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**Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others [2013] KLR-SCK Petition No.5 of 2013 & No. 1 of 2017**

*Teddy J O Musiga*

**Facts**

Since the establishment of the Supreme Court of Kenya in 2011, it has so far determined two disputes arising from presidential election petitions. From the outset, it is important to clarify that this commentary does not purport to review the decisions of the 2013 and 2017 presidential election petitions.<sup>1</sup> It only seeks to review and critique one salient aspect that emerges from the Supreme Court of Kenya's approach in the treatment of rejected votes in those presidential election disputes.

The case note criticises the Supreme Court of Kenya's approach which seems to favour the exclusion of rejected votes in the final computation of presidential election winners. It presents an argument that rejected votes are important in the computation of presidential election winners. It does that by raising three major arguments. The first argument flows from a rights perspective; the right to vote. The second argument flows from the constitutional requirement that presidential election winners ought to garner a fifty plus one percentage of the votes to win an electoral contest. The third argument flows from the legal distinction between votes cast, valid votes cast, spoiled ballots, stray votes and rejected votes. Ultimately, the paper concludes by presenting a case for why rejected votes matter in a presidential election petition and why they should be included in the computation of winners of presidential election contests.

**Holding: The Supreme Court's Treatment of Rejected Votes in Presidential Election Petitions**

In the wake of the 2013 Kenyan presidential elections, three private citizens filed a petition at the Supreme Court of Kenya challenging the inclusion of rejected votes in the final tally of the results of the presidential elections.<sup>2</sup> Prior to filing the Petition, it was alleged and reported in the media that the Electoral Commission had made a decision to include the rejected votes in the computation of the final presidential election results.<sup>3</sup>

At the time of filing the Petition, it was alleged that there was an estimated total number of 330,000 rejected votes and the number kept rising. The petition was filed due to the fear that

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<sup>1</sup> For a full review of the 2013 and 2017 presidential election petitions see; Maina Wachira. 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <<http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html>> accessed 10 July 2019; George Kegoro 'Why the Low-Key Conclusion of a Very High Profile Election Dispute?' <<https://www.nation.co.ke/oped/opinion/440808-1753130-bfjrptz/index.html>> accessed 10 July 2019; Francis Angila Away (2016), "A critique of the Raila Odinga v IEBC decision in light of the legal standards for Presidential elections in Kenya" in Dr Collins Odote & Dr Linda Musumba (eds) 'Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 General Elections in Kenya and the Emerging Jurisprudence' IDLO and JTI 2016; O'Brien Kaaba, 'Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017,' (2018) ISAIPAR Case Review

<sup>2</sup> Petition No. 3 of 2013 eKLR; The Petitioners were Mr. Moses Kuria, Mr. Dennis Itumbi & Ms. Florence Sargon. All of them were referred to as the second Petitioner in the consolidated petition.

<sup>3</sup> Katrina Manson (2013, 6<sup>th</sup> March) 'Rejected' votes will be taken into account in Kenyan election. Accessed at <<https://www.irishtimes.com/news/world/rejected-votes-will-be-taken-into-account-in-kenyan-election-1.1318136>>

their inclusion in the final tally could jeopardise an outright victory for either of the two leading presidential candidates.<sup>4</sup>

The Petitioners thus contended that the decision of the Electoral Commission to include the rejected votes was in contravention of article 138(4) of the Constitution of Kenya, 2010 as well as Rule 77(1) of the Elections (General) Regulations 2012.<sup>5</sup> The Supreme Court agreed with their submissions and held that rejected votes should not count in the final tally of presidential election votes. They also held that the correct interpretation of article 138(4) of the Constitution refers only to valid votes cast and does not include ballot papers or votes that are cast but later rejected for non-compliance with the terms of the governing law and regulations.<sup>6</sup>

Following the 2017 Presidential elections, the question of the inclusion or exclusion of the rejected votes in the final computation of the winner presidential election similarly became a major issue in court.<sup>7</sup> However, this time around, that application was made within the context of the main petition filed by the Petitioners as opposed to the 2013 case where the question arose even before the declaration of the Presidential election winner by the Electoral Commission.

Notably, the actual total number of rejected votes could not be clearly ascertained. On the one hand, the Petitioners alleged that the total number of rejected votes accounted to about 2.6 percent of all the total votes cast.<sup>8</sup> On the other hand, the Respondents (Particularly the Electoral Commission) alleged that the total number of rejected votes were 81,685 as declared in Form 34C, a percentage of 0.54 percent of the total votes cast. Curiously, the Electoral Commission in their submissions in court averred that the variance between the actual number of rejected votes on Form 34C and the public portal (which the Petitioners used) were as a result of human error and did not significantly affect the outcome of the election.<sup>9</sup> And therefore following the precedent from the Supreme Court in 2013, they made a decision not to include them in the final computation of the Presidential election winner.

Whichever the case, the Petitioners insisted and persistently argued that such numbers were still too high to be ignored and that they had an effect on the final results and outcome of the Presidential election. In that regard, the Petitioners urged the court to reconsider its 2013 findings on rejected votes and hold that rejected votes should be taken into account to determine the threshold under article 138(4) of the Constitution.<sup>10</sup>

In rendering their decision, the Supreme Court held that rejected votes should not be included in the final computation of presidential election winners. Particularly, they held that:

a rejected vote is a vote which is void, a vote that accords no advantage to any candidate; it cannot be used in the computation of determining the threshold of 50% + 1. A purposive interpretation of article 138(4) of the Constitution, in terms of article 259 of

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<sup>4</sup> Consolidated petition (Petition No. 5 of 2013)[28]

<sup>5</sup> Consolidated petition (Petition No. 5 of 2013)[28]

<sup>6</sup> Consolidated petition (Petition No. 5 of 2013)[28]

<sup>7</sup> *Odinga & another v Independent Electoral and Boundaries Commission & 6 others* [2017] KLR-SCK Presidential Election Petition No. 1 of 2017

<sup>8</sup> Petition No. 1 of 2017[40-43]; Dissenting judgment by Njoki Ndung'u, SCJ[176]

<sup>9</sup> Petition No. 1 of 2017[78-80]

<sup>10</sup> *Ibid*[154-170]

the Constitution, leads to only one logical conclusion: that the phrase votes cast in article 138(4) means valid votes.<sup>11</sup>

Consequently, the Supreme Court upheld the view they had earlier adopted in the 2013 case. Effectively, both the 2013 and 2017 decision of the Supreme Court held that ‘rejected votes’ do not matter and should not be included when determining computations for presidential election winners.

To better comprehend how the Supreme Court treated the question of either inclusion or exclusion of rejected votes in the two cases, it is important to give a brief background to what those two cases were about.

**(a) 2013 Raila Amolo Odinga Presidential Election Petition (Consolidated Petition No. 5 of 2013)**

Following the disputed elections of March 4<sup>th</sup>, 2013, three separate Presidential election petitions were filed at the Supreme Court of Kenya to challenge that election outcome. The first petition contested the inclusion of rejected votes in the final tally which, they argued had a distorting effect on the percentage votes won by each candidate.<sup>12</sup> The second petition contested the manner in which the electoral process was conducted by the electoral management body.<sup>13</sup> The third petition challenged the legality of the electoral management body’s declaration of Uhuru Kenyatta as president elect.<sup>14</sup>

They were all later consolidated into one petition; *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*.<sup>15</sup> The main issue to be decided by the Court in the consolidated Petition was the allegation that the entire election was not conducted in accordance with the Constitution and the electoral laws. Consequently, it was argued that the presidential electoral process was so fundamentally flawed that it was impossible to ascertain whether the presidential results as declared were lawful.

However, after the hearings, the Court unanimously upheld the election of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as President and Deputy President – elect respectively.

**Table 1: 2013 Summary of Presidential Election Results**

	<b>Actual figures</b>	<b>Percentages</b>
<b>Total votes cast</b>	12,330,028	100.00%
<b>Valid votes cast</b>	12,221,053	99.12%
<b>Rejected votes</b>	108,975	0.88%

**(b) 2017 Raila Amolo Odinga Presidential Election Petition**

In 2017, another presidential election petition was filed at the Supreme Court of Kenya following the disputed presidential elections held on August 8, 2017.<sup>16</sup> Incidentally, the main

<sup>11</sup> Petition No. 1 of 2017 [170]

<sup>12</sup> Petition No. 3 of 2013 eKLR; It was filed by 3 petitioners. All of them were referred to as the second Petitioner in the consolidated petition.

<sup>13</sup> Petition No. 4 of 2013 Eklr; Both Petitioners were identified as the third Petitioner in the consolidated Petition.

<sup>14</sup> *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KLR-SCK Petitions No 5 of 2013

<sup>15</sup> Ibid

<sup>16</sup> *Odinga & another v Independent Electoral and Boundaries Commission & 6 others* [2017] KLR-SCK Presidential Election Petition No. 1 of 2017

petitioner was the same person who was the main petitioner in the 2013 presidential election petition.<sup>17</sup> The petitioners raised many issues *inter alia* that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process as set out in the Constitution, electoral laws and regulations and that the respondents committed errors in voting, counting and tabulation of results. The petitioners alleged further that the respondents had committed irregularities and improprieties that significantly affected the election results. One of the major issues with regards to the counting and tabulation of the presidential election results revolved around the question of either inclusion or exclusion of the rejected votes (which is the main subject of discussion in this paper).

**Table 2: 2017 Summary of August 2017 Presidential Election Results**

	<b>Actual figures</b>	<b>Percentages</b>
<b>Total votes cast</b>	15,593,050	100.00%
<b>Valid votes cast</b>	15,180,381	97.35%
<b>Rejected votes</b>	411,510	2.63%

After the hearing of the petition, the court rendered a decision annulling the results of the 8<sup>th</sup> August, 2017 Presidential elections. In summary, when annulling the results of that presidential election by a majority of four to two, the Supreme Court judges held that there were systemic and systematic irregularities and illegalities that prevented the election from standing. As a result of the foregoing, the Independent Electoral and Boundaries Commission (IEBC) conducted a fresh election on October 26, 2017 whereupon the ruling party's candidate Uhuru Kenyatta was declared the President.

### **Significance**

The position of the Supreme Court of Kenya with regards to treatment of rejected votes is one that excludes the rejected votes in computing the overall election outcome. In their view, 'a rejected vote is a vote which is void, a vote that accords no advantage to any candidate; it cannot be used in the computation of determining the threshold of 50% + 1'.<sup>18</sup>

As a result of both decisions, it has become increasingly doubtful how to treat rejected votes in Kenya. This paper argues that both decisions took a narrow approach by holding that rejected votes only refer to the 'valid votes cast'. In the Supreme Court's view, for a vote to be considered during the computations for determining winners, then it needs to offer a numerical advantage to at least one of the candidates in the electoral contest. Therefore, in their view, the only votes to be counted are the valid votes cast; rejected votes or even stray votes should not be counted at all.

The problem with holding that 'votes cast' only refers to 'valid votes cast' springs from the fact that article 138(4) of the Constitution of Kenya expressly provides for 'votes cast' and not 'valid votes cast'. This presupposes that all the votes found inside the ballot box should be counted and tabulated as 'total votes cast'. In that way, the returns of the election are able to clearly indicate the total percentages of each contestant after the inclusion of all the rejected votes. Unfortunately, the Supreme Court seems to prefer an approach where 'total votes cast' are equated to 'valid votes cast'. This is problematic because throughout Kenya's electoral

<sup>17</sup> The only major difference was that whereas in the 2013 Presidential election, Mr. Odinga ran for the elections under a coalition called, 'Coalition for Reforms and Democracy (CORD)'; in the 2017 presidential elections he ran under a coalition called, 'National Super Alliance'. Both coalitions were composed of multiple political parties registered in Kenya.

<sup>18</sup> Petition No. 1 of 2017[170; see also Consolidated Petition No. 5 of 2013[258-285]

laws, the only mention of the term ‘valid votes cast’ is found in regulations 69(2) and 70 of the Elections (General) Regulations, 2012 which is subsidiary legislation. And interpretation ‘votes cast’ to be ‘valid votes cast’ creates the absurdity that a constitutional principle is being interpreted using a subsidiary legislation.

It therefore remains unclear why the Supreme Court has twice chosen to interpret the meaning of ‘votes cast’ by making reference to the meaning given to it in subsidiary legislation as opposed to giving it the meaning provided for in the Constitution of Kenya. Notably, article 138(4) of the Constitution of Kenya provides for ‘votes cast’; which is a departure is from section 5 (3) (f) of the repealed Constitution of Kenya which provided that in computation of presidential election winners, only ‘valid votes’ matter.

A plain reading of regulations 69(2) and 70 leads to the conclusion that they only refer to valid votes. The Supreme Court in both petitions held that a voter is said to have cast his or her vote when the procedure under regulations 69(2) and 70 of the Elections (General) Regulations, 2012 has been followed.<sup>19</sup> That means that, that upon receipt of the ballot paper, the voter proceeds to mark correctly, indicating his exact choice of the candidate he wishes to vote for, and then inserts that marked ballot paper into the respective ballot box for the election concerned.

Both the 2013 and 2017 decisions further raise several assumptions; first, that the right to vote only refers to valid votes cast to the exclusion of rejected votes, stray votes and disputed votes and second, that the rejected votes have no numerical value to the ultimate computation of all the votes cast in any given election.

Yet, world over it is increasingly becoming accepted that rejected votes play a key role in electoral outcomes and should never be ignored. For instance, Canadian jurisprudence indicates that for an election to be annulled; the total number of rejected votes should be equal to or outnumber the winner’s plurality (*Opitz v. Wrzesnewskyj*)<sup>20</sup>. That shows that the numerical value of rejected votes cannot be ignored.

While countries like the United States of America treat rejected votes as, ‘residual votes,’<sup>21</sup> usually, residual votes are either ‘over-votes or under-votes’. Under-votes refer to a ballot in which a counting machine found no voter choice for a particular office.<sup>22</sup> In such a case, the voter refrains from voting for any candidate. On the other hand, an over-vote is a ballot that is rejected by the counting machine because it indicates more than one choice for an office.<sup>23</sup> In the 2004 presidential petition of *Bush v Gore*<sup>24</sup>, the American Supreme Court held that sufficient ‘legal votes’ existed among the under-votes cast thus making the outcome of the election doubtful. The court therefore ordered a recount of all the remaining under-votes in Florida State.

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<sup>19</sup> Petition 1 of 2017[166-167]

<sup>20</sup> *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76

<sup>21</sup> Michael J. Hammer, Won-Ho Park, Michael W. Traugott, Richard G. Niemi, Paul S. Herrnson, Benjamin B. Bederson and Frederick C. Conrad, ‘Losing Fewer Votes: The Impact of Changing Voting Systems on Residual Votes’ (2010)63 Political Research Quarterly, 129-142; Stephen Ansolabehere and Charles Stewart III, ‘Residual Votes Attributable to Technology’ (2005) 67 The Journal of Politics , 365-389

<sup>22</sup> Analysis and Report of Overvotes and Undervotes for the 2016 General Election, <<https://dos.myflorida.com/media/697477/overundervotereport-2016.pdf>> accessed 10 July 2019

<sup>23</sup> Ibid

<sup>24</sup> *Bush v Gore*, 531 US (2000)

Consequently, comparative jurisprudence on the question of rejected votes indicates that its proper comprehension should come from a solid understanding of electoral behaviour of voters which has a bearing on the overall election outcomes. To further support the importance of rejected votes, Maina Wachira argues in his paper, 'Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test'<sup>25</sup>, that rejected votes should count for two reasons. First, from a rights perspective, the right to vote entails three elements: the right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast a protest vote by rejecting all the candidates on the ballot. He argues that the right to cast a protest vote can be expressed by deliberately spoiling a ballot. Second, he argues that rejected votes should count because the article 138(4) of the Kenyan Constitutions sets high electoral thresholds for the presidential elections. That provision requires that for a person to be declared the winner of a presidential election, they should garner more than half of all the votes cast in the elections as well as at least twenty five percent of the votes cast in more than half of each county. Notably, such a prerequisite does not exist for all other electoral positions.

Therefore, from an electoral theory perspective, the right to vote also contemplates protest votes and thus such votes should not be treated as an error as the Supreme Court has twice done. However, and admittedly, some rejected ballots could arise out of illiteracy levels of voters thereby meriting the argument that they be treated as an error rather than a protest. In such a case, the illiterate voters do not understand how to make their decision from among the candidates presented in the ballot paper. The electoral laws provide that a valid ballot is that which has been marked correctly. The decision of how to mark the ballot paper is often left to the discretion of the individual voter. In giving meaning to the 'mark' made by a voter in the ballot paper, the electoral officers often look at the intention of the voter.

However, a sample of ballot papers that were eventually treated as rejected votes revealed that due to high levels of illiteracy, certain voters fail to mark their ballot papers correctly. They (voters) do so by either not making any mark on the ballot, viz, leaving the ballot paper blank or writing on the ballot paper in a way that cannot be treated as a 'mark' in *strictu sensu*. Additionally, some voters put marks against the names of all the candidates in the ballot paper while others put their signatures alongside 'the mark'. Others also draw on the ballot paper. In all these scenarios (and many others not mentioned), the electoral officers often treat such ballots as rejected votes.

Moving away from the argument that rejected votes come about as a result of illiteracy, disregarding rejected votes leads to two further conceptual challenges. First, it puts the voter who goes to a polling station, queues and makes a decision to cast a protest vote against all the candidates on the ballot in the same position as that citizen who in spite of having the right to vote chooses to stay at home and not vote.<sup>26</sup>

The second challenge is also best captured by Maina Wachira's analogy in which he describes an electoral contest with 100 voters and two hugely unpopular candidates.<sup>27</sup> . The winner of the election outcome is expected to garner 50 plus one of all the votes cast. 60 percent of the

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<sup>25</sup> Maina Wachira. 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <<http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html>> accessed 10 July 2019

<sup>26</sup> Ibid

<sup>27</sup> Maina Wachira, 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test' The East African, <<http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-SupremeCourt-failed-poll-petition-test/-/434750/1753646/-/297c6q/-/index.html>> accessed 10 July 2019

voters protest against both by ‘spoiling’ their ballots. Candidate A, gets 35 votes and candidate B, gets five votes. If rejected votes are included, candidate A has only 35 percent of the votes cast and cannot win in the first round because he/she falls short of the 50 plus one requirement. But if you exclude rejected votes, candidate A wins with 87.5 percent of valid votes cast, and, therefore, meets the required threshold of 50 plus one.

Another reason why rejected votes should be counted stems from the legal distinction between spoilt ballots and rejected ballots. Under Rule 71 of the Elections (General) Regulations 2012, a spoilt ballot paper is generally one that a voter has inadvertently spoiled and handed back to the election officers in exchange for a new blank ballot. The voter is then issued a fresh ballot paper in place of the former. Such a ballot paper does not enter the voting box (it is not cast) and therefore cannot be counted among the votes cast.

On the other hand under Rule 77(1), a rejected ballot refers to that ballot which either (i) lacks certain security features, (ii) the voter has voted for more than one candidate, (iii) the voter has left on it a writing or mark by which he/she may be identified or (iv) the ballot remains unmarked or void for uncertainty. Regardless of the reason, a rejected ballot, therefore, is a cast vote; the result of a voter attending a polling station and placing a ballot in the ballot box. Such a ballot should be counted towards turnout, even if it doesn’t count towards a particular candidate. It is merely counted for purposes of determining who among the electoral contestants meets the 50 plus one threshold. The rationale is that, the law and electoral practise contemplate a tabulation of each and every vote cast at the point of filing returns when the voting exercise ends. This is why, particularly Forms 34A, B & C (used by the electoral management body for filing returns for presidential election winners) each have a slot for tabulating the total numbers of valid votes cast, rejected votes, votes, disputed votes, stray votes and spoilt ballots. Further, rule 81 of the Elections (General) Regulations 2012 also provides that, ‘upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box – (a) valid votes; (b) rejected ballots sealed in a tamperproof envelop; (c) used ballot papers sealed in a tamper proof envelop; (d) counterfoils of used ballot papers sealed in a tamperproof envelop; (e) copy of election results declaration forms; and (f) stray ballot papers in tamperproof envelops.’

In conclusion, the main argument in this paper has been that a proper interpretation and understanding of the term ‘votes cast’ should refer to all the votes cast, viz, all the ballot papers that have been marked and thereafter inserted in the ballot box. Unfortunately, the Supreme Court of Kenya has twice held that the term ‘votes cast’ only refers to valid votes cast. The question then becomes; why tabulate all votes if at the end of the exercise they count for nothing?

Finally, this paper has shown that rejected votes matter and also that they should be included in the final computation when determining presidential election winners. The paper also demonstrated why there is a need to rethink the twin decisions (of 2013 and 2017) of the Supreme Court on the question of the treatment of rejected votes.