



**KENYA HUMAN RIGHTS
COMMISSION**

REDEMPTION OR REVERSION?



A BRIEF ON THE CONDUCT OF KENYA'S POST 2013 BY-ELECTIONS

KENYA HUMAN RIGHTS COMMISSION (KHRC)
August 2015

ISBN 9966-941-93-2

Published by:

KENYA HUMAN RIGHTS COMMISSION
Opposite Valley Arcade, Gitanga Road,
P.O Box 41079, 00100 GPO, Nairobi, Kenya.
Tel. +254-020-3874998/9 3876065/6
Fax. +254-020-3874997
Email: admin@khrc.or.ke
www.khrc.or.ke

LIST OF ABBREVIATIONS

- BVR Biometric Voter Registration
- CORD Coalition for Reforms and Democracy
- CSO Civil Society Organisations
- DPO Persons with Disability Organisations
- DPP Director of Public Prosecutions
- ELOG Elections Observer Group
- EVID Electronic Voter Identification Devices
- IEBC Independent Electoral Boundaries Commission
- KHRC Kenya Human Rights Commission
- NDP New Democrats Party
- ODM Orange Democratic Movement
- ODPP Office of Director of Public Prosecutions
- PPA Political Parties Act
- PWDs- Persons With Disabilities
- TNA The National Alliance Party of Kenya
- UDHR Universal Declaration on Human Rights

Table of Contents

LIST OF ABBREVIATIONS.....	2
INTRODUCTION.....	5
I. MEASURES PUT IN PLACE BY POLITICAL PARTIES AND IEBC TO ADDRESS PAST CHALLENGES	8
1. Voter Education.....	8
a. Voter Education during the By-Elections.....	9
2. Participation of Women and Persons with Disabilities	11
a. Participation of Women and Persons with Disabilities during By-Elections	12
i. Participation in Political Parties' Primaries	13
ii. Participation as Candidates at Polls	14
3. Nominations.....	14
a. Nominations towards By-elections.....	15
b. Pitfalls of Direct Nominations	15
c. Absence of Due Diligence	16
4. Dispute Resolution	16
a. Resolution of Disputes that Arose during the By-Elections Period.....	16
5. Elections Day Procedures.....	20
a. Polling during the By-Elections	20
b. Participation of Party Agents	26
II. ANALYSIS OF KHRC FINDINGS.....	28
1. Voter Education.....	28
2. Dispute Settlement	28
3. Nominations.....	31
a. Balancing Political Rights and Right to Fair Trial.....	31
b. A mockery of the nominations process?	32
4. Polling Day	32
a. Voter Apathy.....	32
b. Elections Observation.....	33
5. Participation of Women and Persons with Disabilities	33

a. Conservative Adherence to Constitutional Obligations to Secure Women and PWDs’ Political Participation.....	33
III. CONCLUSION AND RECOMMENDATIONS	34
a. Recommendations to the IEBC	35
b. Recommendations to the Registrar of Political Parties.....	36
c. Recommendations to Civil Society Organisations	37

INTRODUCTION

The 2013 electoral process was marred with major challenges that were associated with voter education, voter registration, party primaries, procurement of electoral materials and equipment, election day procedures and election disputes that resulted in a significant section of stakeholders including election observers to term the process as neither fully credible nor transparent. The conduct and outcome of the elections was contested and consequentially one hundred and eighty seven (187) election petitions¹ arose in respect of the elections. The Independent Electoral and Boundaries Commission (IEBC) which is mandated by the Constitution of Kenya² to conduct or supervise elections including inter-alia registration of voters, regulation of the political parties' nomination process, voter education and settlement of specific electoral disputes; has admitted to the challenges that were noted by observers. IEBC has agreed to make improvements or changes to ensure that future electoral processes are free, fair, transparent and credible.

The by-elections conducted after the 2013 general elections therefore provided an important avenue to note any improvements in the conduct and management of elections. 187 election petitions were filed to contest the conduct and outcome of the 2013 general elections. Among these, 26³ were successful and occasioned the conduct of by-elections. Besides petitions, the IEBC also conducted some by-elections that were as a result of other factors such as the untimely demise of incumbent legislators⁴.

In a bid to ensure that the forthcoming 2017 elections move closer to the constitutional ideal of being free, fair, transparent and credible; KHRC sought to evaluate the post-2013 election period. This was done by monitoring by-elections as part of broader interventions seeking to harness the lessons from the 2013 polls.

¹ Independent Electoral and Boundaries Commission, Annual Report 2013-2014: Your Vote, Your Future p. xiii.

² Article 88(4) of the Constitution of Kenya, 2010.

³ Supra 2 p. 17.

⁴ Makueni Senatorial by-election & Kabete parliamentary by-election

To this end, KHRC observed the:

- Makueni Senatorial by-election conducted on 26th July 2013;
- Matungulu National Assembly by-election conducted on 17th October 2013;
- Kibwezi West National Assembly by-election conducted on 17th October 2013;
- Siaya Senatorial by-election conducted on 17th October 2013;
- Bungoma Senatorial by-election conducted on 19th December 2013;
- Nyaribari Chache National Assembly by-election conducted on 30th December 2013;
- Bonchari National Assembly by-election conducted on 23rd June, 2014;
- Gatundu South National Assembly by-election that was slated for 7th August 2014;
- Mathare National Assembly by-election conducted on 11th August 2014 and;
- Homabay Senatorial by-election that took place on 12th February, 2015.

KHRC's electoral monitoring is in line with its broader institutional mission of fostering human rights, democratic values, human dignity and social justice. This electoral monitoring exercise builds on its past experiences⁵ which informs its advocacy for improved electoral management practice in Kenya. KHRC developed a toolkit for monitoring and observing the by-elections and trained its monitors and observers on the toolkit after which they were able to monitor the elections and document their findings. The KHRC elections observers also took part in the meetings held by the IEBC for observers of the by-elections conducted in 2013 and 2014.

It is against this background that the KHRC generates this brief which consists of three sections. The first section examines initiatives put in place by the IEBC and political parties to address their past failures and challenges in voter education, participation of women and persons with disabilities; nominations and dispute settlement; and polling and post-polling

⁵ For example KHRC monitored the March 2013 general elections. See generally, Kenya Human Rights Commission, Democracy Paradox: A Report on Kenya's 2013 General Elections (2014).

processes. This section also incorporates the findings by KHRC's trained monitors with regard to the by-elections they monitored.

The second section analyses these findings *vis-a-vis* party nominations, voter education, participation of women and persons with disabilities and polling and post-polling processes. The last section provides recommendations of measures that need to be undertaken to ensure the challenges and shortcomings identified by the KHRC monitors and observers in their findings are comprehensively addressed.

I. MEASURES PUT IN PLACE BY POLITICAL PARTIES AND IEBC TO ADDRESS PAST CHALLENGES

The March 2013 general elections were largely characterized by elections observers as peaceful.⁶ However, some aspects of procedure and management continued to elicit public debate, particularly whether they were indeed free and fair.⁷ Election observers of the March 2013 general elections made vast recommendations on how the IEBC and political parties ought to improve on the conduct of future elections so that they surmount shortcomings and challenges they encountered in 2013, and efficaciously discharge their Constitutional and legislative functions.⁸ Commendably, the IEBC acknowledged the shortcomings and challenges, and committed to give due consideration to the elections observers' recommendations so as to discharge sound electoral management practices in Kenya's milieu.⁹ This section of the brief examines the noted shortcomings and challenges in respect of voter education, participation of women and persons with disabilities; nominations and dispute settlement and polling and post-polling process.

I. Voter Education

Success in electoral management is largely hinged upon voters' comprehension of the envisaged polling exercise. In recognition of this, voter education is enshrined in the Constitution. Article 88(4) (g) of the Constitution mandates the IEBC to conduct voter education. Further, the IEBC is mandated by the Section 4(g) of the IEBC Act to carry out voter education.

In preparing for the March 2013 general elections, the IEBC conducted voter education through generating information, education and communication materials such as: Posters, audio-visual media, social media accounts such as Twitter, Facebook and Google; publishing

⁶ The Carter Center, Observing Kenya's March 2013 Elections: Final Report(2013) p. 10.

⁷ See generally for example, Reports on March 2013 general elections by the Mars Group at <http://s3.marsgroupkenya.org/media/documents/2013/04/45f3663cc85211be5228af64d1f47984.pdf> [accessed on 14 April 2015].

⁸ See generally, Federation of Women Lawyers Kenya, Key Gains and Challenges: A Gender Audit of Kenya 2013 Election Process (2013) and Kenya Human Rights Commission, Democratic Paradox: A Report on Kenya's 2013 General Elections(2014).

⁹ Independent Electoral and Boundaries Commission, Annual Report (October 2013) p. 11.

advertisements in the local dailies, employing sports by the youth to carry out voter education to their peers; and sending short messages (SMS) to voters.¹⁰

KHRC noted that during the March 2013 general elections the IEBC failed to conduct comprehensive voter education that includes inclusive explanation on the role of elections observers, the role of political parties agents, and that the voter education was not responsive to the needs of PWD, semi-literate and illiterate voters. These inadequacies were noted as well by other elections observers such the Carter Group¹¹ and ELOG.¹² These observers like KHRC recommended that IEBC should intensify its voter education and ensure that it meets the specific needs of PWD, semi-literate and illiterate voters. The IEBC on its part acknowledged these shortcomings and committed to undertake specific efforts that would enhance the effectiveness of voter education with regard to these hitherto neglected groups.

a. Voter Education during the By-Elections

In a bid to improve its conduct of voter education aimed at equipping voters' effective participation in the by-elections to be conducted in 2013-2014, the IEBC *inter-alia* trained and commissioned two voter educators per ward to conduct voter education; these groups conducted road shows, held stakeholders forums and carried out community mobilisation efforts.¹³

The impact of the voter education however could not be considered optimal given the observations made on the polling days. KHRC observed the following with regard to voters during the Mathare National Assembly, Bungoma Senatorial, Nyaribari Chache, Siaya Senatorial, Matungulu National Assembly and Kibwezi West National Assembly by-elections:

- They heavily relied on the polling officers to explain to them the voting procedures, particularly the elderly, illiterate and semi-literate ones who turned up at the wrong polling stations to vote;
- They attempted to vote using the waiting cards that are usually given prior to the national identity cards being issued;

¹⁰*Supra* at p. 49-50.

¹¹*Supra* note 9 at p. 12.

¹²Elections Observer Group, ELOG By-Elections Report, October 2013, p.10.

¹³*Supra* note 2 at p. 47.

- Some attempted to vote without national identity cards;
- Others sought to cast their vote using damaged voter cards such as partly burnt ones;
- Some endeavoured to use photocopies of their national identity cards or their voters' cards to cast their votes and;
- Others attempted to use national identity cards that did not belong them to vote.¹⁴

The conduct described above are clear signposts that a significant number of voters are not conversant with the electoral process, and therefore brings to question the quality of voter education conducted by the IEBC. Given that the IEBC voter education materials outline the voting process, it therefore stands to reason that the problem rests on the delivery of the content rather than the absence of it. This view is reinforced when it is considered that there is no cogent mechanism to monitor the delivery of voter education, rather what is in place is evaluation of the voter education which IEBC carries out after elections have been conducted.

According to the IEBC's 2013-2014 report, IEBC held a single session on voter education with PWDs during the year 2012-2013 and another single session during the year 2013-2014.¹⁵ Nevertheless, the IEBC does not furnish information on the nature of the sessions, when and where they were held, neither does it provide disaggregated data on the persons that attended these sessions that would afford an understanding on the PWDs targeted. This hardly points to a comprehensive voter education programme for PWDs. Indeed, the KHRC monitors observed that voter education conducted in preparation for the by-elections were not specifically tailored to target special interest groups such as PWDs.¹⁶ KHRC's finding is further confirmed by ELOG, which observed the Siaya Gubernatorial, and Kibwezi and Matungulu parliamentary elections where ELOG

¹⁴Kenya Human Rights Commission, Report on Mathare National Assembly By-Elections Held on 11 August 2014, p. 12; Kenya Human Rights Commission Report on Bungoma Senatorial By-Elections Held on 19th December 2013, p. 5; Kenya Human Rights Report on Nyaribari Chache By-Elections Held on 30th December 2013 p. 3; Kenya Human Rights Commission, Report on Siaya Senatorial By-Elections Held on 17th October 2013, p. 5.

¹⁵*Supra* note 2 at p. 47.

¹⁶Kenya Human Rights Commission, Report on Gatundu South By-Elections, p.6.

recommended that the IEBC ensures that its voter education and materials are accessible to all persons particularly PWDs.¹⁷

During the Nyaribari Chache and Siaya by-elections the KHRC observers witnessed a few voters escaping to avoid arrest upon discovery by the polling officers that they were registered twice.¹⁸ These incidents raise concern regarding the timing, duration and the content of voter education. Of significant interest is whether voter education includes information on complaints mechanisms through which voters can report elections offences and misconduct they have witnessed. This is of import given that when voters recognise they have a pertinent role to play in elections management by reporting election offences and misconduct, then they have an incentive to report such incidents, and collaborate with pertinent agencies during the determination of elections disputes. KHRC elections monitors noted that there were incidents of voter bribery, intimidation of voters and violence during the 2013 and 2014 by-elections but no member of the public or voters came forward to report these incidents. These incidents are highlighted in section I (4) (a) of this brief.

2. Participation of Women and Persons with Disabilities

Women and Persons with Disabilities (PWDs) have been predominantly marginalised in the Kenyan electoral processes; their political participation has been both dismal and minimal because of various cultural and structural barriers.¹⁹ Such barriers include: inadequate support and discriminative structures from political parties, inadequate financial resources, violence against women and PWDs aspirants and failure to implement electoral laws on nominations.²⁰

The Constitution seeks to secure effective participation of women and PWDs. First, it specifically stipulates in the general principles for the electoral system that not more than

¹⁷*Supra* note 6 at p. 10.

¹⁸Kenya Human Rights Commission Report on Nyaribari Chache By-Elections Held on 30th December 2013 p. 4; and Kenya Human Rights Commission, Report on Siaya Senatorial By-Elections Held on 17th October 2013, p. 5.

¹⁹Federation of Women Lawyers Kenya, Key Gains and Challenges: A Gender Audit of Kenya 2013 Election Process (2013), p.12.

²⁰*Ibid.*

two thirds of members of elective public bodies shall be of the same gender,²¹ and provides for fair representation of PWDs.²² Second, it expressly provides for seats for women and PWDs in the National Assembly²³, the Senate²⁴, and the County Assemblies.²⁵Third, it affirms the rights of women and men to equal political opportunities²⁶and political rights²⁷ which are embodied in the Bill of Rights.²⁸This is imperative because all persons, including the IEBC and political parties are bound to uphold the Bill of Rights.²⁹

In order to secure participation of women in the March 2013 general elections, the IEBC subsidised the nominations fee payable by women to be half of what was payable by male candidates. Notwithstanding IEBC's effort, political participation of women and PWDs during the March 2013 general elections was minimal and as a result their political representation failed to meet the Constitutional threshold.³⁰For example, no woman was elected to the position of Senator and Governor.³¹In a bid to address the poor representation of women and PWDs in the Senate and County governments and to fulfil the aforementioned Constitutional provisions³², women and PWDs were nominated into these constitutionally designated seats.³³While it is commendable that the IEBC worked in concert with political parties to secure these nominations, it was underwhelming as it simply fulfilled the bare minimum requirement of women and PWDs political representation. It is especially deplorable when it is considered that women constitute 50.1% of the Kenyan populace.³⁴

a. Participation of Women and Persons with Disabilities during By-Elections

It is laudable that during the March 2013 general elections, the IEBC by subsidising the nomination fees payable by women candidates and ensuring the polling stations were physically accessible to PWD addressed a component of financial and physical barriers to women and PWD's political participation. However, other aforementioned barriers to women and PWDs political participation continue to persist and therefore the IEBC and

²¹Article 81.

²²*Ibid.*

²³ Articles 97(1)(b)(c).

²⁴ Articles 98(1)(b)(c)(d).

²⁵ Article 177(1)(a).

²⁶Article 27(3).

²⁷Article 38.

²⁸Chapter Four of the Constitution of Kenya, 2010.

²⁹Article 20(1).

³⁰ Supra note 19 at p. 32-33.

³¹ Supra note 19 at p.47.

³² Articles 97(1) (b) (c) and 98(1) (b) (c).

³³ Supra note 19 at p.49.

³⁴<http://www.tradingeconomics.com/kenya/population-female-percent-of-total-wb-data.html>[accessed on 18th April 2015].

political parties cannot escape scrutiny and criticism for failure to put adequate measures to maintain fidelity towards the Constitutional safeguards on women's and PWD political participation.

i. Participation in Political Parties' Primaries

Political parties through their primaries can secure effective participation of women and PWDs by creating a conducive environment for their participation. Such an environment includes one that is free from intimidation and violence during primaries; political parties according financial and technical support to women and PWDs; political parties nominating women and PWDs to contest as candidates in the parties' stronghold; and overtly encouraging participation of women and PWDs in their political parties' structures. These are some of practical means of making Article 91(I) (e) of the Constitution a reality, not mere rhetoric, as in any event political parties commit to fulfil this Constitutional provision during their registration.³⁵

However, in this context, the participation of women and PWDs remains unfulfilled as evidenced during the political parties primaries for the by-elections monitored by KHRC. According to KHRC's observers, there were no women and PWDs who took part in political party primaries in the run-up to by-elections save for The National Alliance Party (TNA) which had one woman candidate during the primaries for the Gatundu South National Assembly by-election.³⁶

The IEBC has been mandated by Article 88(4) (d) of the CoK 2010 to regulate the process by which parties nominate their candidates for elections. However, political parties have not invited the IEBC to regulate their primaries, which is not surprising as a reading of Section 32 of the Elections Act, 2011 suggests that this is optional. Concomitantly, the IEBC has not regulated the nomination processes by political parties and as such political parties are often left to their own devices. It is therefore not uncommon for political parties' primaries to be marred by intimidation, threats and violence. The KHRC observers noted incidents of intimidation towards a woman candidate during the TNA primaries in Gatundu South.³⁷It

³⁵ Section 7(b)(c) (d) of Political Parties Act, 2011 as read together with Section 4(b) of Political Parties Act, 2011.

³⁶ *Supra* note 16 at p.5.

³⁷ *Ibid.*

cannot be overstated that intimidation, threats of violence and violence have in the past effectively locked out women from electoral processes,³⁸ and continues to do so.

ii. Participation as Candidates at Polls

The limited yet meagre participation of women and PWDs was evident during the by-elections. Notably, out of 11 by-elections monitored, only 4 women candidates participated at the polls during the by-elections. The four are:

- Jane Wavinya Kitundu of Labour Party who stood as one of the senatorial candidates for the Makueni Senatorial by-elections³⁹
- Rael Otundo of NARC-Kenya who stood as one of the candidates for the Nyaribari Chache National Assembly by-elections⁴⁰;
- Mercy Winja who stood as an independent candidate for the Siaya Senatorial by-elections⁴¹ and
- Juliana Mumo Kisimbi of Party of Independent Candidates of Kenya who stood as one of the candidates for the Kibwezi West National Assembly by-elections.⁴²

3. Nominations

The nomination process for political candidates is the linchpin of polling processes since it ushers into the ballot papers persons whom voters may or may not vote for. The Commission is mandated⁴³ to monitor compliance by political parties when nominating their candidates. Section 32 of the Elections Act, provides that political parties may request the IEBC to supervise their nomination processes. In the run up to the March 2013 general elections no political party requested the IEBC to supervise their nomination processes; as such political parties' primaries were marred with intimidation, threats of violence and bribery.⁴⁴

³⁸ *Supra* note 19 at p. 3.

³⁹ *Supra* note 4 at p. 2.

⁴⁰ Kenya Human Rights Report on Nyaribari Chache By-Elections Held on 30th December 2013 (December 2013)p. 3.

⁴¹ Kenya Human Rights Commission, Report on Siaya Senatorial By-Elections Held on 17th October 2013(October 2013), p. 5.

⁴² Kenya Human Rights Commission Report on Kibwezi West National Assembly By-Elections Held on 17th October 2013(October 2013), p. 10.

⁴³ Article 88 (4)(k), Constitution of Kenya 2010.

⁴⁴ *Supra* note 9 at p.63-66.

a. Nominations towards By-elections

The IEBC did not put measures in place to supervise political parties' primaries that were conducted with a view to field candidates for the various by-elections conducted post-2013. Further, KHRC observers noted that there was no political party that requested IEBC to supervise its nomination exercise. It is therefore not surprising that nominations by political parties to field candidates during the 2013 and 2014 by-elections were marred by incidents of intimidation, threats of violence and bribery. During these primaries, a vast majority of political parties directly nominated their candidates, which is essentially inimical to the spirit of Article 38 of the Constitution.

b. Pitfalls of Direct Nominations

When political parties directly nominate candidates it not only interferes with internal party democracy but also limits political options for voters and makes a mockery of voters' political rights. This was the scenario that the membership of the Orange Democratic Party (ODM) contended with when the leadership of the party gave a direct nomination to Moses Otieno Kajwang to contest as a candidate in the Homabay Senatorial by-elections on 12th February 2015, , albeit with massive protests from some faction of the party membership.⁴⁵

Often, Kenyan political parties have not utilised their unfettered discretion to directly nominate candidates to promote political participation of women and PWDs. KHRC observed that none of the political parties that fielded candidates to contest in the by-elections conducted in 2013 and 2014 gave direct nomination to women and/or PWDs. The exception to this was the Wiper Party which gave a direct nomination to Ms. Kethi Kilonzo to contest in the 2013 Makueni Senatorial by-elections. However her eligibility to contest in the by-elections was successfully challenged by the Jubilee Coalition on the grounds that she was not a registered voter, which is a core requirement for any person seeking election to be a member of Senate.⁴⁶

Direct nomination of candidates by political parties brings to question what happens in the event the directly nominated candidate decides not to contest in the elections. Such was the circumstance in the 2014 Gatundu South Constituency by-elections, wherein the New Democrats Party (NDP) gave a direct nomination to its candidate, Joachim Kiarie Kamere who subsequently withdrew from contesting in the by-election three (3) days to the polling

⁴⁵Kenya Human Rights Commission, Report on Homabay Senatorial By-Elections Held on 12th February 2015, p. 6.

⁴⁶*Supra* note 4 at p.1.

day, resulting in Moses Kuria remaining as the only contender and being declared the winner.

c. Absence of Due Diligence

The IEBC faced heavy public scrutiny and criticism when it gave its clearance to Ms. Kethi Kilonzo nominated by the Wiper Party to contest during the Makueni Senatorial 2013 by-election, yet it had been alleged that she was not a registered voter; and Prof. Philip Kaloki of the NARC, a member of the Jubilee Party to contest in the same elections yet it was alleged that he was a member of more than one political party.⁴⁷ Although the IEBC subsequently revoked their nominations after the IEBC Dispute Resolution Committee determined the disputes in respect of their nomination on 26th July 2013⁴⁸, these incidences impinge on the effectiveness of the IEBC mechanisms for vetting and registering candidates. This is heightened when it is considered that the IEBC has the voters' roll and that the Registrar of Political Parties who has records of membership of political parties operated under the auspices of the IEBC at the time of by-elections. Therefore, the IEBC was in a vantage position to carry out due diligence prior to giving clearance to Ms. Kilonzo and Prof. Kaloki.

4. Dispute Resolution

The IEBC is mandated by Article 88(4) (e) of the Constitution and Section 74(1) of the Elections Act to settle disputes including those relating to or arising from nominations. Pursuant to these provisions, the IEBC has established the Dispute Resolution Committee which presides over the disputes that emerged in respect of elections.⁴⁹

a. Resolution of Disputes that Arose during the By-Elections Period

Disputes in relation to the electoral process are likely to arise when elections offences are committed or the electoral code of conduct is violated. Section 107(1) of the Elections Act mandates the IEBC to prosecute elections offences. It provides a catalogue on what constitutes elections offences. These are offences relating to multiple registrations as a

⁴⁷*Supra* note 4 at p.1.

⁴⁸*Supra* note 2 at p.18.

⁴⁹*Supra* note 9 at p. 33

voter,⁵⁰ offences relating to voting,⁵¹ offences by members and staff of the IEBC,⁵² offences that defy the requirement to maintain secrecy at elections,⁵³ impersonation,⁵⁴ treating,⁵⁵ exercising undue influence over a voter⁵⁶, bribery⁵⁷, use of force or violence during election period,⁵⁸ use of national security organs to support a party or candidate,⁵⁹ offences relating to elections⁶⁰ and use of public resources.⁶¹

The Elections Act also enumerates illegal practices in respect of elections. These are certain expenditures made for purposes of promoting or procuring the elections of particular candidates during elections,⁶² failure by employers to allow employees reasonable period of time off for voting,⁶³ aiding and abetting offences within the Act⁶⁴ and offences by candidates and political parties.⁶⁵ During the 2013-2014 by-elections period, the IEBC in conjunction with the Kenya Police Service and the Director of Public Prosecutions (DPP), investigated seven (7) and prosecuted six (6) electoral offences and misconducts. The prosecutions are still on-going. However, these investigations and prosecutions remain dismal when it is considered that there were various election offences and illegal practices observed by the KHRC's election monitors during the campaign and polling of the 2013 and 2014 by-elections.

During the Gatundu South National Assembly by-election, KHRC observers noted that candidates bribed voters with money and meals during the campaigning period from 17th - 29th July 2014, for example one candidate publicly gave a young person Kshs. 20,000 to divide it among persons present while another one gave Kshs. 10,000 to children to buy *mandazis*

⁵⁰Section 57 of the Elections Act, 2011.

⁵¹Section 58.

⁵²Section 59.

⁵³Section 60.

⁵⁴Section 61.

⁵⁵Section 62.

⁵⁶Section 63.

⁵⁷Section 64.

⁵⁸Section 65.

⁵⁹Section 66.

⁶⁰Section 67.

⁶¹Section 68.

⁶²Section 69.

⁶³Section 70.

⁶⁴Section 71.

⁶⁵Section 72.

(Donuts). Yet another donated building materials to *bodaboda* (bicycle/motorcycle taxis) riders for construction of a stage with a view to ostensibly secure the riders' votes.⁶⁶

During the campaign period for the Mathare National Assembly 2014 by-elections, a child died from a stampede when people were scrambling for Kshs. 200 given by a TNA politician; a candidate gave money to his supporters in a hotel within the constituency in the presence of TNA politicians; and a candidate gave Kshs. 200,000 to a church within the constituency that he attended in the presence for CORD politicians.⁶⁷ The KHRC monitors observed incidents of alleged voter bribery during the Nyaribari Chache National Assembly and the Siaya Senatorial by-elections.⁶⁸ Further, KHRC monitors were reliably informed of intimidation and violence directed towards two agents of William Oduol, one of the Siaya Senatorial candidates on 16th October 2013 by supporters of one of the opponents; the agents were only released by their attackers when they yelled the said opponents' name.⁶⁹ To date none of these incidents have been investigated or prosecuted.

⁶⁶*Supra* note 16 at p.8.

⁶⁷*Supra* note 46 at p. 10.

⁶⁸*Supra* note 41 at 4, and *Supra* note 42 at p.6.

⁶⁹*Supra* note 42 at p. 7.



An incendiary pamphlet speaking against ODM candidate Stephen Kariuki during the Mathare by-election

The IEBC has not rigorously investigated and prosecuted public officers who have committed election offences and violated the code of conduct, and therefore its enforcement of electoral laws in this regard remains ineffectual. The Elections Act proscribes public officers from: engaging in the activities of political parties,⁷⁰ publicly indicating support or opposition for a party or candidate⁷¹ or engaging in political campaigns or other political activity.⁷² A public officer who violates these provisions commits an offence and upon conviction is liable to a fine not exceeding 1 million or imprisonment for a term not exceeding three years or both.⁷³ By the same token, Section 12(1) of the Political Parties Act restricts public officers from engaging in activities of political parties, which includes to publicly supporting a political party or a candidate in an election.

KHRC's election monitors witnessed a political candidate for Gatundu South constituency being given an opportunity to address members of the public during the launch of *Uwezo*

⁷⁰Section 43(1) (a.)

⁷¹Section 43(1) (b).

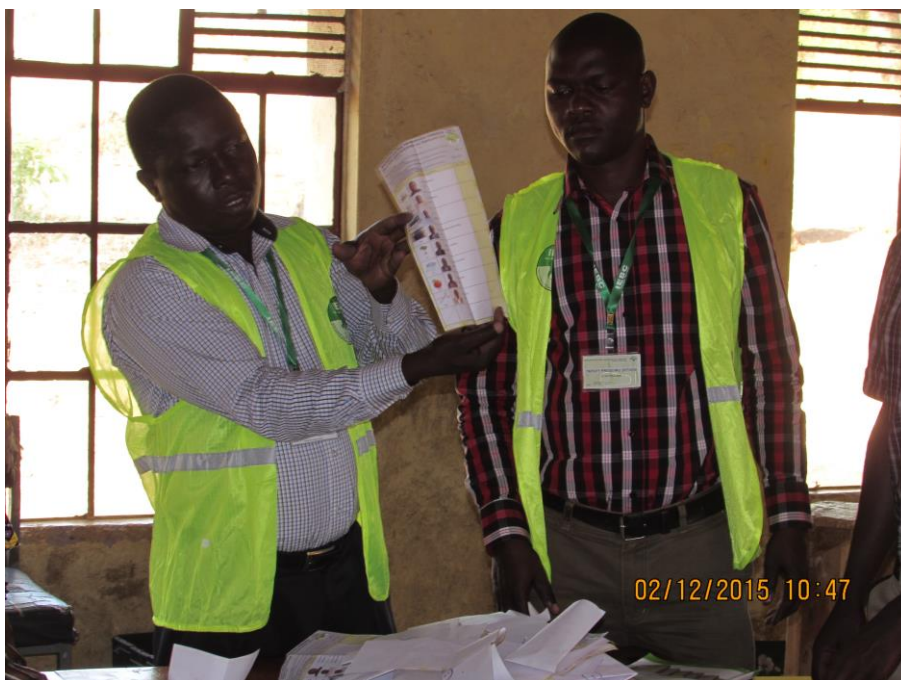
⁷²Section 43(1) (c).

⁷³Section 43(2) of the Elections Act, 2011.

Funds that was attended by a Cabinet Secretary. Other candidates present at the launch were denied a similar opportunity.⁷⁴As such, the Cabinet Secretary publicly supported one of the Gatundu South National Assembly candidates, contrary to the Elections Act. To date no charges for election offences have been proffered against the said Cabinet Secretary.

5. Elections Day Procedures

During the March 2013 general elections, the IEBC faced challenges during the polling day. Commendably, after the elections the IEBC acknowledged and committed to address the challenges it experienced during the March 2013 elections such as: use of Electronic Voter Identification Devices (EVID); presiding officers failed to record reasons for the refusal of candidates and agents to sign Form 35 and caused alterations, and cancellations on Form 35 without the signature of candidates and political parties' agents; and lack of criteria for determining valid and invalid votes. The IEBC committed to enhance its capacity so as to conduct future elections efficiently and effectively.⁷⁵



IEBC Officials scrutinize a marked ballot paper. There is need for criteria to determine valid and invalid votes.

a. Polling during the By-Elections

In preparations for the by-elections in 2013 and 2014, the IEBC enhanced its human resource to conduct the by-elections by recruiting and training 42 deputy constituency

⁷⁴*Supra* note 16 at p.6-7.

⁷⁵*Supra* note 2 at p.xii.

returning officers, 3,278 presiding officers, 3209 deputy presiding officers, 10,502 elections and tallying clerks.⁷⁶ However it remains questionable whether the polling officers were thoroughly trained on how to conduct the voting process for assisted persons. The KHRC observed during the Nyaribari Chache National Assembly by-elections some polling officers did not follow the procedure for assisted voters and those assisting them. Noticeably, the polling officers did not administer the oath of secrecy to the assistants.⁷⁷ Similarly during the Bungoma Senatorial by-elections KHRC observers noted that the polling officers at Bunambobi Primary School failed to administer the oath of secrecy to persons that were assisting the voters.⁷⁸



KHRC Election Monitors (Left) Observing Assisted Voting

The IEBC held prior meetings with observers to the by-elections during which it apprised them on preparatory measures it had undertaken towards the elections,⁷⁹ even though it remains glaringly questionable whether all IEBC's polling officers were thoroughly trained on the role of observers. For example, the polling officers at the polling stations in Matuu Primary School and Matuu Secondary School barred the KHRC elections observers from

⁷⁶*Supra* note 2 at p. 41.

⁷⁷*Supra* note 41 at p.4.

⁷⁸Kenya Human Rights Commission Report on Bungoma Senatorial By-Elections Held on 19th December 2013, (December 2013) p.4.

⁷⁹*Supra* note 46 at p.6.

participating in the Matungulu National Assembly by-elections as elections observers, on the ground that, 'they were not told about observers during their trainings.'⁸⁰



KHRC Election Observer (3rd Right) in Homa Bay County with IEBC Officials

Also debatable is the extent to which the IEBC provided adequate resources for the polling officers to work for long hours during the polls. KHRC noted during the Matungulu National Assembly by-elections that the IEBC did not provide its officials with adequate meals yet polling is a mentally intensive exercise that requires high intellectual concentration. In one polling station the officers were each given 1 loaf of bread and 2 bottles of soda for the entire polling day; in another station the officers were each given 1 loaf of bread, 2 bottles of water and 1 bottle of soda for the entire day; and yet in another polling station, the officers were given 1 loaf of bread, 2 packets of milk and 1 bottle of soda.⁸¹ Ashamedly, even this disparity in providing meals for the polling officers within a particular jurisdiction with the same prevailing conditions cannot be justified.

⁸⁰Kenya Human Rights Commission Report on Matungulu National Assembly By-Elections Held on 17th October 2013 (October 2013), p. 7.

⁸¹ *Ibid.*

In April 2014, the IEBC commenced continuous voter registration that culminated to an additional 4,691 voters as at 30th June 2014.⁸² However the impeccability of the registration exercise and the integrity of the voter register remains questionable with glaring evidence of no marked improvement in comparison to preparations for March 2013 general elections. According to the KHRC elections observers some voters' names were missing from both EVID and the manual register yet they claimed they had registered to vote. For example, some voters that sought to vote in the Mathare National Assembly by-elections at the Lions Health Clinics polling centre alleged that their names were missing from both the EVID and the manual register because they are from the *Kamba* community.⁸³ At Salama Polling Centre in Mathare constituency, some voters' identities were in the EVID but not the manual register.⁸⁴ Similarly, the KHRC observers noted⁸⁴ that some voters who sought to vote in the Makueni Senatorial by-elections found their names missing from the manual registers at the polling centers in the Ngukuni Primary School, Sakai Primary School and Kaskeu Secondary School.⁸⁵ KHRC also observed during the Siaya Senatorial by-elections that some voters' names at Karapol Primary School voting stations were missing yet the voters had voted in the March 2013 general elections.⁸⁶ Further, the KHRC noted during the Matungulu National Assembly by-elections that a handful of voters could not vote because their voter registration was not reflected on the manual register and the biometric system.⁸⁷

The IEBC contended with low voter turn-out during the by-elections which serves as an indictment on the voter education it conducts especially targeting specific groups as youths. This is best exemplified in the Kibwezi West National Assembly by-elections where the KHRC observed a rather worrying low voter turn by the youth at the polls.⁸⁸ On the polling day, the KHRC observers encountered youths who asserted that they would abstain from voting because past leadership in the area had never the addressed their socio-economic concerns.⁸⁹ Furthermore, KHRC elections observers to the Makueni Senatorial by-elections could not access Ukia Polling Station in Kaiti Constituency to observe the elections because the voters were suspicious of them and thought they could engineer rigging of the

⁸²*Supra* note 2 at p.24.

⁸³*Supra* note 46 at p.12.

⁸⁴*Ibid.*

⁸⁵ Makueni

⁸⁶*Supra* note 42 at p.5.

⁸⁷*Supra* note 81 at p.8.

⁸⁸*Supra* note 43 at p.10.

⁸⁹*Supra* note 43 at p.11.

elections.⁹⁰ It brings to question whether the voter education conducted by the IEBC in preparation for the by-elections clearly articulated the role of elections observers.

IEBC measures to ensure that voting materials meet the requisite statutory standards during the by-elections were not adequate. The KHRC elections observers noted during the Bungoma Senatorial by-elections that some ballot boxes used at the polling stations situated in Bumula Primary School, Bunambobi Primary School, Malakisi Health Centre and Chwele Boys Primary School were not marked.⁹¹ The observers noted during the Siaya Senatorial by-elections that the polling officers at *Bar KaWang'a* polling station conducted elections without marking voters' fingers with indelible marker because the marker was not functional. As such, some voters cast their votes without having their fingers marked raising potential of such voters voting twice.⁹² The IEBC did not also ensure the voting materials arrived in time in order to commence voting as per stipulated statutory time. For example, the KHRC observers noted that the Mathare National Assembly by-elections encountered an approximately 1 hour delay in opening some polling stations because the polling materials arrived late.⁹³

⁹⁰*Supra* note 4 at 7.

⁹¹*Supra* note 79 at p.4.

⁹²*Supra* note 42 at p.3.

⁹³*Supra* note 4 at p. 5-7.



IECB officials in Homa Bay County huddle over a singular lantern. Were the IECB preparations for the by-elections adequate?

Despite all this, the IECB's in its assessment concluded that it carried out ample preparations during by elections for use of technology and successfully deployed and managed the electoral system that integrated information, communication and technology, during the by-elections, in comparison to the March 2013 general elections.⁹⁴ The findings by the KHRC elections observers however, cast aspersions to this assessment. The KHRC election observers noted that during the Makueni Senatorial by-elections the EVID that were to be used at Sakai Primary School were faulty and could not be used; and the EVID chargers for use at the Kiumoni and Kambi-Mawe Primary School polling stations ran out in the afternoon and polling officers had to use the spare chargers which caused them deep apprehension that they would not carry out their functions well should the spare batteries run out as well.⁹⁵ Similarly, the KHRC observers noted during the Nyaribari Chache National Assembly by-election the EVID were slow at one polling station because of poor network reception.⁹⁶

⁹⁴*Supra* note 2 at p.36.

⁹⁵*Supra* note 4 at p. 3.

⁹⁶*Supra* note 41 at p.4.

IEBC continued to contend with the challenge of ensuring all polling stations had visible signage at the polling stations. For example, the KHRC elections observers noted two polling stations within Nyaribari Chache constituency that did not have visible signage during the conduct of the Nyaribari Chache National Assembly by-elections. KHRC also noted during the Matungulu National Assembly by-elections that some polling stations such as Kwa Syokimanza Polling Station did not have signage to identify it as a polling station.⁹⁷ By the same token KHRC noted during the Siaya Senatorial by-elections that some polling stations such as Usenge Market Polling Stations had no clear signage to identify them as polling stations.⁹⁸

The IEBC also continued to encounter the challenge of ensuring adequate security at polling stations on election days to curb and surmount threats of violence and actual violence. For example, the KHRC observers noted during the Mathare National Assembly by-elections that there were few security officers assigned at the polling stations. Therefore, the officers had to work for long hours leaving them exhausted and as such, some of the officers had naps during the polling process. This was exemplified in Nyazo Polling Station in Kibwezi East Constituency, where on the polling day there was a scuffle among persons alleged to be supporters of CORD and Jubilee Coalition Senatorial candidates in the by-elections.⁹⁹ KHRC also observed during the Siaya Senatorial by-elections that security officers were not visibly present at some polling stations while some polling stations only had one officer assigned to an entire polling station.¹⁰⁰

b. Participation of Party Agents

Apart from fielding candidates to contest in the elections, political parties and independent candidates assign their agents to observe the conduct of the elections. Elections observers to the March 2013 general elections noted that although political parties assigned their agents to observe polls during the March 2013 general elections, the party agents did not fully comprehend their roles in elections as they only participated in the tallying of votes, as opposed to participating actively on the elections day from the time polling commences. Based on KHRC's observations during the by-elections of 2013 and 2014 it is evident that political parties did not put measures in place to equip their party agents to participate actively in the by-elections. For example, there was general and noticeable waned interest

⁹⁷*Ibid.*

⁹⁸*Supra* note 42 at p.4.

⁹⁹*Supra* note 4 at p. 5-7.

¹⁰⁰*Ibid.*

among political parties to assign agents to take part in the by-elections. Most polling stations in Makueni County had CORD party agents during the Senatorial 2013 by-elections and glaringly some stations in the County did not have any agents from the Jubilee Coalition.¹⁰¹ This is rather worrisome when it is considered that the IEBC's evaluation of its conduct of elections has recently embodied reports by elections observers and party agents.¹⁰² It means that these parties will miss out on opportunities to give the IEBC feedback on the conduct of elections. Equally, the KHRC observed during the Siaya Gubernatorial by-elections, that party agents rather overzealously insisted on having more than one party agent at polling stations,¹⁰³ contrary to Section 67(2) of the Elections (General) Regulations, and yet interestingly these agents only took part in the tallying of votes.



IEBC officials in Kajiado County counting ballots at a polling station in the absence of Political Party Agents. Political parties failed to effectively engage agents during the by-elections

KHRC's findings which illuminate the deficiencies of the IEBC with regard to ample and adequate preparedness for the conduct of by-elections are corroborated. A venerable elections group, the ELOG, based on its observations of the Siaya Senatorial, Matungulu and Kibwezi National Assembly by-elections recommended to the IEBC to devote ample efforts towards preparations for the conduct of elections.¹⁰⁴

¹⁰¹ *Supra* note 4 at p.6.

¹⁰² *Supra* note 2.

¹⁰³ *Supra* note 42 at 4.

¹⁰⁴ *Supra* note 12 at p.9.

II. ANALYSIS OF KHRC FINDINGS

I. Voter Education

The KHRC elections monitors found that although the IEBC conducted voter education in preparation for the by-elections conducted in 2013 and 2014, its impact is yet to be optimally realised as discussed in the section above.

Customarily, the IEBC accredited civil society organisations (CSOs) to conduct voter education during the general election, but seldom engaged CSOs to carry out education during 2013 and 2014 by-elections. By the same token, CSOs did not proactively seek to provide voter education during by-elections. It would be desirable for the IEBC to engage CSOs in carrying out voter education particularly during by-elections, and in this regard intensify its engagement with the persons with disability organisations (DPOs).

2. Dispute Settlement

The Commission's Dispute Resolution Committee determined disputes that arose from nominations for the by-elections of Makueni County Senatorial seat on 26th July 2013 and Shella Ward County Assembly elections on 29th April 2014.¹⁰⁵ Prior to seeking the IEBC to settle disputes, the aggrieved parties ought to have exhausted the political parties' dispute resolution mechanisms. This requirement, while commendable and in line with the principles of fair administrative action has been rather challenging because not all political parties have fully-fledged transparent and accountable internal dispute mechanisms. The absence of functional internal dispute resolution mechanisms within political parties presents a unique challenge to candidates that intend to contest the conduct of political parties' primaries. It impedes the expeditious settlement of disputes that arise from or in respect of political parties, which remains a vital stage in the electoral process. The KHRC elections monitors observed the operations of the TNA dispute resolution mechanism in respect of nomination disputes for the Gatundu South constituency by-elections and concluded that due process of the law was not followed.¹⁰⁶

The hesitation by members of the public to report election offences poses a serious challenge to the IEBC's efforts to enforce the Elections Act. Commendably, the IEBC's *Voter*

¹⁰⁵*Supra* note 2 at p. 18.

¹⁰⁶*Supra* note 16 at p.5.

Education Manual,¹⁰⁷ enumerates what constitutes election offences and electoral malpractices and the nature of disputes that the IEBC and the Judiciary determines. Glaringly, neither does the manual include the procedures of determining those disputes, nor does it highlight the role of the voters that have witnessed such elections offences and malpractices to report and cooperate with the IEBC and law enforcement agencies in the determination of those disputes.

During the 2013 and 2014 by-elections and the campaign period for those elections, the KHRC observed and noted that no member of the public or voters came forward to report incidents of intimidation, threats or violence. This is notwithstanding the fact that members of public and voters expressed apprehension that budding incidents of intimidations and threats they had witnessed during by-election campaigns would escalate.

The KHRC monitors took part in the meetings organised by PeaceNet between the residents of Mathare and police officers in the area during by-elections campaign period for the Mathare National Assembly in August 2014.¹⁰⁸ Although residents complained of intimidation and threats by some political candidates as well as inaction by the police officers towards the threats and intimidation, no one came forward to report incidents of threat of violence, bribery and intimidation.¹⁰⁹

The KHRC elections monitors observed incidents of intimidation, threats to violence and violence that included: one politician who was campaigning for George Wanjohi, TNA's candidate for the Mathare National Assembly by-election, threatened that non-Kikuyu tenants will have to move out of houses belonging to Kikuyu landlords should the TNA candidate lose in the Mathare by-elections; residents of Kiamiako Ward within Mathare constituency were warned that should the TNA candidate lose the elections then non-Kikuyus would have to vacate from the area; in Huruma and Ngei Wards within the Mathare constituency Kikuyu residents were warned that they would have to vacate from

¹⁰⁷<http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/downloads/item/voter-education-training-manual> [accessed on 9th April 2015].

¹⁰⁸*Supra* note 46 at p.9.

¹⁰⁹*Supra* note 46 at p.10.

the area should Stephen Kariuki, the ODM candidate win the by-elections;¹¹⁰ on 29th July 2014, after a scuffle between CORD an alliance that includes the ODM, and TNA supporters, TNA's red range rover was damaged.¹¹¹ There were no charges proffered in respect of these incidents and it is therefore not surprising that the voter turnout at the Mathare by-election was rather low.¹¹²

Correspondingly in Siaya the Senatorial by-elections there were alleged incidents of intimidation during the campaign period, and the voter turnout was low.¹¹³ Unlike in the March 2013 general elections during which the Office of the Director of Public Prosecution (ODPP) constituted a Joint Quick Response Team that worked jointly with the IEBC, National Cohesion and Integration Commission, the Judiciary and the Kenya Police Service to ensure expeditious investigations and prosecution of elections and related offences; receipt and action on complaints of elections and related offences; and receipt of reports on arrests made in relation to elections and related offences, there was no such or similar team established during the by-elections. Instead the IEBC worked jointly with the Kenya Police Service and the ODPP to investigate seven ((7) incidents of elections offences and instituted prosecution of six (6) alleged elections offences, respectively.¹¹⁴ Given that the investigations and prosecutions are yet to be concluded, it has fuelled the public perception of prevailing inaction towards elections offences and given members of the public and voters justification to obsequiously condone the commission of electoral malpractices and offences. Compounding this is the fact that the Commission on Administration of Justice and the IEBC did not have monitors and there were very few CSOs that had monitors on the ground to facilitate enforcement of the Elections Act.

The IEBC stipulates the duration during which campaign periods ought to start and end as from 7.00am-7.00pm. However, KHRC witnessed the political candidates for Mathare National Assembly 2014 by-elections carrying out door to door campaigns after 7.00 pm with some candidates campaigning as late as 11.00 pm.¹¹⁵ The absence of a Joint Quick Response Team akin to the one established in January-March 2013 general elections meant

¹¹⁰*Ibid.*

¹¹¹*Supra* note at 16 p.11.

¹¹²*Supra* note 46 at p.14.

¹¹³*Supra* note 42 at p.5.

¹¹⁴*Supra* note 2 at p.21-22.

¹¹⁵*Supra* note 46 at p.11.

that there was no avenue through which members of the public or voters could report persons campaigning beyond the stipulated time.

3. Nominations

Section 74(2) of Elections Act, 2011 makes it an offence for political parties to knowingly nominate persons who do not meet the requirements of the Constitution. The Commission has the power to disqualify such a political party from nominating a candidate to contest in the concerned election or next elections. Where this offence is discovered after the candidate has been nominated, the Commission shall disqualify the candidate from taking part in the concerned election.¹¹⁶ Further, where this offence is discovered after the candidate has been elected, the Commission shall disqualify the candidate; and the candidate shall not be eligible to contest the next elections.¹¹⁷

a. Balancing Political Rights and Right to Fair Trial

During the campaign period for the Gatundu South Constituency in 2013, one of the candidates Moses Kuria was charged with the offence of incitement to violence and hate speech contrary sections 13 and 62 of the National Cohesion and Integration Act. The case was scheduled to be heard on 2nd September 2014 after the conduct of the Gatundu South Constituency by-elections on 7th August 2014. This presented a quandary: as to whether the IEBC should have revoked his candidature or keep it in abeyance pending full determination of the case; or uphold Moses Kuria's Constitutional right to fair hearing, which includes presumption of innocence until proven guilty.¹¹⁸

This quandary is of significance when it is considered that Kenya's electoral processes have been marred by incitement to violence and hate speech, and the IEBC and other key actors in elections management are particularly keen to ensure electoral processes are free of these electoral malpractices and offences. If there were a Joint Quick Response Team similar to the one constituted during the March 2013 general elections, such a quandary would have been averted since the case would have been investigated and determined in time for the by-elections. The fact that Moses Kuria contested while being tried for hate speech posed the potential violation of Chapter Six of the Constitution that aims to ensure public officers *including candidates* [emphasis mine] are persons of integrity and uphold the Constitution.

¹¹⁶Section 72(3)(a) of the Elections Act, 2011.

¹¹⁷Section 72(3)(b) of Elections Act, 2011.

¹¹⁸Article 50(2) of the Constitution of Kenya, 2010.

b. A mockery of the nominations process?

Although the New Democrats Party (NDP) and its candidate complied with the electoral provisions when their candidate withdrew from contesting the elections, it raised the legitimacy of the NDP's nomination processes and cast aspersions on their fidelity to sound elections management which includes fulfilling the legitimate expectations of the political party membership that they will field a candidate of their choice to contest elections. It is especially accurate when consideration is given to the fact that the party's candidate withdrew three (3) days to the elections day: this was insufficient time for a party member discontented with such decision to seek redress, for example by demanding that the particular party fields a candidate that was a runner-up during the primaries, to contest in the elections at hand.

Conversations continue to abound that the NDP nomination exercise and the subsequent withdrawal of its candidate was a ruse aimed at facilitating Moses Kuria to clinch the Gatundu South Parliamentary Seat. It is therefore desirable that the Elections Act and Political Parties Act have an unequivocal provision that spells out the conditions and timeframe within which a person can withdraw from contesting in elections.

4. Polling Day

According to the Commission even though it had increased the number of registered voters, the voter turn-out during the by-elections was low.¹¹⁹The IEBC commenced registration for the by-elections in April 2014.¹²⁰ As such, persons eligible to vote but were not registered in 2013 were locked out from participating in the by-election conducted in 2013. The Commission attributes low voter turn out to voter apathy.¹²¹This is a pointer to the strong need for CSOs to fortify their general civic work and particularly demonstrate how governance and citizenry daily life is powerfully linked to the participation in the electoral process.

a. Voter Apathy

Low voter turnout and voters turning up to cast their votes without requisite documents is an indictment on the comprehensiveness, quality and the delivery of voter education conducted by the IEBC for the by-elections; and on the general civic work by the CSOs. Improved voter education will contribute to surmounting voter apathy.

¹¹⁹*Supra* note 2.

¹²⁰*Supra* note 2 at p. 24.

¹²¹*Supra* Note 2.

b. Elections Observation

The IEBC is mandated by Article 88(4) (h) of the Constitution to facilitate observations of elections. Observation of elections is crucial since it gives credibility and legitimacy to the conduct of elections. It is also a mechanism by which an election management body receives feedback on its conduct of elections and hence can improve on its future elections. Waned interest in by-elections is not only confined to voters but also election observers. There were few elections observers to the by-elections conducted in 2013 and 2014. KHRC monitors for example, noted that in the Bungoma Senatorial by-elections there was only one international election observer participating in the elections. It is imperative that CSOs remain interested in the conduct of by-elections since it fits within wide architectural design of governance and significantly influences it.

5. Participation of Women and Persons with Disabilities

Participation of women and PWDs in the entire cycle of electoral process during the by-elections conducted in 2013 and 2014 was dismal. This could be attributed to various reasons that are discussed herein.

a. Conservative Adherence to Constitutional Obligations to Secure Women and PWDs' Political Participation

Election observers during the March 2013 general elections attributed forlorn representation of women and PWDs to conversations and observations by a significant number of voters who hold the view that voting for such persons would be 'wasting votes.'¹²² These observations are reflected in the culture of most political parties that undertake the bare minimum steps to respect and promote the political rights of women and PWDs. The parties have consequently and submissively held that they have respected women and PWD's right to political participation by undertaking pitiful steps such as allocating women and PWDs leadership positions in political parties which wield little power in the parties' decision making processes. Accordingly, these steps did not afford adequate political representation to women and PWDs during the March 2013 general elections.

Regretfully, the parties did not take positive steps to improve on women and PWD's political participation during the by-elections of 2013 and 2014; and therefore inimical to Kenya's legal framework on electoral system that assumes a rights-based approach in so far

¹²²*Supra* note 19 at p. 9.

as women and PWD's participation in the electoral process is concerned.¹²³ Equally regretful is that the IEBC did not put in place comprehensive measures to improve on PWD's participation during the by-elections of 2013 and 2014.

It was therefore not surprising that the KHRC's elections observers noted the glaringly weak participation of women and PWDs in these by-elections. For example the ballots were not friendly to the PWDs; the voter materials were not disseminated in a format that is friendly to the PWDs; and during the Mathare National Assembly by-elections some polling centres were not accessible to PWDs.¹²⁴ These KHRC findings are corroborated by ELOG during its observation of the by-elections conducted in 2013 and 2014.¹²⁵

The Supreme Court of Kenya determined that the two-thirds gender principle on elective positions is to be realised progressively and Parliament is to enact pertinent legislation by August 2015.¹²⁶ However, by the time the by-elections of 2013 and 2014 were being conducted, Parliament had not yet enacted legislation as mandated by Article 27(8) of the Constitution. The absence of this legislation meant that there was no framework to secure and enforce meaningful participation by women's in the by-elections, and its effect is evident in the observations by KHRC as aforementioned.

III. CONCLUSION AND RECOMMENDATIONS

Kenya has a robust and formidable election management framework that is afforded by the Constitution of Kenya, 2010, IEBC Act 2011, Election Act, 2011 and the Political Parties Act, 2011 and is premised on their effective implementation. The conduct of the by-elections held in 2013 and 2014 demonstrates that the IEBC, the Registrar of Political Parties, political parties, CSOs and voters ought to work collaboratively to realise sound election management practices that is envisaged in Kenya's legal framework. The standards and expectations to realise these practices are particularly high for the IEBC. It is factual given the recognition the IEBC has so far received for its conduct of past elections albeit the shortcomings observed during the elections.¹²⁷ The findings of the conduct of by-elections

¹²³ Articles 27(3), 54, 38 of the Constitution of Kenya, 2010 as read together with Article 21 of the Constitution of the Constitution of Kenya, 2010.

¹²⁴ *Supra* note 41 and 42.

¹²⁵ *Supra* note 12.

¹²⁶ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate-Advisory Opinion of the Supreme Court of Kenya [2012]KLR-SCK.

¹²⁷ *Supra* Note 1 at p.xiii.

held in 2013 and 2014 illuminate the need to improve the conduct of future elections. It is against this background that these recommendations are being made.

a. Recommendations to the IEBC

1. The IEBC ought to update their register prior to any by-election to capture the details of those who registered during the continuous registration process. This will avert instances where voters turn up to vote only to find their names missing in the register. It will also minimise speculations and allegations of rigging by candidates and their supporters.
2. It is commendable that the IEBC is currently developing legislative proposals on how the two-thirds gender principle ought to be realised. The IEBC should consider how such legislative proposals will have provisions for political parties to be both incentivised and compelled to not only *respect*, but also *promote* the rights of women and PWD as broadly defined within the human rights framework.
3. The IEBC ought to supervise the nomination of political parties as this is one of its functions. The cost-benefit of this cannot be gainsaid as it no doubt ultimately eases the work of the IEBC in determining disputes arising from the nominations that occur as a result of political parties' primaries not being supervised. It is commendable that the IEBC is currently reviewing the Elections Act and the IEBC Act, and as such should include provisions on how it will supervise political parties' primaries.
4. The IEBC should thoroughly train its polling officers on the role of elections observers.
5. It would be desirable for the IEBC to engage CSOs in carrying out voter education particularly during the by-elections, and in this regard intensify its engagement with PWDs and DPOs.
6. The IEBC should consider collating disaggregated data of voters based on gender and voters' disability barriers to enable it customise voter education to their needs and by extension design ballot materials that meet their needs such as tactile ballot papers. This information should be privy to the IEBC to avert situations that may lead to profiling and discrimination on these grounds, in the event such information is public.

7. The IEBC ought to have comprehensive bench marks on the indicators that PWDs have been included or effectively included in the electoral processes, which should include disaggregated data, an assessment of the needs and barriers to PWDs, voter education that is specific to PWDs, their participation as polling officers and elections observers. Such benchmarks should be developed jointly with the DPOs and PWDs, and its implementation monitored and evaluated. Caution should be exercised so that such disaggregated data is not used in a manner that gives rise to potential discrimination.
8. The IEBC, through subsidiary legislation should stipulate unequivocally the conditions and the timeframes within which a person can withdraw from contesting in elections.
9. Although there was a marked improvement on IEBC's employment of technology in polls during the by-elections in comparison to the March 2013 general elections, it is strongly recommended that it should procure and deploy technology at least 6 months before the elections. This would go a long way in addressing any challenges and ensure sterling preparedness of the Commission.
10. The IEBC should consider working jointly with the ODPP, Kenya Police Service and the Judiciary to put in place Joint Quick Response Team to address and curb electoral malpractices and offences during both general and by-elections it is conducting. In this regard the IEBC should fortify its voter education to include venues for lodging complaints of the malpractices and offences and the role of the voters in respect of this. In the same vein the IEBC should work jointly to have ample security officers during by-elections.

b. Recommendations to the Registrar of Political Parties

- I. The Registrar should ensure that political parties have credible internal dispute resolution mechanisms that are grounded in principles of administration of justice such as the right to fair hearing and natural justice. This would be critical to the administration of the nomination of candidates within the political parties.

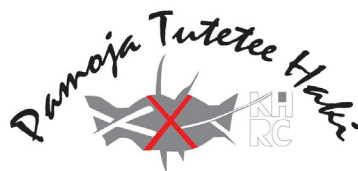
2. The Registrar of Political Parties should work jointly with the IEBC to ensure that political parties conduct their nominations in line with the Constitutional principles stipulated in Article 81 of the Constitution of Kenya, 2010.
3. The Registrar should periodically update the information on political parties to ensure that they are accurate and work jointly with the IEBC whilst it is performing its function of registering candidates to contest elections. This will foster due diligence and avert disputes in respect of nominations that arise where a person who belongs to two political parties seeks to contest in elections, or a political party candidate purporting to contest as an independent candidate.
4. The Registrar should require political parties to ensure that their manifestos and documents are in accessible format for PWDs and allocate support to political parties to ensure this is indeed adhered to, as it is a Constitutional and Elections Act requirement.

c. Recommendations to Civil Society Organisations

1. CSOs ought to demonstrate to their beneficiaries how governance and citizenry daily life is powerfully linked to the participation in the electoral process and encourage their beneficiaries to register as voters and participate in the polls. It will contribute to surmounting voter apathy. By the same token, CSOs should robustly participate as election observers in by-elections and seek accreditation during by-elections to provide voter education to their constituents.
2. CSOs should intensify their programmatic interventions to contribute to positive mind shifts towards women and PWDs as one of the means of breaking cultural barriers to women and PWD's political participation. In this regard it is critical that gender CSOs and DPOs work jointly to target constituents they have not previously targeted in their programmatic work. Such include gender organisations that work with boys and men to foster healthy masculinity.
3. CSOs should develop comprehensive bench marks on the indication that PWDs have effectively participated in the electoral processes.
4. DPOs should proactively reach out to political parties to advocate for the needs of PWD with a view to eliminate the barriers to PWD political participation. They should

also proactively work with other CSOs to ensure that they factor in the needs and perspectives of PWDs in their advocacy for effective political participation. For example, youth CSOs to factor in perspectives and advocate *for*, and *with* youth with disabilities, similarly for women CSO to factor in perspectives and advocate *for*, and *with* women with disabilities for women.

5. Development partners should consider building the capacity of DPOs to participate in the electoral process and support the IEBC and Registrar of Political Parties to realise the political rights of the PWD and women. Such could be in form of capacity building and provisions of technical support by the partners.



**KENYA HUMAN RIGHTS
COMMISSION**

KENYA HUMAN RIGHTS COMMISSION
Opposite Valley Arcade, Gitanga Road,
P.O Box 41079, 00100 GPO, Nairobi, Kenya.
Tel. +254-020-3874998/9 3876065/6
Fax. +254-020-3874997
Email: admin@khrc.or.ke
www.khrc.or.ke