



## Press Statement

20<sup>th</sup> December 2017

### Still a Mirage: A Human Rights Account of the Fresh Presidential Poll for the Period September and November 2017

Given the fact that it was an inordinately drawn out process, the task of monitoring the 2017 General Election turned out to be truly huge for most observers and monitors, the Kenya National Commission on Human Rights (KNCHR) included. The intensity and magnitude of the election was particularly reinforced following the annulment and subsequent call for a fresh presidential poll. I am happy to report to you that despite the numerous challenges that were occasioned by what was one of the longest electioneering periods in our Country, the KNCHR Officers and Monitors soldiered on to monitor, document and report on the extent to which Kenya's electoral cycle complied with safeguarding the sanctity of the vote in line with the country's national and international human rights principles.

The Commission's election monitoring journey began in 2016 with participation in stakeholder meetings on the electoral laws and subsequently, the monitoring of demonstrations on the clamor for electoral reforms in 2016. In 2017 we continued this exercise with the monitoring of the Party Primaries, the August 8<sup>th</sup> campaign and election periods and finally the homestretch to the repeat Presidential poll which took place on 26<sup>th</sup> October 2017.

On Friday 1<sup>st</sup> September 2017, the Supreme Court made the following orders:

- (i) That fresh elections be held in accordance with the Constitution and applicable law, (ii) that there were substantive irregularities and illegalities that affected the integrity of the elections;*
- (iii) That Uhuru Kenyatta was not validly declared as the president elect and thus invalidated that declaration,*
- (iv) That IEBC conduct the fresh Presidential elections in strict conformity with the Constitution and election laws within 60 days, and (v) that each party bears its own costs.*

This annulment of the presidential vote by the Supreme Court meant that KNCHR had to stay the course on the monitoring process so as to have a clear human rights account of the same. The directive to hold fresh presidential polls within the constitutionally agreed timelines seemed a daunting task with competing candidates posing various demands before the electoral body could conduct the fresh elections. The

presidential election was first gazetted to take place for Tuesday 17<sup>th</sup> October and later changed to Thursday 26<sup>th</sup> October.

While the Jubilee Party embarked on a spirited campaign trail, the National Super Alliance (NASA) embarked on demonstrations calling for electoral reforms before the fresh polls could be held. With the weekly demonstrations taking root, the country witnessed and re-lived the dark days of violent confrontations between civilians and the security agents. The demonstrations saw the deployment of excessive force by security agents on one hand while on the other hand, some civilians resorted to the disobedience of the law [mostly through malicious damage and destruction of property] under the cover of demonstrations.

Today, we launch the concluding Chapter of KNCHR elections report. While it was expected that the second poll would—*especially following the orders by the Supreme Court that the repeat Presidential poll be held in strict conformity with the law*—be a reflection of enhanced and more accountable electoral processes and procedures, just as was the case before the annulment, a number of misgivings continued to plague the second round of elections, further pushing Kenya’s electoral democracy into the realm of a mirage of unmet expectations as is summarized in the observations and findings below:

### **1. Attacks on the Independence of the Judiciary**

By granting the Judiciary independence, the Constitution envisaged an institution that would discharge its mandate in a professional and impartial manner devoid of any interference. It was on the basis of the foregoing that the Supreme Court annulled the 8<sup>th</sup> August Presidential election outcome, a move that was received in cheers and jeers in equal measure. Threats were meted on the Supreme Court Justices, mainly those who gave the majority opinion, earning them the unflattering “*Wakora*” name. Following the attacks, the Supreme Court, came out in defense of its decision. The attack on the Deputy Chief Justice’s driver did not go unnoticed at a time when the bench was to sit and listen to one of the cases petitioning the 26<sup>th</sup> October poll.

### **2. Electoral Laws Amendments**

In an unprecedented move, the JUBILEE Party, in reaction to the Supreme Court decision embarked on a process of what it termed as ‘addressing electoral laws gaps’ that arose out of the Supreme Court ruling of 1<sup>st</sup> September.

With a Majority in both the Senate and the National Assembly, the Jubilee Party proposed and passed amendments that were to be applicable to the fresh polls, a move that was seen as geared towards favoring the incumbency rather than the greater good of the country. Indeed, there can be no denying the fact that democracies evolve through legislative processes that facilitate democratic endeavors such as free and fair elections. However, efforts aimed that at bringing change in any country's electoral laws should be inclusive of all stakeholders to ensure that the same reflects the will of the people.

### **3. IEBC's Management of the 26<sup>th</sup> October Polls**

In the areas that the polling proceeded, the Commission notes that in all the stations monitored, the IEBC Officers opened the polling stations on time and provided all the relevant electoral materials including the manual register and KIEMs supervisor validation form which substituted Form 32A used during the 8<sup>th</sup> August 2017 General Election.

The KNCHR further noted a great improvement at the polling stations that were properly labelled and well demarcated (*though in some places with the wrong IEBC banners*). The line marshals had also improved in the identification and prioritization of vulnerable voters and directing voters to the appropriate queues.

Similarly, we noted that at the Constituency Tallying Centres, an improved environment was provided for the observers to monitor the process and the capturing of the results in the requisite Forms 34A and 34B. It was noted that once Form 34A was received and verified by the Constituency Returning Officer, the same was immediately announced. The sharing of Form 34B was also easily available. It should be noted that this time round, the IEBC Staff exhibited more confidence and know-how in the course of their work even in situations where the KIEMS kit presented challenges especially where voters' fingerprints could not be identified. This was further noted during the counting at each of the Polling Stations. The Forms 34A and 34B were also uploaded on time at the public portal.

However, the Commission noted low voter turnout especially in the areas where there had been political declarations of boycotting of the elections. Further, the Commission also noted that IEBC changed the venues of more than fifty (50) Constituency Tallying Centres at the last minute without gazetting these changes as provided for by the Election (General) Regulations, 2012, Regulation 7 which requires tallying centre venues to be gazetted three months prior to the elections.

Further, the Commission noted that in all polling stations monitored, there were only Jubilee agents and due to this gap many Presiding Officers called on the voters present to witness the accountability process in respect to opening and closing of the ballot boxes as witnesses. Also in a majority of the polling stations, there were few observers who were mainly representatives from ELOG, CJPC, KHRC, among others. The absence of other agents and reduced number of observers increased the possibility of electoral irregularities.

#### **4. Pre and Post Poll Unrest and Violence**

The fresh Presidential poll period was also marked with periods of protests and demonstrations; which unfortunately affected similar regions /Counties as those documented by KNCHR in the previous report. These were Nairobi City, Kisumu, Kitui, Bungoma, Busia, Kakamega, Mandera, Meru, Migori and Siaya Counties. While the gravity of occurrences varied from county to county, KNCHR noted that the use of force by the police was still rampant and unlike the August 8<sup>th</sup> period, civilians too armed themselves with daggers and pangas (machetes) and became active perpetrators of electoral violence. Public hospitals, whose staff were still on strike, bore the impact of the fatalities as still many of the affected came from low income earning areas and thus could not afford private facilities.

During this period, the Commission documented 35 deaths resulting from post poll violence covering the period 1<sup>st</sup> September to October 2017. 3 of the dead were minors, 2 were females the rest were males between the ages of 18 and 50yrs approximately. All the victims except, for two, succumbed to gunshot wounds mainly to the head and chest. In addition to our previous records which put the death toll at 57, it therefore, means that at the time of compiling this report, a total of **92 Kenyans had lost their lives in elections related violence.**

It is important to note, however, that there was an additional number of **20 bodies that were documented by the KNCHR team in Kisumu County and which were taken to the morgue between 8<sup>th</sup> and 25<sup>th</sup> August** at the height of the first round of post poll violence and these were also after the Commission had released its first report. Investigations are ongoing to ascertain whether the same were victims of the poll violence.

During the same period, the Commission recorded over **100 cases of injured persons** who included children as young as 5yrs to middle aged civilians. **A majority of the injuries again were as a result of gunshots and blunt objects.**

## 5. Attacks on Security Agencies by Civilians.

Security agencies are under oath to maintain law and order, the same that is enjoyed by themselves and their family members who reside in the same communities they are serving. It is thus matter of concern that in certain parts of the country, civilians attacked security agencies with stones and assortment of other crude weapons. KNCHR condemns such attacks and we continue to call upon our police officers to arrest and promptly charge in our courts of law any civilian caught pelting stones and other crude missiles at the police or damaging vehicles and other equipment belonging to our security officers.

## 6. Suspension of Civil Liberties and Rights.

The Commission notes that the prolonged electioneering period, a number of Civil Liberties and Rights came under attack. Key among these include the following:

- a) **The Right to Life:** A number of Kenyans have needlessly lost their lives during this electioneering period. As has been noted above, most of these were felled by the bullet. In line with the requirements of the law and so as to promote greater accountability, especially of our law enforcement officers, the Officers-in-Charge of the various deployment units that were sent out during the election period must fully account on how the officers under their command used the live ammunition that had been assigned to them. We call upon IPOA and the Internal Affairs Unit to take action against any officer who will be found to have misused his/her firearm.
- b) **Freedom of Assembly:** In complete contradiction of the Constitution, the Commission received reports of cases where some security personnel issued orders purporting to ban peaceful assemblies and protests. The Commission takes exception with such orders and continues to call upon the Inspector General of Police, to work closely with us so as to develop guidelines for policing peaceful assemblies in line with Article 37 of the Constitution.
- c) **Freedom of Association:** The Commission noted with concern, attempts aimed at muzzling the voice of some Civil Society Organizations—like the KHRC, Katiba Institute, AFRICOG and MUHURI—in the run-up to the repeat Presidential Poll of October 26<sup>th</sup> 2017. It is worth noting that these organizations had played a critical role in calling for electoral accountability through our Courts of Law. The attempts to stop the operations of these organizations came from Mr. Fazul Mohamed, the Executive Director of the NGO Coordination Board. The KNCHR has stated before, and does so again here today, that in line with various court directions as well as recommendations of the relevant bodies like the CAJ and the EACC, Mr. Fazul must vacate office immediately as he is not only in office illegally but has

also acted in contempt of court orders. We also call upon the Government to immediately commence the PBO Act of 2013 so that the CSOs can operate in a legally regulated environment free from fear and intimidation.

**d) The Right to Property:** The Commission notes with concern that a number of Kenyans lost their property (*mostly at the hands of some civilians but in some cases, at the hands of some police officers*) during this electioneering period. As we have always done in our previous reports, we call upon all Kenyans to beware of the fact that rights come with responsibilities and that the destruction of either private or public property or both cannot pass as a demonstration of how a responsible citizen should exercise his or her rights. We therefore, call upon all Kenyans to desist from destroying property during demonstrations and call upon the police to arrest and promptly charge all those involved in this act of lawlessness. Where the police are the culprits, we call upon the Internal Affairs Unit to take the necessary action against the offending officers.

## **7. Sexual and Gender Based Violence (SGBV).**

KNCHR is extremely worried by the emergence of Sexual and Gender Based Violence (SGBV) as a weapon of subjugation in the Country's political contests. SGBV is a heinous crime that must not be allowed to take root in our country. So far, and in Nairobi City County alone, the Commission either received or documented 86 cases of SGBV. The Commission is in the process of compiling a comprehensive account of all the cases of SGBV arising out of this electioneering period. Rape was the most common form of SGBV and the Commission documented cases where some of the women who had been raped got pregnant or infected with STDs or both. The Commission, in partnership with other actors will continue offering psycho-social support to SGBV victims while at the same time seek to pursue justice for the victims through our courts. The Commission takes this opportunity to call upon the Government of Kenya to remove its reservations on Article 14 (2) (c) of the Maputo Protocol so that women who are subjected to rape, especially in conflict situations, are not subjected to the additional trauma of being required to mandatorily carry pregnancies arising out of the same.

### **Other observations**

#### **Dangerous Political Polarization of the Country**

The elections also brought to the fore, the deep cavities of our country's politics. Kenyans were treated to circulating infographics of a Central Republic and a Peoples Republic of Kenya, with the suggested demarcation of the country into these two regions bringing out the sharp political divisions between Jubilee and NASA. The political actors and Kenyans in general must make every effort to ensure that the country

remains united and that any underlying electoral or political issues are openly and candidly addressed to the satisfaction of a significant majority of the citizens through the rule of law.

### **Rights and Roles of the Media**

The Commission lauds the media for their professional conduct and electoral updates throughout the electoral process. We also acknowledge the difficult environment in which many of the reporters and correspondents operated in, to ensure that they reported first-hand and even live updates as events unfolded in many of the Counties. A number of these reporters also assisted the Commission in responding to distress cases especially where our monitors were not present with the support of the police hotline.

However, the Commission noted the critical errors that were made by some media houses during the display of election results from some Constituencies. This mistake, if replicated in future polls, poses the danger of fueling tension and denting the credibility of the media in the electoral process.

The Commission encourages the application of caution by the media in the information they share during the electoral period in our country to ensure that media actions do not fan any simmering flames among the general public and/or add to discrediting any institution. We remind the media that the general public take media comments and commentaries very seriously.

Further, the Commission takes issue with the threat to the security of members of the media fraternity. KNCHR condemns the threats to media houses by politicians and the rising attacks on journalists with particular reference to the attack on Citizen's Francis Gachuri and NTV's Jane Gatwiri on 31<sup>st</sup> October at a political party's headquarters. It should be noted that a threat to the media is an affront on the people's right to information under Article 35 of the Constitution and a threat to democracy.

### **Way forward**

The elections and election period may be behind us but no sooner have we closed the 2017 chapter than the 2022 election fever has already begun! It is therefore, important that all stakeholders begin the journey of reflecting what has been documented, interact with communities especially those affected by violence and those who feel aggrieved by the 2017 general election to ensure that the 2022 process (and indeed all subsequent elections) is cohesive, inclusive and a true reflection of the spirit and letter of constitution in matters elections. As a Commission, we commit to the following beginning 2018 as some of the short term interim measures that KNCHR will take to strengthen electoral governance in Kenya:

1. Conduct further investigative missions on the cases documented within the electioneering period with an aim of instituting legal redress for persons/ communities whose rights were violated in one way or another.
2. Hold various stakeholder forums for dissemination of the full and final KNCHR election report with the aim of dissecting and proposing better mechanisms of ensuring that Kenyan's right to vote and be voted for is secured.
3. Endeavor to meet political actors on both sides of the political divide with the aim of working towards harmonized electoral reforms that will ensure elections in Kenya reflect the will of the people despite divergent views and support bases.

The final published report will constitute a number of recommendations and action points to specific institutions mandated with ensuring smooth electoral governance in Kenya.

We call upon Kenyans to cooperate with the KNCHR when called upon and ask for patience as we continue to do our due diligence. The divisive nature of our politics may have polarized our country; but we must remember we all sing to the same national anthem and individually commit to nation-building.

In Conclusion, politics and politicians come and go but it is the citizenry of a country who are the enduring building blocks for change and progress in any nation. But change cannot come about if we allow our political differences and ethnicity to cloud our civic duty as citizens. Let us find a unity of purpose and forge ahead, especially with the County Governments, which by now should be setting an all-inclusive and participatory development agenda for our people. There is need for a paradigm shift from National politics to County politics as this is the true test of where our democracy lies. Just like an election must count at the smallest unit of casting the ballot—at the polling station—let the political life of every Kenyan matter, meaning that, every Kenyan needs to get the greatest benefit of any political outcome as envisaged by the Constitution.

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**Kenya National Commission on Human Rights**