



Election disputes: It's the intention not substantiality, that matters

Kahunga Matsiko Governance

Renowned British constitutional historian, professor, author and philosopher Albert F Pollard holds that no constitution, written or unwritten, is worth more than the political reality of its time allows it to be...a well-written constitution is useless in circumstances of suspicion and acrimony, while a badly written constitution can evolve into something better under the right political atmosphere.

Pollard speaks to Ugandans in 2016. In the wake of the disputed February 2016 presidential election, the media quotes senior lawyers Wandera Ogalo and Erias Lukwago pouring water on the utility of Dr Kizza Besigye seeking court legal redress. Mr Ogalo bases his argument on the provision of 'substantiality' in Section 59 of the Presidential Elections Act. The candidate alleging rigging must prove that the rigging was 'substantial' enough to cause a different result had it not happened. What constitutes 'substantial' is neither defined nor quantifiable.

The law, according to one sage I tickled about this question, is the most malleable 'creature' ever 'created'. It can be panel-beaten, shaped, sharpened, blunted, filed, rounded, drawn-out, bent, twisted, straightened, ribbed and rounded, to suit the purpose and circumstances at hand. And he argues this is most pronounced under English law which Uganda inherited as its governing law, with most of its provisions im-

ported wholesale from a society whose production relations were already at adversarial terms: class interests beyond the common good and human bonds as is our case here. If we were to follow substantiality, he says, then cases of 'attempted murder', 'attempted rape', would not hold, since the effect would not be 'substantial enough' to cause suffering to the victim.

This same sage argues that what matters is the intention, commonly referred to as malice aforethought. In other words, the very fact that there was a mindset inclined to and an effort made at rigging, renders the whole process null and void. In ordinary life, this is what police does, when they suspect that a crime is about to be committed, thus effecting preventive arrest.

They have acted upon and been informed by the 'mindset bent on committing a crime'. We, therefore, must apply the same to election disputes: that where a candidate, his agents, subjects, or officials, commits an act that reveals the existence of intention aforethought to rig, the whole process is nullified, the culprit barred from participating in the same election.

It is this that will render our electoral processes sacrosanct and restore Ugandans' trust in elections as a means of entrusting their sovereignty to leaders. This is the essence of elections: individuals transfer their collective individual sovereignty to one person, who incar-

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nates this sovereignty and exercises it in the common interest and common good.

In the larger realm of things, *mzee* sage maintains that we need a collective memory as a country, which will speak to our innate-self, guiding us to forge a common destiny. And this cannot be achieved by the straitjacket imported legalistic framework we are into today. He shares his experience of traditional judicial systems and practices as the panacea. Here, people who would deny in an 'English court' will naturally tell the truth in a clan court, where their innate self is at work, as opposed to the former court where it is technicalities and wit. This factor of the innate-self (the truth) is what enabled Gacaca courts in Rwanda achieve milestones that would take the million-dollar loaded ICTR 300 years to do, under its judicial system of technicalities and wits. Lessons for Uganda here as we emerge from the election smoke.

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