

The Democratic Paradox

A Report on Kenya's 2013 General Elections

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List of Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples Rights
ACK	Anglican Church of Kenya
AG	Attorney General
ALGAK	Association for Local Government Authorities in Kenya
APSEA	Association of Professional Societies in East Africa
BBC	British Broadcasting Corporation
BVR	Biometric Voter Registration
CAJ	Commission on Administrative Justice
CBOs	Community Based Organizations
CDF	Constituency Development Fund
CDU	Central Depository Unit
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEO	Chief Executive Officer
CIC	Commission for the Implementation of the Constitution
CIOC	Constitution Implementation Oversight Committee
CJPC	Catholic Justice and Peace Commission
CLARION	Centre for Law and Research International
CoE	Committee of Experts on Constitutional Review
CoK	Constitution of Kenya
CORD	Coalition for Reforms and Democracy
CRADLE	Child Rights Advisory Documentation and Legal Centre
CREAW	Centre for Rights Education and Awareness
CRECO	Constitution Reform Education Consortium
CRPD	Convention on the Rights of Persons with Disability

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CSOs	Civil Society Organizations
DC	District Commissioner
DOs	District Officers
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
ECK	Electoral Commission of Kenya
EGM	Electoral Governance Programme
ELOG	Elections Observation Group
EPMC	Electoral Processes Monitoring Centre
EVID	Electronic Voter Identification
FES	Friedrich Ebert Stiftung (Foundation)
FIDA-K	International Federation for Women Lawyers in Kenya
GK	Government of Kenya
GNU	Government National Union
GSU	General Service Unit
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICPAK	Institute of Certified Public Accountants of Kenya
ICT	Information Communication and Technology
IDPs	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IED	Institute for Education in Democracy
IFES	International Foundation for Electoral Systems
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IMLU	Independent Medical & Legal Unit
IPOA	Independent Policing Oversight Authority
IREC	Independent Review Committee
IT	Information Technology
KADU	Kenya African Democratic Union

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KANU	Kenya African National Union
KEPSA	Kenya Private Sector Alliance
KHRC	Kenya Human Rights Commission
KLR	Kenya Law Reports
KNA	Kenya News Agencies
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
K-NICE	Kenya National Integrated Civic Education
KPTJ	Kenyans for Peace with Truth and Justice
KES	Kenya Shillings
KTTI	Kabete Technical Training Institute
KWS	Kenya Wildlife Service
LCC	London Constitutional Conference
LDP	Liberal Democratic Party
LNC	Local Native Council
LSK	Law Society of Kenya
MoJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
MRC	Mombasa Republican Council
MSIPR	Ministry of State for Immigration and Registration of Persons
NAK	National Alliance (Party) of Kenya
NDC	National Delegates Conference
NDI	National Democratic Institute
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organizations
NPS	National Police Service
NPSC	National Police Service Commission
NTA	National Transitional Authority
OCPD	Officer Commanding Police Division
OCS	Officer Commanding Station
ODM	Orange Democratic Movement

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PEV	Post-Election Violence
PNU	Party of National Unity
PO	Presiding Officer
PSC	Public Service Commission
RO	Returning Officers
RPP	Registrar of Political Parties
SGBV	Sexual and Gender-Based Violence
SMS	Short Message Services
TJRC	Truth, Justice and Reconciliation Commission
UDEK	United Disability Empowerment in Kenya
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UN-Women	United Nations Entity for Gender Equality and the Empowerment of Women
URP	United Republican Party
USAID	United States Agency for International Development
YMCA	Young Men's Christian Association

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Foreword

The 2013 General Elections had the potential for being a watershed in Kenya's democratic progression. This was especially the case given the fact that the elections were being held within the framework of a newly promulgated democratic and progressive Constitution of Kenya 2010 (COK 2010). Given its robust provisions on a number of governance issues, it was hoped that the Constitution, which was endorsed by over 67 percent of Kenyans, provided a solid framework within which the 2013 general election's outcome that would positively transform the country's electoral systems and processes and place them on a firm trajectory of free and fair democratic elections. Unfortunately, the 2013 general elections produced a democratic paradox where, despite having a democratic and progressive constitution in place, the electoral exercise was marred by similar irregularities experienced in previous elections.

The 2013 general election was unprecedented by the very number of elective positions, six in total, these being the President/Deputy President; the Governor/Deputy Governor of the county; the Senator; the Member of the National Assembly; the Member of the County Assembly; and finally, the Woman Representative directly elected from the county to be a member of the National Assembly. The added number of elective positions was aimed at flattening the pyramid of power to ensure that although the most coveted seat – the presidency – retained some considerable degree of power, some of that power was to be devolved to the Counties, especially to the governors and senators.

It is also worth noting that the exercise of voting for the above elective seats was held on the same day—a situation that is dissimilar to most other jurisdictions that contain devolved governance structures, such as Uganda or Nigeria, whose national and local level elections are held at different times. Given the low levels of civic and voter education conducted by the Independent Electoral and Boundaries Commission (IEBC) and other stakeholders prior to the election day in what was clearly going to be a complex exercise, the voting process was bound to, and in fact did result in, massive levels of confusion amongst the electorate, who had customarily voted for three candidates (the President, the MPs and the Councillors).

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Additionally, it is worth noting that attempts at voter/civic education have historically targeted subjects such as leadership and democracy, the importance of voting, and so on, but hardly have they interrogated the entrenched voter mentality in Kenya. That is why voters, despite all past and present efforts at civic and voter education, still went ahead to cast their ballot in the 2013 general election based on factors such as ethnicity, clanism and bribes solicited, among other considerations, factors that have always been readily utilized by most political players seeking to influence the choices of the electorate.

It is also worth noting that Kenyans (and the international community) never forgot that the March 2013 general election was being held against the backdrop of the disputed presidential elections of 2007, and the resultant unprecedented Post-Election Violence (PEV). Therefore, it was imperative that the IEBC conduct the March 2013 general election in a manner that was beyond reproach to avoid a repeat of the 2007/8 debacle and later violence. This also meant that there was a high degree of self-censorship, especially from the media, in terms of expressing views that were deemed as 'likely to disturb the peace'. Consequently, even where there were glaring electoral malpractices that required serious attention and remedial action, such was not forthcoming as 'peace at all costs' seemed to be the overriding message during the entire electioneering process.

KHRC invested in scrutinizing key processes around the March 2013 general election recognizing that this election held the potential of transforming Kenya's politics, leadership, electoral processes and therefore augmenting democracy and participatory governance in line with the COK 2010. The Commission therefore monitored and engaged actors within the entire electoral cycle by using human rights standards and frameworks, as contained in the national, regional and international legal instruments. Additionally, it is important to note that KHRC believes that the mainstay of any democratic electoral process is not merely limited to the facilitation of the expression of popular will through the casting of the vote but also to securing good and prudent governance capable of promoting the establishment of a free and open democratic society.

While we appreciate the great efforts taken by all the national, regional and international actors – state and non-state – to support the 2013 electoral process against many temporal and resource constraints, we wish to observe that the stakeholders and the Kenyan society in general may have, at the altar of peace and mostly owing to the experiences of the 2007/2008 PEV, sacrificed the democratic principles of credibility and accountability in the 2013 General Election. The KHRC therefore avers that in a way, the March 2013 general election were a *democratic paradox*. We say so because although the rules of engagement were largely democratic, the same were implemented by the various political

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actors and the IEBC in a manner that gave the process a porously thin if not superficial veneer of acceptability that fell far short of realizing a truly free and fair electoral outcome as illustrated by some of the anomalies captured in this Report: *The Democratic Paradox: A Report on Kenya's 2013 General Election*.

It is interesting to note that “*the peace at all costs*” messages during the electioneering period provided a cover of intolerance against all those who raised issues of transparency or accountability in the 2013 general election. Consequently, for the KHRC and other human rights defenders, an interesting development in the social media as well as the mainstream media commentary were the virulent attacks directed against members of the Kenyan civil society, terming them as “*agents of imperialism*” or their re-christening as “*evil society*”. As part of a well-executed campaign of vilification and demonization, the civil society in Kenya was in the run-up to the 2013 general election caricatured and thereafter continues to be caricatured as an agent of malevolent foreign benefactors, keen and intent on depriving the Kenyan people the freedom to vote for their ‘preferred’ leaders. Ironically, these were the very accusations levelled against the civil society by the Moi regime at the height of its despotic one party rule and state suppression of most civil liberties and freedoms for Kenyans.

The KHRC has since its formation in 1992, advocated for political and civil freedoms as well as socio-economic rights for all Kenyans. The “*agents of imperialism*” label has always been a favourite catchphrase for erstwhile supporters of the *status quo* as well as die-hard merchants of impunity who have ruled Kenya directly or indirectly since 1963. Guided by the COK 2010 and the unwavering principles of human rights, and working together with a broad array of Kenyans, the KHRC will stand its ground and elect to be on the right side of history. Therefore, despite the taunts being hurled our way, we will remain resolute in our pursuit for human rights, guided by the search for peace with truth and justice. KHRC firmly believes that Kenyans will ultimately triumph over anybody or any government that attempts to roll back the gains that have been achieved through many years of unwavering commitment to the ideals of a just Kenyan society as sanctified in the robust Constitution of Kenya 2010. *Aluta Continua!*

Atsango Chesoni
Executive Director

Chapter One

1.0 Methodology and Areas for Monitoring and Advocacy

1.1 KHRC's Background on Monitoring Electoral Processes

The KHRC has consistently monitored and advocated for the respect and protection of human rights standards within the 1997, 2002 and 2007 General Elections; monitored compliance to international human rights norms within the 2005 and 2010 constitutional referenda; and provided ground-breaking research and advocacy for the protection and reparation of various groups whose rights had been historically violated as a result of electoral malpractices.

Using international standards for observing electoral processes, KHRC has traditionally monitored four main aspects of those electoral processes. These include: a) political mobilization and the use of hate speech and unsavoury language in electoral campaigns in 2005, 2007 and also 2010; b) use of violence against all persons, whether contestants or the electorate, in 1997, 2007 and 2010; c) violence meted out against certain persons notably Sexual and Gender-based Violence (SGBV) in 1997, 2007 and 2010; and d) abuse/misuse of State resources (physical, financial and human resources) by those in power to their advantage to win electoral contests in 2007 and 2010. With these, KHRC has produced and disseminated several reports, documenting the violations within the context of what constitutes the basic human rights that must be respected and protected in electoral processes.

In 2013, using a rights-based approach, the KHRC scrutinized the extent to which the fundamental rights and freedoms necessary for the democratic and accountable conduct of the electoral process were applied, protected and promoted in accordance with the letter and spirit of the Constitution. The rights monitored included the freedom of expression, the freedom of assembly, freedom of movement, freedom of the media, access to information, equality and freedom from discrimination as well as the

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political rights under the Constitution of Kenya. Specifically, the KHRC's monitoring process in 2013 laid emphasis on the education and registration of voters, political party nominations and political campaigns, with the view to ensure non-discrimination against women and youth, most of whom have been historically excluded from decision making in political party processes, denied opportunities to contend for political positions and often been misled, misused and abused to advance self-serving political interests. Over the years, Kenya's electoral processes have been marked by serious acts of discrimination against women aspirants. It is for this reason that KHRC also gave attention to monitoring SGBV, traditionally meted out against women but increasingly being inflicted upon men both socially and during periods of mass violence.

The KHRC monitored the 2013 general election against the backdrop of the huge potential they held of transforming Kenya's politics, leadership and electoral processes into a maturing polity of representative democracy. While the democratic rules espoused in the COK 2010 provided a more robust atmosphere for holding an open and transparent electoral process, KHRC was cognizant of the fact that the key political players remained more or less the same. Therefore, there was a real fear that these players may not have evolved politically to keep up with the new and higher standards of conducting elections stipulated in the COK 2010. KHRC firmly believes that while achieving constitutional and legislative

milestones (as is the case with the COK 2010) is cardinal in the push for democratic governance, legal stipulations calling for changes in electoral processes are not enough. A real and meaningful electoral democracy will only begin to sprout once the key political actors start practicing politics in a manner that promotes a constitutional culture that respects the clearly laid down electoral rules.

1.2 Methodology

KHRC mapped out the country geographically based on the history of human rights violations and other elections related criminal conduct in the areas selected. The concerns in question included: 1) hate speech, 2) women participation and discrimination, 3) electoral violence, 4) abuse of state resources, 5) displacement, 6) intimidation, 7) intolerance, 8) voting irregularities and 9) representation of marginalized communities and groups.

KHRC had planned to monitor 86 constituencies spread over 46 counties based on the information gathered from its mapping tool.¹ However, due to resource constraints, the counties were reduced to 19. The 19 counties were arrived at on the basis of the main hot-spot areas that experience rampant incidences of human rights violations around electoral periods. Due to the relative size and population of some of these areas it was considered important to have more monitors

1 See Annex 2; KHRC's Election Monitoring Mapping Tool

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in some counties than in others. Hence, KHRC engaged 36 monitors in the 19 counties that were the focus of the initial monitoring.² However, as resources became available, the number of monitors was increased to 47 from the initial 36 and thereafter to 57 with a resultant increase in the areas covered from 19 to 30 counties.³

The KHRC trained field monitors on the various laws relating to the elections and the proper application of the monitoring tools. Trainings were conducted with each introduction of new monitors. The training regime included weekly feedback sessions with the electoral monitoring assistants as well as follow-up trainings that included critiques on implementation as well as instruction on the proper use of video and audio-recording equipment in the process of monitoring.

After the training, the monitors were deployed to the field with three core duties namely: a) engaging the public in a bid to access its preparedness to engage the electoral process; b) engaging with IEBC's regional field offices to access their progress toward preparing for the elections; and c) engaging with the various duty bearers on human rights and legal violations that may be noted in the process of monitoring.

2 There were, consequently, 36 monitors spread across the 19 counties as follows: Bungoma [1], ElgeyoMarakwet [1], Isiolo [4], Kajiado [1], Kisii [2], Kisumu [1], Kitui [4], Kwale [1], Machakos [2], Migori [2], Muranga [1], Nairobi [5], Nakuru [3], Narok [1], Nyamira [1], Nyeri [2], Trans Nzoia [1] TaitaTaveta [1] and UasinGishu [1]

3 The new counties included: Embu [1], Meru North [1], Garissa [1], Mombasa [2], Malindi [1], Nandi [1] Kiambu [2] Homabay [1], Kakamega [1], Kericho [1] and Kilifi

These functions sought to combine the roles of observation and advocacy as the main roles of the KHRC monitors.

To assist the contracted monitors in their functions, the EPMC, in consultation with the monitors, designed three monitoring tools, namely: elections preparedness monitoring tool; media monitoring tool and elections processes monitoring tools. The monitors were required to fill and submit the said tools to the EPMC on a weekly basis. The EPMC Centre brought together various personnel from within and outside the organization and combined their various capacities towards the elections monitoring process as shown in the appendices.⁴

1.2.1 The elections preparedness tool

This was essentially a questionnaire that the monitors were required to apply in their respective areas. The tool sought to gauge the readiness of individual respondents to make democratically-informed elective choices in the lead-up to the general elections.⁵ In the process of interviewing the various members of the respective communities, the monitors were to provide civic education to the public on completion of interviews where deficiencies in the respondent's information and understanding were identified.

4 See Annex 1: The EPMC Structure and Personnel

5 See Annex 2; the Elections Preparedness Monitoring Tool

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1.2.2 The elections processes monitoring tool

This tool was meant to assist the monitor in assessing the key activities of political parties and aspirants in the lead up the elections i.e. political party nominations, political party meetings and political campaigns.⁶ The aim of the tool was to assist the monitor capture information regarding possible criminal conduct by aspirants of the various parties as they sought to influence popular opinion and generate support from the public.

1.2.3 The Media monitoring tool

This tool was designed to assist the monitor assess the use of both print and broadcast media in the delivery of political messages and the provision of political coverage to the various aspirants in both mainstream and social media. KHRC further secured video and audio recording equipment which was used by the EPMC monitors as a further tool for data collection. The monitors were also required to submit their video and audio recordings on a weekly basis for analysis and reporting by the EMA's.

1.3 Areas for Monitoring and Advocacy

In the 2013 general election, the KHRC monitored and engaged the following key actors and issues within the electoral process before, during and after, with the intention of determining the extent

to which they either enhanced or influenced the conducting of free and fair general elections:

1.3.1 Political Parties and Aspirants

The conduct of aspirants and political parties in previous elections has been marked by a multiplicity of human rights violations and acts of gross electoral misconduct that have had an adverse effect on the outcome of those elections. Consequently, the KHRC monitored the conduct of political parties and aspirants for violations during the entire electoral process with regard to the following issues:

- a. Use of violence, threats of violence, militias and criminal gangs against all persons, whether contestants or the electorate;
- b. Gender-based violence and discrimination;
- c. Use of hate speech and unsavory language in electoral campaigns;
- d. Abuse/misuse of public resources (physical, financial and human resources) by those in power to their unfair advantage in the electoral contests. Public resources also include assets belonging to public benefit entities such as Churches, NGOs or CBOs; and,
- e. Voter buying, voter bribery, unwarranted assisted voting and voter intimidation.

1.3.2 The Media

The media plays a fundamental role in informing and alerting the public of the opportunities, dangers, threats and choices that they will face throughout the electoral process. Political coverage by media

6 See Annex 3; the Elections Processes Monitoring Tool

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houses, whether through mainstream news, documentaries, advertisements or infomercials, were therefore a key area of focus in KHRC's monitoring of the electoral process. Attention was paid to activities of both the aspirants and political parties as reported within the media on the one hand and the activities of the media itself on the other.

KHRC also employed ICTs to monitor violations in both the traditional media and the social media with a view to reducing incidences of incitement and hate speech. The public was able to use our SMS numbers 0708000555, 0734447444 to report violations which were then channeled through the USHAHIDI platform for faster response.

1.3.3. The Relevant State Institutions

The Constitution and other relevant legislation have established various bodies which play specific fundamental roles throughout the electoral process. Of particular importance are the IEBC, the Registrar of Political Parties (RPP), the National Cohesion and Integration Commission (NCIC), the Panel on Elections Dispute Resolution (PEDR), the National Police Service (NPS), the Independent Policing Oversight Authority (IPOA), the Director of Public Prosecutions (DPP), the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC), the Communications

Commission of Kenya (CCK) and the Commission for Administrative Justice (CAJ) among others.

The KHRC monitored the response of these institutions on the violations and trends against their mandate with respect to the electoral processes. Where possible, KHRC partnered with some of these institutions and supported them in making proactive responses with regard to matters raised.

1.3.4. Leadership and Integrity

The Constitution requires the enactment of legislation that will ensure the realization of the principles and standards set out in Chapter Six. However, in the absence of legislation, these principles must still be implemented in accordance with the letter and the spirit of the Constitution.

The KHRC was engaged with the design of the legislation on leadership and integrity and conducted research on the important aspects that must be captured within the draft Bill. The KHRC expected that the draft Bill would establish the proper vetting mechanisms that set the standards that were to put into effect the provisions of Article 10 on National Values and Principles and Chapter Six in so far as those offering themselves for electoral office positions are concerned.

Moreover, the Commission developed and publicized the standards and criteria for profiling, vetting, lustration and litigation on matters of leadership and integrity for elective and

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appointive positions. Based on these criteria, the KHRC compiled a profile of aspirants who have been adversely mentioned in various official and state records. Towards the elections, on February 16, the KHRC issued a statement with regard to leadership and integrity. In summary, the position was that the KHRC unequivocally stated its rejection of *“the election and appointment of any individual credibly implicated in and accused of any crimes and misconduct including crimes against humanity, economic crimes, gross human rights violations, moral turpitude or violations of any provisions of the Constitution.”*⁷ With regard to leadership and integrity, KHRC strongly disagreed with the High Court, in Petition Number 552 of 2012, on the question of the interpretation and enforcement of the leadership and integrity provisions of Chapter Six of the Constitution on whether persons who suffered serious leadership and integrity issues should be allowed to stand for elective office.

1.3.5 Policy Research, Advocacy, Litigation and Public Education

To complement the above interventions, the KHRC engaged in policy research, which shaped the development and implementation of legislation and applied public interest litigation with respect to pertinent electoral issues. KHRC was involved in different public actions and media briefings in response to emerging electoral malpractices and political developments in the country.

Finally, the Commission was involved in the assessment of the peoples' levels of awareness and preparedness on the March 2013 General Elections, in the production and dissemination of public information on elections and the training of aspirants from the marginalized communities.

1.3.6 The Polling and Post-Election processes

KHRC monitored and responded to the offences, violations and irregularities observed during the polling day, the tallying, tabulation and announcement of results and developments thereafter. It is important to note that in all these processes, the KHRC worked very closely with the key stakeholders and observer missions to advance its objectives under this programme. All these interventions were mainly informed by the KHRC's experiences in the monitoring of the previous electoral processes.

1.4 Summary of the Key Findings

1.4.1 The Politics of Ethnic Mobilization around Political Personalities

Although Kenyans gave themselves one of the most progressive constitutions in the world in August 2010, the transformative nature of this Constitution is yet to be fully realized. It was hoped that a constitution that puts in place mechanisms for power-sharing between the national and the county levels of government; calls for a better and more equitable formulae for resource-sharing;

⁷ <http://www.khrc.or.ke/media-centre/press-releases.html>, accessed May 10, 2013

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pays special attention to concerns of ethnic minorities, people with disabilities, women and the youth; would provide the best framework for moving the country forward from the dangerous trend of political organisation through ethnic mobilization, to a new brand of representative democracy politics based on policies and issues. Unfortunately, the voting trends witnessed across the country during the General Elections were an affirmation of the despotism of ethnic mobilization – opprobriously characterized as *'the tyranny of numbers'* – where tribal affiliation, wealth and personality countermanded any concerns as to party ideology and national policy. Fifty years after Kenya's independence, national politics continues to be driven by ethnic and personality considerations at the expense of the requisite leadership, integrity and competence requirements in the governance of public affairs.

1.4.2 Poor Management of the Electoral Process

Although the IEBC assured Kenyans that it would do its level best to ensure that the elections would be free, fair and credible, a number of issues emerged that called into question the levels of logistical as well as managerial preparation that had been carried out by the IEBC. Some of the logistical problems experienced by the IEBC, like the massive failure of the electronic transmission of the electoral results, had been identified during earlier phases of the electoral cycle, whose preparations ended with the voter simulation exercise. However, it appears that no remedial

measures were taken by the IEBC to ensure that the lapses identified in that exercise were corrected ahead of the general elections.

In terms of personnel management, although some of the IEBC staff were excellent in managing their electoral responsibilities – especially at the polling stations level – others displayed spectacular levels of failure either because of their poor training on how to handle the electronic voting equipment or their inability to handle the large volume of voters owing to gross under-deployment. The inability to manage the large numbers of voters resulted in long queues that frustrated many voters and prolonged the voting process in many polling stations. This in turn catalyzed into polling-staff and party agent fatigue with the consequential effect on the duration and veracity of the tallying process.

As is now familiar to many Kenyans, the massive failure of what was supposed to be the 'tamper proof mode' of carrying out the voting exercise – from voter identification to results transmission – saw IEBC revert to the much discredited method of manual voter identification and vote tallying, especially for the presidential poll. The outcome of this and other processes at the counties is the emergence of presidential, gubernatorial and parliamentary elections' disputes at the various courts, containing allegations of gross irregularities in the general administration and counting or tallying process, all seeking responses from the IEBC.

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1.4.3 Security Lapses and the Suspension of Civil Liberties during the Elections Period

Prior to the General Elections, the KHRC had indicated that effective provision of security would be crucial to ensuring that Kenyans turned out to exercise their democratic right without fear about their security and safety. Overall, the IEBC and the Kenyan security forces did a commendable job in ensuring that security was enhanced during the electioneering period. However, there were fundamental breaches of security that saw some police officers killed senselessly at the Coast in attacks allegedly linked to the Mombasa Republican Council (MRC). In separate incidences, KHRC was informed of night attacks in Mathare informal settlement in Nairobi that had been carried out by unknown people. Similarly, a few days to the elections, people were observed moving away from towns like Nairobi, Eldoret, Nakuru and Kisumu for fear that they might be attacked by members of rival communities.

However, while the issue of security was absolutely crucial to ensure that the elections were free, fair and credible, the KHRC took great exception to the verbal orders by the Inspector General of the National Police Service (NPS), who unconstitutionally and illegally violated the freedoms of association and freedom of assembly through banning peaceful rallies or demonstrations, and freedoms of movement, especially within major urban centres and cities. While the NPS would have been legitimately entitled to attend and monitor the activities of

any congregations, demonstrations or rallies, the unilateral order went contrary to explicit constitutional guarantees. Reminiscent of Kenya's troubling political history, the order illustrated a disturbing, if not worrying, willingness by the Inspector General of Police to irreverently and unlawfully disregard constitutionally guaranteed fundamental rights and freedoms in the name preserving public order and security.

1.4.4 The Media During the Elections Period

The Kenyan media has remained one of the key vanguards for democracy and human rights. However, this role has not always remained uncontested. Hence, during the 2007—2008 PEV, the Kenyan media was accused of either being partisan or fanning the fires of ethnic hatred and animosity, which were at the time sweeping across the country. We reiterate that while responsible journalism is crucial for the stability of the country in a potentially volatile situation, reporting of issues as they are, such as anomalies in the entire electoral process, is also part and parcel of responsible journalism necessary for a truly democratic, free and fair election.

Prior to the General Elections, the media offered the potential of providing an active platform to positively influence the electoral process and secure the attainment of a free, fair and credible electoral outcome. However, the mainstream media houses elected to govern their coverage around the peace message and avoided the dissemination of such information as was

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perceived would potentially stir conflict. While the mainstream media engaged in self-censorship, the alternative or social media, especially Kenyans on Twitter and Facebook, ran amok with all manner of unsubstantiated and incendiary remarks, accusations and counter-accusations, which depicted raw ethnic chauvinism and bigotry. More disconcerting was the fact that

most of the users of social media largely derive from the urban middle and upper classes of the society who, in their exchanges of views in political support or opposition of their preferred candidates, exhibited a political discourse that failed to rise above a blind and dumbfounding loyalty to political personalities and parties based largely on ethnic motivations.

Chapter Two

2.0 Universal Suffrage and Political Participation

2.1 Universal Suffrage

Universal Suffrage (also referred to as universal adult suffrage, general suffrage or common suffrage) refers to the extension of the right to vote to adult citizens as a whole. Although suffrage composes of the right to vote and the opportunities to vote, universal suffrage is associated only with the right to vote and ignores the other aspect, which is closely tied to the frequency with which an incumbent government consults with the electorate before making decisions on pertinent government affairs or seeks a fresh mandate from the electorate to govern. Where universal suffrage exists, the right to vote is not restricted by race, sex, belief, wealth, social origin or any other status.⁸

Kenya has a unique history when it comes to suffrage. The process of suffrage was first introduced in the Kenyan Protectorate in 1916 when 6,000 European men and women ‘of pure decent’ chose their first elected representatives. Indian and Arab constituencies were allowed suffrage in 1924 but representation was not extended to Africans. In 1925, recognizing the need for Africans to have some responsibility for their own affairs, the legislative arm of the colonial authority – the Legislative Council (or LegCo) – established the Local Native Councils (LNC’s) to help administer the reserves. While the LNC’s had taxation powers and could mobilize significant resources, most of the members were government appointees and the Councils were primarily discussion forums for communication of grievances to the respective District Commissioners (DCs) that chaired them.⁹

8 The concept of universal suffrage originally referred to all male citizens having the right to vote, regardless of property requirements or other measures of wealth. The first system to explicitly claim to use universal suffrage was in France, and this is generally recognized as the first national system to abolish all property requirements for voting. Republican France first instituted universal male suffrage in 1792. Wikipedia: http://en.wikipedia.org/wiki/Universal_suffrage, accessed March 2013

9 Hornsby, Kenya; A History Since Independence, (2012) p. 30

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It was only in 1954, with the introduction of a new colonial constitution, that Africans in Kenya were first permitted participation in the suffrage process. That year, Oliver Lyttleton, the then Colonial Secretary provided for the representation of all races in Kenya albeit through separate elections and with separate privileges and roles¹⁰. However, the colonial powers wished to ensure that politics functioned only at a sub-national and ethnically-focused level within the ethnically-delineated colonial boundaries, which clearly marked the dawn of ethnic mobilization as a means of political organization.

Even in extending this limited ethnically-driven suffrage, the colonial authority's overarching intention was to maintain colonial rule. Consequently, it designed laws that ensured it controlled the operations of political parties. Through the Public Order Ordinance (1950) and the Societies Ordinance (1952), it could strictly control the freedom of association, assembly and speech of the African population.

However, later in 1957, the Lennox Boyd Constitution expanded the number of elective seats for Africans from 8 to 14, giving Africans numerical equality with the elected European members.¹¹ However, elections were still separated as Britain and the white settlers rejected a

common electoral roll preferring separate rolls for Africans and Europeans.¹²

Later in February 1961, Kenya held its first true national elections as the British conceded to international demands for the liberation of colonial states. The polls were the first to be fought on a common voters roll and using secret ballot. As no proper census of Africans had been done at this point, it was difficult to ascertain the proportion of adults that had actually voted. Most of the voting African public was illiterate and had a limited understanding, if any, of the political impact of their electoral decision beyond the desire for emancipation from colonial rule. Due to mass voter illiteracy, presiding officers ended up marking the ballots for most voters.¹³

Nonetheless, these elections were competitive, and at least included Africans in their own right. Indeed, the competition emerged from two clear ideological paths taken by the two main political parties: positions which emerged from the 1962 London Constitutional Conference (LCC) that brought the disagreement between the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU), concerning the governance structure of the independent State.

On the one hand, KADU, which was made up of representatives of the so-called minority groups

¹⁰ Ibid, p. 53

¹¹ Ogot, Bethwell and Ochieng, William, *Decolonization and Independence in Kenya: 1940-93*, East African Publishers (1995) pp. 59 - 60

¹² Hornsby, Kenya; *A History Since Independence*, (2012) pp. 54 - 55

¹³ Hornsby, Kenya; *A History Since Independence*, (2012) pp. 64—66

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– consisting of the then ‘White Settlers’ and the Kalenjin, Maasai, Turkana and Samburu of the Rift Valley, the Luhya of Western, the Mijikenda of the Coast and the Somali of North-Eastern – preferred a devolved quasi-federal system of government (which came to be referred to as *Majimbo*) in which the regional units would equitably share power¹⁴ and thereby manage the utilization of their respective resources.

The British government in London favoured KADU's views mostly because of concerns about the future of the ‘White Settlers’ and the economy under KANU, but also because KADU represented the ethnic groups that had remained loyal during the emergency.¹⁵ Indeed, the driving force of KADU's argument above was its fear of being dominated by the so-called bigger Kikuyu, Embu, Meru and Luo communities who were KANU's bedrock of support. From this perspective, KANU's ideological lining was clearly a unitary State, with a parliamentary form of governance. KANU discredited the *Majimbo* system seeing it as inappropriate for the political culture of Kenya but accepted it nonetheless, realizing the political necessity of working within the prescribed system in order to facilitate independence.¹⁶

2.2 Political Participation

Prior to advent of colonial rule in Kenya, the African societies that made up the landscape governed themselves within their respective economic and socio-political governance structures. Broadly speaking, authority within these societies was largely personal and local – a function of age, lineage, super-natural abilities, wealth and leadership skills – supported by the communal wisdom of elders and the physical power of young men.¹⁷

Most of these societies were unfamiliar with the individualized electoral governance processes and systems and had a social fabric that, though tiered into culturally prescribed age-sets, considered all people within the society as equal vis-à-vis the social economic and political opportunities available. This all changed upon entry of the Europeans in late 1800's. The Europeans carried the narcissistic belief that Africans were primitive economically, socially and politically and were therefore in dire need of the civilizing influence of the foreigners.

Without effective participation and representation, Africans viewed the colonial State as a foreign entity that lacked legitimacy as it created policies and enacted laws without their consultation or consent and often to their disadvantage. The Europeans approached Africans with a

14 Ahluwalia, D. Pal, *Post Colonialism and the Politics of Kenya*, Nova Science Printers (1996) pp 33 - 34

15 Hornsby, Kenya; *A History Since independence*, (2012) p 70

16 Ahluwalia, *Post Colonialism and the Politics of Kenya*, (1996) p 34

17 Hornsby, Charles. 2010. *Kenya: A History Since Independence*, I.B. Tauris and Co p.27

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paternalistic and racially superior view believing that their impositions were necessary for the civilization and economic advancement of the colony and, by extension, the native African.¹⁸ With avenues for legitimate protest and representation severely restricted, the resultant revolt by some of the indigenous African communities in the 19th Century (especially by the Nandi and the Giriama) was unavoidably violent and destructive as Africans sought to assert their right to self-determination in dethroning the colonial establishment.

However, even after achieving self-governance and later independence, participation of the public in governance was still low, especially for the women and the marginalized groups of former Northern-Frontier Districts (NFD). For example, development of this region during the colonial government had been non-existent as the area had been deemed unproductive for purposes of settler agriculture due to its irregular rainfall patterns. The independence government largely sought to maintain the agricultural economic and land use policies that the Europeans had instituted and would have secured further economic marginalization for the area.

Low participation in governance has also been attributed to the absence of strong political party ideology, and the focus on ethnicity as a main driver of political presentation. Over the years, factors such as personality, populism and

corruption have gained in influence over socio-economic policies – something that has come to shape the current political environment in Kenya today. Extreme political ignorance has also largely contributed to the low level participation by the electorate. The swift transition from the colonial government to a democratic government did not leave room for the public to understand the different roles of the government and its institutions. Even with multiparty politics, the public's awareness and understanding had not improved, and the same was the case with the rise of coalition government as seen in 2002.

Political participation during the Kenyatta and Moi regimes, both under KANU political stranglehold, reduced the democratic space substantially. These reductions were mostly through frivolous constitutional amendments, from the 1st amendment in 1964 to the 27th amendment in 1991, the latter opening the space again through the resumption of multi-party politics. In between those amendments, political parties and political organisation were circumscribed; fundamental freedoms of association, assembly, movement and many others civil and political rights were flagrantly violated, including the right to a fair trial, which led to many illegal detentions and crackdown on any perceived or real enemies of either the president or the KANU government. For example, all 'elections' held, especially the notorious 1988 queue system (*Mlolongo*), were merely to rubber-stamp the president who stood unopposed, or to endorse their preferred

¹⁸ Diley, Ruth Marjorie, *British Policy in Kenya Colony*, Frank Cass and Co (1965) pp 3 - 5, 179—186

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candidates, as it happened in the 'Little General Elections' of 1966.



Members of the public queue to vote during the 1988 “mlolongo” voting system (Images courtesy of the online *East African Standard* newspaper)

Under the immediate former president, Mwai Kibaki, Kenyans began to engage in a more open democratic space. There were many avenues for public participation either directly or indirectly. Indirectly, they did so through many efforts by civil society in general to influence public policy and legislation. Indeed, through the sector-wide approach to reform programme (the Governance,

Justice, Law and Order Sector – GJLOS) such efforts were recognized. Directly, Kenyans participated at local level meetings such as the public forums to formulate the National Policy on Human Rights, the National Land Policy, or the many commissions of inquiry that were mooted to solve long-term governance problems such as economic scandals or other injustices perpetrated under the KANU regime. However, the 2007 elections remains a fly in the ointment for the Kibaki regime as far as the conduct of a free and fair polling process is concerned.

With regard to women over the years, their participation in the process of governance and representation in the legislative arm has always remained low, and it can be gleaned from women's participation in active politics and in the registration process. In 1961, Priscilla Abwao became the first Kenyan woman to be nominated by the colonial governor into the all-male dominated Legislative Council (LEGCO)¹⁹. It was not until the general election of 1969 that Kenya got her first elected woman parliamentarian, Grace Onyango, the former mayor of Kisumu. Three more women were elected in the 1974 elections and the numbers have increased minimally over the years until the 2013 elections, in which women have been elected primarily through the special seats constitutionally reserved for women in Parliament.

¹⁹ For more details, please visit <http://allafrica.com/stories/200911180969.html>

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In summary, since independence, Kenyans' participation in electoral processes has been characterized by electoral malpractices perpetuated by powerful incumbent governments that presided over partisan electoral management institutions. What is more, personality and ethnicity as opposed to political party ideology and policy had come to form the morbid backbone of Kenyan politics. Historically speaking, people from the minority communities as well as women candidates have not been given room to effectively participate in the country's electoral processes. In spite of the foregoing challenges, Kenyans have always worked towards the establishment of an electoral process that will guarantee them good governance through a more democratic process.

2.3 A Unique General Election: Were We Prepared?

2.3.1 The Uniqueness of the March 2013 General Elections

Having promulgated a progressive new Constitution in 2010, the 2013 general elections had the potential to be positively transformative of the country's electoral systems and processes. There were five key reasons why the 2013 general elections were unique in many ways.

To begin with, they were the first general elections to be held under a new constitutional dispensation (the COK 2010). The Constitution provides for a reformed electoral legal framework

derived from an intensely consultative process and establishes new electoral institutions that are largely independent and appositely empowered.

Second, the elections had an unprecedented number of elective positions, six in total, these being the President/Deputy President; the Governor/Deputy Governor of the County; the Senator; the Member of the National Assembly; the Member of the County Assembly; and finally, the Woman Representative directly elected from the county to be a Member of the National Assembly. The added number of elective positions was aimed at flattening the pyramid of power to ensure that the most coveted seat – the presidency – retained some residual powers, with most other powers devolved to the governors and senators.

Third, the elections for the various elective seats were held on the same day – a situation that is dissimilar to most other jurisdictions that contain devolved governance structures such as in Uganda and Nigeria whose national and local level elections are held on different days. Given the low levels of civic and voter education conducted by the IEBC and other stakeholders, the voting process was bound to meet some level of negligence and confusion amongst the electorate and poll administrators, who had customarily had to contend with the election of candidates for three elective positions since the 1992 general elections. Additionally, any attempts at voter/civic education had targeted subjects

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such as leadership, democracy, the importance of the vote, and so on, but had hardly interrogated the entrenched voter mentality in Kenya. That is why voters, despite all past civic/voter education, still went ahead to cast their ballot based on factors such as ethnicity, clanism, bribes solicited, and such kind of factors.²⁰

Fourth, the cost of the just concluded 2013 elections was astronomical by any measure for both political aspirants as well as the elections management body; whether it was the publicity paraphernalia and events, advertising through billboards and media houses, or purchase and preparation of election related material, the resources used far exceeded those expended in previous elections. For political aspirants this included the application of personal wealth as well as financial contributions from 'political friends and business allies'. These costs, assessed in the context of a fragile economy that is yet to recover fully from the effects of post-election violence, would mark a significant misadventure in the event of impropriety in the management of the 2013 elections. Whereas the government 2011 *Economic Survey* pointed towards an increased growth, sceptics pointed to the net effects of the 2007—2008 post-election violence that included: general socio-economic collapse; economic divestment; business and capital flight; decreased

agricultural production; and deterioration of social capital among other factors.²¹

Fifth, the elections were held against a backdrop of the disputed presidential elections of 2007, and hence it was imperative that IEBC conduct the 2013 general election in a manner that was beyond reproach to avoid a repeat of the 2007—2008 debacle. Unfortunately, as is shown elsewhere in this report, the IEBC did not conduct the 2013 general election, especially the presidential poll, in a manner that entirely passed muster.

2.4 KHRC's Verdict before the March 2013 General Election

Prior to the 2013 General Election, the KHRC made some key observations focusing on a broad array of issues that were central in contributing to a free, fair and credible electoral outcome. The issues captured by the KHRC were brought to our attention by a team of elections monitors who had monitored various aspects of the electoral process over a seven-month period.²² Specifically, KHRC took note of the following initiatives:

20 See Kenya Domestic Observation Programme (K-DOP), *When Kenyans Spoke: A Report of the 2002 General Elections*, Nairobi: K-DOP: edited by Tom Kagwe and Sarah Muhoya

21 While government's *Economic Survey* of May 2011 indicated that there was about 5.6 percent economic growth and there had been marked improvement of the economy, Kenyans for Peace Truth and Justice (KPTJ) and African Centre for Open Governance (Afri-COG) launched a report, *Reaping the Whirlwind: The Socio-economic Implications of the 2008 Post-election Violence*, (Issue 01/10, September 2010), which indicates these net effects especially in Rift Valley Province.

22 KHRC monitors were hired in July 2012 and two interim reports on their findings were released by the KHRC and shared with the media in February 2013.

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- i. First, that although civic education had been sorely missing, the IEBC had, albeit late, actively taken up the task of voter education through various public forums as well as through media platforms, mainly through TV and radio infomercials. The IEBC had also concluded the mock-voting exercise, which was to give the IEBC a good opportunity to test the voting system and take remedial measures ahead of the General Elections where gaps were identified.
- ii. One of the biggest challenges facing the then key political protagonists (ODM and PNU) in the lead-up to the 2007 General Elections was the insistence by ODM that the judicial system was partial and therefore incapable of handling an electoral dispute. At the time of holding the 2013 general election, Kenya's Judiciary had undergone (and was still undergoing) radical transformation and there was increasing confidence among the Kenyan public that courts could be trusted to be impartial arbiters of electoral disputes. This boded well for the country as it went to the 2013 polls. Politicians had publicly stated that they will handle any elections dispute(s) through the courts. The Chief Justice and the Judiciary had established electoral courts and regulations that were expected to oversee the judicious determination of electoral disputes and the swearing-in of new leaders at both national and county levels of government.
- iii. Presidential candidates had made joint calls to their supporters for the peaceful conduct of campaigns and elections through infomercials, campaign events and a national day of prayer and a peace concert that brought together all the presidential aspirants at Uhuru Park. All these efforts were laudable in setting up an environment where Kenyans could exercise their right to elect their leaders without fear of violence or intimidation.
- iv. The undertaking of the Inspector General of Police to guarantee security and order throughout the electoral process was commendable. The country had witnessed serious incidents of insecurity in the run-up to the general elections and measures had been put in place to ensure that Kenyans were safe especially during the time of high-stakes elections.
- v. The gazettelement of the appointed Commissioners to the National Land Commission²³ by the President in light of then on-going heated debates on the politics of land-ownership and governance in Kenya was a welcome mitigating measure against the rising political temperatures around issues touching on perceived land injustices.
- vi. Various initiatives by the civil society, the private sector, the religious and development organizations and other non-state actors, including ELOG's innovative approach of establishing a parallel vote tabulation centre and the UN Women's launch of a situation room to observe and intervene on matters affecting women during the elections were all

23 The National Land Commission is constitutionally mandated to address the issue of land reforms.

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welcome measures to ensure that the integrity and outcome of the General Elections was not compromised.

vii. The two presidential debates held in February 2013 were a novel initiative, which offered Kenyans an opportunity to gauge the candidates on the basis of their positions on key policy socio-economic and political issues as opposed to their ability to mobilize their ethnic strongholds.

viii. The 17 constitutional commissions and independent offices with the mandate to deal with different components of electoral governance came together to appraise Kenyans of their preparedness – both at individual and collective levels towards elections. This was meant to minimize political uncertainty and increase public confidence towards the electoral process and outcome.

ix. Finally, the presence of the Inter-governmental observer groups from the African Union, the East African Community, COMESA, IGAD, the Common Wealth, the United Nations and the European Union as well as a host of individual countries and other international elections observation groups provided an environment of 'collective-watching', which was meant to diminish both the room and the opportunity for those out to commit electoral malpractices.

All the foregoing measures were pivotal to promoting a favourable environment for the impending elections, and availed to the nation the possibility of securing an open, peaceful and

informed electoral process and a credible outcome of the 2013 general election.

However, despite the positive outlook above, a number of concerns still remained. In monitoring the campaign process, the KHRC found out incidents clearly showing the continued flouting of electoral laws in relation to the political campaigns. Three days before the 2013 General Election, KHRC noted the following:

a. *Voter bribery*: In blatant violation of the provisions of Section 64 of the Elections Act, several aspirants engaged in attempts to induce support from voters through direct or indirect disbursement of monies to public assembly participants that they were addressing. Bribery was often indirect, with payments done on behalf of an aspirant through other parties. Payments usually were in cash but some opted to use mobile phone money transfer services to disburse money to voters. This also took the form of buying identity cards with a view to disenfranchise voters based in areas perceived to be opponents' strongholds.

b. *Violence, intolerance and intimidation*: Contrary to the guaranteed constitutional freedoms of assembly under Article 36 as well as the restrictions of the Elections Act in Section 67 (1), the use of violence and intimidation by some of the supporters of rival political parties undermined political campaign activities in some areas. There were near violent disruptions of campaign events

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in Embu, Kiambu and Thika which would have degenerated were it not for the speedy intervention of the NPS operating in those areas at the time. In some places, candidates were either booed at or had their speeches disrupted, particularly in Nairobi, Kisumu and Baringo.

- c. *Violations targeted at women and others:* Women candidates continued to experience intimidation from powerful offices. Further, they faced both discrimination and lack of support within their parties, where they were considered weaker candidates. This was most notable where female aspirants contended for senatorial or gubernatorial positions.
- d. *Incitement and use of unsavoury language:* In 2007, the overt use of hate speech and insults against political competitors contributed significantly to the violence that was experienced in the aftermath of the elections. The use of hate speech is no longer overt but rather took the form of subtle incitement, outright threats through the distribution of leaflets in some areas and application of unsavoury language with aim to create an atmosphere of irrational suspicion of competing candidates and supporters. While raising factual matters about an opponent's policies and competencies is crucial to democratic debate, there were instances where what occurred was actually vilification of political rivals. Section 67 (1) (m) of the Elections Act criminalizes the dissemination of information with the intention of, amongst

other things, creating hostility or fear in order to influence the process and outcome of the elections. While outright name-calling was not necessarily observed, there were numerous occasions where competing candidates used phrases or imagery that portrayed their opponents in squalid light or demeaned them.

- e. *Misuse of State resources and offices:* The use of state resources continued in campaigns regardless of IEBC warnings to the contrary. Government vehicles were used in political campaign activities contrary to Section 68 (1) of the Elections Act. Often, these government vehicles were disguised with private number plates to avoid detection. Moreover, there were allegations that some State officers were getting involved in politics and partisan electoral process contrary to the existing laws and policies.
- f. *Destruction of campaign materials:* The destruction of political party campaign material was unabated despite the express reprimands against the same by the IEBC and the provisions of the Elections Act in Article 67 (1) (n). It seems that aspirants and their adherents were unwilling to contest fairly, respect the political space of others and abide by the explicit directives of the IEBC, Kenya's electoral management body.

Finally, the KHRC commended the various state agencies including the IEBC, National Police Service and Judiciary, for the seemingly well-coordinated measures taken ahead of the general election, which measures it was hoped, would

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contribute towards ensuring the delivery of a peaceful and credible election. The KHRC also noted and commended the presence of national, regional and international electoral observation groups ahead of the elections. However, the KHRC was concerned that the above-mentioned violations continued to take place in the run-up to the March 2013 general elections. KHRC remained steadfast in calling for the relevant authorities

and political players to ensure that the law was respected and enforced. Indeed, the KHRC stated categorically that the delivery of a peaceful and credible election would only be achieved if citizens contributed by being vigilant and urged Kenyans to take up their civic duty seriously by turning up in large numbers to vote both peacefully and conscientiously during the March 2013 General Election.

Chapter Three

3.0 Legal, Policy and Institutional Framework for 2013 General Election

3.1 Constitutional Thresholds

3.1.1 Provisions of the Constitution

The Constitution of Kenya 2010 was ratified through a national referendum in August 2010 and thereafter promulgated on 27th of the same month and year. This Constitution is radically different from the former Constitution insofar as the electoral process is concerned. Unlike the former, it provides the right to participate or compete in politics, which is a new provision in the Bill of Rights. Article 38 reads: *“every citizen is free to make political choices, which includes the right...to form, or participate in forming, a political party; to participate in the activities of, or recruit members for, a political party; or to campaign for a political party or cause.”*²⁴

Further, the CoK 2010 equally provides for the right of any Kenyan, without unnecessary restrictions, to vie for office, to register and vote in elections. Indeed, all the civil and political rights that pertain to individual rights and democratic freedoms are all provided for without claw-backs unlike the former Constitution. There are some limitations to those rights and freedoms which are meant to protect against their misapplication in a democratic society. For instance, the freedom of expression does not extend to protecting the propagation of hate speech or incitement to violence.²⁵

With regard to elections per se, the Constitution provides for the Chapter on Representation of the People, whose content is more radical than the provisions of the former Constitution. In Article 81, the Constitution provides that: *“the electoral system shall comply with the following principles... freedom*

²⁴ Article 38(1)

²⁵ Article 33

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of citizens to exercise their political rights under Article 38; not more than two-thirds of the members of elective public bodies shall be of the same gender; fair representation of persons with disabilities; universal suffrage based on the aspiration for fair representation and equality of vote; and free and fair elections”. This provides the IEBC, political parties, candidates and other actors in the electoral process with clear constitutional thresholds, which are to be relied upon for elections to be deemed as credible. To this end, the IEBC relies upon the Elections Act and Subsidiary Regulations to ensure parties and candidates abide by set rules which are documented in the Electoral Code of Conduct.

The IEBC is itself established by the Constitution and given significant authority and independence in the conduct of elections and the drawing of electoral boundaries.²⁶ The Independent Electoral and Boundaries Commission Act and, to a larger extent, the Elections Act were enacted in line with the Fifth Schedule of the Constitution to prescribe the various legal powers and responsibilities of the IEBC.

Besides the express provisions in the Chapter on Representation of the People, there are other Chapters on which elections hinge. These include: Leadership and Integrity, which states what types of qualities and values elected and appointed leaders should have; sovereignty of the People, which places power on the people and their

rights to freely participate in governance directly or through their representatives; Legislature and Executive which provide for qualifications and otherwise of any person seeking to work in either of the two-chambers of the House or the executive arm of government; and the Chapter on Devolution, which sets out principles of ensuring devolution of power works for the people especially through creation of county governments among others.

3.2 Laws on Elections

3.2.1 The Independent Electoral and Boundaries Commission

The IEBC Act (No. 9 of 2011) is the first law that guided the 2013 general election. Broadly, this legislation provides, in a little more detail, the institutional framework as well as the broad powers and functions of the IEBC as set out in Articles 88, 249 and 252 of the Constitution. The act also delimits the composition of the Commission, establishing within the Commission, the Secretariat and making provision for such other units as the Commission may deem necessary.²⁷ The Act also provides for the finances of the Commission requiring that expenses of the Commission be a charge on the Consolidated Fund, and setting up an IEBC Fund to which the remuneration, allowances and expenses of the Commission are to be charged.²⁸ These provisions

26 Article 89 of the Constitution

27 Section 10 – 12 of the Independent Electoral and Boundaries Commission Act

28 Section 18 – 20 of the independent Electoral and Boundaries

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conform to the recommendations of the IREC concerning the funding modalities of the elections management body.²⁹

As the IEBC was to take over the functions of the Interim Independent Boundaries Review Commission (IIBRC) and the Interim Independent Electoral Commission (IIEC) that were still exercising legal functions under the old and new constitutions, the IEBC Act needed to incorporate transitional provisions to secure the assets as well as the resources of the former commissions for the smooth transfer of functions.³⁰

3.2.2 The Elections Act

This Act (No 24. of 2011) is the 'mother of all electoral laws' and is a compendium of previous laws. Prior to the enactment of this legislation, the electoral laws regarding elections of the President and the members of the National Assembly were set out within the National Assembly and Presidential Elections Act (Cap 7) which delimited the procedures to be applied by the then elections management body, the Electoral Commission of Kenya (ECK). By a separate legislation, the Election Offences Act (Cap 66), corrupt and criminal conduct that was considered to impinge upon the fairness of the electoral process was codified and sanctions articulated.

Through the constitution implementation process, these laws were merged into a single statute, the Elections Act, which sets the procedures, standards and offences that attend to all electoral processes including the conduct of referenda. The Elections Act provides the IEBC with significant operational autonomy with regards to the regulation of political activity before, during and after the elections including the conduct of political campaigns. The law provides the IEBC, through the exercise of the power to make regulations under Section 109, with oversight authority over all elections-related processes from the compilation and maintenance of the register of voters, to political party nominations, to elections, to presidential run-offs, by elections and to exercise the right to recall as set out under Article 104 of the Constitution.

The Act also spells out a more inclusive set of electoral offences to reflect the electoral malpractices that have historically marked political activity in Kenya around electoral periods. These include the offences of treating, undue influence, bribery³¹ and the use of public resources typically conducted by the political aspirants to improperly influence the elective choice of voters. The Act also criminalized the acquiescence of members of the IEBC in the corrupt and unlawful application of their mandate, especially where such activity would result in the fundamental distortion of electoral processes.³²

Commission Act

29 Report of the Independent Review Commission, p 151 <http://aceproject.org/ero-en/regions/africa/KE/kenya-independent-review-commission-on-the-general> (sourced 13th March 2013)

30 Id, Part V of the Independent Electoral and Boundaries Commission Act

31 See sections 62 – 64 of the Elections Act

32 See Sections 69 – 73 of the Elections Act

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3.2.3 The Political Parties Act No 11 of 2011

The regulation of political parties prior to the enactment of the new constitution was primarily through the Registrar of Societies under the office of the Attorney General. However, under the old constitutional order, the Registrar of Societies would serve to frustrate the formation of political parties during most of the post-independence era until the repeal of Section 2A of the Constitution. While the political space opened up slightly from 1992, the mandate of registering political parties remained within the office of the Registrar of Societies until 2008 with the commencement of the Political Parties Act (Cap 7 A). The law, though having been assented to in October of 2007, would however not influence the 2007 elections as commencement of the same was deferred to July 1, 2008.

Under the Political Parties Act, as it then was, the office of the Registrar of Political Parties was to fall within the Electoral Commission of Kenya and headed by an officer designated by the ECK.³³ The Act provided for the qualifications and processes for the registration of political parties and set in place dispute resolution mechanisms for members within the same political party as well as for partners in a coalition. The act also established the Political Parties Fund and the scheme for the distribution of the same among political parties.

The Political Parties Act (No. 11 of 2011) that repealed the aforementioned statute mirrors the latter in many ways. Provisions regarding registration of political parties, the party dispute resolution mechanism, and the funding of political parties are to a significant degree quite similar. The most important innovation of the new law is the independence given to the Registrar of Political Parties (RPP) under Section 33 (5) of the Act, thereby separating it from the elections management body.

Prior to an amendment to Political Parties Act, the selection of the RPP was to be conducted by the Public Service Commission (PSC), who would forward the names of nominees to the president for approval. However in June 2012, Members of Parliament, concerned that the selection process excluded the political parties, passed a motion to amend the provisions of the Act that gave the mandate for selection to the PSC and transferred the same to a Selection Committee.

The amendment to the Political Parties Act passed in January 2013, provided for the appointment of the RPP through a Selection Committee composed of persons selected from various professional bodies including the Laws Society of Kenya (LSK), the Institute of Certified Public Accountants of Kenya (ICPAK), the Association of Professional Societies in East Africa (APSEA) and a chairperson to be nominated by the President.³⁴

33 See Section 3 of the Political Parties Act (Repealed)

34 Section 34 A of the Political Parties Act

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The Political Parties Act of 2011 had provided, in Section 51(1) (d), for the continued holding of office by the RPP appointed under the 2007 Act until the selection of the new office holder under the new Act. However, due to the contentions raised by the Members of Parliament over the initially conceived appointment process and the fact that the amendment to the Act providing for appointment of the RPP by a Selection Committee was defeated in effect by time,³⁵ no new RPP was appointed and instead the RPP appointed under the repealed act continues to discharge the mandate of this important office.

3.2.4 Other National Laws and Institutions

As alluded to above, national legislation also creates other bodies with some mandate to assist the electoral process to be free, fair and credible. These include the Registrar of Political Parties (RPP), whose mandate to ensure political parties adhere to the Political Parties Act; the National Cohesion and Integration Commission (NCIC), which was established by the NCIC Act, to stem hate speech based on ethnic or racial or religious persuasion, and arraign persons suspected of propagating hate speech in courts of law to face justice; the Director of Public Prosecutions (DPP), created by the Constitution and whose main role is to prosecute all those

who violate all national laws, and in this matter of elections, the offences listed in the Elections Act and the Penal Code.

Other bodies include the Ethics and Anti-Corruption Commission (EACC), which is empowered by the EACC Act to deal with bribery and corruption, and in this regard to elections; more importantly, it was mandated to vet all aspiring candidates in the 2013 elections. The National Police Service, as established by the NPS Act, has the sole mandate of ensuring elections are peaceful and all security breaches are dealt with in accordance with the Constitution and other written law. To ensure that there is civilian oversight of the same, and especially to ensure rogue police officers are held accountable, the Independent Policing Oversight Authority (IPOA), is created by the IPOA Act, to not only to oversee police operations, especially in elections, but to also receive complaints from members of the public and NPS, regarding any violations of their rights. With regard to recruitment and welfare of police, the National Police Service Commission (NPSC), was constituted by the NPSC Act.

Finally, to ensure all actors in the electoral processes comply with human rights standards, the Kenya National Commission on Human Rights (KNCHR), was created by the KNCHR Act. Closer to this body is the National Gender and Equality Commission (NGEC), whose sole mandate is to ensure that issues surrounding discrimination on any of the protected grounds in the Constitution

³⁵ Section 34 A, introduced into the Political Parties Act through the Political Parties (Amendment) Act of 2012, required that the Selection Panel be appointed no later than 110 days before the election date. The amendment was however, assented on 31 December 2012 and commenced on 4th January 2013 - less than 60 days before the first election - rendering its implementation vis-à-vis the appointment of a new RPP prior to the elections impossible.

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such as race, disability, ethnic origin, and such others, are dealt with, especially when political parties fail to nominate special interest groups as defined in the Constitution. Finally, the Commission for Administrative Justice(CAJ) was established by the CAJ Act to properly deal with any maladministration of justice, and in this context, whether any public officer such as IEBC officials, RPP, police officer (not exclusively as IPOA exists), among other officials.

3.2.5 Ratified International Legal Instruments

Through Article 2 (6) of the Constitution, treaties and conventions ratified by Kenya form part of Kenyan laws, under the Constitution. Consequently, the analysis of Kenyan laws regarding the conduct of elections must, out of necessity, factor in the various international legal instruments as they relate to elections. Those ratified by Kenya include:

- a. *The Universal Declaration of Human Rights (UDHR)*: all member states of the UN subscribe to the UDHR Article 21 of which provides for the right to participation in government, the right to equal access to the public service and the right to periodic and genuine elections through universal and equal suffrage
- b. *The International Covenant on Civil and Political Rights (ICCPR)*: Acceded to on May 1, 1972. In terms similar to the UDHR, the ICCPR in Article 25 provides for the political rights of all persons.
- c. *The Convention on the Rights of Persons with Disabilities (CRPD)*: Acceded to on May 19th, 2008, ³⁶: the Convention in Article 29 obliges States to guarantee to persons with disability political rights and opportunity to enjoy those rights on an equal basis with others.
- d. *The International Convention on the Elimination of all forms of Racial Discrimination (ICERD)*: Acceded to on September 13, 2001. By Article 5 (c) of the Convention, State Parties are obliged to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level
- e. *The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*: Acceded to on March 9, 1984.³⁷ The convention in Article 7 obliges State parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies

36 See, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en, accessed on 23rd February, 2014

37 University of Minnesota, Human Rights Library, Ratification of Human Rights Treaties, Kenya, <http://www1.umn.edu/humanrts/research/ratification-kenya.html> accessed on 23rd February, 2014

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3.2.6 Regional Human Rights Instruments

Alongside the international agreements, a number of regional agreements have been ratified by the Kenyan government which provide for political rights in the country. These include:

- a. *The African Charter on Human and Peoples Rights (ACHPR)*: Ratified in January 3, 1982. By Article 13 of the charter, every citizen is availed the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- b. *The International Conference on the Great Lakes Region (ICGLR)*: Ratified June 12, 2008. *The Protocol on Democracy and Good Governance* that forms part of the Pact on Peace Stability and Development in the Great Lake Region (the Pact), makes various provisions regarding best practices in the conduct of elections and State parties to the Pact are obliged to apply the said best practices with regard to the right to vote, amendment of electoral laws, voter registration and election dispute resolution among other provisions.³⁸

3.3 From the ECK to the IEBC: What Lessons for Electoral Reforms?

The Electoral Commission of Kenya (ECK) was chaired by Zacchaeus Chesoni between September 1991 and December 1997, when he was appointed Chief Justice. In December 1997,

Samuel Kivuitu was appointed chairperson.³⁹ After the Inter Parliamentary Parties' Group (IPPG) agreement of 1997, members of opposition political parties were allowed to nominate representatives onto the ECK.⁴⁰ By December 2002, when the Commissioner's tenure was ending, Moi made seven new appointments and renewed the terms of the rest of the commissioners.⁴¹ The ECK had managed the 2002 elections comparatively well. However, a number of election petitions followed the announcement of the election results, with some raising allegations of irregularities including the bribery of returning officers.⁴² Nonetheless, the general consensus at the time was that Kenya's systems of suffrage were beginning to mature and that the country had turned the corner on electoral democracy.⁴³

In 2007 however, the ECK bungled the election in what would prove to be the most poorly managed elections in Kenya's history. The General Elections in 2007 were conducted by 22 commissioners most of whom had never overseen elections before – of the 22 commissioners only one had been present during the 2005 referendum on the then proposed constitution and only five (including the chairman) had practical experience

39 Ibid, Hornsby, p. 605

40 See Shumbana Karume, Kenya: Compromised Independence of the EMB, International Institute for Democracy and Electoral Assistance (IDEA) http://www.idea.int/publications/emd/upload/EMD_CS_Kenya.pdf, accessed on 23rd February, 2014.

41 Ibid, Lafargue, Jerome, *The General Elections in Kenya 2007* p. 254

42 Ibid, Hornsby, p. 695

43 The Carter Centre, *Observing the 2002 Kenya Elections*, (2003) p. 30, <http://www.cartercenter.org/documents/1355.pdf> (sourced 3 January 2013)

38 See various Articles

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in elections management. It also emerged that the new Returning Officers (ROs) were without experience in the elections and some would later confess that they had mixed up results as they were allocating them and announced losers as winners.⁴⁴ The net result was the post-election violence and numerous law suits and petitions by the losers some of whom were vindicated by the courts over their claims that the elections for their particular constituencies had been rigged.

Following the 2007—2008 post-election skirmishes, the Kenya National Dialogue and Reconciliation (KNDR) process, facilitated by the Panel of Eminent African Personalities, began with the accord between the two main political parties – the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) – to implement four key agenda items. These items include reforms on land laws, police, the civil service, the judiciary; overhaul of the former Constitution; addressing youth and unemployment; and addressing poverty and regional imbalances, among others. The discussions under each of the four agenda items were undergirded by mutually formed commitments that sought to bring a cessation to the hostilities, address the causes and impacts of the violence, set a power sharing arrangement and initiate reforms measures that would tackle the underlying origins of the cycles of elections-related violence that had been experienced in the country since the re-introduction of multi-party democracy in 1992.



A group of youths chanting while armed with crude weapons during the 2007 – 08 post-election violence (courtesy of The Walrus Source: <http://walrusmagazine.com/blogs/tag/kenya/>)

⁴⁴ Ibid, Njogu, p. 23. See also the Independent Review Commission Report (IREC) pp. 70 - 86

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Security forces putting off fire during the 2007 post-election violence (Image courtesy of Getty images Source: <http://www.aljazeera.com/indepth/features/2013/03/201333123153703492.html>)

On February 4, 2008, the KNDR Committee, in a set of agreements that were aimed at resolving the political crisis that stemmed from the disputed electoral results, settled on the establishment of an Independent Review Commission (IREC) that would be mandated to investigate all aspects of the 2007 Presidential Election and to make findings and recommendations to improve the electoral process.

Under the chairmanship of retired South African Judge, Johann Kreigler, the IREC investigated the constitutional, statutory and institutional inefficiencies and deficiencies that had facilitated the mismanagement of the electoral process in 2007 by the then ECK. The findings and recommendations of the commission would be, to a significant degree, incorporated in the main electoral laws that were to emerge out of the constitutional, legal and institutional reform processes, a subject discussed extensively above.

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Their recommendation was for the disbandment of the electoral management body, which was replaced by two institutions in the interim – the IIEC and the IIBRC. Later, in November 2011, the IEBC was established with new commissioners, two of whom came from the defunct IIBRC and the IIEC respectively, as the Constitution had provided for purposes of institutional memory.⁴⁵

Part of the electoral debates after the IREC report, and eventual constitutional architecture resulting from the same, was how to deal with individuals bearing tags that they were responsible for the post-election violence. To deal with the gross human rights violations, which also constituted crimes against humanity under the Rome Statute of the International Criminal Court (ICC), the KNDR processes established the Commission of Inquiry into Post-Election Violence (CIPEV) to investigate and document its findings on who is most culpable. The CIPEV report was made public in August 2008, revealing those who should be held accountable, at least those with the highest responsibility, and the names handed over in a sealed envelope to Kofi Annan, who later handed the same 'envelope' to the former Chief Prosecutor of the ICC, Louis Moreno Ocampo. The Chief Prosecutor opened an investigation into Kenya after Parliament and the Cabinet had failed to establish a national judicial mechanism – then termed as a Special Tribunal – and later, failed to agree to have the matters referred to the ICC. The cases are on-going with the accused persons

being the current Kenyan President (Uhuru Kenyatta), Deputy President (William Ruto) and Joshua Sang a journalist.

45 Constitution of Kenya, Sixth Schedule, Section 28

Chapter Four

4.0 Monitoring the State of Electoral Preparedness: Some Key Findings

4.1 The Delimitation of Boundaries

The current legal framework on delimitation of electoral boundaries was largely informed by recommendations made in the final report of IREC (commonly referred to as the Kriegler Commission). IREC was mandated to examine the 2007 elections and identify the shortcomings that resulted in a disputed result and subsequent violence. On the delimitation of electoral boundaries, IREC concluded that there was a gross disparity in the voting populations of Kenya's constituencies which fundamentally breached the equality principle of democracy.⁴⁶ Indeed, Kenya's last boundaries delimitation had taken place in 1996 with the scheduled delimitation of 2005 failing to take place.⁴⁷

In IREC's estimation, such long-standing discrimination impaired the integrity of the electoral process, with parliamentary elections as the most adversely affected.⁴⁸ The recommendations made in this regard included the establishment of an independent commission that would be responsible for undertaking a delimitation process that would be both consultative and accessible to the public; that such delimitation should take place at least eighteen months before a general election and be preceded by a population census; and that the basic principle for delimitation of constituencies should be the equality of the vote albeit with an allowance of a deviation range of 5% to 20% under justifiable circumstances.⁴⁹

46 Government Printers (2008), Report of the Independent Review Commission on the General Elections held in Kenya on the 27th December 2007, Nairobi, p.3

47 Independent Electoral and Boundaries Commission (2012), The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards- Volume 1, p. 1

48 Ibid.

49 Ibid, p 106

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The initial mandate for reviewing the delimitation of electoral boundaries following the 2007 elections was bestowed on the Interim Independent Boundaries Commission (IIBRC) courtesy of an amendment to the prevailing constitution at the time (now repealed).⁵⁰ The parameters the IIBRC were to take into consideration included: population density, and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas; population trends; means of communication; geographical features; and community interest.⁵¹ The execution of their mandate however occurred in the midst of the promulgation of the Constitution of Kenya, 2010 which saw the IIBRC guided by the following additional provisions: that the commission would not determine the boundaries of the Counties established under the Constitution; and that it would determine the boundaries of the constituencies and wards in accordance with the criteria of the 2010 Constitution.⁵² The 2010 Constitution also imposed a cap on the number of constituencies at 290.⁵³

The IIBRC undertook a review exercise that featured public hearings across the country (106 hearings with a total of 20,726 in attendance)⁵⁴,

and stakeholder consultations and submitted its report to the Parliamentary Departmental Committee on Justice and Legal Affairs.⁵⁵ The IIBRC's findings were however noted to have elucidated intense public debate in addition to allegations that the Kenyan public was not accorded sufficient opportunity to interact with the findings.⁵⁶

Such frustration with the process was epitomized in, *John Kimanathi Maingi v. Andrew Ligale and Others, High Court Petition No. 72 of 2010*,⁵⁷ where a private citizen instituted court proceedings against the IIBRC which among other things challenged the legitimacy of the IIBRC to undertake the boundary review process in light of the newly promulgated Constitution of Kenya, 2010; challenged the eligibility of the sitting commissioners to hold office; and called for the immediate establishment of the Independent Electoral and Boundaries Commission (IEBC) as the legitimate body mandated to undertake the boundary review process under the new constitution. While the court in its decision did not question the legitimacy of the IIBRC to conduct a review of electoral boundaries, it determined that the commission had failed to

50 The National Council for Law Reporting with the Authority of the Attorney General (2009), *The Constitution of Kenya Revised Edition 2009* (2008) Section 41C

51 Ibid

52 Government Printers (2010), *The Constitution of Kenya, 2010, Sixth Schedule: Transitional Clauses and Consequential Provisions*, Article 27.

53 Ibid, Article 89.

54 Independent Electoral and Boundaries Commission (2012), *Preliminary Report on the First review Relating to the Delimitation of Boundaries of Constituencies and Wards*, p. 326

55 The report was titled, "Delimitation of Constituencies and Recommendations on Local Authority Electoral Units and Administrative Boundaries for Districts and other Units", addressed to the President, Prime Minister and the Speaker of the National Assembly dated November 27, 2010.

56 Independent Electoral and Boundaries Commission (2012), *Preliminary Report on the First review Relating to the Delimitation of Boundaries of Constituencies and Wards*, p. 19

57 Available on the Kenya Law Reports website at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=20098185179634110681392 [Accessed on March 13, 2013]

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fully comply with its constitutional mandate. The reason for this determination was due to the fact that the IIBRC had sought to publish the names of the 290 constituencies it had proposed without further details as to their boundaries, population and physical size; which in the opinion of the court was a failure to strictly adhere to the requirements of Article 89 (9) of the 2010 Constitution.⁵⁸ Ultimately, the term of the IIBRC lapsed on November 27, 2011 before it discharged its responsibility to have its report published in the Kenya Gazette.

The completion of the delimitation review process fell to the IEBC as the successor body established in the Constitution of Kenya, 2010 (Article 89). Under its enabling statute, the Independent Electoral and Boundaries Commission Act No. 9 of 2011 (IEBC Act), the IEBC was required to resolve issues emanating from the IIBRC process, utilizing the IIBRC report as primary reference material and the Parliamentary Committee report responding to that of the IIBRC as secondary reference material.⁵⁹ The IEBC Act further defined the issues that required resolution including the re-distribution of wards or administrative units in the constituencies affected by the delimitation exercise and the creation of new constituencies that did not comply with the population quota prescribed by the Constitution.⁶⁰

58 Ibid

59 National Council for Law Reporting with the Authority of the Attorney General (2012), The Independent Electoral and Boundaries Commission Act No. 9 of 2011, Fifth Schedule, Paragraph 1 and 2.

60 Ibid

On January 9, 2012 the IEBC published its Preliminary Report on the First Review Relating to the Delimitation of Boundaries of Constituencies and Wards. The report was stated to be based on the analysis of outstanding issues derived from the primary and secondary reference materials as provided for in the IEBC Act and from other relevant supplementary documents.⁶¹ The report upheld both the IIBRC's determination of the 290 constituencies and the methodology adopted for delimitation.⁶² The IEBC however, made adjustments to the wards in the determined constituencies, resulting into two additional County Assembly Wards.⁶³ Upon publication, the preliminary report was subjected to public scrutiny from January 16-26, 2012 via 69 county meetings, with over 15,000 members and over 1,970 memoranda received.⁶⁴ On February 9, 2012 the IEBC published a revised preliminary report with the proposed determination of 290 constituencies and county wards.⁶⁵

The IEBC observed that there was limited public awareness in regard to the constitutional parameters for delimitation and the special circumstances of the first review. As a result numerous misunderstandings arose based on various misconceived notions regarding the

61 Independent Electoral and Boundaries Commission (2012), Preliminary Report on the First review Relating to the Delimitation of Boundaries of Constituencies and Wards, p. 9-10

62 Ibid, p.24

63 Ibid, p. 177

64 Independent Electoral and Boundaries Commission (2012), The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards- Volume 1, p.8

65 Ibid, p.14 and pp. 23—24

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process including; i) the perception that electoral boundaries were linked to resource allocation rather than the primary purpose of effective representation; ii) public pressure to base alteration of the boundaries on ethnic and clan ties as opposed to constitutional parameters; and iii) a heightened clamour for additional seats on the basis of the implications that the increase of constituencies and county assembly wards would have to the allocation of proportional representation seats based on the Party Lists under Article 90 of the Constitution.⁶⁶

The IEBC further made the following recommendations: (i) that Parliament sets up a legal framework to address disputes arising from the county boundaries (as this did not fall within their mandate); (ii) the establishment of a framework to align administrative boundaries to electoral units; (iii) that government agencies desiring to determine the number of wards should consult the Commission; (iv) that Parliament enacts legislation that promoted the representation of ethnic minorities and marginalized communities as articulated in Article 100 of the Constitution; (v) that Parliament considers setting a minimum and maximum limit for geographical area for constituencies; (vi) that enumeration units utilized during the national census are aligned to the electoral units; (vii) that a mechanism allowing for a national database and information sharing between government

agencies is established; and (viii) a comprehensive civic education programme on the Constitution.⁶⁷

On March 6, 2012 the IEBC, through Legal Notice No. 14 of 2012, published its determination of the number, names and delimitation of boundaries for constituencies and county wards and the specific geographical and demographical details relating to the delimitation.⁶⁸ Upon such publication and in line with the IEBC Act (Paragraph 4, Fifth Schedule), any citizen dissatisfied with the outcome was thereby entitled to apply to the High Court for review.

On account of the immense public interest on this matter and diversity of opinion, the High Court of Kenya received over 200 petitions and applications challenging the determinations of the IEBC.⁶⁹ In recognition of the sheer volume of applications and the mandatory timelines for their resolution,⁷⁰ the High Court after consultation with the various applicants resolved to consolidate the matters and constitute a five-judge bench to make a determination on the issues raised. The case was identified as the *Republic v. Interim Independent*

66 Independent Electoral and Boundaries Commission (2012), The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards- Volume 1, p.26

67 Ibid, p.27

68 Available on the Kenya Law Reports website at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/LegalNotices/14-NationalAssemblyConstituenciesandCountyAssemblyWardsOrder2012.pdf> [Accessed on March 13, 2013]

69 National Council for Law Reporting (2012), The Decision of the High Court of Kenya on the delimitation of Electoral and Administrative Boundaries by the Independent Electoral and Boundaries Commission, see foreword.

70 Article 89(11) of the Constitution and Paragraph 5 of the Fifth Schedule to the IEBC Act mandated the High Court to hear and determine applications arising from the gazette notice within three months of the date on which it was filed.

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*Electoral and Boundaries Commission and another ex parte Eliot Lidubwi Kihusa and 5 others [2012] eKLR,*⁷¹

While the High Court in its judgment addressed significant questions as to its jurisdiction to review the IEBC proposed boundaries and the timeline within which such decisions should be made, the bulk of the decision concerned itself with the constitutionality of the process and its impact on related constitutional rights of citizens. The High Court held that the IEBC's mandate on boundary delimitation had to be based not only on Article 89 of the Constitution but on the principles of the right to fair representation and equality of vote as expressed in other provisions and against the entire background of the constitution.⁷²

The High Court further identified its review mandate under the Constitution to consist of granting appropriate relief if contravention of the Constitution was established – even if such a relief would occasion an inconvenience to the IEBC in light of its preparation for upcoming elections. The High Court therefore translated its mandate to include correcting, modifying, verifying, eradicating, amending, overriding or suppressing any illegality or unconstitutionality carried out by IEBC in its delimitation exercise.⁷³ It

was clarified that the outcome of the delimitation process would take effect and be applied in the upcoming general elections.

The Court addressed itself to the matter of effective representation emphasizing that the question of electoral boundaries went beyond the issue of absolute voter parity and involved considerations such as geography and community of interest. In addition, it stated that attempts to treat marginalized and minority communities in the same manner as larger communities during delimitation would undermine the intended constitutional safeguards on equality and freedom from discrimination.⁷⁴ The Court also examined the extent to which the IEBC allowed for participation and consultation during the delimitation process and held that the IEBC had not properly discharged this function. In particular, it singled out IEBC's failure to consult the Attorney General and implied that it could have resulted in the wide scope of litigation witnessed.⁷⁵

In light of the aforementioned findings, the Court issued orders for renaming of certain wards; the moving of some wards, locations and sub-locations into other constituencies; the moving of some locations into certain wards; and for the amendment of the maps of the affected constituencies in the IEBC Final Report and Legal Notice No. 14 of 2012 accordingly.⁷⁶ The prescribed 290 constituencies however, remained unaltered.

71 Available on the Kenya Law Reports website at: http://www.kenyalaw.org/Downloads_FreeCases/87553.pdf [Accessed on March 14, 2013]

72 National Council for Law Reporting (2012), *The Decision of the High Court of Kenya on the delimitation of Electoral and Administrative Boundaries by the Independent Electoral and Boundaries Commission*, p.4

73 *Ibid.*

74 *Ibid.*, p.5

75 *Ibid.*, p.6

76 *Ibid.*

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4.2 Voter Registration



Members of the public queue outside a registration center (Image: courtesy of AFP)

4.2.1 Voter Registration under the Elections Act

The registration of voters and determination of questions concerning registration is guided by provisions in the Elections Act and the corresponding Elections (registration of Voters) Regulations, 2012.⁷⁷ While the right to vote is constitutional (Article 38(3)), a citizen is only allowed to exercise this right if they are duly registered in the Principal Register of Voters. The Elections Act requires the Principal Register of voters to comprise the following: a poll register for every polling station, a ward register for every ward, a county register for every county, and a register of voters residing outside Kenya.

The IEBC is responsible for the compilation and maintenance of the Principal Register of Voters.



IEBC Officials registering a voter at Iten, Uasin-Gishu County (Source: KHRC Monitors, 2012)

77 See sections 3-12 of the Elections Act, 2011

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The registration of voters under the Elections Act is permitted to proceed with the exceptions that such registration would not take place in the sixty days leading to a run-off in a presidential election and in the run-up to a by-election for a vacant electoral office.

On the eligibility for voter registration, the Elections Act initially only allowed for the registration of Kenyan citizens at eighteen years and in possession of a national identity card or Kenyan passport as evidence of the same. Parliament later passed a set of amendments which allowed the use of acknowledgement slips issued by the registrar of persons to applicants of national identity cards as sufficient evidence of age to facilitate voter registration.⁷⁸ It must be noted however that the amendments never received the support of the IEBC and Attorney General citing fidelity risks and was therefore not applied during the registration exercise.

On the conclusion of a voter registration exercise, the IEBC is required to avail the Principal Register of Voters to the public for inspection to enable any error from the process to be rectified. In the case of a general election, the IEBC is required to avail the register for public inspection for a minimum of 14 days within 60 days from the date of the notice for a general election.

Once the inspection of the register is complete, the IEBC is required to compile the amendments to

the register of voters. It is further required to issue a gazette notice indicating that the compilation of the register is complete and transmit the register as per constituency to returning officers at the constituency level. A unified Principal register of Voters should however be kept at the headquarters. A voter who has registered in a particular polling centre is allowed to transfer from one centre to another but may only do so in not less than 90 days before an election.

The IEBC is required to regularly revise the Principal Register of Voters, deleting the names of deceased voters and rectifying any particulars as required. A fresh voter registration is also required whenever the IEBC undertakes a boundary review.

4.2.2 The Procurement of Biometric Voter Registration (BVR) System

One of the major weaknesses of the 2007 General Election was in the voter registration and vote counting processes. It is for this reason that the IREC tasked to investigate the conduct of the 2007 General Elections, recommended the adoption of a new voter registration procedure which would help curb some of the fraudulent practices of double registration and vote rigging that were prevalent in the previous manual registration system.

The process by the IEBC of acquiring the biometric kits was riddled with controversies that prompted stakeholders to raise concerns over the credibility and transparency of the procurement process.

78 See sections 5(2) (3A) and (3B) of the Elections Act

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According to Kenyans for Peace with Truth and Justice (KPTJ),⁷⁹ the procurement process for the Biometric Voter Registration (BVR) System posed the risk of diminishing the confidence levels of members of the public in the IEBC. This in turn had the potential of undermining the possibility of peaceful, free and fair elections.

Four companies that had been shortlisted: 4G Identity Solution, Systems Integrated Limited (Symphony), Face Technologies and On Track Innovations, they were to be evaluated for their financial capability. On April 29, 2012, the IEBC evaluation committee recommended 4G Identity Solutions as the lowest bidder at Sh 3.73 billion. In the first week of June, IEBC received information from the Foreign Affairs ministry to the effect that there was an order suspending 4G Identity Solutions from operating by Unique Identification Authority of India for non-compliance to rules. The tender committee disqualified the company on the report of a due diligence committee. At one point the IEBC team led by Issack Hassan decided to do away with the hi-tech and purportedly more efficient process.

The breakthrough did not come easily for the IEBC as it had to cede some grounds by accepting interventions of the executive i.e. President Mwai Kibaki and Prime Minister Raila Odinga, who entered into a government-to-government agreement between Kenya and Canada made on August 6, 2012 for the supply of the 15,000 BVR

kits instead of the initial 9,000 kits as proposed by IEBC. The tender was awarded to Morpho Canada Incorporation.

The delay in procurement of BVR kits resulted in IEBC missing its voter registration legal date line, which led to an amendment of the Elections Act, 2011⁸⁰ reducing the period of closure of the voter's register from 90 days to 45 days prior to the General Election. The electoral body had targeted to register 18 million Kenyans by the set deadline of December 18, 2012 but only managed to register 14.3 million.



A voter being registered using the BVR kit (Source: KHRC Monitors, 2012)

79 Kenyans for Peace with Truth and Justice (KPTJ)

80 Section 6(2) of the Act

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4.2.3 Registration of Voters

KHRC lauded the IEBC on a number of issues including: first, the expeditious manner in which the registration was carried out; second, the IEBC's publication of voter registration centres across the country through the local dailies in accordance to Elections Act (Registration of Voters) Regulations 2012;⁸¹ third, the IEBC's use of ICT platforms to encourage the public to register to vote, including SMS updates and alerts; fourth, the conduct of its registration officials who were open and transparent concerning the registration process including the challenges that were being experienced; fifth, the quick responses by IEBC to the various concerns raised by civil society and other actors concerning the registration process; and finally, the cooperation offered by the IEBC Commissioners and secretariat in pursuing a transparent and open registration process.



KHRC team interviewing IEBC officials about their work on the voter registration exercise (Source: KHRC Monitors, 2012)

The KHRC, however, was concerned about the low number of people who turned out to register in the first two weeks of the exercise; it pointed out issues which needed urgent attention from relevant state and non-state actors including low registration figures in the counties within the former coast, North Eastern and parts of Rift Valley provinces, with economic and security issues being the main reason. A good number of voters, while working in urban centres, preferred to register in their rural or the so-called ethnic home areas, highlighting their concerns over security in the aftermath of the polling process in view of the violent outcome of the 2007 elections.⁸² Others preferred to vote in their rural homes out of the habitual desire to elect leaders from their respective rural areas of origin. However, there were a number of voters who could not register in their preferred rural constituencies due to the travel constraints and the resultant cost implications.

81 Regulation 3 of the Elections Regulation 2012

82 <http://www.nation.co.ke/oped/Letters/Many-will-not-register-as-voters-out-of-fear/-/440806/1628792/-/gyuaa8/-/index.html>

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KHRC team monitoring on-going voter registration in Taita-Taveta (Source: KHRC Monitors 2012).

Other reasons include youth frustration with the registration process: that a significant portion of the youth as well as individuals in marginalized areas faced a challenge of being locked out of the registration process due to the lack of identification documentation (either national identity cards or passports). From the centres visited, it was notable that majority of those being turned away were individuals with waiting cards, largely comprising of the youth. It was disconcerting to note that while numerous identity documents had been processed by the Ministry of State for Immigration and Registration of Persons (MSIRP) and disseminated to the respective provincial and district administrative offices, a good number of them remain uncollected.⁸³

83 <http://m.news24.com/kenya/MyNews24/Nyanza-residents-urged-to-collect-IDs-20130102>

Indeed, the preliminary figures that were published by IEBC on the number of those who had registered in the first two weeks of voter registration in more marginalized areas indicated extremely low turn-out in Kwale (49%), Turkana (30%) west Pokot (40%), Wajir (34%), Mandera (23%), Garissa (35%) as at December 18, 2012.⁸⁴ This was occasioned by a variety of factors including logistical complexities of conducting registration in the largely nomadic communities in the aforementioned areas, poor transport and communication infrastructure, lack of identification documents due to protracted vetting processes and centralized collection points, insecurity and voter apathy.⁸⁵

By close of the voter registration on December 18, 2012, the IEBC list revealed that Rift Valley Province had recorded the highest number of registered voters at 3,373,853 out of the 14.3 million national tally, followed by Central with 2,190,477, Eastern (2,092,883), Nyanza (1,954,756), Nairobi (1,778,908), Western (1,434,987), Coast (1,164,083), and North Eastern (347,457). In the listing of counties, Bungoma was in the bottom 10 after it ranked 38th out of the 47 counties; Narok County was ranked 39th, while TransNzoia, Kwale, Samburu, West Pokot, Garissa, Wajir, Turkana and Mandera counties completed the bottom 10.⁸⁶

84 www.iebc.or.ke/index/php/media-center/press-releases/2

85 KHRC Advisory on voter registration process published in the *Daily Nation*

86 IEBC Report on Voter Registration

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Biometric Voter Registration did work for everyone: A man displays his right hand with a missing right thumb at a voter registration centre (Source: KHRC Monitors, 2012)



Aiming for the best shot: IEBC Officials registering voters in Bungoma using the BVR Kits (Source: KHRC Monitors, 2012)

In most of the urban centres and former Central province, some counties registered the highest

turn-out, which was attributed to political mobilization, good infrastructure and access to information. Among the top counties in voter registration was Thika (110%), Nairobi (106%), Kiambu (102%),⁸⁷ Nyeri (99%), and Kajiado (95).

4.2.4 Registration of Kenyans in the Diaspora

IEBC was to register Kenyans living in other countries (the entire Diaspora) to participate in the elections, because, as citizens of this country, they have the responsibility and the right to be involved in making political, leadership and governance decisions of their country. It was suggested that they could register and vote online if systems were to be put in place in time. Another suggestion was for them to register through Kenyan Embassies in their respective countries of residence abroad.⁸⁸The IEBC committed itself to register Kenyans in the diaspora.

Regionally, there are many Kenyans in the Eastern African Community (EAC), which includes Tanzania, Uganda, Rwanda and Burundi. However, there was very little information on eligible population of Kenyans in these countries, the registration processes and registration statistics. With regard to Kenyans outside the East African Community, the IEBC kept confirming that they would be registered until around the middle of the registration process when a decision was taken

⁸⁷ <http://www.nation.co.ke/News/politics/Voters-list-hits-9-1m-as-Kiambu-leads-pack/-/1064/1642770/-/7j1iwnz/-/index.html>

⁸⁸ www.iedafrica.org/documents/Baseline_Survey_Report_on_Voter_Registartion_System.pdf

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that their registration was no longer feasible, albeit after a similar decision taken by the Executive.

Prior to the commencement of the registration exercise, the question of registering Kenyans living abroad eventually became the subject of litigation in *New Vision Kenya (NVK MAGEUZI) & 3 others v Independent Electoral and Boundaries Commission & 4 others & 8 others [2012] eKLR High Court*.⁸⁹ In this case, the petitioners sought a declaration from the court indicating that Kenyan citizens in the diaspora possessed a fundamental and inalienable right to be registered as voters and to vote for all six elective positions and/or seek elective office as prescribed by the Constitution. They further sought an order from the court to compel the IEBC to establish the necessary infrastructure such as polling centres and officers within Kenya's various Embassies and Consulates to enable them to participate in the 2013 general election.

The IEBC as respondents in this case, argued that the registration and exercise of the right to vote by Kenyan citizens abroad was one to be realized progressively and that this was reinforced by the regulations to the Elections Act which allowed the IEBC to factor in logistical considerations as well. The court in its decision stated that the constitutional right to vote is indeed not absolute and can be subject to reasonable restrictions. As a result the Court dismissed the petition and thereby allowed the IEBC to conduct registration

of Kenyans abroad in line with what it deemed feasible.

4.2.5 Some Red Flags: Insufficiency of BVR Kits and 'Nomadic' Registration Centres

While it was commendable that the IEBC had released information on the location of registration centres, the insufficiency of the BVR kits had forced the IEBC to have some registration centres share individual kits among two to four polling stations. As very little information regarding the schedule for sharing had been provided to the public, most voters would appear for registration in one station only to be informed that the BVR kit had been moved to a different one. This enterprise disheartened and probably discouraged several potential voters from registering. It is of concern that IEBC did not publish a list of centres that were to share kits on its website.

4.2.6 Conclusions and Recommendations

The fact that Kenya had not undergone a delimitation exercise since 1996 meant that the first review under the Constitution of Kenya, 2010 would be saddled by numerous and diverse public grievances that would be difficult to fully address under a single delimitation exercise. This could explain the numerous court cases filed by concerned citizens who felt aggrieved by the decisions of the IEBC. The IEBC noted that it received concerns from the public regarding Counties' boundaries, despite the fact it lacked a legal mandate to address the matter.

⁸⁹ http://kenyalaw.org/CaseSearch/view_preview1.php?link=11705875690525380453821.

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The high public interest in the delimitation process did not necessarily equate to increased public awareness on the process or the parameters that guided the IEBC's activities. As per the IEBC's observations of the process, it felt that the public had failed to disassociate the aspect of electoral boundaries from that of administrative units and resource allocation.

The question of representation of minorities and marginalized communities is one that persists and whose solution cannot be found exclusively in boundary delimitation but in the employment of further constitutional safeguards such as the institution of affirmative action measures. For example, KHRC noted that in most areas there was low turn-out among women with regard to registration. There was indication that this was attributed to a variety of factors with the most common being apathy among women voters as well as conflict between official registration hours and work commitments of most women of voting age. During the registration period in areas where women formed a majority of the causal labour force – working in domestic and industrial farms – it was noted that women turned up in large numbers late in the evening when registration centres were closing up.

The aspect of judicial review was a pivotal aspect of the delimitation process. In addition to dispensing with specific concerns by members of the public on respective boundaries, the High Court was able to develop jurisprudence on the matters of

jurisdiction in regard to its powers of review and the holistic understanding of the IEBC's mandate on delimitation as per the Constitution.

Arising from the above, it is the recommendations of the KHRC that:

- a. The IEBC should maintain a consistent and systematic boundary delimitation process within the legally stipulated period of 8 to 12 years in accordance with Article 89(2) of the Constitution. To this end, KHRC concurs with the IEBC that the Kenya National Bureau of Statistics (KNBS) aims to align its enumeration units during the national census exercise to the electoral units and that a mechanism be established to allow for a national database and data sharing for all government agencies.
- b. Parliament should enact legislation to guide the alteration of county boundaries and include a dispute resolution mechanism to address any subsequent fallout. This would be in line with Article 188 of the Constitution.
- c. The government must institute a regularized and comprehensive civic education programme for the public as opposed to *ad hoc* initiatives in the run-up to an election. Such a programme should be able to sufficiently sensitize the public on, among other things, the objects and purpose of the delimitation process and the respective functions of the electoral offices and administrative units established in the Constitution.

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- d. Parliament should enact legislation that introduces affirmative action measures to promote the representation of marginalized groups in Parliament and thereby complement the delimitation process whose options in addressing this matter are subject to statutory limitations. This is provided for under Article 100 of the Constitution.
- e. In addition to the constitutional and statutory provisions guiding the delimitation process, the IEBC should in future exercises take cognizance of the judicial precedence provided in *Republic v. Interim Independent Electoral and Boundaries Commission and another ex parte Eliot Lidubwi Kihusa and 5 others [2012] eKLR*, and in particular the expansive interpretation of the IEBC's constitutional mandate on delimitation as read with the Bill of Rights and other constitutional provisions.
- f. Further, KHRC would like to request the MSIRP to, where practicable and in light of the importance of the registration process, engage ICT platforms such as SMS alerts to citizens, whose identification documentation have been processed, to proceed to collect the said documents from the relevant offices.
- g. Additionally, KHRC appeals to citizens to re-evaluate their choices as to the location of registration based on the criterion of greatest and most proximate interest i.e. if one habitually resides and works in a particular area, then his/her civic duty to elect representatives at county ward, national level is best exercised with regards to aspirants who will represent those areas in which he/ she works and resides. It is indeed a waste of one's right to suffrage if one will vote for a representative from a remote rural location based on ethnic considerations or mere patrilineal/matrilineal interests over a representative in whose jurisdiction one habitually resides and works.
- h. Further, with regard to the registration of voters in the Diaspora, the IEBC should commission a study on comparative jurisdictions to learn how to register all Kenyans living abroad, so that they exercise their constitutionally guaranteed rights in the next elections.
- i. The IEBC should audit the entire procurement system with regard to the BVR kits, and have those responsible for purchase of non-functioning machines, dysfunctional batteries, lack of training of officers, and those responsible for faults in the tallying system (which is also a function of computers that could be sub-standard) be dealt with in accordance with the law.
- j. Finally, especially with regard to women, KHRC appeals to all employers in the formal and informal sectors to allow employees leave for strict purpose of registration in light of the importance of their participation in any future electoral process. Specifically, KHRC also calls upon women to turn up in large numbers to register and vote as this is the only way they can participate in influencing the governance of the country.

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4.3 Voter Education and Awareness

Voter and political education are critical components towards the realization of the civil and political rights in electoral governance espoused in the Constitution of Kenya and the requisite regional and international human rights frameworks. Article 35 of the Constitution provides for access to information required for the exercise or protection of any fundamental right and freedom. The citizens need information as it gives them the knowledge with which they engage with the Government and other public institutions for their own good.

Moreover, Article 38 provides that every citizen is free to make political choices and express their will for elective political positions in the society. Another key aspect of the constitution is the sovereignty of the people, which places them at the centre of the implementation process. According to the Government of Kenya:

*Their participation in the process is therefore, not negotiable. For the people to effectively participate, however, they must understand the content of the constitution, their rights, roles and responsibilities in making the constitution a reality. This will also ensure that they reap the full benefits therein.*⁹⁰

90 See: http://www.knec.go.ke/index.php?option=com_content&view=article&id=145:2civic-education-is-a-catalyst-for-

Historically, previous regimes approached the information of citizens on questions of democracy and governance more from an interest to indoctrinate the masses against the principles of civil participation and informed decision-making and in favour of a more subservient, if paternalistic, approach to leadership and governance. Over the 15 years of the Kenyatta regime and the subsequent 24 years of Moi's reign, the ruling powers engaged in systematic processes of misinformation and social programming intended at suppressing the public consciousness regarding their rights, privileges, duties and responsibilities in a democratic state.

The effect of these years of misinformation and paternalistic misguidance was a public that failed to grasp their full responsibilities and duties regarding the selection of individuals to high positions of public service through the process of suffrage. Little was done to correct this disposition in the 10 years of the Kibaki government.

From the time the KHRC conceptualized its electoral processes monitoring programme in August 2011, we were concerned that the 2013 general election would be bewildering for both the candidates and electors due to its complexity and, in some respects, its sheer novelty. There was consequently an enormous need for non-partisan voter education and information dissemination on the principles processes and virtues of the suffrage under the new constitutional dispensation to

change&catid=111&Itemid=647 . Accessed on March 13, 2013.

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the general public. The KHRC therefore took the position that: “*The public should be well informed as to where, when and how to vote, which positions are to be filled, as well as why voting is important.*”⁹¹ This position was premised on the fact that while over the years some electors made informed choices based on pillars of integrity, leadership and other democratic tenets, most Kenyans had been instead induced by venal appeals to the *tongue, stomach, heart, wind and head*⁹² to cast their ballots.

In the lead up to the 2010 referendum, KHRC participated in the conduct of civic education on the proposed constitution as it then was. During the exercise it was noteworthy that in spite of clear appeals to reason, there was significant resistance to the reception of factual information on the content and potential impact of the proposed law. KHRC considered that perhaps it is a question of the methodology used in the process of civic education that needed to be reconsidered afresh. To depart from past practice, the KHRC planned to assess what impact efforts towards civic and voter education would have on the public's understanding of the electoral choices they would

be undertaking on the day of the election in the run-up to the 2013 general election.

There had been various initiatives by State and civil society organizations to participate in the process of civic and voter education in the lead up to the general election. These were spearheaded primarily under the auspices of the Kenya National Integrated Civic Education (K-NICE), led by the then Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA). The IEBC was also expected to conduct expansive voter education, and Civil Society Organizations (CSOs) such as URAIA were also to play pivotal roles in voter education.

Finally, in conducting voter-education, the KHRC relied on a number of select individuals from partner Human Rights Networks (HURINETs), who were an ideal entry point as they had feelers at the grassroots as to what happens to electors who rely on any one or a combination of the different appeals cited above.

The burden upon the state and non-state actors to conduct comprehensive civic and voter education was immense as the goal went beyond the dissemination of information to the re-education of the public to transform their interaction with governance structures and processes, especially in line with the COK 2010. KHRC concurred with MoJNCCA/K-NICE's observation that voter education would have to be undertaken in the context of civic or political education aimed

91 “Upcoming General Elections in Kenya: Rules, Processes and Actors to Monitor: A Concept Note By KHRC's Elections' Team, August 22, 2011”.

92 See AfrifaGitonga, (1991), *The Science of Election Campaigning*, Nairobi: Cosmopolitan Publishers. Afrifa posited three types of voters, and Tom Kagwe in 2011, has increased them to five typologies, which are available on KHRC Website or visit: <http://www.facebook.com/notes/government-of-fb-kenya-the-official-online-government/which-one-are-you/181849705212427>, Accessed August 04, 2011

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at widening the people's perspectives and engagements with all the governance processes. According to MoJNCCA and K-NICE:

In point of fact, civic education efforts are meant to provide voters with information necessary not only to vote but also to enable them make intelligent assessment of issues that the political environment generates and which require action by the Government. But it becomes critical during an election period such as the one we are moving into. This is because, voters must understand their rights and responsibilities and must be sufficiently knowledgeable and well informed to know which position to take and which candidate to vote for in the light of the information they have about politics, and about the challenges they face as a people.⁹³

Article 88(4) (g) of the Constitution mandates IEBC to conduct voter education. In its Voter Education Manual, IEBC posited that access to accurate voter education would help to nurture an informed voter who is aware of his/her electoral rights and responsibilities in a democracy. It would equip voters with the right skills to effectively participate in the electoral process and help them play their rightful role in developing and safeguarding democracy.⁹⁴

4.3.1 Voter Education Actors

The KHRC noted that voter education was undertaken by many State and non-State actors within both the electoral governance and political education on the Constitution of Kenya. To begin with, MoJNCCA in collaboration with the K-NICE developed a broad-based Civic Education Programme. And second, although civil society was part and parcel of the aforementioned K-NICE programme, they were also involved in other processes which were implemented either via the individual organizations or collective efforts. Most of these efforts saw the production and dissemination of Information, Education and Communication (IEC) materials and other advocacy materials; issuing of statements and briefs in response to political and policies issues; training both the citizens and candidates; and supporting infomercials and participating in media shows and other informative programmes.

Although part of the broader definition of civil society, the private sector and media also had a role to play. The private sector (under the Kenya Private Sector Alliance-KEPSA) was engaged in voter education through media and public engagement forums organized under the auspices of the MKENYA DAIMA initiative.⁹⁵ In April 2012 for instance, this initiative partnered with MoJNCCA to organize a Civil Society Consultative Forum, which provided a great opportunity for

93 See http://www.knice.go.ke/index.php?option=com_content&view=article&id=145:2civic-education-is-a-catalyst-for-change&catid=111&Itemid=647. Accessed on March 13, 2013.

94 See the Independent Electoral and Boundaries Commission, "Voter Education Manual", p. V

95 <http://www.kepsa.or.ke/index.php/information-center/media-center/newsletter/weekly-eshots-list/173-eshot-as-at-28th-february-2013/465-mkenya-daima-peace-campaign-effectiveness>. Accessed March, 13, 2013.

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CSOs to dialogue and interrogate their roles and responsibilities in the promotion of voter education and peaceful elections. From the forum proceedings and recommendations, it was evident that CSOs would need to remain a major player in the process of ensuring peaceful elections before, during and after the general elections.⁹⁶

The media was involved both in voter and political education through its coverage and publicization of the information emerging from public forums and press conferences organized by the different state and non-state actors; organizing talk show programmes on topical electoral issues; airing infomercials and engaging on interactive social websites, among others. Moreover, opinions expressed in editorials, articles and letters to the editor in the print media also helped shape public perspectives, thereby serving as a forum of civic and voter education.

On its part, the KHRC initiated the project on *“Protecting Women’s Rights to Political Representation and Participation”*. The objective of this project was to ensure the rights of women and other marginalized communities to political participation and representation are protected and respected by State and society, in accordance with the Constitution. This was implemented through training aspirants from the marginalized communities,⁹⁷ developing and disseminating

IEC materials, legal and policy advocacy and media engagement.⁹⁸

The KHRC’s course content for aspirants included Equality, Constitution and Law; Structure of Government; Engagement in the political process (nominations); Fundraising for a political campaign and how to make best use of limited funds; Campaigning (including developing manifestos); Public Speaking; Strategies to deal with harassment; Rights Based Approach to politics and leadership and integrity; and Roles and responsibilities if elected.

4.4 KHRC Findings on Voter Awareness

In a report and statement issued on February 11, 2013, the KHRC observed that an overwhelming number of Kenyans had by the close of 2012, not received sufficient civic or voter education on the choices, procedures and mechanisms they were to face in the then upcoming 2013 general election. Responses from prospective voters indicated a poor understanding among voters on elective positions and electoral processes under the new Constitution.

-23 2012-Mombasa, Kenya. KHRC trained 46 female and seven marginalized male political aspirants. 11 of the women trained were nominated. two of these nominated women were elected as Women’s Representative.

96 See “MKENYA DAIMA/ MoJNCCA: A Report on the Civil Society Consultative Forum held on April 17, 2012 at Kenyatta International Conference Centre, Nairobi, Kenya”.

97 See the KHR Report on the Training of the Marginalized Communities in Alternative Forms of Leadership; November 18

98 We held a media event on the 2/3rds gender principle and women in leadership and we have conducted gender specific civic education with our partner networks. Our work with school children, teachers and the education sector also looks at marginalized groups in leadership.

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The KHRC had prepared a questionnaire that was administered by its contracted monitors to willing respondents who were prospective voters within their respective counties. The questionnaires looked into, among other things, the respondents' understanding of the elective positions (what they were, where they sit within the government structure and how they are constituted) as well as the understanding of the constitutional functions that the respective state offices are meant to fulfil.

The overall analysis of the information gathered from the questionnaires illustrated a low overall understanding of the positions and functions of the elective offices that were to be the subject of the 2013 general elections. However, in spite of the limited duration during which civic education was conducted, some of the results indicated improvement in the public's appreciation of the roles and functions of elective state offices where civic education had been conducted or received. For instance, data from Kisumu, Nairobi and Kajiado exhibited far greater understandings of the roles and functions, which most respondents attributed to the civic education they had received⁹⁹.

Some of the results indicated that most voters (at least 51 per cent of those reached) did not understand the basic units of representation and the various elective positions they were to vote for or even the roles of the said elective

positions.¹⁰⁰ However, there were exceptions in places such as Kisumu and Nyeri where respondents indicated a comparatively high understanding of the roles and positions of their County' representatives. Respondents in Nyeri indicated that they had been exposed to civic education and were intensely interested in governance issues as the President was from their region. Respondents in Kisumu stated they had a good understanding of Kisumu County because it was only the name which had changed from Kisumu district to Kisumu County.

In responding to the knowledge of the position of the President, 32 per cent of the respondents exhibited a poor understanding of the president's position relative to the national government structure. However, respondents in Kisumu illustrated a higher understanding of the position of the president, stating that the position was not new and that they knew the president was elected by all registered voters at the national level. Further, a significant number of the respondents in Nairobi and Kajiado demonstrated a fair understanding of the position of the president. This was largely as a result of the metropolitan nature of these areas and the exposure of the respondents to the country's political activities and information. The county of Elgeyo/Marakwet also illustrated a high number of respondents showing a fair understanding of the position of the President. This was largely attributed to the

99 KHRC, Countdown to the March 2013 General Elections, Interim Elections Monitoring Report, KHRC (2013) pp. 12 - 36

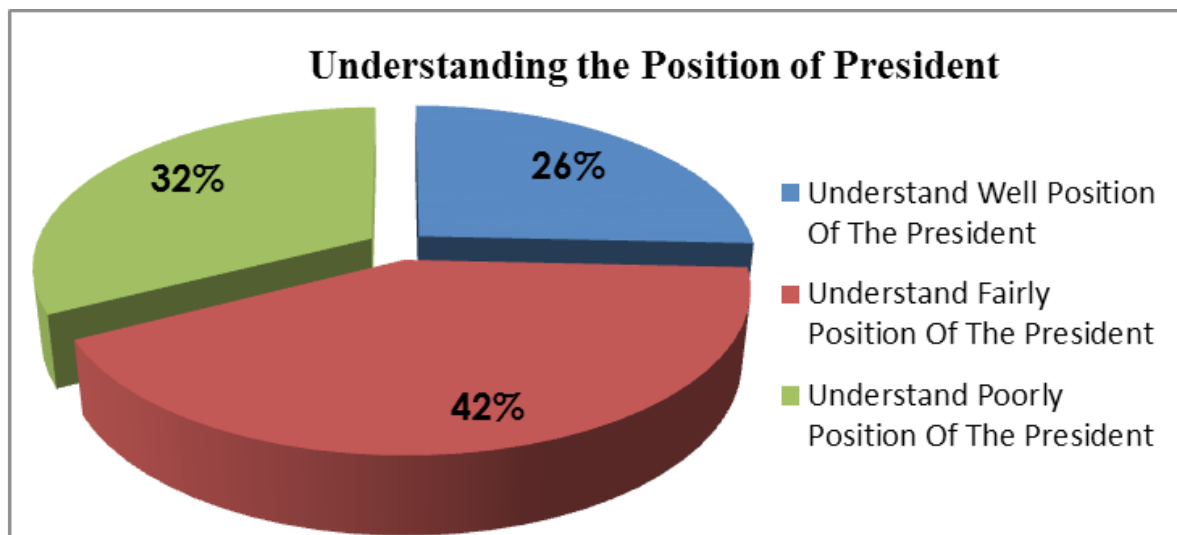
100 KHRC, "Press Statement on KHRC'S Interim Report on Elections, February 11, 2013".

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respondents' exposure to civic education activities conducted by CBOs and community leaders in the area. Figure 1 below summarizes the findings:

Figure 1: Understanding the Position of President



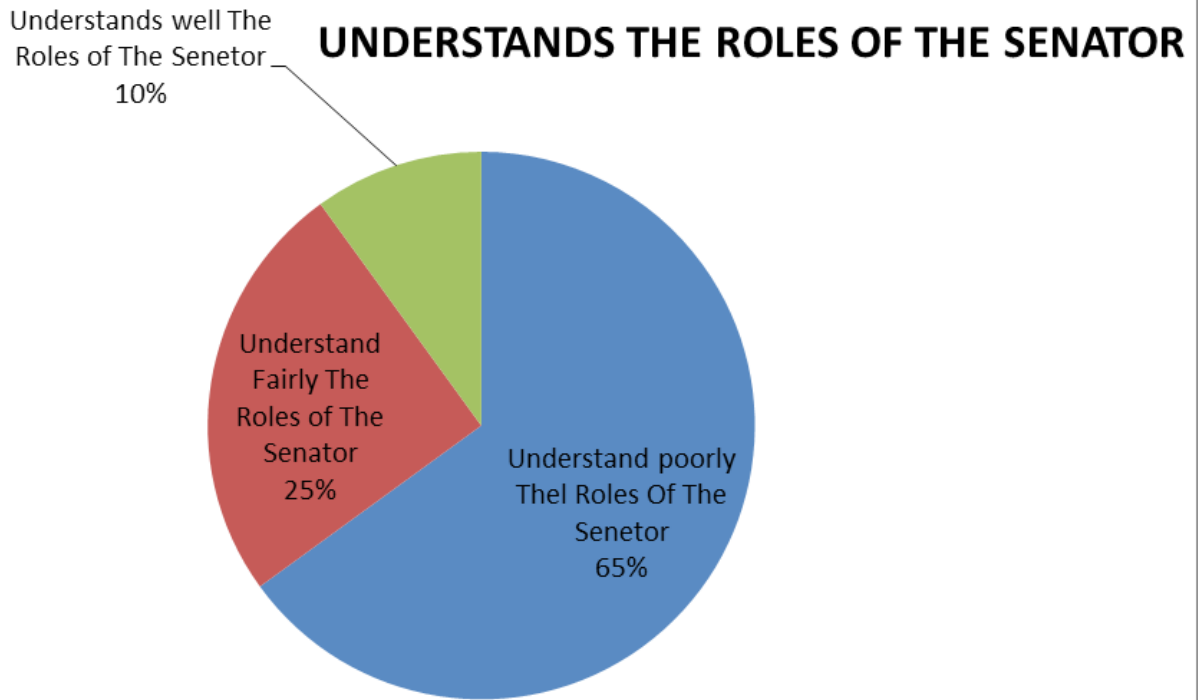
(Source: KHRC Data, 2013)

With regard to knowledge of the role of the senator and the Member of Parliament (MP), the study revealed that only 10 per cent were aware of the role of the senator against 30 per cent of those who knew the functions of an MP. For example, a significant number of the respondents from Kisumu, Migori and Bungoma illustrated a sound understanding of the position of the MP, stating that the position was not new and that they knew the Member of Parliament was elected by all registered voters at the constituency level.

On the role of the woman MP elected at county level, 59 per cent of those interviewed, against 15 per cent, did not know what role this position plays in the National Assembly. When it came to governors, 47 per cent of the respondents had a poor understanding of the role contrasted to 24 per cent who seemed to know it well.

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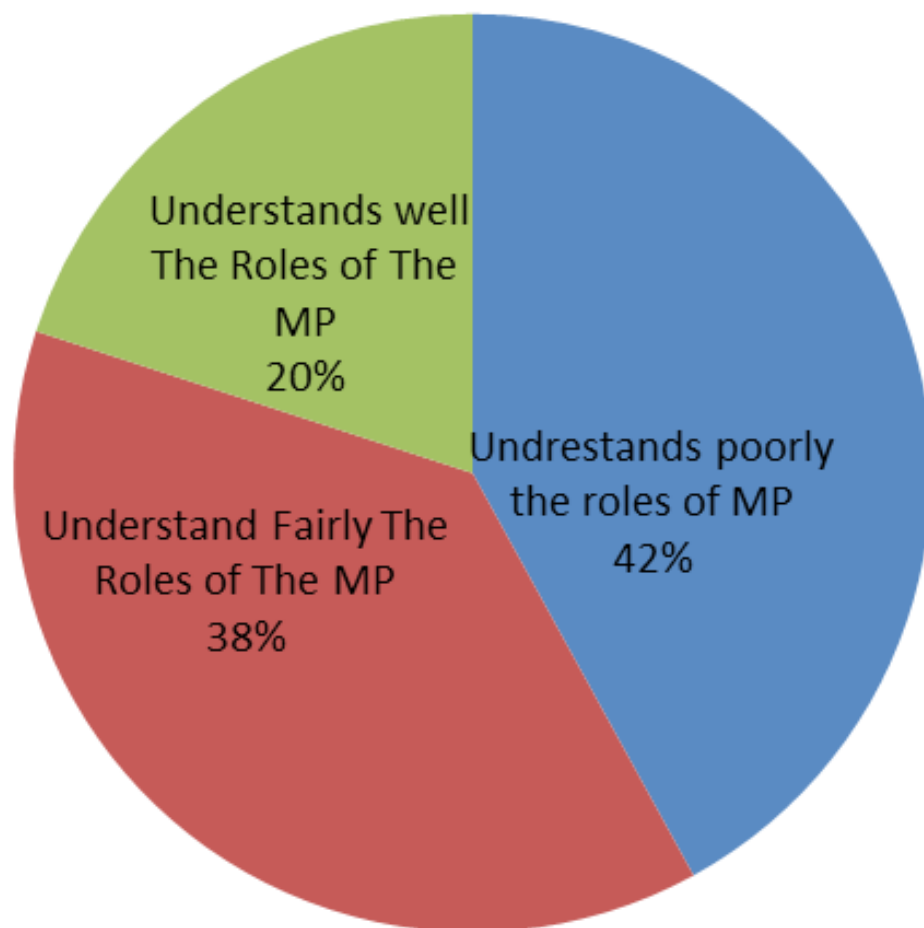


(Source: KHRC Data, 2013)

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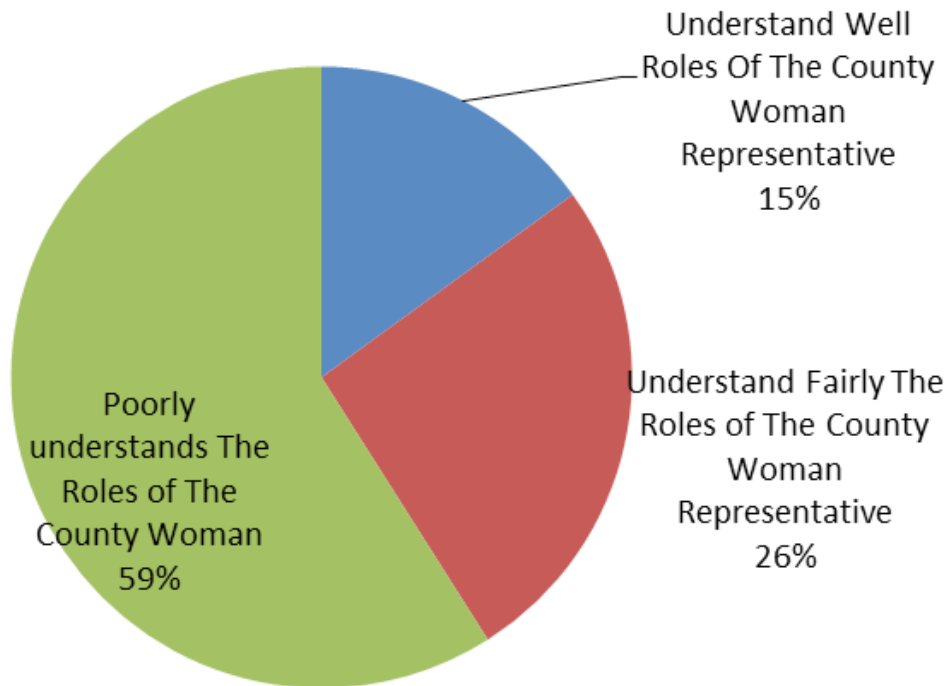
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UNDERSTANDS THE ROLES OF MP



(Source: KHRC Data, 2013)

UNDERSTANDS THE ROLES OF COUNTY WOMAN REPRESENTATIVE

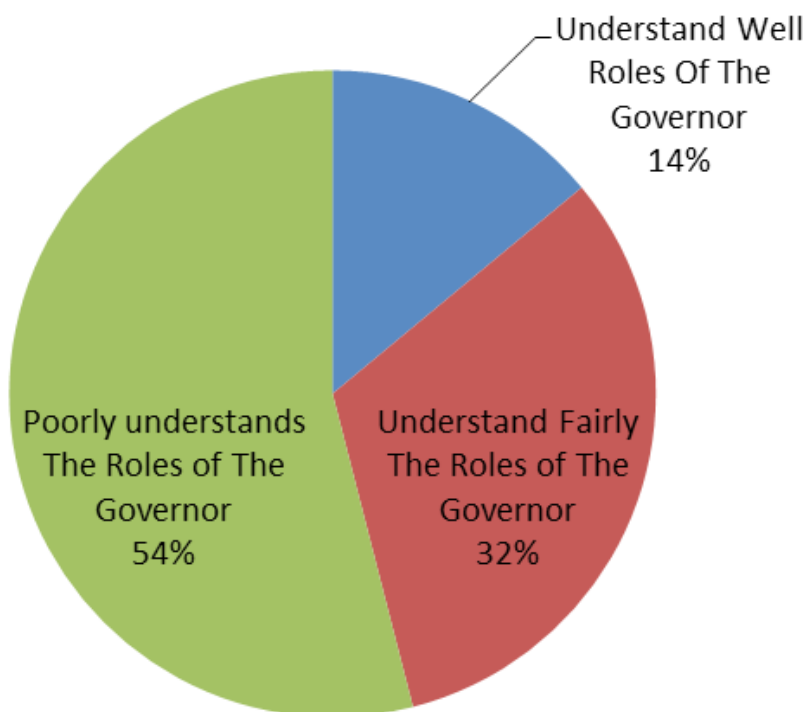


(Source: KHRC Data, 2013)

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UNDERSTANDS THE ROLES OF THE GOVERNOR



(Source: KHRC Data, 2013)

In summary, the levels of understanding of the elective positions appeared to mirror the modicum of appreciation of the functions, which implies a direct co-relation between civic education and voter awareness. Other than the above findings by KHRC, the challenges were as diverse as the players. First, it was very difficult to harmonize and

coordinate most of the voter and civic education initiatives in different parts of the country. This discordant approach, no doubt, minimized the impact of the different programmes on voter education implemented by the state and non-state actors across the country.

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Second, most of the voter education programmes were sporadic and implemented only a few months before the March 4, 2013 General election. Given the complex nature of the electoral and governance framework espoused in the Constitution, these efforts amounted to doing too little, a little too late. Moreover, some of the voter education programmes were based more on electoral processes as opposed to the broader political governance frameworks enshrined in the Constitution, legislation and policies. This skewed approach limited the stakeholders' understanding and engagements with the governance systems and processes at all levels in the society.

Third and as indicated above, the key stakeholders lacked the requisite finances and logistics to roll out a comprehensive and timely voter education programmes in the country. Finally, the key stakeholders had not developed or implemented voter and public education programmes that could easily be embraced and internalized by the beneficiaries without much logistical, operational and intellectual demands.

4.5 Red Flags during the Voter Simulation Exercise

The IEBC conducted Mock Elections in 1,450 polling stations across the country on Sunday, February 24, 2012, which revealed that voters still needed more education on the voting process. With the simulation done so close to an election,

the shortcomings identified were not addressed, showing some level of negligence on the side of the IEBC as the exercise exposed some of the failures that were later replicated during the voting and tallying stages of the actual voting day on March 4, 2013. The simulation exercise was marred by voter apathy – a situation precipitated partly by the inadequate public notification over exercise. The impact of IEBC's failure to inform the public early enough to prepare to take part in the exercise, was typified in Nakuru, where turnout was the lowest. The residents of the town continued with their duties not aware of the mock election.¹⁰¹ KHRC team raised concerns on the level of voter ignorance that could slow down the pace of voting and increase the number of spoiled and rejected votes at the 2013 General Election date.¹⁰²

KHRC also observed that in a majority of the simulation sessions, voters took at least eight minutes to cast six ballots; this raised concerns that many people were not going to be able to vote before the polls closed at 5 p.m. on Election Day as stipulated in the law.¹⁰³ At Uhuru Gardens Primary School, for instance, voters complained of the simulation ballot colours, saying that they were clumsy and confusing. Majority of the polling station had no finger print reader and those that had, the machines were not in use. This omission could largely be attributed the IEBC's failure to anticipate any problems with the EVID system.

101 EPMC

102 EPMC

103 <http://allafrica.com/stories/201302260153.html>

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In Kisumu, Polling Clerks said that many voters required assistance to cast their ballots because they did not get civic education. In Naivasha, majority of the male voters in certain polling stations had problems distinguishing the colour of the ballot boxes, according to the constituency's elections coordinator, Mildred Wachiye. A similar challenge was experienced in Teso.

In other parts of the country, low voter turnout and confusion were the highlights of the simulation vote. In Migori, for example, IEBC clerks opened the booths at 6 a.m. although the turnout was very poor. Many people appeared to be unaware of the exercise or its importance. The clerks stayed idle for several hours before voters began trickling in one by one.

In Kisii, Bomachoge and Borabu, according to IEBC returning officer Gilbert Serem, the exercise attracted a good number of people. However, by 2 p.m., only 95 people had turned up for the exercise at Siaya County Council, which is one of the largest polling stations in Siaya County with 2,340 registered voters. In Mombasa, the residents were taken through the voting process at Marycliff Primary School. In Nyeri and Trans-Nzoia, several polling centres recorded low turnout.

In light of the confusion among voters, the IEBC hired officers to ensure voters cast their ballots correctly. According to the then IEBC Chief Executive James Oswago, a special clerk to ensure

things ran smoothly and faster during the voting had been hired in each polling station.

When it was time to transmit the results, the entire system failed. According to the then IEBC CEO Mr. James Oswago, the system failed during the transmission of results because the server used was of a lesser power than the one they thought should be used. He said they had confirmed that all results were relayed to the server but it failed in the visualization.

A week to elections, the IEBC convened a meeting of political parties' representatives at the Sunshine Holiday Inn in Nairobi. The meeting was to test the efficacy of the equipment that would be used in counting votes and relaying the results to a central location. A mock election was organized by dividing the participants into five groups of three, each consisting of a 'polling station'. The other participants were to observe results trickle in on a screen. When 'voting' at the 'polling stations' began, the results could not be transmitted to the 'tallying centre'. Much to the surprise of the participants, the equipment failed. It is only after an hour that one of the 'polling stations' managed to transmit results to the 'tallying centre'.

It was argued that this was just a rehearsal but the failure of equipment at four 'polling stations' raised more questions than answers. In the main election, there were a record 33,000 polling stations. Results from this large number of stations were to be transmitted to the Bomas

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of Kenya for tallying. The IEBC had failed in their bid to illustrate to Kenyans the effectiveness of the electronic equipment that they intended to deploy in the then approaching elections. One of the participants, in the simulation exercise had warned of high political risks if the IEBC vote transmission system failed. Indeed, there are a number of crucial security issues that were raised with no requisite answers, some of which were to later haunt the IEBC as the petition on presidential poll was being heard before the Supreme Court, including:

- a. Who had access to the database and what were the dangers of it being compromised?
- b. What systems were in place for data encryption to prevent hacking and corruption of data during transmission?
- c. Who would be in charge of the maintenance of the equipment, and could this involve additional, possibly unauthorized, log-in capability and access?
- d. What would happen in the case of server failure? What storage technology, such as RAID (Redundant Array Independent Disk), was being employed to ensure storage of data in different places, and who had access to this?
- e. Had they secured a simple back-up system, in case of data loss?
- f. Hackers could rearrange or delete data from a database, and insert factors that affect the provisional results. What was being done to prevent malicious computer programmers and IT experts from doing this?¹⁰⁴
- g. IEBC had assured political party agents that a larger server had been relocated to the tallying centre for testing, adding that the commission was willing to make any form of improvement on the system as suggested by the political parties' IT teams. Investigations by a local newspaper revealed that the technology, funded by UN Development Programme, had been developed for use in the 2007 elections but was rejected by the defunct Electoral Commission of Kenya. The technology was designed by a Kenyan company called Next Technologies.¹⁰⁵

4.6 Conclusions and Recommendations

The dismal levels of voter and civic education provided a ready platform for voter manipulation and deception. The confusion, errors and misunderstanding that were experienced during the vetting of aspirants, and the nominations, campaigns, the polling, counting, tallying, and announcement of results and the processes thereafter also stemmed from the poor understanding of electoral processes and functions. To move forward, the KHRC recommends that:

¹⁰⁴ <http://www.the-star.co.ke/news/article-108148/iebc-must-fix-results-transmission-system-fast>

¹⁰⁵ <http://elections.nation.co.ke/news/System-to-relay-poll-tally-queried/-/1631868/1704724/-/5pbyj5z/-/index.html>

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- a. Both IEBC and K-NICE should conduct an audit/ assessment of the levels of public awareness of the different positions, functions and electoral process under the new constitution dispensation.
- b. K-NICE be established as a long term civic awareness programme that builds the public's understanding of governance processes. This programme should be devolved at County Wards so as to ensure effective public outreach and engagements.
- c. IEBC in partnership with other state and non-state actors should ensure effective coordination and implementation of the voter education programmes, at least one year before elections.
- d. All stakeholders should develop and implement user-friendly voter and political education programmes and training tools for the general public. The media should consider charging lower fees for the dissemination of voter and public education programmes.
- e. The State agencies in charge of education and devolution should consider making voter and civic education part and parcel of their trainings programmes both to students and adults respectively.

Chapter Five

5.0 Monitoring the Electoral Processes: Political Parties and their Adherence to Rules and Nomination Procedures

5.1 Political Parties' Compliance with Electoral Laws

One of the significant aspects of popular democracies has been the evolution and rise to prominence of political parties as the main vehicles through which groups of individuals can seek to participate in government and influence policies. Party-based politics is now a central feature of modern democratic practice with political parties ideologically viewed as the medium for collective action for the citizen, and perceived as indispensable with the exercise of popular will through the franchise of suffrage.

It is for this reason that most legal and constitutional documents that postulate popular democracy require the freedom of association for the citizen and delimit political rights including the right to form and join political parties and the right to vote. The Kenyan Constitution is no different. In Articles 36 and 38 of the Constitution provide for the freedom of association and political rights, respectively.

Article 38 (1) provides every citizen with the freedom to make political choices including the right to form and participate in forming a political party. This right is complemented by the duty placed upon political parties to have a national character¹⁰⁶ and thereby accommodate membership from the broad spectrum of communities that make up the country's demographic body politic.

The requirement for a nationalistic outlook with regards to membership of political parties is augmented in the Political Parties Act No. 11 of 2011 which makes the recruitment of membership that reflects

106 Article 91 (1) (a) of the Constitution of Kenya 2010

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the regional and ethnic diversity, gender balance and representation of minorities and marginalized groups a requirement for the registration of a political party.¹⁰⁷ Membership to a political party is however denied to non-citizens by Section 7 (5) of the Act.

On political parties' adherence to rule of law, the KHRC found out that despite the registration of complaints by a few of the aggrieved persons to the RPP in writing, the preponderance of the cases revealed that the process of preparation of the membership lists was marked by instances of serious fraud. What is uncertain is whether there was sufficient inquiry to determine the full extent of the fraud to determine whether it was of such a nature as to render the process fatally defective.

By virtue of Section 45(1) of the Political Parties Act, the submission of false information to the RPP amounts to an offence. And while the Registrar is availed significant flexibility in the form of sanctions to be applied for such offences,¹⁰⁸ the fraudulent compilation of party member lists went against the core of the principle of representation through the political party system. Consequently, where such violations are detected, adequate and thorough investigations, and where an offence is established, the culprits should attract the stiffest penalties under the law.

5.2 The Registrar of Political Parties: Complacent in Ensuring Compliance with the Law?

The Registrar of Political Parties is responsible for ensuring that political parties comply with the PPA. By Section 34 (1) of the Political Parties Act, the Registrar is mandated to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act. Unfortunately, the Registrar presided over a compliance process that cleared 59 political parties without closely scrutinizing the data they had submitted.

Whereas the Political Parties Registration Regulations provide for a Party Membership Verification Form to be filled out in respect of each member of a political party (Form PP 5 PART III), the Registrar agreed with political parties, at a meeting they held on December 7, 2012 in Nairobi, to substitute the legally sanctioned Form with a software package that was not approved by legislation.¹⁰⁹

Unlike the Form, which was designed to ensure that political parties recruited real members, the software allows political parties to simply upload unverified membership particulars into the official register. In the matter of *Ford-Asili & Others vs. the Registrar*, Appeal Number 3 of 2012, the Political Parties Disputes Tribunal ruled that the software

107 Section 7 (2) (a) and (b) of the Political Parties Act (No. 11 of 2011)

108 Section 45 (5) of the Political Parties Act (No. 11 of 2011)

109 http://www.standardmedia.co.ke/?articleID=2000074820&story_title=Registrar-responsible-for-fictitious-parties-membership (accessed March 16, 2013)

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was unlawful and therefore illegal, null and void as the same was not anchored in law or approved by any legislation. Given this ruling, if the law was indeed supreme, none of the 59 parties that were registered using the condemned software would be entitled to any benefits of the law, including fielding candidates and receiving public funding.¹¹⁰

Information Technology (IT) experts have queried the effectiveness of the software used by the Registrar of Political Parties to countercheck fraudulent enlisting from the office of the Registrar, questioning procurement process by which the software was secured.¹¹¹ Kenyans would like to know whether the software employed had inbuilt security features to prevent identity theft.

It is against the law to allow the parties to self-regulate. Therefore, by ceding the enforcement of the law to political parties, under some sort of 'gentlemen's agreement' as the Registrar of Political Parties did during her meeting with the political parties on December 7, 2012 undermined the core aspects of the party registration process and raised significant doubts over the efficacy of the registration processes in ensuring that party membership genuinely reflected the national character as required by the Constitution.¹¹²

Further still, KHRC found out that some political parties had been handing out money or gifts to members of the public in exchange for subscription to membership. This practice essentially turns the purpose of membership on its head, and by extension, the rationale of party politics. Ideally, political parties must rightly derive support for their policies – both materially and popularly – from the membership that endorses the party policies, and would seek to sway government policies through the election of representatives of the party to the Executive or Parliament.

Indeed, the concept of party-driven electoral democracy and universal suffrage rests on the assumption that the voting public guides and determines the outcome of the electoral process based on principles of proactive participation and properly informed decision making by the electorate. However, history, both domestically and internationally, has proven that the fiscal strength of parties and aspirants for elective positions can serve to alter the electoral outcome in favour of the better resourced parties or candidates in spite of their unpopularity. In Kenya, this was the net effect of not enacting the Campaign Financing Bill, which is addressed below.

110 Standard Newspaper, January 12, 2013. By Okiya Omtatah (Sourced on 13th March 2013)

111 http://www.standardmedia.co.ke/?articleID=2000074820&story_title=-Registrar-responsible-for-fictitious-parties-membership (Sourced on March 16, 2013)

112 Article 91 (1) (a) of the Constitution of Kenya 2010

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5.3 Party Nominations, Parties' Attempts to Stem Defections and IEBC's Moving Target Deadline to Accommodate the Nominations

Party nominations were to be held between January 4, 2013 and January 17, 2013, with the parties submitting their final list to the IEBC on January 18. However, most political parties held their party nomination process on the January

17, in a bid to frustrate defections by losing candidates. With the chaos taking place during the party primaries, IEBC was forced to extend the deadline to 5 p.m. on January 21, 2013. Despite this extension, it did not receive the parties' nomination lists, compelling it to extend the deadline further to midnight. While most parties had already formed coalitions, they conducted independent primaries, with Wiper and ODM carrying out theirs on January 16, and URP and TNA on January 17.



Pre-Election Party Primaries: Voters queuing to vote at Old Kibera Primary School polling station on 18th January 2013, at 4 p.m. (Source: KHRC Monitors, 2013)

The political parties made some effort to respect gender and practice affirmative action. While all parties had their own regulations about the amount to be paid by aspiring candidates, the

amount for women representatives and persons with disabilities were considerably lower as compared to the rest of the positions. However,

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even with this affirmative action in place, the nomination of women and people with disabilities remained skewed, as shown below in the table below.

Elective post	Nominated	Elected
President	1	0
Senate	17	0
Governor	7	0
Member of Parliament	163	16
Women representative	148	47
Total	336	63

5.4 Electoral Violence and Voter Intimidation

KHRC received reports of voter intimidation in Naivasha, especially in the flower plantations where the majority of workers were from the Luo, Kisii and Luhya communities. Workers complained about drastic changes in their remuneration package that had been effected from November 2012. They were paid a basic allowance of KES 4,050 and a housing allowance of KES 1,800, making it a total of KES 5,850 a month. Some firms paid a similar amount while others paid as much as KES 8,000. This prompted an industrial unrest in the farm, after which most of the workers from the said communities were sacked.

It was feared then that other flower firms could follow suit, especially before elections time, since the majority of those sacked were the Luos and the Kisiis. It was not possible to get any response from any politician or employer. The area chief Mr. Ndungu of Kamere location within Olkaria

ward did not accept to be interviewed and stated that the position of the government was that everything was okay.

On February 2013, In Migori County, one of the KHRC monitors collected one of a number of threatening leaflets that had been circulated in Uriri Constituency. The leaflets, which had been written in Dholuo language, seemed to suggest, amongst other things, that in a meeting held on February 10, 2013, it was recommended that a specific clan take control of certain administrative and elective positions and that communities of different ethnic composition or 'foreigners' should leave the area.¹¹³

In Embu County, violence was witnessed when a group of about 500 youths showed up during a CORD rally on February 15 2013 and started chanting 'Jubilee! Jubilee!' after some leaders

¹¹³ The statement, upon transcription of the segment of the report in Dholuo, asserted that "Countrymen, help me so that we can defeat onyalobirogi (could mean "these foreigners?) I will do the following if you help me win"

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criticised Jubilee Alliance presidential candidate, now President, Uhuru Kenyatta. They gathered at one corner of the Embu Municipal Stadium and started pelting CORD supporters with stones but were repulsed by police. The group seemed to have been incensed by a pronouncement by Mwea parliamentary aspirant Bishop Daniel Njagi, who said the region was not a Jubilee stronghold and accused its flag bearer Uhuru Kenyatta of doing little for the region. Some of the stones narrowly missed two helicopters, which were parked in the stadium.



Jerry Mark Obila's supporters inspecting ballot boxes scattered at the Nyayo stadium tallying centre during party primaries on Feb 18, 2013 (Source: KHRC field Monitors)

5.5 Violence against Women

Since the introduction of multiparty democracy in Kenya in 1992, female candidates have had to contend with violence, abuses and sexist language. Violence against women had been recorded in parts of Nyanza, especially in southern parts of Migori and Homa Bay, where KHRC

received reports that some women aspirants had been attacked by hired youth.

On December 26, 2012, for instance, Mrs. Gladys Wanga – an aspirant for the woman representative seat for Homa Bay County – organized a rally at Kabuoch in Ndhiwa Constituency where a group of youth invaded and disrupted her campaign rally.

In another incident a KHRC field monitor in Migori County reported that in Rongo Constituency at Kuja Primary School, Mr. Dalmas Otieno, a senior politician, was holding a delegates meeting with participants from all the wards in the constituency, where an incident that was a direct action on discrimination of women occurred. The victim, Anne Anyanga, (then aspiring governor, Migori County) arrived in a helicopter and as soon as she touched down, she was assaulted, manhandled and had her dress torn with the view to intimidate her just because she was a woman. She had to bear a barrage of obscene insults that centred on her sexuality/gender. However, her body guards were swift enough to sweep her off and bundle her into a speeding vehicle, which took her to a safe place from where she boarded the chopper. The perpetrators were young men.

In Nairobi, reports from KHRC monitors in Embakasi East Constituency at Komarock School polling centre, indicated that a woman aspirant, Roselyn Achieng, who was vying for county representative seat under the ODM ticket made

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allegations that Hezron Omondi, the Constituency ODM chairman and a parliamentary aspirant, was issuing ballot papers to his supporters and those of the preferred male county representative aspirant. Ms. Achieng protested that this was a deliberate attempt by ODM to block her from of the race on account of her gender and further stated that Mr. Omondi had directly appointed the presiding officers and security men at the polling station. For all her spirited protests, Ms. Achieng was thrown out of the polling station by police officers. Together with her supporters, she then proceeded to record a statement at the police station. The results were thereafter announced with Ms. Achieng's rival being pronounced as the winner. Our Observer informed us that there were allegations that ballot papers were found at Komarock Primary School, in Hezbon Omondi's vehicle, following an interview she conducted with one of the voters at the school.

In Kitui County, Mutomo district, Pauline Ndela was stabbed at least seven times and her arm broken by her husband, Mutuku Nthaka, because he wanted her to vote for Micheal Kivoto for the Member of Parliament post but she went ahead and voted for a woman aspirant Rachael Kaki. The husband was arrested. Further, in Kitui County, Mlango location, a husband threatened to disown the wife, Nzembi Mwendwa, for failing to vote for his brother-in-law, Samson Mutinda, who was contesting for the County Assembly seat under Wiper Party.

In Nairobi, during a CORD rally held on the February 18, 2013 at Mowlem in Nairobi County, drunk Youths carrying Nairobi Mayor George Aladwa's posters jumped onto Makadara parliamentary aspirant Lindy Wafula's truck which was also at Mowlem and harassed female supporters.

In Kajiado County, there were people going around inciting voters not to vote for Peris Tobiko, who was aspiring for the Member of Parliament seat in Kajiado East, because she is married to a man who hails from Narok County.

5.5 Red Flags Indicating Electoral Unpreparedness at the Political Parties Nomination Stage

The nomination processes was marked by serious electoral malpractices in spite of appearances of transparency and order in a few instances. During the entire period of monitoring the nomination exercise in various counties, KHRC picked out some red flags which pointed to the general state of electoral unpreparedness that were manifested at this stage. Some of the key findings were: the high levels of ignorance among the voters as they were not sure of what some of the new positions entailed; the gross electoral misconduct by political parties during the nominations and campaigns processes; and the insecurity experienced in different parts of the country. On nomination day, out of some of the stations visited, KHRC was able to interview voters, who asserted that they

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had been at the stations as early as 6.00 a.m. and by midday, the party nomination voting had not commenced in a majority of the polling stations due to delays in the delivery of voting materials. Voting in most polling station started well into the afternoon and most returning officers who spoke to KHRC monitors attributed this to delays in the delivery of voting materials from the party headquarters.

The logistical failures in the preparations by parties extended beyond the late delivery of voting material. Upon their arrival it became apparent that most of the polling equipment or material was either defective or structurally flawed for the function. In a good number of polling stations, for instance, especially in stations where ODM and UDF were conducting their primaries, the ballot boxes were mere buckets with slots carved out of their lids for insertion of marked ballot papers. These 'ballot buckets' were not sealed thereby limiting the security of the ballot and allowing ready avenues for manipulation of the votes.

The failure to adequately prepare for the party primaries affected all major political parties that conducted polls for the nomination of party candidates. The leading political parties, among them ODM, TNA, UDF, URP, Ford-Kenya and Wiper Democratic Movement had serious nomination hitches. Beyond the late arrival of polling materials, most party primaries did not use party member lists. These parties resorted to the IEBC list of registered voters to conduct the nominations with

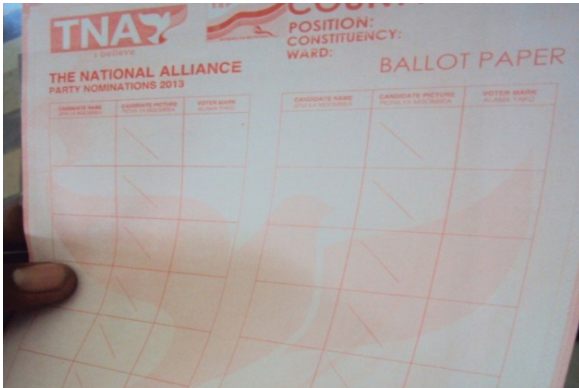
the effect that the party primaries did not reflect the will of the subscribed membership of the political parties. Other glitches included, delays in relaying results, missing aspirants names and photos from the ballot papers, printing of fewer ballot papers forcing the returning officers to turn away voters and in some instances the premature announcement of winners before the finalization of tallying.



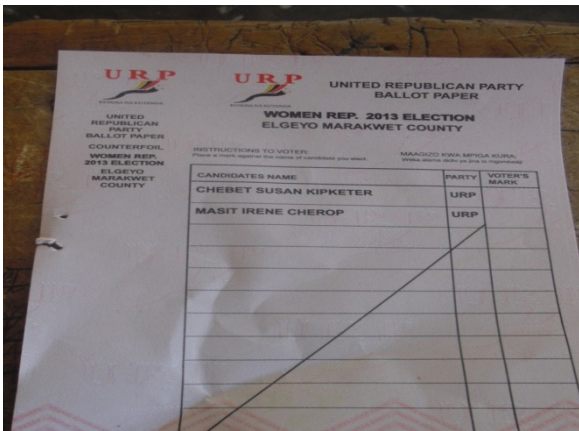
A plastic bucket with no seal at a UDF polling station in Embakasi West (Source: KHRC Field Monitors)

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A ballot paper without aspirants' names and photos during the TNA primaries in Nairobi (Source: KHRC Field Monitors).



Ballot paper without aspirants pictures used during URP nominations in Elgeyo-Marakwet County (Source: KHRC Field Monitors)

5.6 Party Hopping: No Respite in Last-Minute Defections?

Despite the attempts (mentioned above) to stem last minute party defections by holding nomination one day before the official deadline of submitting the nominated candidates' names, last minute defections remained a common phenomenon during party primaries pointing to the fact that politicians do not share or subscribe to the ideology or policy direction of the parties that sponsor them or to which they purport to belong to, but rather, they approach political parties as mere vehicles with which to ascend to power. Some of the defections that were noted on the day of nominations included:

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Aspirant	Registered Party	Defected To	Position
Abdallah Hemed Mwaura	Wiper Democratic Party	TNA	Governor
Omar Sarai Hassan	ODM	Wiper Democratic Party	Senator
John Mututho	TNA	NARC	Member of Parliament
Hillary Alila	ODM	PDP	Member of Parliament
James Nyoro	GNU	NARC	Governor
Philip Kisia	ODM	FPK	Governor
SoitaShitanda	UDF	New- Ford Kenya	Governor
Noah Wekesa	Ford Kenya	ODM	Governor
Abdulqadir Mohamed Omar	ODM	Ford- Kenya	Member of Parliament
JimnahMbaru	TNA	APK	Governor
William Oduol	ODM	National Agenda Party	Governor
Julius Kones	URP	KNC	Governor
George Nyanja	TNA	UDF	Senator
NgumabuMulwa	Wiper	Narc	Governor
Peter Ondieki	ODM	PDM	Governor
Charles Mochama	ODM	TIP	Governor
Job Nyasimi	TNA	RBK	Governor
OlagoAluoch	ODM	Ford- Kenya	Member of Parliament
Jared Okello	ODM	Ford- Kenya	Member of Parliament
PollynsOchieng	ODM	Wiper	Member of Parliament
Manyala Keya	UDF	New-Ford Kenya	Member of Parliament
Amukowa Anangwe	ODM	FPK	Member of Parliament
Titus Ndundu	Wiper	PDU	Governor
George Munji	UDF	KANU	Member of Parliament
Phillip Opiyo	ODM	Ford- Kenya	Member of Parliament
William Omondi	ODM	TNA	Member of Parliament

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5.6.7 Conclusion

The manner in which political parties have been formed and operated in recent years has distorted the conceptual ideals of democracy and expression of popular will through the process of suffrage. Political parties in Kenya exist as mere band-wagons around which support for political personalities can be galvanized through the mechanisms of patronage and tribal affiliation. Consequently, political parties approach the public as mere tools for the achievement of political power.

The poor co-ordination, mismanagement and occasional corruption that marked two of the main party processes – the recruitment of members and nominations – illustrated the indifference of most political parties to the popular will where this went against the vested interests within the party leadership. Significantly, it also demonstrated the incapacity of the relevant duty bearers to effectively address the entrenched distortive cultures and malpractices within political parties in Kenya.

The Registrar of Political Parties (RPP), the IEBC, the DPP and the police service are all vested with significant independence and operative autonomy in the execution of their respective mandates. In the formation and operation of political parties, these independent state organs had key roles to play in ensuring that political parties functioned within the law and observed the guiding principles by which they are constitutionally mandated to operate.

The autonomy of these institutions was secured within the constitution in a bid to ensure that their operations are not influenced by external interests. For some of the institutions, such as the IEBC, the ability to moderate and influence the political party processes was partly frustrated by the manipulation of legislation to suit short-sighted political interests. However, for the most part, the failures witnessed in formation and operation of political parties were largely permitted by the failure of these agencies to assert their independence and implement the laws as they related the regulation of political parties.

Chapter Six

6.0 Monitoring the Electoral Campaigns

6.1 Voter Bribery

Article 91(2) (d) of the Constitution provides that no political party shall engage in bribery or other forms of corruption. The Elections Act, 2011, at Section 64 states, that voter bribery is an offence punishable by a prison sentence of a term not exceeding six years or to a fine not exceeding one million shillings or to both. The offence will have been committed even where aspirants try to sidestep the law by the use of agents on their behalf.

Voter bribery as an electoral offence and misconduct creates a politically unequal playing ground during the electioneering process – making campaigns more “stomach and money-driven” as opposed to “issues and policy-based.” It also makes the country more susceptible to corruption and other forms of economic crimes as the new leaders seek to recoup their “the cost of their investment” during the campaigns once they assume political office.

Both our monitors’ and media reports indicated that there were several aspirants who engaged in attempts to induce support from voters through direct or indirect disbursement of monies to participants they were addressing in public rallies. The bribery was often indirect, with payments being made on behalf of an aspirant through his/her close allies. Some of the aspirants also engaged in treating either through the promise of actual payment of cash hand-outs for meals or through provision of food or beverages in a bid to get potential voters to attend political functions/events and support the party or candidate involved.

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Some politicians also opted to use the mobile phone money transfer services to disburse money to voters. The practice of bribery also involved the buying of identity cards with a view to disenfranchising voters based in areas perceived to be opponent's strongholds. Although most of the political parties were suspected and believed to have been involved in these crimes, the case studies below capture the complicity of CORD and Jubilee (especially the TNA wing), which were the main political coalitions. Some of these are summarized below:

- a. Ferdinand Waititu who unsuccessfully vied for the Nairobi governor's seat on a TNA ticket was caught on still and motion camera dishing out money to a group of youths in a meet-the-people tour in Donholm on February 6, 2013. The TNA candidate allegedly left a bundle of notes with one of the youths, with instructions that he shares the money with the rest.
- b. James Ongwae, who was an aspiring governor in Kisii County on a CORD ticket, was caught on camera on February 1, 2013, giving bribes to potential voters in a secluded area near Nyambara Primary School. The crowd was composed of mostly the youth and middle-aged men. The crowd was instructed to queue before the cash was disbursed amongst them.
- c. On March 3, 2013, a CDF vehicle, Registration No. GK A911 U was impounded at around 1.00 a.m. within Taveta Township for distributing food to entice voters. The vehicle was taken

to the Taveta Police Station and booked under OB. No 34/3/20/13.

Some of the challenges in dealing with the above, among others, were the failure by the IEBC and the police to fully monitor, investigate and prosecute those involved in voter bribery. Even where monitors reported such incidences to the area police, the reports were greeted with significant apathy among the members of the security agencies who often described these practices as common-place and harmless political activity. The absence of a concrete legal framework to provide guidelines and limitations on the mobilization and utilization of funds during the campaigns further exasperated the problem. As stated above, the Campaign Financing Bill was not enacted. Moreover, the failure by citizens to appreciate the need for issue-based as opposed to cash-driven campaigns meant there was a high demand among the public for the distribution of incentives by politicians seeking to secure their support. Indeed, in some areas, the failure to disburse monies or engage in some form of treating secured the disaffection of some sections of the voting public

The bribery of voters by whatever means is inimical to the requirements of Article 38(2) of the Constitution which seeks to guarantee every citizen the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective body or

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office established under the Constitution or any political party of which the citizen is a member. It is thus instructive to recommend that:

- a. IEBC in partnership with National Police Service and Ethics and Anti-Corruption Commission ensure effective investigations into the incidents of voter bribery and fake money and prosecute the culprits during elections.
- b. Organizations involved in observation of elections conceptualize and implement tools and programmes that will ensure effective monitoring and timely response to incidents of treating and voter bribery.
- c. State and non-state actors should ensure effective voter and political education to ensure that all stakeholders – citizens, politicians, state and non-state actors – appreciate the need for issues based and corruption-free campaigns.
- d. There is need to enact and implement the elections Campaign Financing Bill. It is unfortunate that the Tenth Parliament was unable to enact the draft Bill.
- e. There is need to reassess the terms ‘campaign’ and ‘campaign period’ in order to provide a more comprehensive delimitation of the activities that amount to campaigns relative to the respective electoral offences under the Elections Act.

6.2 The Abuse of State Resources during the Campaign Period

The Constitution provides that the electoral system is based on democratic principles, including among others free and fair elections, which are free from improper influence or corruption. Section 68 (1) of the Elections Act provides that no candidate, referendum committee or other person shall use public resources for the purpose of campaigning during an election. According to Section 68 (6) of the Elections Act, a member of IEBC or any person designated by the Commission “*shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.*” Section 68 (7) provides that a candidate, who is convicted of using public resources in campaigns and repeats the offence shall be disqualified by the IEBC and shall not be eligible to participate in the on-going election and the next election. Additionally, such a person shall also be disqualified from holding any public office.

To protect public resources from misuse and ensure that public servants with intentions to contest in the General Elections do not have undue advantage over their opponents during the campaigns, Section 43 (5) and (6) of the Elections Act stipulates that such officers should have resigned from the said positions (6) months before the election or risk being disqualified from contesting any elective seat. For the March 2013 general elections, all the prospective aspirants

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were therefore required to have resigned by September 4, 2012. However, the President, the Prime Minister, the Deputy President, and Members of Parliament, were exempted from this provision in order to facilitate a smooth process of transition.¹¹⁴ It is on this basis that the Kenya Youth Parliament sought the High Court's intervention in the determination of this matter *Charles Omanga & Another vs. IEBC & Another, High Court Petition 2 of 2012*.¹¹⁵ The court's decision was that public officers cannot have one leg in the public service and another at their elective area. The Law was designed to aid them make up their minds on where they want to maximize their energies. Seven months before the election date is sufficient time for them to prepare themselves to meet their fate at the election box. A longer period or a shorter period would be unreasonable.

Pursuant to these legal provisions, IEBC issued a Legal Notice on January 17, 2013 warning state officers not to use government resources in the campaigns. The Notice read in part:

The commission hereby gives notice that further to the provisions of section 68 (2) (7) of the Elections Act any candidate, who is a state officer, an employee of a statutory

corporation or a company in which the government owns a controlling interest is required to state the facilities attached to him/her or any equipment normally in their custody by virtue of that office.

The IEBC gave all public officers contesting in the March 2013 general election two weeks to declare all public facilities at their disposal by virtue of the office they held. The notice went further to warn the non-compliance state officers that: *"Take further notice that a person who fails to comply with this notice commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or both."*¹¹⁶ Other State organs such as the CAJ made their efforts to forewarn and stem the misuse of public resources, but to no avail as politicians and their supports still engaged directly or indirectly in the same electoral offence. For example, on February 16, 2013, the CAJ, through its Chairperson Otiende Amollo, said public servants who used or misused public resources for the benefit of any particular party were culpable of abusing their powers. Towards this, the Commission trained and dispatched 50 monitors to observe the elections with a view to make contributions towards protecting the credibility and integrity of the electoral process as a whole as well as to

114 See: www.iebc.or.ke/index.php/media-center/press-releases. Accessed on March 15, 2013.

115 Charles Omanga & Another v Independent Electoral and Boundaries Commission & Another [2012], eKLR dated and delivered on August 2, 2012, Isaac Lenaola, J http://kenyalaw.org/CaseSearch/view_preview1.php?lnk=78334049888508882867117. Accessed on March 15, 2013.

116 Francis Mureithi, "IEBC warns candidates over state resources" in the Star posted in <http://www.the-star.co.ke/news/article-103154/iebc-warns-candidates-over-state-resources>; on Thursday, January 17, 2013 - 00:00. Accessed on March 14, 2013.

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ensure the accountability of public officers during the electioneering period.

Despite the foregoing efforts, KHRC recorded several incidents of abuse of state resources, including:

- a. Abuse of state resources by at least five senior Government officials who were in the presidential race and as such, had easy access to State resources due to their positions and influence in and across the Public Service.

They included the Vice-President Kalonzo Musyoka, Prime Minister Raila Odinga, Deputy Prime ministers Uhuru Kenyatta and Musalia Mudavadi and Assistant minister Peter Kenneth. Moreover, MPs who were ministers continued to enjoy these facilities until a new government was formed after the March 4, 2013 general election.



GK Passat parked at TNA-URP NDC at Kasarani (Source: KHRC Monitors, 2013)

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GK Toyota at Uhuru Park CORD rally (Source: KHRC Monitors, 2013)

- b. On February 21, 2013, the CORD Coalition wrote to IEBC accusing the then Head of Public Service Francis Kimemia and Mutea Iringo, the then Permanent Secretary for Provincial Administration and Internal Security of campaigning for the Jubilee Alliance and its presidential candidate using state resources. However, IEBC chairperson, Isaack Hassan indicated that the Commission was yet to summon them and that its Code of Conduct Enforcement Committee had given the two a chance to respond in writing before the said Committee made a decision on the issue. As was seen in news carried by some media houses after the end of the 2013 general election, the Office of the Director of Public
- Prosecutions (DPP) cleared them of any impropriety¹¹⁷.
- c. Instances of motor vehicles bearing government number plates in both CORD and Jubilee rallies in either Nairobi or other venues were captured on camera by the KHRC. The KHRC did take issue with relevant authorities but these efforts were in vain. For example, the KHRC wrote a letter to the Registrar of Motor Vehicles, for verification of number plates that had been affixed to vehicles that had government insignia on their mirrors and windows. What followed a couple of weeks later was a response urging the KHRC to comply with minor technical formalities

¹¹⁷ For further details, please see: <http://www.citizennews.co.ke/news/2012/local/item/8941-dpp-throws-out-cord-election-rigging-complaint>

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relevant to the request and refer the matter to another state agency.

Often, government vehicles used in campaign rallies would be disguised with civilian/private number plates to avoid detection. The rampant and illegal misuse of state resources was largely facilitated by the following inefficiencies:

- Failure by IEBC to fully monitor and hold to account those responsible for misuse of state resources and offices,
- Inadequate coordination between the different government Commissions and institutions mandated to ensure accountable use of state resources, and
- Difficulties in isolating and separating the official from private use of government vehicles especially with members of the Executive vying for different positions.

6.3 Conclusions and Recommendations

The abuse of public resources and state offices in the process of political contest should raise significant questions about the party's capability of respectfully and transparently applying state resources once at the helm of government. The criminal conduct, which should have rightly secured for the responsible parties a disqualification from contesting the elections, was largely ignored or overlooked by the very

government institutions that were meant to curb the said illegal acts.

To secure observance of the rule of law by all, breaches of the law must be seen to be penalized swiftly and efficiently, without favour against those responsible for the infractions regardless of status. KHRC, in the interest of preserving the integrity of the electoral process and securing public resources against abuse during electoral periods, therefore recommends as follows:

- i. IEBC and CAJ should put in place concrete programmes and resources to monitor and ensure accountability in the use of state resources and offices at all times,
- ii. the Public Service Commission should ensure professional, impartial and ethical conduct for public officers in the context of elections and campaigns,
- iii. the executive should refrain from the temptation to exploit its incumbency and limit the use of state resources to provision of security to state officers who deserve such privileges during the campaigns among other political events, and
- iv. Organizations involved in the observations of elections should conceptualize and implement tools and programmes that will ensure effective monitoring and timely response to misuse of state resources and offices during the electioneering process.

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6.4 Election Day

KHRC deployed various teams to monitor the voting process. Amongst the teams were our 57 monitors, who were deployed in their respective counties together with KHRC internal observers. The KHRC Monitors and observers arrived at their respective polling stations as early as 5 a.m. to witness the preparation process as well as the time the actual voting started. They later moved to different polling stations in their assigned areas.

6.4.1 Opening of Polling stations

According to the elections general regulations of the Elections Act, Regulation 66 (1), voting should have commenced at 6 a.m. in the morning and have been concluded at 5 p.m. in the afternoon on the polling day. However, the IEBC later announced that there would be an extension of time in compensation for the late commencement of polling in areas where there had been delays.

Many voters queued hours before sunrise to cast their ballots prior to the actual opening of the polling stations. Voters started queuing as early as 3 a.m., three hours before the official opening time at polling stations.

This was commendable as it proved that Kenyans were eager to exercise their democratic rights through the process of suffrage. Though a number of polling stations were observed to have opened fairly late but the majority opened at least at or

a little after 6 a.m., Highway Secondary School Polling Station, Starehe Constituency, Nairobi County,¹¹⁸ reported they waited for party agents in order to witness the sealing of ballot boxes

In the polling stations where opening was delayed, KHRC observed that in most cases the delays were the result of the late arrival of party agents required to witness the sealing of the ballot boxes, malfunctioning EVID kits and the late arrival of IEBC voter materials. Among the polling stations that experienced excessive delays was Mpirani Primary School Polling station, Kinango Constituency, Kwale County which opened at 12 noon.¹¹⁹ This was occasioned by the late arrival of IEBC officials together with the voter equipment after 10 a.m.

6.4.2 EVID Equipment Malfunction

On the day of polling almost every element of the voting process was affected by shortcomings in divergent ways. The much touted electronic voter identification system was no exception. As is now common knowledge, many polling stations experienced problems with the technical/electronic aspects of the exercise – a fact that was well captured by the media.¹²⁰ Numerous polling stations reported complete failure of the electronic voter identification systems, forcing polling officials to revert to manual verification

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120 "Poll kit hitches delay voting for hours" by the *Daily nation online* which was published on Tuesday March 5, 2013 <http://elections.nation.co.ke/news/Poll-kit-hitches-delay-voting-for-hours/-/1631868/1711468/-/15kbwqjz/-/index.html>

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for significant portions of time. This was due to a variety of reasons, the most common being password failures and the lack of power due to faulty or uncharged laptop batteries.

Even where the EVID systems did not totally fail, their ability to identify and verify registered voters proved at times to be ineffective. According to the Elections Act Regulations 69 (1), before issuing a ballot paper to a voter, an election official was obligated, in the case of an electronic register, to require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the image has been retrieved.

However, in some cases, voters who claimed to have been duly registered, as evidenced by their registration confirmation slips, were not able to vote because their details could not be verified during the day of voting. This was reported in various polling stations such as in Gusii Stadium polling station, Nyaribari Chache Constituency, Kisii County; Matasia Primary School; Saint Paul's Primary, Mavoko Constituency, Machakos County).¹²¹ One man in Kisii Primary polling station, Nyaribari Chache Constituency, Kisii County was not able to vote because the picture appearing on the EVID profile was not his.

The challenges of identification and verification affected both the manual and electronic register as reports grew of instances where voters, upon presentation of their identity cards, could not

be located in the electronic and/or the manual register, raising questions about the IEBC's voter registration confirmation exercise and the possibility of interference with the voter register. A few of the stations forced to revert to manual verification found the registers were not in full chronological alphabetical order making the process of verification difficult and time consuming.

Notably, there appeared to be a breakdown in communication between the IEBC officials at the polling stations and those at the head office during the polling process, as it took quite an unreasonably long time for the officials at the IEBC office to respond to queries from the ground. This wasted a lot of time and in so doing the voters got more agitated because of time wastage. For instance in some polling stations where the BVR kit failed, polling officials had to wait for a long time before receiving confirmation as to whether or not to proceed with the Manual register, during which time voters grew increasingly anxious and aggravated.

In Imara Polling Station, Embakasi Central Constituency, Nairobi County one of the poll clerks appeared to be unfamiliar with the computerized system, which later collapsed. At Kamiti Primary School, Buuri Constituency, Meru County, the EVID and manual list did not correspond, so IEBC clerks produced a handwritten list of names which were pinned at the entrance.¹²² The most

121 Information from KHRC team of observers.

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serious of these incidents was reported at Thika Stadium, Thika Town Constituency, Kiambu County, where the Presiding Officer refused to allow approximately 725 voters to vote because the station was using the manual register and their names were not on the list. The PO said he was too tired to listen to their protests. KHRC, Independent Medico-Legal Unit (IMLU) and KNCHR observers tried to intervene and assist the situation.

6.4.3 Poor organisation of polling stations

Signage and the alphabetical streaming of voters caused significant problems across the country. Polling stations had set up slightly different methods; some were organised by first name and others by surname. In Highway Secondary School Polling Station in Nairobi and Ongata Rongai open air market polling station in Kajiado North Constituency, IEBC officers were reported to be contradicting each other, with some saying the streams were alphabetised by first name, others by surname, and others by initials. At the Labour Office Polling Station, Starehe Constituency, and Kawangware Primary polling station, Dagoretti North Constituency, Nairobi County, people were shunted from stream to stream looking for their name on the register.

The confusing set up of streamed queues was exacerbated by the absence of queue clerks in some stations. Verification of voters created serious problems across the country, as manual verification slowed the already lengthy voting

process. For example, the queue at Moi Avenue Primary School, Nairobi Central was reported to be four kilometres long. After the station closed at 5.25 p.m., voters still in the queue were allowed to vote; however, in some streams, voters had only to present their identity cards to be allowed to vote, without having their names verified and crossed off the manual register.

6.4.4 Accessibility of Polling Stations

Many polling stations were not fully accessible to people with disabilities contrary to Section 30 of the Persons with Disabilities (PWD) Act of 2003. In any event, attempts to provide equitable access to voters with particular needs would have been difficult in many cases. Polling stations placed some streams up flights of stairs, down steep drive ways, and on very uneven grounds, which made access by crutches or wheelchair difficult or almost impossible. There were no provisions for sign language interpreters nor were the ballot papers designed to accommodate braille readers at all the polling stations visited by KHRC monitors. Of course, standing in the sun on the queue for long hours was also a significant impediment to some voters.

Voters requiring assistance from the POs created extra stress levels on a system which was already overstretched, such as in Bomondo polling station in Nyamira,¹²³ where there were too many voters requesting for assistance from the PO and in Nongo Polling Centre, Kajiado,¹²⁴ where IEBC

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¹²⁴ KHRC

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officials were overwhelmed by similar requests. As a result, party agents were 'assisting' voters, and some were soliciting for votes from the queue – an act that is contrary to Regulation 72(2) of the Elections Act which provides that in instances where the voter asking for assistance is not accompanied, the presiding officer shall assist such a voter, in the presence of the party agents.

However, there were instances where polling officials took proactive measures to secure the ease of voting for persons with disabilities as well as pregnant and nursing mothers. In Ziwani Polling Station, Kariokor Ward, for instance, there was a polling clerk who was picking out from the queue pregnant women and persons with disabilities and taking them to a dedicated queue for voting. This was laudable.

6.4.5 Voter Behaviour

The behavior and demeanor of voters on voting day was to a significant extent an exemplification of patience and perseverance. Nonetheless, the significant delays in voting, and the obvious confusion in some polling stations significantly contributed to feelings of frustration and anger amongst voters in some areas. The impatience caused by the delays facilitated some rather unfortunate behavior among queuing voters. For example, there were numerous cases where babies were being 'hired out' to women to assist them to jump the queue by passing themselves off as nursing mothers.

In some areas, this caused voters to heckle pregnant women or women with infants who were allowed to cut the queues because of their condition. In Kawangware Primary polling station, Dagoretti South Constituency, Nairobi County, a mother was commanded by the crowd to breastfeed the infant she was carrying so as to prove she was the biological mother. The security officials had to intervene and she was later allowed to vote.¹²⁵ In other polling stations, the IEBC clerks were compelled to use the indelible ink on the foreheads of the infants accompanying a particular voter to avoid 'babies for hire' voting trend

In other incidences voters, growing increasingly agitated by the delays, became overly suspicious of the causes thereof. A Presiding Officer in Bidii Primary School polling station, Makadara Constituency, Nairobi County was slapped by a voter when the PO was thought to be giving preferential treatment to some voters. Police stepped in and diffused the situation.

6.4.6 Impropriety by aspirants and agents

In monitored stations, several instances of impropriety on the part of party agents were observed. Aspirants, their families, and agents attempted to influence voters. In Mabera Primary School polling station, Kuria West Constituency, Migori County, some party agents were 'assisting' voters and telling them to vote for particular aspirants. In the same station, three clerks were

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relatives of an aspirant, although the Deputy Presiding Officer was insisting that he be the only one to assist voters.¹²⁶

In Nyakoe Tea Buying Centre Polling Centre in Kisii, party agents got into an altercation with IEBC staff. IEBC officials complained there were too many observers for aspirants in the polling stream. In one stream at Suneka Baraza Hall, Bonchari Constituency, Kisii County party agents were competing to influence voters.¹²⁷ Voter bribery was observed in Bwengi East where an aspiring ward representative, Mariba (aka Kirinyaga) was handing out money to supporters.¹²⁸

One instance of ferrying voters was also observed where the GNU Thika Township ward aspirant Robinson Ndegwa was ferrying voters for Mitubiri ward, Murang'a country, to Thika Stadium using a Volkswagen Kombi omnibus KAV 667.¹²⁹ Two government cars were also seen distributing food in Taita-Taveta County. The car (GK A911 U, PB NO 34/3/20/13) was impounded by the public at approximately 1 a.m. on March 4, 2013. An aspirant Naomi Shaban was seen at the police station pleading with the OCPD to release the vehicle. A second government vehicle from the Ministry of Lands, vehicle GK 196 C, was also seen distributing food.¹³⁰

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6.4.7 Security Administration

The management of security by the state security agencies in the lead-up to during and following the elections was, generally speaking, commendable. On the whole, the national security services were able to adequately maintain security during the polling process and assisted significantly in averting potential threats during the polling process.



These SSU officers separating supporters of two rival aspirants in Embakasi West Constituency (Source: KHRC Monitors, 2013)

There were several reports of violence, criminal activity and disorder against which the security services effectively intervened. For example, the chief campaigner for Stephen Kariuki – a candidate for MP, Mathare Constituency – was arrested for being in possession of marked ballot papers in favour of the then aspiring MP as well as for the aspirant for the County Representative seat for Huruma Ward, Peter Owera Oluoch. The individual was taken to Mathare police station and later released after paying an amount of KES 100,000.¹³¹

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In Githurai Primary School polling station, Roysambu Constituency, Nairobi County, rowdy youths attempted to break down the gate as they wanted to be allowed to vote at 3 a.m. They alleged that the clerks were conspiring to rig the elections. However, the GSU was called in and swiftly managed to contain the angry youths.¹³²

At St. Monicah Polling Station, Kajiado County, at around 8 a.m. chaos ensued as voters got agitated after waiting since early morning to commence voting. The crowd tried to push down the gate of the polling station. The intervened and contained the unruly crowd. The incident however delayed voting by a full hour.

There were some attempts by alleged MRC suspects to raid Likoni Police station on Sunday 3, March 2013 at around 9 p.m. but the plan was botched after police were informed. On the same night at around 4 a.m., suspected criminals who are also believed to be MRC sympathizers invaded a recreational premise called the Makuti Club, owned by Timothy Mudachi in Mshomoroni near IFC polling station and torched it before fleeing. The proprietor claimed that he lost valuables worth between KES 80, 000 to KES 100, 000, and confirmed that he reported the matter to Nyali Police Station.¹³³

A radio presenter from Radio Victoria claimed he was instructed by an aspirant, 'Jared', vying for MP in Nyando to declare him the winner in Luo

at 11:30 a.m. After the announcement, Jared's supporters went to Ahero Multi-Purpose tallying centre to disrupt the tallying process, believing their candidate had won. The police moved in and used tear gas to disrupt the crowd. At the Centre, Jared's opponent, Outa was leading according to Returning Officer for Nyando Constituency.¹³⁴

However, a few incidences of insecurity in some areas proved to be critical. Two KWS officers were killed in Mwarakaya Ward, Kilifi South Constituency on election eve, as they were taking their supper at a café close to the District Officer's office.¹³⁵ Further, six people were killed on the morning of the election at Chumaini Secondary school, a tallying center for Kilifi North Constituency.¹³⁶

The attack on the security officers was believed to have been orchestrated by a separatist group referred to as the Mombasa Republican Council (MRC). Following the attacks, the former President Kibaki ordered the deployment of 400 additional KDF personnel to the coast. Nonetheless, the attacks had an adverse effect on voting as fewer voters turned up for voting in the affected areas in Kilifi County including Changamwe and Jomvu constituencies. Moreover presiding officers in these constituencies felt significantly insecure during the Election Day forcing some of the polling stations to be closed and transferred to safer areas.

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6.4.9 IEBC Positive Achievements

In the lead up to the elections the IEBC was relatively open and cordial in seeking partnership and providing assistance to civil society and other organizations vis-à-vis their interventions at various stages in the electoral process. The IEBC periodically sought consultations and support from civil society and also secured assistance for those organizations willing to participate in the electoral process. This was exemplified by the numerous local and international organizations permitted and facilitated to observe the elections by the IEBC.

The IEBC also managed to obtain the assistance and cooperation of many actors within the private sector especially from the media. Leveraging the remarkable good faith they had received from the public as well as the desire by most to avoid a repeat of the 2007—2008 poll skirmishes, the IEBC was able to bring state agencies, civil society and the public sector together to work collaboratively in their respective spheres towards promoting a peaceful election.

On the day of the election, a good number of polling stations actually opened on time and in some the biometric scanners were utilized all throughout the polling process, for instance Lavington Primary School polling station, Dagoretti North Constituency, Nairobi County and Kenya High School, Dagoretti North Constituency, Nairobi County. The polling station at Kilimani Primary, for instance, maintained the use of their

thumb scanners for identification though voters had to be crossed out in the manual register after voting.

Some POs did a commendable job of assisting the voters who needed assistance by doing it in a very transparent way in the presence of the party agents and observers. Some of the PO's such as Ambiyoh in Kuria West Constituency, Migori County were noted by KHRC observers for the transparent and amiable manner in which they assisted illiterate voters. The PO would call out the names of the aspirants to the voter in the presence of the agents and put a mark next to the aspirant the assisted voter mentions.

The elderly, pregnant women and people with disabilities were identified and provided with preferential assistance before they actually started queuing and guided by the security to a dedicated line in most polling stations. Furthermore, where the polling stations had opened late, the IEBC allowed for an extension of time to compensate for the delay. The polling stations had adequate security personnel who impartially and genially provided security and crowd control as well as assisted the IEBC officials in logistical and other poll related processes.

6.4.10 Conclusion

In conclusion, most of the polling stations managed to open on time with just a few opening a few minutes or hours late. The main cause of opening late included the malfunctioning of

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BVR kits; otherwise, everything would have run smoothly. The few cases of violence/ insecurity arose because the crowds at the polling stations were agitated after failing to vote early yet they showed up at the polling stations before sunrise. In many instances the security personnel had to step in to help in calming the crowd of which they did a commendable job.

6.5 Counting and Transmission of Results

6.5.1 Lessons from the 2007 Elections

Alongside an irreproachable voter registration exercise and campaigns free of disinformation and hate speech, the counting and tallying of votes is considered an essential element towards realizing a credible and acceptable election process.¹³⁷ The counting and tallying of votes requires the highest levels of transparency and integrity so as to yield results that are considered valid, accurate and thus acceptable to all stakeholders, especially the voters.

In its assessment of the 2007 elections, the IREC concluded that the transfer of constituency-level presidential election results and the tallying at national level were of low quality and actually unacceptable.¹³⁸ Some of the anomalies identified included the failure of electoral officials to fill in

or deliver the statutory forms that were meant to declare official results; discrepancies between the results declared at the constituency level and those declared at the National Tallying Centre; and excessive delays in the transmission of results to the National Tallying Centre.

It is such anomalies that contributed to the loss of public confidence in the electoral process and a subsequent dispute over the results. IREC therefore made the following recommendations in regard to the counting and tallying process:

- Integration of the various descriptions of the entire counting and tallying procedure into one principal document that must be adhered to.
- Development of an integrated and secure tallying and data transmission system, which allows for computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data) to the national tallying centre and the integration of this results-handling system in a progressive election result announcement system.
- Allowing the media full access to the new system.
- Allowing ample time for the verification of provisional results so that they are only declared official or final once there is no risk of errors or substantive objections raised¹³⁹.

¹³⁷ Government Printers (2008), Report of the Independent Review Commission on the General Elections held in Kenya on the 27th December 2007, Nairobi, p.115

¹³⁸ Ibid, p.127

¹³⁹ Ibid, p.138

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6.5.2 2013 Framework: KHRC Observations

The determination and declaration of electoral results is guided by Section 39 of the Elections Act, 2011 which identifies the IEBC as the sole institution responsible for the determination, declaration and publication of the results of an election immediately after the close of polling. Prior to the declaration of final results, the IEBC is permitted to announce provisional results of an election in the order in which the tallying of results is completed. The procedural framework for the entire process is elaborated within the Elections (General) Regulations, 2012.¹⁴⁰ The KHRC made the following observations:

- a. *Closure of polling stations:* The various logistical missteps witnessed at the start of the polling process (malfunctioning EVID kits, late delivery of voting materials, poor demarcation and marking of voter streams among others) had the inevitable effect of causing polling stations to close late.
- b. *Vote Counting:* In most polling stations monitored, the counting process had started by 1.00 a.m. on March 5, 2013. In most Constituency Tally Centres the results started trickling in the early morning hours. This inevitably had an irreparable effect on the rest of the tallying at the county and national levels.
- c. *Public Expectations:* From the foregoing, it became apparent that the IEBC would be unable to live up to its previously stated commitment that Kenyans could start expecting the results for the MPs by 9 p.m. This delay can be attributed to the fact that in some polling stations voting extended into the night. This had been foreseen by IEBC, which had indicated that it would allow voting to continue into the night especially in areas where polling stations were opened late so that all registered voters could vote.¹⁴¹ In some polling stations in Westlands Constituency, as at the official closing time (5:00 p.m.) the queues were still quite long with about 200 people waiting to vote.¹⁴²
- d. *Violations of the Counting and Tallying Rules:* In some instances the KHRC observers noted that Regulation 75(2) on the sequence of the tallying was violated, like in St. Teresa polling station in Mathare Constituency, where the Presiding Officer announced the results for the members of the National Assembly before declaring those of the President.¹⁴³
- e. *Signing of the required declaration forms:* The electoral laws and regulations require that any party agent present at the counting and tallying stations should be allowed to sign the Form 34, 35 and 36, containing the declaration of results as announced by the presiding officer at the polling stations and by the returning officer at the constituency level respectively. This in effect signifies the acceptance of the results by the candidates' agents present. The signification of the acceptance of results

140 See Part XIII, Regulations 73-87

141 <http://elections.nation.co.ke/news/-/1631868/1692100/-/p7ni8az/-/index.html> accessed on March 18, 2013

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by the candidates or their agents was such a crucial part of the regulations concerning the declaration of results that it was required of the presiding officer to indicate the fact and reasons for any refusal to sign the declaration forms by the candidate or agent as well as the failure to sign due to their absence.¹⁴⁴

KHRC noted that in majority of the polling stations the official declaration forms were either insufficient for dissemination to all agents present, not signed by most agents, or not issued to any of the agents. This in effect defeated the intent of the process of filling declaration forms as a form of verification of the vote count.

a. *Tallying Centres:* The queues at the constituency tallying centre were extremely long as each Presiding officer had to queue with all the ballot boxes for their stream in order to present their results to the Returning Officer. This could be ascribed to the fact that vote counting began late and almost at the same time, hence most of the results started streaming in at the same time on the morning of March 5, 2013. This was observed at Busara Primary School, the constituency tally centre for Embakasi West and the East Africa School of Aviation, Embakasi East tally centre. At the Westlands Constituency Tally Centre the queue was extremely long by the time the KHRC observer team got there at about 11.00 a.m.

- b. *Electronic transmission of provisional results:* In most of the polling stations there was reported failure of the electronic transmission system from the first day on March 4, 2013. Regulation 82 clearly required the transmission of results in electronic form by the PO's to the Returning Officer (RO) at the tallying center before the ferrying of the actual results of the election to the respective ROs. The regulations while obligating the POs to transmit the results electronically left it to the IEBC to determine the means of the transmission. The purpose of this procedure was to secure the expedient transmission of provisional data on the outcome of the results at each polling station which would be later verified by the duly completed and signed forms in accordance with Regulation 79.
- c. The failure of the preferred data transmission method did not limit the IEBC from opting for an alternative method of electronic data transmission. That the IEBC had not secured and could not secure a back-up system of electronic data transmission illustrated an inordinate laxity in the preparations for the elections. The situation was compounded further by the revelation that IEBC had ignored advice from its chief IT expert who had warned against the risks of running into the problems that it experienced.¹⁴⁵
- d. *IEBC Pronouncements:* After the official announcement of the final results, despite

¹⁴⁴ Regulation 79 (2) – (6), Elections Act, The Elections (General) Regulations, 2012

¹⁴⁵ <http://www.nation.co.ke/News/politics/IEBC-bought-faulty-kits-despite-warning/-/1064/1722994/-/lf5lxw/-/index.html> accessed on March 19, 2013

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the lingering questions, IEBC began to run a media campaign asking Kenyans to accept the results of the elections.¹⁴⁶ Such advertisements, following the announcement of results that were bound to be challenged in a closely and bitterly contested election, appeared to disregard the legitimate concerns of those who would be aggrieved or upset by the decision. The IEBC ideally stand as an impartial umpire to the electoral contest and while it is within its jurisdiction to defend its processes and activities, the suggestion that the election results be accepted amidst much acrimony over the veracity of the same – a situation exasperated by the clear procedural failures witnessed throughout the polling and tallying process - was ill-conceived and premature and contributed to the appearance of partisan bias by the IEBC toward the announced winners.

6.5.3 Conduct of the Media during Tallying

The media must be commended for its agenda-setting role prior to the elections. It called on Kenyans to come out and vote in large numbers, pointed out challenges that the IEBC was likely to encounter after monitoring the mock elections and called on Kenyans to be peaceful and patient when waiting for the results.

During the elections period, the fourth estate was expected to provide accurate information to the public, interrogate misgivings or complaints from parties involved and be non-partisan in the

process. However, during the tallying process, the Kenyan media selectively failed to highlight the misgivings surrounding the electoral process. The media, at the National Tally Centre, failed to raise fundamental questions with the IEBC even when the opportunity presented itself. The analytical aspect of the media, which Kenyans have been accustomed to in the recent past, was clearly lacking during these elections.¹⁴⁷ Clay Muganda posits thus:

Instead of being a watchdog, the media has turned into a partner, a collaborator of the Government, a feat which the latter achieved – knowingly or inadvertently – by continuously heaping praises on the former as was witnessed during the recent elections, or with semi-autonomous Government bodies incessantly dishing out awards to the media, so much so that our work is nowadays not for viewers, listeners or readers, but for media awards panelists.¹⁴⁸

The local media swiftly fell into the habit of brushing off serious misgivings on the tallying process raised by one of the coalitions' parties while there was on-going debate on the social media and international media particularly by BBC on the same.

¹⁴⁶ <http://www.nation.co.ke/News/politics/-/1064/1721284/-/b00y4/-/index.html> accessed on March 19, 2013

¹⁴⁷ See <http://latitude.blogs.nytimes.com/2013/03/14/erring-on-the-side-of-caution-kenyas-media-undercovered-the-election/> accessed on March 19, 2013

¹⁴⁸ <http://www.nation.co.ke/Features/DN2/-/957860/1724018/-/d4maus/-/index.html> accessed on March 19, 2013

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6.5.4 Tallying Safes

The 2007 elections were marred by malfunctions in the voting procedures not only in the polling process but also in the tallying process. The failure of effecting the laws, procedures and mechanisms that had been prescribed to secure accountable and transparent polling and tallying processes were yet again at the heart of the 2013 elections notwithstanding that the reform in the electoral laws were meant to cure the identified defects.

Article 86 of the Constitution required the IEBC to ensure that at every election, whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

By Section 109 of the Elections Act, the IEBC was given the power to make regulations prescribing for most aspects of the electoral process including the procedure to be followed in vote counting.¹⁴⁹ This power was to give effect to the Constitution as well as the Elections Act and was to be based on the general principles and standards contained in the Constitution and the Act.¹⁵⁰

Concordantly, the Elections Regulations as enacted provided for the processes and mechanisms for the counting, tallying, and transmission of votes as well as for the verification of results. These processes and mechanisms were designed to ensure that the greatest level of accuracy and transparency was availed and applied during the counting and tallying processes. However, the question of accuracy and transparency would soon be jeopardized by the logistical miscalculations and operational failures that would in effect make the process inscrutable and defeat the requirements of Article 86 of the Constitution.

In the design of the election regulations that delimited the processes by which the voting and the tallying would be undertaken, several provisions devised to prevent the interference with the accurate tally and to provide mechanisms for verifications were codified as fail-safes to the true electoral outcome. The fail-safes were essentially the vigilance of the counting clerks; the attestation of party agents; the electronic transmission of provisional results; and the immediate public publication of results at polling station level.

6.5.6 IEBC Officers' Fatigue

After the complications that had been caused by the widespread failure of the electronic voter identification system, voting had proceeded using the manual voter register. This had the effect of prolonging the voting process and resulted in the late closure of polling stations in areas that had

¹⁴⁹ Section 109 (1) (p) of the Elections Act (No. 24 of 2011)

¹⁵⁰ Section 109 (2) (a) and (c) of the Elections Act (No. 24 of 2011)

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witnessed a high voter turnouts or where voting started late. Some of the presiding officers and clerks who had been working since 5:00 a.m. on March 4, 2013 proceeded with hardly any breaks or meals into the late hours of the night, and on many occasions, well into the morning of the next day, with the tallying process.

The fatigue experienced by most of the clerks and tallying officers within the polling stations significantly reduced their vigilance. In some cases EPMC monitors noted that tallying clerks overcome by exhaustion were relying on party agents to assist with the counting process in some streams. The exhaustion of polling officials also saw the failure of clerks in some polling stations to apply the process of tallying laid out the regulations i.e. that the tallying process begin first by counting the unused and spoilt ballot papers in accordance with Regulation 73 of the Elections Regulations.

6.5.7 Ignorance and Indifference of Party Agents

At the end of the counting of the presidential elections, the PO of the polling station in question was required to place the initial vote count in Form 33, the Candidate Vote Tally sheet. He/she would, after addressing any objections to the vote tally, prepare Form 34, Declaration of the Presidential Elections Results, for the polling station and Form 35, Declaration of National Assembly, County Woman Representative, Senate, County Governor,

County Assembly Election Results, for the polling station.

By Regulation 79 of the Elections Act, the party candidates or their authorized agents that were present at the tally would be entitled to sign the declaration form averring that the results of the election represented within each declaration form was true. Conversely, the party agents were also entitled to decline, appending their signature to the declaration form and providing reasons for their refusal to sign.

The party agents would thereafter be entitled to copies of the signed declaration forms and copies of the said declarations were to be affixed at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station. These measures were meant to ensure that results from every polling station had been independently verified with the main instruments of verification being the party candidates or their agents as well as the public.

Following the tallying within some polling stations observed by the EPMC monitors, it was noted that many of the authorized party agents had little or no understanding of their role and entitlements or showed little care for the declaration forms with some failing to sign the same and others failing to secure copies of the signed declaration forms. Consequently, the capability to swiftly dispense with disputes

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over election results in a manner that satisfies all the parties and the public was significantly diminished.

This situation was exasperated by the severe inadequacy of official copies of the declaration forms that were available to the party agents. KHRC observers were often times informed by polling agents that there were only enough declaration forms to provide a single copy to the numerous agents attending the voting process in a given polling or tallying station. Agents were sometimes asked to secure a for themselves a photocopy of the declaration forms in spite of the explicit requirement under regulation 79 and 83 obliging the Presiding and Returning Officers to supply the party agents with the respective declaration forms.

6.5.8 Failure of the Transmission System

Regulation 73 to 81 of the Elections Regulations requires the counting, separation, sealing and packaging for transmission of all ballot papers (whether used, spoilt, rejected, unused or valid) by the POs in each polling station. However, the transfer of the physical ballot material to the Returning Officer at the constituency tallying centre is required to be preceded by the transmission of the results from the polling station in electronic form vide Regulation 82 (1).

The requirement for electronic transmission serves to provide the Returning Officers an immediate source of secondary data of the

confirmed results from the tallying at the various polling stations, and which could later be verified using the physical ballots. It allows the returning officers to swiftly provide provisional results while awaiting delivery of the physical ballot papers.

During the process of tallying, the electronic transmission system that had been preferred by the IEBC failed almost *in toto*. Having failed to resort to a back-up electronic transmission system, the IEBC was forced to act outside the express provisions of its own regulations that mandated the electronic transmission of the results without the option of eschewing in the event of a failure of the transmission system.

Nevertheless, Regulation 82 (1) provides that the presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in *electronic form, in such manner as the Commission may direct* (emphasis added). This means that the IEBC was at liberty at any time to change the mode of electronic transmission to any other mode of electronic message delivery in order to fulfil the requirements set out by the regulation.

With the failure of the electronic voter recognition during voting and the failure of the electronic results transmission system, the IEBC had, in the less than 36 hours since the opening of the polls, lost two key electronic information retrieval systems and the advantages in terms of time

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saving as well as data verification. The Commission had but to resort to the manual systems of result verification that had had been the subject of much contention in the previous elections.

6.5.9 Failure to Affix Forms 34 and 35

The public was to act as the fourth fail-safe. Regulation 79 (2) (d) required the PO to affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station. This was to be done as soon as the results for the particular polling station had been tallied and declaration forms 34 and 35 signed by the PO/DPO and the Party Agents.

The placing of the results in a public place at the polling station would allow the members of the public in the area easy access to the results as soon as they had been tallied and provide a further source of data verification regarding the results of the particular polling station. However, in many of the polling stations, Declaration Forms 34 and 35 were never affixed as required in Regulation 79 (2) (d). Consequently, in the event of a dispute over the results of a particular station the public would be unable to assist with verification of the result as tallied at the polling stations.

6.5.10 The National Tallying Centre

The vote tallying process started immediately after the polling stations were closed in most areas.

The results of the elections for the six elective positions were to be simultaneously transmitted electronically¹⁵¹ by the presiding officers in each polling station to the Constituency Tally Centre, County Tally Centre and the National Tally Centre which was located at Bomas of Kenya.¹⁵² The final results for the Member of Parliament would be announced at the Constituency Tally Centre, while those of the Senator, Woman Representative and Governor would be announced at the County Tally Centre. The final results of the presidential election would be announced at the National Tallying Center by the Chairperson of the IEBC as the Returning Officer for presidential elections.

The Electronic Voter Transmission failed in almost all the polling stations with only 13,000 polling stations able to transmit the results electronically. IEBC then had to resort to manual tallying of the votes, following what they termed as “technical challenges” that caused the malfunction of the main server.¹⁵³ Before the IEBC admitted that the electronic vote transmission system had failed, there was a call by politicians from the CORD coalition alleging that there were problems noted with the national tallying process.¹⁵⁴ CORD claimed that the results transmitted had been doctored

151 <http://elections.nation.co.ke/news/-/1631868/1683804/-/p897b4z/-/index.html> and <http://www.the-star.co.ke/news/article-106102/iebc-reveals-how-electronic-vote-transmission-will-work> accessed on March 16, 2013

152 Hereinafter referred to as “Bomas”

153 <http://www.citizennews.co.ke/elections/index.php/elections-news/item/2251-> accessed on March 16, 2013

154 <http://www.nation.co.ke/News/politics/-/1064/1713824/-/ayfxtk/-/index.html> and <http://www.nation.co.ke/News/politics/-/1064/1713824/-/ayfxtk/-/index.html> accessed on March 16, 2013

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and cited instances where the number of votes cast exceeded the number of registered voters, for example in Bureti, Kajiado South, Runyenjes, Wajir North and Kathiani constituencies. The Coalition also raised doubts as to the integrity of the tallying process and demanded that counting start afresh using the primary documents from the polling stations. These allegations were refuted by the IEBC Chairperson stating that such anomalies would have been noted by IEBC officials who would have cancelled the results.¹⁵⁵

IEBC then embarked on manual tallying of the results using the Form 36 which contained the votes for the presidential elections as tallied at the constituency level. In addition to this, it set up an audit team that comprised of IEBC officials, which verified the results before the same were announced.¹⁵⁶ Upon the adoption of manual tallying using Form 36 from the constituencies, there was a significant reduction in the number of rejected votes – by a margin of over 200,000 votes. The difference was attributed to an error in the IEBC in-house developed database, which according to IEBC had multiplied the numbers tallied by a factor of eight.¹⁵⁷

The IEBC commissioners announced the results after their verification process which they asserted

involved the chief agents of the main political parties involved. This internal verification was attributed to as the reason for the announcement of the results beyond the timeline that IEBC had set for itself. While a number of observers had been accredited to observe the national tallying process, hardly any were allowed into the tallying hall where the results were being verified and most were constrained to wait for the official public announcements by the IEBC commissioners. In so doing, the IEBC lost the observer as a source of verification and authentication of the veracity and integrity of the tallying process and outcome.

As the announcements of the presidential results for each constituency were made, certain parties present at National Tallying Center were dissatisfied with the tallying process and raised their concerns in between announcements over inconsistencies witnessed in the updated figures place on large projector screens at the tallying center's main hall. KHRC observers present witnessed the protestations and some of the inconsistencies in the updating of results. For instance, KHRC observers noted that the figures displayed on the screen at one time changed thrice when the commissioners were responding to the issue raised.

During the tallying period KPTJ wrote to the IEBC raising concerns as to the credibility of the tallying process and demanding that the tallying be redone on the basis of primary documents from

155 http://vote.electionkenya.co.ke/videos/Kenya-Elections-IEBC-rejects-Kalonzos-vote-tinkering-claim#UUQaLIH5_4 accessed on March 16, 2013

156 <http://www.cisaneWSafrica.com/?p=9348> accessed on March 16, 2013

157 <http://www.nation.co.ke/News/politics/-/1064/1714132/-/ayghod/-/index.html> accessed on March 16, 2013

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the polling stations.¹⁵⁸ IEBC never responded to the letter and thus AfriCoG¹⁵⁹ filed a petition at the High Court seeking to get orders from the court to halt the tallying process and raising concerns as to its validity.¹⁶⁰ The petition further stated that the failure of the electronic process compromised the tallying, and urged the court to order that the same be done afresh through verification of results from the primary forms from the polling stations, namely the Form 34 and 35. A three-judge bench, while dismissing the petition on the basis that the High Court had no jurisdiction to deal with the matters, noted that the case raised heavy issues which ought to be determined by the Supreme Court.¹⁶¹

On March 8, 2013, the IEBC held a press conference¹⁶² at Bomas aimed at explaining the tallying process. At the briefing, the electoral body admitted that the process was not easy but that all measures were being undertaken to complete it. It basically stated that the 47 counties had been divided amongst nine teams consisting of IEBC officials who received and verified the results from the constituencies and thereafter forwarded

them to the national audit committee, headed by deputy to the Commission Secretary. The CEO¹⁶³ stated that they would avail copies of all the results to the political party agents and others present at Bomas. Specifically, IEBC promised to provide eight copies of the document, containing forms 34 at the end or before the end of the process. At that time, IEBC asserted that it had published on its website these documents. However it was impossible to access the documents as efforts to access the IEBC official website were frustrated by the website's failure.

IEBC also admitted that there had been some disconnect between the results in the documents announced and those that were actually keyed into the database. The Chairperson of the IEBC stated that once this anomaly was noted the process was temporarily stopped so that the results keyed and displayed would match what was announced. He noted that two or three errors had been brought to his attention and he had given directions to the database administrators to rectify the same. Ostensibly referring to the errors perhaps pointed out.

The KHRC observers at Bomas noted that whereas the then IEBC's CEO Mr. Oswago indicated that he would be answering some questions and the technical questions would be answered by the chair, no answers were forthcoming in respect to one of the two questions asked. Hon Prof. Ayiecho Olweny asked a question with respect

158 http://www.africog.org/sites/default/files/KPTJ%20IEBC%20OPEN%20LETTER_07.03.13.pdf accessed on March 18, 2013

159 A Non Governmental Organization, that filed the case on behalf of KPTJ, a group of over 30 Civil Society Organizations

160 Africa Center for Open Governance v Isaack Hassan and Anor

161 <http://www.kenyanasianforum.org/site/a-short-summary-of-the-proceedings-in-the-case-filed-by-kptj-against-the-iebc-on-friday-8-march-2013/> accessed on March 18, 2013

162 The IEBC held several press conference/media briefings from Bomas, this was one of such that largely dealt with process issues as opposed. This should be distinguished from the announcement of results which was also done under media coverage.

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to the results presented for various candidates, noting that the figures given by IEBC did not add up and that there was a difference of over 23,000 when one added all the votes. He enquired whether it was right for IEBC to give those figures to the public yet they did not add up and cited this as amounting to misrepresentation. The IEBC declined to answer this question or even to take any more questions but instead directed that party agents should not ask any questions in the auditorium but should approach IEBC commissioners and raise their concerns.

The only question that the IEBC answered was with respect to a case that had been filed by AfriCoG¹⁶⁴ stating that the case had been dismissed with the implication that further comment was unnecessary. Be that as it may, the final tallying of the results was concluded in the late hours of the night of March 8, 2013. IEBC made the final declaration of results on the afternoon of March 9, 2013 and the Chairperson of the Commission, who is the Returning Officer for presidential elections, announced that Uhuru Kenyatta had won the elections with a total of 6,173,433, 50.7% of the votes cast and with over 25% of the votes cast in 32 counties. According to the declaration of presidential election results, Raila Odinga came second with a total of 5,340,546. The total number of votes cast was 14,352,545 with a voter turnout of 85.90%. The Constitution of Kenya 2010 at Article 138 stipulates that a candidate shall be declared elected as President if

he or she receives more than half of all the votes cast in the election and at least twenty five per cent of the votes cast in each of more than half of the 47 counties.

6.5.11 Recommendations

It was evident over the duration of polling and tallying that to a large extent, the processes, mechanisms, technologies and procedures that were to be applied by the IEBC to guarantee the credibility of the voting process failed. This had a debilitating impact on the public's confidence in the IEBCs capacity to serve as a fair and impartial umpire where closely contested elections are concerned. The failure of these systems means that the public was forced to take the IEBC at its word that the electoral outcome was above board and that the allegations against any electoral impropriety or the shortcomings of the IEBCs management of the elections were wished away as being without any foundation.

A comprehensive scrutiny through an independent and transparent forensic audit of the registration, voting and tallying processes may at this point be the only means of clearly identifying the full cause and impact of the many failure itemized here-above. If it is to restore public confidence, the IEBC must begin to accept its' significant shortcomings and publicly hold to account those responsible for the failures as well take such remedial measures as would guarantee non-repetition.

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To ensure that the polling, counting and tallying are conducted in accordance to the letter and spirit of the Constitution and the laws, the KHRC recommends the following:

- a. The mechanical hitches with respect to the EVID equipment should be resolved. There should be an inquiry on the cause of the hitches (in addition to that of the electronic transmission of results). Moreover, the IEBC should, in future conduct test-runs on all logistical aspects of voting and respond accordingly to forestall large-scale systemic failures as was observed.
- b. Political parties must begin to professionalize their operations especially as they relate to party agents. Moreover, efforts should be made to ensure the presence of a minimum number of agents and of diverse political party spread at all polling streams, throughout the electoral process chain. To this end, there should be sufficient numbers of agents to ably cover the long and tedious electoral process.
- c. IEBC should provide each polling station and tallying centre with sufficient declaration forms to ensure that every agent accredited for each party receives a copy of the said accreditation form after it has been duly dated and signed by the respective PO/RO as well as the agent s present.
- d. The polling staff of the IEBC faced the onerous task of working long hours with hardly any food or opportunity to take breaks. IEBC should ensure that it recruits sufficient staff to

relieve over-stretched polling staff during the polling period and ensure that their staff have the necessary rations and provisions including ample food and refreshments.

- e. The distribution of voters among polling stations and polling streams needs to be reviewed and a mechanism for ensuring an equitable allocation should be implemented in order to avoid over-stretching of polling stations on Election Day.

6.6 Electoral Disputes and Petitions

Following the final declaration of electoral results, a number of petitions were filed in the Supreme Court and the High Courts across the country challenging the validity and credibility of the election results and election of certain persons to various seats including presidential, gubernatorial and parliamentary. The deadline that had been set for filing of election petitions contesting the outcome of the General Elections was April 10, 2013. The total number of petitions filed in courts all over the country, excluding the Presidential Election Petitions, was 145.¹⁶⁵ The distribution of petitions filed against the various elective posts was as follows: Governor, 20; Senator, 7; Member of National Assembly, 56; Women Representative, 5; County Assembly Ward Representative, 54; and Speaker of County Assembly, 32. The Legal Notice No. 54, published on March 15, 2013, contains the

¹⁶⁵ Visit www.cases.judiciary.go.ke (accessed March 23, 2013) for a summary of the cases. This was not the final figure as some petitions filed late had not been captured by the judiciary electronic Case Management System as at April 11, 2013.

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rules of engagement as to how to file the petitions and determination of the same.

6.6.1 The CORD Presidential Petition and Judgment

Summary of the Petition: On March 12th 2013, following the announcement of the final results for the Presidential elections, the CORD filed a petition with the High Court in Nairobi seeking the court to compel IEBC and Safaricom Limited to release documents related to the coalition's election petition under Article 35 of the Constitution on the right to information. CORD had previously demanded certain information from IEBC but the information had not been forthcoming and no reasonable explanation had been given by the Commission. The CORD petition sought the release of 15 items from the IEBC and Safaricom Ltd including the voter register; forms 34, 35 and 36 from all polling stations and constituencies all over the country in relation to the presidential elections; all the results that were declared electronically at the Bomas Tallying Centre; the log files for all short messages that were electronically received from Safaricom; and all software contracts between IEBC and firms that provided software services to them in connection with the just concluded general elections.¹⁶⁶

A week later, on March 16th 2013, the CORD petitioned the Supreme Court in accordance with Article 140 (1) of the Constitution, seeking to set aside the results of the Presidential election

as declared by IEBC on March 9, 2013 and the concordant declaration of Uhuru Kenyatta as President-elect and William Ruto as Deputy President-elect, respectively, and appealed for orders that a fresh election be held for position of the President.

*Summary of the Decision:*¹⁶⁷ The Court averred that the evidence in the consolidated Petition had been laid out in detail, and was the basis for disposing of several prayers sought by the respective counsels. The Court also considered various questions of law and of general constitutional principle, upon which the Petitioners relied on in their prayers. At the end, the Court singularly pointed out that the question in the petition was whether the certificate of election as President-elect issued to Uhuru Kenyatta, be cancelled and whether there should an Order for a fresh Presidential election to take place in Kenya. In summary, the Court stated:

In summary, the evidence, in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had

¹⁶⁶ <http://www.the-star.co.ke/news/article-111710/cord-files-petition-against-iebc-and-safaricom> accessed March 15, 2013

¹⁶⁷ Informed by 'Supreme Court's Reasoning on the Presidential Election Petition', in <http://www.kenyalaw.org/klr/index.php>, accessed May 10, 2013.

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*not obtained the basic vote-threshold justifying his being declared as such [and] therefore, disallow the Petition, and uphold the Presidential- election results as declared by IEBC on March 9, 2013.*¹⁶⁸

Of course, not all found the decision well-reasoned, especially AfriCoG, an institution which had also filed a petition similar to that of CORD.¹⁶⁹ A further critic of the Supreme Court ruling by leading constitutional law experts Wachira Maina is of the view that:

...the standard the Court imposed on the petitioners was very stringent. Second, the criticisms said that the Court gave tame recommendation that IEBC be investigated and maybe prosecuted and were very lenient on the standard by which IEBC's performance was judged. It was argued that in the opening paragraphs of this lengthy but unpersuasive judgment, the Court grandly hoped that the case would be 'viewed as a baseline for the

*Supreme Court's perception of matters political'. Ultimately, it not whether one wins or loses in court; it is whether the loss or win is seen to be just... Sadly, as the saying is, in this judgment, the Supreme Court has only given us reasons that sound good, not good, sound reasons.*¹⁷⁰

6.6.2 Other Petitions

- a. In Nairobi a voter sought to have the Court order that Hassan Ali Joho, the Governor of Mombasa was unqualified for the position on account of his academic credentials. Justice Isaac Lenaola however threw out the petition saying Joho has a valid university degree and is therefore qualified to serve as Governor since he meets the academic threshold set out in the law.¹⁷¹ However another voter in Mombasa, Fredrick Ngesa Omondi, moved to court to challenge the election of Hassan Ali Joho as the Governor of Mombasa County, who contested on the ODM ticket. The Petition challenged the validity of the election citing alleged irregularities, illegalities and violence during the polling exercise.¹⁷² The petitioner sought to block the gazettelement of Hassan Joho until an audit of the election is done and to nullify his election on the grounds that electronic voter

168 Supreme Court Judgment on Petition No 5 of 2013, P 111.in <http://www.kenyalaw.org/klr/index.php>, accessed May 10, 2013.

169 Supreme Court Petition Number 4 of 2013: AfriCog filed the petition to challenge the presidential elections results and wanted the Supreme Court to invalidate the results as electoral malpractices had been committed. The organisation stated the presidential results that were announced at various counties were different from those declared by the Independent Electoral and Boundaries Commission (IEBC) at the national tallying centre.

170 Visit www.africog.org, accessed May 03, 2013

171 http://standardgroup.co.ke/?articleID=200007938&story_title=Kenya-Joho-qualified-court-rules-as-Kajwang%E2%80%99-gets-life-line accessed on March 18, 2013

172 http://www.standardmedia.co.ke/?articleID=2000079213&story_title=Man-moves-to-court-to-dispute-Joho%E2%80%99s-win (accessed on March 15, 2013)

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verification was not carried out and that there was no electronic transmission of the results from the polling stations to the tallying centres as was provided for in the law.

- b. Ferdinand Waititu filed a petition to challenge the election of Nairobi Governor, Evans Kidero. The former MP for the then Embakasi Constituency said that the election was marred with irregularities in most polling stations claiming that returns from some polling stations showed that the votes cast were more than the number of registered voters. He wanted the court to compel IEBC to produce copies of documents used during the Nairobi Governor's elections. Among the materials sought included a copy of the registers used in Westlands, Ruaraka, Langata, Kibera, Embakasi East, Embakasi South and Mathare constituencies in Nairobi. The Petitioner also sought to be supplied with copies of results for each polling station in the constituencies as well as written complaints of the candidates and their representatives made available. Mr. Waititu also sought to be furnished with spoilt ballot papers in the specified areas.¹⁷³

of any country, these petitions also leave IEBC with questions to answer and a self-assessment to carry out as to whether it was adequately prepared to conduct elections, where there were loopholes that could have been exploited by political parties and its offices to tamper with the process. The jury is still out for most of the petitions, which are yet to be heard and determined. The Constitution is however clear on the matter: that all petitions must be heard and determined within six months from the date of filing and the Rules as contained in the Legal Notice No. 54 of March 15, 2013, must be adhered to in the determination of the same.¹⁷⁴

6.6.3 Conclusions and Recommendations

These petitions are many, and for nearly all posts, including those challenging the elections of various speakers for the county assemblies. While challenging election of some individuals to elective office is part and parcel of the democratic growth

¹⁷³ <http://www.nation.co.ke/News/politics/Waititu-in-court-over-Kidero-poll-victory-/-/1064/1719960/-/p98v76/-/index.html> (Sourced on March 15, 2013)

¹⁷⁴ The Elections (Parliamentary and County Elections) Petition Rules, 2013, in <http://www.kenyalaw.org/klr/index.php>, accessed May 10, 2013.

Chapter Seven

7.0 Broad Conclusions and Recommendations

7.1 Broad Conclusions

The KHRC has never endorsed any political party, or alliance of political parties in General Elections other than in 2002, when KHRC published *Eyes on the Prize*, which endorsed the Kibaki succession of the Moi-Kanu regime. Over the years, the KHRC has been committed to the rule of law and respect for human rights. In a statement on February 16, 2013, the KHRC unequivocally stated its rejection of “the election and appointment of any individual credibly implicated in and accused of any crimes and misconduct including crimes against humanity, economic crimes, gross human rights violations, moral turpitude or violations of any provisions of the Constitution.”¹⁷⁵ With regard to leadership and integrity, the KHRC strongly disagreed with the High Court, in Petition Number 552 of 2012, on the question of the interpretation and enforcement of the leadership and integrity provisions of Chapter Six of the Constitution.

The 2013 General Elections had the potential for being a watershed in Kenya’s democratic progression, especially for being held within the framework of a democratic and progressive Constitution of Kenya, 2010. Given the Constitution, which was endorsed by over 67 percent of Kenyans, the elections had the potential to be positively transformative of the country’s electoral systems and processes. However, the 2013 elections fell short of public expectations. The time taken to queue to cast the ballots was too long; the malfunctioning or failure of the BVR and EVID system contributed partly; the inept tallying that eventually turned manual in some cases, especially the presidential tally; and some of the issues contained in this Report are clear indicators that the IEBC needs an independent and comprehensive audit of the 2013 elections.

¹⁷⁵ <http://www.khrc.or.ke/media-centre/press-releases.html>, accessed May 10, 2013

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As the body in charge of the elections management, and especially sanctioning some of the actors who engaged in practice including political parties, the IEBC is fully responsible for the manner in which the 2013 elections will be remembered. The KHRC prefers to call these elections the *democratic paradox*, where rules of engagement were largely *democratic* but the actors fell short of *practicing* those ideals, since even where clear faults were to be sanctioned by IEBC, the electoral management body turned a blind eye.

7.2 General Concluding Recommendations

In addition to the recommendations cited elsewhere in this Report, the KHRC offers the following broad recommendations:

1. The voting trends witnessed across the country during the General Elections were an affirmation of the tyranny of ethnic mobilization and personal traits, as opposed to party ideology and policy. The KHRC strongly recommends that IEBC and other stakeholders plan adopt and implement a radical form of political education, as opposed to the current 'voter education', which clearly has not resulted in any change when it comes to voting patterns.
2. Despite the IEBC assuring Kenyans that it would do its level best to ensure that the elections would be free, fair and credible, a number of issues emerged, calling into question the levels of logistical as well as managerial preparations carried out by the IEBC. The KHRC calls upon all relevant actors in the electoral processes (especially independent commissions and offices) to independently and methodically carry out various integrity tests on the processes and investigative measures, and to audit the conduct of the IEBC.
3. Overall, the IEBC and the Kenyan security forces did a good job in enhancing security during the electioneering period. However, there were fundamental breaches of security that saw some police officers' and the members of the public die or get killed senselessly. The Inspector General, and the DPP, should ensure all investigations surrounding these deaths are concluded and those culpable prosecuted without fail. Further, these two offices must also ensure that all the individuals or institutions that violated various aspects of national laws that guide electoral processes be dealt with in accordance with the law.
4. Prior to the General Elections, the media either offered the platform for or was an active participant in influencing the electoral process but during tallying, the Kenyan media chose to cover the tallying exercise in what, in their wisdom, was the best way of 'keeping the peace'. The Media Council of Kenya should re-examine and audit possible ways in which the media houses were compromised or stifled from reporting accurately in accordance with

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the Media Regulations governing reporting elections, and make these reports public.

5. During petitions in various superior courts, it was made clear that there was a possibility of a lackluster or simply multiple voters' register. The KHRC recommends that the IEBC should squarely deal with this matter and have not only the voter register cleaned up, but ensure that there is continuous voter registration.
6. Whereas the Political Parties Act is clear, and that the office of the Registrar of Political Parties is empowered to enforce the Act, the 2013 general election recorded various levels of impunity by candidates, political parties or the coalitions. The KHRC recommends to the 11th Parliament to speed up the search for a new, independent and credible RPP since the one holding office was unable to discharge the duties that are provided for in various laws.
7. The judiciary is a fulcrum for the realization of justice; justice which should not just be done, but be seen to be done. Some petitioners seeking justice cast aspersions on the courts' independence in decision-making, where even there was a clear violation of rights of some petitioners in some of the cases. The KHRC is therefore recommending that the judiciary, after the hearing and determinations of all petitions, audits some of the jurisprudence they brought forth, part of which contains irreprehensible jurisprudence from other not-so-worthy countries. Some of these faulty and poorly reasoned judgments should be expunged from our law books.

Annexes

Annex 1

EPMC Structure

The EPMC Centre brought together various personnel from within and outside the organization and combined their various capacities towards the process of monitoring elections as follows:

- i. KHRC Secretariat comprising of the Executive Director, Atsango Chesoni, Deputy Executive Director, Davis Malombe and the Senior Programme Officer (Tom Kagwe, and later, George Morara) for supervisory and policy direction. The secretariat served also as the public spokes persons for the EPMC.
- ii. KHRC Board provided the requisite political and social support;
- iii. KHRC's Director of Finance and Administration and Project Officers from the following departments Media, Monitoring, Finance, Administration Legal Affairs, IT and Data. Each officer informed the centre on various aspect of election processes in relation to their respective department;
- iv. electoral Governance Officer: the EPMC secured an officer charged with ensuring the smooth operations of the centre, supervising the EMA's and contracted field monitors activities, attending various meetings with stakeholders doing work on electoral governance, writing policy papers on contentious Bills being debated on in Parliament which touch on matters of Leadership and Governance ;
- v. elections Monitoring Assistant's (EMA's): the centre engaged four Assistants who were to assist the Electoral Governance Officer in monitoring, supervising and communicating with contracted field monitors, holding urgent action meetings with contracted field monitors when need arises, attending meetings with stakeholders doing work on electoral governance, analyse of data received from the field monitors and prepare monitoring reports. The four Assistants comprised of individuals with backgrounds in law, media, IT and political science;

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- vi. election monitors at national and county levels: the KHRC had recruited initially 35 monitors from 19 counties within the Republic. This number was later increased to 54 monitors to expand the EPMC's coverage to 31 counties; and
- vii. team leaders and members from the EN-D and EC-SP programmes provided complimentary information on interventions which had implications on elections.

Overall, a significant amount of human and material resources were combined in the monitoring effort by the KHRC. At times, members of the entire organization were called in to assist in the monitoring effort. This was especially prevalent during the monitoring of the Election Day and the events that followed.

Annex 2

KHRC Monitoring Tool

2.1 Mapping Based on Human Rights Violations

Symbolic Indicator for each Criteria	Criteria for Mapping and Isolation of Constituencies
♀ (Women Representation)	Constituencies with women aspirants that may require protection against harassment, discrimination, intimidation, sex and gender based violence, poor voter opinion of women candidates, or adverse media coverage, among other gender based injustices during elections.
☹ (Electoral Violence)	Constituencies undergoing and/or prone to grave electoral violence,
⌘ (Abuse of State Resources)	Constituencies with a likelihood of experiencing gross abuse of public resources and state institutions/ facilities
X (Voter Irregularities)	Constituencies with high propensity of voter and or electoral irregularities and malpractices, and
⌘ (National representation and diversity)	Constituencies where minority communities, underprivileged and marginalized groups are likely to get zero attention during the elections monitoring and observation processes. (Has the secondary objective of enhancing national representation and diversity in the monitoring process).
Δ (hate speech)	Constituencies prone to the political use of hate speech by members of parliament or aspirants.
ψ (intimidation)	Constituencies where candidates and/or voters are typically intimidated to step down for or support particular candidates through coercion, evictions or threats to violence.
□ (Intolerance)	Constituencies where ethnic balkanization and the use of tribal gangs or militia groups could trigger violence

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Symbolic Indicator for each Criteria	Criteria for Mapping and Isolation of Constituencies
Đ (displacements)	Constituencies with a history of displacements guised on land rights issues but are really methods of the mobilization of political support from among the interested community.
	Avoid gerrymandering trap which perpetrates geo-political inequities in the apportionment and identification of constituencies,
	Ensure at least KHRC has full and or partial contacts and networks for effective interventions in the monitoring process

2.2 Mapping Geographical Areas Based on Human Rights Violations

Cluster 1	Provinces	Counties	Constituencies	Monitors
	Nairobi	1	8	16
	Central	5	15	9
	Total	6	23	25
Cluster 2	Provinces	Counties	Constituencies	Monitors
	Eastern	7	11	9
	North Eastern	3	4	4
	Western	4	7	7
	Nyanza	6	13	11
	Total	20	35	31
Cluster 3	Provinces	Counties	Constituencies	Monitors
	Rift Valley	14	22	20
	Coast	6	12	11
	Central	1	1	1
	Total	21	36	32
Grand Totals				
Women Candidates in the mapped constituencies: 35	Counties	46		
	Constituencies	86		
	Monitors	88		
Constituencies Covered per Province:	65 i.e. Nairobi (8), Central (7), Eastern (6), North Eastern (3), Western (5), Nyanza (9), Coast (5), and Rift Valley (12)			

Annex 3

Election Preparedness Monitoring Tool

Questionnaire Number

1. Name of Field Monitor _____
2. Telephone: _____ E-Mail: _____
3. Location _____

Part A: Preparation of voters

4. What is the sex of the voter? Male Female Occupation: _____
5. What is the age of the voter?
 18 - 34 years 35 years and above 60 years and above Specific age: _____ years
6. Has the voter ever voted in previous elections?
 Yes No. If Yes, which elections and in what locations did they vote?
7. Does the voter plan to vote in the coming elections? (question seeks to identify factors influencing a person's choice to vote) Yes No. If yes or no, why?
8. Was the voter assisted to vote in any previous elections? (this question concerns women the elderly and the illiterate) Yes No. If yes, why and by whom?
9. Did the person giving the voter assistance to vote influence the choice of the voter?
 Yes No. If yes, how and why?
10. Has the respondent registered to vote? Yes No. If Yes, where? If No why?
11. Does the voter habitually reside in the area he/she intends to vote? (this question seeks to capture migration trends and whether the migration is influenced)
 Yes No. If no, why is the voter registering to vote outside his/her area of residence?
12. How familiar is the respondent with the voting process? (Has the voter received sufficient voter education? etc.) Yes No Not sure. Please explain?
13. Does the voter have a second generation Identity card? Yes No Not sure
14. Does the voter possess their Identity card? (this is especially a concern for elderly, illiterate and female voters) Yes No. If No, who has it and why?
15. How well do the respondent understand their electoral boundaries

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- a) Counties Well Fair Poor. Please explain
 b) Constituencies, Well Fair Poor. Please explain why?
 c) Wards Well Fair Poor. Please explain why?

16. How well do the respondent understand the elective positions at national and county level (Assess how well the public knows the different elective offices that they will be voting for in the coming elections)

National Government	County Government
President <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	Governor <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Deputy President <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain how?	Deputy Governor <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Senate <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	Ward Representative <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Members of Parliament <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	County Elected Woman Representative <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?

17. How well do the respondent understand the roles or functions of the elective positions at national and county level (Assess how much the public understands the functions of each of the state offices?)

National Government	County Government
President <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	Governor <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Deputy President <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain how?	Deputy Governor <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Senate <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	Ward Representative <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?
Members of Parliament <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?	County Elected Woman Representative <input type="checkbox"/> Well <input type="checkbox"/> Fair <input type="checkbox"/> Poor. Please explain why?

Part B: Preparation of IEBC

18. Is voter registration being conducted in the ward?
 Yes No. If yes, where? (give details of the locations that registration is being conducted)
19. What is the ratio of men to women registering to vote? (this can be confirmed by inspecting the registers in the different polling stations)
20. What is the ratio of youth to senior persons registering to vote? (this can be confirmed by inspecting the registers in the different polling stations)
21. Is the polling station using an electronic voter registration system? Yes No. If yes, how well do those registering understand the process of electronic registration? (Ask persons after registration)

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22. Is voter education being provided to people in the area? Yes No. If yes, how, by whom and to what extent are those being given the information finding it easy to comprehend?
23. Are people being turned away from registering at the polling stations? Yes No. If yes, who are they, who are turning them away and why?
24. Are there any violations occurring regarding the registration process
 Yes No. If yes, what is (are) the violations (s) (See section 56 and 57 of the Elections Act)
 Unauthorized registration selling of voters cards Unauthorized printing of voters cards
 Purchasing of voters cards Unauthorized possession of voters card
 unauthorized supplying of voters cards unauthorized destruction of voters cards
 Multiple registration Making false statement during registration.
Please give a description of the violation on an attachment
25. What other anomalies regarding registration have been noted
 Ferrying of voters Refusal to inspect the Register Other (specify) _____

Part C: Preparation of polling station

26. Where is the polling station located in the ward? (Give a description of name, location, type of building as well as the proximity of the polling station to population centers)

Name of polling station	Polling station code

27. How visible is the polling station? (In the event of an election, can the polling station be easily identified?)
28. How accessible is the polling station to all voters (give especial concern to the ease of access of the polling station to persons with disability, the elderly, the sick and the illiterate)
29. How prepared is the polling station for elections? (consider factors such as how well marked the streams are, how secure the venue is, whether the polling station in an ideal location)
30. Verification
Date: _____
Type of Verification
 News Paper Article Copies of documents Photograph IEBC reports
 Witness/ victim statement Police reports Affidavit Other (specify) _____
Further Verification Details: (i.e. what is the item of verification and what does it verify?)
31. Confirmation of details in this tool
I hereby do confirm that the information recorded in this questionnaire is TRUE to the best of my knowledge
Name of Monitor : _____
Signature: _____
Date: _____ Time: _____

Annex 4

Electoral Process Monitoring Tool

Questionnaire Number	
----------------------	--

1. Name of Field Monitor _____
2. Telephone: _____ Email _____
3. Location _____

Part A: Leadership and Integrity

4. Name of Political Aspirant _____
5. Political Party /Affiliation/Independent Candidate _____
6. Political position sought _____

National Government	County Government
<input type="checkbox"/> President	<input type="checkbox"/> Governor
<input type="checkbox"/> Deputy President	<input type="checkbox"/> Deputy Governor
<input type="checkbox"/> Senator	<input type="checkbox"/> Member of County Assembly
<input type="checkbox"/> Member of parliament	
<input type="checkbox"/> County Elected Woman Representative	

Leadership and Integrity1

7. Has the aspirant satisfied the following integrity requirements?
 - a) Has the aspirant resigned from State or Public Office (this includes organizations that operate in the public interest such as NGO's, CBO's and donor agencies). Yes No. If No, briefly explain: (Where was/is the aspirant working? Is there a legal or ethical requirement that the aspirant resigns?)
 - b) Has the aspirant been charged or convicted for any offence?
 Yes No. If yes, what was/is the offence?
 - c) Is the aspirant commonly known for or suspected of other wrongful behaviour? (this includes allegations regarding misappropriation of funds, working with gangs or militia, etc.)
 Yes No. If yes, what is the behaviour in question?
 - d) Does the aspirant possess the minimum qualifications to vie for the office in question?
 Yes No. What are the qualifications of the aspirant? (whether he fulfills the qualifications or not)

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Part B: Political Party Processes

8. Political Party Event (paying particular attention to legal requirements regarding party lists, affirmative action, free and fair nomination, etc.) Election of Party Officials Party Nominations
9. Specific location of Political Party Event (Name of town, centre, park, market or village)
10. Date of Event 11. Time Event started 12. Time Event ended
13. Were nominations or elections to party positions in line with the Constitution and the law?
 YES NO. If no, please specify the violations that occurred
14. Was there discrimination against women and/or the youth during the nominations?
 YES NO. If yes, how were women and youth discriminated against?
 Heckling Coercion to bow out Booing
 Other (specify) Use of sexist and or ageist remarks (specify)
15. Were women aspirants able to participate in the nominations equally with the men? Yes No
16. What was the ratio of women to men that participated in the nominations
17. What was the ratio of women to men that were nominated
18. Were the youth (persons under the age of 35) able to participate in the nominations equally with the more senior contenders? Yes No
19. What was the ratio of youth to seniors that participated in the nominations
20. What was the ratio of youth to seniors that were nominated
21. Were persons with disability able to participate in the nominations equally with the able-bodied?
 Yes No
22. What was the number persons with disability that participated in the nominations
23. What was number of persons with disability to the able-bodied that were nominated

Part C: Political Campaign Processes

24. Political Campaign Event
 Political Rally Political meetings (both public and private whether day or night)
 Road shows Social/Private events (funerals, weddings, fundraisings, project launches, etc.)
 Public Events (Government project launches, public celebrations, etc.) Other (Specify)
25. Specific Location of Campaign Event (Name of town, centre, park, market or village)
26. Date of Event 27. Time Event started 28. Time Event ended
29. Names of Personalities at Campaign Event (*including Ministers, MPs, area councilors, senior public officers, former politicians, clergy, officials from campaign secretariats and lobby groups*)

Name	Position	Political Party/Affiliation	Gender

Attach additional names if the above list is full

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30. Speakers at the Political campaign (please focus on key speakers or individuals whose utterances amount to electoral offences)

Name	Utterances made

Attach additional names and utterances as appropriate if the list above is full

31. Was there any illegal use of public resources? If so what types of resources were used?
 Government Vehicles Government Aircraft
 Use of resources meant for public benefit (e.g. NGO or donor Resources)
32. Vehicle and Aircraft Details

Registration	Type ²	Registration Number	Vehicle/ Aircraft Make/ Motorcycle	Vehicle Colour	Occupant(s)

33. Were there any other violations at the event? YES NO

34. If, yes what were the Violations in this event

- Abuse of public office Hate campaign³ Voter bribery Profane language
 Treating/ Undue Influence ⁴ Sexual and Gender based violence/violations
 Violence and/or Incitement to violence⁵ Use of State Security Forces
 Use of Criminal Gangs, Vigilante and/or Militia⁶ Use of public officers

(On a separate piece of paper please provide details of each of the violation committed. Pay particular attention to the following guiding questions – WHO DID WHAT, TO WHOM, WHEN, WHERE, HOW AND WHY? Where applicable)

Incidences of Violence

35. Was there violence at this event? YES NO

If yes, what is (are) the name(s) of the Violence Sponsor(s)/ Perpetrator(s)/ Victim's of violence if known. (give details of the person(s) or group(s) that instigated the violence)

Who were the victims of the violence?

36. What were the Forms of Violence?

- Destruction Of Property Looting Use of Weapons Abductions
 Violent\ Physical Disruption of Event Confinement Physical Assault Incitement
 Threats\ Intimidations Other (specify) _____

37. What Type(s) of Weapons were used?

- Guns Crude weapons (specify) Clubs (Rungus) Knives Stones Petrol Bombs
 Machetes (Pangas) Grenade attacks Other _____

38. Was the violence incited?

YES NO. If yes, who incited the violence and how?

39. Was the incident reported to the authorities?

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YES NO. If yes, to which authority and by whom?⁷ (Indicate if there were any authorities present when the violence happened)

National Cohesion and Integration Commission (NCIC) Registrar of Political Parties (RPP)

Independent Electoral and Boundaries Commission (IEBC) Director of Public Prosecutions (DPP)

The Police (Regular and Administration) Kenya National Commission on Human Rights (KNCHR)

40. What was the response by the authorities? (Please describe any response made in the space below and if no response was made please tick the same in box below):

Police Response: <input type="checkbox"/> No response	IEBC Response: <input type="checkbox"/> No response
NCIC: <input type="checkbox"/> No response	KNCHR Response: <input type="checkbox"/> No response
D.P.P Response: <input type="checkbox"/> No response	R.P.P Response: <input type="checkbox"/> No response

41. Details of the effects of the violations on people (Please state the number where appropriate)

Effect	Number		
	Males	Females	Total
Deaths			
Injuries			
Hospitalized			
Arrests Made			
Displacement			

Discrimination against Women Aspirants

42. Were women aspirants able to freely conduct their campaigns?

YES NO. If No, what kinds of obstacles did they face?

Discriminatory treatment (e.g. Violence, Throwing stones, Shouting down, booing, whistling Cat Calls etc. (Specify) _____

Negative social/cultural stereotyping (specify) _____

Intimidation and threats to violence _____

Other (specify) _____

Please provide the name of the female aspirants affected and the positions they were vying for

Please provide the name(s) and sex of the persons responsible and specify the exact nature of their responsibility (this could include gangs or militia groups)

(Please attach details to any of these questions if the space above is full or too small)

43. Were there any incidences of Sexual and Gender based violence/violations against women aspirants?

YES DON'T KNOW NOT AWARE If Yes, what forms did the violations take?

Sexual Assault Gender insensitive language (profane) Rape Stripping

Sexual Harassment Other (specify) _____

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44. Was the violence incited? YES NO. If yes, who incited the violence and how? (Please note that women can incite violence against other women as much as men)

45. Was the incident reported to the authorities?

YES NO. If yes, to which authority and by whom?⁸ (Indicate if there were any authorities present when the violence happened)

National Cohesion and Integration Commission (NCIC) Registrar of Political Parties (RPP)

Independent Electoral and Boundaries Commission (IEBC) Director of Public Prosecutions (DPP)

The Police (Regular and Administration) Kenya National Commission on Human Rights (KNCHR)

The Gender and Equality Commission

46. What was the response by the authorities? (Please describe any response made in the space below and if no response was made please tick the same in box below):

Police Response: <input type="checkbox"/> No response	IEBC Response: <input type="checkbox"/> No response
NCIC: <input type="checkbox"/> No response	Gender & Equality Commission Response: <input type="checkbox"/> No response
D.P.P Response: <input type="checkbox"/> No response	R.P.P Response: <input type="checkbox"/> No response

Violence against women

47. Were there any incidences of Sexual and Gender based violence/violations against women?

YES NO. If yes, kindly provide the name, position and or sex of the Perpetrator(s)

What form did the violations take?

Sexual Assault Gender insensitive language (profane) Rape Stripping

Sexual Harassment Other (specify) _____

Please provide the name of the female victim(s) affected if possible

Please provide the name(s) and sex of the persons responsible and specify the exact nature of their responsibility (this could include gangs or militia groups)

(Please attach details to any of these questions if the space above is full or too small)

48. Was the violence incited?

YES NO. If yes, who incited the violence and how? (Please note that women can incite violence against other women as much as men)

49. Was the incident reported to the authorities?

YES NO

If yes, to which authority and by whom?⁹ (Indicate if there were any authorities present when the violence happened)

National Cohesion and Integration Commission (NCIC) Registrar of Political Parties (RPP)

Independent Electoral and Boundaries Commission (IEBC) Director of Public Prosecutions (DPP)

The Police (Regular and Administration) Kenya National Commission on Human Rights (KNCHR)

The Gender and Equality Commission

50. What was the response by the authorities? (Please describe any response made in the space below and if no response was made please tick the same in box below):

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Police Response: <input type="checkbox"/> No response	IEBC Response: <input type="checkbox"/> No response
NCIC: <input type="checkbox"/> No response	Gender & Equality Commission Response: <input type="checkbox"/> No response
D.P.P Response: <input type="checkbox"/> No response	R.P.P Response: <input type="checkbox"/> No response

Part D: Verification and Confirmation

51. Verification

Date: _____

Type of Verification for Violations Observed

Media Report Official Records Witness\ Victim Statement Photograph

Affidavit Recording Physical Evidence Other (specify) _____

Further Verification Details (i.e. what is the item of verification and what observation does it verify?)

52. Confirmation of details in this tool

I hereby do confirm that the information recorded in this questionnaire is TRUE to the best of my knowledge

Name of Monitor : _____

Signature: _____

Date: _____ Time: _____

Annex 5

Media Monitoring Tool

Questionnaire Number	
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1. Name of Field Monitor _____
2. Telephone: _____ Email: _____
3. Location _____
4. Name of Political Aspirant Monitored _____
Was the aspirant monitored the perpetrator or the victim? perpetrator Victim
5. Political Party/ Affiliation/ Independent Candidate _____
6. Political position sought _____

National Government	County Government
<input type="checkbox"/> President	<input type="checkbox"/> Governor
<input type="checkbox"/> Deputy President	<input type="checkbox"/> Deputy Governor
<input type="checkbox"/> Senator	<input type="checkbox"/> Member of County Assembly
<input type="checkbox"/> Member of Parliament	
<input type="checkbox"/> County Elected Woman Representative	

7. Name of community monitored. _____
Was the community monitored the perpetrator or the victim? perpetrator Victim
8. Perceived political affiliation of community monitored _____
9. Form of Print/ Broadcast Media _____

<input type="checkbox"/> Radio	<input type="checkbox"/> Television	<input type="checkbox"/> News paper	<input type="checkbox"/> Poster or flier	<input type="checkbox"/> Video or Audio recording	<input type="checkbox"/> Other (specify) _____
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10. Form of interactive media
 Social Media (Facebook, Blogs, Twitter) Mobile phones
11. Subject Covered by Media
 Political Rally Political Meeting Interview Political commentary Political Advert
 Other (specify) _____ Social/Private Event (Specify e.g. funeral, fundraising, parties etc.)*
 Public Event (Specify e.g. public holiday, public project launch, etc.)*
(Please note that artists can participate in violations as well)

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12. Type of Violation

- Hate Speech Undue influence¹⁰ Use of force (threats or intimidation)¹¹
 Sexist utterances¹² Threats of forced displacement False representations
 Promises to pay bribes¹³ Defamation (libel and slander)¹⁴ Profane/insulting language

13. Statements uttered (verbatim): This includes call-in's, presenters, panelists, studio audience, musicians, etc. Where violations are made by text message, the text should be noted and forwarded. It should be noted whether the number of the text was a Safaricom, Airtel, YU or Orange number

Name of statement maker	Utterances made

NB: Attach content of the utterances if space is full or too small.

14. Name of the media station (for TV and Radio)

Title of the Broadcast (News, News shot, Agenda Kenya, etc.)

15. Owner of Media station (Consideration should be given to Media stations owned by politicians or political party officials, or well-connected individuals)

16. Date and Time Broadcast was aired

17. Name of Publication (for Newspapers, journals, magazines and books)

18. Owner of Publication (Consideration should be given to publications owned by politicians or political party officials)

19. Date and Serial Number of the publication

20. By line and name of reporter

21. Name and link to internet page (for Internet sites)

22. Owner of internet page (Consideration should be given to internet pages owned by politicians or political party officials)

23. Date and Time internet site was viewed by monitor/Staff

24. Date of upload

25. What was the response of the following organizations to the violations or to complaints about the violations

IEBC Response: <input type="checkbox"/> No response	Communication Commission of Kenya (CCK). <input type="checkbox"/> No response
Media Council of Kenya (MSK). <input type="checkbox"/> No response	Media Owners Association (MOA). <input type="checkbox"/> No response
Police. <input type="checkbox"/> No response	Kenya Union of Journalists (KUJ). <input type="checkbox"/> No response
National Cohesion and Integration Commission (NCIC). <input type="checkbox"/> No response	Registrar of Political Parties (RPP). <input type="checkbox"/> No response

26. Verification

Date: _____

Type of Verification

- News Paper Article Broadcast Recording & Transcript
 Photograph Internet link and page image

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- Witness Affidavit Web page print-out
 Poster or flier Other (specify) _____

Further Verification Details: (i.e. what is the item of verification and what does it verify?)

27. Confirmation of details in this tool

I hereby do confirm that the information recorded in this questionnaire is TRUE to the best of my knowledge

Name of Monitor : _____

Signature: _____

Date: _____ Time: _____

Annex Endnotes

- 1 Refer to Criteria developed by Tom Kagwe, (KHRC)
- 2 Red plates are for diplomatic vehicles and international NGO's, Green plates are for Local Authorities, Blue Plates are for Parastatals, Black Plates with KA insignia are for the Army, White plates with GK insignia are for the Police, Yellow plates with GK insignia are for government offices.
- 3 Pay attention to the propagation of hate speech as defined in the National Cohesion and Integration Commission Act
- 4 Pay special emphasis on exact matters to be monitored e.g. money, food, promises for provision of public services etc.
- 5 Pay attention to the offences specifies in the Elections Act as well as
- 6 Pay attention to the offences listed in the Prevention of Organized Crimes Act
- 7 If no report has been made the monitor should himself/herself report the incident to the EPMC as well as the authorities!
- 8 If no report has been made the monitor should himself/herself report the incident to the EPMC as well as the authorities!
- 9 If no report has been made the monitor should himself/herself report the incident to the EPMC as well as the authorities!
- 10 As described under Section 63 of the Election Act
- 11 As described under Section 65 of the Election Act
- 12 It should always be remembered that sexist utterances can be made by women as equally as men
- 13 As described under Section 64 of the Election Act
- 14 As described in Section ... of the Defamation Act and Section ... of the Penal Code