The Supreme Court as a Slot Machine: An Analysis of the Formalistic and Mechanical Reasoning in Martha Karua -vs- Waiguru.

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> *An electoral dispute resolution mechanism that is slow and technically inclined and does not deliver substantial justice adds to the pains of the people and slows down the entrenchment of democracy. It also corrupts the electoral process and leads people towards alternative and unconstitutional means of resolving electoral disputes* [1]

1. Introduction

Siri Gloppen[2] in her '*Courts and social Transformation: An analytical Framework'* answers the question on whether courts can contribute to social transformation in the affirmative. Similarly, Dr. Willy Mutunga, Chief Justice Emeritus, confronted with the same question, answers the question positively[3]. He relies on the idea of transformative constitutionalism to answer the question. He argues that 'The very idea of a transformative constitution (like those of India, Colombia, Costa Rica, Bolivia, Ecuador, Venezuela, South Africa, and Kenya) is the idea that the Constitutional superstructure is embedded on a theory that the Constitution will be an instrument for the transformation of society rather than a historical, economic and socio-political pact to preserve the *status quo* as the earlier constitutions did'. Transformative constitutionalism requires that courts play an active role in social transformation. He however concedes that this transformation can only be achieved where we have a transformed court (a reason as to why the judges and magistrates were vetted after the promulgation of the 2010 constitution). What Mutunga fails to do is to call the problem by its name[4]. That transformation can only occur after

[1] Okoye, F. "Restorative Justice & The Defence of People's Mandate: The Judiciary in the Aftermath of the 2007 Elections, in Nigeria" in Jibrin Ibrahim & Okechukwu Ibeanu (Ed).,*Direct Capture: The 2007 Nigerian Elections and Subversion of Popular Sovereignty*. CDD: OSIWA at 131.

[2] Siri Gloppen, 'Courts and social Transformation: An analytical Framework' in Roberto Gargarella, Pilar Domingo and Theunis Roux (Eds). *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* ASHGATE (2006)

[3] Dr. Willy Mutunga ,Transforming Judiciaries in Africa: Lessons from the Kenyan Experience Keynote Address delivered at the Annual General Conference of the Nigerian Bar Association International Conference Centre, Africa Hall, Abuja, Nigeria Sunday, August 23, 2015

[4] At one point, he came near to this when he argued that 'It is time for the judiciary of Kenya to rise to the occasion, and shake off the last traces of the colonial legacy'. On this see Willy Mutunga, The 2010 Constitution of Kenya and

we have finally shaken off the pre-2010 constitution interpretation theories! A change in legal culture.

For Siri Gloppen, the "transformative potential of courts" can only be achieved when the main components of the litigation process are observed. She conceptualizes four stages which are; voicing of claims, the responsiveness of the courts, the capabilities of judges and the compliance by political authorities. She however concedes that this is the not the whole story. For the purposes of this paper, I will only dwell with the first three stages. The stage of victims' voice is concerned with the provision of an arena where people can take their claims. This stage is defined by the formal or systemic and informal barriers preventing people from accessing the judicial system[5]. For the transformative potential of the court to be fully achieved, this calls for a relaxation of the standing rules and an assurance of access to justice. It can be argued and rightly so that the constitutionalisation of access to justice in Kenya was meant to achieve this element. Similarly, this stage has the demand that people should not be turned away from the seat of justice on technical or procedural grounds (Article 159 similarly calls for substantial justice) or that courts should not be technicality oriented[6]. Simply, the transformed courts should strive to hear matters on merit.

Secondly, the term 'court responsiveness' means the willingness of the courts to respond to the concerns of the people that come before them. At the core of the concept of responsiveness to social rights, is how judges interpret the law, secondly, the legal culture together with judge's personal ideological and personal values influences judges perception of their own role. The concept of responsiveness also depends on the judges' sensitivity –individually and collectively- to the concerns voiced. Important is the fact that the legal culture and norms of appropriateness in the judiciary have an impact on the court's responsiveness. For courts to contribute to social transformation, therefore, there is a need for them to acquaint themselves with the legal culture that is demanded by the project of transformative constitutionalism.

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its Interpretation: Reflections from the Supreme Court Decisions Inaugural Distinguished Lecture Series at University of Fort Hare October 16, 2014

[5] See Roberto Gargarellla, '"Too far removed from the people": Access to justice for the poor: The case of Latin America', UNDP Issue Paper (Bergen: Chr. Michelsen Institute , 2002)

[6] See *Morgan and Others* v. *Simpson and Another* [1974] 3 All ER 722; see also Jackton B. Ojwang' (2013) *Ascendant*
Judiciary in East Africa Strathmore University Press, Nairobi.

On judges' capability, this stage asks the question on whether judges are willing to handle the claim before the court? It also asks whether the judges can not only handle the claim but can respond and find adequate legal remedies to repair the violation. This depends on the skill and capacity of the judges. The development of transformative jurisprudence requires highly skilled judges, research capacity and access to a range of legal materials. Similarly, legal culture is also important at this level and in particular the prevailing theories of judicial interpretation. The point being made under this stage is that there is a need for a country with a transformative constitution to adopt transformative legal education that will properly prepare the students to implement the demands and aspirations of the constitution.

The point being made here is that no transformation can occur where the prevailing legal culture is anti-progress. No transformation can be achieved where the legal culture is formalistic. Simply put, where a transformative constitution is imposed on a formalistic legal culture, the promises of the constitution shall be thwarted. Put differently, in a country where the prevailing legal culture is formalistic, the transformative constitution becomes sterile! It has already been noted that one of the significant potent threats to the transformative project of the Kenyan Constitution is Kenya's legal culture which has been described as 'exceedingly formalistic, rule-bound and deeply rooted in liberal legalist ideology'[7]

It is on this premise that this paper proceeds. This paper will show that despite the fact that the constitution is now almost a decade old, its aspirations and promises have not been fully realised with the highest court on the land abdicating its mid-wifery role. The adoption of the robotic tendencies by the Supreme Court is a demonstration of this problematic legal culture that has bedeviled this country since time immemorial. This paper will briefly look into the mechanical electoral jurisprudence emanating from the Supreme Court and in particular the archaic and anachronistic reasoning in *Martha Karua v Waiguru* [8]while relying on *Lemanken Aramat v IEBC*[9].

2. Transformative constitutionalism and legal culture

[7] See Walter Khobe "The Horizontal Application of the Bill of Rights and the development of the law to give effect to rights and fundamental freedoms" *Kabarak University Journal of Law and Ethics I* 2015
[8] *Hon Martha Wangari Karua Versus Independent Electoral And Boundaries Commission* petition No. 3 of 2019
[9] *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others* SC Petition No. 5 of 2014; [2014] eKLR

Although these two concepts have already received enough ink, it is surprising that the Supreme Court has either failed to clearly appreciate what they mean or they have willingly decided to ignore their import in our legal system. The two ideas were firstly coined by Karl Klare[10], picked by Langa, Roux[11] and later by other academicians[12]. Prof Karl Klare defined 'transformative constitutionalism' to mean:

> […] a long-term project of Constitution enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

The Kenyan constitution has been classified along these lines and our courts have appreciated this position[13]. This has been supplemented by academicians[14]. In *Speaker of The Senate & Another[15]*, the court noted that:

> "Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the

[10] K Klare 'Legal culture and transformative constitutionalism' 14 *South African Journal on Human Rights* (1998) 146 151-156.

[11] see Theunis Roux, 'Transformative constitutionalism and the best interpretation of the South African Constitution paper presented at the University of Stellenbosch conference on "Transformative Constitutionalism after Ten Years" held on 8 August 2008.

[12] See Karin van Marle, 'Transformative constitutionalism as/and critique' follow up to presented at the University of Stellenbosch conference on "Transformative Constitutionalism after Ten Years held on 8 August 2008

[13] See *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR, Constitution Reference 12 of 2010, Where Ojwang J(as he then was) expressed himself thus

'A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.'

[14] Prof. Yash Pal Ghai in '*Chimera of constitutionalism: State, economy and society in Africa'*; see also Godfrey M Musila, 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution' in Japheth Biegon and Godfrey M Musila *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, (2012) 55-88 57-60.

[15]*Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others* Advisory Opinion Reference No. 2 of 2013 [2013] eKLR

preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved"**.**[16]

The Supreme Court also expressed itself in *Samuel Kamau Macharia*[17] that 'A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods.'

At the core of transformative constitutions is the use of the law for social transformation. Transformative constitutions therefore call for substantive and value based reasoning. These elements would shun mechanical jurisprudence emanating from the courts. Furthermore, this transformative agenda is also evident in our electoral system[18]. The 2010 constitution has revolutionized the principles of electoral system[19] and also the electoral dispute mechanism. This is because electoral justice can only be achieved where there is an independent judiciary and a judiciary that has embraced the aspirations of a transformative constitution[20].

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[16]*Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa* HCCC No. 190 of 2010], Ojwang J has remarked that:
'I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. *Whereas the earlier Constitutions were essentially programme documents* for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary.'

[17]*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eklr No. 2 of 2011 at paragraph 62

[18] For a more detailed view of reforms of the electoral system, see generally Elisha Ongoya and Willis Ochieng *EISAs Handbook on Kenya's Electoral Laws and System* (2012).

[19] See *Mohamed Tubi Bidu versus Independent Electoral and Boundaries Commission*, Election Petition No.3 of 2017 at Para 38.

[20] See Ben O. Nwabueze (1997) *Constitutionalism in Emergent States*. C. Hurst & Co., London &Nwamife Publishers, Enugu & Lagos, at 10.

The second concept, legal culture is defined to mean:

> "By legal culture, I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice? What 'inarticulate premises, [are] culturally and historically ingrained' in the professional discourse and outlook?"[21]

Legal culture can therefore be summarised to mean how judges respond to law or cases before them, their habits of mind or intellectual reflexes. Kenya's legal culture has been said to be conservative or legal formalistic (legal formalism). By legal formalism, I refer to the idea that a judge's decision of a case is dictated solely by the content of an existing rule, that decision is not determined by anything else[22], including the values or beliefs or preferences of the judge herself and therefore judges makes decisions by mechanical application of existing legal rules[23]. Kenya's historical background is replete with determination of disputes on technicalities[24]. This can be seen in *Matiba v Moi, Kibaki v Moi*. This demonstrates the fact that Kenya's Election Dispute Resolution history has been characterised by 'the elevation of legal and procedural technicalities over substantive justice'.[25] It is this legal culture of formalism that is against the constitution. It is this conservative and formalist culture that explains why the aspirations of the

[21] Karl Klare
[22] Richard A. Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," (1986) 37 Case Western Reserve Law Review 179
[23] Christopher J. Peters, Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication
[24] see Ben Sihanya, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process' in Dr Godfrey M Musila (Ed),*Handbook on Election Disputes in Kenya :Context, Legal Framework, Institutions and Jurisprudence* 22
[25]See David Majanja 'Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections' in C Odote & L Musumba (eds) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016) 19, 20.

transformative constitution are yet to be felt in our electoral jurisprudence (Muthomi Thiankolu has called it a peculiar jurisprudence)[26] especially the one emanating from the Supreme Court.

Lucianna Thuo while writing on the 2017 election petitions notes that this anti-progressive legal culture[27] undermined the ends of justice and hampered the development of sound, consistent jurisprudence on electoral issues. Similarly, Godfrey M Musila[28], while writing on the transformative nature of our constitution and the new electoral laws has argued in 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws' that:

> "Perhaps informed by the not-so-glorious record of our judiciary, and the need to transform the exercise of judicial function from a formalistic, technical and rule-bound process to a teleological and purposive one that would enable the judiciary to dispense substantive justice while playing the desired central role in transformation, the framers of our constitution chose to include principles to guide the exercise of judicial function".

Summarily, the point can be expressed as follows 'The audit revealed a tacit willingness on the part of the courts to expand the law with a view to summarily dismissing or striking out election petition on the one hand and an unflinching hesitation to expand the law to a substantive determination of the disputes on the merits.'[29]

Notably, the two established writers have belaboured to show that although the constitution has brought new promises to the electoral justice, the judiciary is required to shake off all the traces of the formalistic legal culture that was in existence prior 2010. However as will be shown below, this formalistic legal culture which has the effect of making the constitution moribund is still in existence and is a threat to the promises of our transformative constitution.

3. A shift to substantive reasoning

[26] Muthomi Thiankolu, 'Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions' in Law society of kenya, *Handbook on election disputes in kenya: Context, legal framework, institutions and jurisprudence* (2011) 57.
[27] Lucianna Thuo, 'Compendium of 2017 Election Petitions; Select Decisions Issues and Themes Arising From The 2017 General Elections In Kenya '(2019) 4 *ICJ Kenya* at page 326.
[28] Dr Godfrey M Musila, 'Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws' in Dr Godfrey M Musila (Ed),*Handbook on Election Disputes in Kenya :Context, Legal Framework, Institutions and Jurisprudence* 11
[29] Muthomi Thiankolu, Resolution of Electoral Disputes in Kenya supra ft 27

Article 259 of the constitution contains one of the elements of a transformative constitution. The article sets out how the transformative constitution is to be interpreted. The said article calls for a substantive reasoning as opposed to a formalistic or technical reasoning. The Mutunga-led Supreme Court correctly understood this element of transformative constitutionalism. In *Re Interim Independent Election Commission [2011] eKLR, para [86]* it pronounced itself thus**:**

> "The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."[30]

In his Concurring Opinion, Justice Willy Mutunga held in In *Re the Speaker of the Senate & Another v Attorney General & 4 Others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR*:

> ***"[155] In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.***

[30] The CCK Petition 14 as Consolidated with Petitions 14A, 14B and 14C]

> ***"[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.[31]***

It is this kind or reasoning that is in line with the constitution. A reasoning that eschews formalities but focuses on substantial justice.

This imperative is also evident in article 159 of the constitution. Article 159(2) (d) of the constitution requires courts to administer justice without undue regard to procedural technicalities[32]. It has been argued previously and I agree , that 'of all the principles enacted in

[31] See also *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,* Supreme Court Petition No. 2B of 2014.

[32] Procedural technicality was defined in *James Mangeli Musoo vs Ezeetec Limited [2014] eKLR* in the following terms:

> *A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decision in court matters. Undue regard to technicalities therefore means that the Court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and/or procedural in nature.*

Article 159, this is one singular principle that could have far reaching transformative value in relation to the conduct of electoral disputes, in view of its potential to impact procedure'.

Courts are therefore required to enforce substantive justice. This has also been reciprocated in our electoral laws. Section 80(d) of the Elections Act, 2011, requires an election court to decide all matters that come before it without undue regard to technicalities. Rule 5 of the Elections Rules 2017, states that the effect of any failure to comply with the rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2) (d) of the constitution. The jurisprudence emanating from the courts is two-fold. One school of thought has upheld that the provisions of the election rules are mandatory and that non- compliance should lead to a petition being struck out[33]. On the other hand there are some High Court decisions that have held the view that failure to comply with the election rules is not fatal to the petition and that a court can excuse the infraction[34].

However, when faced with a procedural technicality. Courts should raise above them and ensure the deliverance of substantial justice. This is because **rules of practice are intended to be that of a handmaiden rather than a mistress[35]**

Ouko J writing for the majority in *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 Others* **held that** '**Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness……Essentially**

[33] This view was held in such High Court decisions as in *Amina Hassan Ahmed Vs Returning Officer Mandera County & two Others*(2013) eKLR, *Jimmy Mkala Kazungu Vs Independent Electoral and Boundaries Commission & two others*(2017) eKLR, *Mbaraka Issa Kombo V Independent Electoral Commission and 3 Others* (2017) eKLR and *Martha Wangari Karua Vs Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR where the courts struck out the petitions as being incurably defective for noncompliance with Rule 8(1) (c) of the Elections Rules and held that the rules of procedure in electoral disputes are not mere technical procedural requirements but go to the root and substance of the matters prescribed thereupon.

[34] Examples are High Court decisions in *Caroline Mwelu Mwandiku Vs Patrick Mweru Musimba & 2 Others*(2013) eKLR, *Washington Jakoyo Midiwo Vs Independent Electoral and Boundaries Commission and 2 Others*(2017) eKLR, *Shukra Hussein Gure Vs Independent Electoral and Boundaries Commission & 2 Others*(2017) eKLR and *Samuel Kazungu Kambi V Independent Electoral & Boundaries Commission and 3 Others* (2017) eKLR where the respective High Court judges declined to strike out the petitions for failure to comply with the provisions of the elections rules and held the view that the petitions ought to be determined on merits

[35] *Githere V Kimungu*(1976-1985) E.A 101

the rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice'

Similarly Korir J in the case of *Samwel Kazungu Kambi & Another vs Independent Electoral and Boundaries Commission and 3 Others*(2017) eKLR held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election dispute, the court ought to be mindful that the current constitution dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court shall ensure that the petition is heard and determined on merit and further that Article 159(2)(d) of the Constitution is available to a litigant in an electoral dispute in the same manner that the provision comes to the aid of a litigant in any other ordinary litigation[36]

This shift was also recognised by Kimondo J. in **William Kinyanyi Onyango V Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR** where he stated that:-

"**In my considered opinion, the petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases, only that the court must guard against them trumping substantive justice..."**

[36] See the court of appeal in *Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR.

The import of article 159 had also been captured by the Supreme Court in the famous *Raila Odinga (2013)*[37] although the court ignored the same importance when it refused to admit the affidavits. The court had held that*:*

The essence of that [Article 159(2) (d)] is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.

However, while deeply affected by the formalistic legal culture, the courts have invented a claw-back to article 159(2)(d).This claw back is evident in *Raila Odinga(2013)* and can also be seen in ***Moses Mwicigi & 14 Others vs IEBC & 4 Others***[38] where the court explained that Article 159 (2) (d) is not a panacea for all situations as to warrant a litigant's indiscretion and does not offer succor to parties who do not show regard for the rules and timelines. This is an invention of the courts and such an invention can only be explained by the fact that although we have a transformative constitution, however the same was imposed on a formalist legal culture.

Whereas it is the dictate of our constitution that rules of procedure should not be elevated above the requirement of doing substantive justice to parties who approach the courts[39]. It is disappointing that technicalities have been applied by our courts in a manner that defeats justice in election matters. Courts should therefore move away from this legal culture. Substantive justice can be said to be the basis of the Court of Appeal's "Oxygen rules.'[40] The court of appeal has equally held that as a tool of justice, the overriding objective principle is both procedural and substantive."[41]

[37] The Supreme Court in *Raila Odinga and Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR
[38] [2016] eKLR.
[39] J.Njagi J in *Alexander Khamasi Mulimi v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, Election Petition Appeal 2 of 2018.
[40] See *Kenya Commercial Bank Limited v., Kenya Planters Co-operative Union* [2010] eKLR.
[41] See *Joseph Kiangoi v Wachira Waruru & 2 others* [2010] eKLR.

Article 10 of the constitution also contains another imperative of our constitution. It establishes a value based constitution and therefore demands for a value based reasoning[42] (others have referred to this as a teleological interpretation of the constitution)[43] or a 'realist-cum-value-oriented approach'[44]. These values are *critical in building a robust patriotic and indigenous jurisprudence for Kenya*[45] and they give the real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. These values must therefore be given full effect by every person and authority at all times[46]. Notably is the fact that these values binds all state organs, state officers public officers and all persons[47] whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions[48]. Moreover, there is the call that ***"the values contained in Article 10 must at all times permeate its functions and activities which it is mandated to carry out by statute."***[49] This therefore imposes an obligation on the courts in its interpretative role[50].

Demonstrably is the fact that these values further call for substantive reasoning from our courts[51]. This point has been expressed by the High Court. The court recognised that 'The current Constitution is transformative. The challenge of constitutional interpretation is to define and give life and substance to values and broad principles enunciated in the Constitution in an ever-changing society by application of a principled theory of constitutional interpretation as articulated in article 259'.[52] The point has also been made that 'The Court is therefore required in

[42] AJ van der Walt 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) *11 SAJHR* 169 at 191-192

[43] See for example Du Plessis L *"Interpretation*" in S Wolman & M Bishop (Ed) *Constitutional Law of South Africa* 2 Ed (OS 2008) 32-1–32-193; Scott C *"The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights*" (1989) 27 *Osgoode Hall Law Journal* 769 778.

[44] Dugard *Human Rights and the South African Legal Order* at 400.

[45] *In the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 [2011] eKLR paragraph 86

[46] See *Consumer Federation of Kenya (COFEK) v Attorney General & 2 others [2012] eKLR*, at para (45)

[47] See *Nairobi Metropolitan Psv Saccos Union Limited &25; others vs. County of Nairobi Government & 3 Others* [2013] eKLR.

[48] *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR

[49] See Majanja J in *Samura Engineering Limited & Others v Kenya Revenue Authority* Nairobi Petition No. 54 of 2011; Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012

[50] South Africa also has a similar legal understanding, see Adrians Janet Hofmeyr, 'Constitutional Interpretation Under The New South African Order' *A J* 1998 and S *v Makwanyane* 1995 (6) BCLR 665 (CC) at para 9. Chaskalson P referred approvingly to the dictum of Kentridge AJ in S *Zuma* 1995 (4) BCLR 401 (CC) (at para 17)

[51] Oreste Pollicino, "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint", (2004) 5 *German Law Journal* p. 289; Henk Botha, 'The values and principles underlying the 1993 Constitution' (1994) 9 *SAPL* 233

[52] *Judicial Service Commission v Mbalu Mutava & another [2015] eKLR*

the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach'[53]. This obligation on the court also applies to electoral courts[54]. The point here is that firstly, a value based constitution eschews a formalistic or mechanical interpretation [55] and that substantive reasoning, a reasoning that gives effect to the purpose of the constitution should be adopted[56].

Secondly, the values in article 10 call for a shift from a culture of authority to a culture of justification. Every act must be justified. An idea that is coined by Etienne Mureinik in his seminal paper "*A Bridge to Where? Introducing the interim Bill of Rights"*,[57] who had argued that "A culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion". This shift has been recognised by the High Court in *Samura Engineering Ltd & Others v Kenya Revenue Authority* Nairobi petition No. 54 of 2011, where Majanja J. noted that "By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution". Similarly, the Supreme Court recognised this shift in *Hon. Justice Kalpana Rawal and Others v Judicial Service Commission and Others,* Applications No. 11 and 12 of 2016.

The judiciary is not excluded from the culture of justification[58]. For every exercise of a judicial power, the same must be justified as Pieterse points it out that the judges ‟ duty to demand adequate justification of the other branches of government whenever the constitutional rights of citizens are threatened, as well as the need for the judiciary finally to abandon the remnants of the culture of extreme deference to the executive which it perfected during the apartheid years".[59] Liebenberg puts this point more clearly, she argues that the role of courts as sites of

[53] *Pharmaceutical Society of Kenya v National Assembly & 3 others [2017]* eKLR at para 95-99
[54] *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017*] eKLR at para 37
[55] *Republic v Independent Electoral and Boundaries Commission Ex-Parte Gladwell Otieno & another* [2017] eKLR ; *Samura Engineering Limited & 10 Others V Kenya Revenue Authority* [2012] eKLR at para 57
[56] See Odunga J's reasoning in *George Bala v Attorney General [2017]* eKLR at para 57
[57] Etienne Mureinik, A Bridge to Where?: Introducing the Interim Bill of Rights‟ (1994) 10 *SAJHR* 31 at 32.
[58] C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484 500.
[59] Marius Pieterse „What Do We Mean When We Talk About Transformative Constitutionalism?‟ (2005) 20 *SA Public Law* 155 at 165

justification of public conduct in terms of the Constitution's normative framework will be undermined if adjudication itself does not reflect a culture of justification.[60]

Langa adds that:

> "The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."[61]

Formalism and technical reading of the law cannot therefore amount to a sufficient justification but a substantive reasoning that takes into account the values does. Cora Hoexter puts this point more blatantly[62] when he argues that 'Formalism is thus an insufficient and unsatisfactory form of justification under the democratic Constitution. It may also be a false justification to the extent that it prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society". The point here is that throwing out a matter on a technicality defeats the purpose of the entrenchment of the values in the constitution. It is indeed an illustration of a culture of authority rather than a culture of justification, an expression of 'a smack of judicial utado'!, Just like the other arms of government, every decision of the court must be justified and this can only happen where courts employ a value based reasoning. The call is simple, courts must stop mechanical reasoning, the tides have already changed, and formalism is unacceptable in post-2010!

4. A Court Sanctioned Injustice: The Obsolescent Reasoning in Karua v Waiguru

An idea of a court is a place where anyone can find justice, a place where the weak run to for protection, an ideal place for those whose rights have been violated, and the heaven for those whose tears are flowing. The court is viewed as a hell to those who are hell-bent in violating the

[60] S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 47.
[61] Justice Pius Langa, 'Transformative Constitutionalism" (2006) 17 *Stell LR* 351 at 357 and see Dennis Davis *Democracy and Deliberation* (1999) 15-16.
[62] Cora Hoexter, The Transformation Of South African Administrative Law Since 1994 With Particular Reference To The Promotion Of Administrative Justice ACT 3 OF 2000 (University of the Witwatersrand,2009).

constitution. A place where the streams of justice would flow, where the judges would use the law to do justice to those who come before it as the Court of Appeal held in *Alex Wainaina t/a John Commercial Agencies Vs Janson Mwangi Wanjihia* (2015) eKLR, that:

> **"**The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of Gathiaka & Vs Nduriri (2004) Eklr 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and **with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it**."

Or in the immortal words of Madan J in the *Githunguri case* that *Stanley Munga Githunguri. You have been beseeching the court for an order of prohibition. Take the order. This court gives it to you. When you leave here raise your eyes to the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the judicial system*. Words that were uttered when the judge operated in a very restrictive constitution and little or no democracy. Words that were repeated recently by Justice Eric Ogola that *so also, I say to the applicant thus: Hassan Ali Joho! Lift up your eyes, and thank your God that Kenya is now a total democracy. Your fundamental rights are secured under judicial system of Kenya*[63].With this wise counsel, no one would have thought that a court would one day use the law not to bring justice but to sanction an injustice. But this peaceful wish was sadly ruined by the formalistic and anti-constitution approach taken by the Supreme Court in its recent issued decision (Martha Karua v Waiguru). A decision that confirmed Dr. Peter Onyango Onyoyo lamentations in his 'Judicial Activism And Disenchantment of Legal Formalism in Kenya' that '*In the administration of justice the law has been abused in so many different ways including the Courts whose mandate is to administer it. Some court decisions prove that judges make mistakes and errors in interpreting the law'.*

While pretending to extend their sympathies to the petitioner, the court sanctioned injustice in the following words '[58] *We sympathize with the Petitioner who, without any fault of her own, has been locked out of the seat of justice'.*

A summary of what had transpired is important. The petitioner had challenged the election of the governor of Kirinyaga County. The respondent however filed an application to strike out the

[63] *Hassan Ali Joho v Inspector general of police & 3 others*, constitutional petition 15 0f 2017.

Petition for failure to comply with Rule 8(1) (c) and (d) of the Elections (Parliamentary and County) Petition Rules, 2017. She appealed successfully to the court of appeal and the Appellate Court remitted the matter back to the High Court for its substantive disposal. The high court dismissed the election petition and importantly the court determined that determined that once an appeal is filed at the Court of Appeal, it operates as a stay of proceedings at the High Court pending the outcome of the appeal thus freezing the 6 months' period within which an election petition should be concluded upon filing[64]. On an appeal to the court of appeal, the court upheld the cross-appeal of the respondents who were contending that the High Court's Judgment was a nullity because that Court lacked jurisdiction to hear and determine the election petition since 6 months had lapsed between the time of filing the petition and its final determination. The court held that the High Court lacked jurisdiction to hear and determine the election petition upon the expiry of 6 months after the election petition had been lodged. Further, the Court of Appeal did not find merit in all other grounds of appeal raised by the Petitioner and dismissed them.

On its part the Supreme Court relied on its earlier decision in *Lemanken Aramat*[65] which had expressed similar sentiments as to the court of appeal. The court therefore emphasized *the principles of efficiency and diligence* holding that 'we still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any Court and we see no reason to depart from that position in this or any other case'. The need to adhere to the constitutional timeframes has been expressed in a litany of cases[66]. Korir J had expressed a similar reasoning in *Gerald Iha Thoya v. Chiriba Daniel Chai & another* Election Appeal No. 1 of 2018; [2018] eKLR:

"The reference point is the date the petition is lodged. The calendar is not shifted by the conduct of the parties and neither can it be breached by the actions of the election court. The period is cast in stone and once the six months lapse the election court no longer has any powers to hear and determine the election petition. It must down its tools without prompting."

[64] Section 75 of the election Act requires that an election dispute involving a governor be resolved in 6 months.
[65] *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others* SC Petition No. 5 of 2014; [2014] eKLR
[66] *Hassan Ali Joho & Another v. Suleiman Said Shahbal and Others*, SC Petition No 10 of 2013; [2013] eKLR and *Evans Odhiambo Kidero & 4 others v. Ferdinard Ndungu Waititu & 4 others*, S.C Pet. No. 20 of 2014; [2014] eKLR.

In stark contrast is the reasoning from the Court of Appeal, in the case of *Charles Kamuren v. Grace Jelagat Kipchoim & 2 Others* Civil Appeal No. 159 of 2013; [2013]eKLR, where the Court of Appeal (*Nambuye, Musinga & M'inoti JJ.A*) held:

> *[38] "Turning to Article 105 of the Constitution which requires the High Court to hear and determine an election petition as to whether a person has been validly elected as a member of parliament or whether a seat of such a member has become vacant, within a period of six months of the date of lodging the petition, we are of the considered view that where such a petition had been struck out and an appeal against such an order this Court finds that the petition ought not to have been struck out, the Court has power to direct the High Court to hear and determine the petition, even if the six months period stipulated under Article 105 has lapsed. In such an instance, it cannot be argued that the constitutional period for hearing and determining the petition has already lapsed. The period of six months shall begin to run from the date of delivery of the judgment by the appellate Court. It would occasion great injustice if a successful appellant, (that is, one whose election petition is found to have been wrongfully struck out), were to be denied the right to be heard simply because the appeal is determined after six months from the date the petition was lodged."*

It is the position of this paper that the position of the Court of Appeal is the correct position and the reasoning of the Supreme Court is unfortunately foreign to the 2010 constitution. Had the court read the constitution holistically, a different position would have been reached. However what transpired at the Supreme Court can be compared to the work of a slot machine. A slot machine does not think, or what Davies once said that the court 'became no more than a jurisprudential slot machine into which was placed the nature of the dispute . . . and out popped the answer to the review application'.[67]The decision confirms that there are times when judges can reduce themselves to the status of being operators of a *giant syllogism machine!*

What was the purpose of the timelines in electoral disputes?, The Mutunga-led Supreme Court correctly recognised the purpose in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR:**

[67] Dennis Davis, 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 *Acta Juridica* 23 at 34

Article 87 (1) grants Parliament the latitude to enact legislation to provide for 'timely resolution of electoral disputes'. This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within a reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation[68].

Was the incorporation of the timelines meant to cure the delay in resolving electoral disputes or was it mean to throw away a petitioner from the seat of justice whose fault is just following the appeal process of Kenya's legal system?, put it differently, what was the intent of the drafters?, As I have argued above, Kenya's history is replete of incidences where election disputes took so long to conclude and this informed the incorporation of timelines in our constitution. A petition should only be struck out where a petition is filed after the 6 months, but once a petition has been filed, the striking out should not be on technicalities. Expeditious disposal should not be the only reason for striking out a petition but courts should be concerned about whether justice can be served through such an act. A sound warning was issued by the Court of Appeal in ***Martha Wangari Karua v the IEBC & 3 Others***,[69] (The appeal on the interlocutory appeal) that *[I]t should not appear as though an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out the petition is actually just to all the parties concerned, whether it is proportionate and where the same could be avoided.* Moreover, although the expeditious resolution of electoral disputes is desirable, the same should not be elevated to be an impediment to access to justice[70].

[68]See also *Mututho v Jane Kihara & others* [2008] 1KLR 10 where the Court stated that:
"Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts.
[69] Nyeri EP Appeal 1 of 2017
[70] See Dr. Collins Odote, 'Friend of the Court or Partisan Irritant? The Role of *Amicus Curiae* in Kenya's Election Disputes Resolution' in Dr. Collins Odote and Dr. Linda Musumba (EDS), *Balancing the Scales of Electoral Justice: Resolving disputes from the 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) (2016).

F. Ssempebwa, E. Munuo *et al*[71] have also argued that it cannot be denied that the timelines set in both instances hinder, rather than facilitate justice.

In ***Hassan Nyanje Charo v Khatib Mwashetani & 3 Others,***[72] the Supreme Court, ruling on an application to extend time for filing an appeal, set out the importance of balance between compliance with timelines and facilitating access to justice as follows:[73]

In the emerging jurisprudence, the concept of 'timelines and timeliness' is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice

The reasoning can only be a reflection of the yester years where courts relied heavily on technicalities to throw out cases[74], a point that is captured by Hon. Justice David Majanja in his paper '**Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections**', shockingly enough is the fact that the Honourable justice recognises that the constitution demands a shift. He argued that 'This demanded a shift in focus to ***mwananchi*-based justice. People-focused delivery of justice meant and included access to and expeditious delivery of justice. According to the principles, the judiciary was to discharge justice expeditiously to all without delay or undue regard to technicalities**. It was also tasked with protecting and promoting the purpose and principles of the Constitution'. A question then begs, so what exactly happened during this petition? Or is the court being haunted by the ghost of Matiba v Moi?

Muthomi Thiankolu, correctly argues that the *legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts, especially with regard to timelines and the twin issues of (i) the right of appeal; and (ii) the jurisdiction of appellate*[75]. It is unfortunate that the

[71] F. Ssempebwa, E. Munuo, L. Tibatemwa-Ekirikubinza and Busingye Kabumba, *A Comparative Review of Presidential Election Court Decisions in East Africa*, fountain publishers (2016)
[72] Supreme Court Application 15 of 2014; [2014] eKLR.
[73] At paras 31-32.
[74] See Dr. Collins Odote and Dr. Linda Musumba (EDS), *Balancing the Scales of Electoral Justice: Resolving disputes from the 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) (2016).
[75] Muthomi Thiankolu, 'Standards of Review and Resolution of Electoral Disputes in Kenya: A Review of the Jurisdiction of the High Court; the Court of Appeal and the Supreme Court' in Dr. Collins Odote and Dr. Linda

Supreme Court decided to elevate a technicality above substantive justice. The decision is against the import of article 159. Musila explains the purpose of article 159 in the following terms 'The quest to transform the exercise of judicial function in Kenya from a formalistic and technical process to a purposive one that would enable the judiciary to dispense substantive justice could have informed the drafters of our constitution in their choice to include principles to guide the exercise of judicial function under article 159.' The decision is a demonstration of a technicality minded judiciary[76], a judiciary that finds the comfort of retaining a formalist legal culture, a culture that is anti-constitutional.

The Supreme Court did not look outside what the act and rules were saying. By their reliance on the strict provisions of the law, the courts viewed the legal rules as 'the Alpha and Omega – the beginning and the ending of judicial decision-making'[77]Comparably, the Supreme Court's decision can be compared to that of the Zimbabwean Constitutional Court in the case of *Chamisa v Mnagagwa* (2018)[78] where the court recently held as follows:

> It is common cause that the application was eventually served on the respondents…outside of the timeframes stipulated in the Constitution and contrary to the provisions of the Constitutional Court Rules… The applicant clearly breached the Rules of the Court, and filed a defective application. *However, due to the importance of the matter and the public interest, the Court has the power to condone the non-compliance with the Rules in the interests of justice*.

This decision is similarly anti-the Bill of Rights. The people of Kenya constitutionalized the right to access justice[79] in order to ensure that no one is ousted from the seat of justice. It is wrong when one is ousted by reason of a technicality[80]

Musumba (EDS), *Balancing the Scales of Electoral Justice: Resolving disputes from the 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) (2016) at 114.

[76] Elisha Z. Ongoya, Evidentiary Matters in Election Petitions in Kenya: Progress or Backsliding? in Dr. Collins Odote and Dr. Linda Musumba (EDS), *Balancing the Scales of Electoral Justice: Resolving disputes from the 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judicial Training Institute (JTI) (2016).

[77] See Vitalius Tumonis, 'Legal Realism & Judicial Decision-Making', (2012)19(4) *Jurisprudence*, 1361 -1382.

[78] *Nelson Chamisa v Emerson Mnangagwa and Others* (CCZ 42/18).

[79] Article 48 of the constitution.

[80] *Bosire Ogero v Royal Media Service* [2013] eKLR

I find pleasure in concluding this part by the words of Justice Tsekooko in his dissenting judgment[81] that '… the trial of election petitions is governed by a special Act and special rules of procedure ... These laws emphasize expeditious disposal of a presidential election petition. Therefore, placing undue reliance on technicalities can lead to unwarranted injustice'.

5. The Way Out: Embracing Transformative Legal Education.

Transformative legal education is a term that is associated with Quinot,[82] to him, this has three limbs. First, transformative constitutionalism, which would address the transformation of our society, would be underpinned by a second leg of constructivism which refers to the manner in which a student learns, namely through a process of assimilation of knowledge. The third leg focused on the material impact of digitalization on the process of learning skills and development[83]. This is a concept that would require a paper on its own, however with the limited space, I would seek to propose that Kenya should adopt a Transformative Legal Education as a cure to the legal culture. This is because although we have a transformative constitution, there is a need for legal student and practitioners be taught on the imperatives of transformative constitutionalism. There is a need to equip the legal students and practioners with the tools so as to realise the transformative goals of the Constitution.This would then call for a shift from formalistic reasoning to substantive and value-based reasoning[84].

6. Conclusion

Walter Khobe Ochieng[85], has argued against the Kenyan legal culture that has been in existence since time immemorial. He argues that the problem facing the courts today is that of a formalistic legal culture. He argues that 'This is the question of the formalistic judicial philosophy that always lead to Kenyan courts placing undue emphasis on procedural technicalities, thus procedural concerns trumping substantive justice'. A point that I have struggled to show above. It is wrong when courts view themselves as huge syllogism machines operating by mechanical deduction. It is entirely wrong when the highest court on the land lies. This is because such a lie

[81] The Supreme Court in *Kizza Besigye v. Yoweri Museveni and Electoral Commission* Petition No I of 2001.
[82] Quinot G., *Transformative Legal Education*, 129 SALJ 411—414 (2012).
[83]See also Radley Henrico, 'Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu' (2016) 13 *Us-China Law Review* 816.
[84] Alfred Cockrell, Rainbow Jurisprudence" (1996) 12 *SAJHR* 1 at 34.
[85] Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya - Reflections from the 2017 Presidential Elections' in James Gondi, *Reflections On The 2017 Elections In Kenya: Paper Series On Emerging Judicial Philosophy In Kenya*, The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

must be obediently obeyed by the lower courts due to the doctrine of stare decisis and as the constitution provides that the decisions of the Supreme Court are binding on the lower courts. It is equally wrong when the highest court on the land sanctions injustice by relying on a formalistic, technical and a mechanistic legal culture. The Supreme Court must realise that the constitution calls for a culture that **eschew defeatist technicalities, technicalities that are meant to thwart an opponent's legitimate rights[86]. The clarion call is that we need a culture that will lead to a constitution-compliant jurisprudence!**

[86] *National University of Lesotho v Motlatsi Thabane* C of A (CIV) No.3/2008) at para 4