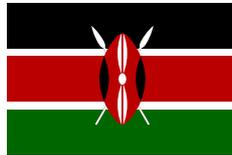




# **European Union Election Observation Mission**

**Kenya 2022**

**Final Report**



**General Elections  
9 August 2022**

*The Election Observation Mission is independent from the institutions of the European Union. The views and opinions expressed in this report are those of the authors and do not necessarily reflect the official policy and position of the European Union.*

## Table of Contents

I.	Executive Summary.....	6
II.	Introduction.....	7
III.	Political Background.....	8
IV.	Implementation of Previous EOM Recommendations .....	9
V.	Legal Framework.....	10
A.	International Principles and Commitments .....	10
B.	Constitutional Rights.....	10
C.	Electoral Legislation .....	11
D.	Electoral System and Constituency Delimitation.....	11
VI.	Electoral Administration.....	11
A.	Structure and Composition of the Election Administration .....	11
B.	Administration of Elections .....	13
C.	Voter Education .....	14
VII.	Electoral Technology.....	15
VIII.	Voter Registration .....	17
A.	The Right to Vote.....	17
B.	Voter Registration Procedures .....	17
IX.	Registration of Candidates and Political Parties.....	19
A.	Registration of Candidates .....	19
B.	Registration of Political Parties.....	20
X.	Campaign Environment .....	21
A.	Election Campaign .....	21
B.	Campaign Finance.....	23
XI.	Media .....	24
A.	Media Environment.....	24
B.	Legal Framework for the Media.....	25
C.	Media and Elections .....	25
D.	Media Monitoring Findings .....	27
XII.	Social Media and Digital Communications .....	28
A.	Social Media Environment.....	28
B.	Legal Framework .....	28
C.	Social Media Monitoring (see also Annex II).....	29
XIII.	Inclusion of Women, Persons with Disabilities .....	31
XIV.	Citizen and International Election Observation .....	33
XV.	Electoral Justice .....	34

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A.	Political Party Nomination & Candidate Registration Disputes .....	34
B.	Constitutional Petitions on Electoral Rights .....	35
C.	Election Offences .....	35
XVI.	Polling, Counting and Tabulation of Results .....	36
A.	Overview of Voting.....	36
B.	Closing and Counting.....	37
C.	Tabulation of Results .....	38
XVII.	Results and Post-Election Environment.....	40
A.	Declaration of Results .....	40
B.	Complaints Relating to the Election Results.....	41
C.	Post-Election Developments .....	45
XVIII.	Recommendations .....	48
XIX.	ANNEXES .....	59
A.	ANNEX I – EU EOM MEDIA MONITORING .....	59
B.	ANNEX II – SOCIAL MEDIA MONITORING RESULTS.....	66

## List of Acronyms

AU	African Union
BBI	Building Bridges Initiatives
BVR	Biometric Voter Registration
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
COMESA	Common Market for Eastern and Southern Africa
CRO	Constituency Returning Officers
CRPD	UN Convention on the Rights of Persons with Disabilities
CRS	Civil Registry Services
CS/CEO	Commission Secretary / Chief Executive Officer
CRO	County Returning Officer
CSO	Civil Society Organisation
CVR	Continuous Voter Registration
DIS	Department of Immigration Services
DRC	Dispute Resolution Committee
DRO	Deputy Returning Officer
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
ECOWAS	Economic Community of West African States
EISA	Electoral Institute for Sustainable Democracy in Africa
ELOG	Elections Observation Group
EOM	Election Observation Mission
EVV/EVI	Electronic Voter Verification and Identification
ECVR	Enhanced Continuous Voter Registration
EU	European Union
HC	High Court
ICCPR	UN International Covenant on Civil and Political Rights and Optional Protocols
IEBC	Independent Electoral and Boundaries Commission
IGAD	Intergovernmental Authority on Development
IGP	Inspector General of Police
ILO	International Labour Organisation
IPOA	Independent Policy Oversight Authority
IRI	International Republican Institute
KEG	Kenya Editors Guild
KIEMS	Kenya Integrated Election Management System
KMSWG	Kenya Media Sector Working Group
KNHCR	Kenya National Commission on Human Rights
KUJ	Kenya Union of Journalists
MCA	Members of the County Assembly
MCK	Media Council of Kenya
NA	National Assembly
NCCK	National Council of Churches of Kenya
NCIC	National Cohesion and Integrity Commission
NDI	National Democratic Institute
NRB	National Registration Bureau
NRO	National Returning Officers
NTC	National Tallying Centre
ODM	Orange Democratic Movement

ODPP	Office of the Director of Public Prosecution
ORPP	Office of the Registrar of Political Parties
OSCE	Organization for Security and Co-operation in Europe
PJAK	Political Journalists Association of Kenya
PPDT	Political Parties Disputes Tribunal
PVT	Parallel Vote Tabulation
PwD	Persons with Disabilities
RO	Returning Officer
ROV	Register of Voters
RTS	Results Transmission System
SC	Supreme Court
TJRC	Truth Justice and Reconciliation Commission
UDA	United Democratic Alliance
UN	United Nations
UNCAC	UN Convention against Corruption
UNDP	UN Development Programme
WFD	Westminster Foundation for Democracy

## I. Executive Summary

The 9 August 2022 general elections in Kenya took place in a peaceful environment overall, with fundamental democratic rights respected. Six separate votes were held at different levels concurrently and this made for a complicated process that took nearly a week to finalise, with numerous challenges emerging. Nevertheless, the fear of violence that was present in previous elections and was a concern prior to this one did not emerge, and a well-developed network of conflict prevention organisations and activities served to mitigate this apprehension. This involved committed state and civil society actors whose actions often positively impacted the process.

Another positive element was the emergence of socio-economic issues as a key focus of the electoral campaign. Although this element is just developing and ethno-regional cleavages continue to underlie voter choice, there is hope that the emergence of issue-based elections is something that might continue to develop in the future.

One of the main features of these elections was that the complicated process, combined with the late start in preparations by the Independent Electoral and Boundaries Commission (IEBC). This meant that many elements were not considered as early as they should have been and were often dealt with in an *ad hoc* fashion, rather than systematically.

The IEBC's administration of the elections was challenged by a lack of resources, both financial and human, a dearth of proper communication that undermined transparency, as well as political divisions that became fully apparent as the process developed. It also called into question the institutional independence of the body, which needs to be further buttressed. Robust institutions that are truly impartial are essential for public trust in future electoral processes.

The IEBC's difficulties were further compounded by ongoing complaints and appeals regarding various elements of the process, with decisions often coming late in the process and challenging the IEBC's implementation. One example of this was the decision of the Court of Appeals on the eve of elections to allow for the use of manual voter registers, whereas a previous court decision had determined that they should not be used; thus, instruction to lower-level commissions that had already been transmitted down had to be rescinded at the last moment.

The elections were marred by the lack of a proper campaign finance framework, which meant that incomes and expenditures went largely unregulated and corrupted the political space. Numerous allegations of corrupt resources being used by political contestants and of voters being paid for their consideration were rife. This significantly undermines democratic principles and practices. Without a proper redress of the role of money in politics in the future, democratic progress will be stymied.

Another key factor in these elections was the results transmission process, which was complicated and time-consuming, despite the technology used. One positive element was that the public results portal for the presidential race was able to be established, although at the very last minute. This led to greater transparency in that results forms were uploaded at the precinct level and could be checked online by interested parties. This also, however, formed a major part of the eventual election petition that was brought by the main presidential challenger before the Supreme Court.

Post-election petitions led to a contentious legal battle that pitted the main rivals against each other and against the IEBC, leading to questions of public trust in the results. Despite the lack of evidence presented to the Supreme Court (SC) by the challenger and its subsequent decision to uphold the presidential election results, the legal proceedings raised questions regarding the proper

implementation of the process that should be addressed in the future in order to build better trust in electoral processes.

The elections highlighted many positive elements in Kenya's continued democratic development and desire to improve the electoral processes. Nevertheless, there are a number of areas that require urgent reform and which form part of the recommendations made by the EU EOM in this report. The priority recommendations are listed here for ease of reference:

### **Priority Recommendations:**

- IEBC to be provided sufficient funds immediately after the end of the current electoral cycle and throughout the next one, to implement continuous voter education activities.
- IEBC to implement improvements in election technology based on regular audits and stakeholder consultations and to improve consistency and transparency.
- IEBC to operationalise the Election Campaign Financing Act to regulate the amount of money received and spent by candidates and political parties during an election or referendum.
- IEBC to introduce procedures for special voting of election officials, security personnel on duty, homebound and hospitalised voters as well as nomadic pastoralists, to vote, if necessary, in another location than the one they registered. This should be balanced against security measures to avoid multiple voting.
- Parliament to detail the legal definition of hate speech in line with international human rights obligations (so both intention to incitement and imminent violence are demonstrated).
- Parliament to remove section 22 and 23 of the Computer Misuse and Cybercrimes Act and explore less intrusive measures for addressing disinformation.
- IEBC to introduce clear and detailed procedures for managing staff and the flow of information at tallying centres to increase the consistency and efficiency of the process, especially the public display of results being aggregated there, and the uploading of all results forms to the public portal to ensure verifiability.

## **II. Introduction**

The European Union (EU) deployed an Election Observation Mission (EOM) to observe the 9 August general elections in Kenya following an invitation from the Kenyan authorities. The EU EOM was present from 26 June to 6 September 2022. The mission's mandate was to observe all aspects of the electoral process and assess the extent to which the elections complied with international and regional commitments for elections, as well as with national legislation. The EU EOM comprised a core team of 12 experts based in Nairobi and 48 long-term observers deployed to all areas of the country.

For election day on 9 August, the EU EOM deployed an additional 48 short-term observers and 44 locally recruited short-term observers to monitor voting, counting and tabulation of results. In total, the EU EOM deployed 182 observers from 27 EU member states, and from partner countries Canada, Norway, and Switzerland as well as a seven-member delegation from the European Parliament. The EU EOM is independent in its findings and conclusions under the leadership of the Chief Observer, Ivan Štefanec, Member of the European Parliament. The mission followed an established methodology and adhered to the "Declaration of Principles for International Election Observation", endorsed under United Nations auspices in October 2005, now espoused by over 50 organisations. The EU has previously deployed EOMs in 2002, 2007, 2013, and 2017.

### III. Political Background

On 9 August 2022, Kenya held its seventh general elections since the return to a multiparty system in 1991 and its third general elections under the 2010 Constitution, voting in six different elections. The presidential race uses the majoritarian system by which the winner is required to gain 50 per cent plus one vote and at least 25 per cent of valid votes cast in at least 24 of the 47 counties. If no winner emerges, a second round of elections is organised among the two candidates who received the most votes.

The five other elections are first-past-the-post: elections for 47 county governors, 290 National Assembly (NA) members, 47 senators, and 1,450 county assembly members (MCA). Additionally, members representing women, persons with disabilities (PwD), youth, workers, and minorities are nominated by parties proportional to their vote share in parliament and in the county assemblies.

Kenya has a history of disputed presidential elections with the 2002 polls being considered the only election since 1992 concluded without major disputes. The 2022 elections were conducted against the backdrop of the three previous, highly disputed presidential elections, of which one led to large scale post-election violence (2007 / 08), and one had been nullified by the Supreme Court in a landmark 2017 ruling. Kenya elections are also considered an elite and male-dominated affair due to the high costs associated with candidate nomination which highly impacts the ability of women, youth, and minority groups to be fairly represented.

For the 2022 general elections, the political landscape was reorganised. President Uhuru Kenyatta and his Deputy William Ruto had fallen out after Kenyatta's 'handshake' in March 2018 with his opponent from the 2013 and 2017 presidential elections, Former Prime Minister Raila Odinga, and their common Building Bridges Initiatives (BBI). The BBI aimed to expand senior governance structure to incorporate more political leaders to overcome problematic impacts of the *winner-takes-it-all electoral* system and at an upward revision of the financial resource allocation formula for counties and constituencies. However, court rulings by the High Court (HC) and the SC decided BBI to be unconstitutional for failing the legally binding public participation criteria and it could, consequently, not be implemented. This controversy over BBI further cemented the political fault lines between the Kenyatta / Odinga and the Ruto camps.

In presidential elections, Kenyans have traditionally voted broadly along ethno-regional lines whereas in all other races a complex mix of national, regional, and local factors determined voters' choice. The four former presidents came from two communities (the Kikuyu of the Mount Kenya region and the Kalenjin of the central and north Rift Valley). In the past, ethno-regional tensions have been pronounced when presidential elections were contested by opposing alliances consisting of mutually exclusive ethno-regional blocs. In 2022, however, the two newly founded broad alliances were cross-ethnic in nature. That mediated against strong tensions and escalations.

Kenyatta and Odinga reorganised their parties (Jubilee and ODM / Orange Democratic Movement) under the new *Azimio la Umoja* (One Kenya Alliance) coalition, with 23 larger and smaller parties under its umbrella, and Ruto founded the United Democratic Alliance (UDA) as his party platform, which became the dominant party under the *Kenya Kwanza* (Kenya First) alliance with 12 parties. With Odinga from the Luo community in his fifth run for the presidency and Ruto from the Kalenjin community in his first bid, there was no major Kikuyu presidential candidate on the ballot for the first time in the multiparty era. The two main presidential candidates, however, both opted for Kikuyu running mates, Odinga for the former Minister of Justice, Ms. Martha Karua, and Ruto for Mr. Rigathi Gachagua, a businessperson. Mr. George Wajackoyah (Roots Party) and Mr. David Waihiga (*Agano* Party) also competed.

With nine years of devolution experience, voters had become more interested in elective positions at the county level, as local development and progress can be initiated there and that they do not depend entirely on the presidency. Even without the preferred candidate winning the presidency, voters usually saw some of their choices being elected to some of the elective positions, either at county or national level. These factors reduced tensions, particularly around the presidential elections.

There was a strong and complex government peace and security architecture in place, anchored in the 2010 Constitution and developed against the backdrop of past post-election violence. It consisted of several government commissions and institutions, including the National Cohesion and Integrity Commission (NCIC), the Ethics and Anti-Corruption Commission (EACC), the Kenya National Commission on Human Rights (KNHCR), the Independent Policy Oversight Authority (IPOA), the Office of Administrative Justice (Ombudsman Office), and the Office of the Director of Public Prosecution (ODPP). Funding gaps, and unclear delineations of mandates and responsibilities between the organisations at times hampered effectiveness.

The state's institutions peace work was supplemented by multi-level, non-state peace initiatives, sometimes in cooperation with state institutions such as the NCIC. They include the National Council of Churches of Kenya (NCCCK), the private business peace initiative *MKenya Daima*, the Inter-Religious Council, the UWIANO (Cohesion) Platform for Peace and others. In the absence of the implementation of the Truth Justice and Reconciliation Commission (TJRC) report from 2013, which would allow longstanding grievances and injustices to be addressed, these state and non-state peace initiatives have established a strong peace narrative that helps bridge cleavages.

Despite a relatively high regard for the judiciary, the respect for rule of law by the executive and legislature was not always consistent. This was demonstrated by a lack of will to enact several court rulings on the two-thirds gender rule of the constitution and on the implementation of the Public Benefits Organisations Act 2013, which leaves civil society organisations (CSOs) vulnerable to arbitrary state interventions.

The backdrop to the general elections was marked by a deepening economic downturn, increased social vulnerability, and rising poverty levels. Drastically soaring prices for fuel, staple food items, and agricultural products in the wake of the COVID-19 pandemic and the Russian invasion of Ukraine had contributed to the downturn.

#### **IV. Implementation of Previous EOM Recommendations**

The EU EOM 2017 offered 29 recommendations for the consideration of the national parliament, the IEBC, the Office of the Registrar of Political Parties (ORPP), and other stakeholders. These encompassed law reform and practical measures, ranging from changes to voter and candidate registration to the conduct of the campaign, the administration of the election and the adjudication of electoral disputes.

Issues of conflict with the international commitments of Kenya were raised in several recommendations in 2017, recommendations which have been reiterated in substance in the recommendations in this report. These include the removal of unreasonable restrictions on the right to stand for election; narrowing the definition of hate speech; implementing the law on the regulation of campaign finance; and improving political participation of women and persons with disabilities.

Areas where recommendations have been implemented include the enactment of the Data Protection Act in 2019 and the subsequent appointment of the Data Protection Commissioner, thereby protecting the right to privacy. Amendments to the Political Parties Act in 2022 (although less than a year to the election) introduced new rules for the conduct of party primaries, which greatly reduced violence during this electoral cycle. The IEBC also made significant efforts to implement the constitutional provisions on the advancement of women, persons with disabilities and other minority groups during candidate registration. Rules on the enforcement of the IEBC Electoral Code of Conduct changed, due to a court ruling, leading to renewed cooperation between the IEBC and the ODPP in this domain. The ODPP also pursued the prosecution of electoral offences with great expedition, with the most serious electoral offences charged within days of commission.

Many of the previous recommendations in the space of electoral administration and political finance, campaign environment and media remain to be implemented and have been reiterated, where appropriate in context of these elections in the recommendations table at the end of the report.

## V. Legal Framework

*A very good constitutional framework exists, providing for democracy, rule of law and the protection of political rights; some legal principles, however, await elaboration in legislation or through enforcement of prevailing law.*

### A. International Principles and Commitments

Kenya is a state party to many of the principal international human rights treaties. These include the International Covenant on Civil and Political Rights (1972); the Convention on the Elimination of All Forms of Discrimination against Women (1984); the Convention on the Elimination of Racial Discrimination (2001); the Convention on the Rights of the Child (1990); the Convention on the Rights of Persons with Disabilities (CRPD) (2008); and the UN Convention against Corruption (2003). Kenya has not acceded to the International Labour Organisation (ILO) Indigenous and Tribal People's Convention, nor to the Convention on the Reduction of Statelessness.

As a member state of the African Union (AU), Kenya has ratified many regional human rights treaties, including the African Charter on Human and Peoples' Rights (1992); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2010); the AU Convention on Preventing and Combatting Corruption (2007); and the African Youth Charter (2014). Kenya ratified the African Charter on Democracy, Elections and Governance in 2021, having signed the instrument in 2008. Kenya has ratified the Disability Protocol to the African Charter on Human and Peoples' Rights (2001), which has yet to enter into force.

The Constitution provides that international instruments that have been ratified form part of domestic law and can be enforced locally. While few of these instruments have yet been relied upon in litigation, the symbolic effect of this constitutional provision is to elevate international law to a high status. There are some gaps, however, between the international commitments and their execution and enforcement domestically, notably with regard to the CRPD, which has yet to be reflected in legislation.

### B. Constitutional Rights

The Constitution of 2010 introduced a total renewal of the electoral system, enshrining extensive political rights and requiring a new legislative framework for elections. An ever-growing body of jurisprudence, interpreting constitutional rights in a progressive manner, is promoting the realisation of civil and political rights, rule of law and democracy. Not all of the principles enshrined in the Constitution have been fulfilled, however, in the absence of implementing legislation.

Protection is provided for the exercise of political rights, including the right to vote and the right to stand for election, as well as the freedoms of association, assembly, and expression. The rights to vote and to stand are subject to restrictions which are, prima facie, contrary to international commitments. Varying across the six elections, these include qualifications based on intellectual capacity, adjudged bankruptcy, and completion of tertiary education.

### **C. Electoral Legislation**

There was little progress in electoral law reform. Elections (Amendment) Bills were introduced to parliament in 2021 and in 2022, followed by a set of five draft Elections Regulations, focusing on the registration of voters, voter education, party nominations, party lists and the use of technology in the transmission of results. Their purpose was to bring clarity to important procedural aspects of the elections, but none was enacted by parliament, despite the urging of necessity by the IEBC. Attempts by the IEBC to resuscitate the Campaign Financing Act, and regulate campaign financing and expenditure, were also thwarted by parliament. The enactment of the Data Protection Act, 2019, and the Political Parties (Amendment) Act, 2022, represented the only progress in law reform, with the latter having contributed to more peaceful political party nomination processes.

### **D. Electoral System and Constituency Delimitation**

Direct elections take place to elect the president and the governors of the 47 counties. The president must win more than half of all votes cast, as well as at least 25 per cent of the votes cast in at least 24 counties. Elections to the national parliament (NA and Senate) and to the county assemblies are mixed, with most members directly elected in first-past-the-post contests in single member constituencies, and others, representatives of special interest groups, nominated by political parties. Forty-seven women are directly elected to reserved seats in the NA.

The IEBC must review boundaries of the 290 NA constituencies at intervals of between eight and twelve years, at least twelve months before a general election. While the distribution of population should be as nearly equal as possible, divergence by up to 40 per cent is constitutionally permitted, dependent upon factors such as geography, means of communication, and the historical, economic, and cultural ties of communities.

## **VI. Electoral Administration**

*Overall efficient election preparations despite prolonged litigation, but lack of transparency and a divided and dysfunctional IEBC.*

### **A. Structure and Composition of the Election Administration**

Elections and referenda are conducted by the IEBC, a constitutionally independent permanent body vested with significant authorities. The IEBC consists of a chairperson and six members, selected through an open and competitive process, appointed by the president for a six-year non-renewable term, following a prior approval by the NA.<sup>1</sup> The public selection process and parliamentary oversight of the final appointment guarantee impartiality and independence. The current IEBC comprises three

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<sup>1</sup> The IEBC Act stipulates that at least six months before the lapse of the term of the chairperson or member, or within 14 days of the declaration of a vacancy, the president shall appoint a seven-member panel consisting of four members nominated by the Parliamentary Service Commission, one by the Law Society of Kenya and two by the Inter-religious Council of Kenya. which is mandated to shortlist and conduct public interviews of qualified applicants. The panel submits its proposals to the president who makes the final selection, subject to NA approval.

commissioners, including the chairperson, who took oaths of office in January 2017 and four commissioners who took oaths in September 2021.<sup>2</sup>

The law sets out the required qualifications of the chairperson and members of the commission. Ineligibilities include having held office within the past five years or stood for election as a Member of Parliament or a county assembly, and/or was a member of the governing body of a political party, or who holds any state office.<sup>3</sup> As provided by the law, during the shortlisting, nomination and appointment process of the IEBC members, no more than two-thirds of the members should be of the same gender while regional balance should also be ensured.

The IEBC commissioners generally enjoy security of tenure and may be removed from office only for serious violations of the Constitution or any other law, gross misconduct, physical or mental incapacity to perform their duties, incompetence, and bankruptcy. Removal of a member may be initiated through a petition submitted to the NA, upon which the president is authorized to appoint a tribunal to investigate, report on the facts and make a binding recommendation to the president.

The day-to-day management of operations is carried out by the Secretariat, headed by the Commission Secretary, who is the chief executive officer (CS/CEO), appointed through a competitive process for a five-year term, eligible for reappointment once. At the local level, the IEBC secretariat comprises 47 County Election Managers who administer elections at the county level (gubernatorial, senate, and women representative elections), and serve as County Returning Officers (CROs) and 290 Constituency Election Coordinators, responsible to coordinate the Commission's work at the constituency level and serving as Constituency Returning Officers (ROs), with their administrative assistants serving as Deputy Returning Officers (DRO). Their nominations were gazetted on 28 April 2022. The system of rotation of county and constituency returning officers before elections was perceived by electoral stakeholders as ensuring impartiality of the election administration at lower levels, while the permanence of their position leads to sufficient experience levels.

The IEBC Act provides that the IEBC financial independence is secured through a budget allocated by the parliament and paid into a specialised fund. Regrettably, all EU EOM interlocutors pointed out that during the last electoral cycle and until less than a year before the 2022 elections, the parliament allocated only the necessary funds for the conduct of everyday operations while minimum resources were allocated for programmes and activities necessary to be implemented on a continuously basis for the IEBC's successful discharge of its constitutional duties, such as voter education.

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<sup>2</sup> Following the resignation of one commissioner in October 2017 and three more in April 2018, the IEBC remained with only three members until 2 September 2021. On 6 June 2018 a petition was filed against the IEBC (*Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another [2018] eKLR*) asking the court to declare, *inter alia*, that its current composition was illegal and unconstitutional as a result of the resignation of four commissioners and hence the IEBC lacked the requisite quorum to carry out its business. The court dismissed the petition and ruled that "the mere fact that there are vacancies in the Commission does not mean that the Commission becomes unconstitutional [...] and that the Commission still meets the minimum threshold of three members as envisaged under Article 250(1) of the Constitution."

<sup>3</sup> The eligibility of one of the four commissioners was challenged in court on 31 August 2021 (Constitutional Petition no. E345 OF 2021), on the grounds that she had participated in Jubilee party primaries in 2017 for the position of Woman Representative, thus her independence was compromised. The court found that she was ineligible for appointment as a commissioner since she stood for elections in 2017 and at the time of her appointment a period of 5 years had not passed. However, the court found it prudent to allow her to remain in office as a matter of greater public interest, as the IEBC was preparing for general elections and her removal from office would have created a constitutional crisis.

Although the Act stipulates that the IEBC funds may also consist of grants, donations, or other endowments, an official request by the government to the international community to support electoral preparedness activities, following a shift from its late 2020 refusal to allow government institutions such as IEBC to receive donor funding was only submitted in late January 2022. Hence, according to representatives of the international community, the activities developed to support IEBC were largely designed based on what was operationally possible to implement only a few months before elections.

### **E. Administration of Elections**

The preparatory stages of the elections were managed effectively.<sup>4</sup> The decentralised recruitment of polling station members was conducted transparently and competitively. The IEBC demonstrated competence in the delivery of cascade trainings for all levels of permanent and temporary election officials according to the schedule. IEBC staff and participants reported that it was more intensive and practice-oriented than in past elections. In some constituencies only one Kenya Integrated Election Management System (KIEMS) kit was available per several participants during the training. EU EOM observers noted that the training included simulation exercises and group work, however, limited focus was placed on filling out the polling station statutory forms and the polling station diary, as well as on the importance of correct packaging of sensitive materials. This was evidenced also by the fact that several forms arrived incomplete at the constituency tallying centres and materials were often placed in the wrong envelopes.

The dismissal by IEBC of 10 polling staff one day before polling<sup>5</sup> for participating in meetings with candidates, thereby potentially compromising their neutrality, demonstrated a proactive effort to ensure the integrity of the process.

***Recommendation: The training of electoral staff to be improved, especially of the presiding officers. Consideration could be given to complement regular trainings before elections with a knowledge-based online system for all IEBC staff.***

Due to the centralised system of information flow, county and constituency returning officers met by the EU EOM received consistent, regular, and timely information regarding electoral preparations, and reported smooth cooperation with the IEBC at the central level. Stakeholders' perception of constituency and county officials' information-sharing was positive overall. On the contrary, the IEBC tended to be more reactive rather than proactive in its communication with external stakeholders, at times only releasing crucial information on sensitive matters after problems had occurred. Although the IEBC made daily use of its social media accounts and established a public information and call centre as well as a press centre at the NTC, its website was lacking important information and was not updated on a regular basis.

***Recommendation: IEBC to strengthen its communication strategy to provide continuous, comprehensive, and prompt information to election stakeholders and to undertake regular and structured stakeholder consultation throughout the electoral cycle.***

In the lead up to the polls, some important uncertainties impacted upon election day procedures, although not as much as was expected. These uncertainties resulted from the IEBC's desire to be

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<sup>4</sup> With a total cost of KSH 44.6 billion and an average cost of about KSH 2,000 per voter, the 2022 election is one of the most expensive elections in the world. Given the high costs, IEBC could explore the cost-effectiveness of electoral cycle activities, including more extensive audits and budget comparisons / analysis.

<sup>5</sup> The six Presiding Officers, two Deputy Presiding Officers and two polling clerks were arrested by the Police and dismissed from duty. They were from Ndhiwa, Webuye East and Webuye West Constituencies.

responsive to past criticism. Many of these decisions could have been considered sooner but were instead dealt with as they emerged. Prolonged litigation - due to the absence of time limits to adjudicate pre-election matters - including a court ruling issued less than 24 hours before the opening of the polls significantly contributed to confusion.

In particular, in its interpretation of a 2017 appellate court decision<sup>6</sup> and with the aim of mitigating perceived misuse of the printed voter register, the IEBC decided to have printed voter registers in security envelopes in polling stations and to use them only in case of total failure of the KIEMS kits. This decision created controversy among electoral stakeholders and was also challenged in court, resulting in a 4 August HC judgment,<sup>7</sup> ordering the IEBC to reintroduce the use of the printed register on election day. This judgment was then stayed by the appellate court on the eve of elections, thus obliging the IEBC to change the instructions to its polling staff once again.<sup>8</sup>

Aiming to prevent electoral fraud, the IEBC also introduced additional safeguards for electronic voter identification. Nevertheless, the efficiency of the KIEMS kits for voter identification and results transmission remained a point of concern for most EU EOM interlocutors during the pre-election period, although the IEBC reiterated its full confidence in the effective functioning of the system and its security features. Overall, the IEBC could have done more to communicate more clearly with stakeholders throughout the process to enhance public trust, although this improved in the last weeks.

The IEBC took certain steps, guided by the 2017 Supreme Court ruling,<sup>9</sup> to modify polling station presidential election results transmission, so as to fully base it on the originals of the results forms, and to require only scanned results form (34A) images to be transmitted instead of sending them together with manual KIEMS results entries. This decision, together with the paper trail, was viewed by the EU EOM as a measure strengthening the integrity of the process.

The EU EOM notes that moving away from direct data entry into the KIEMS at polling station level contributes to the verifiability and transparency of the process. In compliance with regulation 21 of the Election Technology Regulation, the IEBC published the list of polling stations without 3G/4G connectivity and took steps to address this problem in the 1,272 polling stations (PS) across the country identified, via the use of satellite modems for the transmission of results; this was a tangible improvement from the 2017 elections.<sup>10</sup>

## F. Voter Education

The IEBC conducted voter information campaigns by directly engaging regional voter educators as well as accrediting some 111 civil society organisations. In particular, the IEBC engaged two voter educators per ward (so a total of 2900 ward-based voter educators), already during the two phases of the enhanced voter registration activities, and a constituency voter educator in each of the 290 constituencies. However, the late dispersal of funds for voter education<sup>11</sup> delayed the start of activities

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<sup>6</sup> National Super Alliance (NASA) Kenya v. IEBC & 2 Others, Court of Appeal, Decision No. 258/2017.

<sup>7</sup> Kenya Human Rights Commission & 6 Others v. IEBC & 6 others, High Court, Petition No. E306/2022.

<sup>8</sup> UDA v. Kenya Human Rights Commission & 12 Others, Court of Appeal ruling No. E288/2022.

<sup>9</sup> Odinga and Another v. IEBC and 2 others, Supreme Court Decision no. 1/2017.

<sup>10</sup> As IEBC conceded during the 2017 Supreme Court proceedings, on election date of 8 August 2017 it claimed it was “unable” to transmit results from 11,000 polling stations and such inhibition set in place the use of a complementary system of transmission of results envisaged under Section 44A of the Elections Act, which is in essence the physical delivery of Forms 34A to the constituency tallying centres and hence the delay in the declaration of results from those polling stations.

<sup>11</sup> In the last four years after the 2017 elections, the IEBC Voter Education Department received KSH 30 million per year which is largely insufficient for any voter education activities according to the department’s estimation.

and negatively impacted upon the capacity of IEBC staff on the ground, who had limited logistical support and were unable to reach remote areas.

Despite efforts by the IEBC, CSOs and religious leaders, all EU EOM interlocutors considered that voter education was insufficient. Even after important and combined efforts of all stakeholders in promoting inclusivity and multiple platforms enhancing peaceful dialogue among stakeholders, incidents of violence erupted between opponent parties and candidates in some areas. Although the percentage of rejected (invalid) ballots amounted to 0.8 per cent, the high number of voters who asked for assistance in understanding the complicated voting process with the six different ballot papers, also influenced the speed of voting, reflecting insufficient voter education.

***Priority recommendation: IEBC to be provided sufficient funds immediately after the end of the current electoral cycle and throughout the next one, to implement continuous voter education activities.***

Most EU EOM interlocutors, however, acknowledged that the IEBC made concerted efforts to promote the inclusion of marginalised groups, including by creating coordination committees to discuss their concerns and take concrete actions.<sup>12</sup> Through support by the Ministry of Education and in cooperation with the Kenya University Student's Association, the IEBC trained two trainers per university to conduct voter education in campuses of the 78 universities of the country. Voter education materials were also produced in Braille, demonstrating inclusivity.

## VII. Electoral Technology

***Although on election night results transmission worked well, the IEBC encountered difficulties to communicate about KIEMS implementation which undermined transparency and thus public confidence in the technology.***

The Elections Act establishes the use of an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The act is complemented with the Elections Technology Regulations, which has broad coverage, ranging from the adoption and maintenance of the technological solutions, through its implementation, audit, to security-related aspects and governance.<sup>13</sup>

In September 2021, the IEBC published the tender for the supply, delivery, installation, testing, commissioning, support and maintenance of KIEMS.<sup>14</sup> The new KIEMS would integrate the Biometric Voter Registration (BVR), Electronic Voter Verification and Identification (EVV/EVI) and Results Transmission (RTS) functionalities, replacing the legacy technological solutions made up of the old BVR system, that had reached the end of its life, and the 2017 KIEMS software. Following a long and controversial bidding process, the contract was awarded to Smartmatic International Holding B.V.<sup>15</sup> The IEBC did not publish the evaluation either for this or the additional election technology related public procurement processes, undermining transparency, and leaving room for speculation.

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In the year before the 2022 elections the IEBC Voter Education Department received KSH 1.1 billion, but this was too late for a strong positive impact on the electorate.

<sup>12</sup> As of November 2021, the IEBC established the Women Co-ordinating Committee, Disability Inclusion Coordination Committee and Youth Co-ordinating Committee.

<sup>13</sup> Amended section 44 of Elections Act 2011 and Elections (Technology) Regulations, 2017.

<sup>14</sup> IEBC/OIT/001/21/2021/2022.

<sup>15</sup> The award was contested at the Public Procurement Administrative Review Board (PPARB), the High Court, the Constitutional Court, and the Court of Appeal.

The implementation of the new KIEMS suffered because of the appeals, deficient planning, and lack of coordination between institutions. Of a total of 55,100 KIEMS kits, 41,000 were purchased in 2017 and still operational. The late contract award and the IEBC's initial difficulties in getting the previous KIEMS vendor's collaboration to provide the necessary information so as to be able to reuse the old kits provoked delays in preparing them for both the EVV and the EVI processes. The mismatch between the RTS functionality described in the tender documentation and the legal framework resulted in delays agreeing on the requirements and, consequently, the implementation of the RTS software.

The aforementioned issues conditioned the preparation of the KIEMS kits, which were launched a few days later than scheduled. Based on the IEBC's statements, the arrest of a vendor employee in possession of stickers used for the kits identification negatively affected the logistics and deployment plan. The lack of information-sharing, coordination and planning between all involved agencies undermined public trust. In addition, the IEBC was responsible for providing the KIEMS backend hosting infrastructure and the Results Public Website, but lack of planning meant that only a few days before election day there was still no decision on where it would be hosted. Finally, a cloud-based solution was chosen.

The IEBC contracted an audit of the Register of Voters (ROV) that included the assessment of the new BVR system. The audit revealed severe information security vulnerabilities, such as a weak access control to the system, meaning several users could access with the same account and had right to perform more actions than they should.<sup>16</sup> These vulnerabilities impede the accountability of unauthorised operations, such as voters' disenfranchisement, besides being a breach of data privacy regulations. Although the IEBC implemented the corrective measures, the issue evidences the IEBC's lack of supervision during the BVR solution implementation and the deficient technological ownership of the solution.

The IEBC contracted the mandatory audit of the election technology, which was launched a few weeks before the election day. The scope covered both the acceptance of the KIEMS solution, and the security and suitability of the IEBC data centres to receive and process the election results. Transferring the responsibility for conducting the solution acceptance process to an audit firm does not release the IEBC of its accountability, rather it limited its capacity to gain ownership of the technology. The lack of information about the audit execution, its findings and the subsequent improvements undermined the audit's potential to enhance public confidence in the election technology and contributed to speculations.

While party agents and stakeholders were given the opportunity to observe the assembling of the KIEMS kits and the IEBC published information on the security and contingency measures implemented in the KIEMS kits, no equivalent information was provided on the KIEMS backend applications used by the Constituency Returning Officers (CRO) and the National Returning Officers (NRO) nor on the hosting infrastructure, limiting stakeholders' capacity to assess the election technology.

***Recommendation: IEBC to improve public communication on procurement processes and the suitability and security of the election technology solutions notably with regard to voter registration and identification and the results management processes.***

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<sup>16</sup> IEBC/RFP/21/03/B/2021-2022/gk/bds/3 KPMG Final Audit Report 16 June 2022.

Two results transmission simulation exercises were held on 9 June and 19 July, respectively. While several stakeholders recognised improvements following the second exercise, its small scale and limited scope did not fully eliminate doubts on the efficiency and reliability of the system under real conditions. The IEBC focused its communication efforts on reinforcing the message that the transmission of the presidential results would be reliable, without addressing the questions raised by several stakeholders about the performance of the system and the efficiency of the solution compared with that of 2017, when besides the image the results were typed in and electronically transmitted.

Overall, on election day, the KIEMS kits served their purpose, ensuring the identification of the voters either by fingerprint or searching their biographic information. The mission observed unequal performance of the kits raising questions on the maintenance of the KIEMS kits and the solution's sustainability. The transmission of the images of the presidential results forms was constant, with more than 80 percent of the images transmitted by midnight and exceeding the 99 per cent publication rate 24 hours after closing the polls, which contributed to the transparency of the counting process.

At the Constituency Tally Centres, the procedures were loosely followed resulting in many CRO not using the KIEMS application to generate the Form 34B, preventing the traceability of the operations carried out at that level and resulting in a variety of forms published at the Results Public Website. The time needed to complete that process varied from one to three days, raising questions about the efficiency, the integrity, and the transparency of the process. At the National Tallying Centre (NTC), the KIEMS supported the verification of results by party agents. However, as no access was granted to observe the results consolidation process following the verification, the EU EOM could not assess the last step of the tallying.

***Priority Recommendation: IEBC to implement improvements in election technology based on regular audits and stakeholder consultations and to improve consistency and transparency.***

## VIII. Voter Registration

***Despite IEBC's efforts to boost voter registration, delayed funding impacted on its ability to encourage young people to register, while a number of voter register shortcomings revealed in the KPMG report were not sufficiently addressed prior to election day.***

### A. The Right to Vote

Kenya maintains an active voter registration system based on continuous voter registration (CVR), which is carried out, as the Constitution and Elections Act stipulate, at all times in the constituencies except for 60 days before the date of the general elections. Every citizen who has reached the age of 18 as proved by a national identity card or a passport, who has not been declared to be of "unsound mind" and has not been convicted of an election offence during the preceding five years, has the right to register as a voter upon application to the IEBC in the manner prescribed by the law. Due to the cut-off period of 60 days, citizens who turn 18 in the last two months before election day are disenfranchised.

### B. Voter Registration Procedures

Voter registration is conducted using the KIEMS that stores biometric data, alphanumerical data, and a picture of the applicant. In preparation for the upcoming elections, the IEBC conducted a national Enhanced Continuous Voter Registration (ECVR) exercise in two phases, the first phase from 4 October to 5 November 2021, during which IEBC registered 1,519,294 new voters, and the second phase from 17 January to 6 February 2022, during which the IEBC registered 1,031,645 voters. Therefore, a total of 2,550,939 new voters were registered in both phases out of the projected target of

6 million voters (or four million as two million was shown not to possess ID cards). Upon completion of the ECVR exercise, eligible citizens could continue to register in their constituencies until the legal cut-off date.

Although the projected target was not reached, 74.82 per cent of citizens holding national identity cards are included in the final voter register according to the IEBC. The gap in registration was attributed mostly to lack of interest or defiance/expression of protest by the youth, as well as to insufficient IEBC sensitisation especially prior to the first phase of the exercise, caused by delayed and limited funding. Absence of specific efforts targeting youth, women and persons with disabilities groups also had an impact. According to figures released by IEBC, 49.12 per cent of registered voters are women, 39.84 per cent of registered voters are youth, and 18.98 per cent persons with disabilities. Importantly, EU EOM interlocutors did not raise serious concerns either on the inclusivity of the process or the quality of the voter register. Nevertheless, politically motivated transfers of voters were mentioned to EU observers in some areas, while the IEBC itself investigated the illegal transfer of voters in two counties. Trends of irregular transfers were also identified by the KPMG audit.

***Recommendation: IEBC to enhance continuous voter registration efforts to target youth, women, and persons with disabilities in order to ensure universal suffrage.***

Registration for citizens residing outside Kenya to vote for the presidential election was conducted from 6 to 20 December 2021. A total number of 10,443 diaspora voters were registered in 12 countries, this figure being more than double the number of diaspora voters registered in 2017.<sup>17</sup> Registration in prisons was also conducted with 7,443 inmates registering to vote for the presidential election. Although reg. 90 of the General (Elections) Regulations provides for the special voting of election officials, observers, security forces on duty as well as nomadic pastoralists, hospitalised and homebound voters, through procedures that the IEBC may adopt, no such provisions were made for these (or previous) elections, thus *de facto* disenfranchising many voters.

The law provides that the IEBC may engage an external company to conduct an audit of the Register of Voters (ROV) at least six months before a general election. For these elections, the audit was conducted by KPMG, which carried out various tests on the ROV including comparison with the National Registration Bureau (NRB), Department of Immigration Services (DIS) and Civil Registry Services (CRS) to ascertain its accuracy. The preliminary audit report was submitted to the commission on 2 June 2022, revealing a total of 481,711 registrations with duplicate or missing IDs, while 164,269 registrations with invalid reference number compared to the NRB and 4,757 voters who registered with a passport and national ID. The total number of exceptions was 970,351 entries to the provisional ROV.

The final audit report was submitted to the IEBC on 16 June. The final register of voters gazetted on 21 June 2022 totalled 22,120,458. Women accounted for 49.12 per cent and persons with disabilities for 18.94 per cent. Although the general findings of the audit were released by IEBC on 20 June, the actual report was only made public on 2 August, just a week prior to the elections. This undermined the transparency of the process, even though the IEBC purported to have addressed shortcomings. According to the final KPMG report, 70 per cent of those registered with duplicate or blank IDs/passport were deregistered, as well as 59 per cent of those who registered with both an ID and a passport number, and only 11 per cent of those registered with invalid document reference number. The EU EOM analysis shows that in the final ROV there were still several exceptions (anomalies) to

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<sup>17</sup> USA, Germany, South Africa, Tanzania, Uganda, Rwanda, Burundi and South Sudan, United Kingdom (UK), United Arab Emirates (UAE), Qatar, and Canada.

the KPMG report that were not taken into consideration by the IEBC. The estimated number of exceptions within final ROV is 448,576 which constitutes 2 per cent of the published ROV.

To estimate the number of eligible voters, the 2019 census results were used.<sup>18</sup> Additionally, the ward delimitation (used for census purposes) is not the same as constituency delimitation (used for ROV purposes) in every county. In fact, 182 constituencies (out of 290) are the same as wards throughout the country. For the remaining 108 constituencies, there was no possibility to compare the ROV with census data. According to EU EOM statistical analysis, 53 out of the 182 analysed constituencies have voter registration rates over 100 per cent in comparison to the 2019 census data.<sup>19</sup>

***Priority Recommendation: IEBC to introduce procedures for special voting of election officials, security personnel on duty, homebound and hospitalised voters as well as nomadic pastoralists, to vote, if necessary, in another location than the one they registered. This should be balanced against security measures to avoid multiple voting.***

## **IX. Registration of Candidates and Political Parties**

***Rules of access to stand for election, for individuals and political parties, were open; numbers of women candidates were, however, extremely low, at around 11 per cent.***

### **A. Registration of Candidates**

The Constitution guarantees the right of every citizen to be a candidate for election to public office. Candidates may be nominated by political parties or may stand as independents, provided they have not been a member of a political party for at least three months preceding the election. Independent presidential candidates require the support of 48,000 registered voters, including at least 2,000 voters from at least 24 counties. Gubernatorial and senatorial candidates require 2,000 supporters, while NA candidates require 1,000 and county assembly 500.

A group of independent presidential aspirants challenged the requirement that copies of the identity cards of their supporters had to be submitted at registration. On 5 July 2022 the HC found the requirement of the identity cards to be unconstitutional and quashed the relevant parts of the Elections (General) Regulations, 2012. None of the plaintiffs in the case pursued their presidential aspirations any further.

Candidates for parliamentary elections must be registered voters and citizens for at least 10 years. Article 99 (2)(e) of the Constitution excludes “persons of unsound mind” from standing for election. The UN Committee on the Rights of Persons with Disabilities, in its concluding observations on the initial report of Kenya in 2015, stated “*The Committee is concerned about restrictions to the right of persons with disabilities to (...) stand for elections. (...) The Committee recommends that the State*

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<sup>18</sup> For the estimation purposes, two main assumptions were made: a) a mortality rate at 6 per cent (according to official statistics the real figure is 5.3 per cent, but it may be different for different years, thus the higher number was taken), and b) an assumption that at least half of 15 year-old voters from 2019 would be able to register as voters for the 2022 elections.

<sup>19</sup> For instance, in Mt. Elgon constituency in Bungoma county, the official ROV includes 76,159 voters, however the estimated number of voters from the 2019 census including 6 per cent mortality rate and that half of the 15 years old were eligible to register for the 2022 elections is 38,405 so 198.3 per cent estimated registration rate. Likewise, in Lugari constituency-Kakamega county the estimated registration rate is 134.6 per cent, and in Balambala constituency in Garissa county is 138.6 per cent, while in Kitui East in Kitui county is 234.1 per cent.

party: (a) *Repeal constitutional provisions that restrict the right of persons with disabilities to be elected as members of parliament*".<sup>20</sup>

A degree from a recognised university is prescribed in the Elections Act as a requirement of candidacy for several elected offices. This was the subject of much litigation, principally where the genuine nature of the documentation adduced by candidates was challenged. The requirement of a degree for membership of county assemblies and of the NA was struck down, but the requirement stands for other elections. Satisfaction of the educational qualification appears to be in contravention of the authoritative interpretation of the International Covenant on Civil and Political Rights, which has characterised educational requirements as unreasonable and discriminatory.<sup>21</sup>

***Recommendation: Consideration could be given to remove restrictions on the right to stand for elections for person with intellectual disabilities as well as restrictions requiring an educational degree to stand.***

Altogether there were about 16,098 candidates for 1,835 seats in all races, including 1,962 women. Before the primaries the Ethics and Anti-Corruption Commission (EACC) had sent a list of aspirants to the IEBC with a request to reject their candidacies. The list included 241 names with integrity issues, including corruption cases, forgery of education certificates and late resignation as civil servant, that according to the EACC suffice to disqualify them from contesting the elections. Of that list eventually 193 filed nomination papers of which only 3 were not cleared by the IEBC, as they had been previously impeached from public offices.<sup>22</sup> As the other aspirants had not exhausted their legal appeal options the IEBC saw no legal grounds for not clearing them. 36 of the candidates from the EACC list ran for governor (25 for *Azimio*, 11 for *Kenya Kwanza*).

## **B. Registration of Political Parties**

The Constitution provides that every citizen is free to form a political party and to participate in the activities of a political party. Political rights include the freedom to campaign for a party or a cause. At present 89 political parties are registered with the Office of the Registrar of Political Parties (ORPP); 88 of these parties are standard parties, with individual members. The other, *Azimio La Umoja*, is a coalition political party, an entity introduced by amendment to the Political Parties Act in February of this year.

Not all registered political parties participated in the elections, as the deadline for the submission of nomination rules to the IEBC was 18 October 2021. Parties were at liberty to use either direct or indirect methods of candidate nomination, with oversight from the ORPP and the IEBC for coordinating elements of the process. The IEBC cleared 83 political parties to nominate candidates for the elections.

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<sup>20</sup> CRPD/C/KEN/CO/1, 30 September 2015.

<sup>21</sup> CCPR General Comment 25, §15: "(...) *Any restrictions on the right to stand for election (...) must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education (...)*".

<sup>22</sup> These were: Mike Sonko, who was impeached as governor of Nairobi in 2019 and wanted to contest the gubernatorial elections on a Wiper ticket in Mombasa; Chitavi Antony Mkhala, who was convicted for abuse of office on three accounts in December 2011 and wanted to contest the governor elections in Mombasa on a UDA ticket; and Paul Karungo Thangwa who was impeached as Kiambu youth executive over alleged embezzlement of funds and wanted to vie on UDA ticket the Kiambu Senator race.

## X. Campaign Environment

*Respect for fundamental rights and largely peaceful campaign with socio-economic issues profiled but marred by lack of regulation of money in politics and inappropriate campaigning by some public officials.*

### A. Election Campaign

EU EOM observers saw that contestants were able to campaign openly throughout the country to get their messages out to voters and that the fundamental freedom of assembly was respected. Buttressed by the peace narrative and the close campaign monitoring by a wide array of organisations, including the NCIC, as well as the cross-ethnic nature of the two broad alliances, inter-ethnic tensions remained low throughout.

Local competitions, however, between candidates from different alliances and between members of the same alliance were often tensely fought with some resort to violence in some places like Kisii and Uasin Gishu. No incidents of excessive use of force by the police were reported. Almost no cases of ‘derogatory’ language were observed by the EU EOM in campaign events.

The elections were characterised by a hybrid power constellation: both candidates enjoyed elements of incumbency and of opposition. The *Kenya Kwanza* candidate, Ruto, was incumbent as deputy president with direct access to state funding and government human resources. The *Azimio la Umoja* candidate, Odinga, being endorsed by President Kenyatta enjoyed throughout the campaign the controversial active support of several cabinet secretaries. At the same time, Ruto lost some executive privileges through his falling out with the president, and Odinga had no formal representation within the government.

The campaigns centred around socio-economic issues, with traditional ethno-regional appeals running as undercurrents. In order to strengthen his appeal (e.g., among the Luhya in the western region) Ruto enlisted the support of former government ministers, Musalia Mudavadi and Moses Wetangula, whereas Odinga banked on the support of former Vice President Kalonzo Musyoka for the Kamba vote from the Ukambani region.

Ruto ran his campaign as a contest between old entrenched political dynasties and himself with his running mate, Gachagua, as self-made politicians and businesspeople, rising as ‘hustlers’ to national leadership. Odinga emphasised his and his running mate’s credentials (Karua) in their struggle for a multi-party system, their fight against corruption, and his previous experience as prime minister. Odinga’s campaign was somewhat constrained by his alliance with President Kenyatta, being unable to distance himself from state policies. Both candidates emphasised economic issues and promised wide ranging economic reforms benefitting the large groups of disadvantaged and the vulnerable of society. Ruto, with his ‘bottom-up-approach’, became more clearly identified with creating conditions for upward socio-economic mobility.

Allegations of corruption against Ruto and Gachagua by the *Azimio* campaign and counter allegations of ‘state capture’ through Kenyatta, Odinga and their trustees put forward by *Kenya Kwanza* dominated the last weeks of the campaign. In end July 2022, Gachagua was ordered by the HC to pay 200 million Kenyan *shillings*, that he had failed to account for, having two corruption indictments against him.

The last campaign weeks also saw an increasingly bitter and personal exchange between Ruto and Kenyatta over their fallout that markedly heightened tensions between the two camps. Kenyatta did not campaign together with Odinga or Karua, but controversially used his incumbency in public events

like opening of bridges and motorways to drum up support for the *Azimio* candidate. One day after the official campaign's end, President Kenyatta gave a TV/radio interview in Kikuyu, appealing to Mt. Kenya region voters to unite, making clear that they should vote for Odinga, an apparent breach of the campaign silence. This assessment was also echoed by EU EOM interlocutors, including analysts, journalists and CSO members.

Candidates campaigned through a variety of methods. Presidential rallies throughout the country were usually large scale, attracting large crowds. Often, after one presidential candidate visited a region, the other followed within a day or two. Both main presidential candidates were often accompanied by their alliance's local candidates, seeking endorsement. This, at times, created stiff competition and internal tensions amongst coalition parties arose in several places. Controversies about campaign venues were either settled in coordination with the IEBC or by the contestants directly, except for UDA's final presidential rally in Nairobi's Nyayo stadium, which was only granted after a HC injunction.

As a result of the success of the devolution of power since 2013 the gubernatorial and the MCA races attracted a high interest amongst voters. Almost half of the governor seats were open, as incumbents concluded their second and final terms. Whereas gubernatorial candidates also conducted some large-scale rallies, campaigns for other races were smaller (election caravans, door-to-door, town hall meetings).

Campaign regulation violations and misuse of incumbency were noted by EU EOM observers in several cases and corroborated by media reports.<sup>23</sup> EU EOM observers received reports of a Principal Secretary as well as Chiefs and Assistant Chiefs organising support for the *Azimio* presidential candidate locally, thereby contravening the legally required political neutrality for public officers.<sup>24</sup> EU EOM observers also witnessed the misuse of state resources, including vehicles and facilities, by campaigning officials<sup>25</sup> and, in one case, the use of a public function for campaign purpose for *Azimio* candidates.<sup>26</sup>

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<sup>23</sup> For example Capital FM news reported that the Director General of the Nairobi Metropolitan Service, Lt. General Mohamed Badi, publicly supported Odinga, see: [General Badi endorses Raila's State House bid, pledges to release impounded boda bodas » Capital News \(capitalfm.co.ke\)](#). Chief Administrative Secretary (CAS), Rachel Shebesh, organised support for Odinga ahead of his rally in Kisumu, see: [UPDATE: CAS Rachel Shebesh Leads Azimio Campaigns in Kisumu Nightclubs Ahead of Raila's Rally Today - Opera News](#). Principal Secretary Interior Karanja Kibicho was reported by media houses for campaigning for Odinga, for example see: [Kibicho: Intelligence data shows Raila will beat Ruto in round one \(pd.co.ke\)](#)

<sup>24</sup> Campaigning by chiefs and/or subchiefs was reported to EU EOM observers in the counties of Nyandarua, Kirinyaga, Meru, Nyeri, Kisumu, Kisii, Nyamira, and Nairobi. Principal Secretary of the Interior Karanja Kibicho was reported to EU EOM observers as actively campaigning and organising support for *Azimio* in Nyandarua and Kirinyaga. In Kirinyaga, Nyeri and Muranga counties chiefs and subchiefs were threatened with transfer or other sanctions if they do not comply with supporting *Azimio*, according to EU EOM observer interlocutors.

<sup>25</sup> Nyandarua Governor Francis Kimemia (Jubilee/*Azimio*) admitted to EU EOM observers that his whole staff including the press office are fully campaigning for him. EU EOM observers saw ODM gubernatorial candidate in Kakamega, Barasa, using an official county government car for campaigning. EU EOM observers in Nakuru, Kirinyaga, Nairobi, Kiambu, Trans Nzoia and Machakos received reports from multiple interlocutors about the misuse of government vehicles and other assets (fuel, speakers, generators) for campaigning.

<sup>26</sup> On July 20 an official event for the distribution of land title deeds in Kisumu was used by the county commissioner, the deputy county commissioner, the governor and the speaker of the county assembly to campaign for *Azimio* presidential candidate Odinga and to call for six-piece ODM vote on August 9 (i.e. all six ballots should be cast for ODM). A similar incident was reported about Treasury Cabinet Secretary Ukur Yattani, who used the issuance of 6,000 title deeds in Isiolo to drum up support for Odinga, see: [CS Yatani issues 6,000 titles to Isiolo residents \(the-star.co.ke\)](#)

Cabinet Secretaries and members of the county executive committees are exempted from the campaign ban,<sup>27</sup> which contravenes the equality of opportunity principle of the UN Convention against Corruption (article 19 of the CAC). EU EOM observers witnessed Cabinet Secretaries using this controversial legal exemption, including CS for the Interior in Kisii and Nyamira and CS for Defence in Western Kenya. Video footage also show their active support for Odinga.<sup>28</sup> Media houses also reported about other Cabinet Secretaries campaigning for the Azimio coalition.<sup>29</sup> Civil Society organisations took particular issue with the active support for Odinga by CS and his Principal Secretary.<sup>30</sup>

***Recommendation: Strengthen the ban on public resources being used for campaigning, including by removing the exemption for cabinet secretaries and members of county executive committees.***

## **B. Campaign Finance**

The Election Campaign Financing Act has been in place since 2013, but no regulations to give effect to the legislation have ever come into force. The intention of the legislation had been to create a regime of regulation and accountability for funds raised and spent on election campaigns. The IEBC would set spending limits and enforce compliance. To this end, the IEBC submitted campaign finance regulations to the NA in 2016, but they were rejected. These regulations were resubmitted by the IEBC in 2021, with the intention that they would apply to these elections. Despite publication in the Gazette by the IEBC, the regulations were subsequently nullified in parliament.

In May 2022, the HC decided that the requirement that the regulations should be approved by the NA was unconstitutional. This means that, for future elections, the IEBC will have the power to introduce regulations without NA approval. This did not, however, ameliorate the situation for the 2022 elections, as there was insufficient time to draft new regulations and undertake the necessary public consultation.

The absence of regulation of campaign finance is in apparent breach of the legal commitments of Kenya, principally in the Convention against Corruption, which requires, in Article 7(3), that “each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office...”

With this marked and continued absence of campaign finance regulations, there was widespread payment of cash from a multiplicity of candidates to voters during the campaign. This is counter to standards for democratic elections and has a corrupting influence on the voters. Candidates spent large

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<sup>27</sup> The Leadership and Integrity Act (section 23 (1)) specifically exempts cabinet secretaries and county executive committee members from political neutrality requirements.

<sup>28</sup> [Am not ashamed to support Raila Odinga - CS Fred Matiangi | \(thekenyanman.co.ke\)](#); (394) CS Wamalwa launches Azimio lobby group - YouTube; further media reports add details to their support for Odinga: [Gusiiiland: Will Matiang'i Retain Interior Ministry Post In Azimio Government? - Uzalendo News](#); [List of Raila Odinga's Powerful Presidential Campaign Teams Spread Across the Country - Tuko.co.ke](#)

<sup>29</sup> This includes CS for Health, Mutahi Kagwe: [CS Kagwe roots for Raila in Mt Kenya region | Nation](#); ICT CS Joe Mucheru., [ICT CS Mucheru vows to 'guard' Raila's votes - Nairobi News \(nation.africa\)](#); CS Environment CS Keriako Tobiko: [Environment CS Tobiko hits out at DP Ruto \(pd.co.ke\)](#)

<sup>30</sup> [10 Local Human Rights Groups Ask Matiangi, Kibicho To Keep Off Politics Ahead Of August 9 Polls - Shahidi News : Shahidi News](#)

sums of money in direct handouts to organisers, supporters, and event attendees, as observed by EU EOM observers in 23 cases (11 involving *Azimio* parties and 12 *Kenya Kwanza* parties).<sup>31</sup>

As reported by a variety of interlocutors at national and county levels including campaign advisors on both sides, the current economic hardship fuelled increased expectations among the electorate for handouts. Also, the airing of commercials in traditional and/or social media and the use of super-large posters by candidates, including sometimes those for MCA, indicated the unaccounted spiralling of campaign spending.

The unregulated use and influence of money in politics has a negative impact on transparency and accountability and creates incentives for corrupt political behaviour that distorts the playing field, disadvantaging candidates with less funds, particularly, women, youth, and minority representatives who have less opportunity to be fairly represented.

***Priority Recommendation: IEBC to operationalise the Election Campaign Financing Act to regulate the amount of money received and spent by candidates and political parties during an election or referendum.***

## XI. Media

***The media reported extensively on elections, with the focus on the presidential race, giving voters an adequate level of information on which to base their choices.***

### A. Media Environment

The media landscape in Kenya is vibrant, with a spectrum of nearly 200 radio stations, 92 television channels and 100 print publications licensed in the country.<sup>32</sup> Radio plays a predominant role countrywide, particularly in rural areas, where private vernacular radio stations broadcast in 19 community languages. Despite the variety of media outlets, a handful of major media houses with ties to political and business interests controls most influential media groups. Dominant media conglomerates include the Nation Media Group, the Standard Media Group, and Royal Media Services.

During the pandemic, media houses introduced pay cuts or suspended certain work benefits temporarily, leaving dozens of journalists jobless. In addition, generalised cutbacks in publicity revenue forced media companies to downsize their newsrooms and lay off senior journalists. This context damaged the quality of reporting and made the media sector more vulnerable and dependent on state advertising.

The Media Council of Kenya (MCK) successfully engaged in a major effort to bridge with these capacity gaps and increase the standards of media reporting. Throughout the pre-election and the election periods, the MCK carried out trainings across the country which benefited over 3,500 journalists – more than a half of the estimated news community. These trainings provided media practitioners with additional skills in ethical reporting, hate speech, debunking misinformation, and conflict sensitive journalism, which contributed to an improvement in election reporting.

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<sup>31</sup> EU EOM observers witnessed distribution of money and/ or food items (rice, sugar, maize meal) in Malawa and Lurambi (Kakamega county), Kisumu, Endebess (Trans Nzoia), Baringo Central (Baringo), Homa Bay, Kitutu Chache (Kisii), Busia (Siaya), Machakos and Taita Taveta.

<sup>32</sup> [Media Sector Legislative Review](#) 2021, Media Council of Kenya.

Although freedom of the press was generally respected, journalists continued to face attacks and press associations admitted pressure by media owners over coverage of political topics. Credible journalists acknowledged to the EU EOM that they are forced into self-censorship when covering corruption or sensitive political issues.

During the campaign, the Political Journalists Association of Kenya (PJAK) expressed concerns over an increase in the attacks on media practitioners and the profiling of journalists. This included threats, insults and journalists ejected from political meetings.<sup>33</sup> Certain media owners publicly supporting *Azimio* might have contributed to the alleged bias of the journalists on their staff.

***Recommendation: Uphold the right to freedom of expression, including for media practitioners and ensure that attacks against journalists are properly investigated and sanctioned.***

## **B. Legal Framework for the Media**

The legal framework provides an adequate basis for freedom of expression. However, the 2010 Constitution sets limits in the case of advocacy of hatred, which is defined as the “*vilification of others*”, a terminology judged too broad by media advocates.<sup>34</sup> Concerns were additionally raised with the re-emergence of section 13 of Kenya’s 2008 National Cohesion and Integration Act, whose definition of hate speech is also considered vague and would need amendment to promote freedom of expression as part of the country’s international obligations.

***Priority Recommendation: Detail the legal definition of hate speech in line with international human rights obligations (so both intention to incitement and imminent violence are demonstrated).***

In a positive development, the HC protected freedom of expression by declaring unconstitutional the Penal Code provision on criminal defamation.<sup>35</sup> Nevertheless, defamation and libel remain misdemeanours that may carry jail term of up to two years.

The Access to Information Act 2016 entitles a framework for public entities and private bodies to proactively disclose information and to provide information on request in line with the constitutional principles of the right to access information. However, regulations are yet to be passed by the government for its implementation.

The Communications Authority of Kenya is the state regulatory body tasked to regulate frequency spectrum usage and licensing, while the state financed MCK prescribes standards for journalists, ensures the protection of rights, and assess media compliance with the national legal framework.

## **C. Media and Elections**

Election campaign started on 29 May and ended on 6 August, 48 hours before election day. The Election Law regulates the access of political parties and candidates to state-owned media during the campaign period, specifying that they shall be allocated reasonable airtime on public radio and television.<sup>36</sup> Failure to put in place regulations under the Election Campaigning Act (see section XI.B) undermined limits on contributions through paid-up media coverage.

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<sup>33</sup> [Video](#) to PJAK’s public statement in Naivasha, 30 July 2022. During the election period, the Media Council of Kenya [reported](#) various forms of harassment on at least 43 journalists.

<sup>34</sup> Commentary on the Regulation of Hate Speech in Kenya, [Article 19](#). Freedom of speech advocates defend that not all hateful speech reaches the level of prohibition, and a clear threshold should be developed.

<sup>35</sup> [7 February 2017 HC ruling](#).

<sup>36</sup> Elections Act, articles 41 and 108.

In a spirit of transparency, the IEBC, the Kenya Editors Guild (KEG) and the Kenya Union of Journalists (KUJ) signed a Memorandum of Understanding in which they committed to an open-door policy of sharing election information.

To ensure a credible and peaceful coverage, the MCK and media stakeholders abided to the ‘Guidelines for Election Coverage 2022’ aimed at helping media practitioners to provide accurate coverage of elections. Further, the IEBC, the KEG, and the KUJ adopted, on behalf of the Kenya Media Sector Working Group (KMSWG),<sup>37</sup> ‘The Media Guidelines on Elections Management Reporting 2022’, in which a collaborative framework for election management reporting was established. These guidelines included the delivery of media monitoring monthly reports by the MCK. However, in the last stage of the campaign, the state regulatory body interrupted the publication of findings without further clarifications. The journalist community claimed that these reports were never shared with them beforehand.

Additionally, the MCK teamed up with the Media Owners Association (MOA) and the KEG to organise broadcast debates at three levels: Nairobi governor, deputy presidential and presidential candidates. The withdrawal of two candidates from the presidential debate made it less representative. Further, given the 2+2 format initially envisaged, the two remaining presidential candidates, Ruto and Waihiga, responded to questions separately, rather than in debate. Notwithstanding, the presidential debate gave citizens the opportunity to evaluate some candidates’ performance and fact-checking was done by organisers and media on candidates’ statements. During Ruto’s presentation, power cuts were noted in various parts of the country, as corroborated by EU EOM observers. The national power company officially apologised on its website, but many EU EOM interlocutors thought it was politically motivated.

For the first time and in a positive effort to enhance transparency, the IEBC provided a web portal for political parties, observers, the media, and the public to access elections results in real-time. Nevertheless, as election day approached, media interlocutors shared with the EU EOM concerns about IEBC’s poor communication flow, particularly regarding the results transmission on election night. National and international media conducted parallel tabulations based on the downloaded 34a and 34b forms. However, the different approaches used to process the forms and the subsequent discrepancies between their figures created confusion among voters.

Three days after the vote media outlets significantly slowed down their unofficial tallies, when around 80 per cent of the forms were processed. Main media groups claimed staff was exhausted and quality controls were needed. The MCK denied speculations about instructions to stop this exercise, arguing that a review and alignment of numbers was needed.

Divergent information on media tallying results continued to be published on the following days and some international media acknowledged human errors in their exercise, which contributed to allegations on Twitter regarding the hacking of media portals. Dis/misinformation on media preliminary results populated the social media environment and some media published false news without verification.<sup>38</sup>

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<sup>37</sup> The KMSWG comprises the major media players in Kenya. It was formed in 2017 to be a coalition of all like-minded organizations to spearhead synergy in deliberating and getting solutions to emerging issues in the media industry.

<sup>38</sup> Namely a fake joint press release by Royal Media Services and the Standard media group on their own tallying results stating Odinga’s leading in the presidential race.

Though the media unofficial tally emerged as an additional transparency tool during the tally process, media houses delivered an incomplete exercise without providing timely clarifications.

#### D. Media Monitoring Findings

The media reported extensively on elections, with the focus on the presidential race, giving voters an adequate level of information on which to base their choices. Media outlets allocated special programmes and sections to elections, and electronic media organised debates at the gubernatorial, women's representatives, NA and senatorial levels.

The state-owned broadcaster KBC provided free airtime for political parties and candidates during the campaign in line to international standards for equitable treatment and access to the public media, although no criteria for slots' allocation was established (see annex 1, graphic 1). With regards to the presidential race, the Media Monitoring Unit (MMU) findings revealed that private TV channels provided more airtime to *Kenya Kwanza* candidate Ruto, mainly due to the debate. When combining all six levels of elections, private TV channels allocated a more balanced coverage to both main political coalitions. Citizen TV reported more extensively on elections, followed by NTV and KTN (see annex 1, graphic 2).<sup>39</sup>

This trend was followed in newspapers with a slightly more space allocation to the *Azimio* coalition. Dailies reported on elections with a general neutral tone mostly through news and opinion articles. The *Kenya Kwanza* coalition got more critical coverage (see annex 1, graphic 3).

Radio remains the most widespread source of information for most voters. Vernacular radio stations showed preference to one or other major camp in terms of coverage. This was most notable on *Ramogi* FM, the Luo community radio, which promoted *Azimio*'s presidential candidate in terms of time, and *Kass* FM, the Kalenjin community radio, with a significantly allocation of time and positive tone for the *Kenya Kwanza*'s candidate (see annex 1, graphics 4 and 5).

The gubernatorial race was the second most covered election. TV and print outlets allocated most of the coverage to both UDA and Jubilee's candidates, while on radio stations ODM's prevailed (see annex 1, graphics 6 and 7).

The *Azimio* coalition conducted a more comprehensive paid advertisement campaign across the media, particularly concentrated in the presidential ticket. The number of TV advertisements from both presidential front runners tripled during the last week of the campaign, while the more frequent television paid airtime came from UDA's candidates (see annex 1, graphics 8, 9 and 10).

IEBC's communication efforts on voter education entailed a collaboration with national broadcasting media outlets for live simulations on voting procedures. Broadcasted television and radio paid adverts were less, due to a lack of financial means. The NCIC displayed a broad campaign on peaceful elections through advertisements across the media.

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<sup>39</sup> The EU EOM media monitoring sample included the state-owned broadcaster KBC Channel 1 TV and KBC radio; three private TV channels (NTV, KTN and Citizen TV); six private vernacular radios in six different community languages (Citizen Radio – Kiswahili, Kameme FM – Kikuyu, Kass FM – Kalenjin, Mulembe FM – Luhya, Musyi FM – Kamba and Ramogi FM – Luo) and the three main national daily newspapers Daily Nation, The Standard and The Star, plus their online versions. Electronic media were monitored daily from 6 July to 6 August during morning and evening prime time slots: from 6AM to 9AM and from 7PM to 10PM. The Facebook pages of the media included in this sample were also monitored.

Of the total of candidates, 87.8 per cent were male and 12.2 per cent were female. The media provided a gender-sensitive reporting and an adequate coverage of women candidates. TV channels, and radio stations coverage was above the percentage (18 per cent), while on newspapers was slightly behind (10.9 per cent) – see annex 1, graphics 11, 12 and 13.

Roots presidential candidate Wajackoyah was the protagonist of the most over-performing election related posts in television channels and print Facebook pages in the first weeks of the campaign.<sup>40</sup> In the last stage, posts about final rallies performed significantly on newspapers and TV channels Facebook pages, while on radio stations Facebook pages was Wajackoyah's running mate's statement on Root's candidate supporting Odinga.

## **XII. Social Media and Digital Communications**

*Extensive and sophisticated disinformation campaigns distorted the online political discourse, contributing to the erosion of public trust in the electoral process and affecting voters' ability to make decisions free from manipulative interference.*

### **A. Social Media Environment**

There were some 12 million social media users in Kenya in 2021, active on multiple platforms.<sup>41</sup> While recent data show that Facebook, YouTube, Instagram and Twitter lead in popularity, TikTok became the most downloaded app during the campaign, surpassing WhatsApp.

Parties and candidates extensively used different online platforms to campaign, setting up websites, employing bloggers and influencers, as well as digital campaign managers to manage their accounts. The EU EOM observed that the digital teams of the two main political camps used Twitter to shape the narratives of the presidential campaign and the general political discourse online, while Facebook was mainly used to address the local electorate. As a newcomer in the campaign environment, TikTok offered an unexplored space where propagandistic and more divisive content could easily spread. WhatsApp was broadly used to organise campaign activities, mobilise voters and share disinformation through networks of groups. The main communication language on Facebook and Twitter was English; vernacular languages appeared more popular on TikTok.

Hashtags were extensively used by parties to push narratives, create trending topics, criticize opponents and spread disinformation campaigns. The EU social media team observed manufactured amplification and coordination of messages online by fake accounts and malicious, bot-driven activity in support of the presidential candidates. "Puppets for hire" contributed to amplify falsehood to a larger audience throughout the election process.<sup>42</sup>

### **B. Legal Framework**

Kenya's constitution stipulates that freedom of expression does not extend to propaganda for war, incitement to violence, hate speech, or advocacy of hatred. Section 77 of the Penal Code contains further provisions on incitement to violence and disobedience of the law and the 2008 National Cohesion and Integration Act established the NCIC to tame hate speech and promote national unity and mitigation of ethnically motivated violence. In 2020, the Communications Authority of Kenya and

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<sup>40</sup> From 5 to 21 July. In Facebook analytics, a post overperforms when it gets more on-post interactions from the page's audience than average, interactions meaning likes, comments and shares.

<sup>41</sup> We Are Social, report [Digital 2022: Kenya](#).

<sup>42</sup> Sock puppet: an online account that uses a false identity designed specifically to deceive. Sock puppets are used on social platforms to inflate another account's follower numbers and to spread or amplify contents to a mass audience.

the NCIC signed a Memorandum of Understanding to curb hate speech and misuse of online platforms. As part of the measures to reduce inflammatory language, the NCIC launched Kenya's National Action Plan against Hate Speech earlier this year and scaled up capacity to monitor and deter it online during the campaign, setting up a dedicated social media monitoring unit in cooperation with CSOs.

Some figures on the number and nature of the violations identified by the NCIC and its project partners during the election process were made public before the election day. The scope of the definition of 'hate speech', as defined by law and as implemented by NCIC, is overly broad to be in line with international standards in this regard (See Media Section). As well, NCIC's role seems to have been limited to purely a monitoring role, which is of questionable utility. The EU EOM noted that the NCIC did not provide the public with regular social media monitoring reports. While it did not have a specific legal obligation in this regard, releasing broader information may have helped publicly identify incendiary online postings.

While fundamental freedoms are recognised and protected, the Computer Misuse and Cybercrimes Act criminalises the spread of falsehoods and misinformation, falling short of regional and international standards for freedom of expression.<sup>43</sup> The vague prohibition of "false", "misleading" and "fictitious" data is highly subjective, and this law has been used to harass journalists, bloggers and activists in the past.<sup>44</sup>

***Priority Recommendation: Remove section 22 and 23 of the Computer Misuse and Cybercrimes Act and explore less intrusive measures for addressing disinformation.***

Beyond a general hate speech prohibition, the election law does not reflect the increased use and specificity of social media. While a Data Protection Act was adopted in 2019 in line with previous EU EOM recommendations, online advertising lacks adequate regulation and there was no code of conduct covering parties' online activities.

***Recommendation: Include provisions on electoral advertising on online platforms, and explicitly extend the existing campaigning rules to the digital sphere.***

### **C. Social Media Monitoring (see also Annex II)**

Concerns over the possible misuse of online platforms to amplify the reach of hate speech and disinformation operations dominated the public discussion since long before the beginning of the election campaign and in the period leading up to the elections CSOs made a real effort to monitor social media to counter disinformation and raise public awareness. Meta, Twitter and TikTok announced tailor-made measures to help ensure a safer digital space and provide voter information during the electoral process and engaged in bilateral and multi-stakeholders' conversations with the

<sup>43</sup> The Joint Declaration on Freedom of expression and the Internet, 2011, paragraphs 1(a) states: "Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards [...]". Also see: [African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression in Africa](#), Principle 2 on "Non-interference with freedom of opinion" and Principle 5 on "Protection of the rights to freedom of expression and access to information online".

<sup>44</sup> [Joint declaration on freedom of expression and "fake news", disinformation and propaganda](#) by UN, OSCE, OAS and ACHPR states that: "General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression [...] should be abolished." Also see [UN, OSCE, OAS, ACHPR, Joint declaration on Freedom of Expression and Elections in the Digital Age](#): "States should consider supporting positive measures to address online disinformation, such as the promotion of independent fact-checking mechanisms and public education campaigns, while avoiding adopting rules criminalizing disinformation."

civil society and national institutions to ensure implementation.<sup>45</sup> Despite that, all platforms were largely misused to pollute the digital environment, with multiple tactics used to fuel information disorder.

The online space was distorted by extensive and sophisticated disinformation campaigns targeting multiple election stakeholders and largely seeking to undermine public trust in the electoral process through repetitive attacks to the IEBC and its members. The EU EOM observed that different techniques were used to distort the information ecosystem, including doctored newspaper front pages, news alerts meant to discredit election officials, misleading opinion polls, inciteful or false quotes deceitfully attributed to political aspirants, candidates falsely endorsing their competitors, manipulated content announcing unverified election results or containing branding of established media outlets, as well as elements of coordinated inauthentic behaviour, use of false accounts and bots.<sup>46</sup> In a report published after the elections, the MCK flagged seven influential figures for spreading disinformation online during the campaign, also noting that some social media influencers created accounts in the name of notable Kenyans to mislead the public.<sup>47</sup>

The EU EOM identified more than 300 misleading Facebook and Twitter profiles created in the months leading up to the elections to deceive voters across the political spectrum, with multiple cases of use of identical or slightly manipulated profile pictures. On Twitter, they were used to increase the reach of deceptive claims during the campaign and after the elections by retweeting the same or substantially similar content to artificially influence conversations in a coordinated manner. Many were suspended, taken down, or changed their name into non-election-related subjects during the campaign, but the great majority were still active at the time of writing, despite contravening the companies' community standard.<sup>48</sup> These pages aimed at misleading the electorate, weakening its ability to discern sources of political information to make a fully informed decision and thus adversely affecting the right to form opinions on political matters free from manipulative interference.<sup>49</sup>

A number of international and national players exposed information manipulation. Fact-checking organisations and civil society groups established partnerships to identify and investigate misinformation around the elections and advocate to make tech companies more accountable and promote effective content moderation practices. However, the EU EOM observed that on several occasions different organisations debunked the same items multiple times. A better coordination among fact-checkers would reinforce their capacity to timely dismantle false narratives and raise public awareness. Ensuring that voters have access to fact-checked information is essential for election integrity.<sup>50</sup>

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<sup>45</sup> The EU EOM repeated request for a meeting to Google Kenya and YouTube remained unanswered.

<sup>46</sup> The EU EOM monitoring unit isolated 268 accounts created between June and August 2022 that shared disinformation on election night and processed the Twitter handles with Botometer, a bot detector developed by Indiana University, selecting those with a probability equal or greater than 80 per cent of being bots, and then checked and labelled them manually. See: "Annex – Social Media Monitoring Results".

<sup>47</sup> [Report on media performance during the 2022 General Election](#), Media Council of Kenya, 23 August.

<sup>48</sup> [Twitter community standards on manipulation and spam policy](#) and [Facebook Transparency Centre](#).

<sup>49</sup> See United Nations (UN) Human Rights Committee [General Comment No. 25](#) paragraph 19: "Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind."

<sup>50</sup> [Joint declaration on freedom of expression and "fake news", disinformation and propaganda](#) by UN, OSCE, OAS and ACHPR states that: "All stakeholders – including intermediaries, media outlets, civil society and academia – should be supported in developing participatory and transparent initiatives for creating a better understanding of the impact of disinformation and propaganda on democracy, freedom of expression, journalism and civic space, as well as appropriate responses to these phenomena."

***Recommendation: Develop a coordinated effort by the media, civil society and tech companies to build a network to debunk disinformation in order to reinforce the existing fact-checking initiatives in view of future elections.***

A Council for Responsible Social Media brought together representatives from civil society and eminent individuals before the elections. It demanded better accountability from big tech companies in Kenya. It also encouraged the authorities to develop and publicly sign a self-regulatory Code of Practice on Disinformation, to address threats to the integrity of the election process in line with international good practice.<sup>51</sup>

***Recommendation: Develop a self-regulatory Code of Practice on Disinformation by a multi-stakeholder coalition against disinformation to promote greater transparency and accountability of big tech companies.***

Inciteful quotes falsely attributed to political aspirants were observed by the EU EOM social media monitoring unit, with content often migrating among different online platforms and WhatsApp. TikTok's delayed response to violations of its policies on hateful behaviour and harmful misinformation enabled the spread of incendiary rhetoric about the election through threats of ethnic violence targeting certain communities. Several pieces of manipulated content containing disinformation, inciteful language and digital forgeries widely circulated on the platform and content evoking Kenya's violent electoral past for political gain was observed.<sup>52</sup> Women candidates were also victims of harassment on social networks.

While the establishment of partnerships with local stakeholders enhanced the tech companies' capacity to identify harmful content and take action, their ability to conduct effective content moderation in Swahili and other vernacular languages remains unclear.<sup>53</sup> The EU EOM observed 101 instances of inciteful messages and 24 gender based attacks published on multiple platforms during the campaign, 54 per cent of which were in Kiswahili, other local languages or mixed.<sup>54</sup> More clarity around the resources and techniques devoted to content moderation and a bigger effort to develop a network of experts who speak the local languages and understand the context would improve their capacity to safeguard the online space from detrimental behaviours.

### **XIII. Inclusion of Women, Persons with Disabilities**

***While important steps have been made to promote the inclusion of women and persons with disabilities, more needs to be done to operationalise the provisions to make them meaningful.***

Affirmative action was included in the Constitution, as part of the transformative agenda of the document, comprising measures for "minorities and marginalised groups", to ensure that they "participate and are represented in governance and other spheres of life". No more than two-thirds of

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<sup>51</sup> In October 2018, leading tech platforms voluntarily signed the Code of Practice on Disinformation, submitting themselves to transparent self-regulation as laid out by the European Commission. A recent revision of this initiative brought [34 signatories](#) (including online platforms) to join the [strengthened Code of Practice on Disinformation](#), which sets more ambitious commitments and measures to counter online disinformation.

<sup>52</sup> The content analysis of 62 TikTok accounts sharing political content using a mixed combination of 40 political hashtags allowed the EU social media monitoring unit to identify 22 videos collectively viewed over 7 million times as of 7<sup>th</sup> August that violated the platform [community guidelines](#).

<sup>53</sup> A [study](#) on Meta's content moderation of political advertisements involving hate speech released a few days before the elections exposed the company's ineffective content moderation approach, despite previous announcements of an increasing effort in this direction.

<sup>54</sup> See: "Annex – Social Media Monitoring Results".

the members of elected bodies should be of the same gender but no legislation has yet been enacted to implement this two-thirds gender rule. A succession of judicial orders against parliament to implement the principle has been ignored over the last decade, while efforts by the IEBC to mandate compliance by political parties in this electoral cycle were judicially restrained at the instigation of the UDA. Numbers of women elected in direct elections were very low,<sup>55</sup> although reserved seats for women at least maintained the current situation.<sup>56</sup>

The Constitution includes the principle that at least five per cent of the members of elected bodies should be persons with disabilities (PwD), but this has not been given effect in law or in practice. A PwD was successful in the HC this year in securing an order for special treatment in registration for the presidential election, but the order was stayed by the Court of Appeal and appears unlikely to be upheld when eventually heard by the Court of Appeal. An election petition challenging the results of the presidential election was filed by the plaintiff in this case but was dismissed.

A small number of seats in parliament and in county assemblies are reserved<sup>57</sup> for representatives of PwD, nominated by political parties proportionate to their share of the vote. Certification of disability status, by the National Council for Persons with Disabilities, was required by the IEBC for the first time for these elections as a condition precedent to nomination. The Persons with Disabilities Act, 2003, which pre-dates ratification of the CRPD, addresses political rights only to the extent of facilitation of access to voting, and requires amendment to protect the right to stand for election.

The Constitution also requires promotion of the parliamentary representation of ethnic minorities, but no dedicated law has been enacted to achieve this. This strand of affirmative action has, instead, been addressed through piecemeal amendment of electoral legislation, leaving the area under-regulated. The only legislative definition of the beneficiaries is the vague formulation “a group that is not the dominant one in a given society”. The Constitutional Implementation Oversight Committee introduced the Special Interest Groups Laws (Amendment) Bill, 2019 to the NA in 2019, to impose obligations on political parties and on the IEBC to adopt affirmative action for the target groups. It was not enacted.

The UN Human Rights Committee, in its concluding observations on the fourth periodic report of Kenya<sup>58</sup> stated that: “*The Committee is concerned about: (a) The absence of dedicated legislation to provide specific protections for indigenous peoples in the State party (...). The State party should: (a) Develop and enact dedicated legislation to expand specific protection for indigenous peoples.*” Kenya noted the recommendation during the UPR that it should ratify the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).<sup>59</sup>

***Recommendation: Enact constitutional affirmative action provisions. In particular: application of the 2/3 gender principle; application of the principle that 5 per cent of members of elected bodies are PwD; provisions on inclusion of marginalised ethnic minorities.***

Members representing women, persons with disabilities (PwD), youth, workers, and minorities are nominated by parties proportional to their vote share in parliament and in the county assemblies.

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<sup>55</sup> Women elected in direct elections: Senate – 6.4 per cent; County Assemblies – 7.9 per cent; NA – 13.3 per cent; governor – 14.9 per cent.

<sup>56</sup> The NA has 47 seats reserved for women; the Senate has 16; half of the representatives of special interest groups and youth and PwD must be women; members are added to the MCA to comply with the 2/3 gender rule.

<sup>57</sup> Two PwD are nominated to the Senate, a man and a woman; while PwD are among those qualified for nomination to the 12 special seats in the NA & the 6 special seats in county assemblies

<sup>58</sup> CCPR/C/KEN/CO/4, 11 May 2021

<sup>59</sup> UN Human Rights Council 2020, Report of the Working Group on the UPR, 144.21.

Nevertheless, Kenyan elections are also considered an elite and male-dominated affair due to the high costs associated with candidate nomination, which highly impacts the ability of women, youth, and minority group representatives to be fairly represented.

The number of women candidates who contested the elections was very low overall, at around 11 per cent. Several interlocutors highlighted the intimidating climate against women candidates in many places. This assessment was corroborated by findings of EU EOM observers in several counties. Physical harassment of female candidates was reported from Kirinyaga, Kilifi, Nyamira, and Embu, and women candidates faced stigmatisation through ‘derogatory’ speech, verbal abuse, and threats in some 14 counties.<sup>60</sup>

The elections saw a slight increase in the number of women elected, however the figure still falls far short of the constitutionally required, but still un-legislated 2/3 gender rule. Seven women were elected governors (4 more than last election), 3 Senators (no change) and 30 MPs (up from 23). In addition, there are the 47 women representatives (1 per county). In the Senate, there are 16 nominated reserved seats for women, plus the two special interest group seats that must go to women. Nevertheless, the 13<sup>th</sup> parliament is the third consecutive parliament that does not meet the 2/3 gender rule enshrined in the Constitution. For the MCAs, there were 115 women candidates elected, representing a gradual increase (96 previously). Seven counties did not elect any women candidate (12 in 2017).<sup>61</sup>

#### **XIV. Citizen and International Election Observation**

*Extended presence of citizen observers throughout the country enhanced the transparency of the process.*

The main citizen election observation organisation, the Elections Observation Group (ELOG) deployed 290 long-term observers countrywide, intermittently during 2021 and permanently since March 2022, who monitored the enhanced voter registration exercise and party primaries, and in addition 46 monitors of potential hotspots for violence.<sup>62</sup> A week before the elections, ELOG launched together with Ushahidi and 20 other organisations an Election Situation Room, in order to allow citizens to report election-related incidents so as to enable rapid response and mitigate electoral malpractices. For election day, ELOG had 5,108 short-term observers on the ground and conducted a parallel vote tabulation (PVT) for the presidential race. Other organisations, such as the Youth Empowerment and Development organisation deployed around 3,000 observers. Institutions, such as the Kenya National Commission on Human Rights, deployed monitors nationwide to follow election-related human rights issues, while the Independent Medico-Legal Unit monitored the situation since March with 86 observers.

Several international observer missions were deployed for these elections. These included the African Union together with the Common Market for Eastern and Southern Africa (COMESA), the Commonwealth Secretariat, the East African Community (EAC), the Electoral Institute for Sustainable

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<sup>60</sup> These were Trans Nzoia, Kisii, Nyamira, Kisumu, Home Bay, Siaya, Baringo, Kilifi, Mombasa, Kiambu, Meru, Embu, Tharaka Nithi and Machakos

<sup>61</sup> These counties were Lamu, Garissa, Mandera, Marsabit, Samburu, Kajiado, and Nyamira. County assemblies, however, become compliant with the two-thirds gender rule as per the Constitution (Art. 177/1b), which stipulates that as many additional seats are to be created as necessary for compliance.

<sup>62</sup> ELOG members include the Catholic Justice and Peace Commission, Center for Governance and Development, Consortium for Empowerment and Development of Marginalized Communities, Constitution and Reform Education Consortium, Institute for Education in Democracy, International Federation of Women Lawyers, National Council of Churches of Kenya, Supreme Council of Kenya Muslims, United Disabled Persons of Kenya, and Youth Agenda.

Democracy in Africa (EISA), the Intergovernmental Authority on Development (IGAD), and the National Democratic Institute (NDI) / International Republican Institute (IRI) joint mission. The Carter Center and the Westminster Foundation for Democracy (WFD) deployed expert missions, focusing on specific issues. The EU EOM closely coordinated with all of them under the auspices of the Declaration of Principles framework.

In addition to the requisite freedoms that were fully respected thus enabling the citizen and international observers to conduct their duties, the IEBC established regular communication with all observers through WhatsApp groups and information sharing through two official events.

## **XV. Electoral Justice**

*Access to remedies for electoral disputes was open and efficient; most hearings were conducted publicly online.*

The legal framework provides for effective access to legal remedies. Electoral dispute resolution is highly regulated, with well-elaborated procedures in place, which functioned efficiently during this electoral cycle. Judicial and quasi-judicial bodies were variously responsible for handling different types of disputes, without any clashes between their respective areas of jurisdiction.

### **A. Political Party Nomination & Candidate Registration Disputes**

The Political Parties Disputes Tribunal (PPDT) manages disputes both within and between political parties. It is highly accessible, with an efficient system of electronic filing and hearing of cases. In addition to permanent members, the appointment of 18 *ad hoc* members to deal with candidate nomination disputes enabled decentralisation to seven locations. An amendment to the Political Parties Act in 2022, which diminished the requirement of resort to internal party dispute resolution mechanisms, facilitated greater access to the PPDT. Despite this change, the number of disputes on party nominations brought before the PPDT reduced significantly, compared to 2017, due to new party nomination rules. The number of party nomination disputes determined by the PPDT was 199 in 2022, compared to 306 in 2017. All cases were processed within a month, as required by law. Fifty-eight decisions of the PPDT were appealed to the HC.

Disputes relating to candidate registration were managed by the IEBC Dispute Resolution Committee (DRC). This year, 325 cases were brought to the committee, all of which were determined within the applicable 10-day time limit. The substance of the cases related to decisions of the IEBC to either register or reject aspirant candidates for election, based on compliance with the statutory qualifications determining eligibility to stand for election. More than forty decisions of the DRC were appealed to the HC.

In a very positive development, hearings of the PPDT were open to all online. The decisions were made available to the public in a compendium subsequent to the election. Hearings of the IEBC DRC took place in person. The publication of decisions of both mechanisms, prior to the elections, would increase the transparency of election dispute resolution.

Decisions of both the PPDT and the DRC could be appealed to the HC, at any location throughout the country. Such cases were heard in an expedited manner, usually within a few days. There were, however, no legal deadlines in place prescribing a date after which appeals could not be made to the HC against the decisions of the PPDT and the DRC. Plaintiffs could delay for several weeks and then lodge appeals close to election day. The consequence of this was that the IEBC could not be certain of the final outcome of disputes. Printing of ballot papers was postponed in several local elections, due

to appeals on candidate registration continuing perilously close to the election. The IEBC attributed misprinted ballot papers, which caused the postponement of eight elections, to litigation in some instances.

### **B. Constitutional Petitions on Electoral Rights**

Several cases were submitted to the HC seeking judicial review of actions of the IEBC, alleging violations of constitutional rights. The rules set out in the Constitution allow any individual or organisation to bring such a case, due either to a personal interest or in the public interest. This jurisdiction of the HC is exercised through a constitutional bench, which was staffed by two judges for most of the electoral cycle, although by just one for six days following the reassignment of judicial personnel.

The subject matter of the election-related cases heard by the HC included the voting times of the diaspora, the inclusion of photographs on ballot papers, the applicability of the two-thirds gender rule to political party lists, the display of the voter registers outside polling stations, and the use of the manual voter register in polling stations. These cases all took the form of standard constitutional petitions. This meant that the expedition with which the above-mentioned election disputes were handled did not apply.

The HC, instead, dealt with the matters in their standard course of business, but, nonetheless, relatively expeditiously. However, the adjudication of the case on the manual voter register caused great difficulties for the IEBC, as it was uncertain as to the procedures which would have to be followed until the HC decided the case. A decision was delivered on 4 August, but this was followed, on 8 August, by an order from the Court of Appeal which restrained the enforcement of the HC order.

While the open rules of access to the courts to vindicate constitutional rights are extremely important, there is clearly a need for some restraint on the filing of petitions dealing with areas which have represented settled law for a long period in advance of an election. The subject matter of the manual register case could have brought the matter before the courts long in advance of the election. The introduction of a restraint, by way of an administrative practice direction for the HC, prohibiting challenge to settled areas of electoral law within two months preceding an election, would assure greater legal certainty for the conduct of elections. The jurisdiction of the HC must, however, remain available to urgent applications when infringement of electoral rights is apprehended.

***Recommendation: Consider imposition of a deadline on appeals to the HC against PPDT decisions on candidate nomination and IEBC DRC decisions on candidate registration and consider introduction of a deadline to restrain cases against the IEBC to the HC Constitutional Bench in the two-month period prior to election day. Exceptions should be permitted for urgent matters, where the law is not settled before elections.***

### **C. Election Offences**

An extensive range of electoral offences is established by law, set out in the Election Offences Act, 2016, while many election offences also amount to breaches of the Penal Code. These include offences related to the register of voters, to multiple registration and to voting. Impersonation, bribery, undue influence, use of violence and misuse of public resources are also offences, as are attempts to procure, aid or abet the commission of these acts. The Office of the Director of Public Prosecutions (ODPP) published a compendium of election offences, with a useful explanation of the elements of all offences included. A Code of Conduct for Political Parties, within the Political Parties Act, and the Electoral

Code of Conduct, within the IEBC Act, additionally prescribe expected standards of behaviour during the campaign period.

The power to order investigations and to prosecute electoral offences lies with the ODPP. The IEBC had, until April this year, enforced the Electoral Code of Conduct, but the HC determined this power to be quasi-judicial in nature and ultra vires the IEBC, leaving the sole authority with the ODPP. The IEBC provides information on offences to the ODPP, further to a Memorandum of Understanding between the two institutions on 18 July this year. Proceedings must be commenced by the ODPP within 12 months of the election. Reported incidences of elections offences were few during the election campaign, although that changed on election day, with one election-related killing that day and another two days later, as well as some subsequent non-lethal attacks on IEBC officials. Allegations of election offences were made in presidential election petitions but, at the time the EU EOM left the country, it was premature to assess the outcome.

## **XVI. Polling, Counting and Tabulation of Results**

*Although polling and counting were well-administered, the magnitude of the tabulation exercise led to a lengthy process, albeit professionally conducted.*

### **A. Overview of Voting**

For these elections, 46,229 polling stations were created across the country. This represents an increase of 13,08 per cent compared to 2017, in accordance with the 12,79 per cent increase in the number of the registered voters and the legal requirement of no more than 700 voters per polling station. A Greek company was awarded the tender for the printing of 132,722,748 ballot papers for all elective positions. There were eight security features on the ballot papers and five on the results sheets.

Voters exercised their democratic right to vote in a generally peaceful manner throughout election day. The process was calm, albeit prolonged, with dedicated polling stations staff who had to administer six different elections through complicated voter identification procedures.

Problems with KIEMS kits resulted in the use of printed voter register in about 238 polling stations in two counties (in Kakamega and Makueni counties), according to IEBC official data and following authorisation. Errors of ballot papers resulted in postponement of elections in four constituencies (Pokot South, Kitui Rural, Rongai and Kacheliba constituencies) and two counties (Mombasa and Kakamega).

Polling stations (PS) visited by EU EOM observers opened late in 28 out of 33 cases, due mostly to the unpreparedness of staff and KIEMS kits not functioning; in only 5 of those PS visited the delay was over 60 minutes. Party agents were present in all PS visited. The overall conduct of opening was evaluated as “bad” or “very bad” in 4 out of 33 PS visited, a relatively high number. Female Presiding Officers were observed in 13 out of 33 polling stations visited for the opening, and in 161 polling stations out of 433 visited for voting.

During voting, the biometric voter identification was problematic in 35,1 per cent of the PS visited, with KIEMS not being able to immediately verify fingerprints and having to verify alpha-numerically. This led to the slow processing of voters and long queues. Positively, polling staff followed procedures in 135 of the 151 PS where this issue was observed (out of the 433 PS visited). Inconsistent application of the rules on the use of the printed (manual) voter register was noted in a small number of PS visited; an appellate court ruling issued on the eve of voting had stayed a previous High Court judgment instructing IEBC to use the printed register together with the electronic one, and instead ordered IEBC

to only use the printed voter register in case of complete KIEMS failure. This contributed to some confusion among polling staff.

Checking of voters' fingers for ink was not conducted in 111 out of the 433 of PS visited, which constitutes an important procedural violation. The possibility, however, of the KIEMS kits to identify whether a voter has already voted counterbalances this omission. The layout of 90 out of 433 PS visited was not suitable for people with reduced mobility. Procedures related to assisted voting were not followed in 60 of the 144 of the PS where assisted voting was observed, while inking the assistants' finger was not conducted in 62 of these PS. Importantly, the legal provision requiring that when a voter in need of assistance is not accompanied by a person of his/her choice, s/he will be assisted by the Presiding Officer in the presence of the agents, significantly violates the secrecy of the vote.

***Recommendation: More efforts to be undertaken for the inclusion of persons with disabilities in the election day process. IEBC should consider making available a tactile ballot paper in each polling station for voters with visual impairments, to be able to mark the ballot independently.***

Secrecy of the vote was not fully protected in 185 of the 433 PS observed, due to PS layout. Overcrowding was noted in 76 out of 433 PS visited, mostly due to the small classrooms, six ballot boxes and many party agents, who were present in 432 out of 433 of PS visited. Citizen observers were present in 191 of the 433 polling stations visited. Overall, the EU observers assessed the conduct of voting as "good" or "very good" in 400 of the 433 PS observed.

Four EU EOM members of the core team were deployed to Kakamega and Mombasa counties on 28 August to observe the gubernatorial elections rescheduled for 29 August. The two teams observed voting in 14 PS in total and noted very low voter turnout in all PS visited. No major problems were observed during voting. Inconsistencies in the use of the printed voter register were noted, however, in two PS in Mombasa County, where election staff were crossing out the names of voters identified through KIEMS kits. The PS layout sufficiently protected the secrecy of the vote in only half of the PS visited, as polling booths were placed open towards the room.

***Recommendation: The IEBC to consider revising the layout of the polling stations to better safeguard the secrecy of the vote.***

## **B. Closing and Counting**

More than half of PS observed at closing did not close on time, mostly due to late opening and voters still waiting in line to vote. Required integrity checks during ballot reconciliation, such as not counting unused ballots, were not followed in 9 out of 41 PS visited for counting, while spoiled ballots were not counted in 10 out of 41 PS. Unused ballots were also not packed in tamperproof envelopes in 10 out of 41 of the cases. These integrity measures are in place for the important reasons of preventing possible tampering. Counting was conducted in a transparent manner, albeit slowly, and not always according to the rules. Nevertheless, no official complaints were lodged at PS visited. Results forms for the presidential race were not immediately displayed in half the PS observed, reducing transparency.

The EU EOM observed the counting for 66 other elective posts. The transparency of the counting process was evaluated as not good in 6 out of 66 as opposed to 3 out of the 41 of the counting for the presidential election, and as bad in 3 out of 66 as opposed to one out of 41 of the counting for the presidential election.

The overall conduct of closing was assessed as “very good” by both EU EOM teams deployed in Kakamega and Mombasa counties on 29 August, while counting as “good” by one team and “very good” by the other. Party agents and citizen observers were present in both PS. Contrary to the EU EOM observations of the counting on 9 August, this time procedures related to ballot reconciliation and security of the unused and spoiled ballots were duly followed. Likewise, completion of protocols was done without problems. However, importantly, a copy of the PS results form was posted outside of only one of the two PS observed, and copies were not given to party agents despite there being sufficient copies available. They were instead instructed to take photos.

### **C. Tabulation of Results**

EU EOM teams conducted 242 observations across 145 Constituency Tallying Centres (CTC). In the direct vicinity of the CTCs, long queues of Presiding Officers (POs) were observed, who at times had to wait for several hours to deliver their materials and the CTC locations with less yard space were becoming increasingly chaotic. In 133 observations, all tamperproof envelopes arrived intact at the CTC. During the intake process, mistakes such as tamperproof envelopes not been sealed upon arrival of the POs at the CTC, presenting carbonated copies instead of the original, misplaced/unattended ballot boxes, mathematical and clerical errors, were observed in CTCs visited by the EU teams.

As pressure to speed up the tally process increased during the second and third day of the tallying, removing 34A forms from the tamper proof envelopes before reaching the CTC intake desk became a common practice in all the CTCs observed. Although this aimed to increase the speed of the process, it ultimately decreased the effectiveness of the administrative safeguards in place.

In numerous cases POs had sealed original presidential result form, 34A in the ballot boxes. The EU teams observed that POs removed these forms from the ballot boxes while queuing outside the CTC without a proper procedure. In some cases, it was observed and reported that similar situations were handled according to the procedure – opening ballot boxes and resealing them inside CTC in presence of agents while registering broken and replaced seal numbers.

Congestion was noted inside all CTCs observed, due to the large number of candidate agents, supporters and observers from various local level observation groups, and this affected the possibility to thoroughly observe the tallying process as well as the ability of the CTC staff to control whether procedures were properly followed. The congestion was exacerbated in some CTCs by insufficiently spacious premises. In 18 cases, there were unauthorised people inside the CTC, but only in 3 cases they were interfering in the work of the staff. Whereas the overall assessment of the EU EOM observers was that breaches of packaging of the sensitive material packaging were not conducted with an aim to tamper with the results, they may have been interpreted as such by the supporters and agents present in the vicinity of the CTC.

EU observers were not able to observe the process in 40 cases out of the 242 observations because of the distance from the tables while in some CTC the layout was such that observers did not even have visual access to the intake process. Displaying of the data entry and working method was not uniform in the CTCs observed. Even though projectors and screens were installed in the majority of the CTC visited, very few ROs opted to simultaneously project the figures being filled in the excel sheets. This could have managed expectations as to the timeframe of announcement of results and generally would enhance trust in the overall process, while it may also have prevented some incidents of tension at CTCs. In addition, although the IEBC special software for entering the presidential results in the system was made available, in the majority of the CTCs observed the staff was using the Excel

spreadsheet, that does not contribute to the security of the process. In 8 of 242 observations, no party agents were present.

Overall, the most important challenges faced by the ROs, in addition to the magnitude of the tallying exercise of six different elections, was the extreme fatigue after several days of tallying without rest, the frequent reluctance of the security forces to enforce order and control the people present at the CTC and the growing pressure exercised by candidates and their supporters to announce local level MNA and MCA election results that at times resulted in tension inside and within immediate vicinity of the CTCs (both in County and Constituency level tallying centres). However, the EU observers noted that while having to deal with some party and candidate agents' agitation and exhaustion of their own IEBC staff, the constituency ROs handled the tallying process well and acted in a professional manner.

At county level the tabulation process was much quicker and smoother, reflecting the fewer results sheets they had to process. In all 32 observations in 23 County Tallying Centres visited by the EU teams, the overall process was assessed as "good" or "very good".

The development of an Independent Electoral and Boundaries Commission (IEBC) web portal that allowed the public to access all presidential election polling station and constituency tallying centre results forms in real time as they were being uploaded on the system, was a significant step towards transparency.

Tabulation of the presidential results at the National Tallying Centre (NTC) started on 11 August, with the arrival of the first original polling station results forms (34A) and of the CTC collation results forms (34B). Strictly adhering to the procedure stipulated in reg.87(3) of the Elections (General) Regulations, IEBC staff checked the results of each original 34A form (polling station presidential results) against the results for each polling station tallied on 34B forms (CTC collations of presidential election results). Copies of the 34A and 34B forms were distributed to party agents, sitting at tables, and verifying data simultaneously with IEBC staff. Small arithmetical errors on the reconciliation parts of the forms were identified in several forms, and either noted and corrected, if on 34B forms or noted for the IEBC commissioners to take relevant action, if identified on 34A forms.

The slow pace of the process led, in the afternoon of 13 August when only 29.92 per cent of polling stations results had been verified and 124 ROs were still waiting to handover forms, to a decision to increase the number of staff as well as to add one ICT operator in every table to speed up the verification. However, it was apparent that no specific detailed operational plan had been elaborated in advance, as evidenced by the high number of ROs lining up for many days to deliver the sensitive materials and the IEBC decision to optimise the use of ICT operators in order to meet the constitutional deadline for announcement of results.

While at the NTC the results while being aggregated were initially being projected on the screens, on 13 August the projection stopped and only the results verified by constituency and county were being shown. Since then and until the declaration of results on 15 August, no official information was provided by the IEBC on the advancement of the process, the number of constituencies still left to be verified, updated turnout figures, the number of stray and rejected ballots and the votes received per candidate.

***Priority recommendation: IEBC to introduce clear and detailed procedures for managing staff and the flow of information at tallying centres to increase the consistency and efficiency of the process,***

*especially the public display of results being aggregated there, and the uploading of all results forms to the public portal to ensure verifiability.*

The EU EOM analysis of all the 290 constituency tallying centres results forms (forms 34B) revealed errors in a small number of 34B forms. In particular, in 21 forms (or 7,24 per cent) the total number of valid votes does not equal a sum of all candidates. The total difference between the officially announced figures and the correct sum of votes for candidates is 4.023 votes and in 12 forms the difference is greater than 100 votes. These inaccuracies were not of a scale to affect the outcome of the presidential election. They indicate, nevertheless, procedural shortcomings of the results aggregation process that could be attributed to human error rather than systemic manipulation.

Overall, party agents of the four presidential election candidates, as well as local observers, in all observed tallying centres including the NTC, did not raise concerns about the transparency of the processes, while they praised the cooperation with the IEBC officials. No formal complaints were filed in any of the Constituency and County Tallying Centres observed. The work of the NTC staff was characterised by a high level of transparency, being fully observed by party agents and observers who had unrestricted access to the verification process; the EU EOM did not notice any original polling station results forms (34A) being different from those uploaded on the IEBC portal and the copies given to agents. This was also confirmed by the Supreme Court in its 5 September 2022 judgment, which ruled that “no significant differences captured between the forms 34A uploaded on the public portal and the physical forms 34A” delivered to the NTC that would have affected the overall outcome of the presidential election.

## **XVII. Results and Post-Election Environment**

*The declaration of the presidential election results exposed deep fractures within the IEBC and deeply affected public confidence in the process and in the institution itself.*

### **A. Declaration of Results**

The results were declared by the IEBC chairperson on 15 August. At the time of announcement, four commissioners held a press conference at another location during which they announced that they neither accepted nor rejected the results but instead “disowned” them, due to the opacity in the compilation of the form 34C and the refusal of the IEBC chairperson to address some of their questions. Nevertheless, they participated in the announcement of constituency presidential election results at the NTC on several occasions (a point that was later noted by the SC).

The issue of whether the IEBC had the required quorum to finalise verification of form 34C and announce the results was questioned in some of the petitions challenging the results. Notably, the court had previously held that “the issue of the quorum of the commission only arises during the conduct of the business of the commission” and that “even though tied to the commission’s membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will only be the subject of a challenge if the policy decisions of the commission are made without the requisite quorum.”<sup>63</sup>

At the time of announcement, 28 polling station results forms (34A) were still not uploaded on the IEBC public portal and results of 27 constituencies (forms 34B) had not been publicly announced; it was not specified if they had been tallied and included in the form 34C or not. Whereas article 39 (1H)(2) of the Elections Act stipulates that the IEBC chairperson may declare a candidate elected

<sup>63</sup> *Isaiah Biwott Kangwony v. IEBC & another*, High Court, Petition No. 212/2018, eKLR.

“before all the constituencies have transmitted their results if the commission is satisfied the results that have not been received will not affect the result of the elections”, the small margin between the two frontrunners required the tabulation of all constituencies before announcement. Notably, as the IEBC chairperson stated in his sworn affidavit to the Supreme Court, the remaining 27 constituency results were scheduled to be announced on 15 August, but after the security incident at the NTC with supporters and agents of the *Azimio* camp storming the podium just before the declaration of results, the chairperson decided to proceed with the declaration of presidential results immediately.

Following the declaration of presidential election results by the IEBC, ELOG presented the results of its parallel vote tabulation (PVT) exercise. It was in line with the IEBC results, with Ruto obtaining 50.7 per cent of the votes and Odinga 48.7 per cent, with a margin of error of  $\pm 2.1$  per cent. However, the PVT could only confirm that the results were within the margin of error and could not confirm the winner given the close result. In a second press conference, the four dissenting commissioners advanced four arguments justifying their repudiation of the results. One was that the IEBC chairperson appropriated an excess of power to himself in declaring results without the approval of a plenary of all seven commissioners. They also alleged that there were mathematical errors in the results as declared, and that the results declared were incomplete, lacking the numbers of registered voters, of the total votes cast and of invalid votes. Their final point was that not all constituency results were included in the final announcement.

## **B. Complaints Relating to the Election Results**

Nine presidential election petitions were filed with the SC on 22 August 2022, challenging aspects both of the conduct and of the results of the presidential election. An extremely condensed set of deadlines applied for the hearing of these petitions, with 7 days for submission of petitions, followed by 14 days for the SC to reach a decision. The petitioners had to serve the respondents within one day, by 23 August, either in person or in newspapers advertisements. Respondents then had four days to reply, to which petitioners had another day to file a further response.

The substance of the nine petitions was broad, ranging from allegations of treason on the part of the IEBC Chairperson and flaws in the decision-making process of the IEBC, to flaws in voter registration, in the use of technology, in tallying and verifying votes, and of fraud and hacking. The most significant petition was that submitted by the *Azimio* candidates, Mr. Odinga and Ms. Karua. They alleged that the IEBC did not conduct a proper, credible, or valid election and that, as a consequence, there should be either a new result declared for the election or a nullification.

Similar grounds were adduced in six of the other election petitions. These cases were filed by a total of 15 additional individuals, with those involved comprising voters, civil society activists, political activists, and a member of the Senate.

Two petitions differed substantially from the other seven, those filed by Reuben Kigame and Moses Kuria. Mr. Kigame had successfully challenged the decision of the IEBC not to register him as an independent presidential candidate before the HC, an order subsequently restrained by the Court of Appeal. His case centred on the alleged denial of his right to stand for election. The petition filed by Mr. Kuria asserted that Mr. Odinga, through his agents, had interfered with the conduct of the national tallying centre.

Twenty-three applications for interlocutory legal orders, precedent to the hearing of the petition, were filed with the SC. The court responded individually to each of the interlocutory applications. A pre-trial conference took place on 30 August in which the court consolidated seven of the petitions. The original petition number five, that of Mr. Odinga and Ms. Karua, became the lead petition. The six

other, similar-fact petitions were consolidated with this petition. The court then framed a set of nine issues to be addressed in hearing and determining the consolidated petition. The petitions of Mr. Kigame and Mr. Kuria were dismissed.

Presidential Election Petition No. E005 of 2022 was then consolidated with presidential election petitions E001, E002, E003, E004, E007 and E008. The hearing of the consolidated petition began on 31 August and lasted for three days. In addition to hearing both petitioners and respondents set out their cases, the SC adduced questions for both sides to answer. Also, a scrutiny process took place over 48 hours, a report of which, the ICT Scrutiny and Inspection, Tallying and Recount Report, dated 1 September, was placed before the court and interrogated by the parties to the case. The court addressed the nine issues raised for consideration, eight of substance and the ninth relating to the nature of the orders which could be delivered in a ruling on a presidential election petition.

The decision of the SC was delivered on 5 September, with the detailed reasoning for the decision published on 26 September. The seven judges of the court decided, unanimously, to dismiss the consolidated election petition and to uphold the validity of the result of the election, as announced by the IEBC on 15 August. Regulation 87(3) of the Elections (General) Regulations, 2012, was declared to be unconstitutional, to the extent to which it purports to vest the power of verifying and tallying presidential election results in the chairperson of the IEBC, to the exclusion of other members of the commission. Each of the parties was ordered to bear their own costs.

The first issue addressed by the SC was whether, as recommended by the Kriegler Commission Report, and enshrined in Article 86 of the Constitution and Section 44 of the Elections Act, “the technology deployed by the IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results.” The petitioners contended that the conduct of the election had not reached these standards, while the IEBC attempted to rebut these contentions.

The SC reaffirmed the burden and standard of proof to be met in the case, drawing on previous jurisprudence. It was the duty of the petitioners to prove their case, beyond reasonable doubt, through proffering cogent and credible evidence to prove the grounds alleged to the satisfaction of the court. If the grounds were established, then it would be for the respondents to rebut these. The analysis of the evidence led the SC to determine that the IEBC rebutted complaints related to the audit of the voter register.

The court was satisfied that inconsistencies and inaccuracies identified during the KPMG audit had been successfully addressed. The broader technology procurement process had been within the law and there was no abdication by the IEBC of its role in technological aspects of the election. It noted that the IEBC had visibility and control of the electoral system at all times and there was no evidence to show that there had been access to the system by unauthorised persons. It was held by the SC that the technology deployed by the IEBC had not failed the standards of Article 86 of the constitution on integrity, verifiability, security, and transparency.

The second issue addressed by the SC was whether there was interference with the uploading and transmission of the Forms 34A from the polling stations to the IEBC public portal. Evidence was adduced by the petitioners of differences in a sample of 41 polling stations; of 11,000 forms having been dumped or uploaded in a batch, in order to “stage” results; and the claim was advanced that greater fraud was perpetrated in 2022 than in 2017. The IEBC responded that the allegations of compromise or intrusion by third parties had no factual or technical basis and details of the security measures employed were provided.

The findings of the scrutiny report were relied upon by the SC to determine that there was no evidence that there had been any interference in the transmission of the Forms 34A. There was also no evidence that the IEBC had dumped 11,000 Forms 34A together at a particular time, and it noted that there was no “staging” of results. The court determined that some of the logs submitted in evidence by the petitioners were either from 2017 or from unknown or unauthenticated sources. No suspicious activity was found in support of any of the allegations of the petitioners. Allegations of intrusion and penetration of the results transmission system by foreigners were found by the court not to have been proven.

The third issue addressed by the SC was whether there was a difference between the Forms 34A uploaded on the IEBC’s public portal, the Forms 34A received at the NTC, and the Forms 34A issued to the agents at the polling stations. The petitioners alleged that there was a systematic pattern of criminal and fraudulent interference with the Forms 34A, the effect of which was the deduction of votes from Odinga and their addition to Ruto. Forty-one polling stations were identified by the petitioners as examples of the alleged practices, with an alleged shift in 2,793 votes. Recount of these polling stations during the scrutiny exercise yielded no variance or discrepancy in the Forms 34A, except for in four polling stations, where changes were insignificant, except one vote, twice, being deducted from Mr. Odinga and attributed to Mr. Ruto, for a total difference of two votes.

All the Forms 34A submitted by the petitioners, and purportedly given to them by their agents from polling stations, differed significantly from the originals, the certified copies and those in the public portal. In this context, the SC mentioned the consequences of perjury, forgery, and the submission of misleading or fabricated evidence. The result of the scrutiny exercise was that there was no evidence of tampering with Forms 34A and the authenticity of the original forms sampled was confirmed. It was found, overall, that, following the Maina Kiai precedent, the IEBC used the original physical Forms 34A to tally, verify and declare the presidential election results.

The fourth issue considered by the SC was whether the postponement of gubernatorial elections in Kakamega and Mombasa counties, and of six lower-level elections, resulted in voter suppression to the detriment of Odinga and Karua. The allegation of the petitioners was that the postponement was a deliberate effort to suppress votes in areas which had a history of overwhelming support for Odinga. They asserted that the postponement was ultra vires the IEBC and unconstitutional as amounting to a denial of the right to vote.

The SC determined that the IEBC has the constitutional authority to postpone elections and that the postponements effected were justified, although due diligence in inspection of printing templates in Greece could have prevented this occurrence. They did not find any evidence of intention to suppress voter turnout. On the facts, the low turnout in the affected constituencies reflected turnout in neighbouring constituencies and nationally, without any difference between them. The claim of low turnout in the affected areas was dismissed as a “red herring”.

The fifth issue addressed by the SC was whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions. The petitioners alleged that there was a difference of 33,208 votes between the votes cast for president and those cast for other positions, and that this differential indicated electoral fraud by way of systematic voter suppression in the strongholds of the petitioners, and ballot stuffing in the strongholds of the respondents. The SC stated that no document had been produced by the petitioners to prove systematic ballot stuffing.

The IEBC explained that voters in prison and in the diaspora vote only in the presidential election and not for the other offices. Their analysis of voting across all 47 counties indicated that the discrepancy between votes cast in the presidential election and the other election was 791 votes, not 33,208. This small discrepancy was attributed to stray ballot papers. On the evidence, the SC held that there were no inexplicable discrepancies between the votes cast for presidential candidates and other position.

The sixth issue addressed by the SC was whether the IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138(3)(c) and 138(10) of the constitution. The petitioners argued that the chairperson undertook the tallying, verification, and declaration process to the exclusion of four of the commissioners. The essence of this issue was whether there was anything unconstitutional in the discharge of the respective roles of the chairperson and commissioners of the IEBC during their activities at the NTC.

The SC held that, in general, all the powers and functions of the IEBC are vested in the commissioners as a collective body and must be exercised by them, acting collectively. Any exclusive authority of the chairperson must be expressly stated. The SC clarified that the responsibility of tallying and verifying the results of a presidential election at the NTC vests in the IEBC as a collective entity, while the responsibility of declaring the results vests exclusively in the chairperson. A chairperson cannot exclude any member or members of the commission from the execution of tallying and verification. Consequently, Regulation 87(3) of the Elections (General) Regulations, 2012, was found to be unconstitutional, to the extent to which it purported to vest the power of verification and tallying of presidential election results solely in the IEBC chairperson, to the exclusion of the other commissioners.

On the facts of this particular case, the petitioners argued that the chairperson had excluded four of the commissioners from the tallying and verification process. On reviewing the proceedings at the NTC, the SC held that all of the commissioners were involved in activities related to the processing of results. They announced results from several constituencies upon the conclusion of the tallying and verification of the results. The court determined that, notwithstanding the divisions apparent between the chairperson and four of the commissioners, the IEBC carried out the verification, tallying and declaration of results in accordance with Article 138(3)(c) and (10) of the constitution.

The seventh issue addressed by the SC was whether the then declared president-elect attained 50 per cent plus one of all the votes cast in accordance with Article 138(4) of the constitution. The exclusion of rejected ballots from the calculation of results was contested, as was the turnout figure used in the IEBC result calculations. The SC reiterated precedents which established that rejected votes cannot be taken into account when calculating whether a presidential candidate has attained the 50 per cent plus one of the votes cast.

The SC rejected the arguments of the petitioners that the 50 per cent of the votes validly cast, plus one vote, threshold had not been met. The dispute turned first on establishment of the turnout figures to be relied upon, with the alternate figures of 65.4 and 64.76 per cent in contention. It was decided by the court that the turnout figure of 64.76 per cent was correct. It was further decided that the then declared president-elect had attained 50 per cent plus one of all the valid votes cast, in accordance with Article 138(4) of the constitution.

The eighth issue considered by the SC was whether there were irregularities and illegalities of such a magnitude as to affect the final result of the presidential election. The litany of deficiencies, of law and practice, adduced by the petitioners included failures of technology and late opening of polling stations; interference in the supply and delivery of ballot papers; lack of procedures for special voting;

alleged voter suppression; transposition anomalies; absence of party agents; and offences and ethical breaches committed by the chairperson of the IEBC, among others. The court concluded that the irregularities and illegalities cited by the petitioners were not proved to the standard required, or at all.

The court, citing the Harun Mwau case, repeated their previous statement that irregularities must be of such a profound nature as to affect the actual result or the integrity of an election for the court to nullify an election. A high, intermediate, standard of proof is applicable, requiring the presentation of cogent and credible evidence. On an appraisal of the allegations, one by one, the court found that they were not backed by the evidence needed to satisfy this requirement. In the specific case of the IEBC chairperson, the court did not find any evidence of violation or breach of any electoral law or regulation by the chairperson in the management of the presidential election.

The final ninth issue addressed by the court was the matter of what reliefs and orders the court had the jurisdiction to grant. It was determined, as set out in the constitution and elaborated in the Supreme Court (Presidential Election Petition) Rules, that the court has the mandate to determine the validity or otherwise of the election of the president-elect, and, in the case of nullification, to order a fresh election. Otherwise, jurisdiction does not extend to making any other orders. The court does have the power to make recommendations or observations and has done so in the determination of previous presidential election petitions.

Recommendations were offered regarding “the institutional dysfunctionality undermining the optimal functioning of IEBC”, which included legal, policy and institutional reforms. On corporate governance, it was recommended that parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of the IEBC. The IEBC ought to introduce guidelines to clarify the distinct policy, strategic and oversight responsibilities of the chairperson and the commissioners and to manage the separation of the administrative and policy domains. The roles of the members of the commission and of the staff and other third parties should be clearly delineated.

It was recommended, on election technology, that, to the extent possible, access to servers used for the transmission and storage of results forms should be restricted to IEBC staff during the election period, and such servers should be separate from those used for general administration. It was also recommended that statutory Form 34A should be simplified and revised to include a record of stray ballots. There should be thorough training for RO on the determination of valid votes. Special voting should be brought into effect. As in 2017, the SC repeated the recommendation that the 14-day time limit for hearing and determination of a presidential election petition should be extended.

The SC also made recommendations which were directed towards counsel involved in the proceedings. Advocates were reminded of their obligations to preserve the dignity, honour, and ethics of the profession and to refrain from attempting to influence pending decisions of the court. Language used in commentary outside the court room by some advocates was characterised as inappropriate and insulting towards the court, which could amount to professional misconduct.

### **C. Post-Election Developments**

With 50.49 per cent (7,176,141) against Odinga’s 48.85 per cent (6,942,930) Ruto took about 69,000 votes above the 50 per cent plus 1 threshold. Odinga secured a majority in 27 of the 47 counties and Ruto correspondingly in 20. This is broadly in line with the gubernatorial elections in which *Azimio*

initially garnered 24 of the 47 positions<sup>64</sup> and the results for the NA which initially saw *Kenya Kwanza* just slightly ahead of *Azimio* with 163 to 162 members of parliament (MPs).<sup>65</sup> Since the declaration of Ruto as president-elect, the political landscape has started shifting. In the NA, 10 of the 12 Independents have joined *Kenya Kwanza* as have UDM (7 MPs) and 4 small parties with 1 seat each, giving *Kenya Kwanza* a comfortable majority of 184 to 153 for *Azimio*.

Overall turnout was given as 65 per cent, a drop of 12.5 per cent. Stronger than average decreases were particularly noted in areas with no presidential candidate, like the Mount Kenya region (a drop from 83 to 67 per cent), Ukambani (from 77 to 61 per cent) and Nairobi (72.7 to 56 per cent). The turnout in Ruto's stronghold in the Rift Valley<sup>66</sup> decreased substantially less (from 79 per cent to 76 per cent) than the national average, whereas the decrease in Odinga's stronghold in the Nyanza region (83 per cent to 73 per cent) was more marked than in Ruto's area.<sup>67</sup> With 77 per cent of the votes, Ruto could keep a high level of support in the Mount Kenya region.<sup>68</sup> In addition, securing 63 per cent in Bungoma County (Western Kenya) *Kenya Kwanza* was able to turn around the result from the past election when Odinga had received with 87 per cent of the votes. Odinga gained in Nairobi (from 51 per cent to 57 per cent), Mount Kenya (from 7 per cent to 22 per cent) and in Kisii-Nyanza (from 52 per cent to 65 per cent).

Following the declaration of the presidential election result by the IEBC chairperson and the press conference of the four dissenting IEBC commissioners on 15 August, *Azimio* presidential candidate Odinga held a press conference the next day at the Kenyatta International Conference Centre (KICC) in which he rejected the presidential election result, pronounced a SC petition, and called upon his supporters to remain calm and await the court proceedings and ruling. This press conference was closely coordinated with a second press conference by the four dissenting IEBC commissioners and large parts of their and Odinga's statement were identical.

Ruto was gazetted as the president-elect on the evening of August 16, paving the way for the transition process to formally kick-off. A constitutionally prescribed transition team, consisting of representatives of various state institutions and – after the declaration of the presidential result – was joined by three representatives of the *Kenya Kwanza* alliance, had been constituted about a month before the elections.

After the declaration of the presidential election results few spontaneous protests with some destruction of cars in Kisumu and Nairobi. The police acted proportionally and with restraint and on 16 August the protests subsided. In separate incidents some acts of violence against Kikuyu took place in Kalenjin dominated Uasin Gishu county where two houses were burnt down immediately after the elections and immediately before the declaration of results. According to EU EOM observers Kikuyu, understood this as a warning. In this situation, the police also moved in quickly and controlled the situation.

President Kenyatta remained quiet and appeared in public for the first time after the elections when on 18 August meeting a US congress delegation and religious leaders. He assured them of a smooth

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<sup>64</sup> These figures are before any defections occurred. This then included the two UDM governors (Mandera and Marsabit in north-eastern), who since the declaration of the presidential election results have defected to Ruto's *Kenya Kwanza* alliance.

<sup>65</sup> The NA comprises 290 seats and 47 women representatives. In this, 12 independents were elected.

<sup>66</sup> These are the six counties predominantly inhabited by the Kalenjin: Uasin Gishu, Elgeyo Marakwet, Baringo, Kericho, Nandi and Bomet.

<sup>67</sup> This comprises four counties which are predominantly inhabited by Luo: Kisumu, Siayo, Migori and Homa Bay.

<sup>68</sup> The wider Mount Kenya region consists of Kiambu, Muranga, Nyeri, Kirinyaga, Nyandarua, Embu, Meru, Tharaka Nithi, Laikipia and Nakuru.

transition without giving any details. In a press statement, Mr. Odinga accepted the SC ruling although he disagreed with it. On 13 September, Ruto was sworn in as the fifth president of the Republic of Kenya in a festive public ceremony at Kasarani stadium in the presence of several heads of state.

Overall, the post-election environment remained calm and as during the election campaign the strong polarisation between Kenyatta/Odinga on the one hand and Ruto on the other did not translate into strong polarisation within society in the immediate post-election period.

## XVIII. Recommendations

NO.	FR page #	CONTEXT	RECOMMENDATION	SUGGESTED CHANGE IN LEGAL FRAMEWORK	RESPONSIBLE INSTITUTION	RELEVANT INTERNATIONAL / REGIONAL PRINCIPLE /
<b>LEGAL FRAMEWORK</b>						
1	p.33	<p>The Constitution contains affirmative action provisions promoting the participation of women, marginalised ethnic groups, and PwD. However, successive parliaments have failed to introduce the legislation required to implement these provisions, leaving this affirmative action largely unfulfilled.</p>	<p><i>Enact constitutional affirmative action provisions. In particular: application of the 2/3 gender principle; application of the principle that 5 per cent of members of elected bodies are PwD; provisions on inclusion of marginalised ethnic minorities.</i></p>	New legislation.	Parliament	<p><b>Women’s Participation; Equality between Men and Women; Freedom from Discrimination</b></p> <p>Art. 4.1 CEDAW: Art.9 ACHPR Protocol on Women ACDEG, Art. 3 Art.29 CRPD ACHPR Protocol on PwD, Art.21 ACHPR, Art.2</p>

2	p.36	<p>The absence of a deadline for appeals to the HC against decisions of the PPDT and the IEBC DRC resulted in cases continuing throughout the electoral cycle.</p> <p>Similarly, there are no deadlines on constitutional petitions challenging the lawfulness of IEBC decisions, which resulted in cases on several aspects of election procedures continuing until close to election day.</p>	<p><i>Consider imposition of a deadline on appeals to the HC against PPDT decisions on candidate nomination and IEBC DRC decisions on candidate registration and consider introduction of a deadline to restrain cases against the IEBC to the HC Constitutional Bench in the two-month period prior to election day. Exceptions should be permitted for urgent matters, where the law is not settled before elections.</i></p>	<p>Legislation.</p>	<p>Parliament Judiciary</p>	<p><b>Right to Effective Remedy</b> ACDEG, Art. 17</p>
3	p.20	<p>The right to stand for election is subject to restriction on the grounds “of unsound mind”. Persons without a degree are disqualified from standing for certain elections.</p>	<p><i>Consideration could be given to remove restrictions on the right to stand for elections for person with intellectual disabilities as well as restrictions requiring an educational degree to stand.</i></p>	<p>Legislation: Amend Art. 99 of the Constitution to remove “unsound mind”. Amend section 22 of the Elections Act to remove the requirement of a degree to run for election.</p>	<p>Parliament</p>	<p><b>Right and opportunity to participate in public affairs and hold office</b> ICCPR, Art.25 CCPR General Comment 25, §15 Art.29 CRPD</p>

**ELECTORAL ADMINISTRATION**

4	p.13	<p>Stakeholders’ perception of constituency and county officials’ information-sharing, however, was positive overall. On the contrary, the IEBC tended to be more reactive rather than proactive in its communication with external stakeholders, at times only releasing crucial information on sensitive matters after problems had occurred. Although the IEBC made daily use of its social media accounts, its website was lacking important information and was not updated regularly.</p>	<p><i>IEBC to strengthen its communication strategy to provide continuous, comprehensive, and prompt information to election stakeholders and to undertake regular and structured stakeholder consultation throughout the electoral cycle.</i></p>	<p>No legal change required.</p>	<p>IEBC</p>	<p><b>Transparency and access to information</b></p> <p>ICCPR, Art.19.2 ICCPR, GC 34, Para. 19 UNCAC, Art.10</p>
5	p.13	<p>No specific focus was placed on filling out the polling station statutory forms and the polling station diary; this was evidenced also by the fact that several forms arrived incomplete at the constituency tallying centres, as well as on the importance of correct packaging of sensitive materials.</p>	<p><i>The training of electoral staff to be improved, especially of the presiding officers. Consideration could be given to complement regular trainings before elections with a knowledge-based online system for all IEBC staff.</i></p>	<p>No legal change required.</p>	<p>IEBC</p>	<p><b>Genuine Elections that Guarantee the Free Expression of the Will of the Electors</b></p> <p>ICCPR GC 25, Para. 20 African Charter on Democracy, Elections and Governance (ACDEG), Art.17</p>

6	p.15	The late dispersal of funds for voter education delayed the start of activities and negatively impacted upon the capacity of IEBC staff on the ground, who had limited logistical support and was unable to reach remote areas. Despite efforts by the IEBC, CSOs and religious leaders, all EU EOM interlocutors considered that voter education was insufficient.	<i>IEBC to be provided sufficient funds immediately after the end of the current electoral cycle and throughout the next one, to implement continuous voter education activities.</i>	No legal change required	Parliament	<b>Right of Access to Information</b>  ICCPR, Art. 19.2 ICCPR, GC 25, Art. 12 ACHPR, Art. 9.1
<b>ELECTION TECHNOLOGY</b>						
7	p.16	Transparency needed throughout the election technology project lifecycle.	<i>IEBC to improve public communication on procurement processes and the suitability and security of the election technology solutions notably with regard to voter registration and identification and the results management processes.</i>	No legal change required.	IEBC	<b>Transparency and Access to Information</b>  Conference of the States Parties to the United Nations Convention against Corruption. Resolution 5/4, Para. 22  ICCPR, GC 34, Para. 19
8	p.17	Need for regular and agreed upon improvement of the technological solutions.	<i>IEBC to implement improvements in election technology based on regular audits and stakeholder consultations and to improve consistency and transparency.</i>	No legal change required.	IEBC	<b>Genuine Elections that Reflect the Will of the People</b>  ICCPR, Art. 25(b) ICCPR, GC 34, Para. 19
<b>VOTER REGISTRATION</b>						

9	p.18	<p>The gap in registration was attributed mostly to youth apathy, as well as to insufficient IEBC sensitisation especially prior to the first phase of the exercise, caused by delayed and limited funding. Absence of specific efforts targeting youth, women and persons with disabilities groups also had an impact.</p>	<p><b><i>IEBC to enhance continuous voter registration efforts to target youth, women and persons with disabilities in order to ensure universal suffrage.</i></b></p>	<p>No legal change required.</p>	<p>IEBC</p>	<p><b>Right to Vote</b> UDHR, Art. 21.3 ICCPR, Art. 25 and GC 25</p>
10	p.19	<p>Although reg.90 of the General (Elections) Regulations provides for the special voting of election officials, observers, security forces on duty as well as nomadic pastoralists, hospitalised and homebound voters, through procedures that the IEBC may adopt, no such provisions were made for these (or previous) elections, thus <i>de facto</i> disenfranchising many voters.</p>	<p><b><i>IEBC to introduce procedures for special voting of election officials, security personnel on duty, homebound and hospitalised voters as well as nomadic pastoralists, to vote, if necessary, in another location than the one they registered. This should be balanced against security measures to avoid multiple voting.</i></b></p>	<p>No legal change required.</p>	<p>IEBC</p>	<p><b>Right to Vote</b> ICCPR, Art. 25 and GC 25</p>

**CAMPAIGN ENVIRONMENT**

11	p.23	<p>Unfair incumbency advantage: Election Offences Act (sec.14) bans use of public resources for electoral and campaign purposes and bars government from advertising its achievements during the election period. Yet, the Leadership and Integrity Act (sec.23) allows cabinet secretaries and members of county executive committees to campaign, blurring the line between state and party.</p>	<p><b><i>Strengthen the ban on public resources being used for campaigning, including by removing the exemption for cabinet secretaries and members of county executive committees.</i></b></p>	<p>Remove exemptions for cabinet secretaries and members of county executive committees from the requirements of political neutrality (section 23, Leadership and Integrity Act, 2012)</p>	<p>Parliament</p>	<p><b>Equality of Opportunity</b></p> <p>UNCAC, Art. 19</p> <p>ACDEG, Art. 12.3</p>
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<b>CAMPAIGN FINANCE</b>						
12	p.24	The Election Campaign Financing Act, 2013, has never become operational, as successive parliaments have rejected subsidiary legislation proposed by the IEBC to enforce it. Most recently, regulations introduced by the IEBC in 2021 were rejected by the NA and were de-gazetted in October 2021. HC subsequently determined that the IEBC has the power to introduce regulations without NA approval, but the decision was too close to the elections to permit the introduction of same in time for these elections.	<i>The IEBC to operationalise the Election Campaign Financing Act to regulate the amount of money received and spent by candidates and political parties during an election or referendum.</i>	Introduce new regulations subsidiary to the Election Campaign Financing Act, 2013.	IEBC	<p><b>Transparency in Funding and Free Choice of Voters</b></p> <p>CPCC, Art. 10</p> <p>ICCPR GC 25, Para. 19</p> <p>UNCAC, Art. 7.3</p>
<b>MEDIA</b>						
13	p.25	Although freedom of the press is generally respected, journalists continue to face attacks and press associations admit pressure by media owners on coverage of political topics. Credible journalists noted that they are forced into self-censorship when covering corruption or sensitive political issues.	<i>Uphold the right to freedom of expression, including for media practitioners and ensure that attacks against journalists are properly investigated and sanctioned.</i>	No legal change required.	Kenya Police Service  Office of the Director of Public Prosecutions (ODPP)	<p><b>Freedom of Expression</b></p> <p>ICCPR, Art. 19.2</p>
14	p.26	Concerns raised with the re-emergence of sec.13 of the 2008 National Cohesion and Integration Act; hate speech	<i>Detail the legal definition of hate speech in line with international human rights obligations (so both intention</i>	National Cohesion and Integration Act, 2008, section 13.	National Assembly	<p><b>Freedom of Expression</b></p> <p>ICCPR GC 34, Para. 35</p>

		definition is vague and would need amendment to promote freedom of expression in line with international obligations.	<i>to incitement and imminent violence are demonstrated).</i>			
<b>SOCIAL MEDIA</b>						
15	P.30	While fundamental freedoms are recognized and protected, the Computer Misuse and Cybercrimes Act criminalizes the spread of falsehoods and misinformation, falling short of regional and international standards for freedom of expression. The vague prohibition of “false”, “misleading” and “fictitious” data is highly subjective, and this law has been used to harass journalists, bloggers and activists.	<b><i>Remove section 22 and 23 of the Computer Misuse and Cybercrimes Act and explore less intrusive measures for addressing disinformation.</i></b>	Amend Computer Misuse and Cybercrimes Act	Parliament	<p><b>Freedom of Expression</b></p> <p>African Commission on Human and People’s Rights Declarations of Principles on Freedom of Expression in Africa: Principle 5</p> <p>UN, OSCE, OAS, ACHPR, Joint Declaration on Freedom of Expression and Elections in the Digital Age, p.c (i)</p> <p>The Joint Declaration on Freedom of expression and the Internet, 2011, General principles, p.1(a); p.1(f).</p> <p>Joint Declaration on Freedom of Expression and “Fake News” Disinformation and Propaganda UN, OSCE, OAS, ACHPR, p.3.e.</p>

16	p.30	Beyond a general hate speech prohibition, the election law does not reflect the increased use and specificity of social media. [...] online advertising lacks adequate regulation and there was no code of conduct covering parties' online activities.	<i>Include provisions on electoral advertising on online platforms, and explicitly extend the existing campaigning rules to the digital sphere.</i>	Amend Elections Act	Parliament	<p><b>Transparency and Access to Information</b></p> <p>UNCAC, Art. 7.3</p>
17	p.31	Fact-checking organizations and civil society groups established partnerships to identify and investigate misinformation around the elections. However, the EU EOM observed that on several occasions different organizations debunked the same items multiple times. A better coordination among fact-checkers would reinforce their capacity to timely dismantle false narratives and raise public awareness.	<i>Develop a coordinated effort by the media, civil society and tech companies to build a network to debunk disinformation in order to reinforce the existing fact-checking initiatives in view of future elections.</i>	No legal change required.	Public and private media, civil society, tech platforms	<p><b>Right to Access to Information</b></p> <p>Joint Declaration on Freedom of Expression and “Fake News”</p> <p>Disinformation and Propaganda by UN, OSCE, OAS, ACHPR, p.4.e., p. 6</p> <p>UN, OSCE, OAS, ACHPR, Joint declaration on Freedom of Expression and Elections in the Digital Age, p.2 a (iv)</p>

18	p.32	<p>A Council for Responsible Social Media brought together representatives from civil society and eminent individuals a few days before the elections. It demanded better accountability from big tech companies in Kenya. It also encouraged the authorities to develop and publicly sign a self-regulatory Code of Practice on Disinformation to address threats to the integrity of the election process in line with international good practice.</p>	<p><i>Develop a self-regulatory Code of Practice on Disinformation by a multi-stakeholder coalition against disinformation to promote greater transparency and accountability of big tech companies.</i></p>	<p>No legal change required.</p>	<p>Communication Authority of Kenya, civil society, tech platforms</p>	<p><b>Freedom of Opinion and Expression; Genuine Elections that Reflect the Free Expression of the Will of Voters; Right of Access to Information</b></p> <p>ICCPR GC 25, Para. 19</p> <p>UN Guiding Principles on Business and Human Rights (HRC, 2011), art. 13</p> <p>Joint declaration on freedom of expression and “fake news” disinformation and propaganda by UN, OSCE, OAS, ACHPR, p.6</p>
<b>POLLING, COUNTING AND TABULATION</b>						
19	p.38	<p>The layout of 90 out of 433 PS visited was not suitable for people with reduced mobility. Importantly, the legal provision requiring that when a voter in need of assistance is not accompanied by a person of his/her choice, will be assisted by the Presiding Officer in the presence of the agents, significantly violates vote secrecy.</p>	<p><i>More efforts to be undertaken for the inclusion of persons with disabilities in the election day process. IEBC should consider making available a tactile ballot paper in each polling station for voters with visual impairments, to be able to mark the ballot independently.</i></p>	<p>Reg.72 of the General (Elections) Regulations.</p>	<p>Parliament IEBC</p>	<p><b>Participation in Political and Public Life</b></p> <p>Convention on the Rights of Persons with Disabilities (CRPD), Art. 29 (a)</p> <p>ICCPR, Article 25, HRC GC 25, Para. 12</p>

20	p.38	The PS layout sufficiently protected the secrecy of the vote in only half of the PS visited.	<i>IEBC to consider revising the layout of the polling stations to better safeguard the secrecy of the vote.</i>	No legal change required.	IEBC	Secrecy of the Ballot ICCPR, Article 25
21	p.40	<p>Displaying of the data entry and working method was not uniform in the CTCs observed. In addition, although the IEBC special software for entering the presidential results in the system was made available, in the majority of the CTCs observed the staff was using the Excel spreadsheet, that does not contribute to the security of the process. While at the NTC the results while being aggregated were initially being projected on the screens, on 13 August the projection stopped and only the results verified by constituency and county were being shown.</p> <p>Then, until the 15 August declaration of results, no official information was provided by the IEBC on the advancement of the process, the number of constituencies left to be verified, updated turnout figures, the number of stray and rejected ballots and votes per candidate.</p>	<i>IEBC to introduce clear and detailed procedures for managing staff and the flow of information at tallying centres to increase the consistency and efficiency of the process, especially the public display of results being aggregated there, and the uploading of all results forms to the public portal to ensure verifiability.</i>	No legal change required.	IEBC	<p><b>Promotion of Transparency</b></p> <p>AU Convention on Preventing and Combating Corruption, Art. 2.5</p> <p>UNCAC, Art. 7.4</p>

## XIX. ANNEXES

### A. ANNEX I – EU EOM MEDIA MONITORING

The EU EOM conducted a qualitative and quantitative monitoring exercise of the election campaign in print outlets and electronic media during morning and evening prime time slots from 6AM to 9AM and from 7PM to 10PM. The monitoring period runs from 5 July to 6 August 2022, and from 4 July to 6 August 2022 for newspapers. The two-days period of electoral silence (7 and 8 August) was monitored qualitatively.

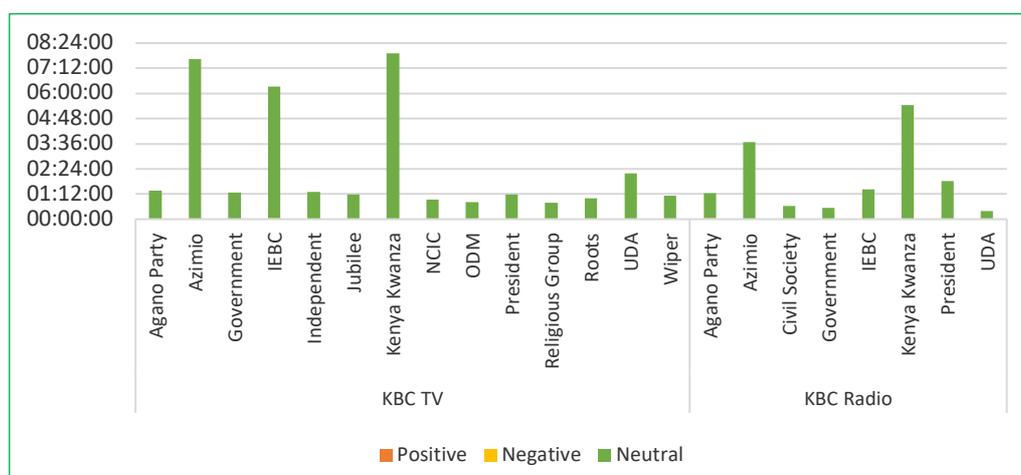
The Media Monitoring Unit coded the time and measured the space allocated to election stakeholders and political actors, including candidates and political parties, as well as the tone of the editorial content. Paid advertising – from political parties, civil society organisations and state institutions –, and gender balance in editorial content was also considered.

The sample is comprised by the state-owned broadcaster and a selection of private media with national coverage, including five radio stations representing the major communities in the country (Kikuyu, Luo, Luhya, Kamba and Kalenjin). The newspapers online versions and the Facebook pages of the media sample were also monitored. Facebook pages were analysed with CrowdTangle to find trending topics and content performing analysis.

The media sample included:

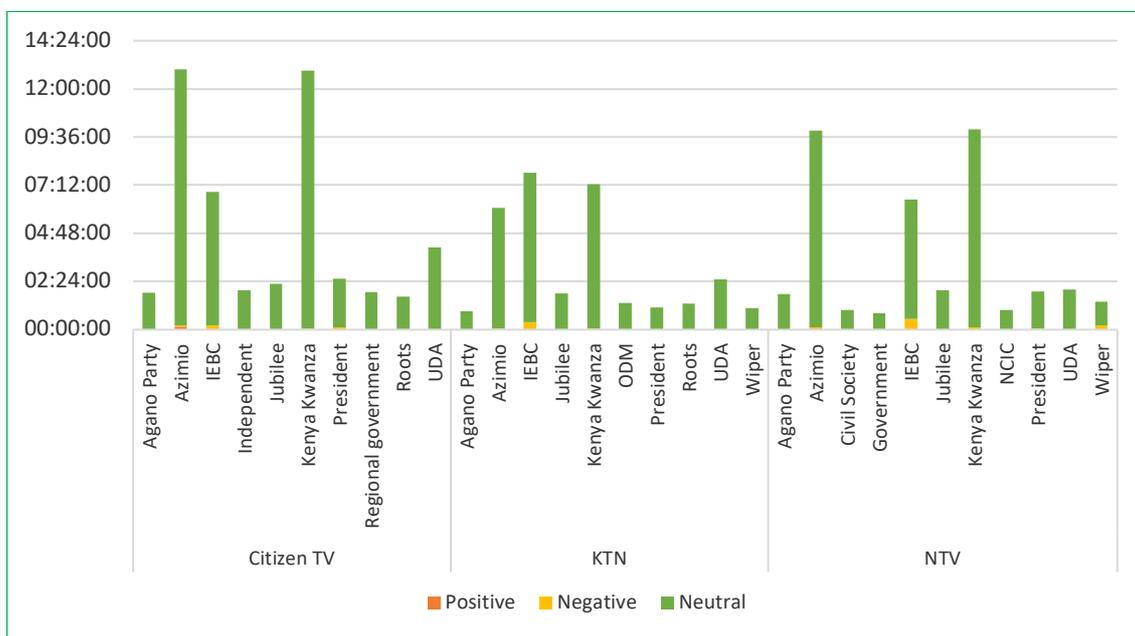
- The state-owned broadcaster KBC Channel 1 TV and KBC radio;
- Three private TV channels (NTV, KTN and *Citizen TV*);
- Six private vernacular radios (*Citizen Radio* – in Kiswahili, *Kameme FM* – in Kikuyu, *Ramogi FM* – in Luo, *Mulembe FM* – in Luhya, *Musyi FM* – in Kamba and *Kass FM* – in Kalenjin);
- The tree main national daily newspapers (*Daily Nation*, *The Standard* and *The Star*);
- The total time monitored for radio and television was 2,178 hours;
- A total number of 3,720 newspaper pages and 986 online pages were monitored.

**Graphic 1: Time and tone allocated to editorial content of political actors and election stakeholders on the state-owned broadcaster – six levels of elections**



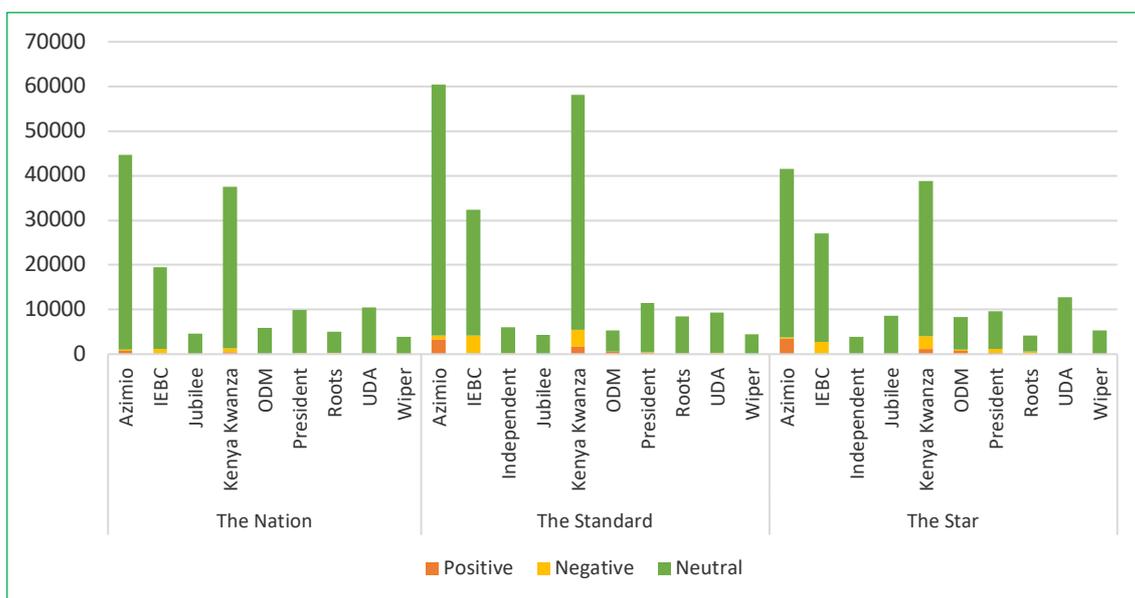
	KBC Channel 1	KBC Radio
Total time	34h 58m	15h 09m

**Graphic 2: Time and tone allocated to editorial content of political actors and election stakeholders on private TV channels – six levels of elections**



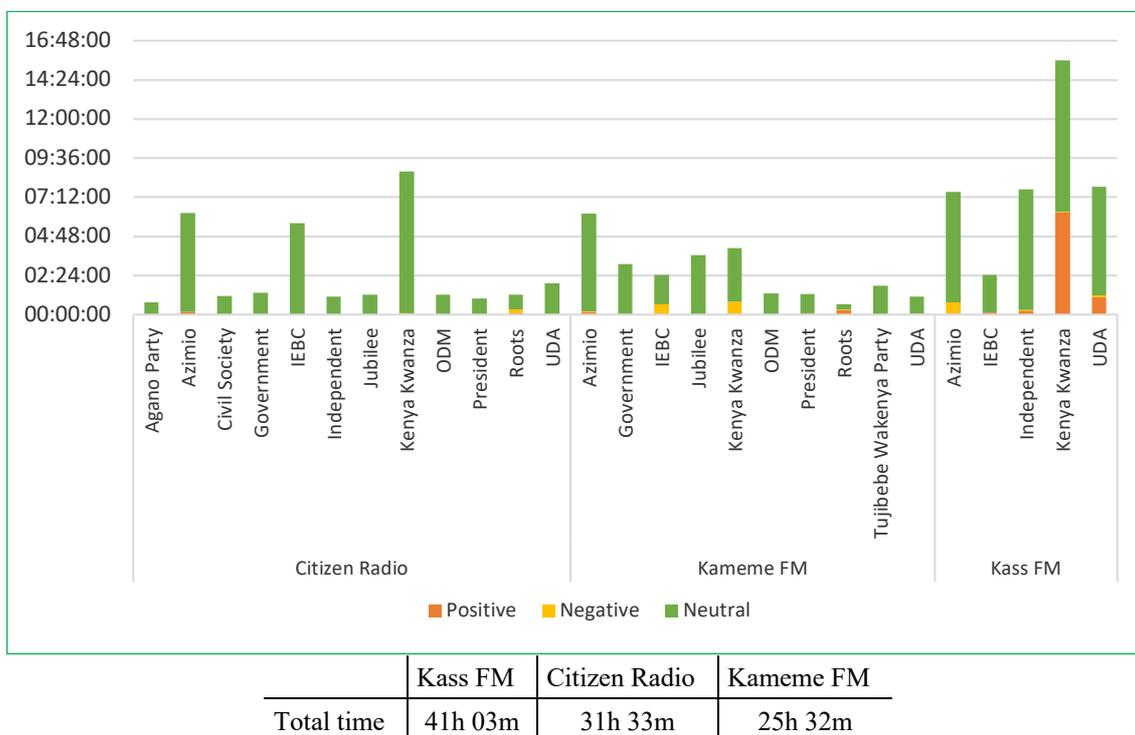
	Citizen TV	NTV	KTN
Total time	49h 00m	38h 12m	31h 10m

**Graphic 3: Time and tone allocated to editorial content of political actors and election stakeholders in newspapers (space in cm<sup>2</sup>) – six levels of elections**

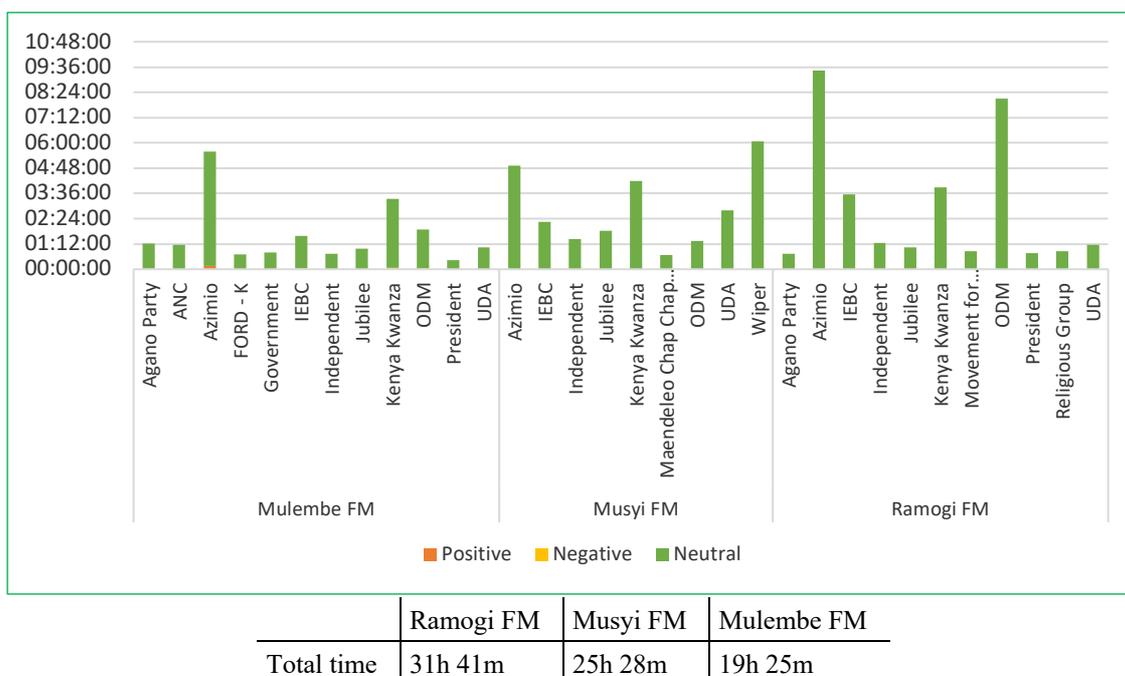


\* For information, a newspaper page measures around 1,064 cm<sup>2</sup>.

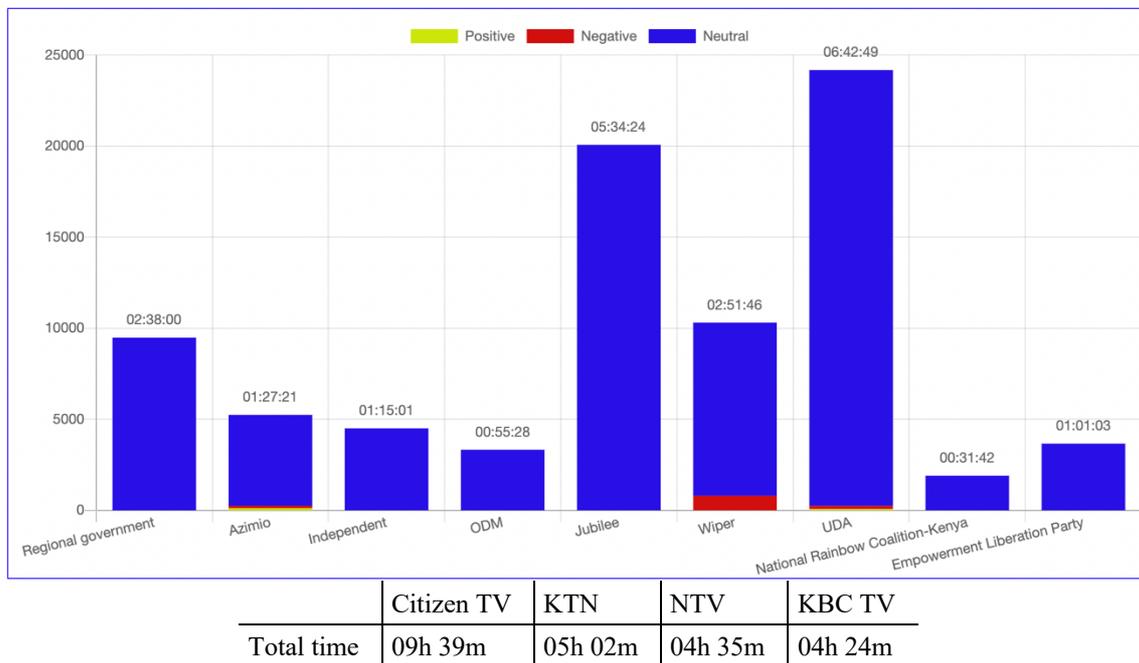
**Graphic 4: Time and tone allocated to editorial content of political actors and election stakeholders on vernacular radios (1) – six levels of elections**



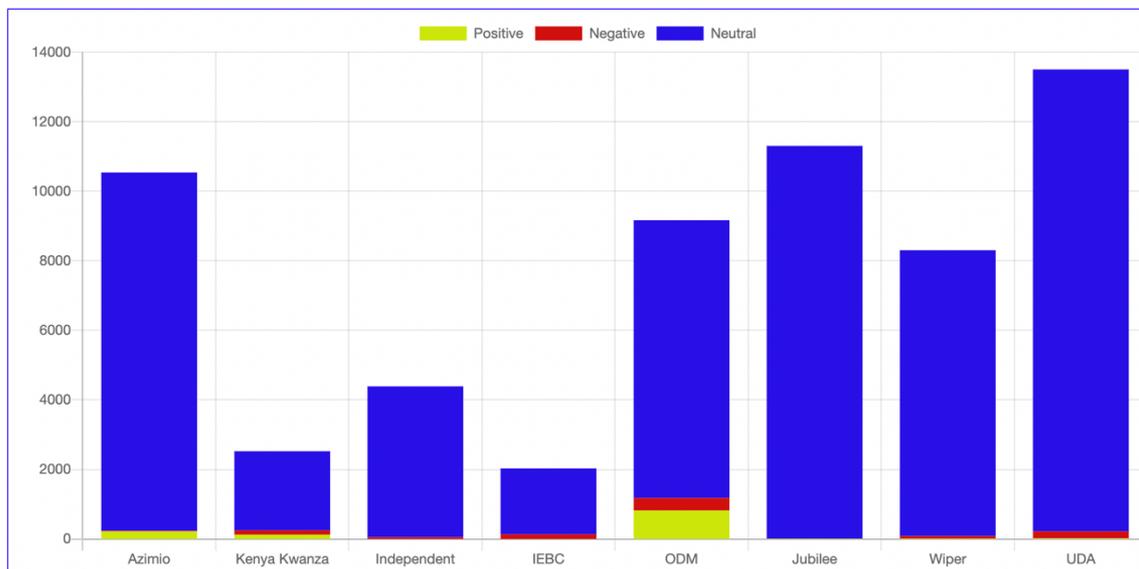
**Graphic 5: Time and tone allocated to editorial content of political actors and election stakeholders on vernacular radios (2) – six levels of elections**



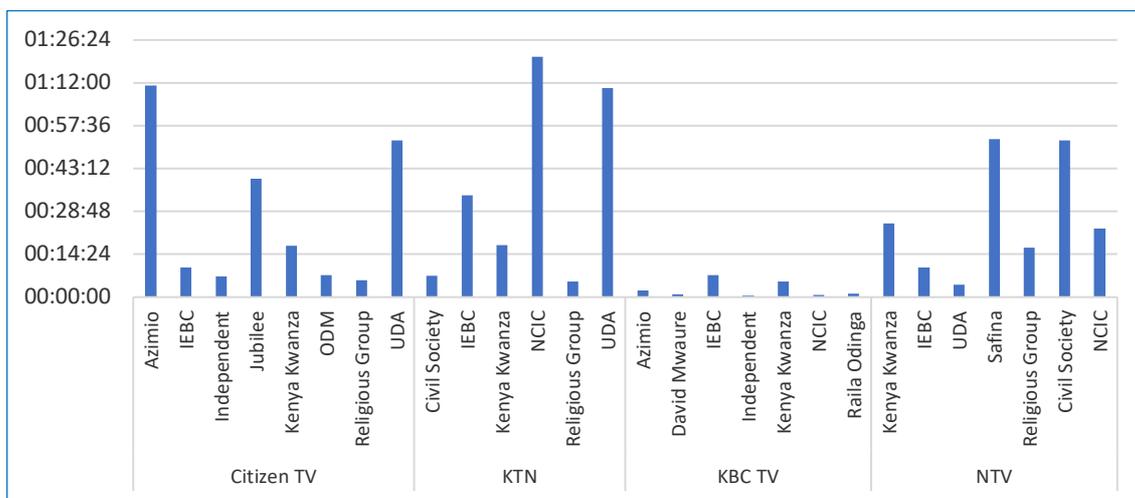
**Graphic 6: Time and tone allocated to editorial content of political actors and election stakeholders on TV channels – gubernatorial elections**



**Graphic 7: Time and tone allocated to editorial content of political actors and election stakeholders on newspapers (space in cm<sup>2</sup>) – gubernatorial elections**

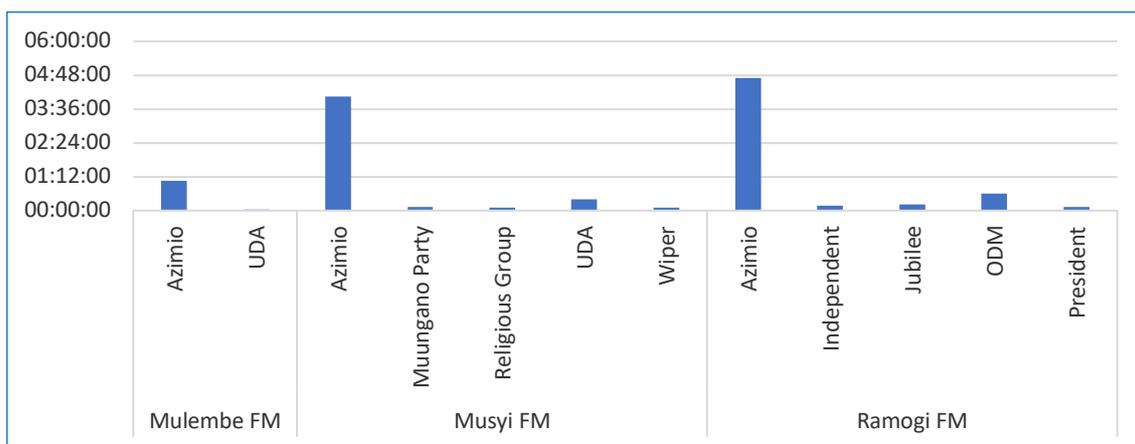


**Graphic 8: Paid advertisement on TV channels – six levels of elections**



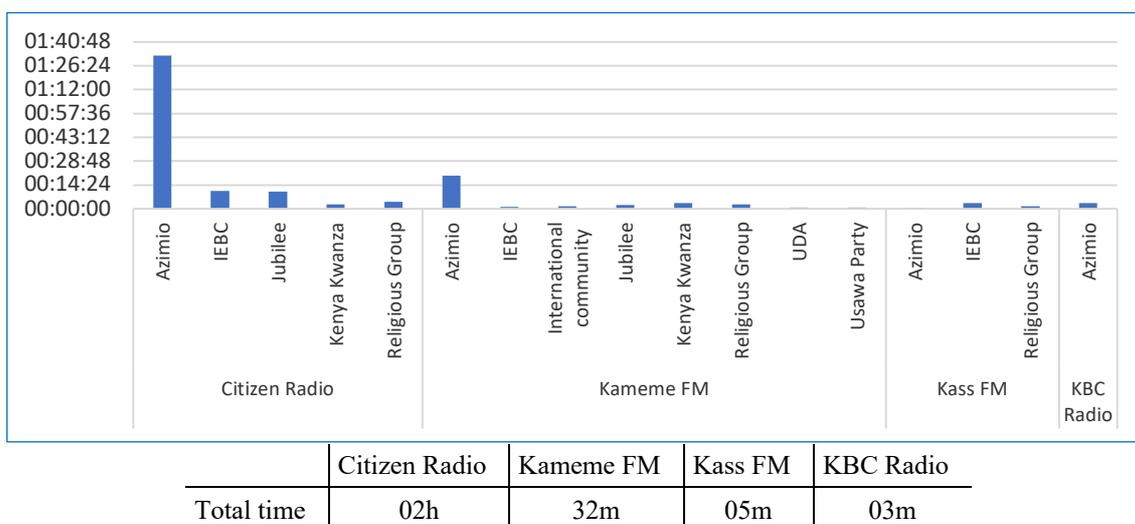
	KTN	Citizen TV	NTV	KBC TV
Total time	03h 34m	03h 30m	03h 04m	18m

**Graphic 9: Paid-up advertisement on vernacular radios (1) – Six levels of elections**

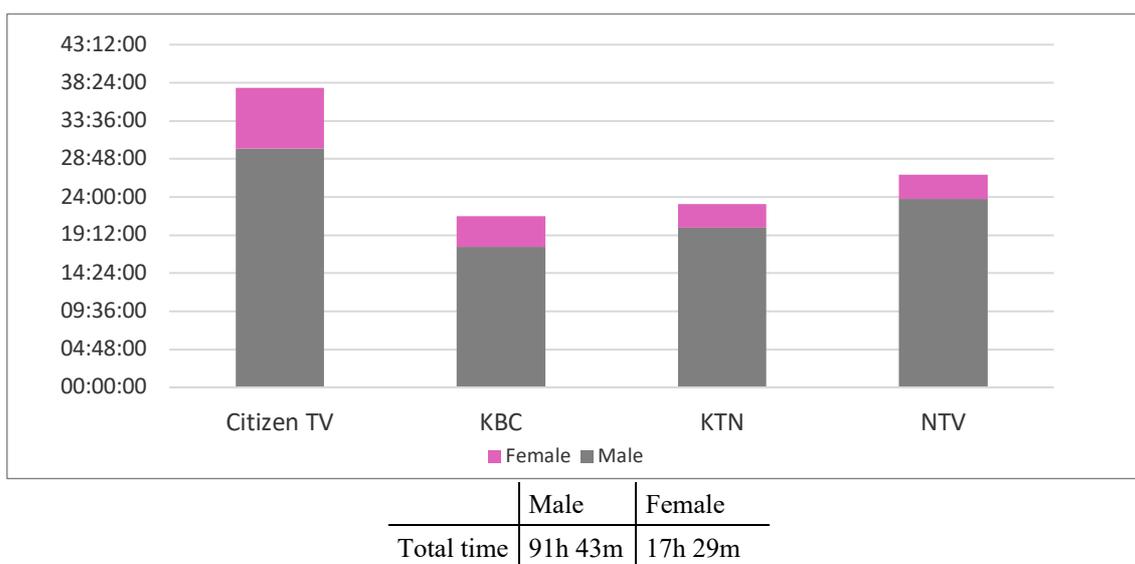


	Ramogi FM	Musyi FM	Mulembe FM
Total time	05h 49m	4h 48m	01h 03m

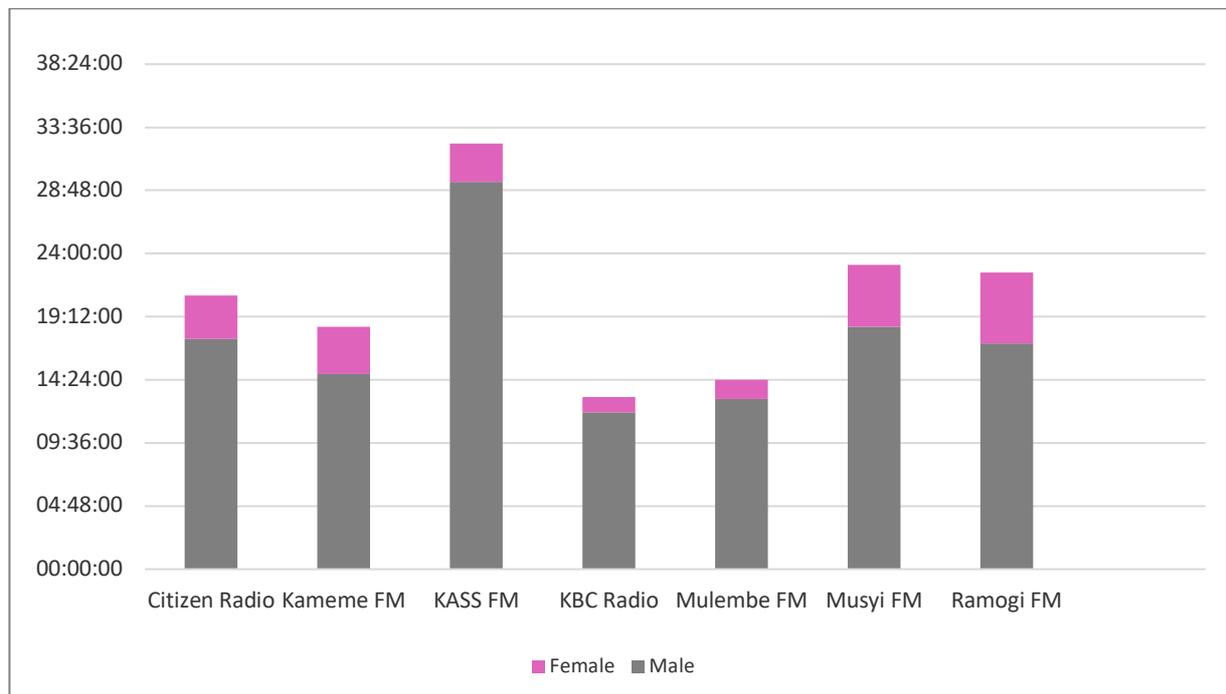
**Graphic 10: Paid-up advertisement on vernacular radios (2) – six levels of elections**



**Graphic 11: Editorial content on TV channels allotted to candidates according to gender – six levels of elections**

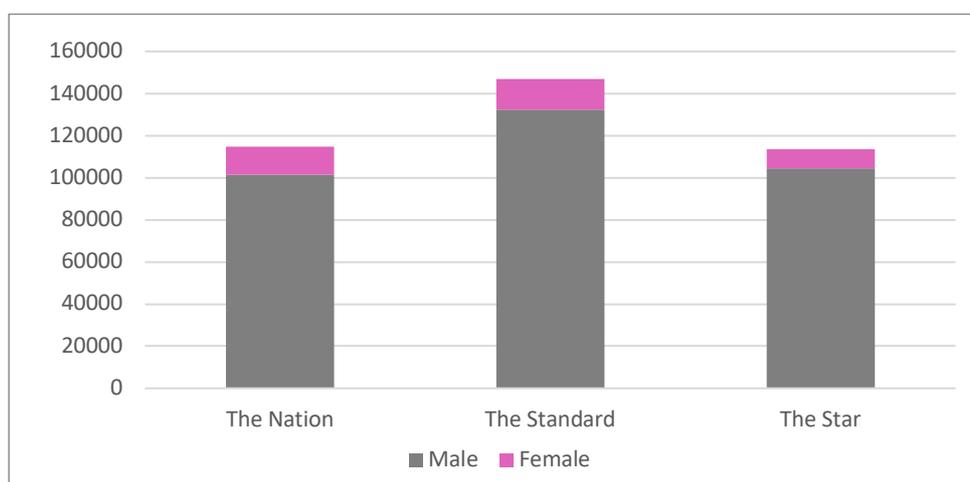


**Graphic 12: Editorial content on radio stations allotted to candidates according to gender – six levels of elections**



	Male	Female
Total Time	122h 10m	22h 32m

**Graphic 13: Editorial content on newspapers allotted to candidates according to gender (space in cm<sup>2</sup>) – six levels of elections**

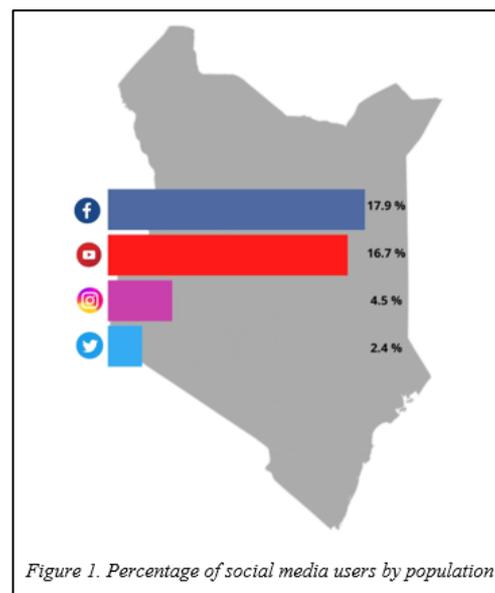


	Male	Female
Total space	338,233 cm <sup>2</sup>	37,037 cm <sup>2</sup>

## B. ANNEX II – SOCIAL MEDIA MONITORING RESULTS

Internet penetration and social media use continue to increase in the country, however there is a lack of consensus as to the total number of Internet users, ranging from 12 to 42 million depending on the source. Nearly 21 per cent of the population use social media, with almost 12 million social media users. Facebook is the leading platform, followed by YouTube, Instagram and Twitter.<sup>69</sup> TikTok is rapidly growing in popularity, and it was the most downloaded app in August 2022. Instant-messaging apps are also quite popular, with WhatsApp leading in terms of use.

The EU EOM Social Media Monitoring Unit (SMMU) started its monitoring activity by mapping the digital landscape in order to assess the social media presence of gubernatorial and presidential candidates and clarify the relevance of each platform as a tool to campaign in the general elections. Different monitoring projects were designed based on priority subject matters identified through preliminary consultations with local stakeholders.



The EU EOM analysed the online election-related content with a particular focus on disinformation, dissemination of inflammatory content and gender harassment. The social media monitoring activity covered the political campaign, the election silence period, e-day and the post-election developments. The selection of the sample was made according to multiple analytical purposes, later reflected in different internal reports.

	Subject	Analytical approach	Monitoring Period	No. of Posts
	Derogatory Speech	Quantitative	29/5 – 8/8	331
	Disinformation	Case-study	1/06 – 15/07	26
	Gender analysis	Qualitative	29/05 – 22/08	15 posts / 20 comments

	Subject	Analytical approach	Monitoring Period	No. of clips
	Derogatory Speech	Quantitative	29/5 – 19/08	558
	Disinformation	Case-study	6/04 – 07/08	22
	Gender analysis	Qualitative	29/05 – 22/08	2

	Subject	Analytical approach	Monitoring Period	No. of Tweets
	Derogatory Speech	Case-study	13 – 30 July	6
	Disinformation	Case-study	8 – 22 June	7,328
	Bot-driven amplification	Case-study	8 – 22 June	55
			9 – 10 August	35
13 – 16 August			30	

<sup>69</sup> Source: ‘We Are Social, report [Digital 2022: Kenya](#).

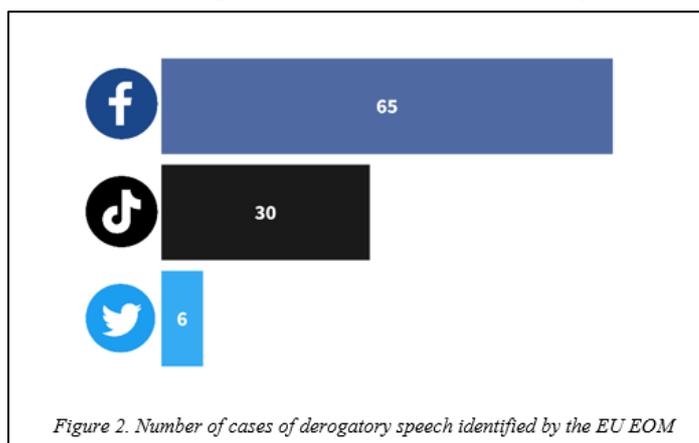
The methodology used for producing the insights in the report relies on data sources that include:

- *CrowdTangle* for Facebook data scraping<sup>70</sup>;
- *Brandwatch* for Twitter data scraping;
- *SentiOne* for punctual analysis of trending topics or key-words;
- *Botometer* and *TruthNest* for bot-driven amplification analysis on Twitter;
- Facebook public transparency tool *Ad Library*;
- Tailor-made reporting forms for Facebook and TikTok content analysis.

### Incitement and Derogatory Speech

The social media team established a hate speech lexicon to run searches on Facebook in order to identify possible instances of derogatory speech. The list of keywords included the hate lex term announced by the National Cohesion and Integration Commission (NCIC) in April 2022 to establish popularly used words to be considered derogatory speech and which use could attract legal action.<sup>71</sup> During the monitoring period the EU EOM identified 101 cases of inciteful language, 65 of which on Facebook, 30 on TikTok and 6 on Twitter. The issues that were identified as having potential to trigger violence include negative stereotypes along ethnic lines, emotive content that could instigate violence, use of threatening or insulting words to incite the public, hate-filled speeches, especially at political rallies, as well as claims discrediting the IEBC. Content evoking Kenya's violent electoral past for political gain was observed on Facebook, Twitter and TikTok. Six tweets recalling the 2007/2008 post-election violence containing content inciting one ethnic tribe against another with a call to violence were published on 13<sup>th</sup> July and taken down by Twitter some days after. A TikTok video using the hate lex term “*Kihii*” to refer to Odinga in a derogatory manner was taken down by TikTok after it had summed more than a million views.<sup>72</sup>

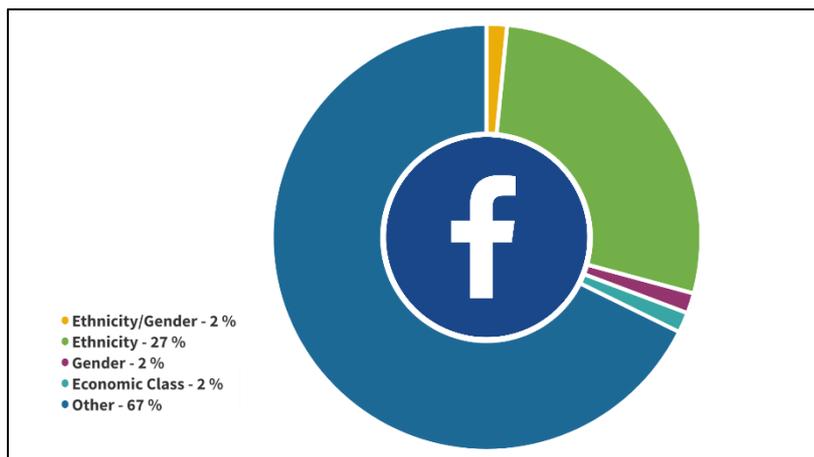
Most of the instances of derogatory speech identified included elements of ethnicity. A breakdown of the cases analysed is summarized in Figures 2-5:



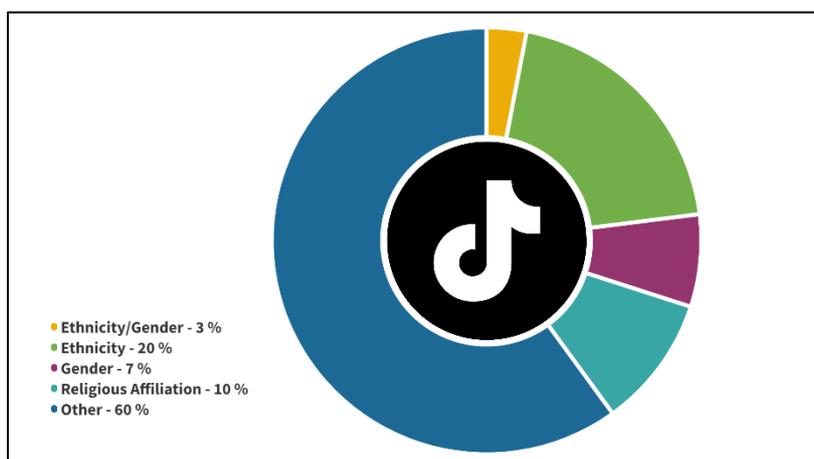
<sup>70</sup> 727 Facebook Pages and 106 public groups were selected and entered in CrowdTangle for data export. A sample of 331 Facebook posts was subjected to the analysis of incitement and derogatory speech. Posts generating the highest number of interactions from Facebook Pages belonging to a sample of women candidates were selected for manual review of comments as part of the gender analysis component. The pages with lower level of activity or interaction were object of the social media monitoring in different ways (manual monitoring of comments, manual checking, case studies).

<sup>71</sup> [Hate speech lexicon](#), as defined by the NCIC.

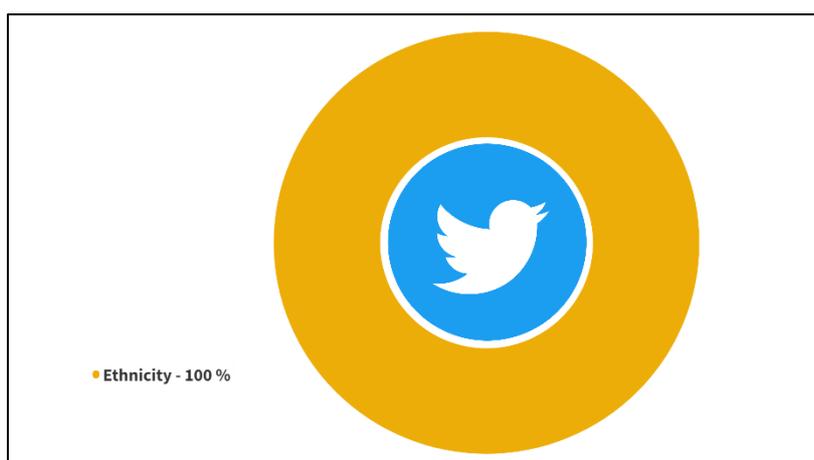
<sup>72</sup> The word “*Kihii*” was included in the [hate speech lexicon](#) of the NCIC.



**Figure 3. Facebook posts containing elements of derogatory speech by topic. Base: 65 cases.**



**Figure 4. TikTok videos containing elements of derogatory speech by topic Base: 30 cases.**



**Figure 5. Twitter videos containing elements of derogatory speech by topic. Base: 6 cases.**

In general, the main communication language on Facebook and Twitter was English whereas vernacular languages appeared more popular on TikTok. However, local languages were clearly more frequent in inciteful claims. A breakdown of the cases of derogatory speech by language shows that

Swahili and other vernacular languages were used in 32 per cent of Facebook posts, 90 per cent of TikTok clips and all the tweets analysed.

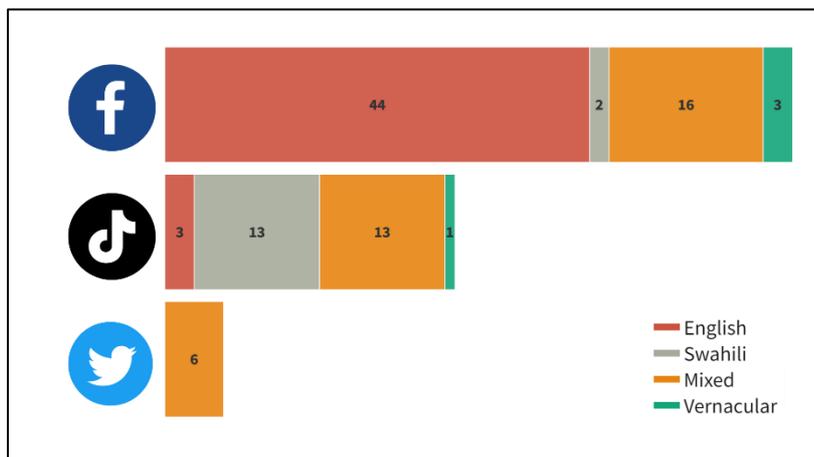


Figure 6. Main languages of derogatory speech content by platform

### C. Gender Analysis

The EU EOM identified 20 elements of gender harassment against 7 women candidates on Facebook and two against one candidate on Instagram, with insulting words used to demean them. All the attacks were surfaced in comments to posts published by the victims, who were object of appearance-based remarks (7), sexualized comments meant to humiliate them through images and memes (10 on Facebook and 2 on Instagram), criticism around family responsibilities (2) and use of sexist language (1). Two cases of appearance-based attacks against female public figures were also identified on TikTok.

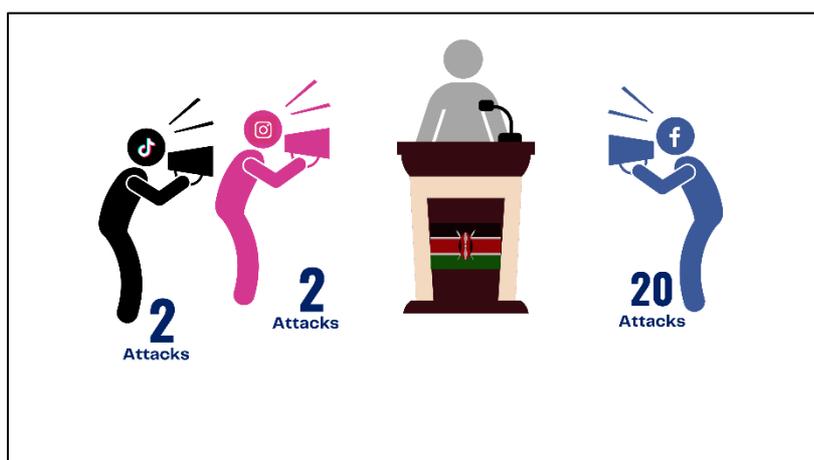


Figure 7. Cases of gender-based attacks by platform

While English was the main language in almost half of the Facebook instances analysed, Figure 8 shows that Swahili was also frequently used on this platform and prevailed on others.

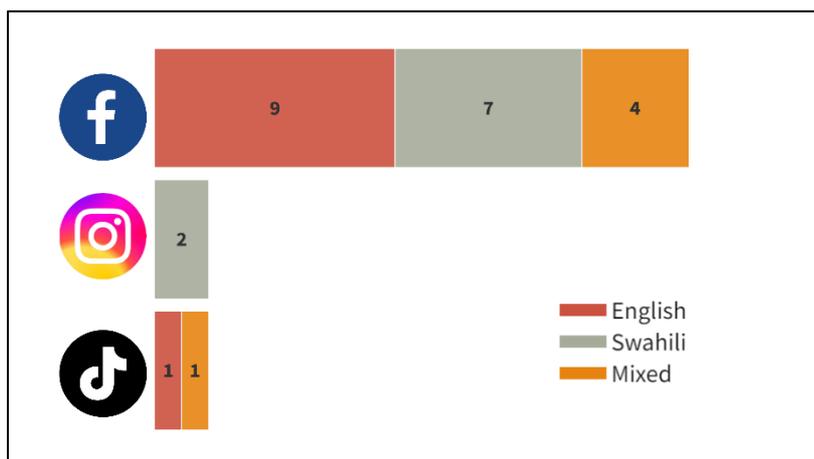


Figure 8. Main languages of gender-based attacks by platform

#### D. Bot-Driven Amplification

The EU EOM SMMU identified 2,838 accounts heavily engaged in disseminating early unverified results in the eighteen hours following the closing of the polling stations on 9<sup>th</sup> August. Among these, 65 were created in June, 119 in July and 84 in August 2022.

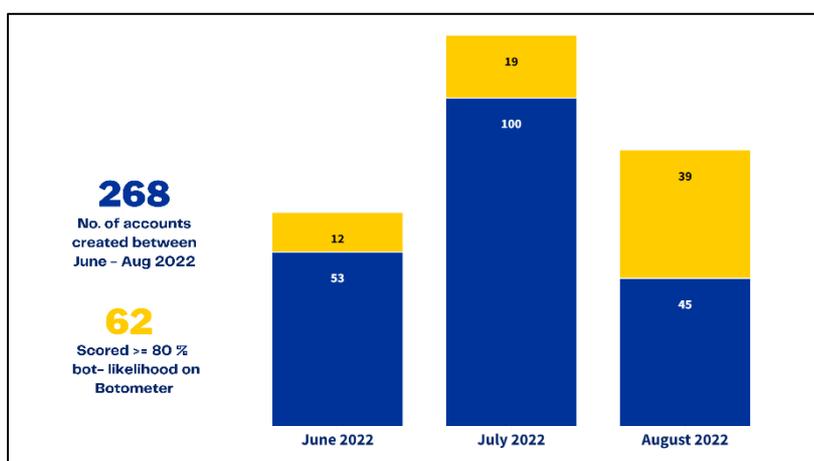


Figure 9. Profile analysis

The analysis of the Twitter handles of 268 accounts created since June with the bot detector Botometer classified 62 of them with a probability equal or greater than 80 per cent of being bots. Of these, 12 were created in June, 19 in July, and 39 in August. A manual review applying further filters (such as profile picture, posting frequency and alpha-numerical nickname) showed that at least 17 accounts presented strong patterns of inauthenticity. A few were deactivated by Twitter in the following days.

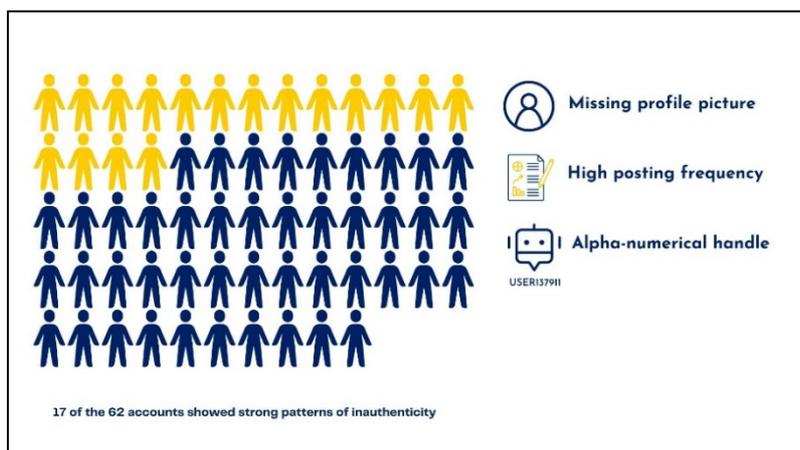


Figure 10. Manual verification

Thirty-five out of 268 accounts showed similar characteristics, such as being fully dedicated to share campaign content, recent date of creation (8 in June, 10 in July and 17 in August), lack of background picture, same layout with similar profile picture, alpha-numerical address (62 per cent). Ten of these accounts were created on election day or the day after.

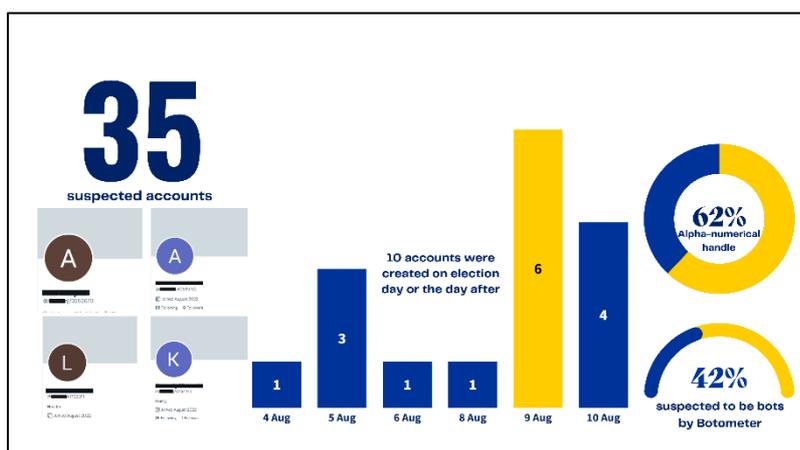


Figure 11. Troll farm

The analysis of the tweet frequency showed that 30 of these accounts published more than 150 times/day, with the highest performing account publishing virtually every two minutes.

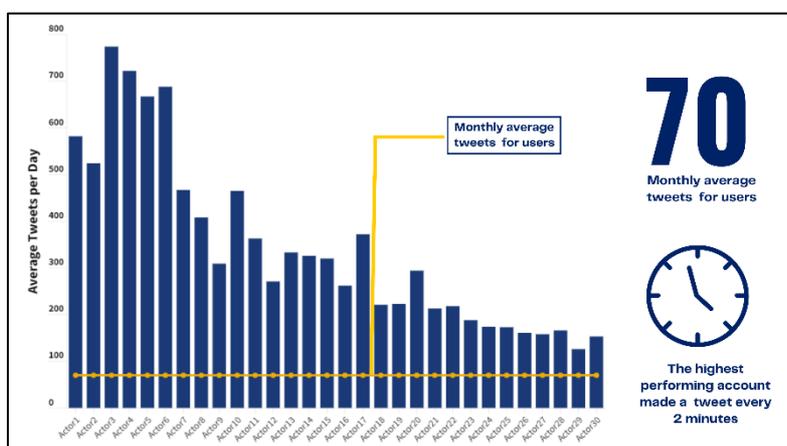
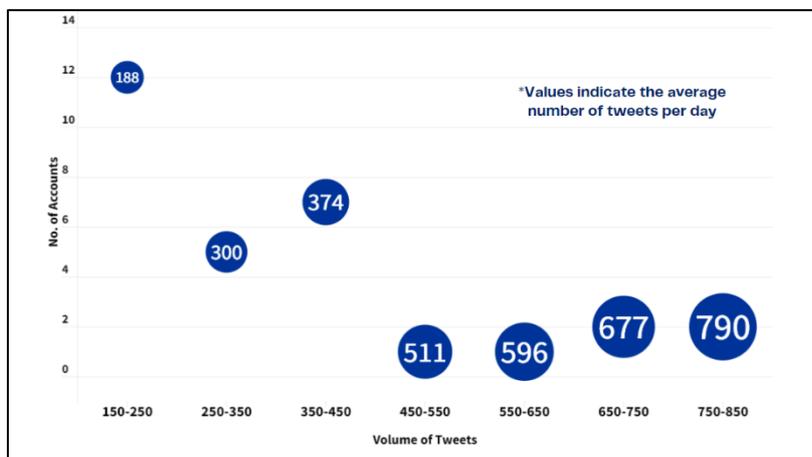


Figure 12. Tweet frequency

The chart below shows the average number of tweets per day published by the 30 accounts publishing more than 150 times a day.



**Figure 13. Average number of tweets per day**

The EU EOM social media team observed that this troll farm engaged in a bot-like promotion of narratives to increase the reach of deceptive claims by retweeting identical or substantially similar content to artificially influence conversations in a coordinated manner, which is at odds with the [Twitter community standards on manipulation and spam policy](#).