

# THE MORE THINGS CHANGE:

## AUGUST 2017 ELECTIONS

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY
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6	7	8	9	
13	14	15	16	
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27	28	29		



## Who we are

The Africa Centre for Open Governance (AfriCOG) and Kenyans for Peace with Truth and Justice (KPTJ) are pleased to present the latest report in their series covering the 2017 General Elections.

In these reports, AfriCOG and KPTJ analyse developments throughout the electoral cycle, with a focus on pre-election preparedness, the administration of Election Day, results announcement processes, and post-election dispute resolution.

AfriCOG is an independent, non-profit organisation that provides research and monitoring on governance and public ethics issues so as to address the structural causes of Kenya's governance crisis. KPTJ is a coalition of governance, democracy, and human rights organisations that was formed following the 2008 post-election violence to work for electoral justice and accountability for the widespread atrocities and political violence that the country had experienced. AfriCOG leads the secretariat of the KPTJ. Both are members of the steering committee of the Kura Yangu Sauti Yangu (KYSY) electoral platform, which actively monitors the electoral process, engages key stakeholders, and facilitates dialogue amongst a broad range of stakeholders to promote credible elections.

We would like to thank our partners at InformAction for their work in collecting and availing the data on which this report is based.

We offer these objective assessments to educate Kenyans on the conduct of their elections and to inform the public debate on the strengthening of our electoral framework.

# **THE MORE THINGS CHANGE:**

The August 2017 Election in Kenya

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# Abbreviations/Acronyms

<b>AfriCOG</b>	Africa Centre for Open Governance
<b>BVR</b>	Biometric Voter Registration
<b>CORD</b>	Coalition for Reforms and Democracy
<b>EVID</b>	Electronic Voter Identification Device
<b>ICT</b>	Information and Communication Technology
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>IIEC</b>	Interim Independent Electoral Commission
<b>JP</b>	Jubilee Party of Kenya
<b>JPSC</b>	Joint Parliamentary Select Committee
<b>KIEMS</b>	Kenya Integrated Election Management System
<b>KPMG</b>	Klynveld Peat Marwick Goerdeler
<b>KPTJ</b>	Kenyans for Peace with Truth and Justice
<b>KYSY</b>	Kura Yangu Sauti Yangu
<b>NASA</b>	National Super Alliance
<b>NTC</b>	National Tallying Centre
<b>ODM</b>	Orange Democratic Movement
<b>RTS</b>	Results Transmission System
<b>SCoK</b>	Supreme Court of Kenya

# Foreword

This report has been prepared for the Kura Yangu Sauti Yangu (KYSY) electoral platform, which actively monitors the electoral process, engages key stakeholders, and facilitates dialogue amongst a broad array of stakeholders to promote credible elections.

It is the latest report in a series examining the management of the 2017 elections in Kenya. It focuses on the conduct of the August 2017 presidential election and its aftermath, in particular the historic petition that saw the annulment of that election result by the Supreme Court of Kenya.

Repeated problematic elections, and the failure or refusal to implement necessary changes, are at the root of Kenya's governance problems. Kura Yangu Sauti Yangu believes that a thorough electoral overhaul is essential if Kenya is ever to escape the unending cycle of impunity, violence, and endemic corruption that continues to plague it. In order to promote this, KYSY highlights the challenges and pitfalls facing the electoral process and makes recommendations to resolve them.

The year 2017 can be regarded as a watershed in the efforts to achieve electoral reform. However, if concerted efforts are not made to seize the opportunities afforded by developments then and since, Kenyans will once again be disappointed in their decades-long struggle for lasting transformation in the way that Kenya's elections are managed.

**Gladwell Otieno**

Executive Director

Africa Centre for Open Governance (AfriCOG)

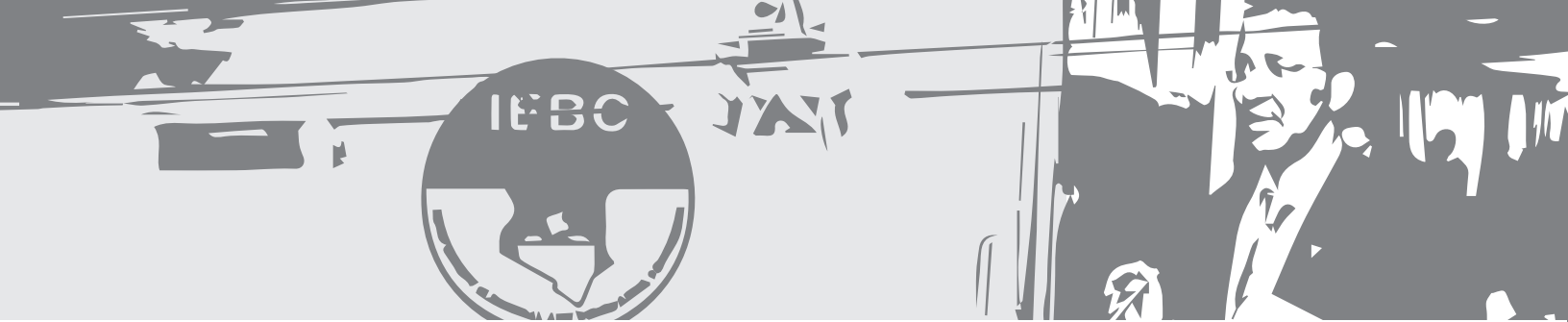
# Introduction

## The More Things Change

Undeterred by a crushing defeat in its 2013 Supreme Court petition challenging the credibility of that year's presidential election, the Kenyan opposition was energized to push for electoral reform. The lead-up to the 2017 national polls was marked by street protests demanding new leadership for the Independent Electoral and Boundaries Commission (IEBC), the establishment of a parliamentary committee tasked with investigating electoral administration, the implementation of an independent audit of the Register of Voters, a raft of changes to the electoral law, and a brand new set of electoral technology.

Despite some apparent reform, including a completely new set of IEBC commissioners, the August election proceeded in much the same way as past elections. The electoral cycle continued to be tainted by many of the same issues from the past, including, for example, the IEBC's lack of transparency and severe dearth of communication with the public, a problematic Register of Voters, last-minute changes to the electoral law, and an almost complete breakdown in the results transmission system. By the time the IEBC announced presidential results, the Commission's credibility, along with that of the results, were at serious risk.

The Kura Yangu Sauti Yangu (KYSY) civil society coalition, established to promote electoral integrity, worked to highlight problems and concerns throughout the 2017 electoral cycle. This report presents an analysis of the August election, highlighting KYSY's main findings and the questions pending resolution related to that election.



## Section 1: Background

### When the Chickens Came Home to Roost:

#### Questioning the Legitimacy of the Issack Hassan-Led IEBC

In the aftermath of the 2013 election, it was clear that there were many questions about the independence and competence of the IEBC.<sup>1</sup> Indeed, an affidavit submitted to the Court by former IEBC Chairman Issack Hassan showed clear evidence of political bias against the opposition presidential candidate. Hassan wrote:

[Odinga is] adept at making others scapegoats for his failures and electoral defeats. He is a man used to ruining others as a sacrifice for his failures and electoral defeats. (...) 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.

Mr. Hassan also called Mr. Odinga "self-centred, narcissistic, and ego-centric."

This sentiment was one of the many indicators of an electoral body that was not impartial and perhaps not competent to conduct free and fair elections. This incompetence and lack of independence together with the Supreme Court's failure to directly address or respond to evidence regarding fluctuating totals of registered voters, had caused a degree of doubt about the IEBC's and the state institutions' ability to remain impartial.

These questions lingered in the post-election years, taking on new life as an investigation into a scandal around the 2010 referendum implicated sitting IEBC commissioners and staff. Known as "Chickengate" in Kenya, the scandal involved members of the former Interim Independent Electoral Commission (IIEC), who were accused of accepting bribes from Smith and Ouzman, a British ballot printing company, in exchange for a contract. "Chicken" was the word used by those involved to refer to the illegal payments. The payments totaled Ksh. 59 million.<sup>2</sup> Those named in the scandal were senior IEBC officials who had presided over the 2013 election, including Chairman Issack Hassan, CEO James Oswago and others. Gladys Shollei, the Chief Registrar of the judiciary during the 2013 presidential petition was also named.<sup>3</sup>

<sup>1</sup> See KPTJ. 2013. "Election Day and its Aftermath." Available at <<https://africog.org/reports/election-day-2013-and-its-aftermath/>> for details about the 2013 election.

<sup>2</sup> Cyrus Ombati. 8 February 2017. "Chicken gate scandal suspects James Oswago and Trevy Oyombra arrested, to appear in court." *Standard Digital*. Available at <<https://www.standardmedia.co.ke/article/2001228648/chicken-gate-scandal-suspects-james-oswago-and-trevy-oyombra-arrested-to-appear-in-court>>.

<sup>3</sup> Citizen Digital. 8 February 2017. "Ex-IEBC chief, James Oswago, two others charged over chickengate scam." Available at <<https://citizentv.co.ke/news/chickengate-scam-returns-to-haunt-ex-iebc-ceo-james-oswago-157147/>>



In 2014, Smith and Ouzman, Ltd, along with its chairman and sales and marketing manager, were convicted of corruptly agreeing to make payments of nearly half a million British pounds to influence the award of business contracts in Kenya and Mauritania. The court ordered imprisonment and a combined total of £2,373,193 in fines.<sup>4</sup> In early 2017, Oswago and two others were charged with corruption. Their trial is currently ongoing, scheduled to conclude in September 2018.<sup>5</sup>

Although these dealings pertained to the 2010 referendum, they had long lasting effects. John Githongo, who submitted affidavits to the British courts, stated that the findings would further erode public trust in the IEBC and embolden corrupt officials to use elections for personal enrichment and could affect the outcome of the 2017 poll.<sup>6</sup>

Problems with the IEBC leadership had been apparent since the 2013 electoral cycle, but the Chickengate revelations provided fresh ammunition to pro-election reform groups in Kenya, including civil society organizations and the Kenyan opposition. In May 2016, after the British Serious Fraud Office submitted a dossier of evidence to the Kenyan government, the removal of the IEBC commissioners became the centerpiece of the opposition's call for reforms. In response to weeks of opposition-led, anti-IEBC protests, the Kenyan state responded with a violent crackdown.<sup>7</sup> Photos and videos of police brutality made the rounds on social media, sparking international condemnation. One particularly graphic video showed three policemen striking and kicking the body of a motionless man.<sup>8</sup> Human Rights Watch research revealed patterns of police violence that were largely unprovoked. It also found that police victimized innocent bystanders who played no role in the demonstrations. Multiple victims were wounded by gunshots while inside their homes.<sup>9</sup> Police regularly disregarded Court orders that required them not to interfere with the demonstrations.



**KES 59 M**

Total amount paid to the former Interim Independent Electoral Commission (IIEC) as bribes from Smith and Ouzman, a British ballot printing company, in exchange for a contract.



**£2,373,193**

Total of fines levied by a UK court against Smith and Ouzman, Ltd. in addition to prison sentences for corruptly agreeing to make payments of nearly half a million British pounds to influence the award of business contracts in Kenya and Mauritania

<sup>4</sup> Serious Fraud Office. "Smith and Ouzman Ltd." Available at <<https://www.sfo.gov.uk/cases/smith-ouzman-ltd/>>.

<sup>5</sup> Alphonse Mung'ahu. June 5, 2018. "Oswago, 2 others to stand trial for Chickengate scam." *The Star*. Available at <[https://www.the-star.co.ke/news/2018/06/05/oswago-2-others-to-stand-trial-for-chickengate-scam\\_c1767750](https://www.the-star.co.ke/news/2018/06/05/oswago-2-others-to-stand-trial-for-chickengate-scam_c1767750)>.

<sup>6</sup> Nzau Musau. 28 February 2016. "Why Chickengate scam must be resolved before 2017." *Standard Digital*. Available at <<https://www.standardmedia.co.ke/article/2000193180/why-chickengate-scam-must-be-resolved-before-2017>>.

<sup>7</sup> Otsieno Namwaya. 18 May 2016. "Dispatches: Police Brutality Threatens Rights in Kenya." Human Rights Watch. Available at <<https://www.hrw.org/news/2016/05/18/dispatches-police-brutality-threatens-rights-kenya>>.

<sup>8</sup> DW. May 18, 2016. "Kenya's opposition vows to continue protests." Available at <<http://www.dw.com/en/kenyas-opposition-vows-to-continue-protests/a-19266641>>; Joan Pereruan. May 17 2016. "Kenya opens probe after police break up protest." *The East African*. Available at <http://www.theeastafrican.co.ke/news/Kenya-opens-probeafter-police-break-up-protest/2558-3207408-qxhvul/index.html>.

<sup>9</sup> Human Rights Watch. June 20, 2016. "Kenya: Police Killings During Protests." Available at <<https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests>>.

Protests and agitation eventually culminated in the formation of a joint parliamentary team tasked with investigating matters related to the IEBC. This committee invited submissions from the public on four thematic areas:

- Allegations against the IEBC
- Legal Mechanisms for the Vacation from Office
- Legal, Policy and Institutional Reforms
- Legal, Policy and Institutional Reforms to Improve the Electoral Process

## **The Joint Parliamentary Select Committee (JPSC) on Matters Relating to the Independent Electoral and Boundaries Commission**

The creation of the JPSC, which was mandated to investigate allegations against the IEBC and to recommend potentially sweeping reforms to the electoral law, symbolized a significant victory for the opposition in the pre-election period. It was, in effect, a public vindication of the opposition's claims that the IEBC was unfit to preside over another election. It was also an opportunity to build on past evaluations of the Kenyan electoral process and refine the reform agenda to focus on the issues that had the power to fundamentally alter the nature of election administration, pushing it to be more in line with the constitutional vision for elections. The inclusion of public submissions was especially important, because they made it possible to hear how well the law worked; people's lived experiences could shed light on the gaps in implementation.

The JPSC's final report included a review of each thematic area, an overview of the current state of affairs, comparative analysis, submissions from individuals and organizations, and recommendations. While many of the public submissions revealed important gaps in the administration of elections and highlighted innovative ideas to address problems, the Committee's recommendations often failed to confront the most important issues uncovered in the analysis. The report's findings also illustrate the great many issues that have been raised multiple times but have never been addressed since the re-introduction of multiparty politics in Kenya.

## **The JPSC's Findings: A Lost Opportunity for Reform**

### **Allegations against the IEBC**

There were a number of allegations made against the IEBC, revealing public perceptions that the Commission failed to meet basic expectations, was politically biased and had engaged in potentially criminal conduct. Some examples of the allegations include:

- Mismanagement and mishandling of election data, including faulty tallying of results, the loss of results-related data, failure to maintain a credible Register of Voters, failure to produce a complete set of results and lack of audit trails of results.
- Financial mismanagement, including failure to obtain value for money in the procurement of BVR and EVID kits.

- Political bias and lack of independence, as evidenced by statements made during the 2013 presidential petition and by nepotism in hiring.
- Potentially criminal acts, including dishonest revision of results, deliberate concealment of information, and persistent and endemic corruption in procurement.

The Committee's analysis and recommendations did not address the clear lack of public trust described in the submissions.

Instead, it made no findings on the allegations against members of the Commission and the Secretariat. It merely stated the following:

The Committee took into account the following factors-

- The provisions of the Constitution and the law on the process for disposal of allegations against the Commissioners and the Secretariat;
- The views received from the public and the stakeholders;
- The time remaining to the August, 2017 General Elections;
- The need to ensure stability, public confidence and an orderly transition in the Commission; and
- The offer by the Commissioners to vacate office in the event of a negotiated settlement.

## **Legal Mechanisms for the Vacation from Office**

By the time the JPSC was in session, the IEBC leadership's exit was a foregone conclusion. Indeed, the Committee explicitly covered the options the IEBC commissioners faced in this regard. These options included:

- **Removal from office:** The Committee found that removal under Article 251 of the Constitution could take as long as nine months. Organizations that made submissions disagreed, with some arguing that there was insufficient time to use Article 251 and others asserting that the Committee had no jurisdiction to address the issue in the first place.
- **Resignation:** Some public submissions supported the IEBC commissioners' voluntary resignation. The JPSC was also open to it, but it noted that this option would be entirely within the discretion of the commissioners.
- **Negotiated Exit:** The majority of submissions were in favour of a negotiated exit for the IEBC leadership. Some organizations specifically stated that commissioners should be given full benefits and be permitted to qualify for appointment to other public offices. Others argued that commissioners who had been accused of criminal activity be forced to face the law.
- **Amendment of the Constitution:** Multiple constitutional amendments to facilitate the removal of the commissioners were also considered. In the end, however, the Committee felt that the timelines for such legislative action would be far too long.

Just as the JPSC did not comment on the allegations against the IEBC, it failed to insist that those accused of criminal actions be held accountable. In fact, the Committee recommended a "dignified vacation from office" for the commissioners. The Committee set a timeline for this vacation and also suggested that the new IEBC leadership use the IEBC's existing human resource policies with regard to the Secretariat.

## Legal, Policy and Institutional Reforms

The Committee discussed several institutional issues, including commissioners' terms of office, necessary qualifications for commissioners, the role of the Secretariat, and transparency and accountability mechanisms. Specifically, the Committee considered the following public views:

- **Size of the IEBC:** Most stakeholders recommended a smaller Commission, which they felt would promote efficiency while safeguarding diversity.
- **Integrity:** There were concerns that Chapter Six provisions were not well enforced by the Commission. Some submissions suggested the inclusion of foreigners in the Commission as a way to boost public confidence.
- **Transparency:** There were also suggestions that the IEBC publish regular financial reports as well as verbatim records of its meetings.
- Issues raised concerning the IEBC Secretariat included:
  - **Size of the Secretariat:** Public submissions suggested that the Secretariat retain a small permanent staff. Stakeholders also commented that an independent evaluation should be done to determine optimum staff levels.
  - **Terms of Office:** The Secretariat staff should be limited to between two and three terms in office.
  - **Integrity and Technical Competence:** There were concerns about the integrity of the Secretariat staff; one submission emphasized the importance of "personal integrity beyond reproach," nonpartisanship and relevant knowledge and skills.
  - **Role:** There was general consensus that the Secretariat and the commissioners must have clearly demarcated roles. Commissioners should be responsible for policy direction, and the Secretariat should focus on the implementation of that direction.
  - **Accountability:** There was a suggestion that the Secretariat should be placed under performance contracting.

The Committee once again declined to address the clear lack of public trust, especially in the Secretariat. Instead, the JPSC's recommendations focused largely on the mechanism through which to choose new IEBC leadership. In this regard, the Committee recommended that the IEBC leadership be made up of seven full-time commissioners and that the new commissioners be chosen by a selection panel and appointed by the President. The JPSC emphasized the tight timelines ahead and therefore suggested that the appointment process be expedited and that the Independent Electoral and Boundaries Commission Act be amended to include provisions on vacation from office by the Commissioners other than by way of removal from office.

## Legal, Policy and Institutional Reforms to Improve the Electoral System and Processes

The Committee also considered several specific activities throughout the electoral cycle:

**Voter Registration:** The Committee received submissions on a number of registration-related issues, including:

- **The integration of civil and voter registration:** An overwhelming majority of public submissions recommended that civic and voter registration systems be merged. The National Registration Bureau specifically suggested a multi-purpose, chip-based, electronic identity card that could support e-government functions and which the IEBC could use for registration. While it did not disagree with the concept of integration, the IEBC did emphasize that voter registration should not be put under the purview of the National Registration Bureau because it is part of the Executive, which has a stake in elections.
- **ID Cards:** Stakeholders were concerned about the difficulties many Kenyans face in acquiring national ID cards, which are necessary to register and to vote. Suggestions included devolving the process to the counties and/or the distribution of IDs in schools.
- **Continuous registration:** Stakeholders urged the IEBC to comply with constitutional provisions requiring continuous (as opposed to intermittent) voter registration.
- **Fresh Registration for 2017:** While the Coalition for Reforms and Democracy (CORD) questioned the integrity of the Principal Register of Voters, the Jubilee Party insisted that a new registration process would be too expensive and onerous, given the short time remaining before the next election.
- **Mandatory registration:** Some stakeholders felt that Kenyans should be legally bound to register and to vote. They felt that mandatory voting would ensure that the government reflected the diversity of Kenya.
- **Diaspora and prisoners' registration:** Several organizations agreed that the IEBC should develop a system to facilitate Kenyans in the diaspora and Kenyan prisoners to register to vote.
- **Waiting cards:** There was disagreement about allowing the use of waiting cards (for those who have applied for but have not received their ID cards) for registration. While some felt that the use of these cards opened the door to fraud, others felt that any such risk could be managed through the use of a reliable database.
- **Public verification:** There was broad support for public verification and scrutiny of the Register before the 2017 election.

Voter registration elicited a significant number of responses from the public; it was clearly an important issue. The JPSC made several significant recommendations, many of which aimed to remove or mitigate obstacles to registration and to boost public confidence in the credibility of the Register. Notably, however, the JPSC failed to comment on the suggestions that voter and civic registration be merged, an idea that has long been recommended as a way to drastically improve the efficiency and success rate of registration. The Committee's recommendations were as follows:

The JPSC recommended that the IEBC engage a professional, reputable firm to conduct an audit of the Register of Voters ahead of the 2017 election. Specifically, the Committee determined that the audit should be completed for the purposes of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register. It also recommended that the audit should be completed by November 30, 2016, a full eight months before elections. Once completed, the JPSC recommended that the IEBC submit the audit report to Parliament within 14 days, implement any recommendations and then submit reports of the implementation to Parliament within thirty days of the receipt of the report.

The JPSC also recommended that stakeholders:

- Amend the Elections Act to increase the period for verification of the Register of Voters and scrutiny and closing of the register before elections from sixty (60) days to ninety (90) days;
- Conduct verification of the Register of Voters only by means of biometric voter data and that this be done at the polling stations;
- Facilitate online inspection of the Register of Voters by individual voters through a public portal;
- Ensure the registration of prisoners as voters for presidential elections as well as the production of a progress report on this matter to be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- Ensure that the necessary mechanisms and targets for the progressive realization of registration of Kenyans abroad as voters are put in place and that a progress report on this matter be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- Facilitate the deletion of sections 5(3A) and (3B) of the Elections Act to disallow the use of an acknowledgment of registration certificate for National Identity Card (waiting card) in elections;
- Facilitate the expeditious issuance of Identity Cards and, in particular, that-
  - in the case of a fresh application for an identity card, the application be processed within a period of thirty (30) days; and
  - in the case of an application for replacement of an identity card, the application be processed within a period of fourteen (14) days;
- Develop simple guidelines for vetting of applicants for issuance of Identification Cards.

**Voter Education:** Stakeholders agreed that the IEBC and partners must do significantly more to educate voters ahead of elections. Submissions commented on the need for more money allocated to voter education and the need to integrate voter education within wider civic education. Others urged the IEBC to make better use of social and traditional media.

The JPSC's recommendations did not respond to the majority of suggestions made. In fact, its suggestion that the IEBC partner with non-state actors in the provision of voter education was rather redundant, given the existence of multiple, ongoing partnerships in that regard. The Committee's other recommendation was one which urged the IEBC to ensure the inclusion of Persons With Disabilities when carrying out voter education.



**Nomination and Registration of Candidates:** There was consensus that party nominations must be more strictly regulated. Stakeholders suggested a greater role for the IEBC, and they also expressed a desire for a more substantive Registrar of Political Parties, who could also play a role in regulating party nominations. Some submissions focused on the need to extend the nomination period beyond 45 days and on the benefits of developing a structure that would promote more women in office.

The JPSC's recommendations for party nomination processes were relatively rigorous, but they did fail to address some key issues. Overall, they aimed to prevent party hopping, to set timelines well ahead of election day, promote compliance with the two-thirds gender provision and to give the IEBC and the Registrar of Political Parties more meaningful roles. Some recommendations could have been more detailed, especially with regard to parties' roles in developing and maintaining credible membership lists and actions needed to strengthen the Registrar of Political Parties. The JPSC did not address submissions regarding the need for political parties to institute and enforce stronger and more credible internal party elections, nor did it address the public's concerns about the practice of geographical "zoning."<sup>10</sup>

The Committee recommended that parties and the IEBC act on the following:

- Require parties to submit their lists of members to the Commission at least 90 days before the date of the general election;
- Require party membership lists to be used for party primaries;
- Mandate parties to submit the names of their candidates to the IEBC twenty-one days before nominations and require the IEBC to publish the names of those candidates in the Kenya Gazette within seven days of receipt;
- Require the IEBC to publish the dates of party primaries of all political parties in the Kenya Gazette;
- Require the names of party candidates and independent candidates who will contest in a general election to be submitted to the Commission at least sixty (60) days before the election;
- Call for independent candidates to forward their names to the IEBC fourteen (14) days before the nomination date in the same manner as candidates participating in the party nominations;



Some submissions focused on the benefits of developing a structure that would promote more women in office.

<sup>10</sup> Zoning refers to unofficial rules about who is allowed to campaign in certain areas, based on ethnic composition/support.

- Disallow candidates who change their party affiliation after their names have been forwarded from being eligible to contest elections as a candidate of the new party or as an independent candidate.
- Establish deadlines such that amendments related to nomination timelines must be concluded at least six months before the August 2017 General Elections;
- Facilitate the IEBC's supervision of party nominations if parties request such assistance;
- Require the Office of the Registrar of Political Parties to continuously update party membership lists so that only registered members are allowed to participate in party nominations;
- Amend the Political Parties Act to provide for fiscal incentives be put in place in the law to encourage the implementation of the two-thirds gender principle in the nomination processes by political parties; and
- Empower the Registrar of Political Parties to enable the Office to effectively carry out its functions.

**Campaign Management:** In their submissions, the public noted the need to cap campaign spending and to develop stronger legislation to curb voter bribery; one organization suggested that the Central Bank of Kenya be empowered to track money from politicians during campaign periods. Stakeholders also felt that the Code of Conduct must be more strongly enforced. It is notable that Kenya's Election Campaign Financing Act, passed in 2014, empowers the IEBC to regulate and administer campaign financing. The Act includes provisions related to spending limits, campaign expenses, contribution limits, contribution sources, and a reporting framework. Since the High Court suspended the law in 2017 (in response to a case filed by Raila Odinga alleging that the law was discriminatory), Parliament has failed to take up the issue and set new regulations.

**Media:** Several organizations expressed the opinion that the country requires a stronger legal and institutional framework to ensure equitable coverage by the media for all parties. They also suggested media monitoring as a way to track rates of coverage. Some organizations recommended that the IEBC and media outlets set up a structure to ensure regular meetings and communication so that all players are on the same page regarding roles, timelines and plans. Some felt that the IEBC should also do more to implement the law regarding media coverage. There were concerns about the media's role in propagating hate speech and suggestions to develop and enforce a code of conduct. Finally, organizations expressed a desire to establish an authority to regulate the timing and publication of political opinion polls.

The Committee's recommendations with regard to the media were scant and did not address the most important public submissions, including those on hate speech, the IEBC's role and authority with regard to the media, and the delicate balance between media regulation and free speech.

The JPSC recommended that the IEBC take the following steps:

- Liaise with the Media Council in developing and implementing regulations on media coverage and conduct during campaigns as well as electoral polls; and



- Mainstream the needs of persons with disabilities in the publications of the Commission on election matters.

**Use of ICT:** There were numerous submissions regarding ICT. While stakeholders felt that the use of ICT is crucial to the future of elections in Kenya, they expressed a desire for more transparent procurement processes, better training of staff to use technology, transparent, inclusive and early testing of ICT, transparent records of technology records, and better and more widespread infrastructure to support the use of ICT.

The JPSC recommended the following changes and actions:

- Amend the Elections Act to provide for the participation of political parties in the testing and validation of ICT;
- Amend the Elections Act to provide for the services of a professional audit firm throughout the electoral cycle;
- Conduct early and transparent procurement processes, with stakeholder involvement in the choice of technology;
- Consult other countries that use elections technology to help develop tamper-proof systems in Kenya;
- Synchronize ICT systems so that if technology fails in one location, the rest of the country automatically switches to manual systems;
- Include ICT agents who can represent political parties and observe the use of ICT throughout the electoral cycle;
- Install electronic counters in each ballot box to maintain a running count of the ballots cast for each office;
- Install CCTV cameras at the entrance to each polling station;
- Adopt ballot scanning as part of the counting process, which can serve as back ups to the physical ballots; and
- Ensure that polling station data is available in easily accessible, electronic formats (as opposed to PDF files).

While the Committee's recommendations did make suggestions that would add a certain measure of oversight of the use of ICT and promote inclusive and timely procurement processes, it did not insist on details such as independent pre- and post-election audits.

The Committee recommended the following sets of guidance:

- Guiding Principles for Use of ICT:
  - Use ICT systems that are impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent;
  - Conduct the identification, procurement and deployment of ICT systems in an open and transparent manner; and

- Do not introduce new technology in the election process later than one year before an election.
- Legislative Framework for ICT:
  - Amend section 44 of the Elections Act to require the use of technology in the electoral process;
  - The IEBC should, in consultation with all relevant stakeholders, including political parties, agencies or institutions, make regulations to govern the use of technology in the elections. These regulations should be tabled in Parliament within thirty days from the date of enactment of the Election Laws (Amendment) Bill;
  - These regulations should be enacted for, among other things-
    - acquisition and disposal of ICT assets and systems;
    - testing and certification of the system;
    - mechanisms for the conduct of a system audit;
    - data storage and information security;
    - data retention and disposal;
    - access to electoral system software source codes;
    - development and implementation of a disaster recovery and operations continuity plan;
    - telecommunication service provision;
    - inventory of ICT assets and systems;
    - capacity building of staff of the Commission and stakeholders on the use of technology in the electoral process;
    - telecommunication network for voter validation and result transmission; and
    - the establishment of an ICT oversight technical committee comprising of key stakeholders.
- ICT for the 2017 General Elections and Beyond
  - Technology for the 2017 General Elections should focus on registration, identification and results transmission (BVR, EVID and RTS);
  - The IEBC should put in place mechanisms to ensure-
    - Electronic submission of names and other information required in the nomination processes;
    - Electronic transmission of all poll results; and
    - Polling result forms be made available to the public through a public portal; and
    - Voter identification through biometrics.
  - The IEBC should ensure that the necessary hardware and software are in place to support the use of technology in the 2017 General Elections;

- The IEBC should, where procurement of new equipment may be necessary, in consultation with all relevant agencies and institutions, ensure the timely procurement of appropriate equipment;
- Finalise all procurement of ICT equipment for the 2017 General Election at least eight months before the election.
- Transparently test and deploy all existing equipment and any new equipment in good time in readiness for the next General Elections;
- Finalise testing for the August 2017 election sixty (60) days before the next General Elections;
- Develop and implement a structured and scheduled capacity building programme for training of staff and other stakeholders on the technology to be used in the electoral process; and
- Urgently put in place a Disaster Recovery and Business Continuity Plan.

**Voting Process:** Some stakeholders suggested that the IEBC introduce electronic voting, and a majority of submissions expressed a desire for a more tightly controlled, regulated, efficient and safe procedure in the polling stations. There were also suggestions regarding the introduction of independent monitoring of vote counting and open, publicly verifiable vote counting. Concerns were also raised about the need to better aid special interest groups and persons with disabilities. Some also suggested better training for polling station staff, the staggering of elections, distributing elections over several days, allowing video recording of results counting, special considerations for diaspora voters, establishment of consequences for withdrawing from the polls after a certain date and the introduction of mandatory voting.

The Committee did not address the large majority of the above-mentioned public concerns. Instead, its recommendations included the following:

- Amend the Elections Act to limit the number of voters in each polling station to a maximum of five hundred (500); and
- Put in place adequate arrangements to facilitate voting by persons with disabilities.

**Transmission and Declaration of Results:** Many public submissions agreed that the IEBC must use a secure, robust electronic system to transmit results in a timely, open and publicly verifiable way. Some suggested that results should be sent to news rooms and observers at the same time as they are sent to the NTC as a way to prevent rigging. Some organizations insisted that while parties should be free to maintain their own tallying centres, the IEBC should retain full control of results announcement. Many organizations insisted that polling station results should be final, while others countered that constituency level results should be final. There was a further suggestion that recounts should be done when turnout is 100 percent or above, or where the difference between the top two candidates is less than 1 percent.

Stakeholders also emphasized the need for uniform, consistent procedures and practices with regard to results transmission, a decision that final verification occurs at the national level, establishment of timelines for the various levels of transmission, and the training of agents in what to look for in transmission.

Given the importance of and sensitivity to regulations regarding results transmission, it was surprising that the JPSC did not provide more detailed recommendations on the topic. It did not confront the question of whether or not the press should have a role in announcing results, timelines for results announcements, how to ensure verifiability of the count, or the level at which the result should be considered final. Instead, the Committee simply recommended that the Elections Act be amended to provide for the electronic transmission of the tabulated results of an election for the president from a polling station to the constituency centers and to the national tallying center.

**Allocation of Special Seats:** Stakeholders agreed that the IEBC must do a better job of discharging its mandate to supervise electoral processes in order to ensure that party lists comply with the law and are not just used by parties to reward loyalists. Organizations also debated whether party lists should be submitted before or after elections, whether or not and in what format lists should be published, and revision of the formula used to calculate the number of special seats. Submissions made reference to the need for more concerted efforts to implement the two-thirds gender rule.

The Committee did little in the way of suggesting ways to enforce the letter and spirit of the law on special seats. It only recommended that the law be amended to require that the IEBC publish the party lists submitted by political parties forty-five days before the General Elections.

**Election Observation, Monitoring and Evaluation:** Organizations submitted proposals for invitations to more groups to act as observers, earlier accreditation processes, better training and capacity building for local observers, and the wide dissemination of observer reports. One organization suggested that CCTV or audio recordings should be used in observation. Finally, one stakeholder suggested that a coalition of government agencies conduct a post-election audit.

The Committee made no comment on the bulk of public submissions in this category. It recommended only that the IEBC accredit election observers and monitors in good time before an election so as to facilitate the work of the observers and monitors.

**Dispute Resolution:** The majority of organizations that submitted recommendations agreed that current dispute resolution legislation needs to be reviewed to clearly demarcate the roles of different institutions. There was also concern about the need to extend the 14-day period for filing and resolution of presidential petitions, and where the right of appeal should stop.

The Committee did not respond to the submissions, recommending only that the IEBC should deliver documents supporting the presidential election results to the Supreme Court within 48 hours of the service of a presidential petition.

**Election Offences:** Submissions focused largely on the definition of voter bribery and treating, or the act of providing material inducements to prospective voters, such as foodstuffs. There was significant debate about simplifying the definitions and merging them. Furthermore, there was the suggestion that the offense of “undue influence” be broken down into its constituent parts so that it is easier to use for purposes of litigation. Some stakeholders also debated legislation regarding the abuse of public resources.

The Committee recommended:

- Enact a 'stand-alone' Elections Offences Bill consolidating all elections offences;
- Simplify the rendition of the offence of bribery under section 62 of the Elections Act;
- Delete the offence of "treating" from the Elections Act and incorporate its elements into the offence of bribery;
- Delete section 4(l) of the Elections Act, which mandates the IEBC to investigate and prosecute election offences by candidates, political parties or their agents, so that the function resides with the Office of the Director of Public Prosecutions;
- Amend section 87 of the Elections Act to provide clarity on the procedures relating to the submission and disposal of a report of an election court following its determination on whether an election offence is likely to have been committed; and
- Amend the law to provide for the commencement of prosecution for electoral offences within twelve months of the date of the election to which the offence relates. In the case of an offence arising out a determination of an electoral court under section 87 of the Elections Act, the twelve months to run from the date of the final judgment.

Overall, the JPSC failed to make strong recommendations that confronted the public's most serious concerns, many of which reinforce the underlying power structures that have long acted as obstacles to electoral integrity in Kenya. The Committee's starkest failure was its complete refusal to comment on and/or make recommendations regarding the public's clear mistrust of the IEBC. The Committee used short timelines as an excuse to sidestep its responsibility to speak to criminal accusations against certain IEBC commissioners and staff members, and it made no recommendations regarding how to start to bridge the gap in public trust. Moreover, the JPSC did not demand that any of the criminal accusations be investigated, reinforcing a deep-seated culture of impunity with regard to elections in Kenya.

The Committee also failed to address other significant public concerns, including the inefficiencies and lack of equality in the issuing of ID cards, the Registrar of Political Parties's crisis of authority, parties' clearly undemocratic internal policies, unequal media coverage, the lack of transparency and oversight with regard to results transmission and the clear loopholes in parties' allocation of special seats.

The JPSC's final report was a testament to Kenyan elites' pervasive power to protect the status quo. Unsurprisingly, then, the reforms that flowed out of it did little to truly alter the electoral landscape.

## Impact of the JPSC Process

The JPSC report provided the impetus for two important changes. First, the IEBC agreed to a negotiated exit and left office in December 2016. The IEBC leadership's vacation of office presented an important opportunity for reform in Kenya. The opposition-led protests and the voluminous public submissions against the character of the IEBC had signaled a serious public confidence crisis ahead of the 2017 election. Instead of addressing this issue, the government propagated the very impunity

that had sparked the crisis in the first place. It declined to hold those commissioners who had been accused of criminal conduct accountable, and it agreed to an exit package that was more than 200 percent in excess of what had been stipulated in the commissioners' original contracts.<sup>11</sup> Such actions communicated not only a willingness to ignore public sentiment but to actively reward leaders who had lost public trust. Furthermore, final appointments of new leadership seemed characterized by the prioritisation of political consideration over technical merit.

Second, the JPSC report provided the basis for a series of changes to the electoral law. Since the Committee had not recommended far-reaching legislative reform, however, electoral legal reform did little to substantively change the electoral environment in a positive way. In fact, extremely contentious provisions regarding the use of manual back-up plans for voter identification and results transmission sparked physical altercations in parliament and an opposition-led walkout.

## The Search Begins: A New IEBC

Although the IEBC Act envisions an independent, fair and merit-based selection procedure for commissioners, it is also a political process. Political allegiances played a role from the beginning, starting with the appointment of the members of the Selection Committee.

In line with the law:

- The Parliamentary Service Commission nominated two men and two women:
  - Evans Monari
  - Mary Karen Kigen Sorobit
  - Justice (Rtd) Tom Mbaluto
  - Oglia Chepkemai Karani
- The Kenya Conference of Catholic Bishops nominated one person:
  - Bernadette W. Musundi
- The National Council of Churches of Kenya nominated one person:
  - Peter Karanja (Rev) Canon
- The Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya nominated one person:
  - Abdulghafur H.S. El-Busaidy
- The Evangelical Alliance of Kenya nominated one person:
  - David Oginde Bishop
- and the Hindu Council of Kenya nominated one person:
  - Mohan Lamba

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<sup>11</sup> Business Daily. December 6, 2016. "Issack Hassan's IEBC team exits with Sh 315m pay perk." Available at <<https://www.hrw.org/news/2016/06/20/kenya-police-killings-during-protests>>

In fact, the chosen individuals were thought to be politically aligned and it was clear that members of the selection panel were expected to toe the line of the parties that backed them. Political allegiances were clear even amongst the appointees of the PSC. For instance, at least two of these appointees were known to be Jubilee Party loyalists, and two leaned in favour of the opposition. Other well-known allegiances include those of Reverend Karanja Canon, who is seen to be a Jubilee supporter. The Hindu Council, with very little political power, is perceived to generally go along with the other religious leaders. No one person on this panel was known to be an independent voice.<sup>12</sup> Some members of the panel were also tainted by integrity issues. Mbaluto, for instance, had been removed from the judiciary after having been found unfit to serve.<sup>13</sup>

Overall, this panel, which lacked the content expertise required to effectively choose the new IEBC leadership, clearly seemed to represent and prioritize the views of one section of Kenyan society over all others. That choice was never justified or explained. "I think civil society and the voices of those people who are viewed as distant from the political establishment – that voice was not anywhere near there and that is because of how that group is viewed. Does it mean that group has no useful contribution? I don't think so. Would its participation improve accountability and the quality of people selected? I think so. Would its participation create the antithetical dynamism as improves decision making? I think so."<sup>14</sup>

The selection process, which lasted from the time the panel published the vacancies advertisement (24 October 2016) through the new commissioners' swearing in (20 January 2017), involved shortlisting, public interviews and the panel's final recommendations to the president. Out of 760 total applicants for IEBC commissioner seats, 36 were shortlisted and nine were recommended to the president. Six commissioners were eventually appointed. Out of 50 applicants for the position of Chair of the IEBC, ten were shortlisted. The panel recommended two to the president, who eventually appointed one.

The selection panel conducted interviews with their shortlisted candidates, assessing their qualifications, technical proficiency, leadership and integrity, ICT skills, general knowledge and presentation skills. It also considered submissions from the public on the candidates, where applicable.<sup>15</sup>



"The selection panel lacked the content expertise required to effectively choose the new IEBC leadership. It clearly seemed to represent and prioritize the views of one section of Kenyan society over all others. That choice was never explained or justified."

<sup>12</sup> Interview with George Kegoro, Executive Director of Kenya Human Rights Commission

<sup>13</sup> Benson Wambugu. January 27, 2013. "Never-say-die judge fights 'unlawful' dismissal." *Daily Nation*. Available at <<https://www.nation.co.ke/news/Never-say-die-judge-fights-unlawful-dismissal/1056-1676296-15rcm07/index.html>>.

<sup>14</sup> Interview with George Kegoro

<sup>15</sup> Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission. December 22, 2016. "Press Release."



Notably, the selection panel's first recruitment process for the position of Chair of the IEBC was canceled when public submissions revealed integrity issues that prevented the panel from clearing the shortlisted applicants for interviews.<sup>16</sup> The position was re-advertised thereafter.

The panel's scores for the final shortlist of applicants were as follows:

### IEBC Applicants, Scores and Appointments

Applicant (for Chair)	Mean Score	Applicant (for Commissioner)	Mean Score
Roseline Odede	77.00	Zephania Aura	80
Tukero ole Kina	76.33	<b>Roselyne Akombe</b>	79
Lucas Naikuni	72.22	<b>Abdi Guliye</b>	75
Taib ali Taib Bajabir	71.83	Henry Okola	69
John Kangu	71.78	Samuel Kimeu	68
Florence Mwangangi	69.72	<b>Paul Kurgat</b>	66
Margaret Shava	66.33	<b>Boya Molu</b>	64
<b>Wafula Chebukati</b>	63.17	<b>Consolata Maina</b>	55
David Malakwen	63.11	<b>Margaret Mwachanya</b>	53

**Sources:** <<https://www.standardmedia.co.ke/article/2000228401/revealed-why-the-best-candidates-for-top-electoral-commission-positions-missed-out>>;

<<https://www.nation.co.ke/news/Eyes-on-Uhuru-as-panel-issues-IEBC-shortlist/1056-3497468-q30cj8/index.html>>

\*Names in bold font indicate those who were appointed

In the end, the panel recommended ole Kina and Chebukati to the president. According to media reports, the panel felt that ole Kina was an uncontroversial and technically meritorious choice. The inclusion of Chebukati as a finalist was meant as a foil. Since Chebukati came from the same region as the IEBC's CEO, Ezra Chiloba, the panel was confident that President Kenyatta would choose ole Kina. In a surprise move, however, President Kenyatta appointed Chebukati. "Chebukati's disadvantages are what attracted the selector."<sup>17</sup>

The new leadership, the majority of whom earned the lowest scores from the panel, assumed office in the beginning of 2017.

<sup>16</sup> John Ngirachu. November 25, 2016. "Selection panel temporarily stops recruitment of IEBC head." Daily Nation. Available at <<https://www.nation.co.ke/news/selection-panel-temporarily-stops-recruitment-of-iebc-head/1056-3465276-12dgqhrz/index.html>>.

<sup>17</sup> Interview with informant.





## Section 2: The 2017 Pre-Election Environment: Pending Vulnerabilities

The JPSC's findings also provided the incentive for changes to the legal framework governing elections. Many of the changes were minor and related to timelines and bureaucratic procedures, but some of the amendments had the potential to have a lasting impact. Examples of the more significant amendments included provisions for an independent audit of the Register of Voters, the establishment of a web-based public portal for the display of results forms, and the introduction of "complementary mechanisms" to use in case electronic voter identification and results transmission systems failed.

The pre-election legal environment was characterized by ill-advised, last minute changes to the elections law as well as incomplete rules and procedures. The most serious issues included:

- **Gender parity:** Once again, Parliament failed to pass legislation to operationalize constitutional provisions requiring that not more than two-thirds of elective or appointed bodies be made up by the same gender. In fact, in 2017, Parliament disobeyed a High Court order to enact legislation before elections. The new parliament is now unconstitutional with regard to gender parity.
- **Campaign Finance:** In 2014, Kenya passed the Election Campaign Financing Act. According to this law, the IEBC is mandated to regulate and administer campaign financing. It is empowered to set and enforce spending limits, monitor and regulate campaign expenses, set contribution limits and verify contribution sources, provide a framework for the reporting of campaign expenses and supervise actors in relation to campaign finances (Election Campaign Financing Act 3(1)). In 2016, the IEBC submitted campaign finance-related regulations to parliament for approval. These rules, which were intended to enforce Section Six of the Act, required political parties to open expenditure accounts, appoint individuals authorized to manage these accounts and to submit bank account details to the IEBC. The regulations also established expenditure limits for parties. In December 2016, Raila Odinga filed suit in Milimani High Court, alleging that the law is unfair and discriminatory. In January 2017, the High Court ruled in favour of Raila Odinga, suspending the law temporarily. By the time of Election Day, the National Assembly had failed to pass the regulations and had referred them back to the Commission.
- **Complementary mechanisms:** Amendments to the elections law allowed the IEBC to introduce "complementary mechanisms" to use in case voter identification and results transmission technology failed on Election Day. The mechanism for voter identification

allowed the IEBC to “look for voters” in a hard copy of the Register of Voters. If results transmission failed, the IEBC planned to examine all hard copies of results forms to determine results. This plan took Kenya several steps backward, relying as it did on presiding officers to travel to Nairobi from all parts of the country with forms in hand. It also eliminated checks on the written results.

- **Valid votes vs. total votes cast:** IEBC regulations allowed the Commission to disregard results from polling stations where the number of total valid votes exceeded the number of registered voters. In order to prevent counting fraudulent results, the regulations should have allowed the Commission to disregard results from stations in which the total number of votes cast exceeded the number of registered voters. Without using total votes cast, it is still possible for fraudulent votes to be counted.

Other problems that marked the pre-election environment included the following:

**Voter Registration:** As in previous elections, voter registration was a contentious issue in 2017. Outside of recommending that the Register be audited, the JPSC had failed to suggest improvements to the voter registration system. Unsurprisingly, then, the registration process was characterized by:

- **Serious difficulties in ascertaining national ID cards,** which are required at the polling station,
- **Faulty BVR kits,**
- **Missing records:** Kenyans who had voted in the 2013 election found that their names were now missing from the Register,
- **Unexplained records:** Some first time voters found that their details were already in the Register,
- **Unexplained transfers:** Many voters found that they had been transferred to different polling stations without their knowledge or permission, and
- **Shared ID numbers:** Despite the requirement that national ID numbers be unique, the voter registration process revealed that multiple Kenyans share the same ID number.

The new electoral law allowed the IEBC to hire a firm to conduct an audit of the Register of Voters. In line with the law, KPMG conducted this audit and identified a host of serious problems, including:

- **Out of date records:** The audit revealed that the IEBC struggles to keep the Register of Voters updated, largely because the government institutions it relies upon for data hold incomplete and inaccurate records.
- **Bloated number of records:** KPMG estimated that the 2017 Register of Voters potentially contained 1,037,260 records of deceased voters, representing approximately 5 percent of the entire Register.
- **Duplicate and incomplete records:** The audit found 264,242 records marked by duplicate IDs or incomplete passport information.

- **Inaccurate records:** 11 records lacked first names and 128 lacked surnames; 69 records contained only numeric characters in the name fields; 8,124 records contained out of range dates of birth; 29,199 records contained inaccurate names and particulars.
- **ID issues:** There are 171,476 ID numbers in the Register that do not match with ID numbers in the national ID database. After the release of the audit findings, the IEBC said that it will leave these records in the Register in order to “minimize chances of disenfranchisement.”
- **Inefficiencies in data transfer:** The IEBC relies on flash drives to gather and consolidate data from across the country, and there is no system to ensure that constituency level returning officers know about changes to the data in their respective areas.
- **Lack of reference material:** There is no centralized, complete list of deceased persons in Kenya. Existing data, which represents 41 percent of expected deaths in Kenya over the last five years, is collected and kept in hard copy only – booklets of 250 registers each. The existing data is also riddled with errors, inconsistencies and missing information. KPMG’s analysis of dead voters was based on approximately 13 percent of all expected deaths of Kenyans aged 18 and above. Updates to the Register are based on the physical transport of data from sub chiefs to sub county offices, which then transfer the data to regional offices.




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The IEBC did not address the large majority of these issues in advance of Election Day.

**Voter Education:** As in previous elections, voter education began late in the electoral cycle. Civil society organizations that had been accredited to provide voter education had not received updated material from the IEBC as late as three months before Election Day. Voter education activities were also adversely affected by government rhetoric which threatened international organizations seen to be “interfering” with voters’ choices.<sup>18</sup>

**Party Primaries:** Around the country, party primaries were marred by striking disorganization (including delayed opening of polling stations, lack of voting materials, insufficient or incorrect ballots, and lack of space for secret voting); parties’ lack of administrative capacity (including untrained and insufficient staff and lack of electricity in

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<sup>18</sup> Wangui Ngechu, “President Kenyatta warns against foreign interference in polls, January 1 2017. Available at <https://citizentv.co.ke/news/president-kenyatta-warns-against-foreign-interference-with-polls-153542/>

polling stations); serious confusion regarding the voters' register and party membership lists; incidents of multiple voting; lack of ballot secrecy; allegations of bribery and other fraud; violence; and multiple delays throughout the process.<sup>19</sup> Overall, the primary contests revealed parties' striking lack of internal organization and deep disrespect for internal democracy.

**Campaign Activities:** Two of the most common campaign-related issues in the lead-up to August 2017 were hate speech and the abuse of state resources. Several politicians, including MPs Kimani Ngunjiri (JP Bahati), Timothy Bosire (ODM, Kitutu Masaba), Junet Mohamed (ODM, Suna East) as well as woman representatives Florence Mutua (ODM Busia) and Aisha Jumwa (ODM Kilifi) have been accused of spreading divisive messages. Moses Kuria was also accused of calling for the assassination of Raila Odinga. He and Ferdinand Waititu, who won the Jubilee Party gubernatorial election for Kiambu, were later acquitted for lack of evidence. There were several complaints about incumbents' illegal use of state resources for election campaigns. In particular, there was concern about an apparent loophole in the law (Article 23 of the Leadership and Integrity Act), which allowed Cabinet Secretaries to campaign for candidates in an election.

**Security:** The pre-election environment was also characterised by an upsurge in violence, some of which was organised by political elites and their militias and some of which was perpetrated by Kenyan security forces. Of particular concern was the spike in extrajudicial killings; this trend was noted by multiple domestic and international human rights organizations as well as by the African Commission on Human and Peoples Rights. Since elections are a time of public demonstration, there was significant worry that the security situation would suppress the public's right to the franchise and their freedom of expression and association.

**Counting, Tallying and the Announcement of Results:** The re-introduction of manual processes as "complementary mechanisms" to the electoral process justifiably prompted a certain level of public suspicion and doubt. Despite assurances to the contrary, the "green book" had reappeared,<sup>20</sup> playing a role during voter registration exercises. This, in combination with the IEBC's decision to check hard copies of the results forms against the electronic results, would mean that the country would once again wait as paper forms are ferried from all reaches of Kenya to Nairobi. This appeared to be very much in contradiction of the courts' decision that results are final at the constituency level.

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<sup>19</sup> InformAction (IFA). June 2017. "Burning Ballots: Kenya's Chaotic Primaries." Available at <http://informaction.tv/index.php/news-from-the-field/item/589-election-watch-report-4>

<sup>20</sup> The "green book" refers to the electoral commission's manual records contained in hundreds of notebooks for entries made during voter registration. It differs from the final, legally gazetted principal Register of Voters and represents a return to the unreliable voters lists criticised by the Kriegler Commission, 2008. For a discussion of the problems associated with the IEBC's use of the shifting Green Book and the perennial lack of a final voters' register, see AfriCOG/KPTJ, 2014, "Registration for the 2013 General Elections in Kenya"



## Section 3: Election Day – The More Things Change, the More They Stay the Same

By the time Election Day arrived, Kenya was in a tenuous position. Last-minute court battles had left experts and the IEBC struggling to understand how to prepare for and understand the ramifications of new laws. In one of the most important legal developments, decided via the *Maina Kiai and 2 Others v. IEBC and 2 Others* case, the Court determined that constituency-level results of the presidential elections are final and subject to question only by the elections court. Once results from the constituency are announced, then, the Commission has no authority to “confirm” or alter them in any way.<sup>21</sup>

In addition, the credibility of the Register of Voters had been called into serious question. Shortly before Election Day, the IEBC also made a last minute announcement that as many as 11,155 (27 percent) polling stations would not have network coverage and therefore would not necessarily be able to electronically transmit results. This, in combination with the lack of clarity regarding the complementary mechanism to be used in case of the failure of the ERT system, further degraded confidence. Finally, the murder of IEBC's IT Director just one week before Election Day cast a long shadow over the validity of the polls.<sup>22</sup>

Throughout the entire process, the IEBC exhibited a striking lack of initiative to regularly communicate with the public. The IEBC waited until one day before Election Day, for instance, to publicly announce that more than 11,000 polling stations would lack network coverage. That announcement came with sparse information. It did not explain what led to such a serious gap in planning, and it provided a shockingly amateurish complementary mechanism for such cases. Presiding officers were simply instructed to move to areas with coverage before transmitting results. There were no requirements for these officers to be checked or for any type of witnessing arrangements. Describing the IEBC's approach to dialogue with the public, the European Union stated, “The IEBC did not sufficiently consult stakeholders and despite some efforts public

<sup>21</sup> *Maina Kiai and 2 Others v IEBC and 2 Others* [2017] High Court Pet 207 of 2016, eKLR

<sup>22</sup> Jason Burke, 31 July 2017. “Kenyan election official ‘tortured and murdered’ as fears of violence grow.” *The Guardian*. Available at <<https://www.theguardian.com/world/2017/jul/31/kenyan-election-official-christopher-msando-dead-before-national-vote>>

communication lacked sufficient structure, consistency and depth."<sup>23</sup> The Carter Center made a similar observation, stating, "However, there was a lack of transparency in the IEBC's operations and inconsistent communication with electoral stakeholders and the public."<sup>24</sup> The EU specifically urged the IEBC to strengthen transparency, communication and public outreach and to undertake regular, structured and meaningful stakeholder consultations.<sup>25</sup>

On Election Day, Kenyans lined up, ready to cast their ballots. Local and international observers noted long lines well before stations opened, and observers commended Kenyans for their patience and perseverance in long lines throughout the day. Early reports on August 8<sup>th</sup> showed that notable improvements had been made in voter identification. The KIEMS kits did, in general, work to identify eligible voters. On the other hand, however, there were a limited number of cases in which the kits failed to identify registered voters. Perhaps more worryingly, observers noted that IEBC polling station staff failed to consistently fill out Forms 32A, which are required when voters who are not identified on the KIEMS kit proceed to cast their ballots after being identified on the manual list.<sup>26</sup>

Other problems noted by KYSY observers included:

- Late opening of polling stations,
- Observers were denied entry to polling stations: In some cases, accredited observers were asked to show letters of appointment and take oaths of secrecy,
- Some polling stations were missing materials: KYSY observers reported that some indelible ink pens were dry. IEBC staff were using regular markers to mark voters' fingers,
- Many voters who had registered found that their names were missing from the Register of Voters: In Kisumu, a group of more than 30 voters who were turned away when their names were not found mobilized to organize a meeting with the IEBC County Office, and
- Overly high numbers of assisted voting in some stations: At Naimarlal Primary School in Maralal, observers estimated that up to 90 percent of voters required assistance

It was only as results began streaming in that significant questions began to arise. The IEBC had, as promised, developed a web-based portal upon which it posted scanned images of polling station results forms. In addition to the images, the portal contained a count of the total number of votes cast for each candidate as well a count of valid, rejected, disputed, and rejected-objected ballots. This system allowed anyone to see all results forms and track results as they came in. Unfortunately, however, the results transmission and publication system did not work as expected or promised.

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<sup>23</sup> European Union. January 2018. "Final Report. Republic of Kenya. General Elections 2017." Available at <[https://eeas.europa.eu/sites/eeas/files/eu\\_eom\\_kenya\\_2017\\_final\\_report\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/eu_eom_kenya_2017_final_report_0.pdf)>, page 5

<sup>24</sup> The Carter Center. March 7, 2018. "Kenya 2017 General and Presidential Elections." Available at <[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya-2017-final-election-report.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf)>, page 4

<sup>25</sup> European Union. January 2018. "Final Report. Republic of Kenya. General Elections 2017." Available at <[https://eeas.europa.eu/sites/eeas/files/eu\\_eom\\_kenya\\_2017\\_final\\_report\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/eu_eom_kenya_2017_final_report_0.pdf)>, page 9

<sup>26</sup> The Carter Center. March 7, 2018. "Kenya 2017 General and Presidential Elections." Available at <[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya-2017-final-election-report.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf)>, page 9



First, the IEBC failed to ensure that all forms were posted on the portal in a manner that made public verification of results possible. In fact, one day after polling, Forms 34A<sup>27</sup> still had not been posted on the portal. By the time presidential results were announced on August 11, the IEBC did not possess all Forms 34A and 34B<sup>28</sup>. According to court documents, the Commission did not possess 10,000 Forms 34A and 187 Forms 34B when it declared the presidential results.<sup>29</sup>

Second, the results forms posted on the portal contained a multiplicity of errors and irregularities. These included mathematical mistakes, missing data, incorrect data, inconsistent data (between forms) and altered numbers. For example, there were many examples of differences between results recorded on Forms 34A and Forms 34B.

Third, there were unexplained differences between the forms, the portal and the announced results. For example, KYSY demonstrated how the IEBC's announced results showed either more or less valid votes than what was posted on the portal:

Name of Polling Station & County	Form 34 A	Form 34 B
Stream 2 - Emkwen Youth Polytechnic - Bomet	Total rejected votes <b>12/212 (unclear)</b>	Total rejected votes <b>2</b>
Stream 2 - Kambi Garba Polling Station - Isiolo	Total rejected votes <b>10</b>	Total rejected votes <b>8</b>
Stream 2 - St. Kizito Polling Station - Isiolo North	<b>2</b>	<b>0</b>
Stream 1 - Ramadhan Primary School Polling Station - Isiolo	<b>0</b> Votes for Kenyatta <b>150</b> Votes for Wainaina <b>1</b> rejected vote	<b>150</b> Votes for Kenyatta <b>0</b> Votes for Wainaina <b>0</b> rejected votes
Stream 1 - Nyamecheo Primary, Stream 1 - Kisii	<b>253</b> Votes for Kenyatta <b>0</b> Votes for Wainaina <b>4</b> rejected votes	<b>0</b> Votes for Kenyatta <b>253</b> Votes for Wainaina <b>0</b> rejected votes

In the case of Central, Chebukati's announced results on August 11<sup>th</sup> *increased* the number of valid votes compared to those displayed in the portal.

#### Central Province Breakdown:

	Valid Votes Aug 11	Valid Votes Portal Aug 18	Difference
Nyandarua	289,514	289,484	30
Nyeri	395,936	394,509	1,427
Kirinyaga	301,856	301,261	595
Murang'a	509,006	508,808	198
Kiambu	985,152	985,417	-265

Overall, this is a sum total difference of +1,985 (plus) valid votes in Central.

<sup>27</sup> Forms 34A contains the presidential election results at the polling stations

<sup>28</sup> Forms 34B contain the collation of presidential election results at the Constituency Tallying Centres

<sup>29</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraphs 224-225

	Valid Votes Aug 11	Valid Votes Portal Aug 18	Difference
Siaya	379,080	380,020	-940
Kisumu	378,903	439,423	-60,520
Homa Bay	403,006	402,836	170
Migori	322,261	322,127	134
Kisii	403,665	405,872	-2,207
Nyamira	204,833	204,838	-5

Overall, this is a sum total difference of -63,368 (less) valid votes in Nyanza.

**Source:** KYSY. August 17, 2018.

Fourth, the total number of votes cast for different candidates were varied. One study showed that approximately five percent of all voters who turned out on Election Day only cast votes for president. In Embu County, Form 34C<sup>30</sup> shows that 253,017 voters turned out to vote. This same study claims that 200,021 more Embu voters cast votes for president than senator. Using these figures, that means that 52,996 voters' senatorial ballots were unaccounted for. In Kirinyaga, 296,392 more Kenyans voted for president than senator, leaving 8,603 senatorial ballots unaccounted for.<sup>31</sup> Since the law requires voters to be given all six ballots, it is unclear how the total number of votes cast for the various offices could have been different.

Fifth, the total number of registered voters appeared to have changed by the time results were announced. When IEBC Chair Wafula Cheukati announced presidential results, he also announced county-level totals of registered voters. The sum of his totals, however, did not match the gazetted total of registered voters. In fact, there was a gap of more than 25,000 voters between the two figures.

Notably, these issues were very similar to those of 2013. In fact, the lack of a reliable and verifiable Register of Voters and inconsistencies and errors on results forms formed the crux of the civil society case challenging the credibility of the election in the Supreme Court.

In the aftermath of the August election, KYSY conducted a sample-based recount of the presidential results. Using seven randomly selected polling stations from each constituency, KYSY used Forms 34A and Forms 34B to conduct its own count of the results. This exercise revealed several important findings, including:

- The sum total of valid votes for all eight presidential candidates, as recorded on Forms 34A, does not correspond with the total valid votes as recorded in the columns for total valid votes on Forms 34A. The differences range from 2.8 percent to 30.6 percent.
- There are two places on Forms 34A where presiding officers are meant to record the total number of valid votes won by all candidates. The sums of these two totals do not match.

<sup>30</sup> Form 34C contains the declaration of results for the election of the President of the Republic of Kenya at the National Tallying Centre

<sup>31</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 14



- Rejected votes totaled between 0.6 and 0.8 percent, depending on which figure of total valid votes is used.
- 6.2 percent of Forms 34A contained at least 1 illegible entry
- 35.2 percent of Forms 34A were missing at least 1 piece of information.
- 1.3 percent of Forms 34A were missing altogether.
- 96.2 percent of Forms 34A were signed by presiding officers.
- 51.0 percent of Forms 34A were stamped by the IEBC.
- In no case do the total valid votes for individual candidates on Forms 34A correspond with the total valid votes for those same candidates on Forms 34B.
- There was at least 1 illegible entry in 0.4 percent of Forms 34B examined.
- There was at least one piece of missing information in 90.2 percent of Forms 34B examined.
- In 3.7 percent of cases, the list of polling stations on Form 34B was incomplete.



## Section 4: The Supreme Court

In the aftermath of Election Day, as results forms came under increasing public scrutiny, questions about the impact of the apparent irregularities abounded. Were mathematical errors important enough to tarnish the legitimacy of the results? Why were some results forms not available on the portal? How many mistakes are too many? Given that forms did not match the portal results, how were Kenyans to know which results were official?

The IEBC was also quickly losing even more public credibility. Chebukati's announcement of presidential results had come with inaccurate voter registration figures, and numbers on the portal were still in flux days after his announcement. In many cases, results forms showed that IEBC staff had trouble understanding the difference between registered voters and rejected votes.

On August 18, 2017, the National Super Alliance (NASA) filed a petition challenging the credibility of the August 2017 election. Its petition alleged that the IEBC had failed to conduct the election in compliance with the law and that Uhuru Kenyatta and members of his administration had illegally used their offices and public resources for campaign purposes. It asked the Court to nullify the announced presidential results.

Specifically, NASA's allegations can be grouped into four main categories:

1. The IEBC failed to abide by the law and also failed to follow its own systems with regard to results collation and transmission. Examples include:
  - a. Results from more than 10,000 polling stations were not transmitted with an electronic image of the results form, as required by law.
  - b. In more than 10,000 polling stations, the data entered into the KIEMS kits were not consistent with the information and data in Forms 34A.
  - c. The results in Forms 34A were often not consistent with results in Forms 34B. This inconsistency called into question the legitimacy of the final results, which are based on polling station and constituency level results.
  - d. The computation and tabulation of the results in a significant number of Forms 34B were inaccurate, unverifiable and internally inconsistent.

- e. A significant number of Forms 34B were missing IEBC stamps and signatures, and many Forms 34B were signed by the same person.<sup>32</sup>
  - f. The IEBC used inconsistently formatted Forms 34B to collect constituency level results.
2. The IEBC failed to verify results before announcing them. Examples include:
    - a. The IEBC declared presidential results without verification of the results forms from over 10,000 polling stations.
    - b. When the IEBC declared presidential results, it did not have 187 Forms 34B, nor did it publically display or avail the same for verification.
    - c. The publicly displayed results were not consistent with the information and data in the respective Forms 34A.
  3. Certain parts of the electoral process were administered wholly outside of the law, making it impossible for the public to verify their credibility. Examples include:
    - a. The IEBC used results from un-gazetted, secret polling stations.
    - b. A significant number of Forms 34B were signed by un-gazetted returning officers.
    - c. By declaring results per County the 1<sup>st</sup> Respondent failed to make the results at the polling stations final as per the decision.
  4. The campaign period was marred by illegal activity. Examples include:
    - a. The Jubilee Party illegally used intimidation, coercion of public officers and improper influence of voters during its campaign.
    - b. The Jubilee Party put up and publicly maintained false, inaccurate and misleading information during its campaign, and this information created an unbalanced playing field and deliberately misled the general public and the people of Kenya.<sup>33</sup>

In response to a request from NASA, the Court ordered its Registrar to oversee a scrutiny of results forms. This scrutiny revealed the following:

- The IEBC did not produce the original Form 34C for the scrutiny exercise
- 19 percent of Forms 34B did not have a watermark
- 11 percent of Forms 34B did not have serial numbers
- 65 percent of Forms 34B did not have a completed handover section (which shows the number of Forms 34A handed over at the constituency level)
- 99 percent of Forms 34B did not have a completed takeover section (which shows the number of Forms 34B taken over at the national level).

<sup>32</sup> Given that Forms 34B are to be signed by the respective presiding officer of 290 constituencies, this is an anomaly

<sup>33</sup> There were reports of collaboration between JP and international firms, in the 2013 and 2017 elections. See for example, Jina Moore, "Cambridge Analytica had a Role in Kenya's Election, Too", The New York Times, March 20 2018. Accessed at <https://www.nytimes.com/2018/03/20/world/africa/kenya-cambridge-analytica-election.html>

Given the above evidence, NASA asked the Court to consider and answer the following questions:

- a) Did the IEBC conduct the August presidential election in compliance with the Constitution and national laws, and if not, did this non-compliance affect the result and/or the validity of the result of the presidential election?
- b) Did the rejected votes, which were calculated to amount to 2.6% of the total votes cast, substantially affect and/or invalidate the count and tally of the presidential election?
- c) Should the total number of verified rejected votes be considered in ascertaining whether any candidate met the constitutional threshold for victory?
- d) Was Uhuru Kenyatta validly declared the president-elect?
- e) Did Uhuru Kenyatta commit election irregularities?

Ultimately, NASA did not prove that the final result had been affected by the issues it raised. Instead, it provided evidence of systematic chaos, starting with results collation at the polling stations and through the announcement of final presidential results. Indeed, the petition stated, "The Petitioners aver that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1<sup>st</sup> Respondent cannot accurately and verifiably determine what results any of the candidates got."<sup>34</sup> NASA asked the Supreme Court to examine this process and provide clarity on how to draw a line between chaos, fraud by negligence and outright rigging. When is an irregularity or inconsistency serious enough to violate the law and what is the process through which to determine whether that issue has the potential to and/or does impact on final results?

These questions had serious implications. A determination that certain errors were permissible could be interpreted as giving a free hand to authorities, who may then lower their standards for the conduct of elections. On the other hand, a ruling that invalidated an election based on unintentional errors could open the door to unfairly disputed polls. Indeed, in 2013 the Supreme Court, faced with much of the same kinds of evidence as in 2017, ruled that irregularities, while they did occur, were not shown to have materially affected the ultimate result. Without such proof, the Court ruled that it could not invalidate that result.<sup>35</sup>

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<sup>34</sup> Petition 1 of 2017, Para 14

<sup>35</sup> For discussions of the 2013 decision see Wachira Maina, "Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test", *The East African*, April 20 2013, and John Harrington, Ambreena Manji, 2015, "Restoring Leviathan? The Kenyan Supreme Court, constitutional transformation, and the presidential election of 2013", *Journal of Eastern African Studies*, Vol 9, 2015, Issue 2.



## Section 5: The Judgment & Electoral Integrity

On September 1, 2017, the Supreme Court of Kenya, in a landmark judgment, nullified the results of the August 8<sup>th</sup> presidential election. While half the country celebrated the victory, hailing the independence of the Court, Kenyatta publicly called the judges “crooks”, depicting them as a problem that needed to be fixed.<sup>36</sup>

The Court's ruling, which recognized the critical importance of the entire electoral cycle – and not just the results – was indubitably a milestone for Kenya and the continent. It was also, however, marked by serious limitations. The Court's annulment of results was based largely on a determination that the process which led to the announced results had not satisfied legal requirements, especially those related to verification of results. This legal non-compliance was compounded by the IEBC's lack of transparency and its general failure to provide satisfactory responses to a number of questions. At the same time, the Court only found in favour of the petitioners on matters related to results. The petitioners' claims related to alleged illegalities committed during campaigns were all dismissed.

Electoral integrity depends, however, on much more than results; the electoral cycle begins well before Election Day. Indeed, the KYSY coalition began raising concerns about the fate of the 2017 election a year before Election Day, citing divisive political rhetoric and systematic delays in the issuance of national ID cards as potential danger signs for the legitimacy of upcoming elections.

The September 2017 judgment thus opened a narrow window for potential reform. A look at the Court's individual decisions reveals pending, unanswered questions and limitations with regard to the push for more robust conceptions of electoral integrity in Kenya.

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<sup>36</sup> Al Jazeera. September 2, 2017. “Uhuru Kenyatta to court: ‘We shall revisit this.’” Available at < <https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html>>.

## Process vs. Results: Section 83

One of the judgment's most significant points was its endorsement of elections as processes. The Court stated, "...the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters is as important as the result of the election itself."<sup>37</sup> Elections are processes rather than events, and their legitimacy is based on far more than numerical results. "Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution."<sup>38</sup>

The Court's acknowledgment and endorsement of the importance of the entire electoral process was a particular victory for election experts, who have long emphasized the critical importance of the electoral cycle approach in elections analysis. Results are only as credible as the process that led to them.

In the context of this petition, which was largely limited to the results process, the Court's pronouncement suggested that the errors and irregularities regarding results collation and transmission compromised the credibility of the final result. At a most basic level, the Court's decision communicated to the IEBC that it needed to ensure that each step of the results process – from the printing of forms, to the counting and recording of results, to the transmission of final results – was as accurate as possible.

Of course, the electoral cycle includes much more than results counting and transmission. While the judgment did reinforce the importance of the cycle, the petitioners did not ask the Court to consider problems with voter registration, boundary delimitation, legal reform, or any of the other phases of the electoral cycle. In this way, the judgment was limited.

### Pending Questions:

- What were the problems that marred other parts of the electoral cycle, and what could be done to mitigate those in future elections?
- What kinds of standards are necessary to ensure that all phases of the electoral cycle are as credible as possible?

## The Lack of Verification

The Court found that the IEBC failed to fulfill its legal duty of verifying results before they were announced. Specifically, the Court determined that the IEBC, by basing results on constituency totals rather than on polling station totals, acted in violation of the Court of Appeal's decision, which had upheld that the polling station is the "true locus for the exercise of the voters' will." In addition, the IEBC's announcement of presidential results without all Forms 34A in its possession was in contravention of the law.<sup>39</sup>

<sup>37</sup> *Raila Amolo Odinga & others v. IEBC & others*, paragraph 227

<sup>38</sup> *Raila Amolo Odinga & others v. IEBC & others*, paragraph 224

<sup>39</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 266

“The failure by the 1<sup>st</sup> respondent to verify the results, in consultation with the 2<sup>nd</sup> respondent, before the latter declared them, therefore went against the expectation of Article 138(3)(c) of the Constitution, just as the failure to electronically and simultaneously transmit the results from all the polling stations to the National Tallying Centre, violated the provisions of Section 39 (1C) of the Elections Act. These violations of the Constitution and the law, call into serious doubt as to whether the said election can be said to have been a free expression of the will of the people as contemplated by Article 38 of the Constitution.”<sup>40</sup>

In this section of the judgment, the Court made it clear that polling station results are final. It also explained that the law expects the IEBC to verify all higher level totals against polling station counts. Clearly, no final results can be determined without all polling station results in hand. What remains unclear, however, is what the IEBC is empowered to do when there are errors or other problems on polling station forms.

The concept of verification is also relevant throughout the rest of the electoral cycle. There is, for example, a legal requirement that the public be given the opportunity to verify its details on the Register of Voters. It is unclear what happens, however, if a voter's details are incorrect.

## Pending Questions

- What happens if the polling station results forms contain mathematical or other errors?
- Is the IEBC empowered to correct mistakes and/or address other problems on the forms?
- What is the process and timeline for correcting the mistakes, and what can a voter expect in terms of verification that the information has been corrected?

## General Lack of Transparency

The Supreme Court also criticized the IEBC for failing to comply wholly with its order to provide petitioners with all original results forms for the purposes of scrutiny.<sup>41</sup> Specifically, the Court blamed the Commission for delaying the provision of forms so much that the petitioners were unable to effectively use them.

Additionally, the Court chastised the IEBC for flouting its order to open IEBC servers for scrutiny: “In other words, our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the petitioners' said claims. If IEBC had nothing to hide, even before the Order was made, it would have itself readily provided access to its ICT logs and servers to disprove the petitioners' claims. But what did IEBC do with it? It contumaciously disobeyed the Order in the critical areas.”<sup>42</sup> The IEBC's failure to open its servers convinced the Court that the Commission's IT system had been infiltrated, either by an external party or by IEBC officials, or that the IEBC was

<sup>40</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 292

<sup>41</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 267

<sup>42</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 279



unable to accept that it had “bungled the whole transmission system and were unable to verify the data.”<sup>43</sup>

While the Court clearly disapproved of the IEBC's behavior, it did not demand any action regarding the Commission's disobedience. There were no consequences, and the information sought through those orders remains elusive.

## Pending Questions

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- Why did the IEBC fail to provide the original Form 34C for the scrutiny?
- What information was in the servers at the time of the case, and what could that information have revealed about the legitimacy of announced results?
- What can be done, if anything, to retrieve the above information?
- What can be done to hold the IEBC accountable for its failure to abide by court orders?

## Incomplete Explanations

There were also several instances in which the IEBC's explanations fell short of Court expectations. Specifically, the Court did not accept the IEBC's explanation that it was unable to transmit Forms 34A from 11,000 polling stations because of poor network coverage in those areas.<sup>44</sup> Furthermore, the Court did not accept the IEBC's assertion that results posted on the portal were “statistics” and therefore justifiably different from announced results.<sup>45</sup> Finally, the IEBC's failure to provide a satisfactory answer to questions about why there were different total votes cast for presidential, gubernatorial and parliamentary candidates convinced the Court to hold the Commission responsible for claims about ungazetted polling stations.<sup>46</sup>

The Court's refusal to accept these explanations did not come with demands to provide more satisfactory responses. Indeed, the IEBC was never held accountable for the lack of network issues, the discrepancies between the portal results and announced results, and the differences in votes cast for various elective offices. These issues are important and could reappear in future elections, especially if there is no accountability now.

## Pending Questions

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- What explains the failure of results transmission in nearly 11,000 polling stations?
- If the portal was supposed to reflect Forms 34A, why were the posted numbers different from what was on the forms? What was the source of those numbers?
- What are the polling station level results, in full, for all elective offices?

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<sup>43</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 280

<sup>44</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraphs 269-272.

<sup>45</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 275

<sup>46</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 281



## Campaign Period

In general, the Supreme Court felt that NASA's allegations about illegal campaign activities were not backed by strong and sufficient evidence. It therefore dismissed those questions. Specifically, the Court ruled that NASA did not provide evidence of its allegations that Kenyatta illegally advertised his government's achievements in public places and that he/his party used public resources for the purposes of campaigning. In addition, the Court ruled that since a related case was ongoing in the High Court, it was unable to adjudicate on these issues.

The Court also ruled that the evidence claiming that Kenyatta threatened chiefs that they would face dire consequences if they did not campaign for him was insufficient.<sup>47</sup>

In response to the allegation that Kenyatta and Ruto corruptly influenced voters by paying reparations to victims of the 2007-08 post-election violence, the Court ruled that the evidence submitted was not convincing.<sup>48</sup>

On the issue of whether the law that allows Cabinet Secretaries to campaign on behalf of a party is unconstitutional, the Court ruled that the forum of a presidential petition was not the correct space in which to consider this question.<sup>49</sup>

A strong judicial decision clarifying the law could have helped strengthen the Court's point about the importance of electoral processes. As NASA contended, the campaign period is rife with illegalities, including voter bribery, intimidation and incumbents' use of state resources. These problems have been long documented by civil society and anti-corruption groups inside and outside Kenya. Without better enforcement of the law, electoral integrity is already compromised at these points, long before Election Day.

Overall, the Court found that multiple irregularities with regard to the results forms impacted the legitimacy of the election. It questioned the use of non-standard forms, raising doubts about their legitimacy as well as of the possibility of forgeries. It also questioned the lack of an original Form 34C and the failure of IEBC staff to sign forms. Overall, the Court determined:

In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8<sup>th</sup> August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.

<sup>47</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 322

<sup>48</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 325

<sup>49</sup> Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*, paragraph 333



## Section 6: Conclusion

Despite significant reform of and attention to the administration of elections in the lead-up to the August polls, the presidential election was marred by many of the same problems that have beleaguered past polls. A general dearth of transparency throughout the electoral cycle, combined with a chaotic results process marked by the use of illegitimate results forms and unverified results, cast a long shadow over the credibility of the election.

Unlike in the past, however, the Kenyan Supreme Court, in a case filed by the opposition coalition, ruled that a non-credible process had led to illegitimate results. The Court annulled the presidential election results and called for a fresh election in 30 days. The Court's much-anticipated judgment set a new standard in the assessment of elections. An illegitimate process, the Court ruled, could threaten the credibility of results, even without proof that the numerical results were materially affected.

The judgment would spark a heated national debate about electoral integrity in Kenya, with various political and non-state actors contributing to a discussion about who defines it and how it is defined. This debate and its impact on the fresh presidential election is the subject of the next report in this series.<sup>50</sup>

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<sup>50</sup> See KPTJ. 2018. "Squandered Opportunities: The October 2017 Presidential Elections."



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