

*Election News*

# #Elections2013: Deliberate Mismanagement?

A compilation of published opinions on the 2013 Kenyan elections.



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# FOREWORD

On March 4, 2014 Kenya conducted a general election, which was historic for several reasons. It was the first general election since the promulgation of the new Constitution in 2010; and it was the first election in which voters would choose candidates for six positions each, the majority of which were newly created by the Constitution. The 2013 elections also ushered in a devolved system of government. Against the background of the 2007 elections that ended in the disaster of the 2008 post-election violence, concern was high that a repeat be avoided.

Many of the Kenyans for Peace with Truth and Justice's individual members have been monitoring Kenya's electoral processes for many years. This gained urgency in the wake of the post-election violence, when the KPTJ coalition was formed as a response. This work continued around the 2013 elections and KPTJ and its individual members issued opinion editorials, publications, open letters and memoranda around various issues of concern in the period before, during and after the elections. It is from this body of work that this compilation and the accompanying CD ROM is largely – but not exclusively – drawn.

One year after the elections and the historic Supreme Court petitions, KPTJ has found it important to offer the public a compilation of articles that will hopefully act as a vivid reminder of these events, and a spur to future action. This collection of articles written around the 2013 elections, from the procurement of BVR kits to the final Supreme Court judgment, should serve to remind us, one year on, that there is still much work to be done in securing elections that adhere to constitutional standards at a legal, institutional and political level.

The Supreme Court's decision was final and settled the question of who was to be sworn in as the President of Kenya. However, the position of civil society has always been that, regardless of who wins particular elections, it is essential that we get our institutions and systems to function effectively and accountably. In a statement released on 16 March 2013, KPTJ stressed that its petition focused on the election process rather than the presidential results, with the aim of protecting the Constitution and safeguarding the future of democratic elections in Kenya. Having spent billions on ensuring credible, transparent elections, it behooves Kenyans to hold to account those institutions and individuals who failed in their duty. Without fair and transparent elections Kenyans will be deprived of a peaceful means to express their choices and change governments if they so wish.

From controversial tendering for biometric voter registration (BVR) kits, an assortment of voter registers, each with a different total, a breakdown in vital technology on the day and final results that didn't balance, the IEBC displayed either gross incompetence or deliberate mismanagement of the 2013 elections. This is compounded by the fact that, over a year later, the IEBC has yet to release the full results of the elections. An audit conducted by Mars Group Kenya found serious discrepancies in the results posted on the institutions website, with over 2,500 Forms 34 missing.

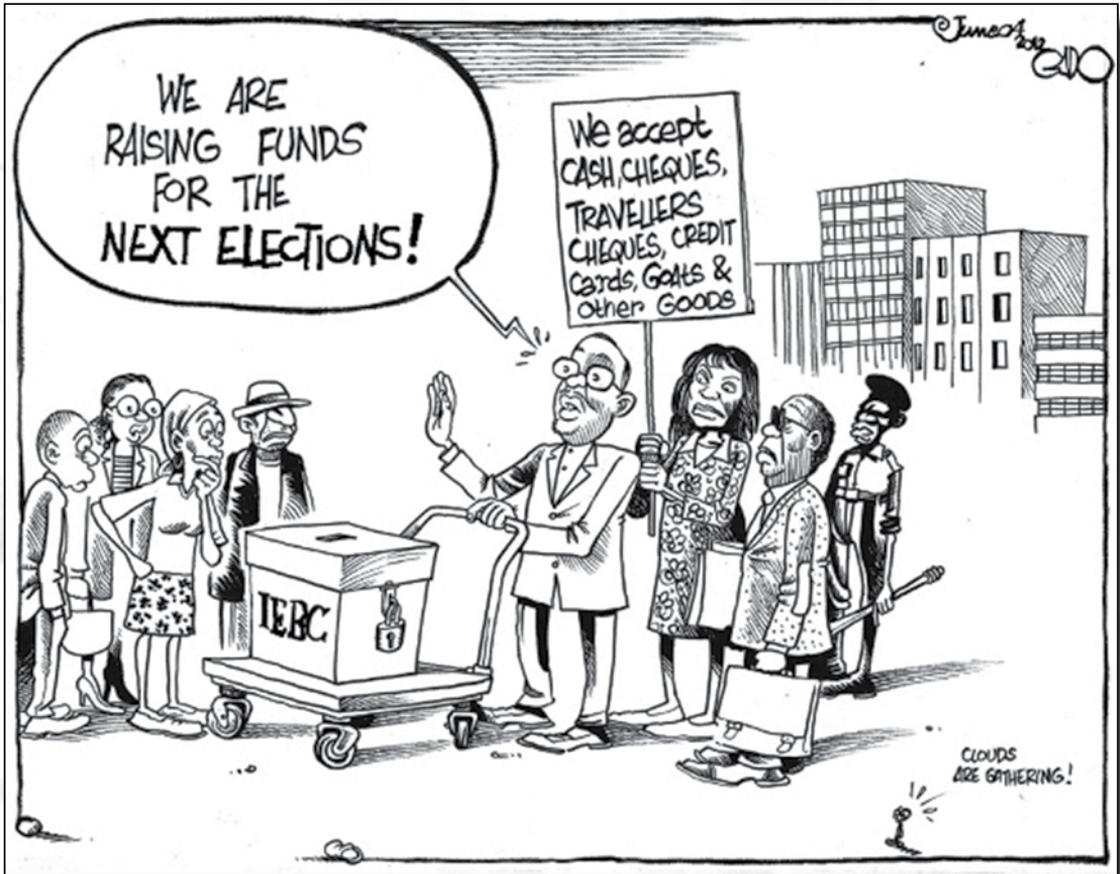
The Supreme Court judgment (based on obscure Nigerian case law and a debatable legal decision from the Seychelles about the definition of 'votes cast') also left something to be desired, impacting on public confidence and leaving the door open for future electoral malpractice by allowing the voters register to be whatever the IEBC says it is "at whatever stage of the election".

This publication forms part of the AfriCOG/KPTJ Series on Elections. We welcome your feedback at [admin@africog.org](mailto:admin@africog.org).

*Kenyans for Peace with Truth and Justice/Africa Centre for Open Governance*



# THE 2013 ELECTION - HOW PREPARED WAS KENYA?



# 8 MONTHS TO GO, STILL HANGING ONTO PRAYER

BY MUGAMBI KIAI

**T**he shambles of the 2007 general elections patently warned us that we should never again head into critical electoral contests hanging only onto a prayer. Today, the date of the next elections is still in doubt and, based on a decision that is currently facing electoral challenge, we have barely eight months to go.

Eight months to go and we do not have voters registered because this will have to wait until the judicial resolution of a consolidated dispute about electoral boundaries from which there will certainly be an appeal: meaning even additional delays should be envisaged with regard to voter registration.

Eight months to go and the Independent Electoral Commission has loudly cried foul about the slashing by Parliament of half its budget and warned this will mean that its voter education programme will certainly be scaled back. Now, Kenyans have had a notoriously bad habit of spoiling votes when the electoral contest has traditionally been around three positions – President, Member of Parliament and Councillor. How much will this decision adversely affect the ability of voters to properly cast votes for the six positions now envisaged at general elections under the new constitution?

Eight months to go and the Registrar of Political Parties has taken no action yet on parties that have been proved to have forged their membership rolls; even incorporating names of persons who are publicly known and certified to belong to other political parties. Eight months to go and parliamentarians have been agitating for the repeal of the legal clause that restricts their ability to party-hop willy-nilly.

Eight months to go and political parties have predominantly based their politics on ethnic mobilisation; all of the five major ethnic groups in Kenya predictably have now a political party which they will be largely affiliated with. The rest... well, when did they ever really matter?

Eight months to go and we are hearing strident allegations of state-backed “projects”: these are those who enjoy the support of the current presidential incumbent and are reportedly enjoying all the trappings of state patronage in their endeavour to capture the country’s top seat. Eight months to go and we still have no handle about political campaign financing meaning that even resources derived from organised crime such as drug trafficking and piracy will find their way into our elections.

Eight months to go and there is still no accountability around the rampant hate speech that we

have previously experienced and will certainly stir the muddy waters of Kenyan politics. Eight months to go and there is no accountability around campaign bribery and intimidation. Eight months to go and the spectre of electoral violence hovers perilously above; with outbreaks of political violence already being reported in some parts of Northern Kenya, Western, Nyanza, Coast and Rift Valley Provinces. Eight months to go and ethnic militia have not been demobilised; in fact this phenomenon seems to have multiplied with newer formations such as the Mombasa Republican Council now entering the fray. Eight months to go and the threat of terrorism looks to be on the rise: will Kenyans be ready to risk their lives queuing outside polling stations while this threat looms ever larger?

Eight months to go and there has been a complete lack of adequate reforms in the security sector. This means that the same policing attitudes and methods that prevailed during the 2007 post-election conflict and were universally condemned as inept, brutal and draconian will most likely continue. Eight months to go and it is no longer apparent that the appointment of a new inspector general of police will have the desired reformist impact vis-à-vis the forthcoming elections. Eight months to go and the same concerns about the ethnic composition of those leading security sector institutions still ring loudly in our ears. Eight months to go and the Minister for Internal Security and his assistant can all of a sudden die when the four-month old, recently-serviced helicopter they are traveling in suddenly and inexplicably drops from the sky.

Eight months to go and we have a young, untested and untried judiciary; that will surely face a deluge of election petitions and must respond in a time-bound manner. Eight months to go and we are seeing the first attempts by the legislature to interfere with the judicial vetting process mandated by the new constitution in a manner that will certainly resonate badly with regard to the fragile public confidence the new judiciary has been enjoying among Kenyans. Eight months to go and we have completely failed to resolve the mess created by the 2007 elections.

There has been painfully little accountability for those who were behind the violence: the schemers, financiers and perpetrators. We have had to rely on the International Criminal Court (ICC) to engage in actions that we ourselves should have carried out. We are now told that those before the ICC should be allowed to run for the highest office in the land without any thought being paid to the spirit and letter of the new constitution. With eight months to go, how

safe are our forthcoming elections if those suspected to have been behind the shenanigans that affected the previous one have not been brought to book and rather, in fact, are central players in it?

It is not that we have not been warned. The Waki Commission warned us that we had lost at least 1,113 lives during the last elections because we were – deliberately or otherwise – reckless about our own lives and destiny. Eight months to go and it seems

that all we intend to do is hang onto a prayer. It is not too late: a lot of these issues can be ironed out and resolved. But knowing Kenya, it looks like we are waiting for the last day so that we can throw up our hands in desperate despair; leaving it to the mercies of the Kismet to keep us out of harm's way. This, as we know, is simply not good enough. Eight months are all we have left.

*8 September 2012 Daily Nation*

## **By-election results only served to show how little civic education has achieved**

By MAINA KIAI

**T**irus Ngahu, Agostinho Neto and Moses ole Sakuda have been sworn in as members of Parliament for Kangema, Ndhiwa and Kajiado North respectively. We congratulate them on this achievement.

However, I am not so sure that “they” won their elections. No, I am not suggesting fraud. I am saying that the people actually elected were not them but Uhuru Kenyatta in Kangema and Kajiado North, and Raila Odinga in Ndhiwa. In fact, both Uhuru and Raila campaigned strongly on this basis, telling voters that they should not really worry about the candidates on the ticket, and instead vote as though it was for them directly. Ngahu emphasised this point in Kangema, emphatically stating

that any vote for him was for Uhuru.

The by-elections are a reminder of one of Kenya's most retrogressive phenomenon: That to win in most parts of the country, candidates need just the one vote of the tribal warlord/chieftain, rather than the votes of the people they claim to serve. And it slams home that comment in May this year from my old classmate, Lewis Nguyai, that TNA would rather “elect dogs wearing TNA colours” than candidates from other parties!

To be sure, it will be perfectly understandable if for the next six months these new MPs decide that their primary duty is to follow, defend and sing the praises of their benefactors at the expense of their constituents. For they

know who got them elected, and how, and it makes sense after all, to chase the vote of one man, bending over when required, than to work and appease the tens of thousands of voters with multiple complex problems that need to be solved.

Conversely, the voters who decided that their votes were for the tribal warlord/chieftain have no right or reason to complain if their MP forgets them, snubs them, or treats them like dirt. Partisans and sycophants of the tribal warlords/chieftains will laud these results and spin them suggesting that this not only shows the popularity of their benefactor, but also tell us that it will help the tribal warlord/chieftain govern effectively with “his” people in positions of authority.

However, the reality is that

it is we, ordinary Kenyans and voters, who lose with trends such as these. For we elect people that have no loyalty or need to work for us, elevating sycophancy and group think, for the benefit of one man. And that is a recipe for the continuing slide into despair and decay that we have been on. And it raises deep questions on the impact of civic and voter education that has been undertaken in the country since 1992.

Millions of dollars have been poured into voter education, across the country, and from 1992 to 2002, in very difficult circumstances. But it seems, if the by-elections are any indicator that it has been for naught.

Yes, Kenyans know their rights better than they did 20 years ago. Yes, most

Kenyans can now vote unassisted — unless they are seeking the second half of the bribe that they have sold their vote for. And yes, we know the mechanics of voting and putting the ballot in the box. But somehow, we seem unable to challenge the tribal warlords/chieftains and their propaganda effectively. They confuse us willy-nilly and we jump in hook, line and sinker. Our civic education modules, content and process seem outdated and overtaken by the sheer cunningness of the political class.

These by-elections should be a wake-up call to all Kenyans of goodwill and intention, and I know that they are the silent majority. The March 2013 elections will be a major test with six offices to fill on

each ballot. And there will be important choices, for the governors and county assembly members will be dealing with local, on the ground issues in each county, charged with delivering services, development and better lives for every person in the county.

We mess this up, on the basis of voting in a “suit” and we will bear the consequences live and in real time, unable to blame Nairobi, other tribes, etc. But more crucially, the March elections will test how fast and effectively that silent majority can change fact, increase its urgency and focus, and get us thinking of the public interest rather than the interests of the tribal warlord/chieftain. It is time to roll up our sleeves.

28 September 2012 *The East African*

# How can we prevent a repeat of poll violence?

By L. Muthoni Wanyeki

***“Have we done enough to prevent what happened last time?”***

## IN SUMMARY

- *Given the absolute flurry of electoral preparations now, we need to take a step back and remind ourselves of what specifically went wrong last time. And to ask whether we are, in fact, paying attention to what we should be paying attention to.*
- *Have we done enough to prevent what happened last time? If not, are we to spend the next five years in yet another flurry of motion without movement? Instead of being able to get on with our little lives undisturbed?*

**W**e are now six months away from the first General Election under Kenya's new Constitution. To dispel fears of a repeat of the events of the last election, we need clarity on two fronts: One, the credibility of the electoral results. We are focused on the technology — its acquisition or non-acquisition. But not its use. Yet, as we all know, technology can be put to whatever use its users desire to put it to.

Recall the warning signs from last time: The tallying at the constituency level. The ways in which that tallying differed for the three different levels being elected within the same constituency. The transmission of tallying results. And, very importantly, the national tallying process electronically. Then there was the sudden interruption and then loss of the televised tallying by the two stations that were engaged in the same (and then the loss of their entire databases).

The decision by the domestic observer group to spend their time “harmonising” their results with those of the then Electoral Commission of Kenya — defeating the very purpose for which the domestic observer group existed.

The decision by at least one organisation doing exit polls not to release their results.

Given the absolute flurry of electoral preparations now, we need to take a step back and remind ourselves of what specifically went wrong last time. And to ask whether we are, in fact, paying attention to what we should be paying attention to.

The second front is the prevention of any kind of election-related violence. Here, practically the same observations can be made. There is a credibly-documented report of arming in the

Rift Valley on “both sides” — the only upside being that those arming all seem to be doing so defensively, in expectation of being attacked, not offensively in expectation of attacking. This report speaks volumes to our lack of faith (or thereof) in the state's capacity to protect us.

### **Counter-terrorism**

This is not surprising, given the blowback from the state's military offensive in Somalia and the current counter-terrorism effort within the country against suspected Al Shabaab supporters.

Then there is the nearly incomprehensible escalation of attacks and counter-attacks in Tana River. Yes, the security services say “police reforms” are well underway, referring to changes

in recruitment and training as well as the plethora of legislative frameworks now in place. What they don't say much about is performance, in terms ability to manage blowback or defuse an escalation of violence. So far, all the motion without movement ultimately signifies nothing. At least to those tragically feeling forced to arm themselves in the Rift Valley. Or to those feeling

they cannot trust the rule of law in relation to handing jihadis among us. Or to those now dead in Tana River.

It's an outrage. We weren't meant to go through either electoral or police reforms just to be able to say that we have. We went through that tedious legislative, policy and institution-building process for results. Results that were meant to prevent what happened last time.

Have we done enough to prevent what happened last time? If not, are we to spend the next five years in yet another flurry of motion without movement? Instead of being able to get on with our little lives undisturbed? It's not encouraging. At all.

*“It's an outrage. We weren't meant to go through either electoral or police reforms just to be able to say that we have.”*

# LET'S WALK INTO THESE ELECTIONS WITH OUR EYES WIDE OPEN

BY MUGAMBI KIAI

On the one hand, there is a sense in which the panic-imperative is overwhelming: "Kenya could as well postpone the March elections. Last week's party primaries made one thing crystal clear. Kenya is ill-prepared to conduct free and fair elections in March... No one and no single institutions, is ready for the elections. Only a goddamned fool would go down a cliff with a car that's got no brakes.

There is a real danger that peace would be seriously disturbed during, and after, the elections," wrote eminent legal scholar Professor Makau Mutua in the January 27, 2013 edition of the *Sunday Nation*. Hold on: "Prophets of doom, both local and foreign, are feverishly predicting chaos and post-election violence as we prepare for the final stretch to the March elections... These false prophets base their theses on flawed and self-serving data and a poor reading of the country's history and probable voting patterns... Such rough hypotheses need debunking with simple facts, objective analysis and probable predictions," wrote another eminent legal scholar Ahmednasir Abdullahi on the page opposite to Professor Mutua's op-ed.

My two law teachers make formidable points: but I happily disagree with both their conclusions. First the facts: Professor Makau Mutua is right... to the extent that we are utterly unprepared for these elections. There can be no other conclusion from the recent monumental shambles that supposedly went by the name of political party primaries. But Ahmednasir is also right to the extent that the analysis must be nuanced to incorporate recent political and constitutional developments in Kenya; despite the data and evidence appearing to be conclusively damning.

Very worryingly, the Independent Electoral and Boundaries Commission (IEBC) seemed to tolerate the putrid stench emanating from all this electoral rubbish with not so much as a twitch of the nose in irritation has caused great disappointment and distress among many who expected a very firm corrective response from the IEBC. It seemed that any vice committed by political parties in the conduct of their primaries was swept under the carpet without so much as even an annoyed frown across the brow of the IEBC.

To compound matters, we all already knew that the security sector is in paralysis; now it is certainly rapidly spiralling towards being comatose after the rejection by Prime Minister Raila Odinga of President Mwai Kibaki's purported appointment to the positions of Deputy Inspector General of Police Grace Kaindi, Deputy Inspector General of the Administrative Police Samuel Arachi, and Director of the Criminal Investigations Department Ndegwa Muhoro.

On this one, the law and practice is clear: the Prime Minister has to be consulted by the President before such appointments are made: and consultations do mean that there is agreement between the two. In addition, there have been serious pending integrity issues raised about Mr Muhoro, not least by the Independent Police Oversight Authority (IPOA). So why did the President proceed to "make" these appointments, if not in pursuit of constitutional sabotage?

The third concern is that the Jubilee coalition ticket of Uhuru Kenyatta and William Ruto is interested in nothing else other than to ascend to the presidency at all costs so as to trigger a "Bashir scenario" of non-cooperation with the International Criminal Court (ICC). Both have loudly protested they will, indeed, cooperate. But the doubts still linger: not helped by the worrying conclusion that their word (signed and witnessed, no less) means zero given their recent pitiful dealings with one Wycliffe Musalia Mudavadi.

Moreover, Uhuru should have known better than to wave his finger in his recent interview on Al Jazeera television when he was pressed on the question of whether he would cooperate with the ICC were he to win the forthcoming elections and assume the presidency. For keen observers pointed out that when former US President Bill Clinton was pressed on whether he had been in a sexual relationship with Monica Lewinsky, he protested his innocence while finger-wagging. Guess what? Behavioural experts immediately stated that, by dint of this act alone, Clinton was lying and proceeded to explain why. And they were right.

So time to panic and engage the parachute? No! If there is something that the constitutional reform process has taught us, it is that Kenyans can and will prevail despite their political and bureaucratic elite. Just think about it: how did we manage to saddle such a progressive constitution on this bunch of pesky and pernicious parasites? This is the redoubtable resilience that Kenyans must call on. Here are five points how to.

First, the IEBC must not be allowed to abdicate its constitutional and legal responsibilities. They must be regularly and constantly reminded of their duty to oversee a free, fair, credible, genuine and peaceful election. Kenyans must be their own guardians in this score: we must document all electoral violations or attempts at them and demand firm and stern action

from the IEBC against reported perpetrators.

Second, the police force too must not be allowed to abdicate their policing mandate. They must secure us within the bounds of constitutional restraint and sanction. And if they fail, Kenyans must then ensure that those who are in police leadership are removed in accordance with the constitution.

Third, all Kenyans must reject violence at all costs. If they are incited or facilitated to engage in violence, they would do well to do as Martha Karua advised and ask the politician so inciting or facilitating to first incorporate his or her family as part of those executing this nefarious mission.

Fourth, Kenyans must demand that the judiciary executes its supervisory role over the elections, especially with regard to verifying claims of electoral fraud, with utmost integrity and diligence.

Fifth, Kenyans must vote to secure their future rather than return the country to its dark past. Out of the eight presidential tickets, there is only one that is definitely guaranteed to do all in its power to take us back to the authoritarianism and arbitrary rule of the big-man personality cult. I am taking no bets for correctly guessing which one this one is.

*5 February 2013, The Monkey Cage*

## 2013 Kenyan General Elections: Pre-Election Report II

By Seema Shah

**W**hat effect does the administration of elections have on the legitimacy of emerging democracies? Jørgen Elklit and Andrew Reynolds (2002) assert that the conduct of elections has a direct bearing on political actors' and voters' perceptions of the legitimacy of polls, and they propose a conceptual framework through which to investigate this relationship.

Through eight case studies, Elklit and Reynolds explore the impact of the conduct of elections on the development of individuals' sense of political efficacy. This, they claim, is an important factor in the development of legitimacy and progression towards democratic consolidation.

Indeed, the relationship

between election administration and democratic legitimacy is under-studied. The next General Election in Kenya, scheduled for March 4, 2013, is, in many ways, an appropriate case with which to further investigate Elklit and Reynolds's theory. Although Kenya has officially been a democracy since independence in 1963, former President Daniel arap Moi only allowed multi-party elections beginning in 1992. Since that time, the country has experienced a total of only four such elections, all of which have been marred by varying degrees of violence and only one of which (in 2002) was considered truly free and fair. The most recent election, held in December 2007, was followed by the most

severe inter-ethnic bloodshed Kenya has ever experienced, leaving approximately 1,133 people dead and another 3,561 people injured. It is estimated that about 350,000 Kenyans were displaced from their homes during this time. In the end, violence only abated when former United Nations Secretary-General Kofi Annan, leading the Kenyan National Dialogue and Reconciliation process, negotiated an end to the crisis through the formation of a Grand Coalition government.

Since then, Kenya has entered a dramatic period of reform, at the center of which is the new constitution (2010), world renowned for its progressive bill of rights. Reforms associated with

*“Despite its mandate to monitor and regulate the nominations process, the IEBC adopted a disturbing “hands off” policy, doing nothing in the way of regulation.”*

the implementation of the constitution have extended to the electoral arena, and Kenyan elections are now overseen and managed by a new electoral management body, known as the Independent Electoral and Boundaries Commission (IEBC). There are also a host of related reforms, including the creation of a Registrar of Political Parties; new electoral system rules for presidential candidates; integrity requirements for political office holders; ethnic and gender diversity requirements for all elective bodies and political parties; and reserved seats in the national and county legislatures to ensure the representation of women and historically marginalized groups.

These reforms have drawn public accolades, but they have also provoked fear in certain segments of the political elite, who are doing their best to maintain the status quo. In fact, a series of amendments have watered down some of

the most critical parts of the new laws. As for the IEBC, it is coming under increasing fire for its silence with regard to the nullification of important laws and for what is being perceived as a lack of will to enforce the law.

The latest controversy involves party nominations, which – by law – were to be held by January 18, or 45 days before elections. In order to try and prevent last-minute defections, the largest and most dominant parties waited until January 17 to hold their nominations.

Despite its mandate to monitor and regulate the nominations process, the IEBC adopted a disturbing “hands off” policy, doing nothing in the way of regulation. As the day wore on, the chaos became increasingly apparent, with reports of violence and allegations of “ethnic zoning” and vote-rigging emerging around the country. In a way, this is unsurprising, given that this is the first nominations exercise to be conducted under the new rules. Moreover, the logistics of coordinating nominations for 290 constituencies, 47 counties and 1,450 wards would be daunting for even the most seasoned political parties/election administrators.

Still, it seems worrisome that the IEBC was so dissociated from the nominations process and that

its response to the mayhem was to extend the deadline for submission of nomination lists from January 18th to 5:00pm on January 21st. The IEBC later extended the deadline even further to midnight on January 21st. As of February 4, 2013, the IEBC was still accepting nomination papers. There have also been allegations that the IEBC has accepted the nomination papers of candidates who, after having been defeated in their party nominations, defected and joined other parties who were willing to offer them candidacies. This last-minute party-hopping is especially appalling because the deadline for party-hopping had already been amended twice by self-serving parliamentarians, finally being moved to January 18, the same date as nominations.

There was also blatant disregard for the authority of the IEBC. Shortly after the close of the nominations period, aspiring MP candidate Mary Wambui stormed the IEBC offices. She had just learned that her name had been removed from the list of The National Alliance (TNA) aspirants for the Othaya parliamentary seat. Wambui, accompanied by outgoing MPs, staged a “sit-in” from 9pm until midnight, demanding that the IEBC address their issue immediately. In response to this dramatic behavior, the IEBC issued a press release notifying Wambui that she stood in

breach of the electoral code of conduct. If such behavior is not more severely reprimanded, Kenyans will be left to wonder what the IEBC will do if and when there are disputes during the General Election, when more is at stake.

It must be pointed out that some of the chaos around nominations was partly due to the IEBC, which had to delay the commencement of the voter registration process multiple times because of a botched biometric voter (BVR) kit tender process. After it became apparent that some of the short-listed BVR-supplier companies were less than credible, the IEBC was forced to cancel the tender altogether. It was only when the government stepped in that the process was re-started, and government involvement cast the IEBC in a less than positive light, with suspicions that the agency was not truly independent. In the end, voter registration was conducted so late in the game that a finalized, publicly verified voter's roll was not ready in time for party nominations. As a result, parties could only make use of the provisional voter's roll, which means that there is no guarantee that all those who participated in the nominations exercise were legally entitled to do so.

The nominations controversies are only the most recent in a string of shady moves. When political parties submitted their membership

lists to the IEBC, a number of Kenyans found that their names had been included without their knowledge. Parties had gleaned names from mobile-phone based money transfer accounts (M-Pesa) in order to populate their lists. In response, the Acting Registrar of Political Parties Lucy Ndung'u explained that complaints would be processed and offending parties would be notified and required to remove the names. The IEBC did nothing. Of course, one could argue that it is not within the IEBC mandate to take action in such cases. That may be true, but the Commission could, at

***“It must be pointed out that some of the chaos around nominations was partly due to the IEBC...”***

the very least, issue a statement condemning such acts. This would convey its authority and reflect its commitment to upholding the rule of law.

The IEBC was also silent when MPs passed a bill that suspended integrity requirements for the upcoming election. According to the law, candidates for office are required to hold university degrees and conform to the constitution's integrity requirements. Now, however, it is only gubernatorial and

presidential candidates who must show university degrees. Moreover, Parliament failed to implement a mechanism that would give relevant bodies, such as the IEBC (and others), the legal mandate to vet political aspirants. So while the IEBC is asking parties to ensure that candidates receive clearance from institutions like the Kenyan Police, Kenya Revenue Authority, Credit Reference Bureau, Higher Education Loans Board and the Ethics and Anti-Corruption Commission, there is no clear framework for barring a candidate if he/she does not receive clearances.

The IEBC is also being criticized for waiting until the three weeks before elections to conduct voter education. This move is questionable, especially since the commission's voter education materials were launched in October. The likelihood that the IEBC will be able to reach all Kenyas and comprehensively educate them on all the newly created offices, the devolved government system and the myriad of rules involved in this election within three weeks is highly unlikely. Waiting until so late in the game is unfortunate, especially since the IEBC's materials are useful. A full-page ad in Kenya's Daily Nation newspaper included photos of the format and appearance of each of the six ballots to be used in the

election. This information, as well as other important updates regarding nomination dispute resolution and nomination lists, are regularly posted on the IEBC's Facebook page. What remains to be seen, however, is if and how the body is reaching out to Kenyans who live outside of the country's metropolises, where internet access may be harder to access.

The next test is already underway. The IEBC just published a strict set of guidelines for political parties to follow as they were formulating their party lists. These lists contain the names of candidates who will be appointed to 12 seats for "special interests" in the National Assembly and 16 reserved seats for women, 2 seats for youth and 2 seats for the disabled in the Senate. The reserved seats in the National Assembly are set aside for the youth, persons with disabilities and workers. In order to ensure that these guidelines are followed, the IEBC, in its above-mentioned rules, stipulated that lists for the National Assembly must alternate between men and women and reflect the regional and ethnic diversity of the country. The first three names on the list must represent the youth, the disabled and workers, and one nominee cannot represent more than one special interest. No more than one nominee on the list for the reserved seats for women can be

from the same ethnic group. For reserved seats in the counties, parties must submit lists that contain eight nominees from marginalized groups. Parties are also required to show which special interest each nominee represents. The names on each list must be ordered in terms of priority.

These are impressive requirements, but it remains to be seen how committed the IEBC is to enforcing their regulations. Submitted lists already show transgressions. Raila Odinga's Orange Democratic Movement (ODM) included the party's executive director, Janet Ong'era, amongst the nominees for Senate and gave Raila's brother Oburu Odinga the first nominee's position on the list of special interest seats for the National Assembly. ODM's list also includes the party chairman, Henry Kosgey, who is contesting for the Nandi Senate seat. If he does not win that election, the party clearly hopes to ensure his inclusion in Parliament anyway. The United Democratic Front (UDF) and NARC-Kenya have gone so far as to include their presidential candidates, Musalia Mudavadi and Martha Karua, respectively, on their lists, attempting to make sure these politicians do not fade away in case they do not win their presidential bids. Details of the TNA list are not yet available, but leaders assured aspirants that they

***"It is too early to tell how the IEBC's seeming laxity will impact the legitimacy of the upcoming elections, but indicators show real concern in public circles."***

would be "included" even if they lost in the primaries.

These glitches are less worrying than the IEBC's response. After all, a certain number of mishaps are inevitable, especially given that this is the first election to be conducted under these new rules. It is too early to tell how the IEBC's seeming laxity will impact the legitimacy of the upcoming elections, but indicators show real concern in public circles. Kenyan civil society recently issued a press release condemning the IEBC for its failure to enforce the law. Clearly, in order to set the foundation for a peaceful election, the IEBC, as the elections authority, must send a zero-tolerance policy to political parties and others who are attempting to deflate the constitutional reforms and maintain the decades-old corruption-ridden system. This is the only way the IEBC will inspire public confidence and set the stage for free and fair elections in Kenya.

# IEBC MUST FIX THE RESULTS TRANSMISSION SYSTEM FAST

BY SARAH ELDERKIN

Last Sunday night, Citizen TV's 'Kibaki Succession' segment on its 9pm 'Sunday Live' programme featured not the usual discussion by David Makali and Peter Opondo of the week's events, but instead host Julie Gichuru interviewing the chairman of the Independent Electoral and Boundaries Commission (IEBC), Issack Hassan. Ms Gichuru talked a lot but failed to ask the fundamentally most important question, "Is all your equipment and are all your electronic systems up and running, fully operational, fully prepared and fully protected?" Hassan was lucky she did not ask this – because it happened that an IEBC demonstration of the equipment and system a couple of days earlier had gone horribly wrong.

Last week, the IEBC called IT-savvy representatives of political parties to a meeting on Friday at the Sunshine Holiday Inn in Westlands, Nairobi, where the use and efficacy of the equipment to be employed for the election counting and reporting was to be demonstrated. A representative of the US National Democratic Institute (NDI) was also present. Party participants had a whole range of questions on which they wanted reassurance from the IEBC, especially concerning potential failures carried forward from the past.

To demonstrate how the new system would obviate all this, some of the participants at the meeting were divided into five groups of three, each group a mock 'polling station'. They were given mobile phones such as those to be used on March 4. The phones are loaded with the software and menus for completing the tasks at hand. The remainder of the group sat watching the screen, waiting for the 'results' to come in.

That's when the problems started. The five 'polling stations' were initially all unable even to log in. After a few of the five did eventually manage it, the next problem arose. They were logged in but there was no connectivity with the 'tallying centre'. The 'polling station' callers could not be authenticated. Finally, after struggling for ONE HOUR, only ONE of these five 'polling stations' managed to transmit its results.

Now, much as we want to trust that the IEBC is going to do a good job, we have to ask – if four out of five 'polling stations' have problems in a demonstration meant to show the efficient use of this technology, what on earth is going to happen when 33,000 polling stations

all try to log in and transmit results at the same time? We hope the IEBC is trying to fix these problems but, on the basis of the evidence so far, and considering the sheer volume of the data to be transmitted, it certainly appears that there could be a massive system failure.

This is an issue that needs to be taken very seriously indeed – particularly in view of the persistent rumours of intended rigging.

There are a number of crucial security issues that need to be addressed.

1. Who has access to the database and what are the dangers of its being compromised?
2. What systems are in place for data encryption to prevent hacking and corruption of data during transmission?
3. Who is dealing with maintenance of the equipment, and could this involve additional, possibly unauthorised, log-in capability and access?
4. What would happen in the case of server failure – what storage technology, such as RAID (Redundant Array Independent Disk), is being employed to ensure storage of data in different places, and who has access to this?
5. Is there even a simple back-up system, in case of data loss?

6. Hackers can rearrange or delete data from a database, and insert factors that affect the outcome of results. What is being done to prevent computer programmers and IT experts from doing this?

A participant was told not to present these questions at the meeting, but we need answers to all these questions from the IEBC.

When the American Express headquarters was destroyed during the 9/11 attack on the World Trade Centre in New York in 2001, Amex data was safe. The organisation had engaged in good practice. Despite the catastrophic event, it suffered no loss of data. Its worldwide database was safely stored in other locations.

What can the IEBC tell us about its own measures for the security and functionality of its systems? What can it actually demonstrate to us about its readiness to conduct these elections? On Friday, those present at the meeting were asked to raise their hands if they were confident of the IEBC's preparedness. No hand was raised.

4 March 2013

# ELECTION DAY - THE LONG WAIT



# The institution to watch in Kenya's election

BY SEEMA SHAH

The March 4 general election in Kenya is being touted as a potentially transformative moment. The violence that killed over 1,000 people in the wake of the country's last election in 2007 shocked the world, confirming, for many outsiders, the stereotype of an incurably dysfunctional Africa. Now many will be watching to see whether the spate of sweeping reforms undertaken since 2007 can carry Kenyans peacefully through this historic poll and reaffirm the country's position as the region's most stable state.

Much of the reporting is likely to focus on the problems of tribal or ethnic divides. Yet there is a much better argument for paying attention instead to the crucial Independent Electoral and Boundaries Commission (IEBC), which will be overseeing the vote. If the IEBC succeeds in asserting the ground rules for a fair election, Kenyans can rightfully celebrate a hopeful watershed in their country's recent history. By the same token, a poor job by the commission could easily trigger a repeat of the violence that has resulted in several of Kenya's leading politicians being indicted by the International Criminal Court. Indeed, it was the questionable judgment of the former electoral commission -- which first accepted the dubious results of the 2007 vote and then hastily facilitated the swearing-in of incumbent President Mwai Kibaki -- that, within minutes, sparked violence across the country.

The stakes are also high this time around, because this election is being held according to new ground rules embodied in the constitution of 2010, created partly in response to the tragic events of a few years earlier. The new constitution provides for far-reaching devolution, opening up the possibility of a cure to the regional rivalries that have so often hobbled democracy in the country. But that potential can only be realized if the commission ensures a free and fair poll.

At first it looked as though the IEBC might live up to the expectations of the optimists. It enjoyed high levels of public confidence, in part because there was a concerted effort to make a break from the past. The search for commissioners was a transparent process, with each candidate's interview open to the public. The final team selected was also purposely diverse, representing many of Kenya's minority communities.

Unfortunately, it's been all downhill from there. Far and away the most spectacular of the commission's failures has been the one that has gained the most domestic and international exposure: Its failure to block the presidential candidacy of Uhuru Kenyatta despite his indictment by the International Criminal Court. That's a move that has not only bruised Kenya's reputation in the international community, but also opens up the likelihood of major instability in case Uhuru (and his indicted running mate William Ruto) actually win. The court had set April 10th and 11th as the days the men must appear before it, but the trial has been postponed till later in the year to avoid clashes with the second round of run-off elections. It still however, raises the possibility that Kenya's newly elected leaders might have to take a break from running the country to defend themselves in the Hague.

To be fair, the IEBC has few options. A series of laws, passed in recent months, watered down constitutional integrity standards for public office holders, eliminated educational requirements for

certain offices and removed checks on politicians' powers to party-hop at will. Such laws allow those with pending criminal cases to run for office and strip relevant commissions from investigating and prosecuting violators. Still, the IEBC's silence on the issue of candidates' lack of integrity, which extends to lower-level candidates who are known drug lords, criminals, and others guilty of engaging in ethnically divisive hate speech, begs questioning.

It's all part of a general attitude of laxity toward the law exemplified by the Commission's failure to enforce the most basic rules -- a dysfunction that extends all the way to such mundane details as the procurement of biometric voter identification kits and ballot papers, a process that has been marked by allegations of corruption. The Commission has compounded its own deficiencies by its unwillingness to live by the same principles of accountability and openness that it's supposed to have applied to the election.

But perhaps the most tragic of the IEBC's mistakes has been its failure to help provide voters with information critical to making an informed decision on Election Day. Although the IEBC released its voter education curriculum in October 2012, it waited until three weeks prior to elections to begin its voter education program. Needless to say, most voters are still in the dark about who the candidates are, especially at the local level, what the new devolved arms of government are, and what the newly created local elective officers will do.

Kenya is facing a crossroads, and the events of Election Day could determine which fork in the road to choose. Let's hope voters seize the spirit of the new constitution and demand a public commitment to making and maintaining a break with a painful and disturbing past.

*Seema Shah is a public policy researcher for the Africa Center for Open Governance in Kenya. Her focus is on elections and ethnic violence.*

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8 March 2013 Daily Nation

# Is this election credible?

By MAINA KIAI

**O**n Monday millions of voters queued for hours to exercise their right to vote. The lines were incredible, and in all the places I visited as an observer, I was impressed by the patience and determination of Kenyans: One of my friends was in the line at 6am and voted at 5pm.

We must credit Kenyans for their patience and determination. For it signifies our belief in voting as an expression of our views. Yes there was frustration at times in

the lines, anger even, but the good humour and courage was unbelievable.

But after this wonderful display of maturity, determination, and patience, the IEBC has taken us through a catalogue of errors that question the credibility of the election. It must be held accountable, no matter who wins or loses. For it has taken the trust we had in them, and trashed it. Or in the words in a letter to the editor in a daily, "the IEBC has become the ECK."

IEBC assured us that everything was

ready and tested and they were certain of “99.99 per cent” success. We believed them because we needed to after our experiences of 2007. And we believed them even though the signs of incompetence—such as minimal voter education--and wavering were clear especially after the chaotic party nominations, and where IEBC bent over backwards to accommodate politicians.

On Monday the mess was baffling. I don’t know of any polling station where the electronic identity kit worked continuously all through the voting. Either it was that the laptops had not been charged, or the passwords were not working, or something else. In one Mombasa polling centre, a voter got the system working after the IEBC staff had kept people waiting for a while trying to get it running.

These breakdowns were explained as “technical glitches.” Yet the electronic register system was meant to remedy the errors of the past by being an additional check on the manual register so that only registered voters voted. As it is now, there is only the manual record, as it was in 2007, and we should not be surprised if votes cast in some regions exceed 90 per cent, as happened in 2007.

Then there were the voter streams with an average of 750 voters per stream. IEBC’s own mock voting showed

that it took an average of 8 to 10 minutes to vote in this election. So if 500 voters for each stream came out to vote (66%) and each one took just 5 minutes it would take 41 hours to finish voting. So how can it be that some areas had more than 90% turnout but voted in less than 24 hours? Moreover, though many voters braved the sun, thirst, and hunger, could a substantial number have decided that this was too much

***“...the signs of incompetence—such as minimal voter education--and wavering were clear especially after the chaotic party nominations, and where IEBC bent over backwards to accommodate politicians.”***

and turned back?

The electronic transmission system has been the most obvious failure. This is not just about technological “glitches.” It is a violation of the law that requires presiding officers to electronically transmit the results from the counting directly to the returning officer, which provisional results must then be verified by the manual tallying on various Forms.

This was set up to remedy the mischief in 2007 where votes announced in polling stations would morph and change by the time they got to the National Tallying Centre in Nairobi.

It was to be a system where we had two records of the votes cast: one electronic and another manual to check each other. By abandoning this system, IEBC has expressly broken the law and put us in exactly the same position we were in 2007 of relying purely on manual tallies—which can change between the polling centres and Nairobi, as we have seen with rejected votes from polling centres and from manual tallying dropping from 5-6% to less than 1%.

IEBC now says—after a long silence--that this difference in rejected votes is because of software misconfiguration that multiplied the figures by 8. Hello! Did they not test this before using it? And why are the actual votes for candidates not multiplied by 8 as well? And there are more issues with lack of information and lack of transparency leading to rumours like we witnessed in 2007.

Are all these errors deliberate? And even if not, if this was a doctor treating a patient would this not be sufficient evidence of malpractice? And do they sufficiently impugn the credibility of this election?

March 7-24, 2013

# TOTAL SYSTEMS FAILURE



# System failures call into question the credibility of entire elections

By GEORGE KEGORO

**T**he Independent Electoral and Boundaries Commission has sought to portray the failure of the electronic results transmission system as a minor skirmish in the management of the ongoing elections, which they were able to easily and quickly overcome by resorting to a manual tallying of the results. The truth, however, is rather different: the collapse of the electronic transmission system is a major failure in the management of the elections and strikes at the credibility of the results declared by the IEBC.

To make this point, it is important to understand the basics: the only place where the votes cast by the electorate are actually counted is at the polling station. All the rest of the processes thereafter constitute an aggregation of those votes to determine a winner.

After counting the votes at the polling station, the presiding officer is required to record a number of details into a preformatted form, designated "Form 34", including the number of votes cast for each candidate, and the voter turnout and the number of registered voters. Form 34 is the only primary record, and the only reference point, in the chain of documents that lead to the declaration of results. In the presence of all the candidates, or their agents, the presiding officer is then required to send to the returning officer the results of the polling centre, initially in electronic form, and thereafter to transmit the physical Form 34.

In the case of the presidential election, there are two levels of aggregation. The first is at the constituency tallying centre, where the returning officer adds up the votes counted at each polling station within the constituency, as evidenced by

Form 34, and records the totals in Form 36. Form 36, is therefore, a verifying document, derived from the results from the record in Form 34.

The second aggregation point for presidential elections is the national tallying centre, the process that has been going on at the Bomas. The electronic transmission of results is built into the law, and is, therefore, a legal requirement. Thus, the collapse of the electronic transmission system is not merely a failure of some fancy gadgetry that the IEBC had introduced into the elections management process: it is the failure of a core part of the accountability for the elections, comparable to the problems of 2007.

The electronic results are, in effect, an SMS sent from the polling station. This simple act builds significant accountability to the electoral process, which its reported collapse has taken away. Experts say that the bandwidth required to support the system is tiny and would not cause the collapse that has been reported by the IEBC. The reported collapse, therefore, remains suspicious.

The IEBC thereafter resorted to what it calls a manual tallying of the results, but which constitutes the adding up the figures contained in Form 36 from the 290 returning officers around the country, without considering the contents of Form 34 in respect of each polling station.

The dispute between the IEBC and the major political parties, particularly the Cord Alliance, has revolved around access to Form 34 in relation to the results of each constituency. The IEBC has taken the view that parties are not entitled to scrutinise Form 34.

Given the fact that the manner in which the results should have been transmitted failed, the

least that parties would be entitled to is access to all the Form 34 documents from around the country to verify if these support the results as tabulated in Form 36. In the absence of such an arrangement, the manual tallying process is no more than a sham, and only adds up to the monumental blunders that have characterised the management of these elections.

The failure by the IEBC to publish a register of voters also means that there is no credible

reference point as to the details of registered voters. There are also issues of value for money reflected in this failure.

It is understood that because of personal interests, the IEBC ignored professional advice in procuring the software that eventually failed. When the country gets down to an inquisition as to what went wrong, this must form part of the inquiry.

*16 March 2013 Daily Nation*

# The IEBC did not conduct a credible or fair election

By Wachira Maina and George Kegoro

**T**he IEBC has been running a campaign asking Kenyans to trust them and accept the presidential results that they announced on Saturday the 9<sup>th</sup> of March. Before Kenyans accept this, the IEBC must answer some difficult questions. They must accept responsibility for willful negligence with regard to the Biometric Voter Register; their culpable manipulation of the Voters Register including addition of names after December 18<sup>th</sup> 2012; their reckless and sloppy tallying of results and their obstinate refusal to release information, especially form 34 to interested parties. Even though the voting was on the whole peaceful, the scale of system failure is so severe that the legitimacy of the result that was announced on the 9<sup>th</sup> of March is seriously in question. Particularly egregious is the IEBC continued manipulation of data after the announcement of official results. We have interviewed experts and done some preliminary data analysis and, starting with the Biometric Voter Registration system, now summarize our findings below.

## **The Failed Biometric Voter Registration system**

The Biometric Voter Registration system together with the Electronic Results Transmission system used by the IEBC in 2013 were meant to eliminate the voting and tallying problems that led to the 2008 violence. In the end the two systems have created worse problems than those of 2007: the BVR system was not used as it should, the Electronic transmission failed, with the result that the final votes cast is in doubt and the such results as IEBC has released have not been verified and validated. To see this, it is important to understand how these two systems were meant to work and how eventually they failed to.

Biometric systems are electronic systems that identify people using unique biological characteristics—finger-prints, eyes or even DNA. Biometric systems provide almost 100 per cent proof of the identity. In Kenya, IEBC decided to use finger prints. The immediate trigger for this decision was the conclusion of the Kriegler Commission regarding the 2007 elections. The commission noted as a “worrisome feature of the elections” the “incidence of abnormally and suspiciously high voter turnout figures reported from many constituencies in certain areas.”

As the Commission saw it, “high turnout in polling stations in areas dominated by one party is extremely suspicious and in the eyes of IREC is in itself a clear indication of likely fraud, most probably conducted through ballot stuffing, utilizing local knowledge of who on the poorly kept voter register is absent, deceased or for another reason unlikely to appear to vote.”

Out of these recommendations, a decision to implement a biometric voter identification system was made, its intent being that no person should be able to vote more than once, a reason for the improbably high voter turn outs in 2007.

But the process of acquiring and using the BVR kit was so incompetently handled that one must assume willful negligence. Trouble began with procurement. Though the procurement began in February, 2011, with an “invitation for bids” little progress had been made by September 2012, more than one and half years later, and very close to the date for the general elections. A variety of reasons were later discovered to be at play: political infighting and a clash of personal – including financial- interests among members of the IEBC. In the end, the acquisition of the BVR kit, which was eventually taken over by the government, cost Sh8 billion. But for the pressure of last minute purchase the kit should have cost Sh3.2 billion.

Unfortunately, problems did not end with procurement. Once acquired, the BVR kit was never deployed as it should, no realistic testing was ever done and even the two demonstrations that were done failed. There was therefore no basis for assuming that the kit would work under high-pressure voting conditions, itself an argument for thinking of effective alternatives.

When fully functional a BVR kit does three things: it provides a fool-proof register of voters; it automatically subtracts from the main national register voters who have voted and thus provides a running tally of total votes cast and is centrally integrated so that multiple voting becomes physically impossible. None of these features worked on voting day.

First, while the BVR is supposed to be a check against multiple voting, the system did not have a subtractive value, the option that deletes the name of a person who has voted and updates the central server on the total votes cast. If this option had been built into the software and consistently applied, it would have progressively updated the list of voters around the country, and at the close of the voting, it would have been possible to immediately ascertain the exact voter turnout. A BVR system typically has a national data-base that is also backed up virtually. The data-base should be remotely accessible from the polling stations. In this case it was not.

The problem seems to be that the 33,000 hand held devices that IEBC had procured for biometric authentication were probably never deployed. These devices are like internet modems, they need sim cards. But no service provider- airtel or appears to have been approached to provide 33000 sim cards. Were these devices ever activated? To guarantee security, IEBC would also have needed a virtual private network, very much like the one safaricom had put in place for the transmission of results. If IEBC had had the will to do the right thing, they may even have used the Virtual Private Network developed for the transmission of the results. That network had more than enough capacity to do both Biometric Voter Authentication as well as transmission of results.

Having failed to do the right thing, the IEBC then resorted to the completely unsatisfactory step of

downloading segments of the voter-register to the laptops that were eventually sent to polling stations. But this raises even more questions: what exactly did the IEBC download to the laptops? Given lack of a link to the central voter database, polling stations would not have been able to subtract those who had voted from the central database. And merely crossing out the name of the voter from the physical register at the polling station guaranteed nothing if more copies of the same register existed. In effect, there was nothing to stop double voting.

Secondly, even if the IEBC had activated the authentication system, it would still have faced major challenges. For some unknown reasons, the IEBC decided to set up the Biometric authentication system on a GPRS platform. The platform was in effect the road that connected the polling station to the national voters register. The integrity and value of the BVR system depends on the ability of the presiding officer at the polling station to confirm that the person who appears to vote is, in fact the person who registered. This is only foolproof if the biometric confirmation actually works. The problem lies in the fact that the GPRS option is way inferior in terms of performance. It has data transmission rates of 56-114kbps. Higher performance platforms are available in Kenya namely EDGE (200 Kbps), 3G (above 200 kbps per second) or better HSDPA (4.6mgbs). These could have been considered but were not. In effect, what the IEBC did was to buy a good car and running it on a cattle track even though a tarmacked highway is available. Considering the amount of data that the system was supposed to run, this was an incomprehensible decision.

One of the arguments that IEBC could make is that GPRS has wider coverage than 3G. However the places without 3G coverage are not that many and in any case, equipment on a 3G platform can talk to GPRS, in the same way that the more advanced Microsoft windows 2008 can talk to the less advanced Microsoft Windows 2004. This means that places without 3G coverage – which are also areas of relatively low traffic- would have been put on GPRS even though the rest of the country- with higher traffic- ran on 3G.

Thirdly, the BVR system relied heavily on a steady supply of electricity for the laptops on which the system would be run. However, in many places no attempt was made to provide backup power beyond the life of the one battery the computer started out on. In some stations, batteries had died within one hour of the opening of the polling. A majority of polling stations had no electric power and rapidly abandoned the BVR system as the laptops had died to lack of power.

The totality of BVR failures completely falsify the assurances given to the country by the chair of the IEBC said that the IEBC had put in place mechanisms for preventing people from voting twice.

In the end, the IEBC announced that 12.3 million voters had cast their votes in the presidential elections. But the failures detailed here also mean that it will never be possible to verify this number. At the end of voting on 4<sup>th</sup> March, the IEBC chair, Hassan, announced that 10.5 million voters had turned out to vote. How did this number increase to 12.3 million?

It is known that parts of the coast, Kilifi in particular, experienced problems as result of the violent attacks on election day. As a result, polling stations in this area did not open until as late as midday and closed within two hours thereafter for fear of insecurity. The larger number of ballots to be cast and the use of BVR, such as there was, both slowed the queues and depressed numbers. It is therefore surprising that the country ended with such a large turnout.

## **The failed results transmission system**

In 2007 the Electoral Commission had a primitive results transmission system that was open to manipulation and fraud. Some results were in fact called in by telephone to some desk in Nairobi. The Kriegler Commission recommended electronic transmission to remove opportunity for manipulation and post-voting fraud.

The system deployed by IEBC was put together with different components: a Virtual Private Network developed by Safaricom for exclusive use by IEBC. To support transmission, an overwhelming majority of the polling station would use Safaricom SIM cards. The application installed in phones to run the transmission of results was proprietary software from the International Foundation for Electoral Systems, IFES whilst the servers would then be hosted or managed by IEBC.

To ensure security, the network would have end-to-end encryption. This means that even though the VPN was within the safaricom public network, access was limited to only those with passwords and, even then, only for very limited purposes.

Once the voting took place, the presiding officer could log on and communicate directly with the IEBC server in Nairobi. This means that even if presiding officers were simultaneously logged onto the system, they could not communicate with each other. The network offered no opportunity for conspiracy and, moreover, once the results were sent after confirmation by party agents at the polling station, they could not be re-called. The servers were owned and controlled by IEBC and Safaricom's responsibilities extended to the security of the VPN and to the reliability of the 17,900 phones that they supplied to the IEBC. There were still another 11000 provided by the IEBC itself with the balance coming from Airtel.

Long before the servers supposedly crashed on Monday night, the problems of the Results Transmission System had become clear. Many of the mobile phones to be used to transmit were not configured in advance. Best practice is usually to configure phones in advance so that they can be tested and confirmed to be fit for purpose. More troubling, even when they were configured, they were not tested in advance.

There are reports that tests were scheduled to be done the night before the elections. If so, this is an extraordinary degree of casualness on the part of IEBC, since even if difficulties were discovered, there was not time to fix them on the eve of the election.

Problems of system integrity directly fed into technical problems with the server. The server intended to receive the results data was not configured correctly and, if we believe the IEBC, eventually ran out of space. This is strange since it would mean that other data other than electoral results were pre-loaded onto the servers. But in any case, this also means that the server was not tested adequately in advance. The standard practice in these matters is to configure the server in advance. Once the server is configured, test data is then sent so that its performance can be checked against planned load.

One of the most glaring inadequacies of the system is lack of redundancy in the system. Let us use a jet-line, say a Boeing 777. The 777 has two engines, even though it can fly on one. Redundancy is built into vital systems to ensure that they fail safe, that is, that they remain safe even when they fail. With reference to the IEBC results transmittal system, this means that it should never have been

possible for the loss of one or more servers to bring down the system. Redundancy should have been built into all components and parts of the system - power supply, hard disks and Processing Units in order to withstand the failure of any one component.

One of the most extraordinary admissions was the statement by the IEBC that the large number of rejected voters initially announced arose from the fact that the computer system was multiplying rejected results by eight.

Once the system crashed, the IEBC then summoned the constituency level returning officers with the tabulated polling station totals in form 36 to Nairobi. It was on the basis of these totals that final results were announced. The problem was that without the source documents, form 34, there just was no way of verifying the veracity of the results.

### **The real Tyranny of Numbers**

There is an emerging narrative that differences in turnout rates across the country are the real explanation for the results in this election. If so, the differentials in turnout rates have had a huge help from miscounting, deliberate slippage and fiddling numbers by the IEBC.

As we have seen from other BVR systems in Africa, once the electronics fail, the lack of a manual fall-back leads to all manner of problems. This is exactly what happened in Kenya.

Results at the polling station are supposed to be recorded on Forms 34 and 35. However, parties had expected that the polling station results would already have been transmitted to IEBC's central servers, so there was not as much attention placed on scrutinizing the tabulation at the constituency level. This means that when these forms were eventually sent to the constituency level centres after system failure, there was little oversight of the filling in of form 36.

Form 36 aggregates data from polling stations into constituency level data. Once aggregated it is very difficult to verify or disprove allegations that polling stations had reported more than 100% voter turnout that should have led to cancellation of results. In fact, there is evidence that this did actually happen. Form 35 from Siana Boarding primary school in Narok West reported that a total of 682 voters had cast ballots. However, the station has only 625 registered voters. In Starehe Constituency, there were three polling stations that had more voters casting their ballots than the registered voters. The results of the polling station should have been cancelled but once they were aggregated into the constituency totals, the over-voting became undetectable. Neither political parties, nor media or even observers can check the announced results against the polling station data. In all, about 20% of forms were not signed by CORD agents.

But there were even more blatant examples: Form 36 from Lari Constituency which was signed by returning officer Yusuf A. Mohammed, gave Uhuru Kenyatta 53865 but the result that was announced and is now posted on the IEBC says that Uhuru got 55232 votes from Lari, a difference of 1,367 votes.

### **1. Variations between presidential totals and parliamentary totals**

The disparities between the parliamentary elections and the national voter turnout for the presidential election is highly suspicious. The total votes cast for the parliamentary election was 10.5 million, or 73.4 percent whilst the turnout for the presidential elections was 86 percent, a whole 1.8 million votes more. Even though in presidential systems, the votes for the president are often higher than those of other elected officials in the same election, in Kenya this should not be given the reforms arising from

the crisis in 2007. When Justice Kriegler reviewed the systemic failures that led to the crisis in 2008, he was told that the suspiciously high variations between presidential and parliamentary votes was evidence of systematic rigging. Under the old voting system, ballots were handed out to voters one after the other, with the Voters getting the parliamentary ballot only after they had received and cast their presidential ballot. That arrangement allowed a voter to cast the presidential ballot and leave without voting for the parliamentary candidate.

This was a departure from previous practice where a voter would receive one ballot at a time for the three categories of elections that Kenya then run. The decision by the IEBC to hand out all six ballots at once fulfilled one of the recommendations of the Justice Kriegler Commission “that all three ballots be handed to the voter at the same time.”

This means that even though the voter is still free to cast a vote in the presidential election only, the other five ballots have already been issued. The 1.8 million vote disparity must be explained: all factors pointed to the fact that the difference between the six elections held simultaneously on that day should have been minimal. Ballot reconciliation requires that IEBC accounts for all ballots: a ballot is either valid or rejected. If Kenyans were voting mainly for the president we expect almost two million unmarked, that is, spoiled ballots. Votes are either valid or spoiled, spoiled because wrongly marked or not marked at all.

## 2. The gap between results for top two candidates

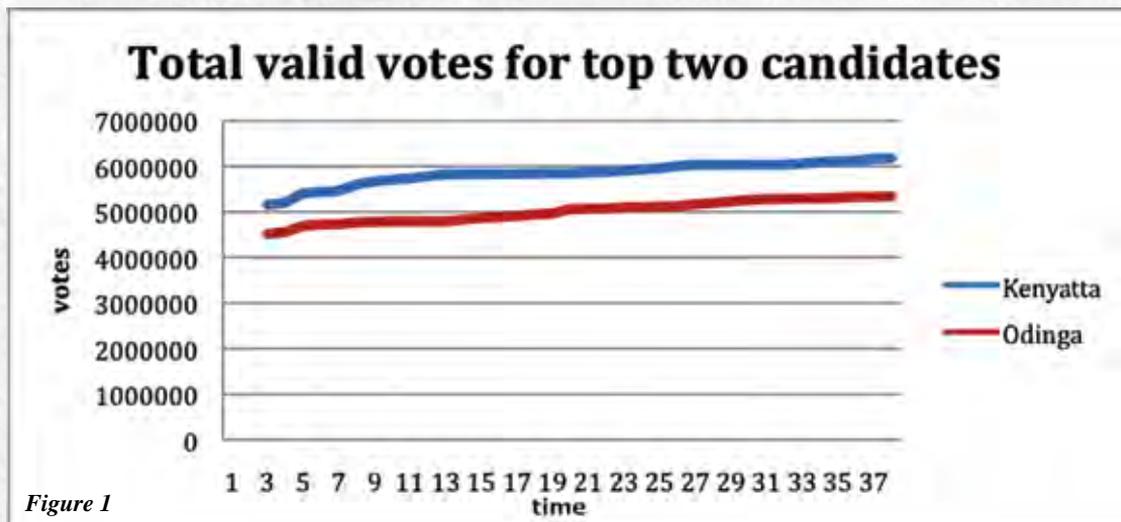


Figure 1

Watching the IEBC results from Friday afternoon, it was soon obvious that there was a pattern both to the reporting as well as to the results themselves. Just how patterned these results were becomes evident when you plot the IEBC results of the top two candidates on a graph. Figure 1 above plots Uhuru Kenyatta’s and Raila Odinga’s results from constituency number 234 at 2.46pm on Friday up to constituency 291 at 2.32 am. The results are oddly, virtually parallel lines. Why is this strange? Constituencies have unequal number of votes and they report randomly. We would expect to see fluctuations in the gap between the candidates, not a patterned steady gap across results. It could be that in effect the IEBC was processing and queuing the results in order to report them in a systematic way. But even that would not explain why results from widely differing constituencies should increase at an almost rigid interval.

### 3. Internal arithmetic inconsistencies

Using screen shots of IEBC results board at Bomas we tested whether the various numbers reported by IEBC were internally consistent. We discovered that they were not. Let us explain. There were five critical numbers that were shown on the IEBC results board: the total votes cast; the number of rejected votes; the number of valid votes and the sum of individual candidates votes.

If the IEBC numbers are correct, we should be able to confirm them by reverse calculations as follows:

- a. If we subtract the rejected votes from total votes cast we should get the valid votes.
- b. Likewise the rejected votes plus valid votes should give us the total votes cast.
- c. And if we add rejected votes to the sum of votes cast for all candidates, we should also get total votes cast.
- d. Finally, if you remove the sum of individual candidates votes from the total votes cast you should get the total rejected votes.

So we did that and promptly discovered that the results did not tally. Over time, the differences between reported numbers and calculated numbers ranged from 2 to 7416. This could, of course, be just a case of poor number work but in an election that was finally won by just over 8000 votes, such variations are critical. Perhaps more worrying, why would IEBC not use just a simple spreadsheet to confirm that their numbers did actually add up? Could be that in fact they were not interested in doing so?

### 4. Voter Registration figures

The easiest way to manipulate an election result before voting is manipulation of the voters register. One of the arguments for a Biometric Voter Register was that the manual register was too easily abused.

Kenya went into elections 2013 without an official register of voters. The Elections Act requires the IEBC to compile and maintain a register of voters. The Act also requires that not later than two months before holding of general elections, the registration of voters shall cease.

Voter registration ended in December and a provisional register of voters was published on 18<sup>th</sup> December, 2012. On 17<sup>th</sup> January 2013, the IEBC gave the political parties soft copies of the provisional register to enable them conduct their primaries. One week before the elections, IEBC published a notice in the local newspapers to the effect that a cleaned out version of the register was available on its website. However, an inspection of the site showed that the register had not been uploaded. The country went into elections without the register ever being uploaded.

This situation raises a number of questions among them: since there was no authoritative version of the register, what was used to conduct the elections. Was it one of the interim versions or the (unpublished) final register?

When we tested the most recent version of the register we could find against the provisional register we ended up with more questions than answers. On an intuition we decided to test the integrity of the register in the strongholds of the two leading candidates, Uhuru Kenyatta and Raila Odinga. We

reviewed the final register used for voting against the provisional registration after close of registration on December 18, 2012. The results for Raila's strongholds are in figure 2 and for Uhuru Kenyatta in figure 3.

*Figure 2: The state of the Register in RAO's strongholds*

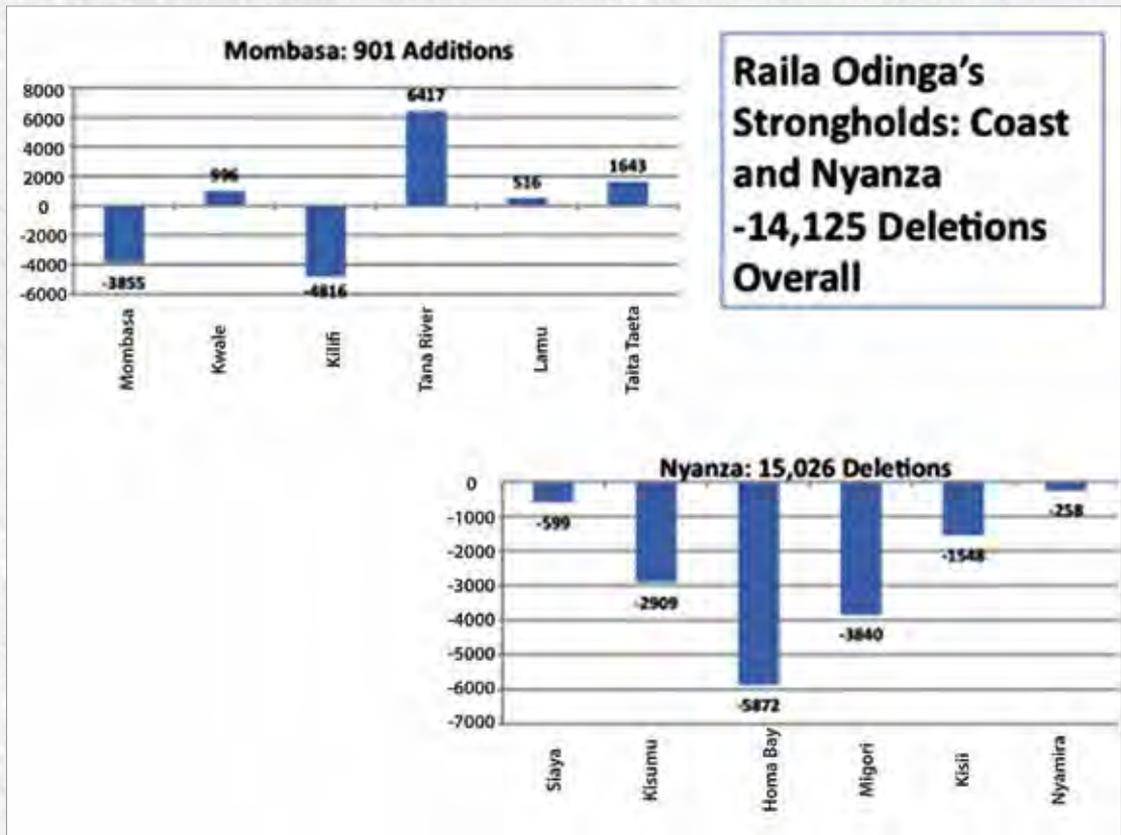
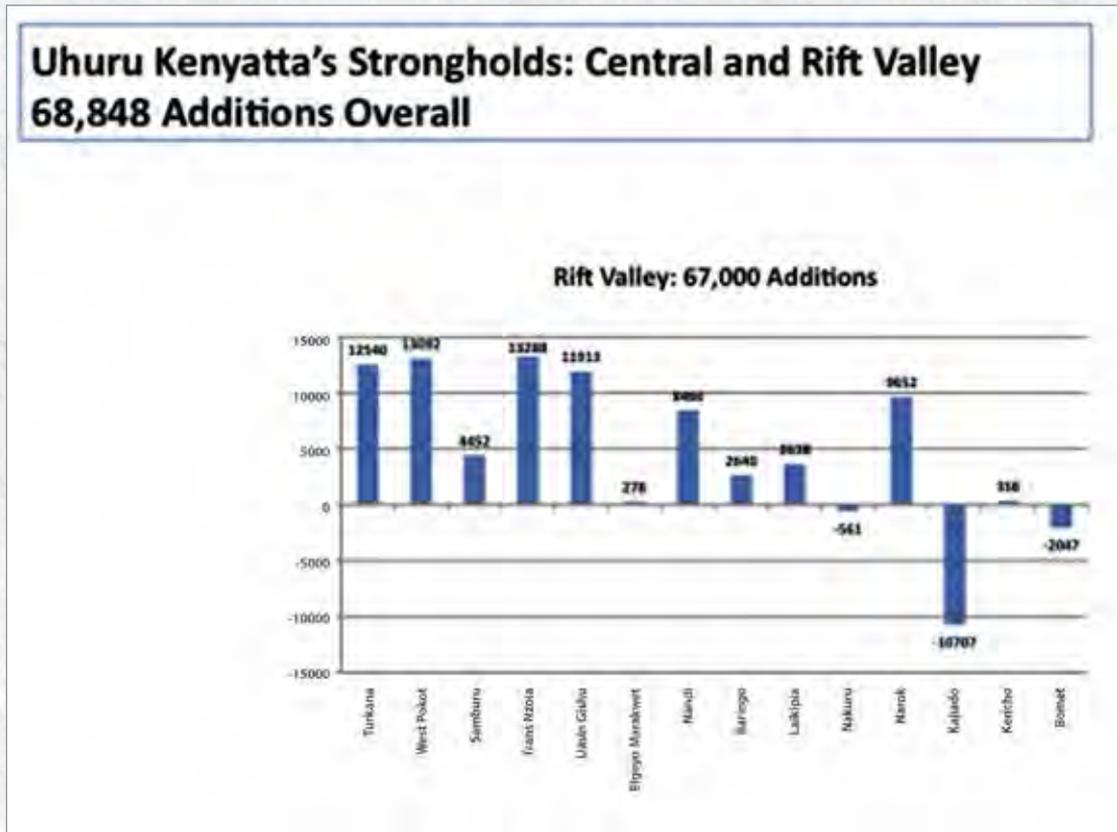


Figure 2 shows that in Nyanza there were only deletions, totalling 14,125 voters. Contrast this number with what happened to the voters register in Central Province and Rift Valley. There were net increases- 1,848 in all- in total number of registered voters in Central. In the Rift Valley, the numbers were a staggering 67,000 additional voters.

Figure 3: The state of the register in UK's strongholds



What does this mean? Deletion of names from the provisional register are explainable. If some essential identifying information was not captured at registration the IEBC may have to delete the name from the register. What explains additions seeing that registration is already closed? And if the additions are explainable, why are they not random? Western Province – a non Uhuru strong-hold- had 2938 deletions and Eastern Province had 4222 additions. Central had 1848 additions.

But there are other problems: Media sources cite different figures as to the number of registered voters, some of which are inconsistent with the IEBC's published registers. The *Sunday Nation*, in its map of results, used results from the provisional register. In Othaya there are three voter registration figures. Speaking to voters at the Othaya CDF station, the Constituency Tallying Center, the Returning Officer announced that although the total number of registered voters at the close of registration was 46,848, this number had subsequently improved to 47,231, 383 additional voters. The official voter registration figure for Othaya is actually 47,293, a total of 445 more than those on the register on December 18.

There are other problems: the IEBC website contains a list of voters without biometrics, uploaded on March 3, 2013. Why are there voters without biometrics?

There are differences between the December and February versions of the register. Some of these are attributable to the fact that the latter version was a cleaner version of the register. Others are more difficult to explain or understand. Not even one constituency contains the same number of registered voters in the old and new versions.

The register that we finally have ended up with is vastly different from the provisional register. Even though, in general terms, there has been a decrease in registered voters, which is expected, there have also been selective but massive increases. How did the IEBC add more voters to the register after the close of registration?

On a quick tally, we discovered that additions were made in 45 out of 47 counties, adding between 101 and 8516 new voters to constituencies. But in many of these constituencies, additions were more than offset by large deletions thus appearing to keep the overall national register close to the provisional register. The final register also takes away between 2 and 11,261 people from the old register. Overall, the new register contains 15,146 less voters.

Examples of the adjustment to the register will make the point: in Turkana County, Loima Constituency has an additional 4519, Turkana Central Constituency was added 8516 voters, Turkana East 1867, Turkana North 5122, Turkana and South 3957. The registered voters for Turkana West were reduced by 11,261.

In West Pokot County, Kacheliba received an additional 1911, Kapenguria a further 4229, Pokot South a further 4988 and Sigor a total of 1964.

The five constituencies in Trans Nzoia County received an additional 13,288 voters and the six in Mombasa County got an additional 901 votes. In Nairobi, the second register contains 50,102 deletions while Kajiado has 10,707 deletions.

The effect of these adjustments is that voters have just been moved around the country in a completely unaccountable process. The IEBC would need to provide a cogent explanation as to the differences between these categories of voters.

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# SUPREME COURT DECISION - CONSTITUTIONAL GAINS REVERSED?



# Given Issack Hassan's evidence, can we trust him with another election?

By MAINA KIAI

The Supreme Court spoke with one voice in deciding that the March 4 election results stand. As we wait for reasons for that decision, let me wish Uhuru Kenyatta, William Ruto and their incoming regime the best, for Kenya needs them to succeed so we can expand our democracy, increase accountability and develop.

They put together a good campaign, turning adversity of the ICC into advantage and somehow convincing Kenyans that despite their establishment, status quo credentials and background, they were the underdogs. Credit this to the British BTP public relations wizards. But this is not about Mr Kenyatta and Mr Ruto. It is about some issues arising from the monumental decisions of the Supreme Court.

We will know in a week why the Court ruled as it did, but perhaps the submissions urging judicial restraint were convincing. May be, they agreed that the petitions were more politics than law. But the Mutunga Court proved to be retrogressively activist in reversing gains in the new Constitution by vitiating two

key, plainly written Articles of the Constitution. They had no judicial restraint here, taking us back to the standards of the old order that we discarded.

First was the ruling that essentially ousted Article 159 (2) (d) which directed courts to administer justice "without undue regard to procedural technicalities," when it rejected analysis of 122 constituency tallies based on information that the IEBC had presented

***"It will be a tragedy if this court should validate that self centred, narcissistic and egocentric philosophy espoused by the petitioner."***

in response to Mr Odinga's petition, reasoning that it was not presented procedurally or on time. This was reminiscent of the rulings in the 1992 and 1997 petitions by Kenneth Matiba and Mwai Kibaki respectively that were thrown out on technical grounds.

Second was the rejection of the plain meaning of the words

"votes cast" in Article 138 (4) (a) in determining whether a candidate had attained the 50 per cent plus one threshold. The old constitution used the words "valid votes cast" rather than "votes cast" in determining threshold and three members of the Committee of Experts confirmed to me that they made a deliberate decision in dropping "valid" when drafting our Constitution.

I'm especially looking forward to reading how the Court deals with Issak Hassan's own submissions, on record, where he delves into an analysis of the character and intentions of some candidates.

Issak Hassan submits in Paragraph 9: "The petitioner is good in making other scapegoats for his failures and electoral defeats. He is a man used to ruin others as a sacrifice for his failures. It is high time we called a spade a spade as we deconstruct the issues that define the petitioner's well-known pattern of refusing to concede defeats." Then in Paragraph 14: "It will be a tragedy if this court should validate that self centred, narcissistic and egocentric philosophy espoused by the

petitioner.”

Mr Hassan may well be right in his assessment of Mr Odinga but that is neither here nor there. This could be validly and legitimately submitted by any other contestant or Kenyan for that matter. But the IEBC chair is no ordinary citizen who can publicise his views on candidates. He was not a

contestant in the elections. He can have his views on candidates and people but he must never utter them publicly. As the official responsible for conducting impartial polls, the constitution requires that he be seen to be unbiased.

How long has he held these views? What weight did the Court give to these submissions

in view of the constitutional requirement of impartiality? Can an election conducted by a person holding such views be legitimate (as opposed to legal)? Remember, Isaak Hassan is not only the Chair of IEBC: he was also the sole returning officer for the presidential election.

12 April 2013 *The Star online*

## AG MISLED SUPREME COURT ON DOCTRINE OF INVALIDATION OF ELECTIONS

BY JAMES GONDI

**T**he recent decision by the Supreme Court which settled the dispute on the conduct of the March 4 general election raises a lot of concern on the legal standard and doctrine which the court chose and which the Attorney General and respondents selectively submitted.

The true standard for the invalidation of a presidential election result, or any other election result for that matter, is much simpler than the AG asserts in his partisan submissions as a ‘friend of the court’. The standard is that of illegality and proof of any laws flouted by any of the parties to the dispute, including the electoral management body, in the process leading to the declaration of the winner.

Key decisions in the commonwealth and other jurisdictions suggest that the true standard is one of substantial compliance with the law and not the effect on the result. The 1975 case of Morgan and Simpson remains the cornerstone judgement in determining the validity of elections. In this case, it was determined that breaches of the law in and of themselves were sufficient to invalidate an entire election even if those breaches did not substantially affect the outcome of the result.

As submitted by the respondents in the consolidated petitions four and five, Morgan and Simpson remains the primary authoritative standard (*locus classicus*) in the determination of disputes relating to the process and result of elections. Therefore the primary standard for the invalidation of

an election result has nothing to do with whether the gross irregularities observed on the part of the IEBC had a substantial effect on the law. The court only needs to be satisfied that there were indeed flagrant violations of electoral laws and regulations.

In the Besigye case, Justice Tsekoko in his dissenting opinion, stated that ‘allowing candidates licence to cheat even as little as cannot affect the results would render the election exercise a farce, a play thing or frivolous’. Tsekoko further asserted that: ‘tolerating cheating and fraud in elections can imply that holding elections itself is not desirable or necessary’.

The American cases of *Welsh v McKenzie* and *Bennet v Yoshina* set out similar standards with regard to the threshold for the invalidation of election results. In *Welsh*, the standard was whether the alleged poll irregularities implicate the very integrity of the election process reaching a point of patent and fundamental unfairness. *Bennet* was similar to the situation in Kenya in that it involved malfunctioning of voting machines. It was held that a fundamental injustice had been afflicted upon the petitioner even though the violations of electoral law and procedure were of a ‘garden variety’.

It is not in dispute that there were violations of electoral laws by the IEBC. The petitioners applied legitimate audio visual means to demonstrate these illegalities and further adduced incontrovertible evidence to demonstrate this fact. The court appears to have ignored this evidence and chartered the easier path towards the net effect of these violations of electoral law on the actual outcome of the elections.

Perhaps the court subconsciously took into account the socio-political effects of an invalidation of an election result and chose the more conservative path as advanced by the AG. Indeed, the law does not exist in a vacuum and the court may have been persuaded to apply the more conservative case law which says that

even after establishing flagrant violations of the law, the petitioners must show that without these violations, a considerably different result would have emerged from the electoral process.

The doctrine of substantial effect on the result even though outdated and controverted may have been a safer way out for the court given the socio political and economic dynamics at play. After all, many in Kenya, especially the middle class and business community had taken the position that the country must move forward notwithstanding their dissatisfaction with the electoral process.

In addition to the desire to move on with life and business, despite the injustices by the electoral management body, the tension between peace and justice came into play behind the scenes. It was feared by the political establishment that an invalidation of the result would have led to widespread violence. Given that the courts operate in society, they may have been swayed towards this narrative and chose to abandon the established violation of law standard and adopt the inferior doctrine of substantial effect on results as part of a political calculation to avoid perceived violence and the detrimental economic effects of invalidation of the election results.

The effect of the electoral malpractices and upholding the result leaves the country balkanised along ethnic lines depending on their desired outcome and taking into account the gross irregularities. One

half of the country feels disenfranchised and that their right to vote has been infringed by legitimising the failure of the election management body to abide by its laws and regulations.

The other half of the country is ecstatic about its coalition ascending to power despite flagrant breaches of the law. The result is that electoral malpractice, irregularity and illegality have been legitimised and any party to future electoral contests will have to either be complicit in the violation of election laws or become the victim of such violation. The disenfranchisement of voters is also an outcome which may lead the populace to significantly diminish its participation in future electoral processes.

More significantly, confidence in electoral justice has diminished while apathy and ambivalence has begun to take root. The gains made after 2007 through the partial implementation of new electoral laws and regulations suggested by the Kriegler report are on the verge of being lost. The courts and the electoral management body will have an uphill task in motivating public participation in elections and dispute resolution. The court had a duty to restore the integrity of elections which the electoral management body has distorted.

*The writer was a Program Advisor at the Africa Centre for Open Governance (AfriCOG) which challenged the outcome of the March 4 presidential election.*

13 April 2013 *The Star* online

## SCRUTINISING OF ELECTION RESULTS: WHAT DIDN'T REACH THE SUPREME COURT JUDGES

By Seema Shah

After observing the Supreme Court's scrutiny of election results from the polling stations and the constituencies, I was surprised that the report presented to the judges barely scratched the surface of what we found.

On the first day of the pre-trial conference, before the hearings even began, the Supreme Court judges ordered judiciary staff to conduct a scrutiny of Forms 34 and Forms 36. The court also ordered a re-tallying of 22 contested polling stations, alleged to have had serious problems. The order was a

welcome one, as it affirmed hope in the independence of the court and seemed to indicate the judges' commitment to fully understanding the myriad problems alleged by petitioners.

Soon after the process began, however, it became clear that it was fraught with problems. Security during the scrutiny was severely lacking. Judiciary employees, as well as agents for the petitioners and respondents, were initially divided into eight stations.

Each group was tasked with scrutinising all submitted Forms

34, which consisted of manually entering all the numerical data from Form 34 into a spreadsheet. All data from the eight scrutiny stations would then be transferred onto one central computer using flash drives. It is unclear when these flash drives were issued and what the protocols were to secure them overnight. There was also little security around the central computer, which was intermittently surrounded by one group of people or another.

After these issues were brought to the attention of the judicial staff, armed guards were brought in.

While that helped secure the room overnight, it did little to secure the main computer receiving all the data.

### **Omitted from the report**

Our observation notes covering just one day of scrutiny showed 64 missing forms 34 from 14 different constituencies. The report to the judges, on the other hand, showed that Forms 34 from only 10 constituencies could not be found. Notably, our notes show several instances in which the number of votes cast exceeded the number of registered voters. Those were not the only omissions. On many forms, the numbers did not add up. For instance, the number of votes cast, as recorded, was not always the sum of valid and rejected votes. There were also differences between the aggregate number of valid votes as written out in numerals and in words. Which result was announced, the one in words or the one in numerals?

We also noted multiple copies of the same form, some of which contained identical figures and others of which included non-identical figures. Some forms were missing results for certain candidates, including instances where all candidates were not listed, or were listed with no corresponding result. Often, figures were missing from the documents, and the numbers were illegible or had been changed without an authorising counter-signature. How did the judges end up receiving a partial report of the scrutiny?

### **Flawed methodology**

The methodology for scrutinising the Form 36 – the document used to collate results at the constituency level -- was also flawed and failed to show important discrepancies. Our analysis showed that in some cases, the numbers for a particular polling station, as recorded on Form 36, were different from what was recorded on the corresponding Form 34. There was no way to

identify the problematic polling stations without using a polling-station level scrutiny of Form 36. Moreover, the methodology failed to capture problems like missing polling stations on Form 36.

Based on our observation, the judiciary review also failed to highlight important differences between Forms 34 and Forms 36. It did not show, for instance, that in Isiolo North, the total number of votes calculated for Uhuru Kenyatta from all Forms 34 was 17,675. On Form 36, Kenyatta is reported to have won 18,489. Where did 814 extra votes come from? In Turkana North, the Form 34 total for Kenyatta was 3,567, but Form 36 showed Kenyatta to have won 3,507 votes, which is 60 less votes than what was on the primary document.

***“...in Isiolo North, the total number of votes calculated for Uhuru Kenyatta from all Forms 34 was 17,675. On Form 36, Kenyatta is reported to have won 18,489. Where did 814 extra votes come from?”***

Such discrepancies can be found for almost all the candidates' results. It is also worth noting that it was impossible to fully observe the scrutiny process, because each station simultaneously reviewed multiple constituencies. This meant that observers had to somehow keep an eye on all the different constituencies at the same time. Since there were only 10 observers from each side, it is not hard to see how being able to keep up with all the forms was difficult.

Also, each station was equipped with a large screen, which was meant to enhance transparency by showing the data being entered by

judicial staff. Since more than one constituency was being entered at each station, though, not all data entry was transmitted to the screen.

### **Turnout beyond 100 per cent**

It is now clear that the judiciary staff never carried out a re-tallying of the 22 contested polling stations as ordered. Instead, they simply reviewed and entered the data from the contested stations' Forms 34 and Forms 36 into its spreadsheet. In this way, then, it was no different from the general scrutiny of the forms. Inexplicably, its report on these stations highlighted only five as problematic. This was surprising, given that a simple calculation using the recorded figures showed four important anomalies.

First, in 16 polling stations, voter turnout as calculated using Form 34 and the principal register exceeded 100 per cent. The largest recorded turnout in this category was 301 per cent.

Second, in 18 polling stations, voter turnout as calculated using Form 36 and the principal register exceeded 100 per cent. The largest recorded turnout in this category was 450 per cent.

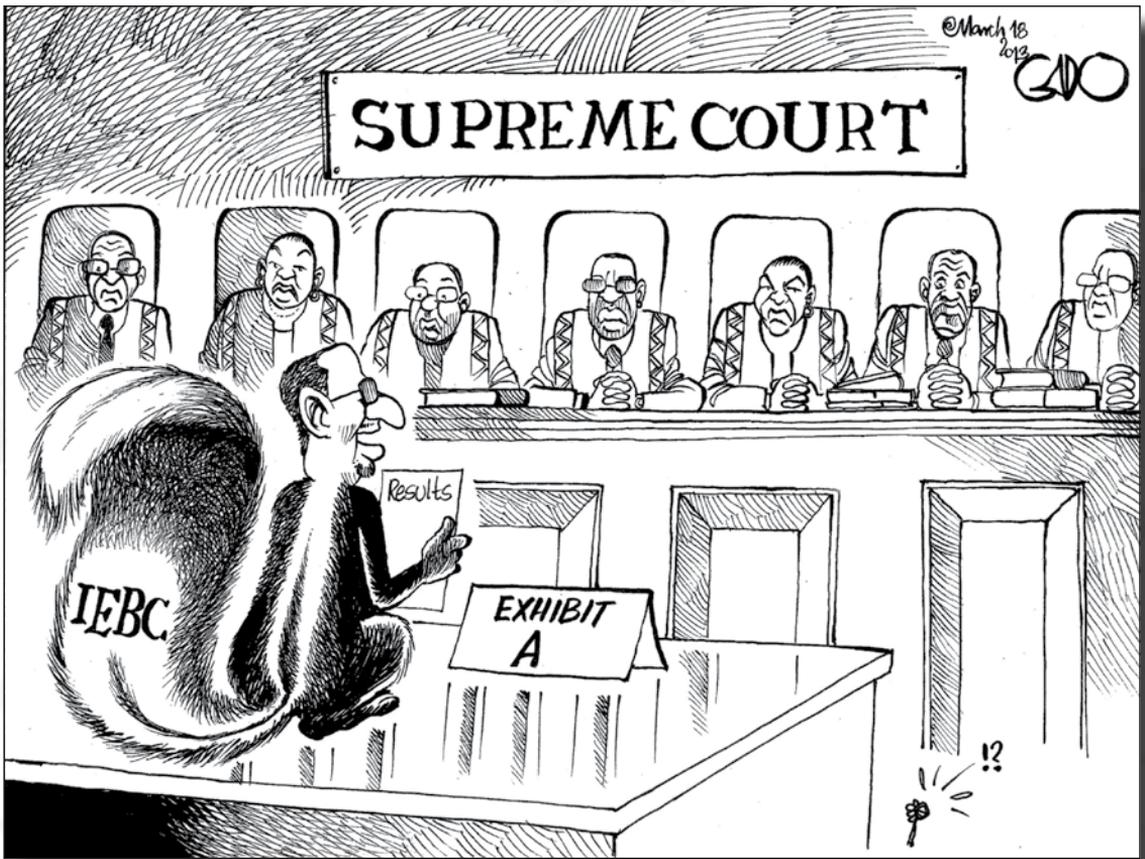
Third, and even more striking, was that there were two polling stations with voter turnout in excess of 100 per cent when using the green book, which the IEBC argued was the actual, complete register. One polling station in this category showed a 238 per cent turnout.

Lastly, it is only in one polling station that the sum of registered voters in the principal register and the special register equaled the number recorded in the green book.

Since the Respondents explained that the principal and special registers (as well as 12 trainees) together totaled the green book, the observed discrepancies are highly problematic and clearly undermine the Respondents' claim. It will be interesting to see how the Supreme Court judges explain this when they release their judgment in less than 10 days' time.

20 - 26 April 2013

# SUPREME COURT JUDGEMENT - ELECTORAL MALPRACTICE LEGITIMISED?



# Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test

BY WACHIRA MAINA

Justice Robert H. Jackson once said of the US Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." The infallibility that finality brings may, in the long view, be one of the few merits of the Supreme Court's much awaited judgment on the presidential petitions.

Sixty per cent of the judgment, by length, is a leisurely rehash of the facts and arguments made by the parties in court. Everything else is given short shrift: Seven paragraphs are spent on reviewing and resolving the issue of the failed technology; another nine paragraphs dispose of the IEBC's discretion to do manual tallies; 11 paragraphs are dedicated to the voters register and, astonishingly for a court given to brevity, 27 paragraphs are set aside to explain why rejected votes must not count in computing presidential percentages.

To paraphrase an old cynic's quip, this judgment is both detailed and important, but the parts that are detailed are not important and those that are important are not detailed. This article offers five reasons for this conclusion:

First, there is the Court's reliance on extremely backward Nigerian authorities urged on it by the Attorney General, Prof Githu Muigai, acting as *amicus curiae*. Second, there is its tolerant and uncritical acceptance of the IEBC's explanations about the ever-fluid totals in multiple voters' registers and what this means in practice. Third, there is the question of tallying and especially, what the Court's own tallies show but is not properly reflected in the judgment. Fourth, there

*"The judgment is completely hazy about what standard of proof it has applied to what issue in order to answer the specific questions raised in the petitions."*

is the Court's use of subsidiary legislation to limit the meaning of "votes cast," an unambiguous phrase in the Constitution. Finally, there is evidential foreclosure that the Court imposes on itself by taking judicial notice of technology failures instead of treating IEBC as spurious, as urged by petitioners.

## **Backward looking, mean-spirited, cramped Nigerian precedent**

Let us start at the beginning. Central to the Court's judgment is what the petitioners needed to prove and to what standard they should have proved it in order to get a remedy. The Court says that the answer to that question is "well exemplified" in Nigerian case law. Apropos of Nigerian inspiration, it concludes that a petitioner must prove that the law was not complied with and also that the failure to comply affected the validity of the elections. That is the legal burden. What is the standard of proof needed? The court seems unsure.

In principle, it says, this should be above a "balance of probability" but below "beyond reasonable doubt." This means a place in-between

the standard in a civil case and that in a criminal case. But the Supreme Court has also invented a dramatic new standard for the presidential election. A petitioner challenging a president-elect who has won in a first round election, as President Uhuru Kenyatta did, must provide proof beyond reasonable doubt. But what constitutional principle is the court vindicating here? None that one can readily see.

***“The effect of this new standard is that a petitioner who questions the IEBC’s maths, as Raila Odinga and Gladwell Otieno did, is then subject to the same standard of proof as a person who says that a president-elect has won by corruption, bribery and conmanship. This is a giant jurisprudential step backwards.”***

All election results are about data. There are no gradations of winning. Why, then, in principle, should exactness in electoral thresholds, say 50 per cent plus one and 25 per cent in at least half the counties impose on a presidential petitioner the duty to discharge a higher standard of proof – than say an MP challenging a victor chosen on the basis of “a majority of votes cast?”

Or maybe this is the Court’s method of radically curtailing the number of petitions that can be brought against the president-elect. Since most of the evidence of wrongdoing will be in the hands of the IEBC — or a similar body — it is extremely difficult to see how a petitioner could

ever succeed. This cannot be what Kenyans thought a new Constitution was meant to do, shield an elected leader from being subject to an election petition. In fact, it seems more likely than not, that Kenya will never have a run-off election so long as a candidate can, by hook or crook, get himself declared elected. The onerous standard of proof would be incredibly difficult to discharge.

The effect of this new standard is that a petitioner who questions the IEBC’s maths, as Raila Odinga and Gladwell Otieno did, is then subject to the same standard of proof as a person who says that a president-elect has won by corruption, bribery and conmanship. This is a giant jurisprudential step backwards. But even more troubling is whether this is the standard that the Court actually used in deciding these petitions. The judgment is completely hazy about what standard of proof it has applied to what issue in order to answer the specific questions raised in the petitions.

But the court takes even bigger steps backwards in relying on the Nigerian cases. The point at issue is what effect IEBC’s illegalities should have on the validity of an election. The relevant law is Section 83 of the Elections Act. That Section is not a model of clarity. Paraphrased, it says that to invalidate an election in Kenya because of irregularities or illegalities either one of two conditions, but not necessarily both together, must be met.

One, that the election has not been conducted according to the principles laid down in the Constitution and in written law or, two, that though the irregularities and illegalities have not violated constitutional principles they have affected the result of the election. The use of the word “or” in this section means that these two conditions are not cumulative, either one of them is sufficient.

But that is not how Attorney General Githu Muigai, the Supreme Court of Kenya and the Nigeria cases cited as authorities are reading

this provision. They say, instead, that the two conditions are cumulative. This means that a petitioner must prove that illegalities have been committed and also that those illegalities have affected the result.

In law, “affect the result” means that without the illegalities somebody else, other than the person who won, would have taken the election. For Raila Odinga, this means that he was expected to prove that illegalities were committed and also that without those illegalities he would have won the election.

But since the Court has created a new standard of proof, it seems that he needed to prove that he had won the election beyond reasonable doubt. The law as borrowed from Nigeria, combined with the new standard of proof, leads to this absurd result: Mr Odinga could show that the irregularities were so gross that everything about the election is in doubt. Such success in Court would not necessarily be to his benefit. The scale of illegalities could be such that he was unable to show beyond reasonable doubt that he, rather than fellow contestant Musalia Mudavadi, would have won the election. In that case, the result announced by IEBC would stand. This, surely, cannot be good law.

### **Questionable jurisprudence**

That we have taken the nastiest Nigerian case law and embedded it in our new Constitution would shock the Nigerians themselves. Indeed a Nigerian colleague who has read the judgment is aghast: “It is tragic that the Court has relied on some of the most awful and questionable jurisprudence from the Nigerian Supreme Court on elections.”

In lamenting thus, my friend echoes the views of his senior, Prof Ben Nwabueze, arguably Africa’s most accomplished comparative constitutional lawyer. Reviewing the very case law Kenya has now approvingly borrowed, Prof Nwabueze excoriated the Nigerian Supreme Court for its

“discreditable” role in wilfully conferring judicial legitimacy on the 2003 and 2007 presidential elections in Nigeria. He lampooned the judges for failing to “appreciate that the question of who should rule Nigeria is not one to be decided by a perverse and narrow legalism, by the technicalities of the rules of evidence, practice and procedure and by considerations of expediency.”

Another Nigerian scholar points to a more progressive line of cases: Alhaji Mohammed D. Yusuf v. Chief Olusegun A. Obasanjo; Buhari v. Obasanjo and the older case of Swem v. Dzungwe. These cases have applied the principle that best represents the meaning of our Section

***“In rejecting the petitioners’ argument that there must be a Principal Register, the Court holds that there is no single document called the “Principal Register of Voters.” What there is, it says, is an ‘amalgam of several parts prepared to cater for diverse groups of electors.’”***

83. In applying the first limb of Section 84, namely, that an illegally conducted election is invalid even if the result is not affected, Lord Denning stated the rule thus: An election conducted so badly that it does not substantially comply with the law is invalid, “irrespective of whether the result was affected, or not.”

Another judge explained the reason: “An election which is conducted in violation of the principles of an election by ballot is no real election.” Similar reasoning had applied in the Hackney Case, an earlier decision. In that case, two out of

19 polling stations had been closed all day and 5,000 voters could not vote. That election was invalid.

Conversely, the case of *Gunn v. Sharpe* applied the second limb of the principle: An election will be held invalid even if it substantially complies with the law so long as the result is affected. Here, the election was invalid because 102 ballot papers that should have been stamped had not been and this had affected the result.

The core issue, to round off this discussion, is straightforward: Which of the two readings of Section 83 would promote the open, democratic, accountable government ethos of the Constitution? Certainly not the backward looking, mean-spirited, cramped reading of the law that weak-kneed Nigerian courts have foisted on the hapless public, and which our Supreme Court so happily borrows.

### **Voters register: A milk-fed turkey to future fraudsters**

So much for the Court turning to Nigerian case law. However, matters don't improve much when we turn to the second point, the Court's conclusions on the voters register. Bluntly put, the Court's decision on this point has kicked open the door to future election fraudsters. In rejecting the petitioners' argument that there must be a Principal Register, the Court holds that there is no single document called the "Principal Register of Voters." What there is, it says, is an "amalgam of several parts prepared to cater for diverse groups of electors."

This, surely, is a non sequitur. It does not follow

from the fact that the law accepts that a voters register can be broken down into sub-registers and stored in multiple forms, manual and electronic, that therefore the law does not require the IEBC to "publish and publicise" a principal register. On the Court's holding, the voters register of the future will be what the IEBC says it is at whatever stage of the election.

Indeed, this is what IEBC appears to have been doing all along these past three months. Four documents have been called Voters Register:

the Provisional Register of December 18, 2012 with 14,340,036 voters; the Gazetted Register of February 18, 2013, with 14,352,545 voters; the March Register, given to political parties on the eve of the election with 14,336,842 voters and the March 9, 2013 register which was put out with presidential results with 14,352,536 voters. It is this last, the Green Book, which the Supreme Court now treats as the legitimate

Voters' Register even though there is a Gazetted Register, that of February 18.

Does it matter? On the face of it, it does not seem to. After all, there is a difference of only 12,509 voters between the register of February 18, 2013 and that of December 18, 2012. A difference of less than one per cent of registered voters between the highest recorded and lowest recorded number of voters is, as the IEBC said, statistically insignificant. Yet if we look behind the small discrepancies between the global totals, we see huge variations in regional and constituency numbers. There are large subtractions from and even larger additions to the register after December 18, 2012.

***"Yet if we look behind the small discrepancies between the global totals, we see huge variations in regional and constituency numbers. There are large subtractions from and even larger additions to the register after December 18, 2012."***

## Arguments

In open court, during the hearing, the arguments seemed stuck on explaining the 36,236 voters who the IEBC said were physically disabled but eligible voters without biometrics. The Court accepted this explanation; after all, it is hard to criticise the cartel of good intentions, among whom the IEBC numbers.

However, the law is that even disabled people should have registered by December 18, 2012. There is therefore no reason for them to be added to the Register only after the Principal Register has been gazetted, that is after February 18, 2013. But even if one discounts this number, there is still a lot more explaining for IEBC to do.

***“Even more damning, the petitioners said that IEBC had tinkered with the Register in 45 out of 47 counties, adding between 101 and 8,516 new voters in particular constituencies. In Turkana County alone five constituencies got added voters...”***

Consider this: Shortly after December 18, 2012, some 13,790 voters in Coast and Nyanza were subtracted from the register; 50,102 voters were subtracted from the register in Nairobi and 2,938 voters were subtracted from Western Province register. These subtractions seem plausible: They may be cases in which essential personal details are missing and IEBC had to remove the names from the record. But, and this is the question the judgment never asks, why are there also so many additions? In Central Province and Rift Valley, 68,836 voters were added to the register; 6,604

voters were added in North Eastern and 4,222 voters were added in Eastern Province.

All these facts were pointed out in the petitions: IEBC did not explain any of the additions; it did not explain why Makueni Constituency had four different voter registration figures for the presidential election, the governor election, the senator election and for the national assembly election. It did not explain why Othaya Constituency had three voter registration figures: 46,848 at the close of registration; an additional 383 by voting day and a total of 47,293 on the final announcement.

Even more damning, the petitioners said that IEBC had tinkered with the Register in 45 out of 47 counties, adding between 101 and 8,516 new voters in particular constituencies. In Turkana County alone five constituencies got added voters: Loima got an additional 4,519 voters; Turkana Central another 8,516; Turkana East, 1,867; Turkana North an additional 5,122 and Turkana South another 3,957.

In West Pokot County, Kacheliba received an additional 1,911; Kapenguria a further 4,229; Pokot South another 4,988 and Sigor a total of 1,964. The five constituencies in Trans-Nzoia County received 13,288 new voters.

Two questions arise. Are these additions lawful? Would these numbers have affected the result? Since the Court’s judgment does not analyse this evidence, it does not answer either of these two questions. The judgment assumes, without analysis, that the integrity of the Register had no effect on the result.

That is a dubious assumption: Small numbers eventually add up. If you had a computer programme that stole 10 votes per station in 25,000 polling stations, the national tally of stolen votes is a quarter of a million votes. With a fluid register, the theft would never be detected. This means that allowing the IEBC to keep an

indeterminate register, as the Court's decision most surely has done, is to gift a milk-fed turkey to future fraudsters.

But we do not have to speculate how the register could affect the result. Let us use the three post-December 18 registers to simulate the effect on the results of the 22 polling stations that Mr Odinga had challenged and that the court had had re-tallied.

Using the registration figures in the Form 34s from these polling stations, 16 out of the 22 polling stations had more than 100 per cent voter turnout. If you use the figures in Form 36 or in the Register of the 18th of February, 18 out of 22 would have had more than 100 per cent voter-turnout. Finally, if you used the registration figures in the Green Book, which neither the presiding officers at the polling stations nor the returning officers at the constituency level had used, two polling stations would have more than 100 per cent voter turnout.

In law, the results from a polling station that reports more than 100 per cent voter turnout should be cancelled. So, take your pick. Is the IEBC to cancel the results of 18 polling stations? Or 16 polling stations? Or two polling stations?

This naturally leads to the third point, how the tallying was done and whether the Court's conclusion on the issue is sound. Here, there are two issues: One, the IEBC's number-work and two, the status of provisional results vis a vis the final result.

The petitioners argued that provisional results are needed to validate final results. From this it followed that without them, final results are invalid. The Court judgment disagrees. It implicitly reads Regulation 82, and Section 39 of the Elections Act, as imposing no requirement that final results be verified against provisional results. The Court comes to this conclusion in a roundabout way. It asks and then answers a

question that was only tangentially before it: Are final results invalid just because provisional results were not electronically transmitted?

Notice though. By framing the issue thus, the Court has erected a straw man that it has then demolished with aplomb. The straw man allows the Court to duck the difficult question of how "to verify and validate final results without provisional results" and to answer, instead, the easier question "whether the means of transmitting provisional results affect the validity of final result."

Does this matter? The poignant truth is that it does. After the 2007 crisis, Justice Kriegler recommended electronic transmission of results. In the rules that were subsequently drafted, results from polling stations, transmitted electronically, would be provisional. And there are two senses in which polling station results are provisional.

First, in Kenya there is no electoral unit that corresponds to a polling station. Technically then, a result announced by the presiding officer at the polling station is not really a result. Legally, at least in petition law, a result refers to an identifiable winner or loser. To the extent that not a single polling station gives such an outcome, all the results announced there and put in Form 34 are provisional until cumulated with other polling station results to give a final result, whether for the MP, the governor or the president.

Second, the law places polling stations results on provisional "probation" to allow verification before a final valid result can be announced. That process involves cross-checking crucial facts: Have more people voted than are registered? Did ineligible voters vote?

Seen thus, the question of whether the failed electronic transmission of provisional results affects the validity of the final result is a red herring. The point is that transmission failures left IEBC without the means to cross-check and

verify tallies in Form 36. But that failure is of IEBC's own making since they made no effort to gather Form 34s. Without Form 34s, how did IEBC actually verify the final results that it announced to the public?

### **Manual or electronic**

Unfortunately, the way the Court settles this issue allows the IEBC to affirm and deny what it pleases when it pleases. Consider. IEBC says — and the Court agrees — that Kenya's voting system is basically manual. Electronics are mere facilitators.

Once you grant that, the conclusion follows as a matter of logic: The failed electronic transmission could not have affected the validity of the presidential result.

This piece of sophistry should have invited a sharp rebuke: If electronics are surplus to requirement, what safeguards had IEBC put in place to tally and verify final results against Form 34 using the manual system? IEBC never answers that question mainly because it has been allowed to speak from both sides of the mouth: It can impugn technology as failure-prone and also evade the duty to create a fail-safe manual system to do that which the technology should have done.

The lack of clarity in the Court's judgment about IEBC's duty to ensure that final results could be verified against provisional results means that the country had to accept whatever numbers the IEBC gave. As subsequent reviews have shown, especially reviews done by Dr Seema K. Shah, the IEBC cannot be trusted with registers, technology or numbers. Dr Shah observed

and reported on the Court-ordered tally of the 33,400 constituencies. Her report is a collection of IEBC's riotous assembly of mis-tallies and contradictions.

Many Form 34s had more votes cast than registered voters. In Turbo constituency, polling station 69, stream 2, some 784 votes were cast but only 755 were registered. In polling station 71, stream 2, there were 741 votes cast but only 716 were registered. In Kacheliba, polling station 112, there were 215 votes cast but only 214 registered

voters. In these polling stations, the results should have been cancelled.

In some Form 34s, not all presidential candidates were listed and, therefore, one cannot tell whether they got no votes or that their votes disappeared.

In Baringo South, polling station 91, stream 1, only Uhuru Kenyatta, Raila Odinga and Paul Muite appeared on Form 34.

In many Form 34s, the numbers do not add up. In Kacheliba constituency, polling station 102, though the votes cast are recorded as 0, there are 170 rejected votes and 170 valid votes. In Baringo South, polling station 117, stream 1, there were 133 valid votes and 0 rejected votes, which should total 133 votes cast. The figure for votes cast, however, is 134. In Cherangany, polling station 2, stream 5, the number of valid votes is 332 and the number of rejected votes is 4, which adds up to 336 total votes cast. The number of votes cast, however, is 340. In Turkana North, polling station 12, the number of votes cast, 340, does not equal the number of valid votes, 340, plus the number of rejected votes (5).

Many Form 34s are missing altogether. There is

***“The right to vote has three elements: The right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast a protest vote by rejecting all the candidates on the ballot.”***

no Form 34 for polling station 84 or for polling station 99 in Turkana North. Polling station 99 does not appear in the list of polling stations published on the IEBC website on February 24, 2013, but it does appear in the paper gazette. Form 34s for polling stations 92 and 113 in Turkana Central are missing.

Looking closely at these numbers, it is not surprising that some of the same constituencies whose the registers had unexplained additions — in Turkana, West Pokot and Trans-Nzoia — have cropped up yet again. Are these coincidences?

To be fair to the Court, one must ask what by way of report-back, its own scrutineers gave the judges. If they did get this information, why is it not reflected in their judgment? Or is it another case of it would have made no difference? Even if these numbers would have made no difference to the result, do they not in fact disclose that illegalities occurred?

### **Spoiled votes: Supreme Court goes fishing in the Seychelles**

Let us now turn to the fourth issue, the question that took so much of the Court's time: Do rejected votes count in computing the presidential percentages? Should they? Are rejected votes "cast votes" in computing percentages?

The Court holds that rejected votes do not count. Though the Court's conclusion can be criticised, as it is in this analysis, it has the merit of being clearly reasoned and properly explained. Why is the conclusion wrong then? The repealed Constitution said that the only votes that counted were the "valid votes cast." The new Constitution says that it is "votes cast."

Relying on the language of the Elections Act, the Elections Regulations and a decision from the Seychelles interpreting remarkably similar provisions in that country's Constitution, the Supreme Court concludes that "votes cast" in the new Constitution means exactly the same as

"valid votes cast" in the old Constitution.

There are two problems here: How to read clear language in law and two, what constitutional theory says about interpreting the Constitution. To the first point. In interpreting laws, words must be given their natural meaning. This rule is applied in all cases unless to do so leads to absurdities or the statute makes clear another meaning is intended. The petitioner did not show, as we argue below, that a plain reading of the "votes cast" phrase leads to absurdities. When the language is clear, the Court must assume that the Constitution means what it says. In this case, the Supreme Court had no need to go fishing in Seychelles.

Second, in interpreting the Constitution, it is illegitimate to limit the broad language of the Constitution based on the language used in statute and regulations as the Court has done here. This is because of the hierarchy of laws: A regulation is only law because it is made under the authority of a statute and the statute is itself only law because it is made under the authority of the Constitution. The legitimacy of law flows backwards to the founding document.

The Court's method of teasing out the meaning of a phrase in the Constitution by parsing similar phrases in inferior law suffers a double infirmity: It is wrong in theory and it is prohibited by the supremacy clause. But there is a point of principle why rejected votes should count. The first limb of that point arises from the right to vote. The second limb arises from why the Constitution sets high electoral thresholds for the president in the first place.

As regards the first limb, the Court, like the petitioner here, assumes that the right to vote is equal to the right to choose one of the candidates on ballot. This assumption is wrong. The right to vote has three elements: The right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast

a protest vote by rejecting all the candidates on the ballot. The right to cast a protest vote can be expressed by deliberately spoiling a ballot.

Saying that rejected ballots don't count as "cast votes" implies that the person who goes to the queue and casts a protest vote against the candidates on the ballot is treated exactly as the one who stayed home. That is not the theory of our Constitution. Not if we take its language seriously. By equating the right to vote to a right to agree with one of the choices on the ballot, the Supreme Court has radically impoverished the meaning of the right to vote.

The second limb of this argument is numerical. The new Constitution wants to ensure that no candidate can win the presidency without a majority of the votes cast, more than 50 per cent, and a reasonably broad geographical base, 25 per cent of at least twenty four counties. Only if a candidate makes this threshold in the first round should he or she be declared elected president. A candidate, and the country, must suffer the inconvenience of a second round of elections to do what the Constitution requires. How do the rejected votes contribute to this math? Consider a simple election with 100 voters, two hugely unpopular candidates and 50 per cent plus one of "votes cast" needed for victory.

Some 60 per cent of the voters protest against both by spoiling their ballots. Candidate A, Grand Butcher, gets 35 votes and candidate B, Floating Scum, gets five votes. If you include rejected votes, Grand Butcher has only 35 per cent of the votes cast and cannot win in the first round. If you exclude rejected votes, Grand Butcher wins with 87.5 per cent of valid votes cast.

In such cases, a protest vote, as David Ndi points out to me, can be used to achieve either or both of two things: Deny a disliked candidate a first round victory or, if not that, long-term legitimacy. But what happens in the run-off? What is the point if both thugs will be running again? The

point is that there is an incentive for either or both candidates to make themselves more pleasant to the electorate in the second round. Or, it may be that the huge protest vote may persuade the authorities that they need to tighten ethics laws so that Butcher and Scum don't seek office in the future.

### **Did the technology fail or was it pushed?**

Finally, we turn to the Court's holding on technology failures. The Court takes judicial notice that technology, including electoral technology, is "rarely perfect." With that assertion it shuts off its own factual inquiry as to whether technology failed or was pushed.

The IEBC said the technology failed. The petitioners said that the failures were so systemic that they show culpable negligence.

Again the Court's short way with these arguments is way too short. When a country has invested Ksh10 billion or over a \$100 million dollars in electoral technology in order to enhance the fairness of its elections and to eliminate fraud, it seems like a cruel betrayal to kill off the issue of why the pricey machines failed with the dispositive statement that "technology fails."

There were very specific questions asked by the petitioners. IEBC did not convincingly respond to any. Why was the Electronic Voter Identification Device, EVID, never deployed? The IEBC had publicly assured Kenyans before the election that it had put in place mechanisms to ensure that the technology would work. Why did IEBC buy the kit but not get the connectivity required to make it work?

Why did the IEBC set up the authentication system on a GPRS platform knowing that this platform's low capabilities could impair performance? Given GPRS data transmission rates of 56-114 kbps, against other higher performance locally available platforms such as EDGE (200 Kbps); 3G (above 200 kbps) was

this a reasonable or responsible decision? Are these the standards an election court expects of a reasonable elections manager, like IEBC?

Instead of asking these difficult questions, the Court actually cut the IEBC more slack. It took judicial notice that many polling stations in rural Kenya are primary schools without electricity. But why should that excuse the IEBC?

IEBC toured the world in search of appropriate electoral solutions. Even at that early stage, it knew the state of power connectivity in Kenya.

Knowing that the BVR system relies heavily on a steady supply of electricity for the laptops on which the systems run, was the IEBC deliberately misleading Kenyans when it said it had put in place measures to make the technology work?

If that announcement were not mendacious, what plans had IEBC actually made to provide backup power beyond the life of the one battery the computers started out on? In some stations, batteries had died within one hour of the opening of the polling. Is it technology failure or recklessness when the battery on the computer fails even before voting has begun?

On the results' transmission systems there are even more questions, all raised by petitioners but none answered by IEBC nor broached by the Court. Were the mobile phones that were to be used to transmit the results actually configured in advance or tested and confirmed to be fit for the purpose? Was the server that was set to receive the results itself configured correctly? Was it ever tested? Why was there no in-built redundancy in the system as there ought to have been if the

system were expected to be fail-safe? How was it possible that the loss of one server brought down the whole system?

Instead of engaging with these issues, the Court accepts the reverse logic urged on it by the IEBC, namely, the argument that the technology was meant to back up the primary manual system. This bizarre logic says, in effect, that Kenya set up a more accurate electoral system — BVR, EVID and Electronic Results transmission — in order to act as the back-up to the inaccurate and inefficient — and already proven to be so —

manual system.

This is the first — hopefully the last — that we shall hear of a country buying state-of-the-art computer technology in order to provide an additional layer of security for its stone-age manual systems. In forward thinking countries, inefficient manual systems are at the bottom of the pile in the hierarchy of back-ups for layers of overlapping technologies.

To support its wobbly case, the IEBC marshalled two cases from the Philippines that ostensibly stand for the proposition that manual systems trump technology. According to the Kenya Court's helpful summary of those cases, "the plaintiffs had based their claims on fears which they had, sparked by potential abuse and breakdown of technology, and the effect of this on the integrity of the electoral system."

That completely mis-describes the cases. One case had nothing to do with technology, the other case was full of praise for technology. The first case, *Douglas R. Cagas v the Commission on*

***“The right to vote has three elements: The right to make a choice from among the candidates on the ballot; the right to refuse to participate in the election by abstaining and the right to cast a protest vote by rejecting all the candidates on the ballot.”***

Elections, was based on a procedural technicality. The issue of electronic machines was irrelevant to that question and was sneaked in by the petitioner, Douglas R. Cagas, who had won the seat of Governor of the Region of Davao del Sur, just so as to frustrate the petition of his competitor, Claude P. Bautista.

Cagas wanted the Supreme Court to dismiss Bautista's petition, which was yet to be finalised by a division of the Electoral Commission on the basis that the Court had already held that election machines were reliable and accurate in the earlier case of Roque, Jr. v. Commission on Elections. His argument was that since Bautista's petition wanted to impugn a technology already endorsed by the court, it should be thrown out. The Court refused. The conclusion then is that in the Roque case, the court was strongly in favour of electoral technology. In the Cagas case, the court merely refused to create a presumption of infallibility of technology.

### **Stringent rules**

The unhappy feeling one comes away from this judgment with is just how stringent the

standard that the Court imposes on petitioners is. And, conversely, save for the rather tame recommendation that IEBC be investigated and maybe prosecuted, just how so very lenient the standard by which IEBC's performance has been judged is.

To conclude: In the opening paragraphs of this lengthy but unpersuasive judgment, the Court grandly hoped that the case would be "viewed as a baseline for the Supreme Court's perception of matters political." One hopes not; the Supreme Court can do better.

Does this criticism impugn the decision that the Court has reached? Not really. Ultimately, it is not whether one wins or loses in court, it is whether the loss or win is seen to be just. Parties look to the reasons that the Court gives to see why they have lost. Judicial reason is the primary tool by which we hold judges to account. The public judges the judges by the soundness of the reasons that they give for their decisions. Sadly, as the saying is, in this judgment, the Supreme Court has only given us reasons that sound good, not good, sound reasons.

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## **We must be afraid, very afraid, that the door is now open for vote thieves**

**By MAINA KIAI**

When delegates at the Constitutional Conference in Bomas began using delaying tactics to earn extra allowances, a friend of mine remarked that they had "reached the end of their intelligence." This phrase has stuck with me as I tried to make sense of the Supreme Court's judgment even after re-reading it. Wachira Maina and George Kegoro have given useful and detailed analyses of the judgment.

By making IEBC almost inviolable, the judges followed the status quo path of US Justice Norman Dugdale who tried to oust the Bill of Rights in the 1980s, asserting that it could not be implemented until subsidiary legislation was made. But let's consider the possible implications that could flow from this decision. This is not about Uhuru Kenyatta or Raila Odinga. It is about the process and integrity of our

electoral and judicial systems.

Like after the 1992 and 1997 flawed elections, the results can't be changed but the decisions and actions of IEBC and Supreme Court will surely have significant impact. By granting IEBC powers to declare, as Wachira Maina puts it, the "voters register...will be what the IEBC says it is at whatever stage of the election," the Court has essentially given carte blanche to rigging by the electoral body. With the register as a moving target, and with IEBC allowed to use the "law and order" bogeyman to kick out agents and observers from the National Tallying Centre, the door has been opened for permanently contentious elections.

Second, by its ousting of Article 159 (2) (d) on supremacy of substance over procedure, the Court has made it impossible to challenge the truthfulness and credibility of respondents in petitions, once they reply to the petitions. In fact, the Court declared that IEBC's

assertions were not challenged but only after it refused to allow responses to IEBC! This will have serious consequences to the practice of law, especially to presidential election petitions for the IEBC can lie, fudge and omit necessary information.

Obviously, the greatest beneficiary of this is the incumbent and status quo. Those wielding state power can influence and manipulate election officials. The third possible implication is that those declared losers will never bother to go to court given this reasoning. We were here in 2007. What will happen next time?

Fourth, because the judgment was pro-status quo, retrogressive and procedural, it is likely judges and magistrates will follow suit. Indeed, we have already seen Judge Mutava deliver a ruling that attempts to close down the Goldenberg scandal without any accountability whatsoever.

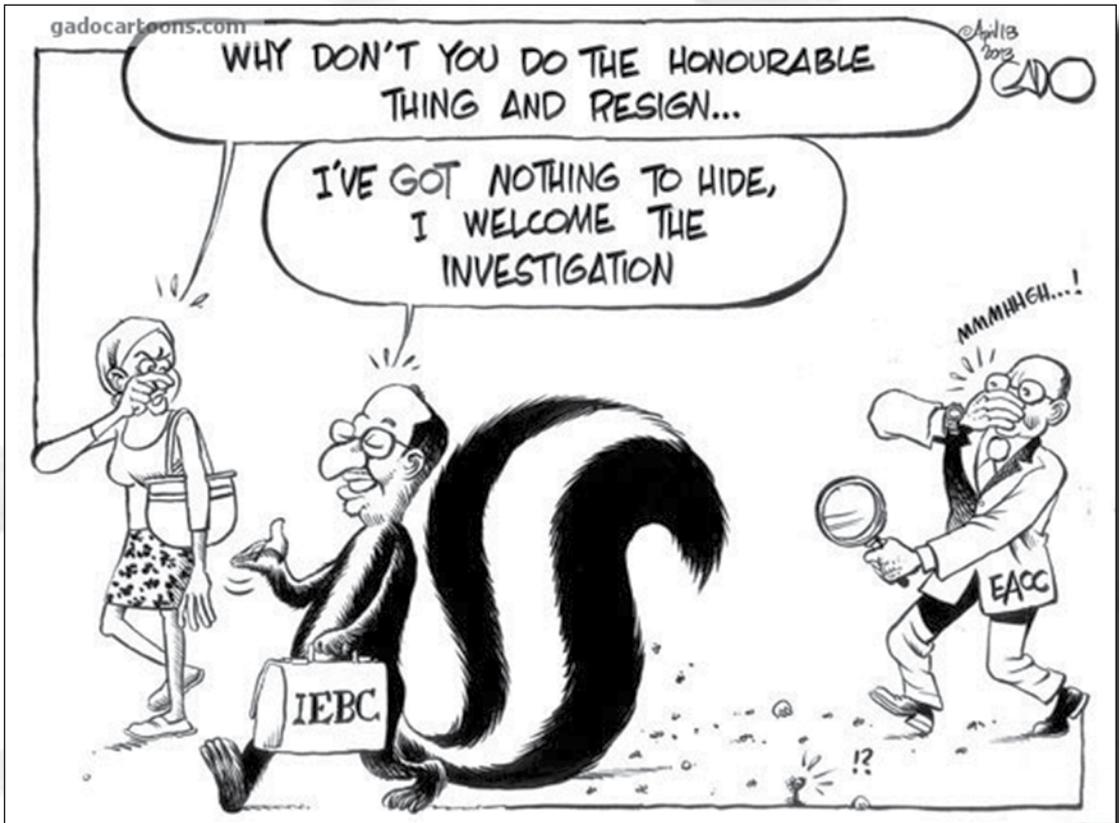
Fifth, by taking judicial notice that technology fails, and that many parts of Kenya do not

have electricity, the Court has elevated the discredited manual systems that brought mayhem in 2007.

There was no notice taken of the damage done by manual systems that led to the atrocities. By so doing, the Court implies it is okay to spend Sh20 billion on electronic systems without accounting for solar energy, or generators, for the IEBC knew some places had no electricity when they procured the systems! The judges mainly focused on oral submissions which were less than 10 per cent of the evidence presented. It is also not clear whether there was any fact checking on the submissions and authorities used as Wachira Maina argues on the decisions from Philippines.

Nonetheless, they have made a mockery of the role of constitutionalism, which is to ensure that those without power, the underdogs, have mechanisms to check and control those in power and authority.

# IEBC INCOMPETENCE MADE PUBLIC



# DID A MILLION GHOSTS VOTE? IEBC MUST MOVE QUICKLY TO RECONCILE DATA

BY JOHN GITHONGO

The report carried what I, in hindsight, considered a startling revelation. One of the IEBC's commissioners was recorded as having said, "We are having sleepless nights reconciling the presidential results and those of the other positions. Over a million votes must be reconciled with the others and if the requirement is not changed, then it will cast the IEBC in a negative light..."

The IEBC was thus reported to have devised three options that would resolve the impasse. The concern 'of casting the IEBC in a negative light' was a little rich. That said, the commissioner's admission itself was deeply troubling about the overall integrity of the polls.

A million irregularly introduced ie rigged votes would take the overall result of the presidential election closer to the scientific pre-election opinion polls and the exit polls that have emerged since, like that from Harvard University that called a close race between Uhuru and Odinga.

Then, last weekend the Daily Nation carried a long interview with Raila Odinga in which he discussed both the elections and his future plans without a hint of bitterness.

Here too my attention was captured by the remarks he was reported to have made:

*"But this idea that there were some areas where there was 95 per cent or 100 per cent turn-out is a myth. Because if you look at the records, the average turn-out was 72 per cent for county reps, for women reps, for MPs, for governors, for senators but only for the presidential 86 per cent. What accounts for that difference? ... They were stuffing ballot papers and that was the evidence that we wanted to adduce in court that over one million people turned up for the ballot and only voted for the presidency and not for the others."*

Some of the top experts on election matters – both Kenyan and foreign – have been pleading ever more insistently for the IEBC to release the full results of elections held almost three months ago. To them, this admission that essentially around one million more Kenyans voted for the presidential candidates but did not vote for any of the other offices (Governor, Senator, MP etc) was a bombshell. After all, none of the multiple teams of election observers noted what surely would have been difficult to miss: one million voters casting presidential ballots and deciding not to vote for any other of the offices.

Nor has IEBC reported five million spoilt votes spread out amongst the other five offices, which would have been the expected result if all these voters had somehow managed to cast only one of their allotted six ballots right – the other plausible explanation. So the one million ghosts in the books are a problem.

## SO WHAT NOW FOR KENYA?

It is ironically comforting to many that the gut feeling that something slick, big and nasty was likely pulled off at the last election is seemingly now proving to be more and more likely correct. This is notwithstanding the sometimes garbled reassuring statements by both local and foreign observers whose positions at the time were not backed up by what Kenyans saw with their own eyes. It is always a relief to realize you did not dream something up.

Little can be changed at this stage; we need to “move on” as Kenyans are being constantly urged to do. I am among those who believe national cohesion can only be achieved if a majority of Kenyans don’t believe in the malevolent ‘tyranny of numbers’ narrative that seems to have laid the ground for subsequent events. To be blunt, it is important that the majority of Kenyans from all races and tribes believe that there are enough Gikuyus who don’t appear to ascribe to the conviction that one ethnic community must lord it over all others in perpetuity.

That so many are not convinced that this is the case is the source of the most furious resentments among non-Gikuyus – and the source of a rapidly dwindling interest in the project of nationhood – ironically at the very historical moment that the country celebrates a significant milestone – 50 years since the end of colonial rule.

All this brings us to grips with our present condition, for better or for worse. That we reached here without the kind of violence we saw in 2008 is a good thing. Second, we acknowledge the reality that Kenya has a legally sworn-in head of state; cabinet secretaries and other functionaries are being appointed. We have a government and matters of everyday life can proceed. On the economic front, the government has been making all the correct noises. It is now in an enviable position of translating its pre-election promises to reality – ensuring that our growth delivers jobs for the youth, for example. Potentially exciting times indeed, what with the huge economic potential promised by the combined coincidence of a critical mass of energetic, young, educated and entrepreneurial African ‘human capital’; massive external economic interest in Africa; the discovery of a range of minerals etc – there is indeed great promise that Kenya could be on the verge of a take-off to that dream envisioned at independence.

However, there still remains important cleaning up to do with regard to our election processes and institutions. Indeed, I would argue, we need to rethink the first-past-the-post system in its entirety. It has brought us much grief: a more volatile polity; tribal division compounded by festering anger and generally less social cohesion, ironically, than when Moi was president of Kenya. No election is perfect, however, this one was the worst ever in terms of the sheer scale of divergence between public expectations and actual performance by the electoral body.

We have now had two apparently fraudulent elections in a row where the fraud was televised, SMSed, tweeted and generally widely reported on, especially during and since the court case that followed contestation of the presidential results. That said, regardless of the manipulations, the voting pattern – largely along tribal lines – told us a great deal about ourselves. It also forces difficult questions upon us.

### **THE FIRST KENYAN REPUBLIC HAS GIVEN UP THE GHOST**

For starters, what is the point of people participating in national elections if it is believed by a critical mass of the population that certain pivotal positions are reserved for certain communities, based not on ability but on ancestry? What does people believing this mean for Kenya? First it explains the generally foul mood of many middle class Kenyans who are neither Gikuyu nor Kalenjin.

A Nigerian friend made the observation last week that the contradictions inherent in the current ruling tribal alliance are so vast that it shall wobble too with time forcing a ‘militarisation of consent’ both formally and informally; both judicially and extra judicially.

I'm not so sure it is possible to militarise consent in Kenya. It has been attempted in northern Kenya since before independence and the project has never really been a total success.

Trying the same in say, the Rift Valley, would be an ambitious prospect. Instead, crime and ethnic cleansing on a voluntary basis has swept across entire swathes of the country.

Secondly, we are slowly coming to terms with the fact that the First Kenyan Republic has given up the ghost. The Second Republic under our 2010 constitution is the Tribal Nation – before all things in the way we relate to one another outside the realm of simple transactions.

Prof. Ogot was correct in April 2006 when he declared the Kenya Project as conceived by the African nationalists who breathed life into the attempts at Nations that colonialism left behind – dead. A more complex beast is emerging. More on this next time...

*14 June 2013 Daily Nation*

## There's need for an independent team to probe conduct of election

By **GEORGE KEGORO**

**W**hile on a visit to the United States, the chairman of the Electoral and Boundaries Commission, Issack Hassan is reported to have acknowledged that Kenyans have 'resentment and anger' over the management of the General Election. He also admitted that there were shortcomings on the part of the IEBC in the manner in which it managed the elections. Hassan now recognises that the commission took too ambitious an approach in managing the March 4 election, citing the breakdown of electronic voter identification devices and the computer system for reporting results. He is reported to have said that the IEBC should have carried out more consultations about the technology it deployed in the elections and tested it in advance.

Hassan also said the commission should have done a better job of managing public expectations on how it was going to run the elections. He said the IEBC had learnt lessons, which will be applied in future elections. Where do the remarks by the chairman leave the country?

In the safety of a foreign trip, Hassan is now

accepting blame for things that he denied at all material times, including during the actual elections. In court during the election petitions filed against the presidential election results, Hassan and the IEBC asserted that the failures that he now accepts had not taken place, and that the IEBC ran free and fair elections.

In his world, there are multiple truths regarding the management of the elections, depending on what audience he is addressing. This is frustrating because with constant shifting of goalposts, it will not be possible to agree on how to overcome the difficulties that the last elections represent.

As the history of this country shows, elections matter. The post-election violence emanated from an electoral dispute. Also, after the 1988 Mlolongu voting, which the Kanu regime used to impose its preferred leadership in sections of the country where it was unpopular, there was a groundswell of ill-will towards the government, culminating in the street riots of 1990 and 1991.

At that time, the 'resentment and anger' that Hassan now acknowledges was most evident in

central Kenya, where Kanu had imposed leaders on the people.

In four years, Kenya will hold another set of elections, which will be informed by the unanswered questions surrounding the last vote. It is obvious that there will need to be significant reforms at the IEBC ahead of those elections. It is not possible, however, for the IEBC to reform itself, given its inherent self-interest and also the constant shifting of positions that it has been engaged in regarding the elections.

What is needed at this time is an independent official inquiry into the affairs of the IEBC, and into the manner in which it conducted the last elections. In the absence of such an inquiry, the Law Society of Kenya has announced that it will investigate the conduct of the last elections.

While this is to be encouraged and supported, it is not a substitute for an official probe. The method for carrying out such a review is

through a commission of inquiry. In law, such a commission is appointed by the President. Since the President and his party participated in the last elections, it would be necessary for other players in the same ballot to have confidence in the commission of inquiry. This can only be generated if the other players are allowed representation in the commission of inquiry. The commission should have the mandate to look comprehensively into all aspects of the management of the elections, and should report within a short period of time, say six-to-eight months.

Last-minute reforms, a curse of Kenya's recent electoral history, will be avoided if the country takes action while there is still time to implement any agreements reached. The appointment of a commission of inquiry will save the IEBC from the forlorn efforts it is currently making in purporting to reform itself.

7 September 2013 *The Standard*

## THE INDEPENDENT? ELECTORAL BOUNDARIES COMMISSION

BY KETHI KILONZO

Once upon time I had a conversation with my late father. And it went something like this: "I blame your coalition for losing the election. For failing to guard their votes. For failing to obtain forms from the Independent Electoral and Boundaries Commission (IEBC) from the polling stations to prove their claims of vote manipulation."

This was the Monday after the declaration of the results of the presidential election, and a few days before I would be asked to represent AfriCOG in the presidential petition.

*"The responsibility to guard the vote from manipulation is IEBC's, and no one else..."*

"Can any presidential candidate from one tribe send party agents to a region of another tribe with a presidential candidate and guarantee their security? The responsibility to guard the vote from manipulation is IEBC's, and no one else. Party agents are not commission officials. They are simply witnesses of a

process that should be conducted properly and impartially by the body mandated to do so by the law."

According to the audit of the presidential election by Mars Group there are over 2500 Form 34s missing from the website of IEBC. As a result, there are over 950,000 votes that cannot be accounted for in the documents disclosed by the IEBC. The Supreme Court has never and could not release the full audit report of Form 34s supplied by IEBC for the presidential election because a large number was missing. At

the Supreme court the IEBC stated that all Form 34s for the presidential election had been uploaded on its website.

It is now well over six months after the General Election. There can be no reasonable explanation for the absence of these forms. None has been offered by the IEBC. It can be very well argued that the only body that could determine the validity of the election of the President, the Supreme Court, has done so. And there is no avenue for appeal.

It can also be very well argued that the President has been sworn in and assumed office. As he is entitled to do

so under the law. However, the IEBC remain and must be held accountable for the returns of the elections. All the elections. They should make available, upon request, all forms and returns made from the last General Election. This responsibility is both legal and moral. It does not end upon filing of an election petition challenging an election.

The Chairman of IEBC, as the Returning Officer for the presidential election, before the Supreme Court certified under oath that the total votes cast in the presidential election in Bomet County was 225,713. The Returning Officer for

Bomet County certified under oath before the High Court in an election petition that the total valid votes cast in the presidential election in Bomet County was 225,143.

The affidavit of the Returning Officer was sworn on April 8th and filed on April 10th; by the time of filing, the presidential petition had not been concluded. The difference in both declarations under oath is 590 votes. A drop in the ocean. But it should bother us that two courts have been issued with two different results for the same election from officials of the same body.

*14 September 2013 Daily Nation*

## Supreme Court debate won't just go away

BY GEORGE KEGORO

**I**t is becoming clear that a major public dialogue is necessary to settle emerging questions about the future management of electoral disputes in Kenya and the role of the Supreme Court in such disputes. The jurisdiction of the Supreme Court to resolve disputes arising from presidential elections is a major innovation of the new Constitution.

However, the first judgment of the Supreme Court when exercising this unique jurisdiction was controversial and continues to divide public opinion, just like the election results themselves. It is now clear that the assumptions which led to the conferment of this jurisdiction on the court have simply not been met.

Questions about perceived shortcomings in the judgment were revisited during a regional conference of East African lawyers in Mombasa last week. Before that, Justice Mohammed Ibrahim, a member of the court, was reported to have said that elections should be decided at the ballot and not in court, a statement that was interpreted to mean that the Supreme Court is possibly uncomfortable with the role of managing presidential electoral disputes and may prefer changes that would remove this role from the court.

Although Justice Ibrahim somewhat denied having said this when he addressed the Mombasa meeting, saying he had been misquoted, these remarks, coupled with the unsatisfactory manner in which the court deployed its new role, have shaped a debate as to whether the court is the best forum for deciding disputes arising from presidential results.

In the Mombasa meeting, there was strong criticism of the Supreme Court judgment and, while some of the issues raised were not new, it is the responses by Justice Ibrahim that were interesting, including three concessions that he made.

In response to questions about the perceived poor quality of the judgment, which included formal errors that the court was then forced to correct, he said that with more time than the 14 days that the Constitution allows for the hearing of petitions, the court might have come to a different decision. Second, he agreed that it would have been better if each judge had written a separate judgment.

Instead the court wrote a collective judgment, in which there was an improbable unanimity on all issues. Third, he conceded that the court, which had conducted a highly publicised open hearing, should have read its judgment in the open, and the failure to do so was probably illegal.

Two questions raised by these responses are, first, what a “different decision” might have looked like and second whether, going forward, the country is prepared to consider the argument for more time for addressing presidential petitions.

The Mombasa meeting noted that in the Supreme Court, the respondents won their counter-petition, the one about “all votes cast”. In giving them this victory, the court decided that the phrase “all votes cast” which is used in the current Constitution, means the same thing as “valid votes cast,” the phrase that the former constitution had employed, in establishing a formula for counting presidential votes. On the basis of plain English alone, it is not easy to agree with this finding, which the court justified on a judicial authority from the Seychelles.

Moreover, an independent examination of the Seychellois authority indicates that it was misapplied and does not support the conclusion it was used to arrive at. Unless overturned by another, the effect of the judgment, however, binds all future elections, whose results will be required to discard spoilt votes when determining presidential results.

The challenge is that spoilt votes acquire a premium they would not have had if they were included in determining the results. This is especially so in close elections, such as Kenya seems destined to always have. However, Kenya’s electoral process remains riddled with errors when counting votes. For example, in the elections of 2013, initial results showed a large number of spoilt votes.

Later, the IEBC explained that a software error was responsible for multiplying the spoilt votes by a factor of 8 and drastically adjusted the number downwards. Excluding spoilt votes imposes a burden of accuracy and probity in electoral management, which the IEBC cannot easily discharge.

Besides an unlikely victory in their counter-petition, all the interim applications before the Supreme Court were decided for the respondents. Taken together, the circumstances left the impression that the respondents would get from the court, just whatever results they wanted.

Officially, the Supreme Court says it welcomes robust criticism of the judgment, and there has been

some. However, the court has uncharacteristically been promoting this judgment, copies of which the court has been distributing. The question is: Why the special treatment for this judgment which others from the same court do not receive?

In the scheme of things, the concessions by Justice Ibrahim were minor and will change little. However, they create a small fissure that can lead to the redemption that the Supreme Court needs, after disappointing so many people. Before last week, the Chief Justice had gone about defending the judgment, which was viewed as an act of insularity, of the kind he warned against when he assumed office. The Chief Justice should establish a stakeholder dialogue regarding its future role in electoral justice. Such a dialogue can answer some of these questions.

*9 November 2013 Daily Nation*

## Kenya still has long way to go in electoral reforms

BY GEORGE KEGORO

A meeting of regional jurists that took place in Dar es Salaam last week revisited the troubling subject of democracy in Africa in the context of elections that have taken place recently in Ghana, Kenya and Zimbabwe. The meeting also provided a platform for revelations by the Mars Group that cast fresh doubts about the reliability of the results of Kenya's presidential election results released by the Independent Electoral and Boundaries Commission (IEBC).

The revelations were made by co-founder of Mars Group, Mwalimu Mati, at the meeting, opened by the chairman of Tanzania's Electoral Commission, Justice Damian Lubuva. The meeting was also attended by IEBC commissioner Thomas Letangule.

The presentation by Mati was the result of an audit carried out by his organisation, of all available copies of Forms 34s used in this year's General Election. The Mars Group Kenya audit independently tallied the figures in all Forms 34s provided by the IEBC at the stream level and then aggregated the totals upwards to the ward, constituency, county and national level. In

all, 32,095 polling streams and 24,622 polling stations were tallied. Some 2,585 out of 32,095 polling streams were missing Form 34s on the official IEBC website and, therefore, the results and votes of the missing streams were not included in the audit.

According to Mr Mati, the audit identified discrepancies between the presidential tally announced by the IEBC and the figures computed from the Form 34 sheets made public by the IEBC. He noted, however, that whereas the missing stream Form 34s may reduce the overall discrepancy in county election results, the Form 34 discrepancies suggest a serious tallying problem that could alter the official final national presidential vote tally per candidate as announced by IEBC.

For the announced IEBC results to be correct, the missing forms must contain at least 943,520 votes. Put differently, 943,520 votes exceed the margin between Jubilee and Cord but is not supported by publicly available forms. In the elections, Uhuru Kenyatta was adjudged to have avoided a run-off by 8,000 votes. Since the

number of votes represented in the missing forms far exceeds the votes by which a run-off was avoided, it becomes important for their contents to be made public.

For the results announced by IEBC to be correct, Uhuru Kenyatta has to have received 360,370 votes in the missing forms, while Raila Odinga has to have 467,305 votes. The only way to confirm the correctness of the IEBC tally is to allow an independent scrutiny of the 2,585 missing Form 34s. It is in the public interest that IEBC account for the 943,520 votes ostensibly contained in the 2,585 Form 34s, which have not been made public.

In response to these revelations, Ms Praxedes Tororey, the IEBC senior legal officer who also attended the meeting, expressed surprise about the missing forms and said this had never been brought to the attention of the IEBC. The significance of this revelation was underscored by another presentation comparing problems in recent African elections.

It was disclosed that while at the onset of multiparty politics in the early 1990s, the chosen method of rigging elections was ballot stuffing, involving fraudulent votes put into the ballot box, security for the ballot box has eventually improved all around Africa, and electoral fraud now takes the form of numerous minor errors at every stage of the electoral process, none of which looks serious on its own, but which cumulatively affect the final results.

The shifting register by IEBC, which has declared more than seven different total number of registered voters at different times, was cited as an example of how the new form of electoral malpractice works.

The meeting considered recent electoral experiences in Kenya, Zimbabwe and Ghana.

In all three countries, the results of the elections were disputed by the opposition. In Ghana and Kenya, there followed unsuccessful court challenges of the election results. In Kenya, the court decision was unanimous but in Ghana, the court was split, with some judges making findings for the petitioner on some of the issues, although these were not enough to change the results. In Zimbabwe, the conditions were so bad that a legal challenge of the results was impossible. The electoral commission failed to provide the register of voters which is still not publicly available.

The commission also failed to provide basic information as would have allowed the petitioners

to go to court. When they approached the court for assistance to obtain this preliminary information, the court declined to grant their request, slamming the door on a possible court challenge of the results.

The meeting noted that initial strides towards democracy within the continent in the 1990s, which led to upsets in presidential elections, have

now suffered recent setbacks across the continent, so that it is no longer possible for the incumbent, or the candidate preferred by the outgoing incumbent, to lose elections.

The meeting concluded that, worryingly, it is becoming increasingly difficult for electoral grievances to be taken seriously. Independent observers will now invariably declare elections as free and fair, unless there is a violent demand for grievances to be addressed.

The upshot of this is that the prevailing conditions surrounding elections in Africa tempt losers towards violence, as the only means of getting their grievances to be taken seriously by courts and the international community. Unless there are genuine electoral reforms, therefore, electoral violence will be an inevitable risk.

***“For the announced IEBC results to be correct, the missing forms must contain at least 943,520 votes. Put differently, 943,520 votes exceed the margin between Jubilee and Cord but is not supported by publicly available forms.”***





The views expressed in this publication are not necessarily those of KPTJ and AfriCOG.

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Africa Centre for Open Governance  
P.O. Box 18157-00100, Nairobi, Kenya  
Telephone: +254 20-4443707/0737463166  
Email: [admin@africog.org](mailto:admin@africog.org)  
Website: [www.africog.org](http://www.africog.org)

