The Supreme Court And The Presidential Election Petition

Kwame Frimpong*

1. Introduction

The Supreme Court judgment of 29 August 2013 on the Presidential Election Petition raises both legal and jurisprudential questions that the nation has to confront for years to come. It is doubtful if the majority position of dismissing the petition ever took into consideration the wider implications for the promotion and the sustenance of the rule of law, constitutional development, the advancement of democratic aspirations of the country, and the wider national interest.

This commentary seeks to address those issues and argue that, the majority in the case failed to appreciate the wider national interest that the case sought to advance.

2. The issue(s) at stake

It is instructive to note that this case is unprecedented in the history of this nation, not only in terms of advancing our democratic aspirations, but also, more importantly, of establishing the rule of law, grounding transparency and accountability, and determining the course of justice. Justice Ansah stressed this point in the opening remarks of his judgment:

Without doubt, the resolution of this case portends much for the future path of our democratic development (at p. 51).

The question however is whether the majority of the judges recognised these important issues in their judgment.

The case even takes on a more fundamental significance in the socio-political history of the country, as a result of the infamous Supreme Court judgment in the case of Re Akoto.¹ As it may be recalled, this was a case in which, when the liberty of citizens was under consideration, the then Supreme Court adopted a narrow and cynical interpretation of a constitutional provision to deny a fundamental human right remedy to the aggrieved parties. This case did not only tarnish the image of the judiciary for failing in its primary role of serving the interests of the citizens,

---

* Professor of Law and Dean, School of Research and Graduate Studies, MountCrest University College.

¹ [1961] 2 GLR 523, SC
but also for exposing itself to criticism for delivering a bad judgment that has bedevilled this nation for over half a century. Most political analysts hold the view that if the Supreme Court at that time had decided *Re Akoto* on its constitutional merits the political history of this country would have been different. Many constitutional law analysts were therefore very hopeful that the Supreme Court in the Presidential Election Petition of 2012 would seize the golden opportunity to redeem its battered and sunken image, by taking a bold step in addressing the fundamental question before it, namely, confronting the issues of illegality, lawlessness, and impunity. Unfortunately this was not the case, as the golden opportunity was sacrificed on the altar of literally “endorsing illegality and act impunity.”

3. **The issues for the Court**

The Court and the parties agreed to address the petition on two issues:

I. Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential elections held on 7th and 8th of December 2012; and

II. Whether or not such violations, omissions, malpractices and irregularities, if any, affected the outcome of the said election.

On the basis of these broad areas agreed upon for the adjudication of the case, three specific issues were accepted as the petitioners’ grounds for electoral violations, malpractices and irregularities:

1. The absence of signatures of presiding officers
2. Over-voting, and
3. Voting without biometric registration

At the end of the day, they all boiled down to the determination as to whether Ghanaians have exercised their franchise and validly elected the president of the country. We need to state it authoritatively that it is only the will of the people of Ghana that determines who the president of the nation is. It is neither the Electoral Commission nor the Supreme Court that makes that decision. Article 63 (2) states:

> 163 (2) The election of the President shall be on the terms of universal adult suffrage...."
This position is further strengthened by Article 1 (1) which provides:

“1 (1) The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.”

The Electoral Commission’s mandate is to merely declare the will of the people. Similarly, if the Supreme Court is called upon to determine whether the declaration by the electoral Commission was in accordance with the laws of the land, its mandate is to determine whether Ghanaians have legally elected the president. It is not an exercise of the imposition of the subjective prejudicial views of the court on Ghanaians or the exercise of doubtful judicial interpretation of constitutional or statutory provisions to merely advance parochial interest. When any of those were to happen it would amount to the judiciary electing a president for the nation and not the exercise of the sovereign will of the people of Ghana. That kind of decision will amount to usurpation of the will of the people of Ghana.

In terms of the Petitioners’ claim, the primary duty on the court was to determine whether the president was validly elected in accordance with both the substantive and procedural laws of the country. It is worth noting that, as far as elections in Ghana are concerned, whether presidential, parliamentary or referendum, the laws regulating the conduct of elections fall under the 1992 Constitution, the relevant statutes and regulations. In the case of the 2012 presidential election the relevant regulations were under CI 75. It therefore necessarily follows that any determination as to whether a person is validly elected as the president or not must be based on the compliance with both the Constitution and the relevant statutes and regulations. Therefore if any judgment seeks to determine whether a person was elected the president or not it will have to pass the test of compliance with the constitutional, statutory and regulatory requirements.

4. The Judgment

I. Absence of Signatures of Presiding Officers

On the issue of absence of signatures on pink sheets by the Presiding Officers, Justices Atuguba, Adinyira, Gbadegbe, Baffoe-Bonnie and Akoto-Bamfo dismissed the petition on the ground that the failure of Presiding Officers to sign the pink sheets was simply the result of administrative errors that could not affect the validity of the election results. In the opinion of the majority, it was not only the presiding officers whose signatures were crucial, as there were polling agents at
Clearly the underlying purpose of the signatures of the presiding officer and the polling agents on the pink sheets is to provide evidence that the results to which they relate were those generated at the relevant polling station in compliance with the constitutional and other statutory requirements, otherwise each “signature in itself has no magic about it.” The evidence in this case clearly shows that absent the presiding officer’s signature, those of the polling agents are there. In those circumstances even if the failure by the presiding officer to sign the same is condemned as unconstitutional yet the polling agents’ signatures, the public glare of the count and declaration of the results in question, the provision of copies of the same to the polling agents and their sustenance at the constituency’s collation centre and all the way to the strong room of the 2nd respondent (the Electoral Commission) and the cross checking of the same thereat by the parties; representatives should satisfy the policy objective of article 49(6) regarding signature. Indeed the petitioners have not on any ground approaching prejudice of any sort questioned the authenticity of the results which do not bear the presiding officer’s signature. (At page 18).

In trying to equate the position of a polling agent with that of a presiding officer, Adinyira, JSC devoted two pages (139-141) to buttress her opinion:

[“There was evidence that some forms were unsigned by the presiding officers and the party agents. The Petitioners are requesting that the votes in these polling stations be annulled as the non-signing of the sheets by presiding officers is an infringement of Article 49 (3).

Counsel for Petitioners submits that:

“It should respectfully be noted that article 49 (3) does not place any premium on the presence of the signature of the agent on the declaration forms unlike that of the presiding officer. That is why it stipulates that “the polling agents (if any)” shall then sign the declaration form after the signing by the presiding officer.”

I find this argument misplaced as the words the ‘polling agents if any’ is taken out of context. To single out the words ‘the polling agents if any’ without reference to the remaining words in section 49(3) of article 49 would be a totally wrong approach to the interpretation of that subsection.
For it is important in interpreting a provision of a statute to take account of all the words used since the legislature is presumed not to have used the words unnecessarily. In *Halsbury’s Laws of England*, (3rd ed.) at pages 389 to 390, paragraph 583, states:

“It may be presumed that words are not used in a statute without a meaning and are not tautologies or superfluous, and so effect must be given, to all the words used, for the legislature is deemed not to waste its words or say anything in vain.”

It is also trite law that the overriding principle of statutory interpretation is that the “words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act.” E. A. Driedger,

*Construction of Statutes (2 ed. 1983)* at page 87.

Article 49(3) which states:

“The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating…”[Emphasis added]

In my opinion by the use of the commas in the sentence, the underlined words relate to referenda and the phrase ‘if any’ refers to the whole of the underlined words. This makes sense as voting in a referendum does not involve candidates vying for public office; but is usually to decide on constitutional issue(s) as was held in 1977 or 1978 on the issue of UNIGOV oron *(sic)* 28 April, 1992 for the adoption of the 1992 Constitution; or as the citizens of Ghana may probably be required do in the future for the amendment of some entrenched provisions of the Constitution following the recommendations of the Constitution Review Commission.

It is not envisaged that there would be or should be contesting parties in a referenda that is why the words ‘if any’ was used by the legislator. The phrase ‘contesting parties’ to me does not necessarily mean political parties. It includes any group of persons such as civil society, pressure groups, organised labour and civil rights activists who may choose to campaign on the issues that affect governance and civil rights of citizens or group of
persons; and also to be watchdogs at the polling stations.” (Emphasis added).]

It was not necessary for this long meandering argument. A proper construction of Article 49 shows that the entire provision covers both “public election” and “referendum.” Clauses (1), (2), and (3) of Article 49 read:

(1) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating –

It is to be noted that in Clause 2 of Article 49 “polling agents” appear as an addition to the candidates or their representative for both public election and referendum. But strangely, Adinyira JSC, in her reasoning and misleading art of construction wants us to exclude “polling agents” in public election. They may be appointed by the candidates in both public elections and referenda by the candidates so the use of the words “if any” is consistent with the simple understanding that they may not have been appointed. It should have been clear to Justice Adinyira that the confusion she created for herself is based on her misunderstanding of the entire Article 49. If she wants to be dogmatic with her construction then she should rather make a case for the insertion of a coma after “agents” in Clause (3). In that sense it can be argued that the drafts person omitted a coma after agents. In addition, there should be another coma after “and the polling agents.” The Clause would then read:

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents, and the polling agents, if any, shall then sign a declaration stating –

This makes more sense, as the “polling agents” are for both public elections and referenda.
Furthermore, Regulation 19 (2) of C.I. 75 makes it clear that it is at the discretion of a candidate for presidential election to appoint a polling agent. It reads:

“19 (2) A candidate for presidential election may appoint one polling agent in every polling station nationwide.”

Accordingly, the submission by the Counsel for the Petitioners that the presence of “if any” in Article 49 (3) suggests that candidates are not obliged to appoint polling agents at both public election and referendum is correct and Adinyira JSC’s reasoning on this is seriously flawed.

As far as Justice Adinyira is concerned polling agents and presiding officers should be put on the same level –

The violation and irregularities complained about were as a result of lapses on the part of presiding officers and polling/counting agents.

Justice Atuguba also had a similar position at page 16:

In this case it would be unfair and fraudulent for the petitioners to authenticate the results through their polling agents’ signatures and turn round to seek to invalidate on the purely technical ground of absence of the presiding officer’s signature.

Any attempt by Justices Atuguba and Adinyira to treat polling agents as part of the “Electoral Commission” to conduct elections in the country is misplaced and should be rejected, as that reasoning is inconsistent with rationale behind the creation of polling agents. The conduction of any election in the country is the sole responsibility of the Electoral Commission and its staff. A candidate in any election may choose not to appoint a polling agent, and even if one is appointed the one so appointed may choose not to be present at the polling station and yet an election can still take place. On the other hand, if a presiding officer is not at any particular polling station there cannot be a valid election.

When the counsel for the Petitioners sought to put high premium on the signatures of the presiding officers, Justice Atuguba in his judgment at page 18 doubted the significance of signatures, “signature in itself has no magic about it.” However at page 34 he contradicted himself by suggesting that signatures by polling agents should be given constitutional effect and authority:

The signatures of the polling agents to the declaration of results therefore have high constitutional and statutory effect and authority, which cannot be
discounted.

This obviously does not commend itself for a serious weight to be attached to the judgment. If we should not attach any value to signatures by presiding officers, who are mandated by the constitution to conduct elections, then it stands to reason, *a fortiori*, that signatures of polling agents need not be given any higher value.

Justice Owusu had a very authoritative way of responding to these flimsy and lame reasoning:

> The 2nd respondent told the court, that in spite of the failure to sign, he will accept the results because the polling Agents did sign. What is the role of the polling Agent at the polling station? (p.212).

She provides the answer at page 215:

> The polling Agent is not an electoral officer and the fact that he has signed the “pink sheet” cannot legalize that which is otherwise an illegality (emphasis added).

On the same issue Justice Anin Yeboah at pages 484-5 of his judgment had an emphatic answer to the position taken by the majority:

> From the evidence on record apparent on the pink sheets many political parties did not send agents or representatives to many of the polling stations. None of the parties herein is making a case out of that, in that, the interpretation one can put on Article 49(3) is that political parties are not bound under the constitution to send agents to the polling stations. Their absence at any polling station and for that matter not signing any pink sheets as representatives or agents of the political parties would not amount to any irregularities or malpractice in the electoral process. A close reading of regulation 19 Of C.1 75 that is The Public Elections Regulations 2012, in my view shows the limited vote (*sic*) the polling agents play at the polling stations. The polling agent does not have any major role to play in course of the elections. It is clear under regulation 44 of C. 1 7 (*sic*) that the non-attendance of the polling agent shall not invalidate the act or a thing done. The role of the polling agent is to detect impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing elections. (Emphasis added).
In effect, the position taken by the majority on the issue of absence of signatures does not have the support of sound judicial reasoning. For As Justice Ansah would point out at pages 71 to 72 of his judgment, the presiding officers through their signatures are representing the whole nation in declaring the results that would determine the election of a president:

In Presidential elections, a polling station is but a microcosm of the country at large where the whole country is a one constituency. A presiding officer at a polling station in a constituency is like a returning officer for the whole country in Presidential elections where there is only one constituency. If the presiding officer at a polling station shall fail to sign a declaration form at the end of a poll what shall it mean? Can the Returning officer in a Presidential election refuse to sign the declaration form and announce the results of the election and still hope it will still be accepted as valid? If the answer is in the negative, then it is to the same effect where a presiding officer fails to sign the declaration of results portion of a pink sheet at a polling station and so do I hold.

II. Over-Voting

On the issue of over-voting the majority held the view that even if there were cases of over-voting; the error was of no significance as to affect the outcome of the election. In reaching this conclusion some of the judges adopted a sarcastic view and even trivialised the whole issue of over-voting – whether to classify it as over-voting or ballot stuffing. Even though the Electoral Commissioner had stressed that once there is evidence of over-voting, even if it is by one vote, the credibility of the election should be treated as compromised, the majority disagreed with this basic principle in elections and held the view that over-voting should never be a factor for annulling any election result unless it can be shown to have in fact affected the result. Justice Adinyira argued:

This brings me to the issue:

*Whether the over-vote if any should lead to an annulment of the total votes cast at the polling station?*

This Honourable Court was invited to advert its mind to the fact that, in an election at a polling station shown to have been affected by over-voting, it is not possible to determine which of the votes cast constitutes the invalid votes and, therefore, which votes cast count as the lawful votes. The practice, therefore, has been to annul all the results of the polling stations
where they are proven to have occurred

I do not subscribe to this suggestion and its application in this case. In seeking to annul votes, it needs to be clear which polling stations are being called into question. The confusions about exhibits have undermined their case. As there is insufficient clarity on the polling stations in question, the attempt to annul certain votes cannot even get off the starting blocks. Moreover the few instances of over-voting that was demonstrated during the hearing, going by the average of those votes; there is no mathematic chance that the results in those polling stations would change the outcome of the results at the polling station. Even if the aggregate of the actual over-vote in polling stations where over votes is established and proportionally deducted from the votes of each candidate, it would not affect the results. Even if they are deducted from the winning candidate’s vote it would still not affect the votes.

My brethren who took the position that there was over-voting and so the votes are to be annulled for a re-run of polls in the affected were unable to ascertain and provide the total number of over votes from the pink sheets for me to change my position on this claim.

The Petitioner could not establish to my satisfaction whether the number of votes cast in these polling exceeded the number of registered voters as indicated in the Voters Register. They had copies of those registers but only produced one to show there was double registration at the Mampong Anglican School.

The Petitioners have not led sufficient evidence for me to come to the conclusion that there was clearly a mathematical chance that the results could change then the votes would have to be annulled and a re-run held. But then in many instances the over-voting was either one or two, and certainly that cannot lead to annulment of the entire votes.

Dr Bawumia referred to a statement made by Dr Afari-Gyan before the election that if the ballots are counted at the end of the day and it is found that even one ballot exceeds what was issued to voters verified to vote; the results of that polling station would be annulled.

I find this pronouncement disturbing as it is not based on any statute or any constitutional instrument made by him as he is empowered to do under
Article 51 of the Constitution. The directive that an over vote by one ballot would invalidate the whole results of a polling station when despite the over vote a winner is clearly ascertainable, is contrary to both the letter and the spirit of the Constitution and contravene articles 42 on the right to vote (pp. 168-169).

The difficulty that Justice Adinyira created for herself was self-inflicted, as she seemed to be conflicting herself. At page 171 she argues:

“I absolutely affirm the concept that over-voting debases and dilutes the weight to be accorded each individual vote. So where in Lamb v. McLeod (1932) 3WWR 596, cited by counsel the subject matter of the complaint was the validity of 17 votes in an election where the margin of victory between the candidates was only 5, the court rightly in my view annulled the votes on the grounds, inter alia, that:

“It cannot be said that there was an electing of a Member of Parliament by the majority” as the intrusion by wrongdoers made “it impossible to determine for which candidate the majority of qualified votes were cast”.

However, it is my considered opinion that with the margins of over-vote involved in each of the impugned polling stations, it was possible to determine the winner at each polling station where over-voting occurred and accordingly Lamb vs. Macleod is inapplicable to this case.

The Plaintiffs have not been able to discharge the burden of persuasion in accordance with the Evidence Act. Accordingly I would also dismiss this category of irregularity.”

If we “affirm the concept that any form of over-voting debases and dilutes the weight to be accorded each individual vote,” then we cannot at the same time hold the view that where over-voting takes place we cannot annul the election result of a station where over-voting has taken place, simply because the margins of the over-voting are insignificant. In Justice Adinyira’s opinion,

“...in many instances the over-voting was either one or two, and certainly that cannot lead to annulment of the entire votes.”

Some questions that need to be answered are, how do we know who is responsible for over-voting; how do we determine whether the votes are genuine or not; and
how do know for whom the wrong vote was cast? Since there are no answers to those questions the credibility of any such election is compromised and cannot be said to provide a basis for clean and transparent election, especially if it is for the election to highest office of the president of a nation.

III. Voting Without Biometric Registration

The majority also dismissed the Petitioners’ claim of voting without biometric registration. Even though the Electoral Commission and all the contesting Parties in the Presidential and Parliamentary elections had agreed that biometric verification was mandatory for all voters, the majority was to treat it as a non-violation of an electoral requirement for a valid election. Justice Atuguba, for instance, dismisses both the over-voting and voting without biometric verification allegations as not impacting on the declared results:

In the circumstances I do not think that the petitioners have established their allegations of over-voting and voting without biometric verification, except to the limited extent admitted by the Electoral Commission’s chairman, which cannot impact much on the declared results (at p. 28).

Here also, it is clear that the position taken by the majority amounted to disregarding the regulations for the election and ignoring the basic reality of what actually transpired during the election.

5. Some Implications of the Judgment

It appears from the way the majority decided the case they were simply determined to decline the petitions and therefore simply wanted to undertake some legalistic excursion to support their position. It can easily be inferred from justice Atuguba’s position that the general practice is to uphold elections and not annul the same. For him this is purely in the public interest to uphold such elections:

For starters I would state that the Judiciary in Ghana, like its counter parts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it.

With this kind of attitude it was obvious from the onset that all efforts would be made to endorse the obvious illegality imposed on the Ghanaian people. It can
easily be deduced from so many pronouncements in the majority opinion that their primary objective was to validate the election and therefore would find any justification, however infantile, weak and doubtful in nature, to declare the election as valid. In total, it can be argued that the majority simply endorsed illegality and abandoned the principle of the rule of law in favour of lawlessness and impunity.

The danger with this judicial jingoism is that the judgement sets a very dangerous precedent for Ghana. The majority wants Ghana not be law abiding but to uphold illegality even if violates the Constitution, the supreme law of the country.

What the majority failed to realise is that by their judgment they are putting themselves above the Constitution, which is the very source of their positions and powers as the Judges of the Supreme Court and other members of the judiciary (Ref. Chapter 11 of the 1992 Constitution). As Justice Amissah has stressed in a Botswana case:

No institution can claim to be above the Constitution, no person can make any such claim.” Attorney-General v. Dow [1992] BLR 119, at p. 129 (Emphasis added).

By refusing to declare unconstitutional acts that infringe the constitution, to which they have sworn oath, the majority is declaring themselves to be above the constitution.

The Constitution in Article 1 (2) entrenches the supremacy of the Constitution and expects any laws, actions and omissions that are inconsistent with any provision of the Constitution to be held invalid.

The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void (emphasis added).

That responsibility of declaring any act to be inconsistent with the provisions of the Constitution lies on the Supreme Court, as Article 2 confers on the Supreme Court the power to enforce the Constitution:

2 (1) A person who alleges that -

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person;
is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made (emphasis added).

Therefore when most of the majority members were unwilling to annul the unconstitutional and an illegal election under the pretext of disenfranchising the electorate, they were merely hiding under a flimsy reasoning and failing to appreciate the wide discretionary powers conferred on the Court in the said Article 2 (2). If they were to annul an election they could equally order a re-run of the entire presidential election or of those affected areas. When that approach is adopted disenfranchisement would not arise.

A careful assessment of the position taken by the minority shows that they were more concerned with the desire to uphold the rule of law and for that reason, the Constitution, being the Supreme law of the land, must prevail. Justice Anin Yeboah for instance adopted an emphatic position:

It should also be noted that all elections here and elsewhere, especially in constitutional democracies are regulated by statutes. It is within the limits of the statutes that elections elsewhere and in this country are conducted. In the very recent case of REPUBLIC V HIGH COURT (FAST TRACK DIVISION) ACCRA; EX-PARTE NATIONAL LOTTERY AUTHORITY (GHANA LOTTO OPERATORS ASSOCIATION & OTHERS INTERESTED PARTIES) [2009] SCGLR 390 at 397 the worthy president of this court ATUGUBA JSC said:

"It is communis opinio among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute such as Act 722 s 58(1)-(3) is unless expressly or impliedly provided a nullity." (At p. 471).

The question is if a court of law does not give effect to the law who will?

In the above-cited case, Date Bah JSC, one of the most illustrious and lucid exponents of our contemporary judiciary said at page 402 as follows;
"No judge has authority to grant immunity to a party from consequences of breaching an Act of parliament. But this was the effect of the order granted by learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of parliament by their orders. The end of the judicial oath set out in the second schedule of the 1992 constitution is as follows: 'I will at all times uphold preserve protect and defend the constitution and laws of the Republic of Ghana: ... is entirely inconsistent with any judicial order that permits the infringement of an Act of Parliament"

In my respectful opinion any attempt to endorse a clear illegality in the nature of over-voting which is contrary to and inconsistent with our constitution and the constitutional instrument made thereunder would itself be unconstitutional in the sense that it would defeat the principle of Universal Adult Suffrage stated in our constitution.

I am of the opinion that no matter the number of votes involved that may constitute over-voting; it is a clear illegality and should not be endorsed by a court of law, more so by the highest court of the land. I will therefore proceed to annul all votes which were proved by the petitioners to be so. The figures and the polling stations would be addressed later in this delivery. (At p. 472). (Bold, italic and underlined added).

Justice Anin Yeboah was even more assertive at page 479:

The requirement of the presiding officers signature on polling stations declaration forms or Pink Sheets emerged as a constitutional requirement for the first time in our post-republican constitution of 1992. As a country with a desire to entrench democracy based on universal adult suffrage and transparency and accountability the framers of the 1992 constitution had cause to debate and insert this very important provision in the constitution. Care must be taken to avoid any attempt to multiply words through linguistic manipulations to deny it effect as a constitutional provision, entrenched for a purpose.

One other important point worth noting is the attempt by the majority, through the opinions, particularly of Justices Atuguba and Adinyira, to decline the petitions on the ground of purposive approach to the interpretation of statutes or constitutional provisions. The main substance of their reasoning is that a literal interpretation
would have to yield to a liberal or purposive one if a strict adherence to the literal approach would result in either absurdity or injustice. A series of cases were cited to support this position. What however seems to have eluded Justices Atuguba and Adinyira, the proponents of the purposive approach to interpretation, is the fact that it is used primarily to **either avoid absurdity or prevent injustice**, as they rightly pointed. All the authorities they cited point to that approach. **There is no precedent, as there has never been an attempt by the judiciary within the common law jurisdiction at any point in time to use the purposive approach to justify illegality or validate an illegality.** None of the two eminent Judges cited any authority in which the purposive approach has been used to defeat justice, or entrench injustice or to perpetuate absurdity. As any average law student knows, this approach to statutory interpretation is also referred to as the mischief rule, which seeks to address or remedy a mischief. **It is never used to defeat the ends of justice. It is for the first time that a superior court, in the history of the common law, has resorted to the purposive approach to interpretation in order to endorse illegality.** A precedent indeed!

The illegality stems from the fact that there are acknowledged violations and illegalities, which cumulatively deny the Ghanaian people the right to determine their president. Those violations had occasioned a flawed presidential election. All that the petitioners are seeking is the annulment of the election to allow Ghanaians to determine who their president should be. To suggest that a purposive approach is to be used in order to sustain the election whose credibility is seriously in doubt is to misunderstand the simple meaning of the purposive approach to interpretation.

6. **Granting of Reliefs**

We see completely different approaches to the reliefs sought by the petitioners. On the one hand the majority would decline the reliefs sought by the petitioners but would readily endorse the declaration that the president was validly elected, even when they acknowledged the existence of widespread cases of violations. So in effect it was the Supreme Court that was determining who the president of Ghana is, by virtue of their refusal to annul the election, even though there were violations.

On the other hand, even when the minority was prepared to grant the reliefs sought by the petitioners, none was prepared to grant a relief that would usurp the right of the Ghanaians as the sole authority to determine the president of the country. Accordingly Justice Ansah would decide:
I make the following conclusions and directions:

1. That the relief that a declaration be made that Mr. John Dramani Mahama was not validly elected the president of Ghana, is hereby granted;

2. That a declaration be made that Nana Akufo-Addo be declared the candidate who was validly elected the President of Ghana, is also refused.

3. The consequential order I make is that the E.C. conducts a re-run of the presidential elections for the two leading candidates, Mr. John Dramani Mahama and Nana Akufo-Addo, in all the polling stations affected and indicated in the petition and its supporting documents, forthwith. (p. 101).  

(Emphasis added).

Justice Anin Yeboah made the point clearer:

I would have readily proceeded to grant the reliefs sought in its entirety but the ONLY problem is that from the available evidence, the widespread violations, omissions and malpractices appeared to be of such proportions that it would not be proper for me to declare the first petitioner as winner of the elections in controversy in terms of the reliefs sought. I find the malpractices, omissions and violations enormous which rock the very foundation of free and fair elections as enshrined in our constitution which was itself breached through over-voting, lack of presiding officer's signature and lack of biometric verification which takes its validity from Article 51 of the very constitution.

I would therefore grant the relief (i) in view of the evidence led and decline to grant relief (ii). I, however, as consequential order, order the second respondent to organize an election to elect a president as I cannot rely on an election which was seriously fraught with all the malpractices, irregularities and statutory violations proved in this petition to declare the first petitioner as having been duly elected. (pp. 505-6). (Emphasis added).

Presumably in response to the claim that by annulling the election results Ghanaian voters would be disenfranchised, Justice Owusu offered a practical way forward
along the same lines as Justices Ansah and Anin Yeboah:

For this reason, I will not by annulling votes under the three categories indirectly deny the voters their fundamental and inalienable right to vote as enshrined in the constitution.

Consequently, where votes have been annulled as a result of violations, irregularities etc, I will call for a run off of the elections. (p. 218). (Emphasis added).

She rather chose the path that would give the Ghanaian people the right to choose their president:

For this reason, I will and hereby declare that the 1st Respondent was not validly declared winner of the 2012 presidential election. The first relief of the petitioners is hereby granted.

The 2nd relief for a Declaration that Nana Addo Dankwa Akufo-Addo the 1st petitioner herein rather was validly elected president of the Republic of Ghana cannot be granted because of the order for re-running the election in polling stations where the votes are to be annulled. The 3rd relief has been granted in the polling stations where the election is to be re-run. The petition succeeds in part. (pp. 231-2). (Emphasis added).

7. Some Disturbing Aspects in the Case

A serious objective assessment of the case shows that the reputation of the Supreme Court has been seriously marred by the way and manner in which it was handled. There were several instances where flaws could be detected.

1. Among other things one can refer to the length it took the Supreme Court to handle a case of this great importance to the nation. Justice Adinyira in her judgment at page 104 conceded the importance of adjudicating a case within a reasonable time:

Electoral Justice gives people who believe their electoral rights to have been violated, the ability to make a complaint, get a hearing, and receive adjudication within a reasonable. (Emphasis added).
One wonders whether this case was adjudicated within a reasonable time. For a case that seeks to invalidate the election of a president it does not commend itself to any reason for it to have taken eight months for it to reach finality. To have allowed a person to remain in office as a President for a period of eight months and still be expected to be removed on the ground that he was not validly elected was not only utopian, but also sheer fanciful expectation. Presumably this was to legitimize his position and therefore comply with the position of Justice Atuguba 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.

2. The joining of the National Democratic Congress (NDC) to the case was not necessary. It contributed substantially to the delay.

3. Another major flaw was the way the proceedings were handled. The Supreme Court forgot its role as a superior court of law and not a criminal trial court. For a constitutional litigation, the approach is different from how proceedings are conducted in typical criminal proceedings.

4. The Court became obsessed with the desire to establish its authority by visiting contempt sanctions on some selected individuals. It has to be stressed that reverence is earned, but not enforced. It is through actions and omissions that a court may lose respect of the people who are the beneficiaries of the court’s authority. Any selective application of the contempt law is the one that brings the court even into more disrepute. The Supreme Court must understand that it is through such doubtful decisions as the current one that leads to the disrespect for the court. If anything at all, it can be argued that it is the Supreme Court that has acted in contempt of the people of Ghana, by usurping their right to democratically choose their own president legally in a transparent and credible election.

5. The Court lost credibility in the eyes of many Ghanaians when it turned a blind eye on the conduct of some parties, by treating them with kid gloves, while treating others harshly. The comment by Mr. Justice Anin Yeboah at pages 462-463 do not augur well with the Court. He lamented:
I must confess that I was very uncomfortable with the way and manner this highest court of the land was left unassisted by the second respondent in whose custody the original pink sheets are kept. It appeared from the reports of the official referee that as many as 1,545 of the pink sheets supplied by the petitioners as filed exhibits were not legible. In a serious matter in which the mandate of the entire voters of this country is being questioned through a judicial process one expected the second respondent as the sole body responsible for the conducting of elections to have exhibited utmost degree of candour to assist the court in arriving at the truth. Surprisingly, the second respondent opted for filing no pink sheets leaving this court unassisted and thereby placing reliance only on the pink sheets supplied to the agents of the petitioners at the various polling stations in issue. Why the second respondent elected to deny a court of law in search of the truth in a monumental case of this nature is beyond my comprehension. I think this must be deprecated in view of its constitutional autonomy granted to it to perform such vital functions under the constitution for the advancement of our democratic governance. The second respondent strongly resisted an Application to produce Documents for inspection filed by the petitioners The Results Collation Form which are in the exclusive custody of the second respondents were never exhibited, indeed not a single constituency collation form was before the court This court was thus left to consider only the pink sheets supplied by the petitioners which were copies of the original.

If one may ask, where was the Supreme Court when a party whose failure to fulfil his constitutional mandate had put the country in an election mess, could blatantly refuse to disclose public documents under his control, especially when those documents would help address the very issue before the court?

8. Conclusion

The failure of the Supreme Court to annul the 2012 presidential election leaves the country with many unanswered questions. The central issue was to determine the validity of the 2012 presidential election. Even though constitutional violations and many irregularities were admitted in court to have occurred, the Supreme Court, in
the majority opinion, concluded that they were not sufficient basis for the annulling the election. The danger with this decision is that it endorsed illegality at the highest level and leaves the country in a state of helplessness – whether litigants in constitutional matters of this magnitude can put their faith in the Supreme Court. It reminds Ghanaians of an earlier Supreme Court decision in *Re Akoto*. It also reminds us of another earlier Supreme Court judgment in the *Kwakye Case*\(^2\) where the liberty of an individual was ignored by the Court in a very blatant way. We may be asking if we can trust our Supreme Court to protect us against abuses by those placed in authority over us. The judgment, to a greater degree, sends the country back to the Stone Age, where the end can always justify the means.

The judgment in the 2012 election petition has clearly demonstrated that constitutional litigation should be taken seriously in the country. It has also exposed the weaknesses in our approach to addressing election petitions, particularly in the area of presidential election. It is accordingly recommended that a serious effort should be made to introduce a constitutional court in the country along the lines of the existing practice in South Africa. Such a court would be in a unique position to address future constitutional issues, including presidential election petitions.

\(^{2}\) [1981] GLR 944