

AfriCOG/KPTJ Election Series

Election Day 2013 and its **Aftermath**



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List of Acronyms

AfriCOG	Africa Centre for Open Governance
AGLI	African Great Lakes Initiative
BVR	Biometric Voter Registration
CORD	The Coalition for Reform and Democracy
CRO	County Returning Officer
ECK	Electoral Commission of Kenya
ELOG	Election Observation Group
EOM	European Observer Mission
ERT	Electronic Results Transmission
EUEOM	European Union Election Observation Mission to Kenya
EVID	Electronic Voter Identification
FCPT	Friends Church Peace Team
GPRS	General Packet Radio Service
IEBC	Independent Electoral and Boundaries Commission
MARS Group	The Media Analysis and Research Group Kenya
MP	Member of Parliament
MRC	Mombasa Republican Council
ODM	Orange Democratic Movement
OMR	Optical Mark Reader
PO	Presiding Officer
PVT	Parallel Vote Tabulation
RO	Returning Officer
TNA	The National Alliance

Foreword

On March 4, 2013 Kenya held a landmark general election. It was the first national election since the promulgation of the internationally lauded constitution, which created a devolved system of government. For the first time, Kenyans voted simultaneously for six elective offices, ranging from president to local ward representative. This election was also the first to be administered by the newly created Independent Elections and Boundaries Commission (IEBC), a body which enjoyed over 90 per cent public confidence in the lead-up to the national polls. In an attempt to rid Kenyan elections of the stigma they incurred after the 2007 debacle, the IEBC announced its decision to integrate digital technology into voter registration, election day voter identification and results transmission. In this way, the IEBC hoped to strengthen public confidence – both domestically and internationally – in the transparency and verifiability of the electoral process.¹

Indeed, all eyes were on Kenya in the lead-up to election day. Domestic and international press reports were full of accounts of sporadic outbreaks of violence in the months preceding the election, with allegations that politicians were involved in fanning the flames of inter-ethnic hostility. A wider array of peacebuilding organisations worked to prevent the escalation of tensions, and billboards across the country reminded Kenyans to “vote for peace”. On election day international and domestic monitors fanned out across the country. By and large, their reports endorsed the election, congratulating Kenyans for the relatively peaceful atmosphere on election day. While some irregularities were cited, the general consensus among observers was that these did not subvert the will of the people.

In commemoration of this historic election, the Africa Centre for Open Governance (AfriCOG) presents its own findings related to election day and its aftermath in this report. In line with its commitment to promote permanent vigilance by citizens over public life and public institutions, AfriCOG provides an account of voters’ experiences at the polling station. In addition, the report details the counting, tallying and results transmission procedures, noting the varied problems associated with these procedures. Overall, in contrast to many observer reports, AfriCOG finds that the failure of electoral technology made it impossible to verify the manual counts of election results. This was compounded by a wide array of problems at the polling station, ranging from names missing from the voters’ register to voter bribery.

To conclude, AfriCOG recommends a series of reforms to ensure that future elections live up to constitutional standards for transparency and verifiability.

¹ Kenya National Dialogue and Reconciliation (KNDR). February 2013 February 2013, vii. Accessible at [http://www.dialoguekenya.org/Monitoring/\(February%202013\)%204TH%20Review%20Report%20on%20Electoral%20Preparedness.pdf](http://www.dialoguekenya.org/Monitoring/(February%202013)%204TH%20Review%20Report%20on%20Electoral%20Preparedness.pdf).

Introduction

A wide array of problems were noted by Africa Centre for Open Governance (AfriCOG) observers and partners on election day. To uncover how systematically these problems were experienced, AfriCOG commissioned a national opinion poll to gauge voters' opinions regarding the credibility of the electoral process as well as public confidence in political institutions. The poll was conducted in May 2013 and surveyed more than 2,000 respondents across the country.

The results showed that nearly 80 per cent of respondents experienced at least one irregularity at their polling stations. This included clear irregularities, such as names missing from the voters' register; non-registered people being allowed to vote; registered voters being turned away; bribery of voters; coercion of voters to select particular candidates; violence; and differences in the declared results as witnessed at the county/constituency level and those announced in Nairobi. It also included significant logistical shortcomings, such as delays in voting because of long lines; incompetence on the part of staff of the Independent Electoral and Boundaries Commission (IEBC); the failure of electoral technology; and inadequate materials at polling stations. The results revealed that more than half of those who said they would not vote again cited lack of faith in the IEBC as the reason.

The most common problems are detailed below:

The Electronic Voter Identification (EVID) System

One of the most striking problems on election day was the failure of the EVID system, meant to identify registered voters through the use of a fingerprint

matching system. Just a few hours into election day, it became clear that EVIDs were malfunctioning. While failure reports were widespread, the exact rate of failure is unclear. AfriCOG's poll results indicated that only 50% of respondents were identified using the EVIDs. The Carter Center reported technology failure in 41 per cent of polling stations and the European Union (EU) reported technology failure in about half of all polling stations.² An investigation by *The East African* indicated that the technology failed in at least 80 per cent of polling stations.³

When the EVIDs broke down, IEBC staff turned to paper copies of the voter register, which included voters' photographs but did not include fingerprints. While this was an improvement over previous elections, it fell short of fulfilling the "one person, one vote" standard. Indeed, one pending election-related petition shows the paper voter register used was different from the electronic voter register, which raises questions regarding the validity of whichever voter register was used.

The EVID system, along with the electronic transmission of results, was considered essential to improving the legitimacy of the election. By using biometric information to positively identify a registered voter and then deleting that name from the list of eligible voters, the EVID system was designed to prevent the ills that had plagued previous Kenyan elections, including multiple voter registration, multiple voting or stuffing of ballot boxes and other irregularities.

The IEBC's resort to the paper voter register undermined transparency, as the multiplicity of voter registers (*detailed in the 'Voter Registration' paper in this series*) meant it was difficult to track who was voting and under which voter register.⁴ Was the IEBC using only one voter register on election day and, if so, which one?

2 European Union Election Observation Mission to Kenya (EUEOM). 2013. "Final Report," p. 1. The EU deployed 65 observers in total, but it is unclear how many polling stations these observers visited.

3 *The East African*. 9 March 2013. "Electronic Systems Meltdown Causes Long Delays, Affects Credibility Of Poll." Available at <http://www.theeastafrican.co.ke/news/systems-meltdown-causes-delays-affects-credibility-of-poll/-/2558/1715830/-/view/printVersion/-/ie1djj/-/index.html>

4 KPTJ, AfriCOG. "Voter Registration for the 2013 General Elections in Kenya." March 2014.

The EU observers reported:

The use of the voter register on election day did not enable consistently reliable records of registered citizens, nor of how many had voted. Following the failure of pollbooks (laptops with a full voter register and a fingerprint-reading device), alongside difficulty in identifying voters in the correct polling stations, four different lists were used: the register in pollbooks; the lists printed for individual polling stations; the list of people whose biometric data had not been captured, and finally, the entries listed in the 'green books' – the manual records of entries made during voter registration.⁵

The African Great Lakes Initiative (AGLI) observers witnessed similar problems and highlighted the unreliability of the paper voters' registers:

These registers were not only cumbersome, slowing down the voting process and creating long lines, but also ineffective in preventing duplicate voting. We had several reports of poorly organised manual registers, of voters' names missing from registers, of a voter being on the biometric list but not the manual, and of voters' names appearing in a different polling station's register than the one in which they had registered. Additionally, two observers noted that the IEBC staff either didn't check identification cards or let people vote who only had a receipt from their registration. Given these problems, it is doubtful that the use of manual registers provided adequate voter identification.⁶

Reasons for the EVID System Failure

The IEBC claimed the EVID system failed because of low batteries, lack of electricity supply and forgotten passwords. That the EVID machines would require a steady supply of electricity was not a surprise. The IEBC had requested generators in its budget, presumably because there were at least two major pieces of important technology to be used on election day, namely EVID system kits and mobile phones, which would relay results through the electronic results transmission system.⁷ It seems surprising then that so little was done to ensure adequate back-up power. In some polling stations, batteries died within one hour of polling stations being opened.⁸ Many sets of spare batteries also died.

Moreover, it is questionable that there appears to have been no password retrieval system. Even if IEBC staff did forget passwords, the IEBC has not clarified why there was no system in place to be able to remind such staff of their passwords or to create new ones. Such systems are standard for many password-locked applications and websites.

Other Problems on Election Day⁹**Long Lines and Delayed Voting**

A number of factors, including names missing from the register, overcrowded polling stations, and the failure of technology led to such massive delays in voting that in some polling stations voting had to continue through the night. Overall, voters waited for as long as 13.5 hours and some gave up before reaching the front of the line.¹⁰

5 EUEOM, p. 15.

6 Ossman, Kathy. April 6, 2013. "African Great Lakes Initiative Report on Observation of March 2013 Kenyan National Elections," p. 8.

7 Menya, Walter. May 16, 2012. "IEBC slashes polls budget by Sh 10 billion." *The Star*. Available at <http://www.the-star.co.ke/news/article-18249/iebc-slashes-polls-budget-sh10-billion>.

8 *Gladwell Wathoni Otieno and Zahid Rajan v. Ahmed Issack Hassan, IEBC, Uhuru Muigai Kenyatta and William Samoei Ruto*. Petition of Gladwell Wathoni Otieno and Zahid Rajan. Paragraph 28. Available at <http://africog.org/content/civil-society-election-petition>.

9 Please note that the examples in this section are taken from a number of sources, including international and domestic observer reports, media stories, social media conversations, submissions to The People's Court website and results from an AfriCOG-commissioned opinion poll.

10 See <http://www.thepeoplescourt.co.ke>; <http://www.thepeoplescourt.co.ke/voting-experience/165-abdi-sheikh-my-voting-experience>.

IEBC Staff Incompetence

Observer reports and voters relayed anecdotes including the following examples of IEBC staff incompetence:

- Clerks had to be reminded of what to do. “Unprofessionalism was the order of the [day] at these polling stations.”¹¹
- AGLI observed polling station staff make errors in manual procedures in 41.5 per cent of observed stations, including handing out ballot papers incorrectly and issuing multiple ballot papers to one voter.¹²
- Some clerks placed ballots in the wrong boxes.
- There was often confusion regarding whether queues were organised according to first name or surname: “Inside the compound there was total chaos as there was no IEBC staff to guide people on the division of the streams as per the voters’ names (previously surnames were used). In the present case we were told it’s the first name used. So after trying to locate your stream for over 30 minutes one would start queuing.”¹³

Indeed, observers from the EU recommended better training of staff, noting the IEBC’s focus on training senior staff left the bulk of ordinary polling station agents without enough skills and knowledge.¹⁴

Voter Register and Failure

Voters had a wide range of problems related to the voter register on election day. Some of the most serious issues included the following:

- Voters who had received confirmation that their details were in the voter register were turned away

by IEBC staff, who said their names could not be found in the voter register.

- Voters’ names appeared in the electronic version of the voter register but not in the paper version.
- Voters were allowed to vote, despite their names not being found in the voter register: at Saint Andrew polling station in Turbo, 88 voters were shown to be registered at a different polling station. After they complained, the IEBC officials allowed them to vote at a polling station where they were not registered.¹⁵
- Voters were allowed to vote without proper identification.
- Some polling stations recorded more votes cast than registered voters.

Voter Secrecy

Examples of a lack of voter secrecy include:

- The EU found the secrecy of the vote was not sufficiently protected in one-third of stations it observed. This was mainly because of the way polling booths were arranged and because provisions for assisted voting for disabled or illiterate voters were not adequately applied.¹⁶
- The Carter Center, which deployed 38 short-term observers to 265 polling stations in 34 counties, identified problems with maintaining secrecy of the vote in 20 per cent of the polling stations they visited.¹⁷
- “The party agents did not leave voters alone. It was claimed a majority of the voters could not read, but it got to a point where the agents even tried to guide some voters. The secrecy of voting and the neutrality can seriously be put into question.”¹⁸

11 See <http://www.thepeoplescourt.co.ke/voting-experience/181-irregularities-at-polling-station-025-luanda-constituency-vihiga-county-western-province>.

12 Shah, Seema. April 13, 2013. “Numbers in the Voter Registration Just Won’t Add Up” The Star. Available at <<http://www.the-star.co.ke/news/article-116530/numbers-voter-registration-just-wont-add>>.

13 See <http://www.thepeoplescourt.co.ke/voting-experience/145-philip-ogunda-my-voting-experience>.

14 EUEOM, p.12-13.

15 *Ibid.*

16 EUEOM, p. 30.

17 The Carter Center. October 16, 2013. “Observing Kenya’s March 2013 National Elections,” p.46. Available at <http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf>.

18 See <http://www.thepeoplescourt.co.ke/voting-experience/207-anonymous-observer-report-2-gatundu-south>.

Bribery

- AGLI observers noted eight cases of bribery at six of the observed polling stations.¹⁹

Violence

Despite reports to the contrary, polling itself was not free of violence. On the coast, two attacks allegedly by the secessionist group known as the Mombasa Republican Council (MRC) killed at least 13 people, including six police officers.²⁰ Uchaguzi reports indicated the violence had started the previous night and that there were more casualties than were reported by the press.²¹

In at least one area, violence resulted in no voting. On the coast, armed violence attributed to the MRC is reported to have killed approximately 20 people. The MRC had threatened to disrupt the elections, in response to what they believed was inadequate government action on unemployment and other grievances in coastal areas. In Chumani, the MRC is accused of killing five people, including three police officers and two civilians. Uchaguzi reported that no voting had taken place in Chumani.²² Its crowd-sourced report stated the following:

At 3 pm on March 4th tension is still very high in the area. Reports from the area state: 1. The number of casualties is higher than official figures; 2. Hearing gunfire for around an hour overnight; 3. Police collected bodies of fallen officers; 4. Two bodies have not been collected and are still lying in the bushes; 5. The two bodies lying in the bushes have red headbands which usually indicates affiliation with the Mombasa Republican Council (MRC); 6. The presence

of uncollected bodies is increasing tension in the area; 7. The local community is not collecting the bodies, as it does not recognise them. They are strangers in the area.²³

It is unclear whether Chumani residents were ever able to cast their ballots. It also remains unclear how IEBC handled the final tallies if there were no votes from this area.

Other Problems

Other problems included:

- Clerks failed to ink voters' fingers.²⁴
- Clerks did not allow access to accredited observers.²⁵
- A voter in Mount Elgon reported to AGLI/FCPT interviewers doing a follow-up that he had been issued with ten presidential ballot papers. He stated he had refused to take nine of them, but reported to us that a police officer who was voting was given 30 presidential ballots.²⁶
- One candidate reported there were several cases in which voters were issued multiple ballots (for the same elective office) at Bulanda AC Primary School. The candidate reported the problem to the presiding officer, who also acknowledged the problem.²⁷
- Clerks failed to assist illiterate voters.
- Staff slept on the job.
- Staff refused to allow observers to look at ballot paper books.
- Some IEBC staff told voters who to vote for.
- A presiding officer (PO) refused to read political symbols to illiterate voters.²⁸

19 Ossman, p. 6.

20 Smith, David. March 4, 2013. "Kenyan elections marred by Mombasa violence." The Guardian. Available at <http://www.theguardian.com/world/2013/mar/04/kenyan-elections-marred-mombasa-violence>.

21 See <https://uchaguzi.co.ke/reports/view/1671>.

22 *Ibid.*

23 *Ibid.*

24 Ossman, p. 8.

25 See http://www.thepeoplescourt.co.ke/downloads1/cat_view/4-observer-reports.

26 Ossman, p. 15.

27 See <http://www.thepeoplescourt.co.ke/voting-experience/166-phillip-maina-my-voting-experience>.

28 See <http://www.thepeoplescourt.co.ke/voting-experience/181-irregularities-at-polling-station-025-luanda-constituency-vihiga-county-western-province>.

One voter said the following about his overall experience, which captures much of the frustration around the country on election day:

I have voted in the previous elections since 1997 at the same polling station and this was the worst experience I ever went through. I thought voting should be made easy and not a torture like it was on March 4th, 2013! I had so much faith in the IEBC going by how they conducted the referendum and other by-elections and also from the constant media briefings but I was disappointed by their lack of professionalism in conducting the elections- the staff were inexperienced, discourteous and there was a general lack of organisation on their part.

In an election it's not a must that your candidate wins but at least you should feel that though your candidate lost the elections were free and fair. In this case am still bitter and feel that the elections were not free and fair and furthermore justice did not prevail!

IEBC can waste tax payers' money as they like by asking us to move on and accept the results but that will not change the fact that they failed to deliver a credible election.²⁹

Counting and Tallying

The problems did not end with voters' personal experiences as they attempted to cast their ballots. Indeed, the counting and tallying process revealed another set of serious inconsistencies.

There was a significant lack of transparency at every stage of the process, beginning at the polling station. The European Union reported that in nearly half of all stations observed, party agents were not all given a copy of the results forms. In some cases, this was because there were no copies. In other cases, party agents did not ask for the forms.³⁰ The Commonwealth Observer Group noted instances in which polling stations were too small to accommodate party agents.³¹ Observers from the African Great Lakes Initiative reported that agents had insufficient space for observation, such that they could not be sure that IEBC staff were crossing names off the manual register as voters appeared.³²

The fundamental problem with the counting and tallying process in 2013 was the lack of credible and verifiable polling station tallies, as recorded on Forms 34. These forms, on which each polling station's votes for all presidential candidates were recorded, constitute the foundational record of presidential election results. The Forms 34 were meant to be the basis of both what was relayed via the electronic results transmission (ERT) system and the final, verified results.

AfriCOG's analysis of these forms noted the following categories of problems:³³

- **In at least 138 polling streams**, the numbers on the forms do not add up. For instance, valid votes plus rejected votes do not equal votes cast
- **In at least 28 polling streams**, the number of votes cast exceeded the number of registered voters.
- **In at least 27 polling streams**, the number of registered voters, as recorded on the forms, was different from the number of registered voters as published by the IEBC before the election.

²⁹ See <http://www.thepeoplescourt.co.ke/voting-experience/145-philip-ogunda-my-voting-experience>.

³⁰ EUEOM, p. 30.

³¹ Commonwealth Secretariat. 2013. "Report of the Commonwealth Observer Group," p. 27.

³² Ossman, p. 8

³³ These observations are based on reports from AfriCOG's agents who observed the court-ordered scrutiny of forms. AfriCOG's agents were unable to observe the scrutiny of all forms. This catalog represents observations from approximately ten agents.

- **In at least 80 polling streams**, Forms 34 were missing.
- **In at least 64 polling streams**, numbers on the forms had been changed without an authorising signature.
- **In at least 71 polling streams**, forms had illegible numbers.
- **In at least 37 polling streams**, some forms were irregular (they did not match the formatting of the other forms; one was simply hand-written on a piece of paper).
- **In at least 46 polling streams**, there were non-identical copies of some forms, without an indication of which version of the numbers was final.

In addition, there were several complaints that political party agents did not receive copies of these forms, and contrary to the law, the Carter Center noted in nearly one-quarter of the polling stations observed, polling station officers did not post the completed Forms 34 on the doors of the polling stations.³⁴ The Carter Center noted the failure to post the forms contributed to “the undermining of an important safeguard for the transparency of the counting and tabulation process.”³⁵ Given that a significant number of counting operations did not reconcile the number of ballot papers properly or at all, the failure to post the forms made the process all the more opaque and questionable.³⁶

In mid-March 2013, the Coalition for Reform and Democracy (CORD) candidate Raila Odinga, and civil society, represented by AfriCOG and the Kenyan Asian Forum, filed petitions challenging the integrity of the presidential election process. Both petitions based many of their claims on the myriad problems with Forms 34. Indeed, these problems were so apparent that the Supreme Court ordered a scrutiny of all the

forms, the results of which were to inform their ruling. As was detailed in Voter Registration brief in this series, this scrutiny identified many of the problems listed above.

The problems with the forms were magnified at the constituency level, where the results from Forms 34 had to be amalgamated and recorded onto Forms 36, which tallied presidential results at the constituency level. AfriCOG’s analysis showed that Forms 36 had many of the same problems as Forms 34, including numbers failing to add up, multiple copies of the same form, forms without IEBC signatures, forms showing more than 100 per cent turnout and forms with missing entries. AfriCOG also found discrepancies in the numbers of registered voters and results for individual candidates between the two forms. For example, in Buuri, the difference between the recorded and officially published numbers of registered voters was 3,897. In Chesumai, this difference was 5,239 voters. AfriCOG found such differences in at least 82 constituencies. There were also significant differences in results for individual candidates, as they were recorded on various pages of the same Form 36. For example, Form 36 for Balambala constituency shows two different results for Odinga, which differ by 23,233 votes. In Maragwa A, results in various parts of Form 36 show a difference of 6,203 in votes for Uhuru Kenyatta.

It is unclear whether these were the result of human error or whether the changes were wilfully made. International observers reported it was difficult to monitor work at the tallying centres. “European Observer Mission (EOM) observers reported that although they and party agents had access to constituency and county tally centres, neither their appointed place nor the disposition of election staff enabled them to follow closely enough how tallying was carried out.”³⁷

34 EUEOM, p. 31

35 Carter Center, p. 47.

36 *Ibid.*

37 EUEOM, p. 31.

The Carter Center remarked:

Firsthand access to information is integral to conducting credible and impartial observation... However, the national tally centre did not provide enough transparency for observers or party agents to assess the overall integrity of tally of presidential results. Unfortunately, the Center regrets the IEBC decision to confine party agents and observers to the gallery of the national tally centre, making effective and meaningful observation impossible.³⁸

The inconsistencies on Forms 34 then transferred to other tallying forms. For example, Forms 34, 35 and 36 for Makueni Constituency, signed by the same County Returning Officer (CRO), Joseph Kamandi Kittony, applied the following different figures for registered voters.³⁹

Elective Office	Total Registered Voters
Number of registered voters in the Principal (Electronic) Register, on the 2nd Respondent's website	64,708
President	64,708
Governor	64,877
Senator	64,879
Member of National Assembly	64,976

In September 2013, the Media Analysis and Research (MARS) Group completed an audit of all publicly available Forms 34. They found there are 2,585 Forms 34 still missing from the public record. Forms are missing from all but two counties (Tana River and Samburu), and the number of missing forms per county ranges from one (Taita Taveta, Kwale and Elgeyo Marakwet) to 228 (Kitui). According to their audit, those forms must contain 943,520 votes for the IEBC's official tally to be correct. The MARS Group noted the widely different standards across the country and urged the IEBC to take note for future elections. "The audit reveals widely disparate standards in the recording of results in Form 34 by presiding officers. The future contracting of presiding officers who served in the 2013 elections should be predicated on an assessment of the accuracy of their work in 2013. The audit has been able to capture presiding officers who should not in any future election work for IEBC, and those whose work is commendable."⁴⁰

Additionally, some results announced at the county level differed from those announced at the National Tallying Centre. Discrepancies were shown in results announced by returning officers (ROs) in Nyeri, Othaya, Kieni and Makueni, among others. In Nyeri alone, over 1,000 extra votes had appeared by the time the results were read out at the National Tallying Centre.⁴¹

CORD also reported its political party agents had discovered several worrying errors, including the IEBC's failure to include votes from 11 constituencies to the tally.⁴²

38 Carter Center, p. 52.

39 Gladwell Wathoni Otieno and Zahid Rajan v. Ahmed Issack Hassan, IEBC, Uhuru Muigai Kenyatta and William Samoei Ruto. Petition of Gladwell Wathoni Otieno and Zahid Rajan. Paragraph 22. Available at <http://africog.org/content/civil-society-election-petition>.

40 MARS Group. September 3, 2013. "Mars Group Kenya Audit Report on 2013 Kenyan Presidential Election Results." Available at <http://blog.marsgroupkenya.org/2013/09/03/mars-group-kenya-report-audit-report-on-2013-kenyan-presidential-election-results/#more-3166>.

41 Kaberia, Judie. March 27, 2013. "Video Evidence Shows Glaring Flaws in Poll." *Capital FM*. Available at http://www.capitalfm.co.ke/news/2013/03/video-evidence-shows-glaring-flaws-in-poll/?wmp_switcher=mobile.

42 Menya, Walter. March 8, 2013. "CORD Lodges Complaint with IEBC." *The Star*. Available at <http://www.the-star.co.ke/news/article-111209/cord-lodges-complaint-iebc>.

In addition to the fact that observers had trouble accessing the critical areas within the tallying centres, as noted above, all observers were eventually evicted from the National Tallying Centre. The IEBC claimed those removed had been unruly, but a formal statement to this effect was never released. This move only added to the worrying secrecy of the IEBC, which consistently failed to issue explanations or assurances to the public over concerns raised before, during and after election day.⁴³ It was also in violation of the law, which states that agents are to be allowed into the counting venue.⁴⁴

The IEBC announced its final presidential results on March 9, 2013. Notably, even this announcement contained conflicting numbers of registered voters. The grand total, as recorded on the announcement, does not correspond to the total of all registered voters in all counties.

After the announcement of the results, a total of 186 election petitions were filed in various courts across the country.⁴⁵ Many of these petitions revealed glaring anomalies across the country.

In a petition filed by Kibwezi legislator Kalembe Ndile contesting the election of Patrick Musimba as member of parliament (MP) for Kibwezi West, a recount ordered by the court indicated Ndile had indeed won the election.⁴⁶ In Kisumu, testifying in a case filed by the National Agenda Party of Kenya gubernatorial candidate, William Oduol, Returning Officer (RO) Rose Obare told the court she noticed discrepancies in which Form 35 showed the petitioner had 81 votes while Form 36 indicated only one vote.⁴⁷

Makadara MP Benson Kangara testified before court that National Assembly results for Makadara constituency had corrections, yet those of President, Governor, Senator and Woman Representative had none. He said the two forms showing the Makadara parliamentary results given to him by the IEBC RO Florence Kwamboka were different.⁴⁸

In a recent submission in court an ODM (Orange Democratic Movement) political party agent claimed that he, along with the other political party agents at his polling station, were asked by the Presiding Officer (PO) to sign a blank Form 35 before the ballot count had been completed.⁴⁹ Problems with tallying forms have also been the focus of several other cases, including the challenge to Nairobi Governor Evans Kidero, Kisii Senator Chris Obure, MP Zebedeo Opopo, Bomet Senator Wilfred Lesan, Machakos Governor Alfred Mutua and others.

Failure of the Electronic Results Transmission

The tallying forms became even more critical in the wake of the failure of the electronic results transmission (ERT) system. Without a full set of electronically transmitted provisional results, the IEBC was left to rely solely on the paper forms, which, as has been detailed above, were severely flawed.

In the lead-up to the election, the IEBC explained that polling station staff would use a specially designed mobile phone application to securely transmit results to the IEBC tallying centres upon completion of counting.

43 *Gladwell Wathoni Otieno and Zahid Rajan v. Ahmed Issack Hassan, IEBC, Uhuru Muigai Kenyatta and William Samoei Ruto*. Petition of Gladwell Wathoni Otieno and Zahid Rajan. Paragraph 33. Available at <http://africog.org/content/civil-society-election-petition>.

44 *The Elections (General) Regulations 2012*, 74 (4) (f).

45 *The Daily Nation*. April 16, 2013. "Poll Petitions Hit 180 Mark." Available at <http://www.nation.co.ke/News/politics/Poll-petitions-hit-180-mark/-/1064/1749594/-/n4dibbz/-/index.html>.

46 Nzia, Daniel. July 3, 2013. "Kibwezi West Vote Recount Shows Kalembe Ndile Won Election." *The Standard*. Available at http://www.standardmedia.co.ke/?articleID=2000087337&story_title=kibwezi-west-vote-recount-shows-kalembe-won-election.

47 Odiwuor, Maureen. June 26, 2013. "Returning Officer acknowledges irregularities." *The Standard*. Available at http://www.standardmedia.co.ke/?articleID=2000086781&story_title=returning-officer-acknowledges-irregularities.

48 Limo, Lucianne. June 11, 2013. "Makadara MP Benson Kangara admits to poll discrepancies." *The Standard*. Available at http://www.standardmedia.co.ke/?articleID=2000085726&story_title=makadara-mp-admits-to-poll-discrepancies.

49 Namuliro, Alex. June 26, 2013. "Witness: I was told to sign a blank Form 35." *The Standard*. Available at http://www.standardmedia.co.ke/?articleID=2000086782&story_title=Kenya-witness-i-was-told-to-sign-a-blank-form-35.

In a February 2013 statement, the IEBC said:

Provisional results will be transmitted electronically from the polling station to the constituency, county and national tallying centres. Priority will be given to presidential results, and preferably followed by those of the Governor, Senator, County Woman Representative, Member of Parliament and County Assembly Ward Representative, in that order. The results will be displayed on big screens mounted in all the 338 tallying centres. Presidential results will be tallied at the National Tallying Centre, those of the Governor, Senator and Woman Representative will be relayed at the County level while winning Members of Parliament and County Assembly Ward Representatives will be declared at the Constituency tallying centre. The electronic results transmission application runs on a mobile phone and can be sent through GSM or satellite networks. These will however be provisional results and confirmed results will be announced by respective returning officers once the statutory electoral forms, co-signed by party agents, have been delivered and verified.⁵⁰

Once transmitted, those results would be shown via a live results presentation system. As polling streams concluded their counting on the evening of March 4, results did begin coming in. However, soon after the electronic results began to be aired, it became clear that the gap between Kenyatta and Odinga was

remaining largely constant. During the 12-hour period before the alleged crash, for instance, Kenyatta's percentage of votes stayed between 49.72 per cent and 51.28 per cent, a range of 1.56 per cent. Odinga's percentage of votes remained between 42.15 per cent and 43.77 per cent, a range of 1.58 per cent. Given that the results were supposed to be coming in randomly, as various polling stations around the country finished their counting, it is difficult to give credence to this apparent consistency in results in a country with pronounced regional variations in voting patterns.⁵¹

At approximately 9:30pm on March 4, IEBC Chief Executive Officer James Oswago announced that the IEBC's server, responsible for receiving electronic results, was experiencing problems related to disc space.⁵² Five days later, IEBC Chair Isaak Hassan admitted the electronic transmission system had failed in totality, necessitating the use of the manual system.⁵³

The electronic results transmission system also suffered due to the failure of many of the mobile phones through which results were to be sent. Reports indicated the application for results transmission was inaccessible due to forgotten passwords, low batteries and problems connecting to the network. In many instances, the applications necessary to run the programme had not been uploaded to the mobile phones provided to IEBC officials.⁵⁴

Some of these problems were not altogether unexpected. IEBC had held a "test-run" of its electronic transmission system in February 2013. The media reported the test's less-than-inspiring results.

50 IEBC. February 4, 2013. "Media taken through results transmission process." Available at <http://www.iebc.or.ke/index.php/news-archive/281-february-2013/457-media-taken-through-results-transmission-process>.

51 Gladwell Wathoni Otieno and Zahid Rajan v. Ahmed Issack Hassan, IEBC, Uhuru Muigai Kenyatta and William Samoei Ruto. Petition of Gladwell Wathoni Otieno and Zahid Rajan. Paragraph 32. Available at <http://africog.org/content/civil-society-election-petition>.

52 Matata, Lydia. March 5, 2013. "IEBC Assures Public Over Transmission Hitches." The Star. Available at <http://www.the-star.co.ke/news/article-110570/iebc-assures-public-over-transmission-hitches>.

53 *The East African*. March 9, 2013. "Electronic Systems Meltdown Causes Long Delays, Affects Credibility Of Poll." Available at <http://www.theeastafrican.co.ke/news/systems-meltdown-causes-delays-affects-credibility-of-poll/-/2558/1715830/-/view/printVersion/-/ie1djg/-/index.html>.

54 Bowman, Warigia and Longwe, Brian Munyao. March 29, 2013. "Technology, Transparency and the Kenyan General Election of 2013" *Al Jazeera*. Available at <http://www.aljazeera.com/indepth/opinion/2013/03/2013329135519365308.html>; Gladwell Wathoni Otieno and Zahid Rajan v. Ahmed Issack Hassan, IEBC, Uhuru Muigai Kenyatta and William Samoei Ruto. Petition of Gladwell Wathoni Otieno and Zahid Rajan. Paragraph 30(c). Available at <http://africog.org/content/civil-society-election-petition>.

Only one of the five sample polling station mobile phones was able to connect and electronically transmit its results.⁵⁵ Furthermore, questions were raised as to why the IEBC set up the authentication system on a GPRS platform. GPRS data transmission rates of 56-114 kbps are far slower than other higher performance, locally available platforms such as EDGE (200 Kbps) or 3G (above 200 kbps).⁵⁶

Although the electronically transmitted results were supposed to reflect a particular polling station's total tally for each candidate, in some constituencies the final result from all polling stations for a particular candidate was lower than the result that had previously been transmitted electronically from only a fraction of the polling stations. In some cases, it was revealed that what was recorded on Form 34 from a particular polling station differed from what was electronically transmitted from that same polling station.⁵⁷ AfriCOG conducted an in-depth analysis of the results reported for Kenyatta and Odinga. This analysis revealed that in several cases, what was recorded on Form 34 from a particular polling station differed from what was electronically transmitted from that same polling station. Examples are detailed below (see page 16).

Alternate Server

During the election petition evidence was presented that a server with IP address 196.1.26.40 was hosted by the Kencall company, and that it was used by both IEBC and The National Alliance (TNA) party for purposes of collecting and recording election results.

Notably it appears that the registered users for both the IEBC and TNA databases were the same, indicating that the same staff were able to access both databases. Finally, the technology used to collect and

record the results was characterised by a web-based manual override system, which allowed users from both databases to see and alter results as they wished.

Final Results

To date, the IEBC has not released polling station-level results for any offices. Instead, the IEBC has chosen only to release aggregated results for constituency and county levels, some of which are still incomplete. Even within the released results, the IEBC has only shown the number of valid votes per candidate. Constituency-level rejected votes and votes cast have not been provided.

The EU Observer Mission stated:

Published presidential results were only disaggregated to constituency level, making it difficult for stakeholders to trace results they had collected. Although in a positive move the IEBC put all polling station results forms on its website, disaggregation down to polling station results is the only way to ensure that figures are easily traceable and verifiable.⁵⁸

Without these results, it is impossible to verify the final counts and tallies. Moreover, the exit poll conducted by James Long, Karuti Kanyinga, Karen Ferree and Clark Gibson, shows that neither Kenyatta nor Odinga passed the 50 per cent mark. While it is true that the exit poll done by the Elections Observation Group (ELOG) shows that the IEBC's results fall within its margin of error, that margin is so wide that it inspires little confidence in such a close election. ELOG's parallel vote tabulation (PVT) projection was

55 Elderkin, Sarah. March 7, 2013. "IEBC Must Fix the Results Transmission System Fast." *The Star*. Available at <http://www.the-star.co.ke/news/article-108148/iebc-must-fix-results-transmission-system-fast>.

56 Maina, Wachira. April 20, 2013. "Verdict on Kenya's presidential election petition: Five reasons the judgment fails the legal test." *The East African*. Available at < <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/view/printVersion/-/e8srqh/-/index.html>>.

57 See <http://www.thepeoplescourt.co.ke/case/results-reports>.

58 EUEOM, p. 32.

that Kenyatta received 49.7 per cent of the vote and Odinga received 43.4 per cent of the vote. The margins of error in both cases were more than 2.5 per cent which means that there is a significant possibility that no candidate passed the 50 per cent threshold.

Confusion over Rejected Votes

By March 5, 2013, the IEBC was already reporting alarmingly high figures of rejected votes. By 11 am on that day, 284,232 of the roughly 4.8 million votes that had been counted had been rejected. This represented more than the combined vote totals for all candidates except for Odinga and Kenyatta.

Hassan's response to concerns was:

It is true it is quite a big number. These are basically the votes which have been cast and which are now rejected... because they were wrongly marked. He also said that the "complexity" of the election could have been a factor as voters were electing six candidates.⁵⁹

Tensions heightened after a visibly shaken Hassan announced rejected votes were to be included in "all votes cast," significantly lowering each candidate's percentage of votes won. In response, the Jubilee coalition held a press conference claiming it was unconstitutional for the rejected votes to be included. It also accused the British High Commissioner to

Kenya of being "in cahoots with Maina Kiai... canvassing to deny outright victory to Uhuru Kenyatta."⁶⁰ This objection baffled many who considered the law to be clear on what constitutes "all votes cast." The previous Constitution said the only votes that counted were the "valid votes cast." The new Constitution says unambiguously that it is "votes cast" that count."⁶¹

On March 7th, 2013 Hassan announced that the huge number of rejected votes was the result of a computer bug, which was causing each rejected vote to be multiplied by a factor of eight. After fixing this alleged error, the percentage of rejected votes plummeted from six per cent to around one per cent of the total votes cast. Instead of reassuring the Kenyan people, Hassan's announcement sparked accusations of fraud and raised numerous questions.⁶²

Indeed, the Carter Center stated:

The IEBC wrongly attributed the high number of rejected ballots on March 5 to the complexity of a simultaneous vote for six different positions, only later to state that the original high number was the product of a server malfunction that multiplied spoiled votes by a factor of eight. This controversy signalled that the IEBC poorly managed the vote counting process and undermined public confidence in their capacity to tally final results with accuracy.⁶³

59 Ngirachu, John. March 5, 2013. "Rejected Votes Worrying, Says Hassan." *Daily Nation*. Available at <http://elections.nation.co.ke/news/Rejected-votes-worrying-says-IEBC-chairperson/-/1631868/1712046/-/ju23imz/-/index.html>.

60 Mojtehdzadeh, Sara. March 6, 2013. "Kenya Election: Kenyatta Team Criticises UK." *Sky News*. Available at <http://news.sky.com/story/1061036/kenya-election-kenyatta-team-criticises-uk>.

61 Maina, Wachira. April 20, 2013. "Verdict on Kenya's presidential election petition." *The East African*. Available at <http://www.theeastafrican.co.ke/OpEd/comment/Five-reasons-Kenya-Supreme-Court-failed-poll-petition-test/-/434750/1753646/-/item/3/-/2659o8/-/index.html>.

62 BBC. March 8, 2013. "Kenya Election: Computer Bug Blamed for Vote Error." *BBC News*. Available at <http://www.bbc.co.uk/news/world-africa-21707152>. (full stop was added)

63 Carter Center, p. 51.

Conclusion and Recommendations

One year after the 2013 Kenyan elections, voters do not have access to information about many of the most fundamental election-related events. It is impossible for members of the public or civil society to verify the IEBC's count of the results, because polling-station tallying forms are not publicly accessible. It is only forms in relation to the presidential elections that have been made public, and even that record is incomplete. Moreover, it is apparent that voters faced a broad range of problems at the polling station, casting doubts over the integrity of the process. What remains unclear, however, is the effect of these problems on the final results. Not unlike the 2007 election, the sheer number of irregularities makes it difficult to conclusively determine who won the 2013 election.

With respect to the 2013 election, we recommend the following to the IEBC:

- Release the missing 2,585 missing Forms 34 so that there is a complete public record of the polling station-level presidential results.
- Release all polling station-level results for all positions.
- Explain how and why results shown on Forms 36 do not correspond to the corresponding Forms 34.
- Explain how and why final presidential results were announced without the results from ALL Forms 34.
- Provide a detailed explanation as to why the number of rejected votes changed so drastically and why attempts to divide the results by eight did not result in whole numbers, as would be expected if a computer error had multiplied them eightfold.

With respect to future elections, we recommend the following to the IEBC:

- Schedule advance training in operation of the EVIDs for all polling station staff, with opportunities for trainees to ask questions and practice troubleshooting.
- Ensure that all polling stations are equipped with generators or extra batteries for EVID operation. Make sure that all machines are fully charged and

operational before polling stations open.

- Review IEBC staff training procedures and create new procedures, where necessary, in order to ensure that all polling station staff know the details of the voting procedure and the laws relevant to managing and assisting voters.
- Consider a new plan for staffing the polling stations so that officers are not operating without sleep. Multiple presiding officers might, for instance, work in alternating shifts.
- Train staff to position voting booths in a way that prioritizes ballot secrecy.
- Clarify and publicly explain the rules regarding the register and voting, so that the public understands what happens if a name cannot be found on the register and under what circumstances, if any, a voter can vote if his/her name does not appear.
- Reorganize the management of polling stations such that it is clear how queues are categorized (by first name or by surname). Ensure that all polling station queues are organized in the same way and signage and staffing is adequate to direct voters.
- Consider either adding more polling stations or redistributing the number of voters assigned to polling stations so that voting is more efficient and voters do not wait for several hours.

With regard to transparency of voting, counting and tallying procedures:

- Ensure that observers and agents can watch counting and tallying in a manner that allows them to witness events and also allows staff to complete their tasks.
- Make sure that all completed Forms 34 are posted on the polling station door.
- Organize and implement multiple pre-election tests of the ERT system, at least one of which should be open to the public. Provide public explanations regarding how the system works and its security features.
- Publicly explain how electronically transmitted results will be collected and counted. This explanation should include details about the IEBC's server and who has access to it.

- Review the manual counting and tallying procedures with a view to streamlining them. This includes:
 - Ensuring that only formatted and serialized forms are printed and distributed, in sufficient quantities, to all polling stations and counting centres,
 - Ensuring that there is a clear, traceable chain of command of staff who have authority to handle and authorize the forms,
 - Ensuring that the forms used to calculate the results are made available to the public in an efficient and easily accessible manner.

With respect to future elections, we recommend the following to political parties:

- Appoint and train your agents early so that they

are familiar with all relevant electoral laws and procedures.

- Recruit enough agents to cover every single polling station.
- Instruct all agents not to leave the polling station without copies of tallying forms.

With respect to future elections, we recommend the following to election observers:

- Study previous Kenyan elections in order to be knowledgeable about common problems experienced in previous elections.
- Adopt statistical tests whose results are sufficiently meaningful and thus inspire public confidence.

ERT Results v. Forms 34 Results: Unresolved Discrepancies

Presidential Candidate	Constituency	Electronic Results Total Votes	Final Results as Reported by IEBC	Difference (IEBC Less Electronic Results)	Total Number of Votes Lost	Differences between electronic result and Form 34
Kenyatta	Masinga	2,605	2,507	-98	98	
Odinga	Masinga	33,780	33,361	-419	419	<ul style="list-style-type: none"> ● Wambo Primary School form 34: 380; electronic register: 280. ● Muthesya Primary School form 34: 639; electronic register: 630. ● Muthamwaki Primary School form 34: 279; electronic register: 275. ● Several forms also appear to have been edited (Ndelekeni Primary School, Muri Farm Primary School, Mukameni Primary School, Mbusyani Primary School, Kivuthi Primary School, Kiambani Primary School and Eendei Primary School). See attached annexe.
	Ruiru	142	43	-99		
	Masinga	319	308	-11		
	Nyeri Town	279	120	-159		

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