



**The 2017 Kenyan Election: Pre-Election Statement
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Introduction

Four days ahead of the 2017 election, Kura Yangu, Sauti Yangu issues this pre-election statement, based on more than one year of pre-election observation and analysis.¹

Overall, KYSY notes a pre-election period that has been marked by a clear lack of respect for constitutional standards of integrity, public participation and public expression. On a technical level, KYSY has identified and assessed problems with legal reform, compressed timelines, procurement processes, voter registration and the Register of Voters, party primaries, lack of clarity with regard to laws and regulations and rising insecurity. The Kenyan State's increasing attempts to unconstitutionally control and restrict public questioning of electoral preparedness as well as public scrutiny of the electoral process reveals a worrying lack of respect for the sovereignty of the voter.

Many of these problems were evident in 2013, and the lack of progress made in addressing them demonstrates the IEBC's and parliament's lack of will to learn from the past.

¹ See: AfriCOG and KPTJ. May 2017. "Ready...Or Not? An Assessment of Kenya's Preparedness for the 8 August 2017 General Election." Available at <https://africog.org/wp-content/uploads/2017/05/Ready-Or-Not-An-Assessment-of-Kenya's-Preparedness-for-General-Elections-on-8-August-2017.pdf>; AfriCOG and KPTJ. July 2017. "Ready...Or Not? An Assessment of Kenya's Preparedness for the 8 August 2017 General Election: April -June 2017." Available at <https://africog.org/wp-content/uploads/2017/07/Ready-Or-Not-An-Assessment-of-Kenya's-Preparedness-for-General-Elections-on-8-August-2017-Edition2-Final.pdf>; AfriCOG and KPTJ. August 2017. "The Register of Voters: Where we are One Week Ahead of Election Day." Available at <https://africog.org/wp-content/uploads/2017/08/Ready-Or-Not3-Registration-of-Voters-Final1.pdf>; InformAction. October 2016. "ElectionWatch 2: Voter Registration." Available at <<http://information.tv/index.php/news-from-the-field/item/564-election-watch-report-2>>; InformAction. March 2017. "ElectionWatch 3: Gateway to the Ballot Box." Available at <<http://information.tv/index.php/news-from-the-field/item/583-election-watch-report-3>>; InformAction. June 2017. "ElectionWatch 4: Burning Ballots: Kenya's Chaotic Primaries." Available at <<http://information.tv/index.php/news-from-the-field/item/589-election-watch-report-4>>. KYSY. 19 April 2017. "Statement on the KPMG Audit of the Register of Voters." Available at <http://kurayangusautiyangu.org/wp-content/uploads/2017/06/Statement-on-the-KPMG-audit-of-the-register-of-voters.pdf>; KYSY. 8 July 2017. "KYSY Concern on Upcoming Election." Available at <http://kurayangusautiyangu.org/articles/kura-yangu-sauti-yangu-concern-on-upcoming-election/>; KYSY. 31 January 2017. "KYSY Press Statement on the Ongoing Mass Voter Registration Process." Available at <http://www.khrc.or.ke/images/docs/KuraYanguSautiYangupressstatementontheongoingMassVoterRegistrationprocess.pdf>; KYSY. June 2017. "The Road to Credible 2017 Elections." Available at <<http://www.khrc.or.ke/publications/157-the-road-to-credible2017-elections/file.html>>.



KYSY finds that the weaknesses of the pre-election period have severely compromised the integrity and credibility of the electoral process thus far. In order to promote and protect the legitimacy of and public faith in the results, we urge the IEBC and other authorities to immediately address the issues that relate to the remainder of the election cycle, explained below.

Pre-Election Period Issues

Several political and technical problems have marred the 2017 electoral thus far. The most notable include:

1. **Legal Reform:** The process of debating and passing amendments to the elections law, especially those that introduced the use of “complementary mechanisms,” undermined the democratic principles of dialogue and transparency. The process was marked by fistfights in parliament, a walkout by the opposition and blocked access to the media gallery. Moreover, KYSY has noted its concern about parliament’s failure to pass and implement campaign finance regulations and constitutionally mandated gender parity legislation. This situation leaves Kenya deeply divided, with opposition candidates and their supporters mistrustful of the law’s ability to protect the integrity of the vote; it also leaves the new parliament at risk of being unconstitutional.
2. **IEBC:** The IEBC’s behavior has threatened public faith in its independence. Extreme delays in publishing the Register of Voters and failure to explain how it will address the multiple problems raised in the audit of the Register taint the verifiability of that list. The IEBC’s decision to appeal the High Court’s judgment that presidential results announced at the constituency level are final also raised doubts about the Commission’s independence and stake in the result, and allegations of fraudulent procurement processes have left the impression that – while the faces of the IEBC may have changed – the ethos and approach remains unreformed. In fact, the IEBC has continuously ignored public demands for explanations on all manner of technical issues; it appears that the IEBC has forgotten that its power and authority is derived from Kenyan voters.
3. **Party Primaries:** Other problems have included chaotic party primaries, which were marked by rampant disorganization, the absence of party membership lists, untrained officials, allegations of fraud and clear disrespect for voters’ choices, and incidents of violence.
4. **Campaigning:** Political campaigns have been marked by the blatant misuse of state resources by senior officials and by widespread voter bribery. The decision to exempt non-cash “treats” from the definition of bribery allows politicians free rein to distribute all manner of items to voters, thereby illegally influencing their choice at the ballot box and undermining the true value of elections.



Election Day Issues

1. **Freedom of Movement:** Articles 37 and 39(1) of the Constitution of Kenya, 2010 guarantee that every person has the right to peaceably assemble and to the freedom of movement. Assembly and movement takes on special importance during elections, when voters necessarily want to participate in public campaign events, vote, witness the announcement of results, inspect results and express their opinions and reactions.

In late July, Acting Interior Cabinet Secretary Fred Matiang'i announced that those who have not been accredited to be inside polling stations on Election Day will be "removed from the polling stations by all means necessary."² That statement, in combination with IEBC regulations that grant presiding officers authority over an area of 400 metres around the centre of a polling station, raise serious concern that voters will be prohibited from meaningful participation in their elections. Moreover, the selective prohibition of peaceful protests in Kisumu, an opposition stronghold, is a clear and discriminatory violation of the right to peacefully assemble.

While it is reasonable to expect that non-accredited persons are not permitted to remain inside the polling station for purposes other than voting, it is unreasonable to bar voters from congregating outside of the voting area – especially because they have a right to witness the polling station results as they are announced and to scrutinize the written record of those results, which are required to be posted at the polling stations.

2. **Security and Violence:** The recent killing of the IEBC's Acting Director of ICT, Chris Msando, has cast a grave pall over election preparations. As the official who oversaw the implementation of the integrated elections management system, which includes biometric voter identification and electronic results transmission, Msando played a critical role. His murder has sparked serious fear about the security of the IEBC's systems and the potential for outside intervention in the data that feeds that system. Msando's killing took place against a general context of increased violence around the country, including between communities and between security forces and citizens. Additionally, the curfew in Lamu, and ongoing security operations in Laikipia and Baringo threaten to depress voter turnout. As Election Day approaches and the likelihood of mass public expression increases, it is critical for security forces to understand that Kenyans have a constitutional right to peacefully assemble and demonstrate.

²Joseph Ndunda. 22 July 2017. "Matiang'i quashes NASA plan to adopt polling stations." *The Star*. Available at <http://www.the-star.co.ke/news/2017/07/22/matiangi-quashes-nasa-plan-to-adopt-polling-stations_c1601944>.



3. **The Register of Voters:** There are several unanswered questions regarding the Register of Voters. First, the regulations governing voter identification suggest the existence of multiple registers. The new rules state that if a voter cannot be identified in the biometric register on election day, the IEBC may look in the copy register to identify the voter. If the copy register is supposed to be a printed copy of what is in the biometric list,³ why would a voter appear in one and not the other? This regulation suggests that there are differences between the two lists.

Also, the IEBC's last minute decision that clerks will not be permitted to open the copy register and that voters' names will not be crossed off the copy register once they have voted nullifies the point of the complementary mechanism. That mechanism, which allows voters to be identified in the copy register if they are not in the biometric list, attempts to provide a stopgap for registered voters whose records do not appear in the biometric list. Notwithstanding the implication that there are thus two registers, eliminating it means that there is no recourse for those who cannot be found in the biometric list nor for the situation in which the voter identification technology malfunctions or fails.

Furthermore, in April and May 2017, the IEBC gave the certified, provisional biographic and certified, provisional biometric Registers of Voters to KPMG for the firm's audit processes. Notably, the biometric list contained 1,162 more records than the biographic list;⁴ this difference has not been explained to date. The IEBC has previously explained that some individuals' fingerprints could not be captured, meaning that, if anything, there should be fewer biometric records than biographic records. Why were there 1,162 more biometric records than biographic records?

Second, there is a lack of clarity surrounding the use of the so-called "green book." This record, which was in use during 2016-2017 mass voter registration exercises,⁵ is yet to be explained by the IEBC. Why was it used during registration? What purpose did it serve if voters were being registered using biometric technology? Will it be used to identify voters on election day? The re-emergence of the green book, and the IEBC's refusal to acknowledge it and address public concerns about it, demonstrates a worrying lack of commitment to transparency by the IEBC. It also suggests that the IEBC is not committed to one – and only one – Register of Voters. Overall, it calls into question the reliability of the voter registration process and the resulting data.

³The Elections (General) Regulations, 2012, Part I, Article 2; The Elections (General) (Amendment) Regulations, Article 2(a).

⁴IEBC. 2017. "[Media Release: Report on Audit of the Register of Voters](#), page 2.

⁵ InformAction. 2017. "[ElectionWatch3: Gateway to the Ballot Box](#)."



Third, KPMG’s audit of the Register of Voters revealed a wide range of problems with data in the Register, including duplicate records, multiple voters sharing the same ID numbers, dead voters, and records with ID and passport numbers that lacked validity. Related to these issues is the problem of voters having been transferred without their knowledge or permission. It remains unclear how the IEBC will address these issues on Election Day and in the long term.

Results Counting, Tallying and Announcement Issues

1. **Complementary Mechanisms:** There are no regulations for the use of complementary mechanisms in the case that the electronic results transmission system fails. This means that if there are problems with digital transmission, there are no legally stipulated provisions that regulate what course of action the IEBC must take. This is a dangerous gap, and unless it is immediately addressed it could lead to widespread confusion and chaos around results counting and announcement.
2. **Disregarding Polling Station Results.** The regulations allow the IEBC to disregard results from any polling station in which the number of valid votes is greater than the number of registered voters and/or from any polling station in which the number of total votes is greater than the number of people who turned out to vote.⁶ Neither of these calculations reveals the primary indicator of ballot stuffing – voter turnout that is greater than 100 percent. That calculation depends on a comparison between the number of total votes cast and the number of registered voters at a polling station.
3. **Definition of votes cast:** In determining the winner of the presidential contest, Article 138(4) provides *inter alia* that the winning candidate must receive more than half of all the votes cast in the election. There is a lack of clarity regarding how the Commission intends to interpret this provision. Will it take into account the totality of the votes cast for president, or will it only take into account the valid votes cast? The Supreme Court’s 2013 ruling that only valid votes should count in the calculation disregards the fact that everyone who placed ballots in the ballot boxes cast their votes. If a vote could not be counted – because the voter’s choice was not clear, because the ballot was lacking a security feature or because it was unmarked – that does not mean it was not cast. Discounting those votes effectively disenfranchises those voters.

⁶ The Elections (General) (Amendment) Regulations, 2017, Article 37



4. **Counting, Tallying and Announcement of Results:** In its recent explanation of how votes are counted and announced, the IEBC neglected to include mention of the posting of results forms at polling stations.⁷ After results have been announced at the polling station, election regulations require the IEBC to “affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.”⁸ Voters have a right to see and scrutinize the results of their votes, and the IEBC must immediately clarify that it will comply with this law.

Additionally, it is worrying that the Form 34B that has been published by the Commission does not include a space to show the totals of the constituency tally. This is a serious omission, making it impossible to know the constituency-level totals for each office. Since the judiciary has ruled that presidential results are final as announced at the constituency level, tally sheets must include totals.

The IEBC has also issued a directive that cameras and phones will be barred from the interior of the polling stations, including by accredited media. While it is understandable and necessary to protect the secrecy of the vote, measures to do so must not be excessive. The public has a constitutional right to participate in the elections, including through recording and photographing the process as long as it does not violate the secrecy of the vote. In particular, any member of the public has a right to take a photograph of the results once they are published.

5. **Extra ballot papers for presidential elections**

There has been a lack of transparency with regard to the printing of ballot papers, and there is suspicion about the need for 1,206,577 more ballots than registered voters. This surplus represents 6.2 percent of the number of registered voters. Related to this is the IEBC’s printing of 12 Forms 34A (presidential results forms at the polling station level) per polling station. Multiple copies of the same form can be dangerous, opening the door to the possibility of differing totals and lack of clarity around which of the twelve are legitimate.

Conclusion

Based on the above issues, KYSY finds that the integrity and credibility of the pre-election period has been severely compromised. We strongly urge the IEBC and other authorities to immediately address the issues related to Election Day and results counting/announcement in order to protect the integrity of the remainder of the process.

KYSY’s Elections Centre

⁷ IEBC. 27 July 2017. Results Management Framework. Available at <https://twitter.com/IEBCKenya/status/890606082082590722/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.iebc.or.ke%2F>.

⁸ The Elections (General) (Amendment) Regulations, 2017, Section 34.



The KYSY coalition is establishing an Election Centre (EC), to be housed at the Kenya Human Rights Commission, which will receive and process member organizations' election observations from across the country on Election Day and thereafter. These observations will be used to create and disseminate regular statements on the integrity of the process, focusing on opening of polling stations, voter identification, counting procedures, results announcement, violence and the conduct of security forces. The Centre will be open to the public, and officers will also be on hand to hear complaints, observations, and concerns. Experts will also be available for interviews with the media.

Dates and Hours of Operation: The EC will be open from 8 August through 11 August, from 07:00 to 18:00. The EC will remain available until all results are announced.

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About Us

Kura Yangu, Sauti Yangu (KYSY) is a citizen movement spearheaded by a number of like-minded civil society organizations (Kenya Human Rights Commission, Independent Medico-Legal Unit, Constitution and Reforms Education Consortium, the Africa Centre for Open Governance, the Civil Society Organization Reference Group, Inuka Trust, Katiba Institute, Freedom House, and the Kenyan Section for the International Commission of Jurists, Kenyans for Peace with Truth and Justice, Development through Media) who have come together to proactively support Kenya's preparations for the 2017 elections with a view to ensuring that the country minimizes the risks related to dysfunctional electoral systems and practices.

KYSY is also committed to promoting political dialogue across the country. We believe that political consensus on the elections will increase public confidence and ultimately make both the process and results more credible and legitimate, and therefore contribute to the overall state of political certainty and stability of the country.