts itself in accordance with provisions of sub-article (1)

and the latter, no court shall have jurisdiction to inquire into the election of a presidential candidate. If the INEC did not announce a presidential election and all over sudden declares a person to have been duly elected, then the courts should not be ousted from inquiring into such an act. It is a considered view that, when elections are conducted in accordance with the provisions of the article, the courts are ousted from inquiring into the election.

The second limb of the condition is that; political parties have to submit the names of their proposed candidates to INEC. This is amplified by the electoral act,¹⁰⁵ which states that, whenever a presidential election is to be held, each registered political party intending to participate in such election shall submit to the commission names of proposed candidates. Where the political parties have submitted to INEC proposed names of presidential and vice-presidential candidates and the legal procedures are followed accordingly, the courts are ousted from inquiring into the election of a presidential candidate. The second school of thought is of the view that, if political parties have not submitted names in accordance with the law, and INEC declares a presidential candidate to have been elected then the courts are not ousted from inquiring into such election. A person who has evidence that the INEC did not abide to the provisions of the Constitution and the electoral law may object the election of such a presidential candidate whose election was not conducted in accordance with the provisions of article 41.

The second considered condition precedent to challenge presidential election as per the second school of thought requires that, names of the proposed candidates be submitted to INEC on date and time appointed in accordance with the law and candidates have to be supported by the number of voters

¹⁰⁵ PPCEA s 32.

required by the law.¹⁰⁶ Where this constitutional condition is observed courts are ousted from inquiring into an election of a presidential candidate. This condition has two parts. The first one concerns submission of names on an appointed date and time. The second part is the one which requires the candidates to be supported by a required number of voters in accordance with the law. Looking at part one, if there is evidence that, the INEC declared a presidential candidate to have been duly elected whose name was not submitted on the appointed date and time,¹⁰⁷ the courts are not ousted from inquiring into such an election. This school of thought is of the view that, if a candidate did not fulfil the constitutional and legal requirements the courts may entertain an election petition to decide whether such a candidate was duly elected in accordance with the provisions of article 41.

The second part of this condition is that, the presidential candidate has to be supported by the required number of voters and in manner as prescribed by the electoral act. If the candidate declared by the INEC has not fulfilled the such legal requirement, and there is a proof that INEC nominated a person not supported by the required number of voters and in the manner prescribed under the electoral law, the court is not ousted from entertaining such a petition. In case such a person is declared to have been elected to be a president, the courts may entertain a petition on that ground. In such a scenario the provisions of article 41 have not been adhered to hence a petition is allowed. The provisions of article 41 of the Constitution must be read together with other electoral laws. For instance, each presidential candidate must be

supported by 200 registered voters in each region, from ten regions at least two regions from Zanzibar.¹⁰⁸ Where there was an objection against a candidate and proof produced but the commission continues and finally declared such a candidate to have won, his election can be challenged in court according to the second school of thought.

The third condition precedent for challenging election of a presidential candidate states that, when only one candidate is nominated, his name has to be presented to the voters in accordance with the constitution.¹⁰⁹ According to this second school of thought, the courts may entertain a petition filed against an election of a presidential candidate who was not elected in accordance with the provisions of the constitution and the electoral law. Section 38 of the PPCEA, requires INEC to present to the voters the name of a sole presidential candidate nominated to be voted for or against. The sole candidate shall be duly elected president if he obtains majority of the valid votes cast. If that requirement is not fulfilled then the provisions of article 41(7) should not bar the courts of law from entertaining a petition arising from violations of the constitution. The second school of thought has the opinion that under such circumstances the Constitution does not oust the courts of law from entertaining presidential election petition resulting from non-compliance of constitutional requirements.

The fourth condition precedent for challenging presidential election states that, election of President of the United Republic shall be held on a date appointed by INEC in accordance with the law. The INEC is mandated to appoint an election day under section 41(3) of the PPCEA. Such date is the one on which voting for the presidential candidates shall be

¹⁰⁶ Ibid s 33.

¹⁰⁷ Ibid (n 105) Every Presidential candidate shall deliver in such manner and at such place as the Commission may direct, not later than four o'clock on the nomination day, in such number of copies as the Commission may direct...

¹⁰⁸ Ibid (n 105) s 33.

¹⁰⁹ Article 41(3), Ibid s 38.

conducted. The election date appointed by the INEC is the one where all the voters, polling agents and candidates participate in the election in accordance to the provisions of the PPCEA. Where voting is conducted prior to the appointed date without any lawful procedure, the court should not be ousted from allowing a petition on irregularity or illegality on the part of INEC which was occasioned for non-compliance of the law.

The fifth condition precedent is that, the matters concerning presidential election procedure are as provided for under the law enacted by the parliament. The Parliament of Tanzania is vested with the powers to enact laws where implementation requires legislation.¹¹⁰ The Constitution states clearly that all matters concerning the election of the president shall be provided for under the law. If the election of a president was not conducted in accordance with provisions of the electoral law, one can challenge such election in the court of law. This is due to the fact that, the restriction stated under article 41(7) concerns an election conducted in accordance with the provisions of the article. That means, a presidential election which was conducted contrary to the provisions of article 41 is eligible to be challenged in a court of law. Unless the president-elect was elected in accordance with the provisions of article 41, the courts are not barred from entertaining a petition on the non-compliance of the constitutional requirements in view of the second school of thought.

The sixth condition precedent for challenging a presidential candidate election is that, a candidate shall be declared to be duly elected only if he has obtained majority of votes. Where there is evidence that the president-elect was the one who garnered majority of valid votes cast, courts are ousted from inquiring into the election of such candidate.

The second school of thought is of the view that, when the candidate declared to have been elected did not obtain majority of valid votes nothing should bar the courts of law from entertaining a petition challenging the election of such candidate.

The Constitution should not be used to cover irregularities in the name of ouster clauses. If the INEC declares the candidate who gains the lowest votes as the winner, while all the polling agents, tallying agents, candidates and the commission itself is sure that the candidate declared to have been elected is not the one who garnered majority of valid votes, ouster clause should not apply. In such a situation the court has to entertain the petition in order to maintain order and justice. The law is clear that, a presidential candidate shall be declared to have been elected president if he receives the greatest number of all the valid votes.¹¹¹

Therefore, the second school of thought is of the general view that, sub-article (7) is a general condition for challenging a presidential election results. The provisions of this sub-article restrict the courts of law from accepting a petition against presidential election. It provides that, when a candidate is declared by the Electoral Commission to have been duly elected in accordance with this article, then no court of law shall have any jurisdiction to inquire into the election of that candidate. The courts are ousted from inquiring into the election of a candidate which has been conducted in accordance with article 41. This means if the election of the candidate was not conducted in accordance with article 41 the courts of law should have jurisdiction to inquire into the election of such candidate. The second school of thought is of the view that, people did not test the provisions of article 41(7) before the courts of law.

¹¹⁰ Constitution art 63(3) (d).

¹¹¹ PPCEA s. 45 (10).

Unless the court reasons in the same way as the second school of thought did, it will not accept and entertain any petition against a presidential election. In order to be clear, the Constitution of the United Republic of Tanzania should have been unambiguous like the Constitution of Kenya on the petitions against presidential elections. Reading the provisions of Article 41(7) of the Constitution of the United Republic of Tanzania, literally, the courts are barred from entertaining petitions against a presidential election. It is advised that the provisions of the Constitution be amended to clearly allow petitions against presidential elections. This will show that Tanzania abides by international principles of electoral justice. By so doing, the complaints as to the infringements of the candidates' and electorates' rights shall be reduced or eradicated. Best practice can be borrowed from Kenya, where the judiciary is vested with the powers to resolve election petitions from the lower levels to the presidential level.

Complimenting the judicial dispute resolution is the alternative dispute resolution mechanisms which are employed in the electoral processes. Alternative dispute resolution is applied during voter registration processes both in Kenya¹¹² and Tanzania.¹¹³ In Kenya the Elections Act¹¹⁴ requires a person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer. The procedure for making claims has been elaborated under regulations 17 to 20 of the Elections (Registration of Voters) Regulations of 2012. The law states that the registration officer shall determine claims concerning registration, and the appeal shall be lodged to the Principal Magistrates Court on matters of fact and law and to the High Court

on matters of law.¹¹⁵ After the court decides on the appeal, the registration officer must make any changes to the register depending on the orders issued in the appeal.¹¹⁶

In Tanzania, the voter also applies for his name to be inserted in the register to the registration assistant, and appeals to the registration officer, whose decision is appealable to the primary court. Whereby the decision of the primary court is final and conclusive.¹¹⁷ It cannot be enquired into by any other court.¹¹⁸ This is curtailing of people's rights. In Kenya the matter goes up to the High Court which is a court of records on matters of law. The primary court in Tanzania is the lowest court in the court hierarchy. The next level is the district court with concurrent jurisdiction with resident magistrate's court. The law is silent whether the primary court will determine matters of law or fact. The right to register is a constitutional right both in Kenya¹¹⁹ and Tanzania.¹²⁰ The electoral legal framework is expected to resolve electoral disputes arising before, during and after elections. Closing the door for an aggrieved voter or applicant from appealing against the decision of the primary court violates not only the constitution but also violates regional instruments on electoral justice.¹²¹

¹¹⁵ Ibid s 12(2).

¹¹⁶ Ibid.

¹¹⁷ Ibid (n113) s 30(1).

¹¹⁸ Ibid.

¹¹⁹ Constitution of Kenya of 2010 art 88(4)(a).

¹²⁰ Constitution of Tanzania of 1977, art 5(1).

¹²¹ ICCPR, Art 2(3) "Each State Party to the present covenant undertakes- (a) to ensure that any person whose rights or freedoms are herein recognized as violated shall have an effective remedy, notwithstanding that the violation has been committed by people acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by legal system of the State, and develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such

¹¹² Ibid (n113).

¹¹³ Ibid (n31).

¹¹⁴ No. 24 of 2011 R.E 2022.

Nomination of candidates also involves dispute resolution mechanisms. In Kenya, the appeals against nomination of candidates are filed to the courts of law. Prior to approaching the courts, the Independent Electoral and Boundaries Commission (IEBC) forms dispute resolution committee. In 2013 the IEBC formed the Dispute Resolution Committee (DRC) to discharge a regulatory duty. The DRC made decisions in response to complaints filed concerning the 2013 general elections and by-elections after the general elections. Most disputes emanated from controversies surrounding internal party nominations and the election of National Assembly, Senate and County Assembly members under proportional representation.¹²² Over 200 complaints were about internal party nominations, while over 1000 were related to proportional representation.¹²³ The right to stand for election is codified in international standards.¹²⁴ Kenya used an online candidate nomination and ballot design tool in the 2022 elections for the first time, which simplified the process and facilitated adherence to those standards. Citizens must be registered in IEBC's voter register to be eligible to endorse candidates, and they can only endorse at most one candidate for each race. This makes personal data protection issues fundamentally important to the candidate registration process. The Elections Act explicitly regulates the conduct of candidate nomination and political primary competitions. Political parties must submit the names of nominated candidates at least 60 days before the election. Avoiding complaints on candidate disqualification on

unreasonable grounds, candidates are registered through Candidate Registration Management System (CRMS).¹²⁵ In the 2017 general elections a total of 15,082 candidates were registered.¹²⁶ In the 2022 general elections, 16,100 candidates were registered using the CRMS the online nomination system, including four presidential candidates, 266 gubernatorial candidates, 341 candidates for senator, 360 candidates for woman members of National Assembly, 2,132 candidates for members of National Assembly, and 12,997 candidates for Member of County Assembly.¹²⁷ This application election technology in the voter and candidate's registration is backed by the Constitution of Kenya of 2010.¹²⁸ It requires the IEBC to apply technology in the election processes. The Elections Act No. 24 of 2011 R.E 2022 operationalized the provisions on election technology through section 44 by establishing an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

The Constitution of the United Republic of Tanzania of 1977 do not have any provision on application of election technology as that of Kenya. As a result, the Presidential, Parliamentary and Councillors Elections Act No. 1 of 2024 do not have a specific provision on the application of election technology. Only section 166 which is not in mandatory terms provides that, INEC may use technology in discharging its functions. This wording is quite

remedies when granted." UNHRC, General Comment 32, para. 25: "The motion of fair trial includes the guarantee of a fair and public hearing."

¹²² Independent Electoral and Boundaries Commission, Case Digest, Decisions of the IEBC Dispute Resolution Committee, p.1, available at https://www.iebc.or.ke/news/?IEBC_Dispute_Resolution_Committee, accessed 30 March, 2025.

¹²³ Ibid.

¹²⁴ ICCPR art 25.

¹²⁵ IEBC, Press Release on Interim Report Candidates by Political Parties, available at <https://www.iebc.or.ke/uploads/resources/ncaogZbbdX.pdf>, accessed 31 March, 2025.

¹²⁶ Ibid.

¹²⁷ IEBC, GE 2022 In Perspective, 2022 GE Registered Candidates, 2022 available at <https://www.iebc.or.ke/uploads/resources/eY2ACv8FGq.pdf> accessed 31 March, 2025.

¹²⁸ Article 86 (a).

different from the Elections Act of Kenya.¹²⁹ It made the use election technology mandatory. That is why there is online voter and candidate's registration. In addition, registration of voters in Kenya is a continuous process.¹³⁰ In Tanzania, candidates are registered manually and later their particulars are keyed in the candidate management system. The law requires candidates to submit to the commission their nomination forms.¹³¹ For sustainability of the election technology, the Elections Act of Kenya requires the IEBC, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.¹³² Such legal requirement lacks in the Presidential, Parliamentary and Councilors Elections Act of Tanzania.¹³³ The gap identified in the electoral legal framework of Tanzania caused complaints during voter registration and nomination of candidates. In voter registration applicants and voters take long time in the queue for registration. This calls for extension of registration of voters in some regions contrary to time set by the INEC. For instance, in the 2025 voter registration in Dar es Salaam, INEC extended for two days.¹³⁴ Extending the time, the chairman of INEC stated:

Therefore, I would like to announce to all citizens of the Dar es Salaam Region that the Commission has extended the two days for updating the Register to 24th and 25th March, 2025 and the exercise will be

completed on 25th March, 2025
at 12:00 pm.

The call for extension of time for registration can be avoided if the electoral legal framework will provide for continuous voter registration online. The INEC's main duty will be verification of voter's particulars and production of a provisional voter's register for inspection and correction of voter's particulars.

In the nomination of candidates, in the 2015 general elections report shows that presidential aspirants were 11 but nominated 8.¹³⁵ There was no candidates' objection. Nominated members of parliament candidates were 1,209. Out of that, 158 candidates' nomination were objected, 57 appealed to the INEC, two candidates were deregistered by INEC and 14 candidates were reinstated to the list of candidates. Only one candidate was elected unopposed in accordance to section 44 of the National Elections Act, Cap 343 now repealed.¹³⁶ The gap learnt between the electoral legal framework of Kenya and Tanzania manifested in the 2020 general elections where the Independent National Electoral Commission (INEC) received 615 appeals from councillors and members of parliament candidates challenging the decisions of returning officers in the constituencies. The INEC's (by then NEC) election report depicts that 15 presidential candidates were nominated.¹³⁷ There were two objections lodged by CHADEMA presidential candidate against the incumbent president and CCM candidate and CUF candidate. The NEC as then was dismissed the objections on the ground that the objections were meritless.¹³⁸ A total of 1,257 members of parliament

¹²⁹ No. 24 of 2011 R.E 2022.

¹³⁰ Ibid s 5(1).

¹³¹ Ibid (n118) s 34(2).

¹³² Ibid (n130) s 44(2).

¹³³ No. 1 of 2024.

¹³⁴ The INEC announces the extension of two days for the update of the register in Dar es Salaam Region until March 25, 2025 <https://www.inec.go.tz/pages/uboreshaji-wa-daftari>, accessed 30 March, 2025.

¹³⁵ See the Report of the National Electoral Commission, 2015, 41 & 43.

¹³⁶ Ibid at 44, 45, 46 & 47.

¹³⁷ See the Report of the National Electoral Commission, 2020, 37

¹³⁸ Ibid at 41.

candidates were nominated.¹³⁹ There were 334 objections against candidates' nominations. The commission received a total of 165 parliamentary candidates' appeals whereby 64 appeals for deregistration were rejected, three candidates were deregistered, 31 appeals for reinstatement were rejected and 67 appeals for reinstatement were successful.¹⁴⁰ Members of parliament who were elected unopposed were 28 out of 264 constituencies.¹⁴¹ In the councilors election a total of 9,231 were nominated.¹⁴² There were 1,228 objections against councilor candidates.¹⁴³ The commission received 451 appeals.¹⁴⁴ Where 389 appeals were for reinstatement, 235 were successful and 154 were rejected. Appeals for deregistration of candidates were 62, all were rejected. A total of 882 candidates were elected unopposed. The nomination system in Tanzania allows for complaints on biasness and unfair treatment of some candidates. If the electoral legal framework will allow online registration of candidates like that of Kenya, complaints will be reduced or eradicated as there will be no physical contact between the returning officer and the candidate. Complaints have been that the returning officers being appointees of the president of the country who is a chairperson of the ruling party they cannot treat all candidates fairly. This claim was presented before the High Court of Tanzania and later in the Court of Appeal in the case of *Bob Chacha Wangwe v Attorney General and Two Others*.¹⁴⁵

6. REGIONAL INSTRUMENTS ON ELECTORAL JUSTICE

Tanzania is member of international and regional organisations. She ratified many of the international and regional instruments on

election, democracy and governance. Regional instruments require state parties to establish and strengthen courts in order to resolve election disputes timely and independently.¹⁴⁶ Accessing the courts seeking redress is both regional and national based right of the citizens of state party. They also provide for the right to participate freely in the government of a country, either directly or through freely chosen representatives under the law.¹⁴⁷ Where their rights are infringed, they are entitled for court redress.¹⁴⁸

As analysed in this paper, the Constitution of the United Republic of Tanzania of 1977 and the PPCEA do not allow petitions against president-elect. Denying the candidates and the electorate at large the right to access courts to seek remedy as provided for by the Constitution of the United Republic of Tanzania of 1977 and the PPCEA is against international instruments. Article 7(1) of the African Charter on Human and Peoples' Rights (the Charter) requires states parties to accord equal rights before the courts. It states that every shall have the right to have his cause heard.¹⁴⁹ Also, article 26 of the Charter state parties to guarantee independence of the courts and facilitate them to in promoting and protecting the rights and freedoms provided for under the Charter. Given the fact that Tanzania ratified the Charter, she has to allow petitions against presidential election to abide to international instruments and afford citizens

¹³⁹ Ibid.

¹⁴⁰ Ibid at 42 & 43.

¹⁴¹ Ibid at 111.

¹⁴² Ibid at 44.

¹⁴³ Ibid at 45

¹⁴⁴ Ibid at 46.

¹⁴⁵ [2019] 1 T.L.R. 76.

¹⁴⁶ See African (Banjul) Charter on Human and People's Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October 1986) art 7, African Charter on Democracy, Elections, and Governance (ACDEG), which was ratified on January 30, 2007, the Principles and Guidelines Governing Democratic Elections Adopted in Pretoria on 20th July 2015, the Election Management, Monitoring, and Observation Principles Adopted in Johannesburg on 6th November 2003.

¹⁴⁷ ACHPR art 13(1).

¹⁴⁸ ACDEG art 10(3).

¹⁴⁹ Ibid.

access to electoral justice freely.^{150 151} The right to access the courts of law is both international and national right as provided for in the international and regional instruments and the Constitution of Tanzania while limiting petitions against presidential elections. Since it is a right, it has to be provided for under the constitution and the electoral laws like the Kenyan electoral justice.

7. CONCLUSION

This article carried out a comparative analysis on the electoral justice systems of Kenya and Tanzania. The electoral legal framework of Kenya is a best practice to Tanzania in voter registration, nomination of candidates, alternative dispute resolution and election petitions. The Constitution of Kenya of 2010 sets a benchmark for Tanzania as it provides for application of election technology in voter registration, candidates nomination and presidential election petitions. The Supreme Court of Kenya entertained presidential election petitions in 2013, 2017 and 2022. Meanwhile, in Tanzania the Constitution has never been tested on presidential election petitions. As a result, aggrieved candidates are denied with the opportunity to hold the INEC accountable for its functions.

The absence of election technology for voter registration, candidate nomination, and presidential election petition is a hindrance to complaints-free elections in Tanzania. Online voter registration in Kenya is done continuously, thus there is no need for extension of time for registration as it has been in Tanzania, where it is periodical voter registration. Also, voter registration appeals

finally and conclusively being determined by the primary courts remains a complaint unattended to. Further, restriction to challenge presidential election petitions demoralizes voters and candidates.

8. RECOMMENDATIONS

Given the analysis adduced, it is clear that the electoral justice system in Tanzania has some provisions which deny candidates and the electorate from challenging presidential elections in courts of law, challenging voter registration to higher courts, and applying election technology.

It has been observed that the provisions of Article 41(7) of the Constitution of the United Republic of Tanzania of 1977 are not clear. It is crafted in a way as to put a condition precedent to candidates in challenging presidential elections. In order to avoid ambiguous interpretation of the provisions of article 41(7) of the Constitution of the United Republic of Tanzania of 1977 it is recommended that:

- (i) Amendments be made to article 41(7) Constitution to allow election petitions against presidential elections where there is proof of constitutional violation by the commission. To achieve this, it needs political will and financial enhancement. Awareness programme can be introduced to achieve the goal.

¹⁵⁰ African Charter on Democracy, Elections, and Governance adopted 30 January 2007 and came into force 15 February 2012.

¹⁵¹ International Convention on Civil and Political Rights, 1966 Adopted by the General Assembly of the United Nations on 19 December 1966.

- (ii) Amendments be made to 74(12) of the Constitution to allow inquiry into the commission's acts when proved to have been violating the provisions of the constitution. To achieve this recommendation, it needs political will and financial enhancement. An awareness programme can be introduced to achieve the goal.
- (iii) Amendments be made to the section 166 of the Presidential, Parliamentary and Councillors Elections Act, N. 1 of 2024 to accommodate election technology as a mandatory requirement. Since the commission has information technology department this may not be a challenge in implementing the section is amended.