

Unwelcome evidence

FROM THE MOMENT THE ELECTORAL COMMISSION OF KENYA announced the results of the 2007 presidential election, Kenyans for Peace with Truth and Justice (KPTJ) lobbied for an independent investigation into them.

KPTJ believed, as it does now, Kenyans have a right to know what had, in fact, happened to their vote. That lobbying, in part, led to the formation of the Independent Review Commission – a bi-partisan investigation with independent leadership. KPTJ expects the IREC to provide answers for the questions around the 2007 elections.

In this special edition of *Truth & Justice Digest*, KPTJ puts in the public domain its analysis of the 2007 elections. It was prompted by a chain of events, among them the unusual delay in announcing the results, the loud complaint by no less than the ECK chairman about ‘cooking of the results’ (paraphrased), and the resignation from the ECK’s tallying centre of a member of staff saying he could not abide with what he had witnessed. Further, four of the five domestic observers allowed into the ECK’s tallying centre on the night of December 29 and 30 made a reports to us, which has been transcribed into affidavits and also used as the basis of a narrative that lists anomalies and irregularities attending the presidential election results.

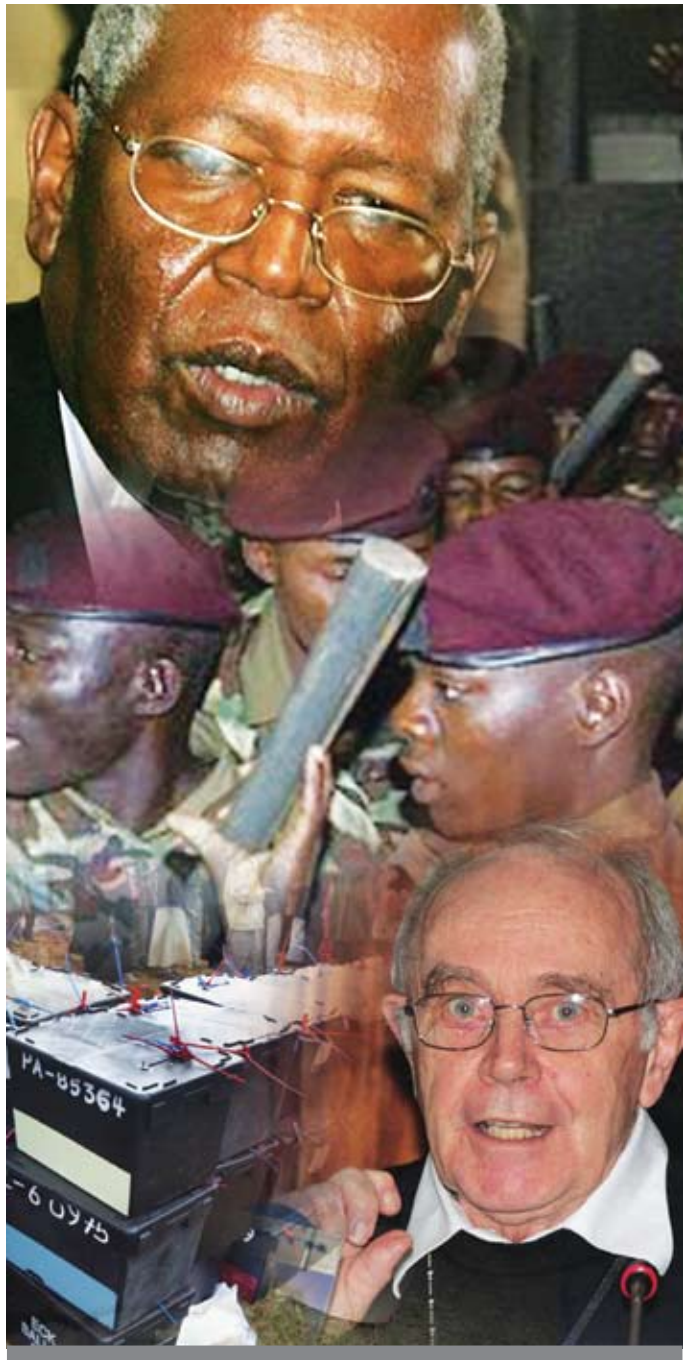
All domestic and international teams that observed the 2007 General Election up to the point of tallying have found that it did not produce credible results.

KPTJ’s own post-mortem analysis of the ECK results revealed tendencies consistent with vote rigging. There is no consistency in results documents from the constituency level. A number were difficult to read or contained numerous errors, such as lacking dates, signatures and ECK stamps. One single form needs to be adopted with standardised recording and verification procedures. Any form not meeting such procedures should be considered invalid and those responsible for errors considered for prosecution under the criminal charge of falsifying public documents.

Differences existed between the results registered on constituency result documents and what the ECK ultimately published as results. Since the ECK is the source of both numbers, these discrepancies are a cause for concern and should be investigated, with a view to prosecution under the criminal charge of falsification of public documents.

Detailed recommendations have already been made to IREC. These recommendations reiterate KPTJ’s belief that what is required of the ECK is not just competence and skills, but also accountability and independence.

It is important that IREC produces not just recommendations but practical measures - legal and administrative - that can be taken to enhance the ECK’s accountability to the public (rather than to the Executive) and its independence (from all



political interests) as well as improve its enforcement powers. Parallel vote counting, tallying and reporting by the media and observers (both domestic and international) should be entrenched in the law. The media that failed to report their tallies as planned in 2007 should be investigated to determine why they did not. There must also be a law to protect exit polls. The data from the University of California’s exit poll remains the only reliable check on the ECK’s official results, and it demonstrates discrepancies with the same.



COUNTDOWN TO DECEPTION: 30 hours that destroyed Kenya ... Election observers log of what happened before the big announcement

THE FOLLOWING ACCOUNT LISTS ANOMALIES, malpractices and illegalities drawn from the statements of four of the five domestic election observers allowed into the verification process the night before the announcement of the 2007 presidential election results.

Saturday, December 29, 2007

1.43pm: Some ECK Commissioners express concerns to IED director Koki Muli about long delays in receiving results.

4pm: ECK boss Samuel Kivuitu suspicious of discrepancies and begins to contemplate a re-examination of results.

6pm: The day teams leave without properly handing over to the night teams. Kipkemoi Kirui, deputy leader for Team II (night) notes that results for Lamu East, Lamu West, Wundanyi and Dujis have come in without Forms 16A, 16 and 17A and refuses to receive them.

7pm: The tallying centre sets up 10 teams to verify and forward constituency results to the computer team. Each team is working on about 21 constituencies.

8-9pm: Observers denied access to the tallying room at KICC. ECK Chair and Secretary intervene to let them in.

10.37pm: ODM's James Orenge insists that results for all 210 constituencies be reviewed while PNU's Martha Karua wants scrutiny to be limited to Forms 16A of contested constituencies only.

10.47pm: All results for the presidential election are in except for 14 constituencies. Documents for these constituencies' returns have serious anomalies, including:

- returning officers not signing forms;
- party agents not countersign forms;
- only photocopies of forms available, in some cases;
- some forms don't have ECK stamp, so are not valid;
- most returning officers phone in different results from what they deliver in person.
- although the law and ECK Regulations require the commission reject results that show 100 per cent and above voter turnout, Maragwa has a 115 per cent voter turnout and returning officer allowed to reduce it to 85.24 per cent.
- ECK senior staff and Commissioners accept results from Kipipiri, Starehe, Kinangop, Garsen, Turkana Central and Turkana North and Kajiado North without proper documentation.

A total of 44 constituencies did not have original signed, countersigned and stamped documentation for the election results. They included Gatundu South, Makadara, Likoni, Kaloleni, Galole, Lamu East, Wundanyi, Malindi, Voi, Ijara, Dujis, Igembe South, South Imenti, Nithi, Kitui West, Kitui South, Mwala, Kinangop, Ol Kalou, Mukurweini, Juja, Githunguri, Kiambaa, Lari, Eldoret East, Baringo East,

Baringo Central, Laikipia West, Nakuru Town, Naivasha, Kuresoi, Rongai, Kimilili, Bumula, Alego, Bondo, Kisumu Rural, Kasipul-Kabondo, Ndhiwa, Migori, Kuria, Bomachoge, Bobasi, Nyaribaru Chache and Kitutu Masaba.

Results for Dagoretti constituency were announced while vote tallying was still in progress. Documents for Kinangop, Kipipiri, Ol Kalou, Ndaragwa, Tetu, Kieni, Mathira, Othaya and Ndaragwa had no ECK stamp. There were no signatures and stamps on most results documents from Nithi, Kitui West, Kitui South, Mwala, Kinangop, Ol Kalou, Mukurweini, Gichugu, Lari, Mathioya, Eldoret East, Mosop, Aldai, Baringo East, Baringo Central, Laikipia West, Naivasha, Nakuru, Kuresoi, Kajiado North, and Kajiado South.

There were 34 unsigned results documents for Mathira. The total presidential tally of returns for the constituency was actually 77,442 votes against the 80,024 announced by the ECK.

ECK announced results for the following constituencies without proper results documents –Makadara, Starehe, Likoni, Malindi, Galole, Wundanyi, Ijara, Lamu East, Voi, Dujis and Igembe South.

Results from Kimilili, Bumula Alego, Kitutu Masaba, Nyaribaru Chache, Bomachoge and Kuria constituencies were also announced without documentation.

Returning officers claim they could not find the original files for Kieni, Ol Kalou and North Imenti.

11pm: Close to midnight, the returning officer from Moyale arrived, without election results documents. Hours later, the ECK chair announced Moyale, Saku and Laisamis results, which an election official (Kirui) had declined to receive. The Kipipiri results reported on the telephone give 36,470 votes to Kibaki against the 37,315 announced by the ECK. The final tally on file shows 37,279 votes.

Sunday, December 30, 2007

1 am: A ECK senior staff member tells Muli outside the hall that it is important for observers to scrutinise all returning officers' returns and also cautions her that the discrepancies are not accidental but have been planned.

2am: The only constituencies without results are Kibwezi and Emuhaya. ECK Chair announced the results the following day.

Kirui's raises the alarm about discrepancies to his Team Leader, [...] Njuguna, who tells him to leave if he so wishes. Kirui leaves the ECK offices for the last time.

4am: Observer Julius Melli asks for the Nithi constituency file, but the returning officer grabs it and holds it close to his chest. He goes outside, carrying all his documents with him. 5am: Molo constituency returning officer provides results showing that Kibaki has 50,145 votes at completion

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'The best evidence ... other than the ballots'

AFTER CASTING THEIR BALLOTS ON DECEMBER 27, 2007, SOME 5,495 KENYANS in all the eight provinces stepped out and found researchers who wanted to interview them on how they had voted. The interviewees were selected at random – meaning that everyone who voted had an equal chance of being chosen – from 179 of the country's 210 constituencies and covering all the districts but two.

Respondents were asked 30 questions whose answers revealed who they had voted for and why, as well as their perceptions and attitudes.

The exit poll was designed and conducted by American scholars with help from a local firm, but its results would be kept away from the public for six months (due to a contractual agreement between the poll's partners).

James D. Long, a doctoral degree candidate at the University of California, San Diego, and the chair of that university's political science department, Clark Gibson, designed and supervised the exit poll. They hired local pollster Strategic Public Relations and Research to conduct it.

Raila Odinga: 46.07%
Mwai Kibaki: 40.17%
Kalonzo Musyoka: 10.22%

Just what did the exit poll say?

It says the wrong candidate was sworn in as President. In the presidential race, Raila Odinga beat Mwai Kibaki by 6 percentage points, according to the voters interviewed.

The exit poll found that 46.07 per cent of the voters chose Raila as President while 40.17 per cent had picked Kibaki, and another 10.22 per cent settled for Kalonzo Musyoka. The official results gave Kibaki 46.42 per cent of the vote against Odinga's 44.07 per cent.

Exit polls allow researchers to match attitudes and evaluations with vote choice and are often used to check if the results of an election do hold up to scrutiny. Writing in the July issue of the respected *Journal of East African Studies*, Nic Cheeseman of Oxford University calls the IRI exit poll "the best evidence available bar the actual ballots themselves".

The International Republican Institute, a US government-funded organisation, had paid for the poll and refused to release the results, saying that it could not trust it. IRI has since backtracked on its position and said the exit poll is accurate.

Besides estimating the votes that candidates would receive, the exit poll also found that voters preferred Raila on the creation of employment, majimbo (regional government), fighting corruption, reforming the constitution and bringing new ideas to government. Kibaki, on the other hand, scored highly on delivering education, economic growth and bringing experience to government.

The spread of the sample – distributed across constituencies in all but two districts – enabled the pollsters to predict how each candidate would fare in reaching the 25 per cent vote threshold in five of the eight provinces to be validly elected.

Although the official election results show that Kibaki only missed the 25 per cent threshold in Nyanza and Raila in Central and Eastern Province, the exit poll tells another story. Kibaki only definitively reached the 25 per cent vote threshold in four provinces: Nairobi, Eastern, Central and Rift Valley, according to the exit poll.

The poll also explodes a common myth about the 2007 election and the extent of tribal voting. In fact, it finds that while ethnicity might have played a role in the election, the public's assessment of government performance as well as expectations of what it would do drove voting behaviour.

The exit poll shows that Kenyans' choices were not fully respected by the outcome. These polls are an important check against official results when those results are called into question—as they were in this election. But, of course, they need a timely release. The important discrepancy between the exit poll's results and those announced by the Electoral Commission of Kenya argue heavily in favour of much-needed institutional reform if the ECK is meant to conduct further elections.

Kenya election observers' log

(CONTINUED FROM PAGE 2)

of counting but ECK prepares to announce 75,261.

Observers at the ECK tallying centre at KICC who take a break from the tallying room or come in to relieve their colleagues on night duty are barred from entering.

9.30am: A message goes out on the public address system asking all agents to leave the premises.

Observers are also ordered out and forcibly removed.

10am: An ECK media briefing scheduled to announce presidential results is put off indefinitely.

11am: ODM presidential candidate claims at a press conference that he has won the election.

2.21pm: ODM holds a press briefing at KICC and discloses rigging by the ECK in 48 constituencies.

4.20pm: Kivuitu attempts to announce the final results of the presidential election, starting with announcing those for Molo as 75,261 and is shouted down by ODM members. ECK Commissioners leave the briefing centre under police escort.

4.42pm: ECK staff member Kipkemoi Kirui tells an ODM-convened press conference that the poll results and documents are being manipulated at the tallying centre.

5pm: A signal goes out to the diplomatic corps that the ECK is about to announce the results.

5.39pm: Paramilitary police clear KICC as the ECK Chair announces, via the public Kenya Broadcasting Corporation and picked up by other networks, that Kibaki has won the presidential election.

6.24pm: Kibaki is sworn in as President at State House in Nairobi as protests erupt all over Kenya. A live press conference by ODM is pulled off air as the Minister for Internal Security suspends live broadcasts.

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UNWANTED EVIDENCE: Expectations that the presidential race would be close may have tempted both the government or Party of National Unity (PNU) and the main opposition or Orange Democratic Movement (ODM) to participate in fraud.

AS COUNTING OF VOTES PROGRESSED AFTER POLLS closed on the evening of December 27, 2007, members of political parties, accredited observers, both domestic and international, as well as civil society organisations and ordinary citizens lodged allegations of rigging.

Electoral Commission of Kenya members, including their chairman, also cast aspersions on the results. There were instances when the Commission had two different figures (high and low) for the same constituency.

No single methodology or element of analyzing the figures employed "proves" fraud. It is not possible either to assign blame on any party, candidate, or individual. However, a variety of techniques and sources of numbers used in this analysis reveal startling anomalies in the vote count.

There are various inconsistencies within the ECK results on their own, as well as when they are compared with other sources of information. A problem in any one of the areas highlighted deserves scrutiny.

An examination of "Forms 16A," -- the forms that show the final tally from polling stations at the constituency level, filled out by returning officers and submitted to the ECK headquarters in Nairobi -- reveals a number of problems in the way they were filled out and submitted.

Next, results reported by media organisations compared with official results do not tally. Lastly, there are the two problems of voter turnout. Suspiciously high turnout may have helped to inflate vote totals for candidates. Differences in turnout between the presidential and parliamentary elections result seem to confirm the first supposition. Statistical tests based on prior voting behaviour in Kenya can be helpful in highlighting a number of irregularities, as well as suggesting whether these irregularities tend to bias in favour of any one candidate, and whether or not such bias is by enough votes to switch the result.

Although there is a consistent bias in favour of President Kibaki, statistical analysis cannot place blame for malfeasance on any one party, candidate, or individual.

It does, however, underscore a number of problems that existed within the ECK and ought to urge policymakers and politicians to reform that institution. Moreover, for a complete understanding of what took place in Kenya's 2007 elections, our statistical analysis should be bolstered by detailed and investigative information gathered from the people involved at all levels of the vote count, from polling

stations, constituencies, and headquarters of the ECK.

II. Anomalies in Forms 16A Submitted to ECK

Examination and scrutiny of the ECK's results documentation is at the crux of arguments for electoral reform. Forms 16A hold the tallies from all of the polling stations within a constituency, and therefore list the final presidential tallies at the constituency level. Although not necessarily indicative of fraud, a number of problems are notable across the submission of these forms.

Not all returning officers used the same form and none of them followed a standard format with candidate names pre-printed in the same order. Therefore, every sheet followed a different method of listing the candidates and their totals. Many of the candidate names, written in by the returning officers, were difficult to read, as well as the total votes for each. This makes tallying more difficult and potentially prone to errors. Two forms had no signature from returning officers¹, six forms were not dated and one form was 'dated' December 20th³. Some 39 forms (or 19 per cent of constituencies) never received a stamp from ECK headquarters showing that the Commission ever officially received the results in Nairobi. Some forms also included totals that had been crossed out and revised, which may have been accurate corrections from prior mistakes made by the returning officers, but which may have also led to confusion and led observers to think that the vote totals had been altered.

Important differences exist between the numbers given on the Forms 16A and the results published by the ECK. In 24 constituencies, there were discrepancies between Kibaki's totals. In 21 of these constituencies, Kibaki registered more votes in the original tally than were published by the ECK, totaling 30,668 votes. In three, he registered more votes in the final tally than he did on the original forms, totaling 9,296 votes. The total difference in votes is therefore 39,964 and the net difference, or "loss," between original 16A forms and the final ECK results of 21,372.

Raila's differences in totals occurred in 27 constituencies (18 overlap with Kibaki's differences in totals).⁴ In 21, he had more votes in the original tally than were ultimately published, totaling 8,257 votes. In six, he had more votes in the final publication compared to the original tally, for a total 11,216 votes. The total difference in votes is 19,473 and a net "gain" of 2,959 votes from the original to the final

¹Ndia and Eldama Ravine; although it is important to recognize that ECK officials in Nairobi could have appended signatures to forms where they were missing. That is, the existence of a signature is not proof that the returning officer provided it.

²Laikipia West, Laikipia East, South Mugirango, Bomachoge, Bobasi, Kitutu Masaba.

³Mukurweini; an impossible date as the election occurred on December 27th.

⁴34 total constituencies with Kibaki and Raila vote differences between constituency tallies and ECK publication.

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tally.

Aggregating all the vote differences for the two main candidates between Form 16A results and those published by the ECK does not produce enough of a difference to have changed Kibaki's official victory. However, the fact that Kibaki and Raila "won" and "lost" votes between the two tallies suggests problems at the constituency count, the ECK publication, or both.

III. Media Analysis

An innovation that helps lend credence to or challenges results certified and published by electoral commissions is to have the media monitor results as they are announced at the constituency level (by the election officials) to see if they ultimately match results published by the commission.

report a problem, 93 (45 per cent) did. This is quite alarming as it suggests the potential of counting or reporting errors in almost half of the constituencies.

The next columns show the votes "added" (e.g., "Kibaki+") between KTN's result and ECK's final published figures, as well as the amount "subtracted" (i.e., "Kibaki-") for all three candidates. That is, the "added" categories are those where the totals for the ECK exceed what KTN reported from the constituency count, and the "subtracted" categories indicate where the final ECK report had fewer votes than initially reported by KTN.

The first striking statistic is the total number of votes produced by differences in KTN and ECK figures across the three main candidates: 208,208. The second point to notice is that all three candidates had votes added and subtracted between the two counts. Third, the biggest differences occurred for Kibaki, who gained 66,446 but also lost

Table 1: ECK Results compared to KTN Results

	Problem Consts	Incomplete/ No results	No problem	Kibaki+	Kibaki-	Raila+	Raila-	Kalonzo+	Kalonzo-	Total
Nairobi	4	4	0	140	107	348	0	227	0	822
Coast	10	2	9	865	5797	1545	13805	346	2934	25292
North Eastern	7	0	4	1477	0	1651	214	556	95	3993
Eastern	8	7	21	11425	1169	293	22	118	136	13163
Central	9	1	19	18628	376	2	233	37	80	19356
Rift Valley	23	11	14	31634	22067	21947	17647	3031	11449	107775
Western	15	0	9	2056	2310	1811	4725	131	307	11340
Nyanza	17	0	15	221	63	22335	3560	162	126	26467
Total	93	25	91	66446	31889	49932	40206	4608	15127	208208
Net				+34557		+9726		-10519		

While the major media organisations were present at constituency counts (including KBC, Citizen, and NTV), only KTN released their results, and then not completely (their release was eventually stopped, although only speculation can postulate why). It remains unclear why the media would position themselves on the ground to tally results as communicated by the ECK without releasing the complete set later. In this section, we present results comparing KTN's count to the ECK's official results. Citizen released results from 54 out of 210 constituencies (26 per cent), which are hard to analyze given that they are incomplete.

Table 1 represents discrepancies by province between results announced by the ECK at the constituency level and reported by KTN with the final results published by the ECK. The first three columns list the number of constituencies where any discrepancy existed between the tallies, constituencies where KTN had incomplete results or did not release results, and constituencies where there were no differences. While 91 (44 per cent) constituencies did not

31,889. This caused the greatest net vote gain among the candidates at 34,557. Raila more or less gains (49,932) and loses (40,206) the same amount of votes for a net gain of 9,726.

Provincial Differences

The differences in vote totals for KTN and ECK are not spread randomly across constituencies, witnessed by the number of constituencies without differences as well as those with highly concentrated differences. In Coast, massive differences existed in Changamwe, where Kibaki lost 5,447 votes, Raila lost 10,640, and Kalonzo lost 2,934 from the ECK result compared with KTN figures. In Siakago constituency in Eastern, ECK added 10,858 votes to the initial KTN result for Kibaki. In Kibaki's home province of Central, the ECK added votes for Kibaki in Kinangop (10,000) and Limuru (7,601).

Rift Valley has the largest overall differences, where in Molo⁵ the ECK gives Kibaki 25,116 more votes than KTN gave >

⁵Molo remains a contentious constituency when it comes to discussions of fraud because the European Union highlighted it as one of their "problem constituencies" with respect to its vote tally in their electoral observation mission report.

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him, but also 4,073 more votes for Raila. In Mosop, Raila got 15,025 more votes and in Naivasha, Kibaki lost 20,024 votes. Raila lost 10,000 votes in Kuresoi and 4,917 in Narok North. In Nyanza, Raila's home province, he gained 6,477 in Kisumu Town West, 6,561 in Nyaribari Chache, but lost 3,460 in Rangwe.

While comparing media results to official results proves difficult given that many of the media houses provided only partial results and stopped reporting them while the count was under way, they do provide something of a parallel tally to final ECK figures. A total discrepancy of 208,208 votes between these two counts is indeed disturbing as it significantly alters the tally for the leading candidates. While these differences did not benefit only one candidate, there is a bias towards Kibaki, although this bias is not enough to have swung the results of the election.

IV. Overall Turnout

Suspiciously high voter turnout numbers in the presidential race caused grave concerns that "ballot stuffing" of some form or other may have occurred in candidate strongholds. Most likely, this resulted from double-voting rather than actual ballot stuffing, but in any event, results are suspicious, and not just from candidate strong-holds.⁶

Table 2: 2002 Presidential Turnout

Province	Rank	Percent Turnout ⁷	Standard Deviation ⁸	+1 Std Dev	-1 Std Dev
Nairobi	7	42.16	3	45.16	39.17
Coast	8	45.41	8.89	54.3	36.52
NorthEastern	6	58.7	5.93	64.63	52.77
Eastern	4	61.29	6.37	67.65	54.92
Central	1	67.13	5.5	72.63	61.64
Rift Valley	3	61.48	7.73	69.22	53.75
Western	5	57.41	4.5	61.91	52.9
Nyanza	2	56.78	8.43	65.2	48.35

Although it is ultimately difficult to base any arguments about turnout in one election to those in another as it is a function of many things, Table 2 provides a few lessons towards thinking about baseline turnout in Kenyan elections. First, turnout was not generally high in 2002. Central Province, the home region of both the leading candidates Uhuru Kenyatta and Mwai Kibaki, yielded the highest rate at 67 per cent. Not even half of the voters in Nairobi and Coast voted. Second, the standard deviations for provinces are not large. That is, there are not significant differences in turnout between constituencies in a province.

Table 3: 2007 Presidential Turnout

Province	Rank	Percent Turnout ⁹	Standard Deviation ¹⁰	+1 Std Dev	-1 Std Dev	2007 Turnout Minus 2002 Turnout (%)
Nairobi	7	56.88	5.57	62.45	51.31	14.72
Coast	8	54.83	9.58	64.41	45.26	9.43
NorthEastern	6	61.40	7.44	68.84	53.96	2.70
Eastern	4	71.37	7.96	79.32	63.41	10.08
Central	1	83.18	3.47	86.65	79.70	16.04
Rift Valley	3	73.78	11.31	85.09	62.50	12.29
Western	5	64.14	5.41	69.55	58.73	6.73
Nyanza	2	77.77	11.59	89.36	66.19	21.00

Looking at the 2007 presidential turnout in Table 3, a number of important dissimilarities from 2002 become apparent. The right column shows that in every province, turnout went up, and by more than 10 percentage points in five of eight. This is remarkable. It is perhaps unsurprising that the highest gains were in Nyanza (Raila's homeland) and Central (Kibaki's homeland) provinces.

More important than comparing provinces across years (2007 and 2002), is comparing across provinces in 2007 to arrive at unrealistically high or low turnouts. The average turnout for the provinces is 70.67 per cent. With a standard deviation of 12.38, the maximum and minimum voter turnout away from the mean is 83.05 per cent and 58.29 per cent.

The identities of the main candidates, in addition to the "euphoria" from voters and hard campaigning should have resulted in generally high turnout over-all, and indeed the average was 70.67 per cent. While this is significantly higher than the average from 2002 of 56.28 per cent, it is possible. However, any turnout above 80 per cent is suspicious, given the difficult nature of voting itself, particularly in rural areas. We also suspect that levels below 50 per cent might be quite unrealistic given previous voting patterns as well as the general trend in the 2007 election. Therefore, votes above 80 per cent and below 50 per cent are treated as suspicious.

To support this standard, we can look at turnout in Kalonzo Musyoka's home region. We expect Kalonzo voters to be similarly "euphoric" for his candidacy as voters in Raila and Kibaki's home regions were. However, allegations of rigging from Kalonzo's region (Eastern Province) have not been made, producing a sort of "control" scenario that allows us to measure the mean turnout a candidate should receive in a home region but without fraud. From those constituencies in Eastern that went for Kalonzo, the average turnout rate >

⁹This is the average percent turnout of constituencies within a province.
¹⁰This is the standard deviation of constituency turnout within a province.
⁶This includes Central Province for President Kibaki and Nyanza Province for Raila Odinga.
⁷This is the average percent turnout of constituencies within a province.
⁸This is the standard deviation of constituency turnout within a province.

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is 67.66 per cent. Therefore, setting the maximum likely turnout at 80 per cent is a fairly liberal standard.

Provincial Turnouts

In Nairobi, turnout remained low in 2007 as it had in 2002, but only one constituency produced less than 50 per cent turnout, Dagoretti at 47.17 per cent and a potential 1,614 votes. Coast province produced surprising and consistently low turnouts, especially in the urban constituencies of Mombasa. Some 12,628 votes are produced from areas where Raila won resoundingly but turnout was less than 50 per cent. North Eastern and Western provinces did not yield any suspicious turnouts. Eastern Province, the homeland of third place candidate Kalonzo Musyoka, results in four constituencies with problematic turnouts. Three of them — South Imenti, Ruyenjes, and Siakago — have a majority of Kibaki support, however, producing 2,745 votes beyond the 80 per cent threshold.¹¹

Central Province produces a number of potentially unrealistically high turnouts, even given its status as Kibaki's home region. Out of 29 constituencies, only five had turnouts below 80 per cent, the lowest being Juja at 73.3 per cent. The average turnout was 83.18 per cent, the highest for any province (and higher than the 67 per cent from 2002, when both leading presidential candidates were from the province). The total votes from high turnouts, which all benefited Kibaki, are 60,628.

Analyzing turnouts in Rift Valley is hard since the province is not home to any presidential candidate and its constituencies were widely contested between them. Large differences between extremely low and extremely high rates (mean 73.78 per cent and standard deviation 11.31 per cent). Three contested constituencies register turnouts in the 40s, producing 4,071 "too few" votes.¹² In 17 Raila-favored constituencies, high turnouts produce 22,687 votes. In one Kibaki favored constituencies, high turnouts totaled 4,023 ballots. Therefore, constituencies with high turnouts heavily favored a production of votes for Raila.

in Nyanza — Raila's home province — 15 constituencies posted turnouts above 80 per cent and a total of 66,897 votes in Raila favoured areas. The contested constituencies in Nyanza (heavily populated by the swing ethnic Kisii community) did not post unrealistic turnouts.

Large turnouts in their home provinces helped both the two top candidates, to about the same degree. It is hard to rely on total turnout though as indicative of fraud or rigging, given that the places one would expect high turnouts is where it might be easier for both sides to artificially inflate totals. However, even accepting a relaxed standard for a likely maximum and minimum turnout, a number of

suspicious ballots are added and subtracted from the main candidates.

V. Differences in Presidential and Parliamentary Turnout

Kenya conducts three elections at the same time same on the same day, with voters able to cast ballots for local civic councilors, their members of parliament, and the presidency. Voters cast these ballots in the same polling station and the same booth. Each voter receives three ballots. Three different boxes are in the room where each voter casts the ballots.

The overwhelming majority of Kenyan voters cast ballots for all the three offices that they are offered the opportunity to elect candidates for. It is rare for a voter to cast a ballot for his preferred presidential candidate and ignore or decline to cast a ballot for an MP or Councillor. Kenyans are equally motivated to participate in local elections as they are national elections (perhaps even more so), therefore variances between the presidential and parliamentary election will arise primarily as a result of differences in the number of spoiled ballots in the two elections. There will be also a small number of abstentions — conscious or otherwise — from one or the other.

On the whole, the difference is so low that it cannot alter the result of the presidential election. Moreover, differences that exist should be randomly distributed, and roughly equal across constituencies. That is, some constituencies should not register large differences and others small differences, they should all be similar and follow patterns of voting behavior that are particular to the nation as a whole, not any one particular constituency.

Statistics for all the previous multi-party election conducted since December 1992 support this.¹³ In the 1997 and 2002 elections, the turnouts for the parliamentary and presidential races were almost identical. We use the 2002 elections as a baseline because that election did not carry claims of presidential rigging. Although the 1997 presidential election carried this claim, we note that there was no marked difference between the total valid votes cast for presidential and the total valid votes cast for parliamentary candidates (except in about 10 constituencies where MPs were elected unopposed, which we take into account).

In 2002, valid votes cast for parliamentary candidates exceeded valid votes cast for presidential candidates, for instances, in about 48 constituencies by a total of 114,000 votes. This is equivalent to 1.9 per cent of the presidential votes in those constituencies. However, two constituencies Bomachoge and Kasarani had unusually large variances,>

¹¹The remaining constituency—Masinga—is in a Kalonzo territory and had a 45.5 turnout or 1,050 votes "too few."

¹²Given their contested nature, neither candidate obviously wins from a subtraction of votes.

¹³Even though KANU ran in some constituencies in 1992 and 1997 unopposed.

ANALYSIS

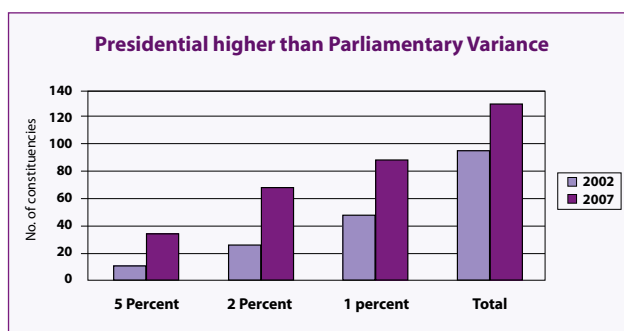
40,000 votes between them, close to one third of the total. If these two outliers are excluded, the variance is 74,000 equivalent to 1.2 per cent of the valid votes. Ninety six constituencies had variance in the other direction, that is, where presidential votes exceeded parliamentary votes. This amounted to 64,000 votes, equivalent to 1.1 per cent.

As is evident, the variance in the two directions almost cancels out, leaving a 10,000 votes difference countrywide. This variance is consistent with differences in the number of spoiled ballots and a few voters who may have voted for one office and not the other. Regardless of the reason, however, the variance could not swing the presidential election in 2002. Neither could the difference in the 1997 presidential election affect the overall outcome. Going by this analysis, a difference of around 1.2 per cent between the presidential and parliamentary valid vote is what we have taken to be standard.

Table 4: 2002 Presidential Exceeds Parliamentary Turnout

Turnout Threshold	Votes	As % of parl	As % of prez	No of Constituencies
5 percent	34066	0.57	0.57	11
2 percent	50448	0.84	0.84	26
1 percent	59723	0.1	0.1	48
Total	64185	1.07	1.07	96

Graph 1: Comparison of Presidential and Parliamentary Turn outs from 2002 and 2007



The 2007 Presidential Versus Parliamentary Election Results

The variance between valid parliamentary and presidential votes in 2007 is startling. A review of the result – excluding five constituencies for which one or the other results are unavailable -- produces a number of unrealistically high turnout variance. There are as many as 35 constituencies where the variance is above 5 per cent, which translates to over 237,000 votes. These constituencies include instances where the variance is above 10,000 votes. Embakasi

constituency has a variance of over 30,000 votes. This would mean, implausibly, that about 10,000 voters in some of these constituencies deliberately chose not to vote for an MP. They voted for their presidential candidate and walked out of the polling station. There are about 70 constituencies where the variance is above 2 per cent, implausibly implying that many people in these constituencies chose not to vote for an MP or even a civic candidate.

In this analysis, where the presidential tally exceeds the parliamentary, the incidences are much higher in 2007 than in 2002. Variance of more than 5 per cent occurs in three times as many constituencies in 2007 (35) as in 2002 (11). Variance of 2 per cent or more also occurs with close to three times the frequency -- 70 constituencies in 2007 compared to 25 in 2002.

In 2007, the parliamentary election has 25 constituencies where the parliamentary vote exceeded the presidential vote by more than 2 per cent. This is a rather liberal cut-off given the norm of 1.2 per cent. Looking at raw votes, this disparity produces about 116,000 ballots that are anomalous. This means presidential candidates lost about 116,000 votes. Factors responsible for this loss or wasting of the presidential vote are not clear. Where did these votes go? Which presidential candidate – or even parliamentary candidates benefited from this anomaly? We make one simple observation with regard to these questions. That this number of votes is critical for shaping the outcome of presidential election and in particular an election that was too close to call. It is possible that these votes contributed to altering the final result of the presidential election. >

Table 5: 2007 Parliamentary Exceeds Presidential Turnout

Turnout Threshold	Votes	As % of parl	As % of prez	No of Constituencies
5 per cent	105,727	1.11	1.07	16
2 per cent	115,469	1.21	1.17	25
1 per cent	126,936	1.33	1.29	43
Total	130,547	1.37	1.32	69

Table 6: 2007 Presidential exceeds parliamentary turnout

Turnout Threshold	Votes	As % of parl	As % of prez	No of Constituencies
5 per cent	237,572	2.49	2.41	35
2 per cent	304,963	3.2	3.09	70
1 per cent	318,176	3.34	3.22	90
Total	325,131	3.41	3.29	130

ANALYSIS **Votes that Might Have Altered the Outcome**

If we add votes where parliamentary turnout was unrealistically high to ballots where the presidential turnout is unrealistically high, we find votes that we consider anomalous. Refer to Tables 5 and 6. The variance between the presidential and parliamentary ballots in the 2007 election is a total of 455,667 votes. This variance comprises two sources. One is 325,000 votes in about 130 constituencies where the presidential tally exceeds the parliamentary tally. This excess is equivalent to 3.3 per cent of the total valid presidential vote. Two, it comprises 130,547 votes in 69 constituencies where the parliamentary tally exceeds the presidential tally. This is equivalent to 1.4 per cent. By adding these two figures, one can see where the anomaly lies.

We have not attempted to apportion the suspicious votes to either presidential or parliamentary rigging. It would be surprising if shenanigans at the parliamentary did not occur. The winning margin in the presidential election declared by ECK is 231,728. The suspicious votes exceed the winning margin by close to 130,000 votes. Fraud of this magnitude is more than sufficient to have altered the outcome of the presidential election.

A parliamentary result may exceed a presidential result because parliamentary supporters “stuffed” ballots in favour of a particular parliamentary candidate or that presidential supporters “wasted” ballots (or reduced those of the presidential rivals), or some combination of the two. Similarly, a presidential vote may exceed a parliamentary vote because parliamentary voters were wasted, or presidential votes stuffed, or a combination of both. It is significant that in Lang’ata constituency, a clerk with the Electoral Commission of Kenya (ECK) who was stationed at a polling station where the ODM presidential candidate was also a parliamentary candidate was arrested for hiding or stealing parliamentary ballots and failing to give them to voters. Certainly, this was meant to deny certain voters an opportunity to vote for one of the parliamentary candidates.

It is also possible that this was meant to give particular voters more ballots to cast for a preferred candidate. Whatever the method of adding or reducing presidential or parliamentary ballots, significant differences that exist between the two turnout figures is problematic. It is important to note that our analysis is restricted to those constituencies where on balance the differences between stuffing, wasting, or even undercounting were great enough to produce abnormal variance in the turnout rates that appear in the official ECK results. There may in fact be a number of constituencies where either stuffing or wasting occurred in both races simultaneously, such that turnout rates are close but parties committed fraud nonetheless.

Do Differences in Turnout Appear to Favour Any Candidate?

Table 7: 2007 Presidential exceeds parliamentary turnout

	Parl>Prez	Prez>Par	Total
Kibaki strongholds	65,692	28,905	94,598
Raila strongholds	26,455	2,127	28,582
Kalonzo strongholds	12,916	31,392	44,308
Contested	151,163	29,620	180,784

Table 7 lists the differences in presidential and parliamentary turnout allocated by candidate stronghold. It shows that between the three main candidates, the differences in turnout benefited President Kibaki the most, where he generated more than three times the number of dubious ballots from his lead challenger Raila Odinga. The largest number of suspicious ballots comes from contested areas, however, suggesting that it is not always a candidate’s home region that may be the source of electoral malfeasance, but rather in areas where it may arguably harder to catch, given divided electorates in swing constituencies.

Hitting a brick wall

FOR A CONSIDERABLE PERIOD, KENYANS FOR PEACE with truth and Justice have been seeking entry to Independent Review Commission as amicus curiae (friend of the court) in order to comment on or question submissions and also make submissions of its own. The commission has resisted these attempts relentlessly for the past three months.

In the explicit view of IREC, KPTJ’s membership does not qualify to be regarded as stakeholders to the process — it only recognises the ECK, political parties and itself.

Traditionally, the Attorney General as custodian of the public interest has played the role of amicus curiae, but other organisations such as the Law Society of Kenya have been allowed such status at commissions as well. The fluid political nature of the circumstances under investigation raise grave questions about the AG’s ability to play that role, hence KPTJ’s application. KPTJ, which was admitted to the Commission of Inquiry into the Post Election Violence as a friend of the court, has provided help in probing issues from a non-partisan>

standpoint.

After strenuous lobbying in August, KPTJ received word at the last minute that its lawyers would be allowed to comment on and question a foreign expert's presentation to IREC.

The commission's strong opposition to civil society presence has severely limited the opportunity to question what is going on—on behalf of the Kenyan people.

IREC had refused to allow KPTJ to even present the statistical analysis contained in its reports, or even explain them. When KPTJ was finally allowed, it was at the tail-end of the commission's public hearings. No less than the chair of the commission made a spirited attempt to denigrate and dismiss KPTJ and civil society's presentations, and went a step further to accuse the coalition of issuing "inflammatory statements" and "fanning chaos".

Follow-up inquiries about the amicus application received no definite response from the commission, as a summary of correspondence on the subject shows. At its last public hearing, the commission said that it would not entertain that application.

August 12: Dan Juma of KHRC writes to IREC chairman Johann Kriegler asking to be admitted to comment on the presentation by David Throup on the August 15. He notes that while political parties, media houses, the Media

Council of Kenya, the Electoral Commission of Kenya and the European Union (Observer Mission) had been invited, domestic civil society or human rights organizations that had always followed the electoral and democratic process in Kenya had not.

August 13, 2008, 8.36am: Professor Jorgen Elklit, Secretary to the Independent Review Commission writes to Juma saying that since the KHRC and David Throup has not adversely mentioned the KPTJ in his presentation, they will not be allowed to question him.

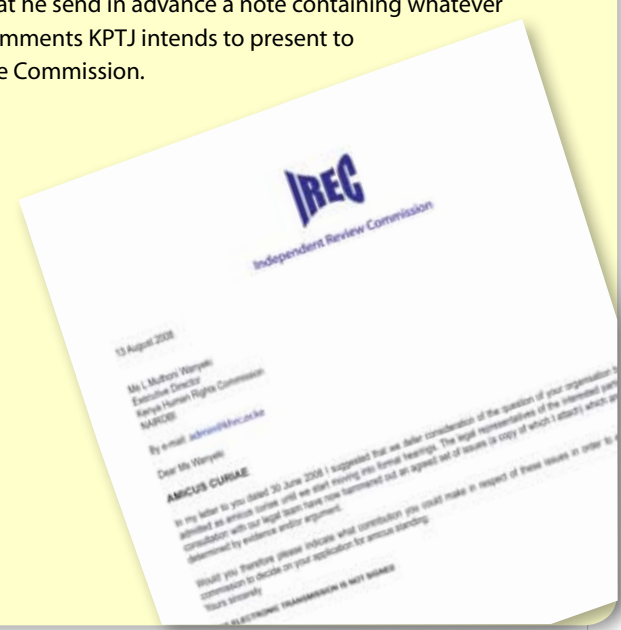
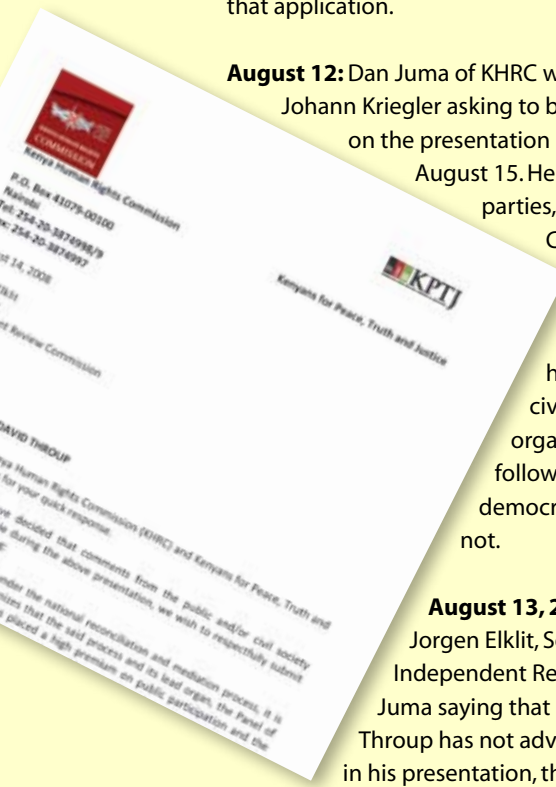
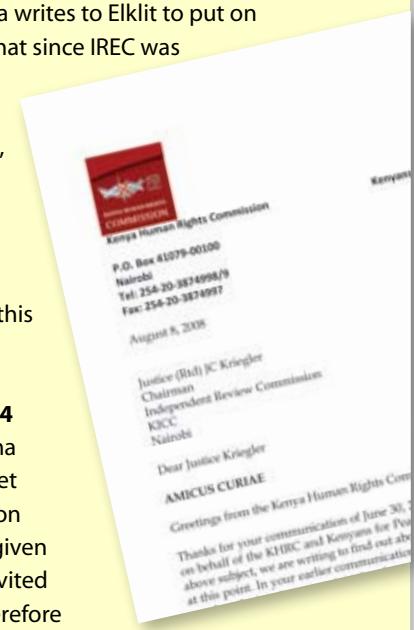
August 13, 2008 2:04 pm: IREC Commissioner Marangu Marete writes to Prof Elklit and Juma saying that he supports the decision to keep with the policy of limiting participants who could question the presenters to ECK, political party participants and IREC.

August 14, 2008: Juma writes to Elklit to put on record the following: That since IREC was established under the national reconciliation and mediation process, which placed a high premium on public participation and the role of the civil society, excluding KPTJ defied this principle.

August 14, 2008, 10.14 am: Elklit writes to Juma saying that IREC has met and changed its decision about who should be given special treatment as invited commentators and therefore KPTJ was welcome to make comments on Prof Throup's presentation.

August 14, 2008 11:10 am: Juma writes to Elklit and Kriegler seeking leave for KPTJ to contribute with regard to the agreed issues but be urgently notified of IREC's decision to admit it as amicus curiae.

August 14, 2008 1:51 pm: Kriegler writes to Juma asking that he send in advance a note containing whatever comments KPTJ intends to present to the Commission.



ELECTION INVESTIGATION Special Edition

Ending the culture of impunity: In the spirit of campaigning against impunity, the KHRC – a member of KPTJ – while monitoring the 2007 General Election documented laws that were broken during the process.

THE LAWS THAT GOVERN OR RELATE TO ELECTIONS include: the Constitution of Kenya; The National Assembly and Presidential Elections Act; the Election Offences Act; Public Officer Ethics Act; the Local Government Act; the Societies Act; the Penal Code; the Anti-Corruption and Economic Crimes Act; the Public Order Act; and, the Preservation of Public Security Act, as amended. Other relevant laws include the KNCHR Act, which establishes the KNCHR and gives it powers to conduct independent investigations into human rights violations; and the KBC Act, which provides that the national public broadcaster must give balanced coverage to all aspirants and political parties.

KHRC also monitored and showed how public servants campaigned for the incumbent political party and abused public resources, contrary to the Public Officers Ethics Act as well as the National Assembly and Presidential Elections Act. Yet impunity thrived — a recurrent problem during election periods, when Kenya seems to suspend laws or provide ‘collective impunity’ for breaches of the same. Connected with impunity is the passing of the buck. The ECK shifted the blame to the Kenya Police Force; the Kenya Police Force gave a counter-argument to the ECK. The Attorney General, as head of public prosecution, shifted the responsibility to the Kenya Police Force to furnish evidence to enable prosecution or just watched with deafening silence. The Kenya Anti-Corruption Commission was also caught napping. In this vicious cycle, impunity reigned as no one public institution took responsibility for prosecuting those who were liable. This analysis of laws assisted the KHRC in making firm conclusions and recommendations.

Recommendations

As early as December 26, 2007, the KHRC had noted seven concerns that could jeopardize the freeness and fairness of the 2007 General Election.

1. The right to the security of the voter had not been guaranteed, especially in conflict areas, which led to lower voter turnout and influenced outcomes of the elections both in those areas and nationally.
2. The right to campaign, particularly for women, had been compromised, violating the candidates’ right to be elected, which could have impacted on of the ratio between men and women in political office at all levels.
3. The right to freedom of expression had been abused, where hate speech compromised the choices Kenyans made.
4. The right to freedom of assembly had been violated,

which affected voting patterns.

5. The misuse of public resources and the expedient allocation of districts and other public goods compromised the right to vote.
6. Voter bribery through financial inducements continued unabated and therefore compromised peoples’ choices.
7. KHRC singled out persistent allegations of rigging the elections in favour of the incumbent political party, which as we have seen compromised electoral outcomes and, therefore, the inalienable right of Kenyans to decide their own destiny.

In view of these assessments, and the entire monitoring exercise, KHRC concluded that: first, the chief custodian of the right to vote is the ECK. The independence and integrity of the ECK was compromised by its complicity before, during and after polling day, especially with regard to the national tallying exercise at the Kenyatta International Conference Centre.

- The ECK should be disbanded and reconstituted at all levels, using the Inter Parties Parliamentary Group (IPPG) formula. The IPPG agreements on ECK should be legally secured and appointments based on merit to ensure political parties select competent professionals with integrity.
- KHRC observes that the first-past-post electoral system is not suitable for a multi-ethnic Kenya and therefore recommended that constitutional, legal, policy and administrative changes be made to replace the current electoral system with Mixed Member Proportionate Representation (MMPR).
- Further, the Kenya Police Force should guarantee the constitutional right to security and integrity of the person. The police played an exemplary role on Election Day and deserve commendation for working under difficult circumstances. KHRC recommends that a Police Service Commission be established within the framework of the Bomas Draft Constitution, by the end of 2010.
- KHRC identified, however, that the Force is also a ‘regime force,’ which has used excessive force against Kenyans and has not been accountable to the public. A Civilian Oversight Authority, based on international frameworks for checking excesses of the police, should be established.
- KHRC recommends that the Force should investigate and prosecute those who committed violence against police officers and those police officers who committed violence against Kenyans >

Moving forward from here

by the end of 2008, especially in Nyanza and the Rift Valley, and that the Commissioner of Police be relieved of his duties (since the buck stops with him) by the end of 2008.

- With regard to hate speech, KHRC recommended that the Kenya Police Force and the KNCHR investigate sources of the leaflets, emails, blogs and SMSs propounding hate speech and prosecute those responsible. Further, that the Kenya Police Force should investigate audio and video recordings of politicians in campaign rallies to prosecute those responsible for inciting violence. Lastly, the 10th Parliament should enact hate speech legislation. Connected to this, the KHRC observes that the right to access information has been violated under the Official Secrets Act.
- Additionally, the Kenya Broadcasting Corporation has an obligation to broadcast in a balanced manner and that the same applied to all media, including local language radio stations, according to the Guidelines for Elections Reporting of the Media Council of Kenya. Indeed, the Communications Commission of Kenya should examine audio records of local language radio stations between August 2007 and February 2008 and withdraw licences for those found guilty of hate speech.
- Further, the Freedom of Information Bill should be enacted and related policy formulated and implemented. With regard to KBC, the station's management should be de-linked from the State and the corporation be transformed into a genuine national public broadcaster through appropriate legislation and internal policies.
- In terms of discrimination, KHRC depicted the manner in which women and other marginalized groups were subjected to discrimination through hate speech and violence. Although women form the bulk of the population, only a handful made it through to civic seats and parliament. KHRC recommends that the 10th Parliament amend the Constitution of Kenya to provide for district seats where women contest parliamentary seats, relative to the Bomas Draft Constitution. Further, the principle of ensuring women's representation in appointive and elective offices needs to be enshrined in all public staffing policies -- at least the Beijing target of 30 per cent, if not the African Union target of 50 per cent. It also suggests that Parliament and the reconstituted ECK work out a formula, through MMRP to providing space for women and other marginalized groups.
- There was no ceiling on campaign financing -- those who have less money have their rights to campaign compromised. Legal as well as illegitimate businesses bribe candidates for future favours, resulting in corruption. It was recommend the Kenya Police Force, the Attorney General and the KACC investigate all campaign financing between September and December 2007 and prosecute all those guilty of corruption. In this regard, we recommend that the Coalition for Accountable Political Financing (CAPF) give the concerned public offices information that could lead to arrests and prosecutions.
- KHRC further notes with concern how the presidency controls many institutions in charge of the electoral process, from appointments to the ECK, to the Judiciary, which presides over election petitions. The Provincial Administration is also under the control of the Office of the Presidency. Therefore, KHR suggests that the 10th Parliament alters the Constitution to reduce the powers of the presidency, the Provincial Administration be abolished, and that all Kenyans press for the drafting and enactment of a new and democratic constitution.
- Further, it is recommends that the state undertakes comprehensive judicial and electoral reforms.
- Finally, KHRC is concerned about the culture of impunity that has taken root in Kenya over the years. Constitutionally, the powers of prosecution rest with the Attorney General, with some delegated to the Kenya Police Force. In this regard, KHRC recommends that the current Attorney General, as chief prosecutor for over a decade when impunity seems to have taken root, be relieved off his duties.
- Further, KHRC suggests that the State establishes Transitional Justice mechanisms, such as a Truth Justice and Reconciliation Commission to deal with past and present injustices and impunity.
- **Excerpted from Kenya Human Rights Commission's *Violating the Vote: A Report on the 2007 General Election***

TRUTH & JUSTICE DIGEST. A publication of the **KENYANS FOR PEACE WITH TRUTH & JUSTICE, (KPTJ)** a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Law Society of Kenya (LSK), Mazingira Institute, MARS Group Kenya, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

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