

SQUANDERED OPPORTUNITIES:

The October 2017 Fresh Presidential Election



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

In these reports, AfriCOG and KPTJ analyse developments throughout the electoral cycle, with a focus on pre-election preparedness, the administration of Election Day, results announcement processes, and post-election dispute resolution. Following the historic Supreme Court of Kenya decision annulling the August 2017 presidential election, this current report reviews the conduct of the fresh election held in October 2017

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

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

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

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Fresh Presidential Election**

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Abbreviations/Acronyms

AfriCOG	Africa Centre for Open Governance
BVR	Biometric Voter Registration System
IEBC	Independent Electoral and Boundaries Commission
KIEMS	Kenya Integrated Election Management System
KPMG	Klynveld Peat Marwick Goerdeler
KPTJ	Kenyans for Peace with Truth and Justice
KYSY	Kura Yangu Sauti Yangu
NASA	National Super Alliance
SCoK	Supreme Court of Kenya

Introduction

In October 2017, Kenyans went to the polls for the second time in three months. It was a unique historical moment, the result of the Kenyan Supreme Court's nullification of the August 2017 presidential election results. The fresh election was a rare chance, an opportunity for the Independent Electoral and Boundaries Commission (IEBC) to quickly respond to criticisms and demonstrate its ability to directly address the Supreme Court's judgment. Unfortunately, the lead-up to Election Day was marked by significant chaos and instability. By the time polling stations opened, one IEBC commissioner had fled the country in fear for her life, violence had claimed dozens of lives, and presidential candidate Raila Odinga had withdrawn from the election. Despite the IEBC Chair's public expression of doubt about his ability to oversee a credible election, the polls proceeded as scheduled.

As in previous elections, Kenyan civil society played a key role as watchdog and public advocate for reforms. In 2017, the Kura Yangu Sauti Yangu (KYSY) coalition led election-related analysis throughout the cycle, identifying and analyzing key vulnerabilities. In the aftermath of the fresh presidential election, which was marked by continued violence and many of the same irregularities and illegalities that had marred the August polls, KYSY filed a petition in the Supreme Court. This petition, which alleged that the IEBC had failed to administer the election in line with constitutional standards, was also a way for civil society to talk to the public and inform the Kenyan people about why electoral integrity was at risk.

In this report, KYSY presents findings from its election-related analysis. This analysis demonstrates state institutions' failure to address the multiple issues raised in the Supreme Court judgment and identifies the ways in which Kenyan elections continue to struggle with longstanding, unresolved problems.

Squandered Opportunities

Electoral Integrity

In the aftermath of the August judgment, electoral integrity was under the microscope in Kenya. Indeed, the Supreme Court's judgment, which had acknowledged the importance of the electoral cycle in totality, opened the door for a comprehensive review of the administration of all aspects of Kenyan elections.

Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes...[Electoral processes] consist of several stages...voter registration, political party and candidate registration, the allocation of state resources and access to media, campaign activities, and the vote, count, tabulation, and declaration of results."¹

The judgment was thus a boon for reform, opening the door to the scrutiny of all the phases of an electoral cycle. In fact, KYSY had raised a whole host of issues prior to Election Day, including voter registration, party nominations, campaign activities, legal reform, and the IEBC.² As Kenya prepared for the fresh election, the judgment offered the chance to acknowledge and to begin to address some of the country's most long-standing, unresolved election issues.

Unfortunately, political elites used the judgment as a launching pad for the pursuit of their own interests, with little attention to longer-term, sustainable electoral integrity goals.

The National Super Alliance, jubilant in its victory, used a narrow reading of the judgment to address plans for results tabulation and announcement, which had been the primary focus of its petition and continued to attract the lion's share of its attention as it prepared for October. Specifically, NASA's demands were grouped into the following nine categories³:

- **Forms 34B:** All Forms 34B should be standardized and pre-printed, and returning officers should physically fill in the forms and make results announcements at the constituency level, in front of agents, media, observers and the public.
- **Printing:** A firm other than Al Ghurair should be used to print forms and ballots.
- **Election Monitors:** The IEBC should create and deploy a multi-sectoral group of "election monitors," who can sign off on forms at the polling station and constituency levels.
- **Returning Officers:** Returning officers should be appointed from a political party-endorsed pool of individuals. ROs' postings should be determined through an open balloting process. ROs from the August election should not serve as ROs in the fresh election.

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

² AfriCOG and KYSY. "Ready...or Not? An Assessment of Kenya's Preparedness for the 8 August 2017 General Election." Available at <<https://africog.org/reports/ready-or-not-an-assessment-of-kenyas-preparedness-for-the-8-august-2017-general-election/>>.

³ National Super Alliance. September 2017. "NASA Position Paper on Irreducible Minimums Before the Fresh Elections are Held." The Elephant. Available at <<https://www.theelephant.info/wp-content/uploads/2017/09/NASA-Irreducible-Minimums-Before-The-Fresh-Elections-Are-Held.pdf>>.

- **Results Transmission:** The IEBC must announce voter turnout, based on KIEMS data, at 5pm. Results must be verified and announced at the constituency level before they are posted at the National Tallying Centre. Media must also show a live feed of results. Results should not be transmitted via SMS.
- **Party Agents:** Candidates must be entitled to deploy their agents, including IT and other agents, at all stages of the electoral cycle.
- **ICT:** NASA demanded several changes to the ICT infrastructure. The coalition demanded specific systems, service providers, and the full disclosure of records and logs.
- **Polling Stations:** IEBC must provide a list of all polling stations and the number of registered voters per polling station in advance of election day.
- **Personnel:** NASA also demanded that certain IEBC staff not be permitted to participate in the administration of the fresh election.

While this list of demands did reflect legitimate concerns, it was short-sighted and did not go far enough in terms of substantive election reform. NASA's perceived need for election monitors and new returning officers demonstrated, for instance, deep distrust in the capacity and independence of IEBC staff. Its extensive list of requirements regarding the ICT structure revealed its lack of faith in a fool-proof, secure and transparent digital results transmission and collection system. NASA's demand that certain IEBC staff be excluded from administering the October election showed the coalition's serious doubts about the capacity and independence of the election management body. NASA's focus on superficial solutions would only treat the symptoms of a more serious, underlying disease.

The Jubilee coalition also responded to the judgment. In fact, it proffered its own conception of a credible election by introducing legislation that blatantly attempted to curb the power of the IEBC Chair, remove certain checks on IEBC actions, and prevent the Court from annulling any future elections. Some proposed amendments included:

- A change to the definition of "chairperson" of the IEBC, which removed the requirement that the chairperson be qualified to be a judge of the Supreme Court.
- A revision of requirements for IEBC decision-making that allowed decisions to be made without input from all members of the IEBC.
- An additional requirement in results transmission that required the IEBC to transmit manual as well as electronic results to constituency and national tallying centres.
- A declaration that if there are differences between the results, hard copies trump electronic results.
- A change to the structure of senior leadership which allowed the vice-chairperson to assume the duties of the chairperson in his/her absence.
- A decrease in the number required for quorum so that only three commissioners were required (instead of five).
- The removal of a technical committee to oversee the adoption and use of electoral technology.

- A change to Section 83 of the Elections Act, intended to make it extremely difficult for courts to annul any elections. The original wording read:

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **or** that the non-compliance did not affect the result of the election.

The new wording of Section 83 read,

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law **and** that the non-compliance did not affect the result of the election.

Although this change appeared relatively minor, it made it extremely difficult for the Court to annul any future election. While the former law allowed the Court to nullify an election result in cases in which there was serious non-compliance with the law or if the non-compliance affected the results, the new law required both the existence of non-compliance and proof that the non-compliance impacted the final result.

The inter-election period was marked by political elites' sharp insecurity. While NASA feared that the IEBC would be unwilling and/or unable to make the changes necessary for compliance with the judgment, the Jubilee government sought to curtail institutions' ability to demand significant reform of the status quo. In this context, it was virtually impossible to have a meaningful discussion about the future of electoral integrity in Kenya.

Unanswered Questions in the Lead-up to Elections

Violence and Disorder

It was clear from early on that the fresh presidential election was proceeding on shaky ground. First and foremost, the lead-up to October 26th was marked by significant violence, perpetrated mostly by police and security forces against civilians. As the primary political parties and coalitions engaged in discussions with the IEBC about reforms to be made before elections, protesters from both sides took to the streets to express their support for their respective sides. Unfortunately, security forces responded to these protests in a clearly partisan manner. In fact, Amnesty International reported that the Kenyan police used excessive force, including live bullets and teargas against opposition supporters, but allowed government supporters to protest without interference. Dozens died, and 33 civilians, including children, were shot by police. Amnesty International also reported that the number of post-election deaths, also a result of security forces' brutality, is unknown because people were afraid to report them.⁴

The Kenya National Commission on Human Rights reported 25 deaths between September 1st and October 25th, as well as more than 100 injuries. In addition to police violence, the Commission also documented violence perpetrated against the IEBC and police.⁵

Human Rights Watch also reported on election-related violence:

Police also carried out violent house to house operations, beating or shooting primarily male residents, even though they also beat female residents for failing to produce the males suspected of participating in demonstrations. At least 67 people were shot or beaten to death by police nationwide, and hundreds more were injured during these operations. There were troubling reports of rape and sexual harassment during police operations in Kisumu and Nairobi.⁶

The Disintegration of the IEBC

As violence raged, the IEBC was also busy. In addition to working to understand and act on the Supreme Court's judgment and addressing political demands, the Commission was struggling to stay together. Indeed, a series of leaked internal memos revealed serious divisions in the Commission.

On September 5, 2017, just four days after the Supreme Court's annulment of the August election, a leaked memo revealed that IEBC Chair Wafula Chebukati was demanding that CEO Ezra Chiloba explain a list of problems that had been identified in the NASA petition. Chebukati also demanded that Chiloba explain his position on the Supreme Court judgment, which contradicted the IEBC's official position.⁷ On September 7, five commissioners issued a press statement that sought to

⁴ Amnesty International. 2017/18. "Amnesty International Report 2017/2018. The State of the World's Human Rights." Available at <<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>>.

⁵ Kenya National Commission on Human Rights. May 2018. "Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections." Available at <<http://knchr.org/Portals/0/CivilAndPoliticalReports/Still-a-Mirage-at-Dusk.pdf?ver=2018-05-23-123451-723>>.

⁶ Human Rights Watch. 2018. "World Report 2018: Kenya. Events of 2017." Available at <<https://www.hrw.org/world-report/2018/country-chapters/kenya>>.

⁷ Wafula Chebukati. 5 September 2017. "SC Election Petition 1 of 2017. Raila Odinga & Another vs IEBC & 2 Others." Available at <<https://www.theelephant.info/documents/memo-from-iebc-chair-to-ceo-of-05-09-17-on-supreme-court-election-petition-no-1-of-2017/>>.

distance them from Chebukati's memo. In that statement, the commissioners stated, "We wish to clarify that the contents of the said memo were not discussed and sanctioned by the Commission Plenary. The Commissioners came to know of the memo through the media like everyone else."⁸

On September 18, another leaked memo revealed that Chebukati continued to have serious disagreements with Chiloba. In fact, the Chair was still questioning the CEO about allegedly contradictory remarks and about a series of pending issues related to ICT. The memo also demanded the suspension of three ICT officers, including the Director, an ICT Coordinator and ICT Officer. The memo further revealed Chebukati's suspicion regarding the ICT officers' use of his account.⁹

Akombe's Resignation

One month later, on October 18, 2017, amidst claims that she feared for her life, IEBC Commissioner Roselyne Akombe fled to New York and resigned from her position. In her statement, Akombe made several claims¹⁰:

- The IEBC is under siege;
- Commissioners vote along partisan lines and fail to consider the merit of issues before them;
- Anti-IEBC sentiment was so severe in some parts of the country that the lives of IEBC field staff were at risk;
- The election, as planned, cannot meet the standards of a credible election;
- Commissioners and IEBC staff are intimidated by political actors;
- The Commission's legal advice is skewed to align with partisan interests.

Akombe's statement was deeply revelatory, offering a rare glimpse of the state of the Commission in the aftermath of the Supreme Court judgment. Perhaps most striking was Akombe's claim of the IEBC leaders' partisanship. This claim cast a long shadow over the IEBC's integrity and public legitimacy, a serious issue in the lead-up to arguably the most critical election in recent Kenyan history.

Chebukati addressed the Kenyan public in the immediate aftermath of Akombe's resignation. His speech was equally striking, confirming Akombe's doubts about the Commission's ability to hold credible elections as well as her concerns about internal divisions. Indeed, Chebukati stated that the Commission had been unable to provide an environment in which Akombe, or others like her, could work to fulfill their potential without fear for their lives.¹¹ Chebukati also spoke of his attempts to make critical changes at the Commission, all of which were defeated by other commissioners. He said that under such conditions it was difficult for him to guarantee free, fair and credible elections.¹²

⁸ IEBC. 7 September 2017. "Clarification on Alleged Memo from the Commission." Available at <<https://www.theelephant.info/documents/alleged-iebc-press-statement-on-memo-from-chair-to-ceo/>>.

⁹ Wafula Chebukati. 18 September 2017. "SC Pet No 1 of 2017. Raila Odinga & Another vs IEBC & 2 Others." Available at <<https://www.theelephant.info/wp-content/uploads/2017/09/Leaked-Memo-from-Chairperson-of-IEBC-to-CEO.pdf>>.

¹⁰ Business Today. 18 October 2017. "Dr Roselyn Akombe Resigns; Here's her full statement." Available at <<https://businesstoday.co.ke/dr-roselyn-akombe-resigns-heres-full-statement/>>.

¹¹ Fredrick Obura. 18 October 2017. "Chebukati blames politicians for Akombe's resignation." Standard Digital. Available at <<https://www.standardmedia.co.ke/article/2001257746/chebukati-blames-politicians-for-akombe-s-resignation>>.

¹² "Chebukati's Statement: IEBC chair full statement after Akombe's resignation." Available at <<https://www.youtube.com/watch?reload=9&v=w-uAeHwEhKM>>.

Shockingly, however, Chebukati reversed his position just one week later, stating that “relevant authorities” had provided sufficient assurances to ensure that the election could go forward.¹³

By the time election day dawned in Kenya, it was clear that the IEBC's legitimacy, as well as that of the entire election, was on shaky ground. NASA's withdrawal, along with the clear internal IEBC divisions, cast a long shadow over the country's readiness to proceed.

NASA Withdrawal

In the midst of the fallout at the IEBC, NASA announced that it was withdrawing from the fresh election. In its statement of withdrawal, NASA alleged that the IEBC had “refused, neglected or failed to put in place mechanisms to correct...illegalities and irregularities. We deem that the fresh election ordered by the Supreme Court cannot therefore be held.” NASA further alleged that the IEBC had engaged in “ping pong game,” with no sincere intention to make necessary changes to the electoral administration system. NASA also cited the Jubilee coalition's amendments, which it claimed were intended to “legalize and regularize the illegalities that led to the invalidation of the August 8 election.”¹⁴

Ready...or Not?

In response to the pre-election chaos, civil society filed a petition in the High Court, arguing that the IEBC was not yet ready to administer an election. In *Khelef Khalifa, Samwel M. Mohochi, and Nahashon G. Kamau v. The Chairperson of the IEBC and the IEBC*¹⁵, which was also filed on behalf of the KYSY coalition, petitioners made the case that political interference, intimidation of the IEBC, the lack of clarity surrounding the effects of the NASA withdrawal, and the IEBC's own divisions and statements regarding its lack of preparedness made it impossible for the Commission to ensure that it could conduct a credible election.¹⁶ This case was never heard, however, because – for yet to be explained reasons – the Court was unable to achieve quorum. In fact, Chief Justice David Maraga had defied a last minute announcement that October 25th would be a public holiday and had ordered courts to sit and hear urgent cases that required hearing before Election Day. This scenario provoked serious doubts about the credibility of the election process. In fact, the European Union observed that the judiciary had been subject to intimidation throughout the electoral process. It called the inability of the Court to achieve quorum “highly unusual” and said that it “raised serious questions among Kenyan stakeholders, including whether this was the result of political interference. The failure to hear the case...cut off the path for legal remedy before the election.”¹⁷

The context became even more tense when, two days before Election Day, the Deputy Chief Justice's driver was shot and injured.

¹³ Jeremiah Wakaya. “Election is definitely going ahead Thursday – Chebukati.” Capital FM. Available at

¹⁴ <<https://www.capitalfm.co.ke/news/2017/10/election-is-definitely-going-ahead-thursday-chebukati/>>.

¹⁵ NASA. “Statement of Withdrawal,” pages 46, 48 and 56.

¹⁶ Presidential Petition No. 1 of 2017, *Raila Amolo Odinga & others v. IEBC & others*

¹⁷ *Khelef Khalifa & Others vs. The Chairperson of the IEBC & Others*

Election Day

Process Observations

On Election Day, KYSY observers reported a range of problems. Some of the most serious examples included:

- Low voter turnout;
- Delayed opening and/or closing of polling stations;
- Violence around polling stations, perpetrated by citizens and/or security forces;
- Voter intimidation;
- Obstruction of voters;
- Obstruction of agents and/or observers;
- Malfunctioning of electoral technology.

Illustrative examples include:

- In Teso South Polling Centre in Mombasa, KYSY observers recorded the burning of KIEMS kits, ballot papers, ballot boxes and IEBC staff's reflector vests.
- In Embakasi Central in Nairobi, observers reported that a group of youth harassed a vendor of boiled eggs, asking him if he had voted. When they found that he had no ink on his finger, they took his eggs.
- Observers saw three policemen with serious knife wounds admitted to hospital in Homa Bay.
- In Mathare, violence broke out after police fired teargas.
- KYSY observers witnessed a gang of youth attack a voter in Malaba Uplands.
- In Kitmikayi Tallying Centre in Kisumu, police destroyed multiple motorbikes.
- In Athi River, police fatally shot one person and two others were hospitalized for gunshot wounds.
- Several observers with IEBC badges were not permitted inside polling stations. IEBC staff asked them for letters of appointment.

Results Observations

In the aftermath of the October election, KYSY analyzed IEBC's polling station results forms. Similar to the August election, the forms were characterized by a range of problems, including:

Turnout: There were at least nine cases of turnout at 100 percent or greater. In Jibal Centre in Banissa, Mandera, turnout was more than 300 percent. The law requires results from polling stations that show turnout in excess of 100 percent to be nullified.

Incomplete Forms: In many cases, forms were incomplete, making it impossible to verify results. See the table below for details.

Number of Missing Data Cells in Results Forms

Cell Identity	Number of Missing Such Cells
Aukot	112
Dida	68
Jirongo	94
Kaluyu	97
Kenyatta	2
Mwaura	94
Nyagah	88
Odinga	32
Valid Votes A	762
Disputed Ballots	426
Rejected Ballots	426
Rejected Objected to Ballots	429
Registered Voters	365
Total Valid Votes B	233

On one form (Vihiga, Emuhaya, Central Bunyore, Mwitukhu Primary School, Stream 1), the only information that was included was the number of registered voters.

Illegible Forms: Many Forms 34A from the October presidential election were also partially or wholly illegible. Without a complete set of results on each form, it was impossible to independently verify the figures. In addition to the table below, which shows how many of each of the individual cells on Forms 34A were illegible, there were a total of 176 completely illegible forms.

Number of Illegible Cells in Results Forms

Cell Identity	Number of Missing Such Cells
Aukot	245
Dida	241
Jirongo	229
Kaluyu	237
Kenyatta	306
Mwaura	238
Nyagah	241
Odinga	264

In the aftermath of the October election, KYSY analyzed IEBC's polling station results forms. Similar to the August election, the forms were characterized by a range of problems

Cell Identity	Number of Missing Such Cells
Valid Votes A	296
Disputed Ballots	225
Rejected Ballots	254
Rejected Objected to Ballots	220
Registered Voters	410
Total Valid Votes B	277

Mathematical Inconsistencies: The Forms 34A were also marred by multiple types of mathematical errors and inconsistencies. Examples include:

Valid Votes: In order to calculate the total number of valid votes in a polling station, it is necessary to add together the total number of valid votes for all candidates. Forms 34 contain two different spaces for presiding officers to record the total number of valid votes. Inexplicably, however, these two figures were often inconsistent. It is thus unsurprising that adding the candidate totals does not produce the same number as adding the recorded numbers of valid votes.

Adding all the candidates' totals equals 7,528,885. The sum total of valid votes recorded in the first total valid votes box equals 7,364,866. The sum total of valid votes recorded in the second total valid votes box equals 7,497,271.

Evidence of Alteration: KYSY also found that a total of 437 Forms 34A contained evidence of altered numbers. Some examples include the following:

FORM 34 A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
#PE1041371

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: YOUNG MUSLIM PRIMARY SCHOOL POLLING STATION 2 of 2
Code 033 - 2 of 2
Ward: IFITIN
Code 0134
Constituency: GARISSA TOWNSHIP
Code 027
County: GARISSA
Code 007

Name of Candidate	No. of Valid Votes Obtained
1. AUKOT JOHN EKURU LONGOGGY	02
2. DIDA MOHAMED ABDUBA	05
3. JIRONGO SHAKHALAGA KHWA	00
4. KALUYU JAPHETH KAVINGA	00
5. KENYATTA UHURU	430
6. MWaura MICHAEL WAINANA	00
7. NYAGAH JOSEPH WILLIAM NTHIGA	00
8. ODINGA RAILA	03
Total number of valid votes cast	430

Decisions on disputed votes if any

Serial Number of Ballot Paper (if with dispute)	Name of Candidate assigned the vote
1	
2	
3	
4	
5	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station	545
2. Total Number of Rejected Ballot Papers	5
3. Total Number of Rejection Objected To Ballot Papers	00
4. Total Number of Disputed Votes	00
5. Total Number of Valid Votes Cast	430

Declaration
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in YOUNG MUSLIM PRIMARY SCHOOL POLLING STATION Constituency GARISSA TOWNSHIP County GARISSA on 26/10/2017
Presiding Officer: ABDINABO ABU JIBRE Signature: [Signature] Date: 26/10/2017
Deputy Presiding Officer: EMMA MARI PAUL Signature: [Signature] Date: 26/10/2017

Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1	<u>Abdullahi Nassir</u>	<u>32861917</u>	<u>JUBILEE PARTY</u>	<u>072908179</u>	<u>[Signature]</u>	<u>26/10/17</u>

Reasons for Refusal to Sign (if any)

Presiding Officer's Comments:
The process was successful with more than 85% turnout.

FORM 34 A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
#PE1149077

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: MALO KUMI PRIMARY SCHOOL POLLING STATION 1 of 2
Code 044 - 1 of 2
Ward: CENTRAL
Code 044
Constituency: NYANDARUWA
Code 093
County: NYANDARUWA
Code 018

Name of Candidate	No. of Valid Votes Obtained
1. AUKOT JOHN EKURU LONGOGGY	000
2. DIDA MOHAMED ABDUBA	000
3. JIRONGO SHAKHALAGA KHWA	000
4. KALUYU JAPHETH KAVINGA	000
5. KENYATTA UHURU	477
6. MWaura MICHAEL WAINANA	000
7. NYAGAH JOSEPH WILLIAM NTHIGA	000
8. ODINGA RAILA	000
Total number of valid votes cast	477

Decisions on disputed votes if any

Serial Number of Ballot Paper (if with dispute)	Name of Candidate assigned the vote
1	
2	
3	
4	
5	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station	554
2. Total Number of Rejected Ballot Papers	000
3. Total Number of Rejection Objected To Ballot Papers	000
4. Total Number of Disputed Votes	000
5. Total Number of Valid Votes Cast	477

Declaration
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in MALO KUMI PRIMARY SCHOOL POLLING STATION Constituency NYANDARUWA County NYANDARUWA on 26/10/17
Presiding Officer: CHARLES KUMBATI GICHINA Signature: [Signature] Date: 26/10/17
Deputy Presiding Officer: KIRIKI WALTER NTHIGA Signature: [Signature] Date: 26/10/17

Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1	<u>Samuel Mwaniki Muri</u>	<u>755111</u>	<u>JUBILEE</u>	<u>07282061</u>	<u>[Signature]</u>	<u>26/10/17</u>

Reasons for Refusal to Sign (if any)

N/A

Presiding Officer's Comments:
THE POLLING PROCESS WAS A SUCCESS WITH MORE THAN 85% TURNOUT.

FORM 34 A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
#PE1220681

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: MBOYON PRIMARY SCHOOL POLLING STATION 1 of 1
Code 101 - 1 of 1
Ward: ELANI
Code 101
Constituency: WEST POKOT
Code 132
County: WEST POKOT
Code 024

Name of Candidate	No. of Valid Votes Obtained
1. AUKOT JOHN EKURU LONGOGGY	000
2. DIDA MOHAMED ABDUBA	000
3. JIRONGO SHAKHALAGA KHWA	000
4. KALUYU JAPHETH KAVINGA	000
5. KENYATTA UHURU	000
6. MWaura MICHAEL WAINANA	000
7. NYAGAH JOSEPH WILLIAM NTHIGA	000
8. ODINGA RAILA	000
Total number of valid votes cast	085

Decisions on disputed votes if any

Serial Number of Ballot Paper (if with dispute)	Name of Candidate assigned the vote
1	
2	
3	
4	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station	
2. Total Number of Rejected Ballot Papers	
3. Total Number of Rejection Objected To Ballot Papers	
4. Total Number of Disputed Votes	
5. Total Number of Valid Votes Cast	

Declaration
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in MBOYON PRIMARY SCHOOL POLLING STATION Constituency WEST POKOT County WEST POKOT on 26/10/2017
Presiding Officer: DAVID KOCES Signature: [Signature] Date: 26/10/2017
Deputy Presiding Officer: LEONARD PRINCE KAMONDI Signature: [Signature] Date: 26/10/2017

Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1	<u>Isaac Maskei Lokot</u>	<u>208444</u>	<u>JUBILEE PARTY</u>	<u>07662348</u>	<u>[Signature]</u>	<u>26/10/2017</u>

Reasons for Refusal to Sign (if any)

Presiding Officer's Comments:
There was no disputed vote.

FORM 34 A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
#PE1259621

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: AGALAT PRIMARY SCHOOL POLLING STATION 1 of 1
Code 029 - 1 of 1
Ward: KOLOWA
Code 072
Constituency: TIATY
Code 197
County: Baringo
Code 030

Name of Candidate	No. of Valid Votes Obtained
1. AUKOT JOHN EKURU LONGOGGY	00
2. DIDA MOHAMED ABDUBA	00
3. JIRONGO SHAKHALAGA KHWA	00
4. KALUYU JAPHETH KAVINGA	00
5. KENYATTA UHURU	124
6. MWaura MICHAEL WAINANA	00
7. NYAGAH JOSEPH WILLIAM NTHIGA	00
8. ODINGA RAILA	00
Total number of valid votes cast	124

Decisions on disputed votes if any

Serial Number of Ballot Paper (if with dispute)	Name of Candidate assigned the vote
1	
2	
3	
4	

Polling Station Counts

1. Total Number of Registered Voters in the Polling Station	171
2. Total Number of Rejected Ballot Papers	000
3. Total Number of Rejection Objected To Ballot Papers	000
4. Total Number of Disputed Votes	000
5. Total Number of Valid Votes Cast	124

Declaration
We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in AGALAT PRIMARY SCHOOL POLLING STATION Constituency TIATY County Baringo on 26/10/17
Presiding Officer: PAUL KITEMO Signature: [Signature] Date: 26/10/17
Deputy Presiding Officer: FRANLINE AUTO KHATE Signature: [Signature] Date: 26/10/17

Agents or Candidates (if present)

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Tel. Contact	Signature	Date
1	<u>Devilla J Kituh</u>	<u>463584</u>	<u>JUBILEE</u>	<u>071424091</u>	<u>[Signature]</u>	<u>26/10/17</u>

Reasons for Refusal to Sign (if any)

Presiding Officer's Comments:
EBC VOTING PERIOD WAS SUCCESSFUL

FORM 34A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
IPE/1078247

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: **BARBA TERRY TONKA POLLING STATION 1 of 2**
Ward: **ABOETA EAST**
Constituency: **SOUTH MENTI**
County: **MERU**

Number of votes cast in favour of each candidate:

Name of Candidate	No. of Valid Votes Obtained
1. AIKOT JOHN EKURU LONGODIY	00
2. DIDA MOHAMED ABDUBA	00
3. JIMONDO SHAMHALAGA KHWA	00
4. KALLETU JARHETHI KAVINGA	00
5. KENYATTA UHURU	00
6. MWAIRA MICHAEL WANANA	00
7. NYAGAN JOSEPH WILLIAM NTHIGA	00
8. ODONGA RALA	00

Total number of valid votes cast: _____

Declared on or disposed votes if any:

1. Total Number of Registered Voters in the Polling Station	2. Total Number of Registered Voters in the Polling Station	3. Total Number of Registered Voters in the Polling Station
1. 000	2. 000	3. 000
4. 000	5. 000	6. 000
7. 000	8. 000	9. 000
10. 000	11. 000	12. 000

Declaration: I, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate copies of the results of the count as announced by the Presiding Officer.

Presiding Officer: **MOHAMED JOHN LINDO**
Deputy Presiding Officer: **GACERI DILAH**

Agents of Candidates (if present):

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Id. Contact	Signature	Date
1.	MURUKI PETER	7465372	UNREGISTERED	081623634	[Signature]	26/10/2017

Reasons for Refusal to Sign (if any): _____

Presiding Officer's Comments: **ELECTION WAS SUCCESSFUL**

FORM 34A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
IPE/1089611

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: **AKK MICHONGE CHURCH GROUNDS POLLING STATION 1 of 1**
Ward: **CATSHI SOUTH**
Constituency: **MANAYATTA**
County: **EMBU**

Number of votes cast in favour of each candidate:

Name of Candidate	No. of Valid Votes Obtained
1. AIKOT JOHN EKURU LONGODIY	000
2. DIDA MOHAMED ABDUBA	000
3. JIMONDO SHAMHALAGA KHWA	000
4. KALLETU JARHETHI KAVINGA	000
5. KENYATTA UHURU	000
6. MWAIRA MICHAEL WANANA	000
7. NYAGAN JOSEPH WILLIAM NTHIGA	000
8. ODONGA RALA	000

Total number of valid votes cast: _____

Declared on or disposed votes if any:

1. Total Number of Registered Voters in the Polling Station	2. Total Number of Registered Voters in the Polling Station	3. Total Number of Registered Voters in the Polling Station
1. 141	2. 002	3. 000
4. 000	5. 000	6. 000
7. 000	8. 000	9. 000
10. 102	11. 000	12. 000

Declaration: I, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate copies of the results of the count as announced by the Presiding Officer.

Presiding Officer: **AKK MICHONGE CHURCH**
Deputy Presiding Officer: **MOGOLIS KARUKU M.**

Agents of Candidates (if present):

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Id. Contact	Signature	Date
1.	MURUKI PETER	7465372	UNREGISTERED	081623634	[Signature]	26/10/2017

Reasons for Refusal to Sign (if any): _____

Presiding Officer's Comments: _____

FORM 34A
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
IPE/1470257

PRESIDENTIAL ELECTION RESULTS AT THE POLLING STATION

Name of Polling Station: **REMA HILLTOPS ESTATE HILLTOPS ESTATE 1 of 1**
Ward: **PEPELE**
Constituency: **URUGURU SOUTH**
County: **NAIROBI CITY**

Number of votes cast in favour of each candidate:

Name of Candidate	No. of Valid Votes Obtained
1. AIKOT JOHN EKURU LONGODIY	001
2. DIDA MOHAMED ABDUBA	001
3. JIMONDO SHAMHALAGA KHWA	000
4. KALLETU JARHETHI KAVINGA	000
5. KENYATTA UHURU	000
6. MWAIRA MICHAEL WANANA	000
7. NYAGAN JOSEPH WILLIAM NTHIGA	000
8. ODONGA RALA	000

Total number of valid votes cast: _____

Declared on or disposed votes if any:

1. Total Number of Registered Voters in the Polling Station	2. Total Number of Registered Voters in the Polling Station	3. Total Number of Registered Voters in the Polling Station
1. 637	2. 001	3. 000
4. 000	5. 000	6. 000
7. 000	8. 000	9. 000
10. 214	11. 000	12. 000

Declaration: I, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate copies of the results of the count as announced by the Presiding Officer.

Presiding Officer: **LEWIS CUMMINS**
Deputy Presiding Officer: **RODOLPH ALIEN**

Agents of Candidates (if present):

No.	Name of Candidate or Agent	ID/Passport No.	Party Name/Independent Candidate	Id. Contact	Signature	Date
1.	FELISTER MURUGI JERISSHI	JUBILEE	UNREGISTERED	071120446	[Signature]	26/10/2017

Reasons for Refusal to Sign (if any): _____

Presiding Officer's Comments: _____

Register of Voters: KYSY also noted problems with the Register of Voters. Specifically, KYSY questioned why Chebukati's announced figures of registered voters, which were included in his declaration of the August presidential results, were different from the gazetted totals (at the county level). The sum of all the registered voters in each county, as announced by Chebukati on August 11th, was 19,631,533 voters. This was 20,110 more than the 19,611,423 voters that had been gazetted. In its judgment, the Court stated that the difference in registered voters was due to the inclusion/non-inclusion of prisoners in the totals. This claim does not resolve the issue. Adding prisoners (5,528) to Chebukati's total only increases the gap.

Some county-level differences can be seen in the table below:

Differences in Registered Voters over Time

County	Gazetted	Form 34C August	Form 34C October
Taita Taveta	155,716	155,794	155,926
Tharaka-Nithi	213,154	213,157	213,156
Kisumu	539,210	539,593	539,597
Migori	388,633	388,700	388,696

The Supreme Court

In the aftermath of October 26th, it was clear that the fresh election had been marked by many of the same issues that had marred the August 8th polls. Indeed, KYSY's study of the results forms demonstrated that the tallying process had not shown much improvement at all. Mathematical errors, incomplete forms and non-standard forms continued to make it impossible to reliably calculate and verify announced results. These problems compounded a chaotic and violent pre-election period.

In response to this situation, the KYSY coalition decided to file a presidential petition in the Supreme Court. This decision reflected a firm belief in the importance of holding actors and institutions accountable for their failure to obey the law and to engage Kenyans on the question of electoral integrity. In this way, KYSY sought to show the Kenyan people the myriad ways in which their elections were compromised and to explain why they had cause to doubt the legitimacy of the election results.

Accordingly, on November 6, 2017, Njonjo Mue and Khelef Khalifa, representing the Kura Yangu Sauti Yangu coalition, filed a petition in the Supreme Court against the IEBC, Chairman Wafula Chebukati, President-Elect Uhuru Kenyatta and the National Super Alliance coalition, challenging the conduct of the repeat presidential election.¹⁸ This petition alleged that the fresh presidential election in Kenya had not been conducted in accordance with constitutional provisions related to a free, fair and credible election.

Specifically, KYSY argued the following primary points:

First, KYSY asserted that the administration of the October 26th election failed to realize the constitutional requirement of universal suffrage. It therefore did not adhere to Article 38(2) of the Constitution, which guarantees every citizen the right to free, fair and regular elections based on universal suffrage and the free expression of the will of electors. In fact, KYSY argued that the inability of voters to cast ballots in 27 constituencies and the IEBC's decision to cancel elections altogether in those areas violated the law. Moreover, KYSY alleged that the IEBC's decision to allow voters in Turkana Central and Fafi to vote when counting had already started in other areas degraded and undermined the quality of the vote in those areas.¹⁹

Second, civil society argued that, contrary to Article 81(e)(ii) of the Constitution, the election was not free from violence, intimidation, improper influence or corruption. KYSY used the president's public promises to "deal with," "revisit" and "sort" the Supreme Court judges and multiple incidents of excessive police brutality to demonstrate that the context was far from peaceful. Indeed, the ongoing violence was largely responsible for the situation in the 27 constituencies where Kenyans were unable to cast ballots. KYSY also presented evidence of the incumbent's illegal deployment of state resources as well as the incumbents' use of militarized rhetoric to demonstrate intimidation and improper influence.²⁰

¹⁸ EU Election Observation Mission. 2017. "Final Report Republic of Kenya General Elections 2017." Available at <https://eeas.europa.eu/sites/eeas/files/eu_eom_kenya_2017_final_report_0.pdf>, pages 4-5.

¹⁹ Presidential Petition No. 4 of 2017, *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 63.

²⁰ Presidential Petition No. 4 of 2017, *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraphs 73-88.

Third, KYSY posited that the election was not conducted by an independent body, nor was it administered in an impartial, neutral, efficient, accurate and accountable manner. It therefore violated Articles 81(e)(iii) and (v) of the Constitution. As evidence of its claims, KYSY presented the Court with former Commissioner Akombe's statement of resignation, which detailed the partisan divisions within the IEBC. KYSY also alleged that the government's decision to declare October 25th a public holiday was a deliberate attempt by the government to control the judiciary and prevent the Court from hearing Petition Number 17, which argued that the election should not proceed.

Fourth, KYSY argued that the election was characterized by many of the same illegalities and irregularities that had marked the August election. For instance, KYSY contended that the IEBC broke the law by failing to conduct presidential nominations in advance of the October election. Also, the petitioners accused the IEBC of using ungazetted and/or illegally appointed returning and presiding officers, printing ballots with Odinga's name and thereby ignoring NASA's withdrawal, arbitrarily relocating polling stations, failing to consistently use biometric voter identification, and neglecting to provide consistent and reliable voter turnout information. These issues were compounded by unreliable results forms, which were marked by mathematical errors, missing data and clearly altered figures.

In August, the Supreme Court had noted the significance of illegitimate results forms, explaining that the inability of the public to verify results cast significant doubt on the legitimacy of the results. In its case, KYSY attempted to demonstrate to the Court that little had changed. In fact, the petitioners' scrutiny of results forms had revealed that there were at least two different sets of results in circulation. The results forms that the IEBC held in its offices and which it referred to as the "official" results were materially different from the results forms it had posted on the public portal. This inconsistency is detailed in civil society's report on the court-approved scrutiny of results forms.²¹ Unfortunately, however, the Court did not acknowledge this discrepancy, primarily because it refused to appoint its own representative to oversee the scrutiny and because it did not allow petitioners to submit a written report of the scrutiny findings.

The Judgment

In December 2017, the Supreme Court quietly released its full judgment of the October presidential petition. The Court dismissed the petition and upheld the presidential election results.

Specifically, in response to the petitioners' claims about violence and improper influence, the Court ruled that neither the State nor the IEBC failed to fulfill their duties to respect and guarantee the vote. Instead, the Court judged that the IEBC's pre-election correspondence with security forces, which requested interventions and assistance to protect Commission staff and voters, demonstrated that preventive action was taken. On Election Day, the police made arrests and charged various suspects with various crimes.²² The Court did recognize the violence that occurred, but it did not address the question of whether or not that violence impacted the credibility of the election. Instead, the Court addressed the violence by blaming "unidentified private citizens and political actors."²³ In one instance, the Court pointed fingers at petitioners for the violence, stating,

²¹ AfriCOG/KPTJ. 2018. "Unanswered Questions: The October 2017 Presidential Election.

²² Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraphs 293-95.

²³ Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 297

"Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying the election."²⁴

Strikingly, the Court also ruled that the occurrence of violence cannot, on its own, invalidate the election. In fact, the Court said that such a ruling would open the door to "cynical acts of violence" which could be instigated for the explicit purpose of nullifying an election.²⁵

In response to the petitioners' allegations regarding the executive's use of inflammatory rhetoric and other forms of intimidation, the Court ruled that there was insufficient evidence to back up these claims. The Court also found insufficient evidence with regard to the allegation that the government had unlawfully used state resources during the campaign.

In a somewhat shocking decision, the Court fully refused to discuss the question of the independence of the IEBC. Instead, it stated,

Such is a bare contention, which, besides, implicitly denigrates the very constitutional and legal process which has entrusted the conduct of election to but one, duly appointed agency – the IEBC. The contention, in effect, argues against the very concept of legality under the constitutional process, thus negating the essential democratic values of constitutionalism and legal process. Such a stand is negative, retrogressive, and invited disapproval by this Court. Accordingly we hold the contention in question to be devoid of merit.²⁶

Finally, the Court ruled against petitioners with regard to the issue of illegalities and irregularities. It stated that there was insufficient evidence to support the claim that polling stations had been irregularly moved. With regard to allegations of incomplete results forms, mathematically incorrect results forms and forms without serial numbers, the Court stated,

...The difficulty with the 2nd and 3rd petitioners' submission on this issue is that, not being candidates or agents, may not really be privy to the nitty gritty of the operations of the electoral process...The petitioners, however, make general allegations, but without specifying in which manner transparency was not achieved, and in what aspect *sic*.²⁷

The Court was also unconvinced about petitioners' allegations that the Register of Voters had been characterized by fluctuating numbers and unreliable totals. In fact, the Court stated that the number of registered voters was correct as stated on the Form 34C. This assertion revealed that the Court did not look closely at the evidence, which showed that the sum of the individual county totals on Form 34C did not equal the total written at the bottom of Form 34C. The Court also incorrectly asserted that the differences between KYSY's and the IEBC's totals were due to the inclusion (or not) of prisoners in the total number of registered voters.

²⁴ Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 315

²⁵ Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 315

²⁶ Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 310

²⁷ Supreme Court of Kenya Judgment. *Njonjo Mue & Others vs. The Chairman of the IEBC & Others*, paragraph 349

Conclusion

The October 26th fresh presidential election in Kenya was a squandered opportunity for substantive, far-reaching electoral reform. Despite the September judgment, which laid out standards for a credible results counting and transmission process, the IEBC's administration of the fresh election was marked by many of the same issues that marred the August election. These issues included faulty EVID machines, the use of paper and electronic registers at the polling stations, obstruction of observers, inconsistent and error-filled results forms, and severe violence.

Civil society's presidential petition attempted to raise these issues, arguing that the fresh election had again failed to meet constitutional standards for a credible election. Unfortunately, the judgment failed to address most of the points raised in the petition, leaving Kenyans without a clear path forward with regard to the pending issues.

Once again, Kenyans find themselves confronted by politicians' plans for the next election with no closure or explanations with regard to the previous election. If electoral integrity is to be saved before the next election, it is critical for stakeholders to take a close look at the longstanding problems that have characterized past elections. A sincere, substantive attempt to address the roots of these problems could go a long way in achieving broad-based support for and faith in electoral democracy in Kenya.

Acknowledgements

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The opinions presented in this report are those of AfriCOG/KPTJ alone.

Kenyans for Peace with Truth and Justice (KPTJ) is a coalition of citizens and organisations working in the human rights, governance and legal fields that came together after the crisis over the disputed results of the 2007 presidential election. Members include: Africa Centre for Open Governance (AfriCOG), Bunge La Mwananchi, Centre for the Development of Marginalized Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The CRADLE – The Children’s Foundation, Constitution and Reforms Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay and Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict (ICPC), Inuka Kenya Ni Sisi!, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, the National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF) – Africa and Youth Agenda.

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