



PRELIMINARY STATEMENT

Kenyans demonstrate strong commitment to democratic elections

Nairobi, 6 March 2013

Summary

- Kenya's General Elections were characterised by a huge society-wide push for peaceful, transparent and credible elections. Kenyans should be congratulated for their civic pride and responsibility, queuing patiently for long hours to cast their vote. While several serious violent incidents occurred in some parts of the country, overall the atmosphere was calm and the democratic spirit of Kenyans prevailed.
- These elections were the first real test of Kenya's new Constitution, new electoral framework and reformed judiciary. It was an ambitious undertaking to elect the president, the national assembly, the senate, governors and county assemblies in one day. This called for huge efforts on the part of the Independent Electoral and Boundaries Commission (IEBC), as well as dedication on the part of Kenya's electorate.
- Throughout the electoral preparations, the IEBC retained the electorate's trust. Nonetheless, the IEBC's inconsistent decision making mechanisms drew it into a series of delays. The IEBC and its staff succeeded in overcoming the technical and operational difficulties which arose on Election Day to ensure that the integrity of the vote was protected. The counting and tabulation are still ongoing and represent a crucial part of the process, which EU election observers are following closely around the country.
- Civil society played an active and positive role in supporting the electoral process, with young people playing an important part. Kenya's state commissions, constitutionally responsible for monitoring and protecting equality and human rights, remained independent and constructive throughout the election.
- Freedom of speech in the media was respected. The media were active in advocating for a peaceful process. They offered extensive coverage of elections and voters were able to access information about contestants and compare candidates in the broadcast debates.
- Despite the quota system and constitutional principles for affirmative action, women's participation as candidates was disappointingly low. Even so, women were well represented in the electoral administration and committed as voters.
- Some Kenyan communities and marginalised groups remain disenfranchised as a result of not having national ID cards. In addition more than 3m eligible voters were not registered during the biometric voter registration process and were therefore unable to vote in these elections.
- A negative consequence of the amended timelines in the Elections Act was that some candidates who won their High Court bid to be on the ballot were still excluded.

Background

The 2013 General Elections were the fifth since the re-introduction of the multiparty system in Kenya in 1991. They were held against the backdrop of the 2007 post-election violence and have constituted the first major test for the Constitution, for the many implementing laws, and for the reformed judiciary. Most of the recommendations of 2007 European Union Election Observation Mission (EU EOM) to Kenya and 2008 Kriegler Commission were integrated into the Constitution and the Elections Act. The Constitution introduced a bicameral parliamentary system, devolved government to 47 counties and introduced elections for six offices in one general election: the President, Senator, Governor, Member of Parliament, Women's Representative, and County Assembly Representatives.

In all, 59 political parties registered 12,483 candidates for the 1,882 elective positions. In the run up to the election, political competition was characterised by the formation of strategic alliances between the major players (Amani coalition, Eagle alliance, Coalition for Reform and Democracy alliance and Jubilee coalition). As a sign of commitment to peaceful campaigning and acceptance of results, political parties and candidates signed an Electoral Code of Conduct, and promised that any complaints would be dealt with through the courts.

Legal Framework

Kenya's electoral legal framework has been completely rewritten, the judiciary reformed through a radical vetting procedure and the dispute resolution mechanisms much expanded. The new transformed framework is in accord with regional and international commitments for the conduct of democratic elections. In addition Kenya has ratified the major international instruments which include electoral rights, and under the 2010 Constitution these treaty obligations are incorporated directly into Kenyan law at ratification.

While the new electoral laws are comprehensive, there remain shortcomings particularly in the area of campaign and party financing; there is no statutory mechanism to implement the right to access information, and an unclear structure to implement integrity vetting of candidates. The reformed judiciary has shown itself to be active and protective of election rights and enjoys high confidence among citizens.

The Supreme Court's opinion stating that the constitutional gender quota should be applied progressively by 2015 and therefore that it does not apply fully to these elections was pragmatic given the lack of legislation passed to support its implementation. However it must be regarded as a setback to the achievement of Kenya's international and regional commitments to achieving gender equality. It had the effect of demotivating parties in their efforts to achieve equality in the candidate nomination process.

The Elections Act originally set out a coherent structure of timelines to allow for internal party competitions, nominations to the IEBC, checking of qualifications and provided time for disputes relating to these steps. However amendments introduced by Kenya's previous parliament had a highly detrimental effect on these timelines, truncating them to the degree that there was no time for disputes over nominations to be resolved or for the vetting of candidates' integrity.

Election Administration

The IEBC was charged with simultaneously administering six nationwide elections; the volume and complexity of its tasks have been extraordinary. The Commission's competent handling of the 2010 Referendum and 11 by-elections prior to its official establishment had helped establish its credentials, and it was able to retain stakeholders' trust, most importantly with respect to its impartiality.

However, the IEBC's efficiency was sometimes hindered by the lack of a consistent decision-making process, resulting in a series of delays. Beginning with a three-month delay of voter registration as a result of procurement difficulties, key elements of the electoral framework were carried out in evermore compressed timeframes and too close to polling to ensure steady implementation. In the last few weeks of preparations, endeavours such as recruitment of polling staff and the distribution of materials were made more difficult in the absence of finalised decisions about polling stations.

The IEBC's investment in technology to ensure transparency and efficiency inspired crucial public trust, specifically in relation to voter registration and identification, and the processing of results. However, some of the confidence-building advantages of technology could equally have been achieved by more frequent and detailed communications to the electorate, alongside more precise, comprehensive and widely-disseminated published procedures covering all stages of the electoral process.

Voter Education was started late for such a complex election process. The IEBC carried out its own programmes as well as accrediting other organisations to do so. However there was little evidence of effective voter education until the IEBC launched its ward-based programme one month before polling. While the visible voter information in the media came only about two weeks before the elections, it was not limited to spots and also involved good quality programmes addressing voters' understanding of voting procedures.

Voter Registration

The Constitution establishes extremely inclusive criteria for the right to vote. In practice however, the Elections Act stipulates that qualifying age and citizenship must be proven by possession of a National Identity Card and not all citizens have one. It is estimated that some 3m Kenyan citizens do not have ID cards and were thus unable to register.

Biometric Voter Registration (BVR) was carried out in order to prioritise accuracy and reliability of the register for the 2013 General Elections, and this approach significantly contributed to the credibility of the Voter Register. The final National Voter Register lists over 14m people, which constitutes an improvement over registration for the 2010 Referendum. However delays in the process led to curtailed registration and verification periods. Since the Voter Register is a cornerstone of any election process and requires significant mobilisation, it is regrettable that the time available was shortened. Several amendments were made to the Elections Act to reflect the shortened timeframe, including setting a deadline for publication just 14 days before polling.

This deadline was impractical given how vital the Voter Register is for planning other elements of election administration.

Registration of Candidates and Political Parties

Nominations for the political party primaries took place for the first time in the new electoral framework in an atmosphere of intense competition. The party primaries were marred by some serious if localised violent incidents. The way the political party nomination process was carried out led to party hopping and was also discriminatory against women and marginalised groups.

Orange Democratic Movement and The National Alliance emerged as the two major political parties and eight presidential candidates and their running mates were cleared by the IEBC to run. Women's participation as candidates in the General Elections was disappointingly low. Out of 237 candidates for 47 governor positions, only seven candidates are women (3%). Out of total number of 244 candidates for 47 elected Senate positions, 19 candidates are women (8%). Out of 9,603 candidates for county assembly 697 candidates were women (7%).

Campaign Environment

EU observers reported a calm election campaign with respect for freedom of expression, assembly and movement for political parties and candidates around the country. Some isolated cases of destruction of campaign materials were observed which had a negligible impact on the electoral atmosphere. The most serious incidents took place in Meru and Embu on 14-15 February during CORD presidential rallies which were disrupted by a number of rival supporters. Several instances of intimidation of women candidates and their supporters were reported.

An unequal playing field was evident throughout the campaign. This was exacerbated by uncertainty over the exact start date of the campaign, which was never officially announced by the IEBC, giving the advantage to those parties which could afford to finance a longer campaign period. The Jubilee coalition and the CORD alliance were the most dominant campaigners, enjoying more media coverage and clearly having more financial resources. Larger parties used all available means to campaign: local radio stations and newspapers, social media platforms, banners and billboards, rallies, caravans with music, distribution of visibility materials, community meetings and door-to-door campaigning. The handing out of money to voters was directly observed by the EU EOM during rallies.

Major campaign themes included land reform and tribal identity in attempts to split voters along ethnic lines and according to historical land grievances. Political parties used these issues to boost their popularity, even though they risked dividing Kenyans. Nevertheless, the candidates also debated on key public policies and good governance, especially during the two presidential debates which were held in February.

Media

Freedom of speech in the media was respected. Overall, the media gave extensive coverage of the elections, voters were able to access information about key contestants and they could also compare presidential and gubernatorial candidates in the televised debates. Broadcast media were very active in promoting voter education in the last two weeks of the campaign. However, there were also a few cases of journalists who were intimidated or prevented from conducting their work.

The national media focused predominantly on the two leading coalitions. Most vernacular radio stations monitored by the EU EOM showed a preference in terms of time offered to one or the other of the two front running coalitions. Negative media coverage was usually the result of critical remarks by political opponents, rather than bias from the media. The access of less prominent parties and contestants to the media was limited, with a lack of financial means being the main discriminatory factor.

The state-owned Kenya Broadcasting Corporation (KBC) gave more coverage to the two major alliances, but it also offered free significant segments of time to other contesting parties and maintained generally equitable coverage of the presidential candidates. KBC provided free airtime to key contestants and parties, but it was not organised in such a way that all parties could benefit.

The broadcast media played an active and important role in advocating for peaceful elections, and tended to filter inflammatory messages reportedly articulated by politicians in their campaign rallies. In seeking to comply with the restrictive legal framework on dissemination of hate speech, they may at times have limited public awareness of the negative tone of some of the campaigning. Some media did not respect either the ban on publication of opinion polls within five days of Election Day or the campaign silence period.

Participation of marginalised groups

An overly bureaucratic and lengthy procedure for obtaining ID cards caused minority groups and indigenous communities to face difficulties in registering as voters. This was borne out by significant discrepancies in the number of voters registered in border counties in comparison to urban areas. For example, while in Turkana on average just 30% of the population registered to vote, in central areas the number was close to 100%.

The constitutional principle of providing representation for minority and marginalised communities through the system of special seats has not been fully implemented. The lists of nominated special seats were published late due to the fact that some political parties failed to comply with the legal requirements relating to the gender, age and special interest groups quota. The High Court decided that it was constitutional for the Elections Act to provide that candidates for president or deputy president can also be on the list for special seats.

Civil society and election observer groups

Civil society played a positive role in Kenya's electoral process by managing voter education campaigns, awareness raising programmes and peace promotion events. Special road shows, caravans, debates and trainings were organised throughout the country to promote peace by religious leaders, non-governmental organisations as well public bodies, mainly via Peace Committees. Moreover, many mass prayers took place, including one which gathered six presidential candidates and was widely covered in the media.

The IEBC facilitated the activities of international and national observer groups. Over 50 Kenyan citizen observer organisations were accredited by the IEBC, of which the largest and most long-term was the Elections Observation Group (ELOG), a permanent platform of civil society organisations which began long-term observation in November 2012 with 442 observers in all constituencies. On Election Day, ELOG deployed over 5,500 observers across the country, as well as 1,800 observers who carried out Parallel Voting Tabulation.

Electoral Dispute Resolution

The electoral framework provides strict deadlines for the resolution of electoral disputes to achieve effective electoral justice. However the new legislation on dispute resolution is complex and created confusion among complainants. The competency for electoral disputes is shared between the IEBC, the Political Parties Disputes Tribunal and the courts. Even though the mandate of the election commission includes the regulation of the nomination process, it adopted a passive stance, stating that it was not responsible for the outcome of nominations. It was regrettable that the IEBC cleared some candidates nominated after the legal deadline.

The time left to deal with complaints following the nominations process was clearly too short. After the IEBC dispute resolution mechanism was completed, more than 50 out of 207 cases were appealed to the High Court. This resulted in some court decisions to reinstate or remove around 10 candidates from the ballots. With the deadline for printing ballots approaching and no mechanism in the law to postpone, the courts gave the IEBC the option of proceeding with the disputed ballots and allowing petitions after the elections. This could have been avoided if nomination and dispute timelines had been sufficient in advance of the election.

Polling and Counting

On Election Day, polling was marred in Coast and North Eastern by attacks which in some cases involved significant loss of life. Violent incidents remained isolated and did not overshadow the spirit of the day. Polling day was largely characterised by a high turnout of motivated voters waiting for many hours, most often with great patience and fortitude.

In roughly half of polling stations observed, the Electronic Voter Identification Device did not work: instead voters were identified, according to procedures, by their identity documents and on

the paper Voter List. In part thanks to the IEBC's swift public statement, citizens accepted this solution with equanimity.

Polling stations were adequately staffed, opening and polling procedures were generally followed, and EU EOM observers considered that in most of the stations visited, the overall conduct of operations was good. Nonetheless, in a third of cases EU EOM observers found that secrecy of vote was not sufficiently protected, mainly because of the way polling booths were arranged.

The speed with which large numbers of voters could proceed to vote and leave depended in part on the number of polling booths in each station, which varied significantly. Most polling stations attended by EU EOM observers closed within an hour of the official closing time and in all cases counting took place in a peaceful atmosphere. Closing and counting procedures were respected, including correct allocation of votes to candidates, determining valid and invalid ballots and the procedures for disputed ballots.

EU EOM observers considered that in all the polling stations attended, the overall conduct of operations was good and that the recorded results reflected the will of voters. Party agents were able to attend counting and observe procedures unhindered but in nearly half of polling stations observed, not all party agents received a copy of the results forms. Electronic transmission of provisional results was only successfully carried out in a small number of the polling stations attended by EU EOM observers, with failures occurring most often because the network was congested. The EU EOM is observing tallying of official results at constituency, county and national tally centres.

The European Union Election Observation Mission (EU EOM) has been present in Kenya since 19 January 2013 following an invitation from the Independent Electoral and Boundaries Commission. The Mission is led by Chief Observer, Alojz Peterle, Member of the European Parliament (Slovenia). In total, the EU EOM deployed 65 observers from 26 EU Member States, Norway and Switzerland across the country to assess the whole electoral process in accordance with international and regional commitments for elections as well as the laws of Kenya. A delegation of members of the European Parliament, headed by Krzysztof Lisek MEP, also joined the mission and fully endorses this Statement. The EU EOM is independent in its findings and conclusions and adheres to the Declaration of Principles for International Election Observation signed at the United Nations in October 2005. The EU EOM will remain in country to observe post election developments and the tabulation of results and will publish a final report, containing detailed recommendations, within two months of the conclusion of the electoral process. The EU EOM wishes to express its appreciation to the Independent Electoral and Boundaries Commission and other authorities, political parties and civil society as well as the people of Kenya for their cooperation and assistance in the course of the observation. The EU EOM is also grateful to the Delegation of the European Union to Kenya and the European Union member states' diplomatic missions for their support throughout.

An electronic version of this Preliminary Statement is available on the Mission website www.eueom.eu/kenya2013. For results of the EU EOM media monitoring analysis, please visit the mission website link <http://www.eueom.eu/eu-eom-kenya-2013/media>. For further information and interview requests please contact: Peter Visnovitz, EU EOM Press Officer, Mobile: +254 (0) 7249 68788, Email: peter.visnovitz@eueomkenya.eu.

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