

## CASE COMMENTARY

# ELECTION PETITIONS AND THE STANDARD OF PROOF

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## 1. INTRODUCTION

In *Bater v Bater*<sup>1</sup> Denning LJ stated that:

“... in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard”.<sup>2</sup>

He added that a higher degree of probability would be required where a civil court was considering a charge of fraud than when considering whether negligence had been established. Even so, a court was not required to adopt “so high a degree as a criminal court, even when it is considering a charge of a criminal nature”.<sup>3</sup> In *Hornal v Neuberger*<sup>4</sup> he again suggested that:

“The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law”.<sup>5</sup>

Courts and tribunals in several jurisdictions have considered the proposition that an “intermediate” standard of proof or even the criminal standard of proof is applicable in a range of civil proceedings. These have involved, for example, cases concerning allegations of fraud,<sup>6</sup> allegations

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<sup>1</sup> [1951] P 35.

<sup>2</sup> *Ibid* 37.

<sup>3</sup> *Ibid*.

<sup>4</sup> [1957] 1 QB 247.

<sup>5</sup> *Ibid* 258.

<sup>6</sup> In *Addington v Texas* (1979) 441 US 418, the Supreme Court of the United States recognised an intermediate standard in the form of “clear and convincing” evidence in civil cases involving allegations of fraud and other quasi-criminal

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of professional misconduct,<sup>7</sup> matrimonial issues,<sup>8</sup> child protection proceedings,<sup>9</sup> and contempt of court in civil proceedings.<sup>10</sup>

This note explores the issue of the standard of proof in relation to presidential election petitions and reviews two recent decisions by the apex courts in Kenya and Ghana. These are of particular interest given the very different approach of the UK courts to election petitions (noted below) and epitomised in the case of *Erlam and Others v Rahman and Others*.<sup>11</sup>

### 2. THE PRESIDENTIAL PETITION CASES

Disputes as to whether a presidential or parliamentary election was “free and fair”<sup>12</sup> can inevitably raise considerable tensions with the losing candidates often alleging vote-rigging, corruption, bribery and other electoral malpractices by their opponents.<sup>13</sup> Allegations of such

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wrongdoing. Another example is found in the International Cricket Council’s *Anti-Corruption Code for Participants*. This includes a series of corruption-related offences and makes provision for a formal hearing of allegations by the ICC Anti-Corruption Tribunal against any person suspected of breaching the Code. Article 3.1 provides as follows: “... the burden of proof shall be on the ICC in all cases brought under the Anti-Corruption Code ... and the standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt”.

<sup>7</sup> In *Re A Solicitor* [1993] QB 69 it was held that allegations of professional misconduct before a solicitors’ disciplinary tribunal were to be proved to the criminal standard where an allegation amounted to a criminal offence.

<sup>8</sup> *Preston-Jones v Preston-Jones* [1951] AC 391 but see now the Family Law Reform Act 1969, s 26.

<sup>9</sup> In *Re H (Minors)* [1996] AC 563 the House of Lords overruled earlier decisions and held that the standard of proof was the normal balance of probability in such cases.

<sup>10</sup> *Re Bramblevale Ltd* [1970] Ch 128.

<sup>11</sup> [2015] EWHC 1215 (QB).

<sup>12</sup> A right enshrined in numerous international and regional instruments including the International Covenant on Civil and Political Rights (Article 25) and the African Charter on Democracy, Elections and Governance (Chapter 7). See also Part I of the Charter of the Commonwealth.

<sup>13</sup> See the discussion in John Hatchard, Peter Slinn & Muna Ndulo, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, Cambridge 2004) 62. Of course, some of the activities of the losing candidate(s) and their supporters may also involve similar practices.

malpractice involving the election of a directly elected president who is both head of state and head of government<sup>14</sup> are of particular concern as they raise issues of the highest political, social and economic importance and sensitivity. Especially in small and/or ethnically divided states, the ensuing uncertainty and discontent can have far-reaching repercussions. This is epitomised by the violence in Kenya in 2007-8 which followed a disputed presidential election and which led to the deaths of over one thousand people and the displacement of over 600,000.<sup>15</sup>

It is therefore essential to have in place a credible and transparent system to address allegations of electoral malpractice. Whilst electoral commissions often have general responsibility for the settlement of disputes prior to the election itself, the traditional approach in common law countries is for post-election challenges to be brought to the appropriate court by way of an election petition.

Given that the allegations by the unsuccessful presidential candidate(s) often include charges of criminal or quasi-criminal conduct on the part of the respondent(s), a key issue in every case concerns the standard of proof to be applied by the court. Here there is a divergence of opinion as to the appropriate standard and this is well-illustrated by the cases under review (known collectively as the “presidential petition” cases). Both have similar facts.

First the Kenyan case. In *Odinga v Independent Electoral and Boundaries Commission and Others*,<sup>16</sup> (the *Odinga* case) following the presidential election in 2013 in Kenya, Uhuru Kenyatta was declared the President-Elect. A successful presidential candidate required an overall majority of the valid votes cast. Mr Kenyatta received 50.7% of the votes cast.<sup>17</sup> The unsuccessful challenger, Raila Odinga then lodged an election petition averring that “the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful”.<sup>18</sup> Here the main complaint was that the

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<sup>14</sup> As well as being Commander in Chief of the armed forces.

<sup>15</sup> For a disturbing account of the post-election violence see generally the *Final Report of the Truth and Reconciliation Commission of Kenya*, Nairobi 2013.

<sup>16</sup> [2013] eKLR: available at

[http://www.kenyalaw.org/CaseSearch/view\\_preview1.php?link=37779366692853178723650](http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=37779366692853178723650) (accessed 1 August 2015).

<sup>17</sup> According to the Independent Electoral and Boundaries Commission Mr Uhuru Kenyatta received 50.7% of the votes cast whilst Mr Raila Odinga had received 43.31%.

<sup>18</sup> *Odinga* (n 16) [15].

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election was not carried out in accordance with the electoral law with alleged defects in the Voters Register being the main cause for concern.

In the Ghanaian case of *Akufo-Addo v Mahama*<sup>19</sup> (the *Mahama* case), according to the Ghana Electoral Commission, in the 2012 presidential election of the almost 11 million votes cast, Mr John Mahama received 50.7% whilst Mr Nana Akufo-Addo had received 47.74%. Article 63 of the Constitution of Ghana requires the successful presidential candidate to receive more than 50% of the valid votes cast. A loss of just 154,000 votes would have required a run-off between Mr Mahama and Mr Akufo-Addo. In his petition, Mr Akufo-Addo alleged that a series of electoral malpractices had affected the outcome of the election. Indeed Atuguba JSC in the Supreme Court of Ghana noted that “it is clear that the irregularities associated with the 2012 presidential election were substantial”.<sup>20</sup>

As regards the burden of proof, the courts in both the *Odinga* and *Mahama* cases adopted the approach of the Uganda Supreme Court in the *Besigye v Museveni*,<sup>21</sup> another presidential petition case. Here it was held that the burden of proof in election petitions lies on the petitioner to prove not only that there had been non-compliance with the law but also that such failure affected the validity of the election itself.<sup>22</sup> The court then added that the “... only controversy surrounds the standard of proof required to satisfy the Court”.

### 3. WHAT IS THE STANDARD OF PROOF IN PRESIDENTIAL PETITION CASES?

There are three markedly different approaches considered in the presidential petition cases.

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<sup>19</sup> The case is seemingly unreported but a copy of the lengthy judgment is available at [http://judicial.gov.gh/files/NANA\\_ADDO\\_DANKWA\\_AKUFO\\_ADDO\\_\\_ORS\\_\\_VRS\\_\\_JOHN\\_DRAMANI\\_MAHAMA\\_\\_ORS.pdf](http://judicial.gov.gh/files/NANA_ADDO_DANKWA_AKUFO_ADDO__ORS__VRS__JOHN_DRAMANI_MAHAMA__ORS.pdf). (accessed 1 August 2015) All page references to the case in this note refer to this report.

<sup>20</sup> 99.

<sup>21</sup> [2001] UGSC 3. This report is seemingly not readily available and for the purposes of this note, the judgment used is found at <http://www.ulii.org/ug/judgment/constitutional-law-election-petitions/2001/3> (accessed 1 August 2015). Regrettably, this contains no page numbering nor numbered paragraphs.

<sup>22</sup> See *Odinga* (n 16) [196] and *Mahama* 122.

*Apply the Criminal Standard of Proof*

There is some jurisprudence to support the argument raised by the respondents in the *Odinga* case that given the seriousness of the allegations, a presidential election petition becomes a quasi-criminal matter which requires the court to impose the criminal standard of proof.<sup>23</sup> This reflects the view of the Supreme Court of India in *Shri Kirpal Singh v Shri V V Giri*<sup>24</sup> that:

“Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice”.

Similarly, the decision of the Supreme Court of Nigeria in *Nwobodo v Onoh*<sup>25</sup> is one of a series of cases in which Nigerian courts have held that allegations of criminal activity in relation to election petitions must be proved to the criminal standard.<sup>26</sup> This view was supported by Anin Yeboah JSC in the *Mahama* case who asserted that “It is only when crime is pleaded or raised in evidence that the allegation sought to be proved must be proved beyond reasonable doubt”.<sup>27</sup>

This approach also reflects the position in the United Kingdom. Thus in the *Erlam* case,<sup>28</sup> the petitioners petitioned to have a local election in the London Borough of Tower Hamlets set aside on several grounds, principally alleging that the respondent or his agents had indulged in corrupt and illegal practices contrary to the Representation of the People Act 1983. In his judgment, Commissioner Mawrey QC recognised that an election court is a civil court and not a criminal court.<sup>29</sup> However,

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<sup>23</sup> [181]. For an interesting argument that the criminal standard of proof should be applied to all civil cases involving allegations of criminal conduct see Ennis McBride, ‘Is the Civil “Higher Standard of Proof” a Coherent Concept?’ (2009) 8(4) *Law, Probability and Risk* 323.

<sup>24</sup> 1971(2) SCR 197; 1970(2) SCC 567.

<sup>25</sup> [1984] 1 SC 1; (1983) 14 NSCC 470.

<sup>26</sup> See also *Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) 1 and *Agagu v Mimiko* [2009] All FWLR (Pt. 462) 1122.

<sup>27</sup> 460.

<sup>28</sup> *Erlam and Others v Rahman and Others* (n 11)

<sup>29</sup> [45].

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following the Court of Appeal decision in *R v Rowe ex p. Mainwaring*<sup>30</sup> he noted that:

“There was no controversy at the hearing about the standard of proof the court must apply to charges of corrupt and illegal practices. It is settled law that the court must apply the criminal standard of proof, namely proof beyond reasonable doubt”.<sup>31</sup>

*Require the petitioner to establish the case on a balance of probabilities*

In the well-known case of *Jugnauth v Ringadoo and Others*,<sup>32</sup> the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. Lord Rodger of Earlsferry, giving the judgment of the Board emphasised that “there is no question of the court applying any kind of intermediate standard” and accordingly:

“It follows that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition.”<sup>33</sup>

This view is reflected in the *Mahama* case where the majority of the judges of the Supreme Court adopted the approach of Atuguba JSC who was content to apply section 12 of the Evidence Act 1975 which provided that the standard of proof is by a “preponderance of probabilities”.<sup>34</sup> In doing so, he emphasised that “The standard of proof in especially election petitions, a species of a civil case, is on the balance of probabilities or preponderance of probabilities”.<sup>35</sup>

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<sup>30</sup> [1992] 1 WLR 1059.

<sup>31</sup> [47].

<sup>32</sup> [2008] UKPC 50.

<sup>33</sup> [17] and [19].

<sup>34</sup> Section 12(2) reads: “‘Preponderance of probabilities’ means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence’.

<sup>35</sup> At 62. A similar view was taken by Owusu JSC (199 et seq), Dotse JSC (316), Baffoe-Bonnie JSC (517) and Akoto-Bamfo JSC (570).

*Apply an Intermediate Standard*

Two earlier decisions from Commonwealth African courts had supported this approach. In *Lewanika and Others v Chiluba*<sup>36</sup> the petitioners had alleged that there was bribery, fraud and other electoral irregularities in a presidential election in Zambia and sought its nullification. Ngulube, CJ, giving the judgment of the court, stated:

“... we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.”

No authority was cited for this statement but it formed the basis of the holding that:

“... where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raised are required to be established to a fairly high degree of convincing clarity”.<sup>37</sup>

Similarly, in *Besigye v Museveni*<sup>38</sup> the unsuccessful presidential candidate had alleged that the respondents were responsible for a series of offences and other illegal electoral practices. Odoki CJ having referred to the decision of Denning LJ in *Bater v Bater*<sup>39</sup> with approval, asserted that in election petitions the “standard of proof is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance”.<sup>40</sup>

The Supreme Court of Kenya in the *Odinga* case, considered these cases and also adopted the “higher standard of proof” approach holding that:

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<sup>36</sup> [1999] 1 LRC 138.

<sup>37</sup> No page numbers are provided in the electronic version of the relevant law report.

<sup>38</sup> *Besigye* (n 21).

<sup>39</sup> N 1.

<sup>40</sup> 84.

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“The threshold of proof should, in principle, be *above the balance of probability*, though not as high as beyond reasonable doubt: save that this would not affect the normal standards where criminal charges linked to an election, are in question”.<sup>41</sup>

Similarly, in the *Mahama* case, Adinyira JSC noted the need for “high standards of proof” in cases imputing election malpractice and concluded, without further consideration, that the “threshold of proof should, in principle, be above the balance of probability”.<sup>42</sup>

### 4. WHICH STANDARD OF PROOF TO APPLY?

Applying the criminal standard raises significant issues. As Omotola has pointed out, there are already numerous obstacles facing those seeking to bring an electoral petition and “the huge cost of seeking electoral justice, the undue protraction of litigation, and the seeming lack of independence of the judiciary, have served to limit the reach of electoral justice”.<sup>43</sup> In the *Erlam* case, Commissioner Mawrey QC noted the “enormous courage” required by a private citizen to bring an election petition and that “If things go wrong and the Petition is dismissed, the Petitioners face a potentially devastating bill of costs which ... may well bankrupt them”.<sup>44</sup>

Thus placing on petitioners an additional hurdle of satisfying the criminal standard of proof is surely unacceptable. Even where there are allegations of criminal or quasi-criminal conduct made against the respondents, an election petition is fundamentally different to a criminal case and it follows that the courts in the presidential petition cases rightly recognised this point.<sup>45</sup>

The view contrasts starkly with that of the Court of Appeal in *R v Rowe*.<sup>46</sup> Here the Court of Appeal was considering an appeal from the

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<sup>41</sup> [203]. Emphasis in the original.

<sup>42</sup> 122-123.

<sup>43</sup> Shola Omotola ‘Explaining electoral violence in Africa’s “new” democracies’ at page 52: available at [www.ajol.info/index.php/ajcr/article/download/63320/51203](http://www.ajol.info/index.php/ajcr/article/download/63320/51203) (accessed 1 August 2015).

<sup>44</sup> *Erlam and Others v Rahman and Others* (n 11) [643] and [644].

<sup>45</sup> In *Besigye v Museveni* (n 21), the Supreme Court also rejected earlier Ugandan decisions imposing the criminal standard.

<sup>46</sup> N 30.



Divisional Court concerning the judicial review of an election petition involving section 115 of the Representation of the People Act 1983. Subsection (1) provides that “A person shall be guilty of a corrupt practice if he is guilty of undue influence”. Whilst Farquharson LJ noted that the issue was not significant in the case itself, he asserted that in addressing the standard of proof in relation to such cases:

“... a person accused of corrupt practice before an electoral court should only be held to have committed it if the allegation is proved beyond reasonable doubt. The subsection refers to a person being “guilty” of corrupt practice, and that connotes a criminal offence. It would not be desirable to have a different standard of proof in different courts on the same issue”.<sup>47</sup>

It is precisely because an election court is widely (and arguably correctly) viewed as being a civil court, that the imposition of a lower standard of proof is justified. Whilst a person found to have been involved in electoral malpractice may face serious consequences, including being disqualified from participation in future elections, an election court does not impose criminal penalties. This is a matter for a criminal court which is very different animal, especially given the application of the right to a fair trial provisions and the restrictive rules as to the admissibility of evidence.

As regards the application of an intermediate standard, there are several inter-related arguments to support its adoption. Firstly, given their subject matter, presidential petition cases are “peculiar civil proceedings” meriting special treatment.<sup>48</sup> Thus as Ngulube CJ asserted in *Lewanika v Chiluba*, given that the outcome of such a case would “impact upon the governance of the nation and the deployment of the constitutional power and authority”, imposing a high evidential hurdle on petitioners would “deter unmeritorious petitions designed to destabilise the new government”.<sup>49</sup> Secondly, it is argued that judges must avoid the “political question” for the national Constitution has entrusted the people with the task of electing their President. This is highlighted by the holding of Supreme Court of Kenya in the *Odinga* case that: “As a basic principle, it should not be for the Court to determine who comes to occupy the

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<sup>47</sup> Ibid 1068.

<sup>48</sup> See the Supreme Court of Nigeria in *Nwobodo v Onoh* (n 48).

<sup>49</sup> Ngulube CJ in *Lewanika* (n 36).

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Presidential office”.<sup>50</sup> Similarly, Atuguba JSC in the *Mahama* case asserted that:

“... for starters I would state that the Judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it”.<sup>51</sup>

In analysing such decisions, it is important to place them against the background of the significant pressures inevitably placed on judges dealing with presidential petitions, especially for those serving in small, ethnically divided and/or politically volatile countries. Thus imposing a high standard of proof on petitioners can be seen as a way of ensuring that the most sensitive of “political questions” is avoided as well as any “counter-majoritarianism” arguments whilst offering judges some protection from undue political pressure or concerns as to their independence.

The arguments against an intermediate standard focus both on practice and policy. As regards the former, the question of what constitutes the appropriate “intermediate standard” is not explored in any of the cases. Instead various phrases are suggested including a “fairly high degree of convincing clarity”, “above the balance of probability”, and a “very high standard of proof”. Such opaqueness concerning this so-called “high evidential hurdle” is liable to seriously impact on those with a meritorious case and reinforces the argument that the standard of proof is merely being used as a convenient mechanism to prevent/deter challenges to presidential elections.

As regards policy, it is a fundamental constitutional right for the people to choose their own President in *free and fair elections*. It is trite that maintaining a level playing field throughout the electoral process serves to reinforce the constitutional imperative of holding demonstrably free and fair presidential elections in order to establish and maintain political stability and public confidence in the electoral process. As the

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<sup>50</sup> At [299]. See also the comment by Smith Etieno ‘The Political Question Doctrine: A Look at Petition No 5 of 2013 available at [http://www.academia.edu/6730672/The\\_Political\\_Question\\_Doctrine\\_A\\_Look\\_at\\_Petition\\_No\\_5\\_of\\_2013\\_Raila\\_Odinga\\_and\\_2\\_others\\_v\\_I.E.B.C\\_and\\_3\\_Others](http://www.academia.edu/6730672/The_Political_Question_Doctrine_A_Look_at_Petition_No_5_of_2013_Raila_Odinga_and_2_others_v_I.E.B.C_and_3_Others) (accessed 1 August 2015).

<sup>51</sup> 99.

Supreme Court of Kenya itself noted in the *Odinga* case, the Constitution of Kenya places on the judiciary the obligation to:

“safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections”.<sup>52</sup>

It follows that presidential petitions are not “peculiar civil proceedings” as asserted in *Nwobodo v Onoh*<sup>53</sup> meriting special treatment but are civil cases raising fundamental constitutional issues. Such issues do not require a higher standard of proof than that required in other civil matters. Indeed it is because fundamental constitutional rights are involved that the application of the normal civil standard is necessary. Accordingly the courts cannot abrogate their constitutional mandate nor seek to circumvent it by requiring a higher standard of proof. This is rightly supported by the majority of the judges in the *Mahama* case.

## 5. OVERVIEW

The confusion over the standard of proof in presidential petition cases is unnecessary and unacceptable. Whilst some might agree with the view of Denning LJ in *Bater v Bater*, albeit in very different circumstances, that: “The difference of opinion which has been evoked about the standard of proof ... may well turn out to be more a matter of words than anything else”,<sup>54</sup> the issue is far too serious to adopt this approach. There is therefore no basis for applying anything other than the civil standard of proof.<sup>55</sup> However as Lord Rodger of Earlsferry noted in *Jugnauth v Ringadoo*,<sup>56</sup> in an election petition case “as a matter of common sense rather than law” a Court was unlikely to be satisfied on the balance of probabilities that there has been bribery without cogent evidence to that effect.<sup>57</sup> This point is reflected in the words of Lord Nicholls of

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<sup>52</sup> *Odinga* (n 16) [299]. Italics in the original.

<sup>53</sup> N 25.

<sup>54</sup> Ibid 36: a point noted by Odoki CJ in *Besigye v Museveni* (n 21) 8.

<sup>55</sup> It is argued that this principle also applies to the UK position and that the decision in *R v Rowe* needs reviewing.

<sup>56</sup> N 32

<sup>57</sup> [19].

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Birkenhead who explained in *In re H (Minors)(Sexual Abuse: Standard of Proof)*<sup>58</sup> that:

“... some things are inherently more likely than others... On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not”.<sup>59</sup>

Whilst bound by the earlier Court of Appeal decision in *R v Rowe*, it is unfortunate that the court in *Erlam v Rahman* did not take the opportunity to at least note this decision, perhaps with a view to having it applied in later election petition cases in the United Kingdom. Certainly, courts when faced with presidential election petitions should be encouraged to adopt this approach.

In the event, the petitioners in both presidential petition cases were unsuccessful.<sup>60</sup> However, disagreement over the fundamental issue as to the appropriate standard of proof to apply in such cases can only bring confusion and a sense of grievance on the part of petitioners and their supporters.

Overall, perhaps the most noteworthy aspect of the presidential petition cases is that the disputes were fought out in the courts and not in the streets. Further that the decisions of each court were respected by the unsuccessful petitioners. Accordingly the cases rightly “represent a necessary non-violent, constitutional move, worthy of commendation, to correct and secure the integrity of elections, hence, the future of democracy, peace, stability and development in Africa”.<sup>61</sup>

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<sup>58</sup> [1996] AC 563.

<sup>59</sup> *Ibid* 586. These words are in stark contrast to the view of the Court of Appeal in *R v Rowe*.

<sup>60</sup> In the *Mahama* case the Supreme Court of Ghana rejected the petition by a 5-4 majority with all the judges recognising that there had been irregularities in the electoral process. However, in the view of the majority, the number of votes affected was not so significant as to make any impact on the result even if they were annulled.

<sup>61</sup> A phrase drawn from the Danquah Institute *Report on the Presidential Election Petition in Ghana 2013*, 1: available at <http://www.danquahinstitute.org/news/1807-report-on-the-presidential-election-petition-in-ghana-23-february-2013-updated-18-march.html> (accessed 1 August 2015).