

GENERAL ELECTIONS:
THE KENYAN CASE WITH PARTICULAR REFERENCE
TO THE ROLE OF THE JUDICIARY

Dissertation submitted in partial
fulfillment of the requirements for
the LL.B Degree, University of Nairobi.

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NAIROBI

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The Kenyan Case: Kenya and the Party
The ideas expressed in this dissertation are those of the author and do not represent the views of the faculty of Law. (vii)

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ELECTION OFFENCES ACT.

Chapter one covers the General Elections. In this Chapter, theories of representation will be discussed. This is done by

reference to various writers on the subject. A review of GENERAL ELECTIONS AND PRESIDENTIAL ELECTIONS ACT.

electoral systems and procedures will be made, with a view to showing the great importance placed on general elections. In this chapter I will also look at the freedom of choice in elections. Candidature for elections will also be looked at. This chapter, then deal with the electoral system as a whole, and its object is to show how effective our electoral system is.

In Chapter two, I will discuss the trends in the party. Here I will look at the role played by the party in the state and party in General Elections. Developments in the party will be looked at with a consideration of the factors that have contributed thereto. A review of these trends is important in my discussion since they also relate to the General Elections.

In chapter three, I will discuss the Judicial role in the elections. In doing this I will first look at the independence of the Judiciary in the State. I will look at the factors which make the Judiciary an Independent organ and also why it is important that the judiciary should be independent from the executive and the Legislature. As regards the role played by the Judiciary, I will look at the supervisory role in the elections and whether this role is played impartially and independently. This is because the independence of the judiciary is based on the assumption that the judiciary is impartial. The judiciary is the ultimate supervisor in the elections since it is the one that determines, if the question arises, whether a person has been validly elected. To show how the judiciary has executed its role, a review of the decided election petition cases is to be attempted. I will look at those cases where the court has nullified the elections.

INTRODUCTION

In this dissertation I am addressing my mind to General Elections in Kenya. However, this subject will be looked at mainly in relation to theories of representation, democracy and the role of the Judiciary.

Chapter one covers the General Elections. In this Chapter, theories of representation will be discussed. This is done by way of reference to various writers on the subject. A review of electoral systems and procedures will be made, with a view to showing the great importance placed on general elections. In this chapter I will also look at the freedom of choice in elections. Candidature for elections will also be looked at. This chapter, thus, deals with the electoral system as a whole, and its object is to show how effective our electoral system is.

In Chapter two, I will discuss the trends in the party. Here I will look at the role played by the party in the state and particularly in General Elections. Developments in the party will be looked at with a consideration of the factors that have contributed thereto. A review of these trends is important in my discussion since they also relate to the General Elections.

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Particularly where the court finds a person guilty of an election offence, it will be looked at with a view to weighing it with the provision of the Presidential pardon. This is an attempt to establish whether the judiciary is free from influence of the other organs of the state particularly the executive.

CHAPTER 1

The final chapter sets out certain possible reforms. It is the contention of the writer that the more urgent possible reforms are in the area of representation. The observation of the writer is that members of Parliament do not represent the majority. This will be shown by reference to some tables based on the election results. These tables cover results of four areas and it is hoped that they will bring out the points made. This will be taken to represent the position in many other areas of the Republic, and this is why I have ventured to consider the reforms needed in the area of representation. However, other reforms are recommended, which it is thought, would make our electoral system effective and fair as regards both the electorate and the candidates.

Thus it is the election that reflects the people who are to go to Parliament, the Supreme Law making body.

It has been observed that elections are generally the means of making a legislature.¹ This is a move to a democratic government which exists to uphold and enforce a certain kind of society.² It can be said that in a democracy the electoral system has two primary functions, namely, to provide a framework within which a workable majority government is to administer the state, to make the government accountable and responsible to the people. It has been stated that the effectiveness of the electoral system is evidenced by how well it is able to discharge these two functions.³ Since a government is necessary to bring about an ordered society, this necessity raises the problem of how to limit the arbitrariness inherent in government and to ensure that its powers are to be used for the good of the society at large. It has been observed that this can be achieved through constitutionalism which involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which Legislative and executive acts are to be performed and delimiting their permissible content. This in essence suggests that those elected by the people continue to be responsible and should have the community interests in their daily undertakings. Thus, those representatives who sit in the Legislature should represent the interests

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Democracy in the words of Abraham Lincoln as a government of the people for the people by the people has a wide universality, of acceptance and lays down the foundation that a government rests upon the consent of the governed, given by means of election in which the franchise is universal both for men and women and that it exists for their benefit.

CHAPTER 1

THE GENERAL ELECTIONS

The General Elections in Kenya are the forums where people are left free to express their wish as to who is to rule over them. Elections are important in that they are the process which brings into existence a government. The government so elected can be said to be representative since it is the expression of the bulk of the community as to who should govern it. To begin with, there is the political party which recruits people into it for the purpose of support in the elections. After the elections are held the political party loses importance and Parliament becomes an important organ in the country. Thus it is the election that reflects the people who are to go to Parliament, the Supreme Law making body.

It has been observed that elections are generally the means of making a legislature¹. This is a move to a democratic government which exists to uphold and enforce a certain kind of society.² It can be said that in a democracy the electoral system has two primary functions, namely, to provide a framework within which a workable majority government is to administer the state, to make the government accountable and responsible to the people. It has been stated that the effectiveness of the electoral system is evidenced by how well it is able to discharge these two functions.³ Since a government is necessary to bring about an ordered society, this necessity raises the problem of how to limit the arbitrariness inherent in government and to ensure that its powers are to be used for the good of the society at large. It has been observed that this can be achieved through constitutionalism which involves the proposition that the exercise of governmental power shall be bound by rules, rules prescribing the procedure according to which Legislative and executive acts are to be performed and delimiting their permissible content. This in essence suggests that those elected by the people continue to be responsible and should have the community interests in their daily undertakings. Thus, those representatives who sit in the Legislature should represent the interests

of the electors who have given them the Mandate to be in the Legislature. So the representatives must be guided by rules and principles which must be with a view to checking abuse of discretion. An effective electoral system is thus important.

Democracy in the words of Abraham Lincoln as a government of the people for the people by the people has a wide universality of acceptance and lays down the foundation that a government rests upon the consent of the governed, given by means of election in which the franchise is universal both for men and women and that it exists for their benefit. In other words, people must be left alone and be given the freedom to elect their representatives without having any undue influence by the authorities concerned. This is the only way that a popular government worthy ^{of} its name can be achieved.

Elections are thus important and this importance is reflected in the great variety in the methods in which the elections are organised and carried out. What is important to understand is the nature and significance of these different methods for they help to explain the differences in the status and functions of the Legislatures themselves from country to country.⁵

Elections enhance the idea of representation. A responsible government must be immediately and universally representative of the whole community. So it is clear that in elections the voters become important in that their opinion as to who should sit in the Legislature is given effect. The essence of a democratic election is freedom of choice. That is, every eligible member of the community should be free to vote regardless of his party inclinations. In the Kenyan case, every registered voter has a right to vote even though he has no card indicating that he is a paid-up member of the party. It has been observed that in this respect it may be remarked that the idea of free choice of a representative institution, and thus of an executive authority (which must come from Parliament) has been adapted from its Westminister character to the realities of the local political context. Thus, in elections, the presence of one or more political parties is not relevant, what is important is the freedom of choice which must exist ^{It starts from party nomination} ^{This view is unfounded} ^{Rep} ^{once party is vital} ⁶ is of right, for all adult members of the community who are eligible.

Another writer on representative government whose views are still relevant to today's politics is Edmund Burke. He is of the view that those elected must represent all. He came up with the Representation means that as between all adult members of the community

it is implied that the representatives are responsible to the represented and are periodically subject to re-appointment or removal by them. The main principles which are implied in theory of democracy are: that a just government presupposes the consent of the governed; that popular consent is properly expressed by means of an exercised act of choice by election; that for the purpose of selecting and so ultimately controlling their rulers and legislators all adult members of the community shall be held as equal in right and capacity. Elections should be held with this view in mind and people should be left alone to decide whom they are to give their mandate to represent them.

A constitutional and democratic government has as its function, to secure and enhance freedom of choice. This freedom of choice is cautioned by and proportioned to the common good of the community. People have expressed their views of democracy and representation. Rousseau's view is that the only democracy worthy of the name was the direct democracy of a community whose citizens could come together, debate and decide their own affairs?⁷ In his view elected deputies of the people cannot be representatives but only commissaries or delegates. Belief in direct democracy lends itself logically to the idea of representation when the communities in question are too large and too complex in structure to admit of direct self-government and indeed the modern common tendency has been to infer the need of representative democracy from the practical impossibility of applying direct democracy. (A representative or parliamentary democracy⁸ enables the whole or a majority of the people to identify themselves as the ruled with their representatives as their rulers. This has a value in so far as it stresses the principle that democratic government is government by the consent of the governed. In the modern world, universal ^{actual} suffrage has gradually established itself, as the pre-condition of political representation, for anything less than ^{actual} universal suffrage fails to fulfill a democratic principle which affirms the equal right of each and every citizen to participation in political affairs. Thus, in democratic communities, elections may be the primary means by which a representative capacity may be created or achieved.

Another writer on representative government whose views are still relevant to today's politics is Edmund Burke. He is of the view that those elected must represent all. He came up with the past-independence legislative system. It was in the late stages of

theory of virtual representation. He wrote:

"Virtual representation is that in which there is a communion of interests and a sympathy in feeling and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them. This is virtual representation. But this sort of virtual representation cannot have a long or sure existence if it has not a substratum in the actual. The members must have some relation to the Constituents"⁹

For Burke, legitimate government rests on the consent of the governed. This conception is implicit in the doctrine of virtual representation. In the context of political democracy, represented and representative denote respectively the electors and those whom they choose by vote to act on their behalf or on behalf of the community for certain well-defined political and social purposes. Representation in relation to government in Burke's view is that the final norm of political and social life is the common good of the continuing historical community, while in a constitutional regime the trustee of that good is a responsible representative government.¹⁰

"The object of the state is (as far as may be) the happiness of the whole"¹¹

Burke conceives that elections have their primary purpose to enable the various sections of the electorate to make their wishes and needs known to those who are in charge of the community. He further contends that a representative being a member of the parliamentary body which stands for the whole community, then, his responsibility is not confined to the interests of his constituents but extend to those of the Nation at large.

It becomes clear that the consent of the governed is a corollary to democratic government. Another writer who has expressed his view on government is Locke. He rightly argues that the test of valid government is that the government must be based on the consent of the governed.

In our Kenyan experience, the government was to a large extent influenced by the colonial period. Our laws were inherited from the colonial period with minor or no modifications at all. It has been observed that the colonial period laid down the foundations of the post-independence legislative system.¹² It was in the late stages of

colonialism that election began to play an increasingly important part in the composition of the legislative council. It is important to note that here the Legislative Council was established in 1906 in response to the demands of the white settlers who sought a legislative voice and a public forum for the expression of their grievances. The Constitutional provisions relating to legislative council seemed designed to strengthen the position of the governor by affording him a law making department within the broader scope of his general competence; the Council was not representative nor was it supposed to act independently.¹³ So, if one is to use Locke's test of valid government above that the government must be based on the consent of the governed, one would come to the conclusion that Kenya did not have as far as the majority of the people were concerned, valid laws during the colonial period. It was with independence that was won with hard struggle for equality¹⁴ that we can talk of valid laws which are not discriminatory.

During the colonial period, Africans were being represented in the Legislative Council by European missionaries and other Europeans who showed sensitivity towards the Africans. The governor nominated such Europeans to represent the Africans.¹⁵ It has been stated that the assumption for this mode of representation was that the Africans were unable to represent themselves.¹⁶ The Africans rejected this assumption and wanted to be represented in the Legislative Council by their fellow Africans. A strong case was made and the Kikuyu Central Association in particular demanded nothing less than representation by Africans. It was not until 1944 that an African E.W. Mathu was nominated to the Legislative Council. By 1952 there were six representative members. There was during the late stages of colonial period an attempt to bring all the races into a more active participation in the affairs of the government. It was based on a recognition of community as distinct units in society; and therefore in its concern with groups, regardless of numerical strength, rather than individuals, it was in conflict with the basic premise of a true democratic society.¹⁷ It is in the light of these arguments that we can say that it was with independence that democratic government came into existence, a government which has concern for all.

The Constitution at independence and presently made provisions to ensure impartiality and honesty in elections to the legislative bodies

There was established an independent electoral Commission consisting of the two speakers of the houses¹⁸ of the National Assembly and a nominee of Prime Minister and each Regional President. The Commission was responsible for drawing of constituency boundaries and for the actual conduct of elections.¹⁹ The underlying principle is that all the constituencies should contain as nearly as possible equal number of inhabitants as is reasonably practicable, though the commission may take into account population density (and in particular adequate representation of Urban and sparsely populated areas)²⁰ population trends, Communication, geographical features, community of interests and the boundaries of existing administrative areas. Any order by the commission upon such review comes into operation upon next dissolution of Parliament.²¹

There are basically three statutes which govern the electoral procedures: the Kenya Constitution, the National Assembly and the Presidential Elections Act and the Election Offences Act. The first step towards the general elections is the dissolution of Parliament, whereupon all the seats of the National Assembly are declared vacant by the speaker who directs that the elections shall be held, and serves out writs according to law.²² The supervisor of elections then announces the dates of the elections. Prior to the elections the party plays its role in that every candidate wishing to contest the elections must be cleared by the party and also be nominated by it. Since Kenya is a de jure one party state²³ the relevant section for nomination by the party reads:

"Subject to Sec 35 a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless at the day of nomination - He is a member of the Kenya African National Union (K.A.N.U) and is nominated by that party in the manner prescribed by or under Act of Parliament."²⁴

Prior to the elections, a registration officer is appointed in each Constituency to compile the annual register of voters.²⁵ No one can vote in an election unless he has been so registered. To be registered as a voter a person must be a Kenyan Citizen who has attained the age of eighteen years²⁶ and be in possession of an identity card. He must not be insane or be undischarged bankrupt, or be under lawful custody

or illiterate person may be assisted to record his vote. After the or have been guilty of an election offence within the preceeding five years.²⁷ The person wishing to be registered must have been resident in Kenya either for a period of not less than one year immediately preceeding the date of application or for a period or periods amounting in the aggregate to not less than four years in the eight years immediately preceeding that date.²⁸ He must have resided for five months in the previous twelve in the constituency in which he applies to be registered, or alternatively he must for a similar period have been employed, possessed property or conducted business in the Constituency.²⁹ An objection to one's own registration is determined by a sub-ordinate court of the first class having jurisdiction in the Constituency.³⁰

In a general election, voting is by secret ballot. It is important here to note a brief history of secret ballot. South Australia was the first State to introduce the secrecy of ballot in 1858 and for that reason secret ballot is referred to as Australian ballot. The system spread to Europe and America to meet the growing demand for protection of voters.³¹ The means of securing secrecy vary considerably. In Great Britain the secret ballot was finally introduced for all Parliamentary and Municipal elections by the Ballot Act of 1872. Here in Kenya secret ballot was recommended by Mr. W. F. Coutts after study to recommend the best methods of choosing African members to the Legislative Council.³² But he could not advocate universal adult suffrage at that stage of African development. He therefore recommended a qualitative vote. The Kenya government accepted the recommendations and embodied them in the Legislative Council African Representation Ordinance 1956.³³ After Independence the secret ballot was adopted in elections and is still practised today.³⁴ Election officials make a declaration that they will maintain secrecy of the poll. All the polls are held on the same day. Each voter must identify himself as being on the local register and must produce a voter's card in respect of that registration. The ballot paper is officially stamped, the number and name of the elector as stated in the copy register shall be called out and the voters number is entered on the counterfoil of the ballot paper.³⁵ It must be indicated on the register that a ballot paper has been delivered to the elector.³⁶ The candidates' names are printed on the ballot paper and the voter places a cross (X) against the candidate of his choice. Any additional ^{signature} may invalidate the vote.³⁷ The voter then folds his ballot paper and casts his vote in the ballot box. A blind

or illiterate person may be assisted to record his vote. After the polling stations have closed, all ballot boxes are taken to the centre where the votes are counted.

In Kenya, people elect their representatives to the National Assembly. At the centre the District Commissioner is the returning officer and he is charged with the duty of supervising the counting.³⁸ Agents of the candidate may be present at the counting. A recount may be ordered by a candidate or his agent, but the returning officer has a discretion whether or not to order a recount.³⁹ The person with the greatest number of votes is elected.⁴⁰ This system is known as first-"past-the-post".

That is how the electoral system is organised. Elections take place, (unless there is anything which may shorten the period or increase it) after a period of five years. It is clear that freedom of choice is guaranteed in the elections in that every person who is a registered voter has a right to vote. Hence in Kenya elections are held on a wide franchise.

should be satisfied → X but how free? 70% - KANU - 5m 5 million / 30 million } ppl voting

On the other hand, candidates are given a fair play in that each gets an opportunity to address the voters and conduct his campaign freely. Kenya being a one party State a candidate has to conform with requirements set out by the party and if he does so in time, he is nominated as candidate for the elections and is free to conduct his campaign. Due to the fact that there is only one political party, the party preliminary elections are no longer necessary and there is only the general elections. This is more so since the country became a de jure one party state. The concept of a de jure one party state no longer can be reconciled with the idea of primary elections. After the elections, it only remains for the successful candidate to file their papers accordingly to prescribed procedures and they are declared elected. It has been observed that the effect of these is that the party's norms relating to nomination have become an integral part of the Constitutional law relating to general elections.⁴¹ A notable aspect of these procedures is the unrestrained competition, which as rule takes place among varying numbers of individual contestants in each constituency. Thus the candidates compete for votes and the electors vote freely. In this way the people are seen as controlling their elected leaders and thus rule themselves, in that way they can switch

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FOOTNOTES TO CHAPTER ONE

their support from one set of rulers to another after a specified period.

C. Wheare, Legislatures (2nd Ed 1968) Pg 22

In Kenya, people elect their representatives to the National Assembly. The National Assembly and the President make the Parliament whose main functions are making of laws, controlling public finance, criticising the government and requiring it to account for its actions.

See C. Wheare Supra Note 1 Ch. 2

6. J.S. Ojwang. 'The Residue of Legislative Power in English and French-Speaking Africa: A Comparative Study of Kenya and the Ivory Coast.' (1980) 29 I.C.L.Q. Pg 296 - 326

7. J.J. Rousseau, On Contract Social Ch. 1 PP 26

8. For a discussion of the Origin of Parliamentary Democracy, See C.H. Mc Ilwain Medieval Estates Vol VII, The Cambridge Medieval History.

9. Edmund Burke: 'Letter to Sir Hector Langrishe & C' Vol III PP. 334 - 335

10. Edmund Burke, 'Speech on the Petition of the Unitarians' Vol VI Pg 116.

11. Ibid Pg 116 Et Seq

12. J.S. Ojwang Supra

13. Ibid

14. Chanan Singh. 'The Republican Constitution of Kenya; Historical Background.' 14 I.C.L.Q. PP 909 - 915

15. See G. Bennet. Imperial Paternalism. The representation of African interests in the Legislative Council. Essays in Imperial Government. Edited by K. Robins and F. Madden, Blackwell, Oxford 1963 Pg 141

16. Ghai & Mc Auslan. Public Law & Political Change in Kenya (Nairobi Oxford U.P. 1970) Pg 62

17. Ibid Pg 66 et seq

18. At Independence the Legislative Council was replaced by two Houses - the Senate and the House of Representatives. The Senate was composed of 41 members, one drawn from each of the 40 districts and one from Nairobi Area and the speaker. The House of Representatives consisted of 117 constituency elected members, 12 specially elected members chosen by the House sitting as an electoral college, the Speaker and the Attorney General. This regionalist system was thought necessary to protect ethnic, racial and other special interests

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1. K.C. Wheare, Legislatures (2nd Ed 1968) Pg 22
2. C.B. Macpherson, The Real World of Democracy. Pg. 4
3. Nwabueze B.O. Constitutionalism in the Emergent States Pg 1 - 20
4. De Smith. The New Commonwealth and Its Constitutions 1964
5. See K.C. Wheare Supra Note 1 Ch. 2
6. J.B. Ojwang. 'The Residue of Legislative Power in English and French-Speaking Africa: A Comparative Study of Kenya and the Ivory Coast.' (1980) 29 I.C.L.Q. Pg 296 - 326
7. J.J. Rousseau, On Contrat Social Ch. 1 PP 26
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8. For a discussion of the Origin of Parliamentary Democracy, See C.H. Mc Ilwain Medieval Estates Vol VII, The Cambridge Medieval History.
9. Edmund Burke; 'Letter to Sir Hector Langrishe & C' Vol III PP. 334 - 335
10. Edmund Burke, 'Speech on the Petition of the Unitarians' Vol VI Pg 116.
11. Ibid Pg 116 Et Seq
12. J.B. Ojwang Supra
13. Ibid
14. Chanan Singh. 'The Republican Constitution of Kenya; Historical Background.' 14 I.C.L.Q. PP 909 - 915
15. See G. Bennet. Imperial Paternalism. The representation of African interests in the Legislative Council. Essays in Imperial Government. edited by K. Robins and F. Madden, Blackwell, Oxford 1963 Pg 141
16. Ghai & Mc Auslan. Public Law & Political Change in Kenya (Nairobi Oxford U.P. 1970) Pg 62
17. Ibid Pg 66 et seq
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41. J.B. Ojwang Supra.

against domination by more advanced tribes. Subsequently it became progressively clear that bicameralism was not ideal to the needs of Independent Kenya and that the original fears that had necessitated the creation of a senate no longer existed. Consequently, the constitution was amended and the two Houses were amalgamated in 1967 forming a National Assembly of 158 constituency elected members, 12 specially elected members and two ex-officio members (the Speaker and the Attorney General.)

19. Kenya Constitution Sec 41 and 42
20. H.B. Ndoria Gicheru. Parliamentary Practice in Kenya 1976 Pg 46
21. C.F. in Chapter 4
22. National Assembly and Presidential Elections Act. (Cap 7 Laws of Kenya) Sec 12
23. Constitution of Kenya (Amendment) Act No 7/1982 Sec 2A.
24. Ibid Sec 34(d)
25. Supra (Cap 7) Sec 4
26. The Constitution of Kenya (Amendment) Act No. 2/1974
27. Constitution Sec 43
28. Ibid
29. C. F. to Chapter 3
30. Encyclopedia Britannica Vol 8 PP 121 - 123
31. "Report of the Commission appointed to enquire into methods for the selection of African Representatives to the Legislative Council Nairobi 1955
32. No. 10 of 1956 as amended by No. 30 and 35 of the same year.
33. Supra (Cap 7) Subsidiary Legislation Part V Sec 21 (1)
34. Ibid Sec 15
35. Supra Note 33 Part V Sec 28 (1) (a), (b), (c).
36. Ibid Sec 28 (d)
37. Ibid
38. Ibid Sec 28 (3)
39. Ibid Sec 35 (1)
40. C. F. to Chapter 4
41. J.B. Ojwang Supra.

CHAPTER 2

THE KENYAN EXPERIENCE; TRENDS IN THE PARTY

A political Party is important in a State since it is seen as the medium of competition towards expressing divergent opinions and formal usurpation of State power. The party, while organising itself decides on the operative rules of competition and these tend to Legalise the party taking the decision. In the previous chapter it has been observed how the party is involved in the general elections, particularly in determining the people who are to present themselves to the electorate as candidates for Parliament. Elections are also important since they produce the people who are to go to Parliament from among the party members. In the arena of political party in Kenya, there has been three experiences: viz multi-party de - facto one party State and de - jure one party State.

The history of multi-party State dates back to 1963 when Kenya became independent. During the colonial period, there was racialism in Kenya and each tribe in every reserve was officially required to develop as separate entity into which members of other tribes were prohibited from entering. Nationwide political parties were discouraged and would not be registered under the relevant legislation. Hence the only parties which were allowed were those which were tribal in nature and even these could only be registered as Welfare Associations¹. There was the Kikuyu Central Association which was formed in 1921 and was followed by others among the Luo and the Luhya reserves. The effect was to create mistrust among the different tribes of Kenya. This is the background under which we trace the emergence of the two political parties which led Kenya to Independence. These were, the Kenya African National Union (K.A.N.U) and the Kenya African Democratic Union (K.A.D.U). These parties were formed in 1960 after the Lancaster House Conference². African representatives to this Conference, asked the British government to relax the ban on the nationwide political parties, a plea that was assented to by the colonial office.³

were not very important since the power of a region could be taken away by the Central Legislature and had very little true autonomy.⁸ KANU was opposed to regionalism and urged

12/1/60
K.A.N.U. was the first Nationwide political party to come into existence on 27/3/1960 after a Conference held at Kiambu. It was intended to embrace all peoples of Kenya and hence its executive was drawn from the Leaders of the various district-based political parties of the early fifties. These included Nairobi District Congress Nairobi Peoples Convention Party, Mombasa African Democratic Party, Coast African District Party and the Kisii Highlands Association. With its simple slogan "Uhuru Sasa" or freedom now, K.A.N.U. believed that political independence was a guarantee for everything a State could aspire after.

However, not all sections were satisfied by KANU and hence the formation of KADU on 26/6/1960. The grudge was that KANU was dominated by the Kikuyus and the Luos which were the biggest tribes in Kenya.

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Consequently KADU was dominated by minority tribes like Nandi, Masai, Kalenjin, Somali and the Coastal tribes. In addition to these minority tribes, KADU received support from Asian and European Communities. Thus at the dawn of independence, there was rivalry between the two parties and each had to be given equal representation and status in the Legislative Council. Hence the two leaders of the parties were given comparable seniority and therefore Kenya missed the stage of a Chief Ministership which is conventionally the stage before full internal Self-Government. On 1st June 1963 Kenya was granted full internal Self-government with a Constitution which was to form the basis of the independence constitution. The introduction of this constitution was preceded by a general election to the two legislative houses which was for the first time based on universal adult suffrage without a communal franchise. K.A.N.U. was victorious and won the right to form a government. On 12th December, 1963 Kenya became Independent.

The Constitutional document that finally led Kenya to Independence had as its base a scheme of regionalism which had been advocated by KADU. The scheme of regionalism was to provide for the sharing of power. Seven regions were created and in each there was to be a Regional Assembly with elected and specially elected members. These regions were Eastern, Central, Rift Valley, Nyanza, Coast and North Eastern. The constitution did not provide for proper party government in the Regions. In actual fact the regions were not very important since the power of a region could be taken away by the Central Legislature and so had very little true autonomy. KANU was opposed to regionalism and urged to lead the Country towards socialism. Another important factor is the

that it was expensive in terms of money and personnel and that it would prevent the growth of Nationhood while retarding the economic development. This was made explicit at the initiation of the Republic when, on 14th August, 1964 Jomo Kenyatta, then Prime Minister, announced the government's proposal to the House of Representative and said that the Regional Assemblies should have no exclusive executive authority on any matter which should be planned and directed on a National Scale. He said that Regional establishments would be abolished and the Public Service was to be centralised. Subsequently a Bill was introduced in the House of Representatives in October 1964 to give effect to these proposals.

While the Bill was being debated, in the Houses, a change had occurred in the House due to several members of KADU having crossed the floor to join the government party K.A.N.U. On 12th December 1964 Kenya became a sovereign Republic. Regionalism was henceforth abandoned and in 1968 it was deleted from the Constitution. Kenya became in essence a de facto one party state.

This era of de facto one party state was shortlived. In 1966 twenty members of Parliament left KANU to found the Kenya Peoples Union (K.P.U.) From the above discussion, it is evident that KADU was not formed on principle but was born out of power struggle. The formation of KPU as an opposition party, though coming in the era of Independence was no exception. Parliament was the only forum for Public political discussion and at that stage of independence; it can clearly be said that views of the members started to differ and so they could not remain under the umbrella of one party as had been the case. The events that led to the formation of KPU started with a KANU Conference held at Limuru on 13.4.1966. At this Conference, party elections were held. The then Vice-President of KANU was not present at the Conference. The office of KANU Vice-President was abolished and in its place seven provincial Vice-Presidents' offices were created. The Secretary General of KANU became second in Command after the President. This meant that the former party Vice-President was now one of the provincial Vice-Presidents. It was this Conference which led to dissatisfaction among the party members and consequently led to the formation of KPU.

the KANU and KPU were divided by wide ideological rift. While KANU was committed to capitalist mode of production, KPU intended if elected to lead the Country towards socialism. Another important factor is that

KPU was composed of radicals who had resigned from KANU. As a direct result of the formation of the opposition party there was a Constitutional amendment in 1966¹⁰ which required those M.P.s who crossed the floor of the National Assembly to resign their seats and seek a new mandate at the polls. The elections were held - known as the little 'General Elections',¹¹ to fill the vacancies. As re-election was doubtful in such a situation and one would incur financial loss, many members were unwilling to join KPU. In effect, KPU had very few members of Parliament and it was quite a small party. Furthermore the Standing Orders were amended to the effect that for a party to be recognised as an official opposition it must have thirty (30) or more members and so KPU could not be recognised as an official opposition.¹²

The members of the KPU had an uneasy time during their three year lease of life. This is because one party State was favoured by the government and so it faced difficulties in trying to establish itself. For example the registrar of societies had refused to register KPU as a political party until the nomination day of the so called little 'General Elections' and this had the effect that the new party could until then neither set up a national organisation nor hold any public meetings.¹³

The most effective way to curb opposition was through constitution amendments and other Acts of Parliament. Under a Constitutional amendment,¹⁴ and also under the preservation of Public Security Act,¹⁵ the President was empowered to bring into operation part III¹⁶ of the Preservation of the Public Security Act provided he brought that fact to the notice of Parliament within twenty eight (28) days after the coming into operation of that part. Before this amendment the notice was required to be given within seven days and it could be approved by a majority of the sitting members.

In 1969 the late President Kenyatta invoked section 85¹⁷ of the Constitution and thereby brought into operation part III of the Preservation of Public Security Act. The late President invoked this section after a turn of events which followed after certain disturbances on his visit to Kisumu which was the stronghold of KPU. The government proceeded to arrest all KPU M.P.s while detaining or restricting others.¹⁸ On 31st October, 1969 KPU was banned. This saw the restoration of Kenya into a de facto one party State. The government soon announced the elections and consequently Parliament

was dissolved on 7th November, 1969. The elections were held under the auspices of the party; candidates were not allowed to issue their own manifestos. The right to vote was available widely since a voter did not have to produce evidence of membership to the KANU party. A verbal declaration of support for it was enough to qualify as a voter.¹⁹ Thus despite the ban of KPU the elections provided for a large element of choice to voters. In the result, 5 Ministers, 13 assistant Ministers and more than 60 other MPs lost their seats. Thus a new era of a de-facto one party State was initiated with a fresh Parliament.

Those
lost did
organize
have
made

It is important to note that here these trends in the party were in line with what the leaders at Independence desired, President Kenyatta had said:

"On my return from the recent London and Cairo Conferences, I stated that from now on we will work towards a good government of one-party State. Events have shown that not only was a one party system inevitable but it was also the most prudent method of attaining those aims and objects which our people hold so dear."²⁰

He saw opposition as not people seeing fault in the ruling party but only wanted to oppose for oppositions sake. He thus favoured the constitutional machinery of changing the government through free elections. He further commented that if a need for opposition did arise it was not his wish to bar it with legislation.²¹ Thus, like his counterpart Julius Nyerere of Tanzania,²² Kenyatta saw a one-party State as ideal for African States.

The desire for one-party system has led the leaders to amend the constitution to make Kenya a de-jure one party State. This is manifest in the way the bill for the amendment went through Parliament. The bill was read in Parliament for the first time in the month of May and by 9th June 1982 the bill was read for the third time. The bill ~~swam~~^{swam} through Parliament without any debates over it. The bill then received Presidential assent on 17th June 1982 and henceforth became the settled law.²³ The relevant section now reads:

"There shall be in Kenya only one political party the Kenya African National Union."²⁴ 2A

Repealed
(Ford)

So it becomes clear that a political party becomes important in the state due to the fact that it is the only body that has the right to acquire State power, and that a political party is the medium of competition towards the acquisition of State power.

So, Kenya is now a de-jure one party State. It has been observed that:

"In Kenya's one-party political situation today, and by virtue of certain constitutional provisions which have formerly elevated party dictates to the status of constitutional norm; the National executive which is also the party executive - is so placed as to demand and rely on receiving the loyalty of the Parliament."²⁵

This is so because as I have indicated in chapter one above, a Parliamentary candidate must have the blessings of the only political party KANU, by way of nomination by it. This is to ensure that the M.Ps are loyal.

The party constitution reiterates that KANU is both a political party as well as a mass movement. As a political party, KANU will form the government and accept the responsibility of Leadership and good government of the Country.²⁶ It further states that KANU must be concerned with the need for stability, harmony, the rule of Law and respect for law and order. KANU policies will be reflected and implemented in the actions, administration policies and legislation of the country through the decisions of the Cabinet and Parliament and establishment of the necessary machinery for consultation and co-operation between the public and the government.

"Thus, when Kenya has one-party system, this will remain the free democratic and voluntary decisions of the people of Kenya."²⁷

KANU as a mass political party, has its aims and objectives, inter alia to promote National consciousness and unity.²⁸ It is observed that in the era of Multi-party state the attention of the leaders was concentrated on securing the strength of the party and issues of National importance were ignored. It has also been shown that the formation of KADU and KPU were born of power struggle and not on policy. This is intended to show that Multi-party system as Nyerere rightly observed is not ideal for African States which have a need for rapid development.²⁹

So it becomes clear that a political party becomes important in the state due to the roles it performs. Of essence is the way it lays down rules and organises the general elections,³⁰ for this makes it clear that a political party is the medium of competition towards the acquisition of State power,

FOOTNOTES TO CHAPTER 2

1. Oginga Odinga, Not yet Uhuru Pg. 146 - 171
2. The Conference was held with the official aim of directing progress towards a Constitution based on the principles of Westminster Parliamentary system which at the same time incorporated special provisions for the protection of the minorities.
3. Oginga Odinga, Supra.
4. Y.P. Ghai & J.P. WB Mc Auslan. Public Law and Political Change in Kenya (Nairobi: Oxford U.P. 1970) Pg. 177
5. The Constitution provided for a form of Westminster government and an extensive system of regionalism.
6. Contained in Kenya Constitution, Chapter 7.
7. The executive functions of the Regions were vested in a Committee of the Assembly, the finance and establishment Committee and could be exercised on its behalf by other Committees of the Assembly.
8. Ghai & Mc Auslan Supra Pg 200-201
9. Act No. 16 of 1968
10. Constitution of Kenya (Amendment)(No 2) No 17 of 1966.
11. Bennett, 'Kenya's Little General Elections' World Today 1966 of Pg 336
12. Standing Orders 1968
13. For more discussion on this see: J. B. Ojwang, "Kenya and the concept of Civil Service Political Neutrality: A case of Silent but determined Politicization" (1978) Vol XXIV No 2 Indian Journal of Public Administration PP 430 - 440
14. Act No 18 of 1966
15. Cap 57 Laws of Kenya
16. Part III of Cap 57 deals with Special Public Security Measures.
17. Deals with bringing into Operation of part III of Cap 57
18. Legal Notice Nos. 2983 - 2988, 3094 - 3095 and 4101 of 1969
19. See Ghai & Mc Auslan Supra PP 522 - 524

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20. 'Kenya News Agency' Handout No. 1414 of 1964

21. Ibid

22. Julius K. Nyerere. Freedom and Unity. He has observed that the formation of Political Parties in Europe was due to class conflicts. Africa he says is different in that its struggle was a united one in the form of Nationalism against colonialism but no parties. Furthermore, parties assume fundamental policy differences. Rapid development being agreed upon becomes one of choosing the best individuals to implement policy. This can be done within one-party State. The poverty and need for rapid development emergency, hence there must be commitment which can be achieved only in a National movement through a single party in a state.
Pg. 196 - 7

23. Constitution of Kenya (Amendment) Act No. 7/1982

24. Constitution of Kenya Sec 2A

25. J. B. Ojwang in Executive Power in Independent Kenya's Constitutional Context. LL. M Thesis 1976 at Pg. VII

26. KANU Constitution Preamble.

27. Ibid.

28. Supra note 26. In Kenya, the Independence of the judiciary is guaranteed.

29. Supra note 22. It has been observed that the judiciary is invariably the most

30. One of the ways in which Parliament is controlled by the executive is through party machinery. this role, it has always been considered to be of the essence that there be executive non-interference. It is also important that the judiciary should maintain high standards of fairness. The judiciary is not left out in general elections and it infact exercises a supervisory role in the elections.

There are constitutional provisions which show that the judiciary is an independent organ of the state. The constitution provides for the mode of appointing judges. There is a requirement for definite professional standards which a candidate for appointment to the bench. A person who is to be appointed judge, must be a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or the Republic of Ireland, or a court having jurisdiction in appeals from such a court; or alternatively an advocate of the

CHAPTER 3

JUDICIAL ROLE IN THE ELECTIONS

The Judiciary is conceived as the watch - dog of the fundamental rights and freedom.¹ In the previous chapters we have seen that, in general elections there are rights which ought to be safeguarded, it is this in mind that I venture to elaborate on the role the judiciary performs in the elections. Kenya practices liberal democracy which dictates that the governed should have effective control over the governors by way of choosing the governors.² It has been observed that:

"Liberal democracy combines a large measure of individual liberty with a fair approximation to majority rule."³

For this reason, there is a strong insistence on separation of the institutions of power within the state. That is to say, the Legislature, the judiciary and the executive have to operate independently in the execution of their roles. In Kenya, the Independence of the judiciary is guaranteed.

are you sure! Remember the telephone calls? This - But not history 1988 Amendment take away judicial review

It has been observed that the judiciary is invariably the most impartial organ in the state system, and so for the due performance of this role, it has always been considered to be of the essence that there be executive non-interference.⁴ It is also important that the judiciary should maintain high standards of fairness. The judiciary is not left out in general elections and it infact exercises a supervisory role in the elections. and the District Magistrates of the first, second and third class.⁵ There is the Kadhis Court which is established under the constitution.

There are constitutional provisions which show that the judiciary is an independent organ of the state. The constitution provides for the mode of appointing judges. There is a requirement for definite professional standards which a candidate for appointment to the bench. A person who is to be appointed judge, must be a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or the Republic of Ireland, or a court having jurisdiction in appeals from such a court; or alternatively an advocate of the

High Court of Kenya of not less than seven years standing;⁶ also any other person who has experience for a total of seven years as either a barrister-at-law of England or in the Republic of Ireland or a solicitor of the Supreme Court of judicature of England or a solicitor in Scotland.⁷ This shows that experience matters, and previous professional performance is taken into consideration. This is important because there is no contest involved. The professional requirements are designed to ensure the highest degree of judicial independence. Equally relevant is removal process in respect of judges. A judge can only be removed by the President⁸ acting on recommendation of a tribunal which is appointed by him. Where it is the question of removal of the Chief Justice the tribunal shall be selected by the Chairman of the judicial service commission; and when it is the question of removal of a puisne judge the tribunal shall be selected by the President. The president then suspends the judge. However the suspension may be revoked at any time by the President. There is also a judicial service commission which recommends and confirms the appointments of judicial officers or their removal.⁹ Thus careful provisions have been made in the constitution to ensure that the judiciary is as far as practicable kept independent of the executive. And, although the President has discretion to appoint a Chief Justice, this discretion is limited by the fact that the person to be appointed to the post of Chief Justice must as a matter of law meet the professional standards set down.

Our judiciary consists of the Court of Appeal which is established under the Appellate Jurisdiction Act,^{10(a)} and the Constitution.^{10(b)} Below the Court of Appeal there is the High Court which is established under the Constitution.¹¹ Then there are the Sub-ordinate courts which include: Resident Magistrates, Chief Magistrates and the District Magistrates of the first, second and third class.¹² There is the Kadhis Court which is established under the constitution¹³ and the Kadhis Court Act.

The concept of the independence of the judiciary is justified on the assumption that the judiciary is impartial. The High Court has as will be shown played its role in matters of election with impartiality and has nullified elections and found people guilty of election offences, thus barring them from vying in elections for five years. In so far as elections are concerned, the constitution at barring voters of the petitioner from entering polling booths on the polling day.

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The Court in dismissing this petition held that the Constitution of Kenya provides that in determining questions as to membership in the National Assembly the High Court has jurisdiction to decide whether a person was validly elected or a seat is vacant.^{14(a)} An application for such determination may be made by any person who was a voter in the election to which the application relates or the Attorney General.^{14(b)} Any application challenging the validity of the election results, or seeking declaration of vacancy in a seat in the National Assembly, shall be by way of a petition to an election court consisting of three judges.¹⁵ Petitions challenging the validity of elections to the National Assembly are required to be instituted within ²⁸fourteen days after the publication of the results in the Kenya Gazette.¹⁶ Upon receipt of such an application the election court may reject it summarily (although in the history of independent Kenya there has never been such a rejection) or fix a date for its hearing.¹⁷ The decision of the election court is final and not subject to appeal.¹⁸

The High Court in the exercise of its jurisdiction has listened to election petition cases and pronounced its judgements. In the case of Dr. Julius Gikonyo Kiano V. Hudson Misiko & Kenneth Stanley Matiba,¹⁹ the petitioner and second respondent were the only candidates who contested the Parliamentary election in the Mbiri Constituency in Murang'a District. The elections were held on 8th November, 1979 and the second respondent won by a majority of 3,507 votes. The second respondent was accordingly duly gazetted as elected member of the National Assembly for the constituency on 26th November, 1979 and the petition was filed on the 11th December, 1979 well within the period laid down in Sec 20 (1) (a) of the National Assembly and Presidential elections Act.²⁰ The first respondent was the returning officer concerned.

The grounds of the petition were inter alia, that the election was not conducted in accordance with the general law or principles of Natural justice and that this was to the detriment of the petitioner. The petitioner also alleged that the secrecy of the ballot, and the voters' freedom of choice and of a fair and impartial electoral proceeding, were breached by the presence of the agents of the second respondent in the polling stations. The petitioner further alleged that there were incidents of oath-taking by the second respondent during the campaign period and that there was bribery, and harrassment, aimed at barring voters of the petitioner from entering polling booths on the polling day.

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The Court in dismissing this petition held that in absence of an independent ground of corroboration of oathing it could not hold that the incident was proved to the required standard, and so it could not succeed. The petitioner failed to discharge the burden of proving any of the allegations and so the petition was dismissed with costs. The court upheld the election of the second respondent.

In yet another election petition case Elias Marete V. Albert Kang'ethe and Gilbert Kabere M'mbijiwe²¹ where seven candidates contested the Parliamentary seat of Meru Central. The second respondent scored 7,179 votes and the petitioner scored 6,655. The first respondent was the returning officer. The petitioner asked the court to declare the election void on grounds of oathing by the second respondent and whipping by the agents of the second respondent. There was also an allegation of prevention of free franchise by stripping or threatening to strip voters of female sex to ascertain if they were adults. Other allegations were that the agents of the second respondent threatened violence to the voters who did not vote for the second respondent. The petitioner also claimed that there were irregularities in the sealing of the ballot boxes and that the votes were improperly counted. This was based on the fact that votes said to have been cast in certain polling stations exceeded the number of the registered voters and the returning officer when requested to order a recount, refused to do so.

The High Court allowed the petition on the ground that the oathing did take place; and that there was interference with the exercise of freedom of choice and franchise. However the second respondent was not found guilty of an election offence on account of the oathing since it was not proved that he was the one who master-minded the oathing. The court ordered a by-election to be held.

Another petition case which is illustrative of the independent role that the judiciary plays in elections, the court nullified the election of a cabinet Minister. In Raphael Samson Kithika Mbondo V. Luka Galgalo and Paul Ngei,²² the petitioner was intending candidate at the preliminary elections for the Parliamentary constituency of Kangundo in 1974. The petitioner withdrew from the elections before the nomination day. He alleged in respect of the withdrawal that he was illegally and improperly prevented from contesting the elections

Constitution... after the decision of the inter-alia by the second respondent personally threatening him with danger to his life unless he withdrew. As a result of the withdrawal, the second respondent was the sole candidate who was nominated validly and consequently returned to the Parliament unopposed. The petitioner alleged that the conduct of the respondents constituted the offence of undue influence under Sec 9 of the Election Offences Act. Sec 9 (c) provides that any person who directly or indirectly makes use of threats force or violence for the purpose of:

"Inducing or compelling any person to refrain from becoming a candidate or to withdraw if he has become a candidate commits an offence."

In allowing the petition, the court observed that:

"He (the second respondent) was in our opinion acutely conscious of his high position in the government and it was this which moved him to a sense of outrage when he learnt that he was to be opposed by the petitioner."

led to Ngei Amendment - act 1975 Extension of P. Prerogative of Mercy - Executive Involvement
 The election of the Minister was nullified and he was found guilty of an election offence which meant that he could not contest an election for a period of five years. This case shows that the judiciary is prepared to keep watch on the executive so that there is no encroachment on the guaranteed individual rights. This is because the petitioner was only an insignificant person whereas the respondent was an important political figure as a Cabinet Minister. This case illustrates that the Judiciary is prepared to balance the rights of all persons.

not a good word to use - no body is insignificant
It seems you're not sure of what happened. Ngei was left free to contest - Prerogative of Mercy Amendment - 1975 correct!
 However what followed after this decision is what is important.

to this discussion. After the decision, there was an amendment to the constitution empowering the President to extend his clemency to election offenders²³ who would otherwise be barred from contesting elections. This amendment showed that the executive and the Legislature interfered with the independence of the Judiciary since the judges are influenced by the rules which are laid down in determining cases. By this amendment, it meant that even if the judges followed the rules laid down in the Election Offences Act and the other Acts to come to the conclusion that a person is guilty of an election offence the decision would still be subject to whether or not the President exercised his clemency. Although the proper means were followed to amend the

Constitution, this amendment, coming after the decision of the court aimed at rescuing a favourite of the executive, shows the influence which the Judiciary may experience, hence it may not be independent in executing its role.

However this does not mean that the Judiciary ceases to be important. The role of the Judiciary in the elections remains important since it is the ultimate supervisor. What is essential is that the Judiciary should be safeguarded from the influence of the other organs of the state so that it executes its role independently. It has been observed that:

"In a democratic set up the judiciary holds a position of eminence as the protector of the rights and liberties of the citizen against encroachment by the state. It is therefore essential that the judiciary should be independent of both the executive and the Legislature so that it may not be exposed to influences and pressures."²⁴

The judiciary performs its role with a lot of impartiality in trying to balance the individuals rights without looking at the political status of the parties concerned.

** Check Sections cases
* Kinyati, Oloo etc.
Politics intervened and they were carried*

In another petition, Titus Kitili Mbathi v Joseph Thungu and Daniel Musyoka Mutinda²⁵ the election of a Cabinet Minister was being challenged. The petitioner alleged that there was connivance between the second respondent and the administration through the active intermediation of the respondent's brother who was a senior civil servant. The petitioner further alleged that there were acts of bribery in that the second respondent had during the campaign period given or caused to be given money and material to induce voters to vote for him. By doing this the second respondent exceeded the statutory maximum of expenditure in the campaign. It was also alleged that the second respondent had deliberately delayed a cheque issued by the government for KShs. 15,000.00 in aid of a school which he produced during the campaign period to influence the voters. Further the petitioner alleged that his agents were not allowed to witness the marking of the ballot papers for illiterate voters on the polling day. The second respondent had also allegedly caused the polling to halt when he handed a note to the presiding officer at one polling station. The petitioner had scored 9,365 and the second respondent had scored 9,759.

observing that:

In allowing the petition the court held that the second respondent was guilty of an election offence of bribery.²⁶ He was also found guilty of using undue influence in the elections in that he delayed the government cheque. The court found that it was proved beyond reasonable doubt that there were acts of irregularity in the polls. The election of the respondent was nullified and a by-election was held. Thus the court stripped the respondent his portfolio. The second respondent could only participate in the by-election if the President pardoned him. However the President did not pardon him soon enough to enable him to contest in the by-election but the President pardoned all the elections offenders of the 1979 elections when he announced early election in 1983.²⁷ The respondent fell under this group but he did not contest in the general election.

Another case is Archbishop Stephen Oluoch v Stanley Thuo and Mathew Ogutu.²⁸ Here the petitioner alleged that Ogutu, the second respondent had committed either by himself or through his agents the offence of bribery by providing food to voters in the queues on the polling day and during the campaign when he gave cash to influence vote at night meetings. It was also alleged there was active collusion between the second respondent and the administration with the chiefs acting on his behalf to harass the petitioners' supporters. The petitioner further alleged that his agents were refused consent to witness the marking of ballot papers of illiterate and aged voters.

Irregularities were further alleged to have occurred when voters were turned away from Sigalame (one of the polling stations) and through the returning officer refusing a recount of the votes for all the candidates and proceeding to declare the second respondent the winner. Also it was alleged that the agents of the petitioner were not allowed to escort the ballot boxes to the counting halls. The second respondent polled 12,452 votes against the petitioner 12,429.

The court found in favour of the petitioner observing that at Sigalame:

"The Presiding officer prevented people from voting when they were entitled to vote. At least 500 people who attended the station to vote did not do so."

The election was nullified but the petition took a dramatic turn when the court found the petitioner was guilty of an election offence observing that:

"It is in line that he (the, whatever, petitioner) has succeeded on in the past the two grounds, each of which is fatal to the election. And by presenting the petition he has brought to light what was clearly a wrong procedure in the recount of votes and also of grave irregularities at Sigalame polling station but we find that by taking into his possession the ballot papers, he was himself committing an offence".

The offence committed by the petitioner is specified in the election offences Act thus; Any person,

"Who being a person not entitled to be in possession of any ballot paper which has been marked with any official perforation, stamp or mark, has any such ballot paper in his possession,"²⁹

shall be guilty of an election offence.

The petitioner could not therefore contest the by-election. The second respondent was not found guilty of any election offence and so

he could contest the by-election. Consequently the second respondent contested the by-election but he lost. This case illustrates that the court executes its functions impartially and in this particular case the court observed the maxim of equity which says,

"who ever comes to equity must come with clean hands."

In another petition case, there was an allegation of oathing during the campaign. This was the case of Francis Phillip Wambua v Luka Daudi Galgalo and Simon Kitheka Kiilu,³⁰ where the petitioner

alleged that the "Kithitu" oath was administered in a public market in Yatta Constituency. The ritual was alleged to have been performed with the concurrence and connivance of the second respondent and in his presence. The oath required voters to vote for the second respondent on the pain of temporal or spiritual injury. In consequence the voters voted for the second respondent or did not vote at all.

In allowing the petition the judges observed about this oathing in elections thus:-

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"That in any case, whatever the use and utility of oaths in the past they are out of place in the political circumstances of the Kenya today. The constitution allows citizens free votes: an oath would be by putting shackles on that freedom, subvert the constitution."

Oathing was held to be an offence under Sec. 9 of the Election Offences Act. The decision in this case was followed in yet another petition of Simeon Masau Kioko v Luka Galgalo and Fredrick Mulinge Kalulu.³¹ Here oathing was alleged to have taken place at a public rally. The other ground of petition was that the respondent used a fraudulent trick, device, or deception to influence voters to vote for him, by allowing a plane (his election symbol was a plane) to fly low over several polling stations dropping leaflets and defamatory handbills which seemed to portray the petitioner as a corrupt person who was not interested in the welfare of the constituency. The court held that there was oathing, though the respondent was not proved guilty in respect of the oathing. In holding for the petitioner the court said that it was immaterial that distribution was from an aeroplane. Of essence to the commission of the offence is that such bill is printed, published, or posted. The court nullified the election.

It is important to note that after the general elections, very many petitions are filed. This is because people trust the court and want it to be the last supervisor. Again, this attitude is seen because the court is considered to be an impartial arbiter. At the time the author is writing this dissertation, the High Court is in the process of hearing cases arising from the general election held in September 1983. The government devised rules³² before these election petitions started to be heard to ensure that they do not take too long. Rule 18 A(6) requires that the affidavit recorded in a language other than English, should be accompanied by an English translation, with copies for judges and other parties. One petition has failed on the technical ground of failure to comply with this rule. This was in the case of Njoroge Karanja v. Francis Mwangi Thuo.³³ The petitioner was seeking the nullification of the election in Kigumo Constituency in Murang'a District. When the petition came up for hearing the petitioner could not produce original Kikuyu affidavit. The judges held:

1. The Kenya C "Since there is no evidence
2. C.S. Macpherson to support any of the grounds
3. Ibid Pg 2 of the petition, we dismiss the petition."

Thus we can see that the judiciary remains the final supervisor of elections.

In Burudi Nabwera V. Silvester Kimaru Tororey & Joshua Mulanda Angatia.³⁴ The petitioner was seeking to unseat the second respondent as the Member of Parliament for Lurambi North. The petitioner had scored 11,062 votes against the second respondent 11,583 votes. One of the major grounds was that a ballot box had its contents counted with votes for Lurambi North while it was not one of the boxes used on the polling day. The court observed with respect to this ground that:

12. Magistrates "It would be well nigh impossible
 13. Sec 56 for a strange box to pass the
 - 14a Section 44 (1) scrutiny of the receiving officers
 - 14b Section 44(2) or the agents watching the arrival
 15. Election Officers of the boxes at the counting hall
 16. Ibid Section or when all boxes are checked before
 17. Cap 7 Section counting or when their contents
 18. Kenya Constitution Sec 44 (5) are poured out in the presence of
- numerous people watching hawk-eyed' as graphically described by one of the witnesses".

In dismissing the petition the judges said that they were satisfied that the election in the area had been properly conducted and that its outcome had been just.

Looking at these petitions one trend becomes ^b obvious: that the judges are particularly concerned with the freedom of choice. This is because in most petitions where there are allegations of acts of inducing voters, where there are allegations of acts of inducing voters, where these allegations are proved the court readily nullifies the election. This is in line with a view expressed earlier that freedom of choice is the conerstone of the democratic elections. On the whole it can be said that the judiciary acts independently following the rules laid down in the Acts, But some decisions tend to reflect some degree of influence on the judiciary particularly by the executive. ^{200 go a} This should be discouraged to ensure that the judiciary performs its role independently. Being an impartial organ of the state the judicial role cannot be played by any other organ of the state whatsoever.

FOOTNOTES TO CHAPTER 3

1. The Kenya Constitution. Sec 84
2. C.B. Macpherson, The Real World of Democracy Pg. 39

3. Ibid Pg 3
4. J. B. Ojwang, Executive Power In Independent Kenya's Constitutional Context.

5. Kenya Constitution Sec 61 (3) (a)

6. Ibid Sec 61 (3) (b)

7. Advocates Act. Sec 12 (a) (b) (c) and (d)

8. Kenya Constitution Sec 62.

9. Ibid Sec 69

- 10a Cap 9

- 10b Section 64

11. Section 60

12. Magistrates Court Act. Part II ~~A~~

13. Sec 66

- 14a Section 44 (1)

- 14b Section 44(2)

15. Election Offences Act, Section 19

16. Ibid Section 20

17. Cap 7 Section 22

18. Kenya Constitution Sec 44 (5)

This is based on the fact that the composition of the Election Court is like that of the Court of Appeal. However, since the Court of Appeal is within reach of the petitioners at their own expenses, a party who is not satisfied with the decision of the High Court should be given the right of Appeal.

19. Election Petition No 6 of 1979

20. National Assembly and Presidential Election Act Cap 7

21. No 15 of 1974

22. No 16 of 1974

23. Kenya Constitution. (Amendment) Act No 14 of 1975 Sec 2

24. H.B.N. Gicheru, Parliamentary Practice in Kenya

25. No 17 of 1979

26. Election Offences Act Sec 10

27. The 1983 election is discussed further in Chapter 4

28. Election Petition No 3 of 1979

29. Sec 3(f)

30. No 20 of 1974

31. No 24 of 1974

SUGGESTED REFORMS AND CONCLUSION

32. The rules come under the National Assembly Elections (Election Petition) (Amendment) rules 1983. Published in Kenya Gazette of 4th November, 1983.
33. Daily Nation 3.3.1984
34. Ibid 24.2.84

The most recent general elections in Kenya were held on 26th September, 1983. These elections were held earlier than they were scheduled. Whereas the term of elected members in Parliament is five years, the members term was reduced to three and a half years. In announcing the early elections on 17th May, 1983 the President said

"I have decided that all elected leaders including myself will seek fresh mandate from the electorate."

He gave the reasons for this act: that this was meant to rectify the weaknesses in the government caused by evil people who had been working against him and the government. That he had been disappointed with the performance of some people who he had appointed to senior positions as Ministers and Civil Servants.² The factor of calling early elections is an indication that there are some reforms which are needed in the electoral system. This is because elected members get their way into Parliament easily. I say this because we have seen people going to Parliament not because they have been voted in by the majority of the electorate but because they won "a majority" against their fellow opponents. Also once the members are elected there is no check as to whether they are representing the people who elected them so that they will remain in Parliament for the stipulated term.

One area of reform is with regard to the party. We have seen that Kenya is a de-jure one party state. There is the requirement for nomination of each candidate by the political party.³ Before one can

CHAPTER 4

SUGGESTED REFORMS AND CONCLUSION

In the previous three chapters I have looked at General Elections from the point of view of representation theory electoral system, the party and the role of the judiciary. This was done to show that the government has tried to have an effective electoral system. Well, this may appear to be the case, but then on close scrutiny, it is evident that our electoral system as a whole needs some reforms which would go along way in making the electoral system more effective. So in this chapter a number of reforms are suggested which are hoped would improve the standard of our elections.

The most recent general elections in Kenya were held on 26th September, 1983. This elections were held earlier than they were scheduled. Whereas the term of elected members in Parliament is five years, the members term was reduced to three and a half years instead. In announcing the early elections on 17th May, 1983 the President said:

"I have decided that all elected leaders including myself will seek fresh mandate from the electorate."¹

He gave the reasons for this as: that this was meant to rectify the weaknesses in the government caused by evil people who had been working against him and the government. That he had been disappointed with the performance of some people who he had appointed to senior positions as Ministers and Civil Servants.² The factor of calling early elections is an indication that there are some reforms which are needed in the electoral system. This is because elected members get their way into Parliament easily. I say this because we have seen people going to Parliament not because they have been voted in by the majority of the electorate but because they won "a majority" against their fellow opponents. Also once the members are elected there is no check as to whether they are representing the people who elected them so that they will remain in Parliament for the stipulated term.

One area of reform is with regard to the party. We have seen that Kenya is a de-jure one party state. There is the requirement for nomination of each candidate by the political party.³ Before one can

be nominated one has to be cleared at the branch level of the party.⁴ The clearance is done by the Chairman of the branch. In most cases the branch Chairman is usually the sitting M.P. There have been cases where such Chairmen refuse to clear their opponents, or unnecessarily delay the clearance, thus occasioning such opponents much cost and anxiety. This practice is unfair to hopeful candidates and I would suggest that any clearance should be done by the Party Governing Council since it would be impartial and fair to all hopeful candidates.

The other area which needs a change though the government has tended to ignore it, is the area of returning officers. The District Commissioners are the returning officers. Such D.Cs might have stayed in the District ^{for} more than five years. This means that, as administrators they must have worked together with all the former members of Parliament. So when it comes to elections, all those former M.Ps will be his friends such that it will be hard for the D.C. to be impartial. Thus, one finds that in most election petition cases, the D.C.s are joined as co-respondents. For example in Samson Mbondo V. Luka Galgalo and Paul Ngei⁵ where the petitioner alleged that he was prevented from presenting his nomination papers by administration policemen who were acting on the orders of the D.C. himself named as first respondent. The candidate could not leave his home and so the second respondent was nominated as the sole candidate. Thus, the D.C.s instead of being "referees" in the elections, become "fans".
participants - a better word When it comes to counting of votes, the D.C.s are known to refuse to exercise their discretion to order a recount. For example in Otieno Aggrey Ambala V. Horace Meshak Ongili Owiti⁶ where among other grounds of petition it was alleged, that the D.C. when requested to order a recount, he refused to do so. During the hearing of the petition, the votes were recounted and it was found that the petitioner had a majority of votes. The court nullified the election of the respondent. In view of all these shortcomings on the part of the returning officers, it is only desirable that the D.Cs should not be the returning officers in their respective districts but should be posted to other areas on the eve of the election day. Or even some other responsible government officials like Permanent Secretaries should act as returning officers to ensure that there is no partiality and hence, all candidates will be treated fairly.

⁴ Anyone who breaks the law while being elected and is later found to have committed an offence.....

Another area where reform is called for is expenses by the candidates. There is a provision in the National Assembly and the Presidential Elections Act⁷ to the effect that no candidate for the election should spend more than KShs. 40,000.00 during his campaign. Such provision should not be in our statutes. This is because, it seems to suggest that only rich people should be candidates. Furthermore in most cases this provision is only observed in breach. This is because, it is the candidate who is supposed to show, after the elections, that he has not exceeded the limit. The government has no other means or source to establish whether or not a candidate has exceeded this KShs. 40,000.00 limit. Even if it means asking the candidates to declare all their wealth, I do not see how the government can ensure that this limit is not exceeded. So I recommend that this limit should be scrapped from the statute.

Formerly, the election petitions used to take too long before they were heard. The court did not hesitate to nullify such an election forgiven him suggests that the candidate should win the by-election. So the question was how were the electorate, if at all, represented? However, this has now been rectified by the introduction of nineteen-constitution should be amended to delete the provision of Presidential rules which are meant to hasten the proceedings of the petitions.⁸ The rules provide inter-alia that a petitioner should deliver to the registrar of the High Court an affidavit sworn by every witness the petitioner intends to call at the trial not less than 48 hours before the petition starts. These rules have helped to save time and infact the proceedings are taking a very short time.

In the area of Presidential pardon,⁹ I am of the opinion that it should not be exercised in relation to elections. The section to cover the elections was enacted so that the then President could pardon one of his Cabinet Ministers. This was in the case of Mbondi V. Galgalo and Ngei.¹⁰ In this case, the High Court nullified the election of a Cabinet Minister and also found him guilty of an election offence, thus barring him from contesting an election for five years. A bill to amend the constitution to enable the President to pardon election offenders was introduced in Parliament soon after this decision. However, it was opposed by some of the members. One of the members objected to it in these words:

"Anyone who breaks the law while being elected and is later found to have committed an offence.....

26th September, 1953 in the High Court before a European Judge and not African Judges should not only be thrown out of Parliament but should be jailed

If leaders are going to be chosen in ways which are illegal, and are pardoned for the illegality then you will find some people locking up their opponents in houses to prevent them from presenting their papers."11

The member was of the opinion that the amendment would interfere with the independence of the judiciary. It is not fair for a person who has committed an election offence to be pardoned and then go to the electorate to ask for votes. Since the electorate would be already aware that the candidate had committed an election offence, they will have lost their trust in him. Also it would seem that the particular candidate who is pardoned, is being imposed on the people. This is because one would conclude that the fact that the President has forgiven him suggests that the candidate should win the by-election which will follow. To remove this element of mistrust therefore the constitution should be amended to delete the provision of Presidential clemency in the area of election offences. The other area of reform with respect to the judiciary is the outcome of election petitions. The constitution provides that the decision of the High Court as to whether any person has been validly elected as a member of the National Assembly is final and thus not subject to appeal. I do not see why a party who is not satisfied by the judgement of the High Court should not be allowed to appeal, since the Court of Appeal is there within their reach and, furthermore, it is up to the party who wants to appeal to meet the expenses. So I would recommend that the right to appeal be provided for in election cases.

The other area which calls for reform is that of representation. Our elections do not achieve anything that can be called true representation. This is because attention is only paid to the winning candidate who is the person who scores 'a majority' of votes as against his opponents. This is the system of first-past-the-post, and it is inefficient. To make my points clear, I will use four tables which I will refer to.

There are four tables attached at the end of the chapter which I will be referring to. Table A shows the result of the elections of

26th September, 1983. The table is drawn from results of three constituencies in the Nairobi Province. These results show that the turn out was very poor. No constituency had a turn out of fifty per cent. This means that the elected representative represents something less than twenty per cent due to the fact that there were many contestants. For example in the Parklands Constituency in the same table, there were 49,616 registered voters. The winner was elected by 2,509 votes. The second in line scored 2,459, that is, a difference of only fifty votes. This then means that ~~37,105~~^{47,107} voters are not represented by the M.P. In the Bahati Constituency in the same table, it is the same case. The Dagoretti Constituency is no better. I am not saying that the candidate should be elected by all the voters as such. However, in such situations I am of the opinion that the election here should be repeated may be between the two candidates with the highest number of votes. Also in this regard I am recommending that a provision should be made to the effect that for a person to be said to be validly elected he must attain atleast fifty per cent of the votes of the registered voters in the constituency. In this way, a person going to Parliament will be seen as representing the majority. The other aspect is in relation to the opportunity to vote. I am suggesting that ^{polling} voting day should be made a holiday so that every person has an opportunity to vote without having to ask permission from his employer.

Table B shows the results of three constituencies of Kiambu District in Central Province. From this table, it is clear that there is need to review and devide some of the constituencies. In one constituency there are 97,143 voters whereas another constituency in the same district has 52,575. This indicates that the former constituency must be too large compared to the others. Also this number of voters is too large to be represented by one person. The constitution provides that the maximum number of constituencies that Kenya should have is 168 and the minimum number is 158.¹² So there is still room for more constituencies. Furthermore the constitution provides that:

"All constituencies shall contain as nearly as equal numbers of inhabitants as appears to the Commission¹⁴ to be reasonably practicable but the commission may depart from this principle to such extent as it considers expedient in order to take account of - inter alia, the

that the number of density of population and in particular
fifty per cent. the need to ensure adequate representation
of urban and sparsely populated rural areas".¹³
this Table, it is (emphasis mine) the constituencies are either
too large or densely populated and such are the areas where there
So if we rely on this particular section, we can see that the
Commission has not ensured adequate representation and it is high
time it introduced these reforms.

When compared, Table A and B show a very undesirable pattern
of representation. In Table A, the M.P. of Parklands goes to Parliament
with a total of 2,509 votes out of 49,616 registered voters. Whereas in
the Gatundu Constituency of Table B, a person elected by 16,314 is loser
in the election. Also the M.P. for Bahati in Table A goes to Parliament
after scoring 4,390 votes. Whereas, a person elected by 14,378 voters
is a loser in the Githunguri Constituency of Table B. This pattern
is experienced in other areas. It is clear that many people are left
dissatisfied after the election. So this calls for a review of the
electoral process. This pattern also emphasizes the need to have a
certain limit of votes to be scored by a candidate. This would ensure
that the M.P. will represent a majority of the electorate in his
constituency. Furthermore, this would go a long way to make the
elections fair for both the electorate and the candidates.

Table C represents the results of the election in two
constituencies in Mombasa District in the Coast Province. This table
illustrates the slight difference of votes between the winning
candidate and the second in line. In Mombasa North Constituency, the
winner goes to Parliament after scoring 10,490, the second in line was
voted for by 10,427 voters. In such a situation the difference is only
63 votes, are the voters who elected the loser going to be represented?
The politicians will call on people to forget the politics of election
and join hands with the elected members in National Development, but
this is not giving them satisfaction which they wanted in the elections.
What is urgently needed is reform in this particular area of representat

Table D shows the results of elections in three constituencies
of Bungoma District in Western Province. The table illustrates that
the winners, compared to the losing candidates, have scored a majority
of votes. But still these majority represent $\frac{1}{3}$ (one third), or even
less, of the total number of registered voters. So this may not
represent the popular will of the electorate. The table also indicates

that the number of votes cast in each constituency is less than fifty per cent. Looking at the number of registered voters in this Table, it is suggestive that the constituencies are either too large or densely populated and such are the areas where there is need to ensure adequate representation. The constituency boundaries need to be reviewed before the next General Election.

On looking at the four tables they show that the turn-out in the election of September 1983 was so poor. In most areas in the Republic the turn-out was below fifty per cent. There were many areas in which candidates turned out effectively and the election had an air of freedom and fairness about it; which augurs well for the future of democracy in Kenya. But many M.Ps were elected with a small percentage of votes. One thing might have contributed to this state of affairs. There is a general trend in Kenya that once a person is elected in a particular constituency, he holds the seat almost in perpetuity, so that when elections comes, he is seen as the one who should go back to Parliament.¹⁵ This has made the elections lose taste and it is as if those who do not support such candidate sit back and refuse to vote. To rectify this situation and to encourage voters to participate in elections, I am of the opinion that no candidate should hold a Parliamentary seat for more than two consecutive terms. That is to say, if a candidate contested the first time and was elected, and after that term he is again re-elected for the same seat, when the next election comes, he should not contest. This should apply to all M.Ps, apart from the President and the Vice-President who were not opposed in the last elections.¹⁶ This would attract more candidates and hence more voters.

is this free choice which you have been advocating to few

There is also the question as to whether some M.Ps represent the interests of the people who elected them. This is because, from among the elected members, the President chooses his Cabinet. It becomes apparent that when an M.P is given a portfolio, he is mostly involved in the affairs of the whole nation rather than just in the interests of those who elected him to Parliament. I am of the opinion that the President should appoint Ministers from non-M.Ps and only give the M.Ps the posts of assistant Ministers. This would ensure that the M.Ps are involved in the affairs of their respective constituencies instead of the whole Nation. After all, that is why the electorate sent them to Parliament. Or the President

has already done¹⁷

can, as he has already done,¹⁷ appoint his ministers from among nominated members. Here I would also like to suggest that there should be a check on the M.Ps to see what they do in their constituencies. For example every M.P. should present to Parliament a report of what he has done in his constituency after every one year during his term as member. This would ensure that the elected members should not only have an easy time in Parliament, but should represent well the interests of the people who voted them in.

Thus our electoral system would achieve good results if these reforms are considered and given effect. Since the poor turn-out in the September 1983 elections raised a national outcry by the leaders for something to be done to ensure a large turn-out, the reforms suggested here, particularly those in the area of representation, should be considered for implementation. There was a suggestion that voting should be made compulsory. A motion was moved in Parliament, to the effect that a provision for neutral voting for those who did not like any of the candidates be made. And that any person who does not vote should be punished.¹⁸ However, I still contend that what is needed is reform in the electoral system, rather than compelling people to vote. The present system leaves many people dissatisfied after the elections. Hopefully, by the time the next general elections come, a system will have been evolved which will ensure that elected M.Ps do in fact represent the majority of the electorate.

Mduji's career in 1986 - a good idea which has been about why not by secret

CONCLUSION

It can be said that the government has attempted to formulate electoral rules in such a manner as to suit the local conditions. Of importance is the fact that freedom of choice is made available to all, by and large. In General Elections, people express their own wish as to who should govern them, and they thus participate in the making of the government. General elections enhance the reality of representation and so, the representatives should represent the majority of the electorate. Elected Members in Kenya are on the whole not voted in by an absolute majority, and this calls for reforms in the electoral system. It is hoped that, before the next general election, the reforms suggested here will have been introduced. In this way the elections are likely to be fair to both the voters and the candidates.

The role of the judiciary with respect to the elections, is well defined and the judicial officers have readily executed this role.

This role should be effectively discharged and all measures possible must be taken to maintain the Judiciary as an impartial organ, free from interference from the other constitutional organs.

Kenya being a de jure one party state, there is need to ensure fairness to all the candidates. Thus some of the rules emanating from the party executive should be relaxed.¹⁹ The party governing council does the final clearance; nomination for elections is done by the party. The Council comprises the President among others. This shows that the party executive takes an interest in ensuring that those who want to be candidates are cleared well in time, for nomination in elections. In this way the party is seen as serving well the interests of all. Thus we can say, elections in Kenya are one of the most important areas where the citizens exercise their democratic rights freely. Meaningless

- (d) - Name of Candidates
- (e) - Votes Secured
- (f) - Number of Registered votes in the particular Constituency.
- (g) - Overall percentage of the votes cast in the particular constituency.

3.5. The candidates names are not arranged in the order of merit.

* Indicates the winning candidate.

KEY TO THE TABLES

There are four tables, viz A, B, C, D which show the election results of three constituencies of one district, respectively, in four different provinces of Kenya. These results are those of the General Election held on 26th September, 1983. There is no particular criteria used in picking the four provinces or the districts but it is hoped that the way they are presented will illustrate the points we aim at bringing out. The tables are divided into seven columns, named a, b, c, d, e, f, g which represent:

- (a) - Name of the Province
- (b) - Name of the District
- (c) - Name of the Constituency
- (d) - Name of Candidates
- (e) - Votes Scored
- (f) - Number of Registered votes in the particular Constituency.
- (g) - Overall percentage of the votes cast in the particular constituency.

N.B. The candidates names are not arranged in the order of merit.

* Indicates the winning candidate.

TABLE A.

(a)	(b)	(c)	(d)	(e)	(f)	(g)
PROVINCE	DISTRICT	CONSTITUENCY	CANDIDATES	SCORES	NO. OF REG. VOTERS	% OF VOTES CAST
NAIROBI	NAIROBI	BAHATI	1. GEORGE MUCHAI 2. Dr. JAMES MURIUKI 3. DANIEL ARAP TANUI 4. RADING OMOLO 5. VICKY WACHIRA 6. FREDRICK OMI X DO* 7. FRANCIS MUTURA 8. JOSIA KIHHEREKO 9. MWANIKI KARUNGU	1,098 3,235 1,668 4,110 50 4,390 923 49,378 28	48,768	32%
CENTRAL	KIAMBU	GIITHUNGURI	1. NJENJA KARUME* 2. SIMON WAMBAA 3. SIMON KIVUITU* 4. KARANI GITAU 5. MRS BATROBA KEMOLI 6. AMINI WALJI 7. KILLIAN MWANGANGI 8. CHARLES WACHIRA 9. BERNARD ODEPO 10. WACHIRA WAWERU 11. HARRON AHMED 12. MAINA KAMANDA 13. JESSE KIMANI 14. NGANGA NJOROGE	23,642 1,071 2,509 1,981 856 2,218 64 67 853 2,459 486 915 114 20	53,104	67.8
NAIROBI	NAIROBI	PARKLANDS			49,616	27.5
		GATUNDU			97,143	34.9
		DAGORETTI			55,328	38.58

TABLE B.

(a)	(b)	(c)	(d)	(e)	(f)	(g)
PROVINCE	DISTRICT	CONSTITUENCY	CANDIDATES	SCORES	NO. OF REG. VOTERS	% OF VOTES CAST
CENTRAL	KIAMBU	GITHUNGURI	1. DAMIAN KUNG'U 2. ARTHUR MAGUGU* 3. DR. JOSPHAT KARANJA	534 20,534 14,378	53,104	67.35
		KIAMBAA	1. NJENGA KARUME* 2. PETER NJOROGE 3. LAWRENCE KARIUKI 4. MUNYUI KAHUHA	23,642 166 4,458 271	52,575	57.97
		GATUNDU	1. NGENGI MUIGAI* 2. KIMEMIA GAKUNJU 3. WANGUHU NG'ANG'A	35,860 16,314 833	97,143	54.9

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TABLE C.

TABLE D

(a)	(b)	(c)	(d)	(e)	(f)	(g)
PROVINCE	DISTRICT	CONSTITUENCY	CANDIDATES	SCORES	NO. OF REG. VOTERS	% OF VOTES CAST
COAST	MOMBASA	MOMBASA WEST	1. MWAI KARANI	2,732	65,997	33.1%
			2. MAURICE NDOO	289		
			3. CYRIL ONDATTO	4,149	58,266	43.15
			4. MOHAMED ALI	232		
			5. MORRIS MWENDAR	333		
			6. MARK OFWONA	350		
			7. ALI SOOD	505		
			8. DR. PIUS ONYACHI	907		
			9. SIMON MSECHU	1,452		
			10. FERDINARD MWARO	4,175	64,005	32.33
			11. JOSEPH KILIKU*	4,493		
			12. JAMES WANYOIKE	753		
			13. MUIGAI CHOKWE	139		
			14. GEORGE OPOTO	1,070		
			2. JOSEPH KRAOYA	6,824		
			3. LANDRICK SIMONIA	20,523		
		MOMBASA NORTH	4. FRANCIS WALWA	963	61,688	36.49%
		BUNGOMA EAST	1. JOSEPH MUTUNGA	299	77,963	47.79
			2. CROWTHER FARRAR	288		
			3. MOHAMED MACHELE	786		
			4. ABDALLAN MWARUNA*	10,490		
			5. SAIDI HEMED	10,427		
			6. PETER SIPUNA	5,728		

TABLE D

(a)	(b)	(c)	(d)	(e)	(f)	(g)
PROVINCE	DISTRICT	CONSTITUENCY	CANDIDATES	SCORES	NO. REG. VOTERS	% OF VOTES CAST
WESTERN	BUNGOMA	BUNGOMA CENTRAL	1. MASEMBE SIMIYU 2. GEORGE KAPTEN 3. NATHAN MUNOKO 4. PETER KISUYA*	286 9,097 5,416 13,104	58,266	48.18
		BUNGOMA SOUTH			64,090	49.33
			1. MARK WAMALWA 2. JOSEPH KHAOYA 3. LAWRENCE SIFUNA* 4. FRANCIS WASWA	731 8,824 20,572 963		
		BUNGOMA EAST			77,963	47.79
			1. REYMOND WASIKE 2. MBITA WANYONYI 3. CRISTOPHER KISAKA 4. PETER SIFUNA 5. ELIJAH MWANGALE*	719 1,643 2,077 5,728 25,606		

FOOTNOTES TO CHAPTER 4

1. Kenya Times Wednesday May 18 1983
2. Ibid.
3. Kenya Constitution Sec. 34(d)
4. This is a procedural requirement which is announced by the Secretary General of the party once the elections are called. However there is no provision in the Kenya Constitution or the KANU Constitution or any rule whatsoever expressly providing for this.
5. Election Petition No. 16 of 1974
6. Election Petition No. 2 of 1983
7. Cap 7 Sec 18 (B) (1)
8. National Assembly Elections Petitions (Amendment) Rules of 1983 published in Kenya Gazette Friday November 4, 1983
9. Kenya Constitution Sec 27 ✓
10. Supra Note 5 and Chapter 3
11. Weekly Review, December 22, 1975 Pg 6
12. Kenya Constitution Sec 42 (2)
13. Ibid Sec 42 (3) (a)
14. Refers to Electoral Commission, discussed in Chapter One.
15. There were some M.Ps who held their respective Parliamentary seats in their respective constituencies since independence until death did them part the seats in this decade.
16. There is popular acceptance that the President and the Vice-President who are the highest political figures in the Nation should not be opposed in their respective constituencies
Is this free choice which you have been advocating before?
17. The current Minister of Finance is a nominated Member of Parliament. *(now MP)*
18. Parliamentary Debates 29th November 1983
19. Supra Note 4