



# KENYA'S GROUNDZERO

A REPORT ON ELECTIONS IN AFRICA

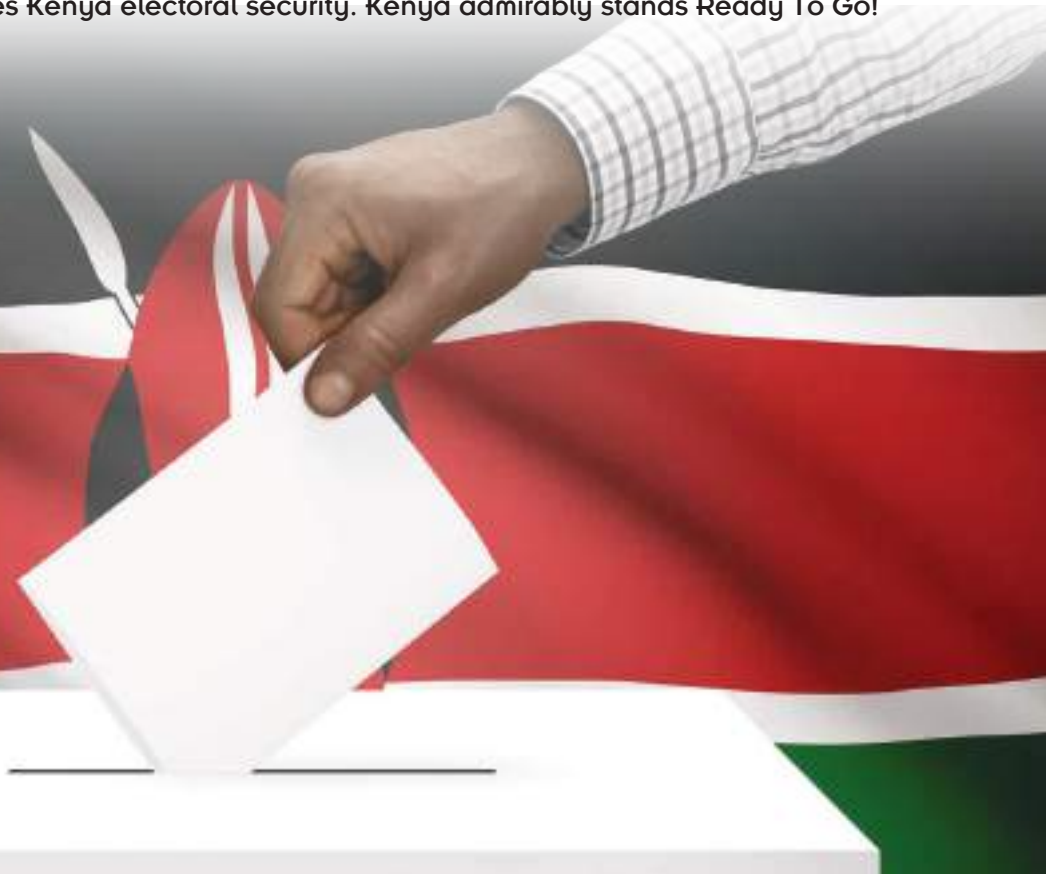
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5 August, 2017



# Ready to Go!

Kenya, East Africa's largest economy goes to the polls in two days. A well canvassed electorate stands decided and ready to discharge its civic duty. The IEBC has covered all ground ready for the biggest election in Kenyan history. Candidates have proffered their support for the election and are ready for the ballot in what is expected to be a free, fair and credible election. The Judiciary has interrogated many electoral issues, interpreting and clarifying electoral laws while giving the confidence necessary for handling petitions. The security services have shown a preparation that guarantees Kenya electoral security. Kenya admirably stands Ready To Go!



AFRICAN ELECTORAL  
OBSERVATION GROUP





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Ground Zero is an African Electoral Observation Group initiative on elections in Africa. Elections have become moments of vulnerability to violence, conflict and the near disintegration of states. These are moments that expose and exploit the weaknesses of institutions and the entire state. The objectives of this initiative are;

1. Provide field based analysis of issues and challenges relating to the management of elections in African countries.
2. Make recommendations to guide practical action and research based policy to guide action and response to challenges generated by the elections.
3. Contribute to peaceful and transparent elections leading to post election stability.



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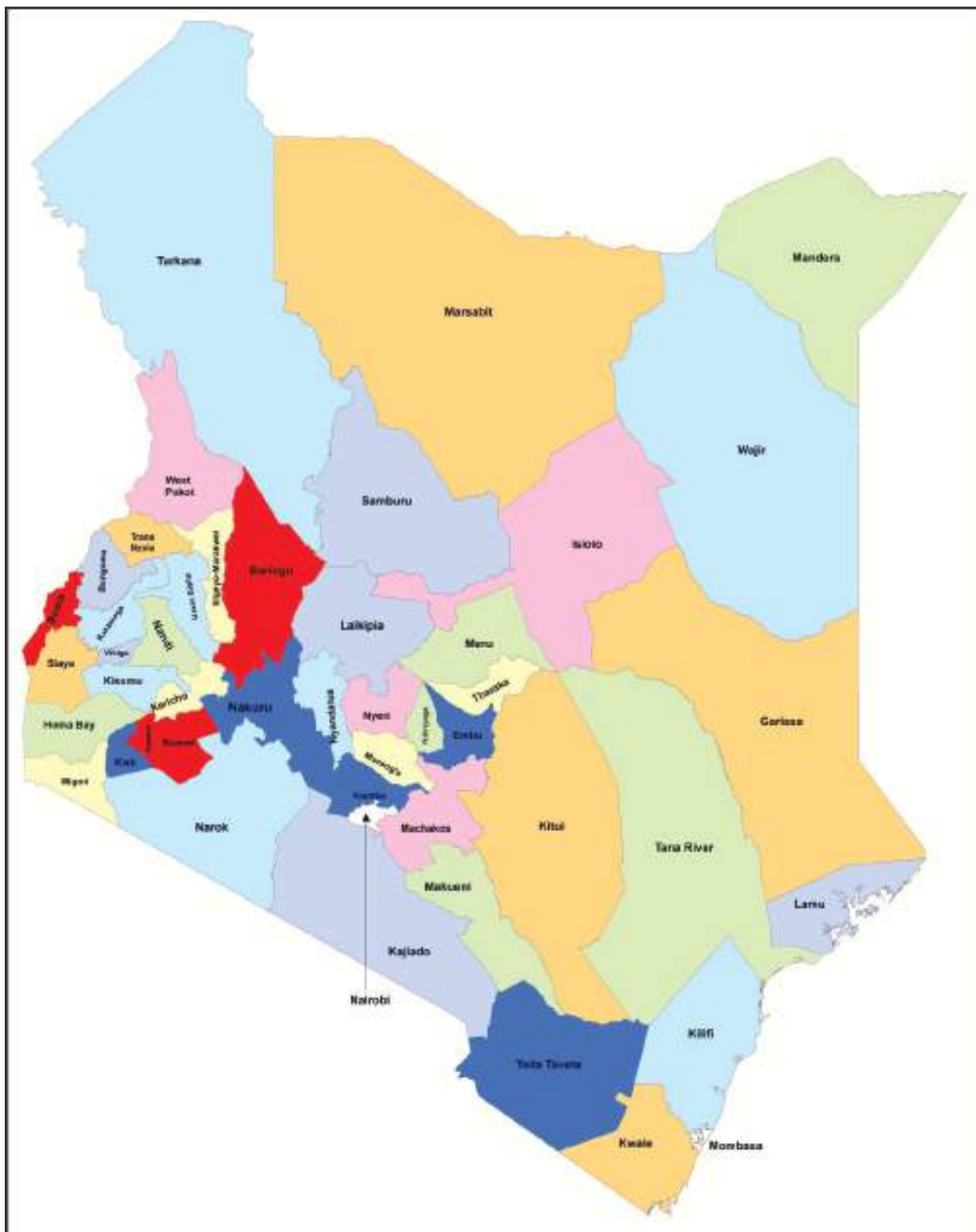
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# LIST OF ACRONYMS

|         |                                                    |
|---------|----------------------------------------------------|
| AfriCOG | Africa Centre for Open Governance                  |
| BVR     | Biometric Voter Registration                       |
| CORD    | Coalition for Reforms and Democracy                |
| CA      | Communication Authority of Kenya                   |
| ECK     | Electoral commission of Kenya                      |
| ID      | Identification Document                            |
| ICC     | International Criminal Court                       |
| ICT     | Information and Communications Technology          |
| IEBC    | Independent Electoral and boundaries Commission    |
| IFES    | The International Foundation for Electoral Systems |
| KANU    | Kenya African National Union                       |
| KDF     | Kenya Defense Forces                               |
| K-DOP   | The Kenya Domestic Observation Programme           |
| KPU     | Kenya people's Union                               |
| MVR     | Mass Voter registration                            |
| NASA    | National Super Alliance                            |
| NARC    | National rainbow Coalition                         |
| NIS     | National Intelligence Service                      |
| NYS     | National Youth Service                             |
| NCIC    | National Cohesion and Integration Commission       |
| ODM     | Orange Democratic Movement                         |
| TUCK    | Trade Unions Congress of Kenya                     |
| WDM     | Wiper Democratic Movement                          |

# MAP OF KENYA



# EXECUTIVE SUMMARY

**THE IEBC AND THE ELECTORAL PROCESS:** The bipartisan process in late 2016 that led to the amendments to the electoral laws and the inauguration of new commissioners presented the biggest challenge to the organization of a credible election in August 2017. In office for only six months before Kenya's biggest election yet with new electoral parameters put in place, the commission was going to be tested. The electoral body has however reasonably risen to the task and discharged its mandate. The electoral process' main challenge going forward is the anticipation that the Kenya Integrated Election Management System (KIEMS) will work flawlessly. The country has not been appropriately prepared for a scenario where the commission might have to rely on a complimentary system of voter identification and vote transmission. This presents the elections with its ultimate challenge and the biggest threat to the perception of a free, fair and credible election.

**THE JUDICIARY:** The judiciary has emerged as a major platform for political battle in this election season. Cases have been deployed to clarify some electoral issues and others to seemingly scuttle the entire process. A major fight for the soul of the judiciary has emerged with certain individuals in the bar, on the bench and at the registry coming under intense focus. The discussions around the judiciary have cast it to the forefront as a major player in the elections. It has interpreted the electoral laws to the satisfaction of many, clarifying several issues that would have otherwise presented points of crisis at the election. This is welcome and encouraged. As the roles of other major election management institutions become almost defunct after announcement of the results, the Judiciary will again take centre stage as the ultimate arbiter in many contests. It is expected that all grievances with the election will be worked out in the courts. The assurance from the Chief Justice needs to be buttressed with action and movement on their part that should give the country the confidence that the Judiciary is indeed ready for the task.

**CAMPAIGN FINANCING:** Kenya's biggest election yet has seen depressed campaign spending as compared to the last two general elections. Aggressive spending has taken a back banner as intense media battles mostly fought out in the nightly news, online media and other traditional media unfold. New campaign financing regulations, hardly implemented to the book, with the possibility some campaigns have completely ignored them, have greatly curtailed the flow of money. These new financial regulations have reduced the movement of huge sums of money to candidates. Designation of bank accounts for campaigns according to the law has affected spending since for the first time, campaign financing has come under the spotlight of anti money laundering financial regulations. The capping of money to be spent in a campaign, although generous, has also severely affected campaign financing. The use of state resources has moved from being a preserve of the party in power to the opposition as well through county governments under their control. The underwriting of national campaigns by gubernatorial campaigns has

emerged as a new form of campaign financing that should fall within the purview of observers, campaign laws experts and the IEBC.

**ELECTORAL SECURITY:** New concerns for electoral security are emerging besides the old and known concerns. Terrorism continues to be a big threat to electoral security. The emergence of the vote protection and voter turnout strategies that involve assembly and movement of people in groups present new security concerns. While these strategies remain crucial to political mobilization and need to safeguard a credible election, they represent possible infringement of certain rights pertinent to an election. Protect the vote strategies may intimidate other voters from exercising their right to vote by creating a siege over a polling station. Turnout strategies may infringe on the right to a voluntary and free choice at the ballot. These two scenarios present the security services with new Election Day security challenges. The security services reassurance of a deployment that will ensure electoral security throughout the country is welcome. It is important for Kenya to understand that no matter their political affiliation, they will all depend and call upon the security services to ensure the entire electoral period is secure to guarantee a free, fair and credible election.

**OPINION POLLS:** Public opinion surveys commonly referred to as opinion polls have come under intense focus in this electoral period and have largely become political propaganda tools rather than the informative research based tools they are supposed to be. A public opinion survey on the elections commissioned by this observer group and released to the public was hardly published by news media. The emergence and steady decline into bias by certain firms has also largely eroded confidence in opinion polls. The new law on opinion polls has also been ineffective in regulating the sector with numerous polls released and publicized without publication of financing, methodologies and full reports as required by law. Lack of public scrutiny and peer review has also been a major issue with Kenyan public polling. The laws need to be more specific and provide regulations that have regard to the publication of opinion surveys, with penalties for those found to have been deliberately misleading the public.

**THE MEDIA:** The fragmentation of media and the emergence of online media competing with traditional media has seen a disparate campaign with more of targeted rather than bold universal messages. The rise of fake news, primarily driven through online media has also had a huge effect on campaign messaging and public perceptions. The rise of numerous analysts, most without solid foundations has seen the public lack anchor voices to political events taking place. The controversial management of the Presidential Contenders Debates and boycott by certain candidates does not bode well for a media fraternity that has hitherto been Kenya's most trusted voice. Complaints by both presidential campaigns of bias by media houses should be a cause of concern. The regulation of hate speech and censorship of war mongering by media

houses is commendable but continues to be a major alternative platforms nevertheless carry it. The media's role in framing, tallying and transmission of results will be crucial and will largely contribute to the post election scenarios that will be experienced. Every media house is expected to discharge its public trust with a duty of care over the entire nation, not sections of it.

**CONCLUSION:** Kenya stands at the opportunity of further deepening its democracy and entrenching its electoral institutions and good governance. The rest of Africa looks at you with hope that a kingpin of African democracy will once again make a great leap forward. Future generations are looking back at Kenya and hoping you make the right choices. The continent wishes Kenya a **FREE, FAIR AND CREDIBLE ELECTION.**

# I. INTRODUCTION

Ground Zero is an African Electoral Observation Group initiative on elections in Africa. Elections have become moments of vulnerability to violence, conflict and the near disintegration of states. These are moments that expose and exploit the weaknesses of institutions and the entire state. The objectives of this initiative are;

1. Provide field based analysis of issues and challenges relating to the management of elections in African countries.
2. Make recommendations to guide practical action and research based policy to guide action and response to challenges generated by the elections.
3. Contribute to peaceful and transparent elections leading to post election stability.



## II. THE IEBC & THE ELECTORAL PROCESS

The bipartisan process in late 2016 that led to the amendments to the electoral laws and the inauguration of new commissioners presented the biggest challenge to the organization of a credible elections in August 2017. In office for six months only before Kenya's biggest election yet, with new electoral parameters to put in place, the commission was going to be tested as various voices had warned. Elog, the Elections Observation Group, had in March 2016 opposed calls for the disbandment of IEBC, saying its dissolution will complicate preparations for the 2017 general elections. Elections Observation Group (ELOG) told off politicians calling for the dissolution of the Independent Electoral and Boundaries commission accusing them of "personalizing the war against the electoral body".

The commission has however reasonably risen from the loss of confidence the Isaack Hassan led commission had plummeted into and has reasonably discharged its mandate of laying out the requisite infrastructure and personnel for the election. The challenges that have come forth and been dealt with however fade in comparison to the challenges the commission will face should its main electoral infrastructure, the Kenya Integrated Elections Management System (KIEMS) fail. Kenya has not been appropriately prepared for a scenario where the commission might have to rely on a complimentary system of voter identification and votes transmission providing the elections its ultimate Achilles heel and biggest threat to the perception of a credible election.

### a) IEBC Timelines and Organisation

After the swearing in of the new IEBC commissioners, on 10th February 2017, the commission released new election timelines. The commission required political parties to submit the names of candidates for the party primaries between 26th March and 5th April 2017. The party primaries were held between 13th and 26th May according to the revised election timelines released by the commission. The nominations for the presidential and senatorial elections took place between 28th May and 29th May 2017. The gubernatorial and National Assembly nominations were to take place between 1st and 2nd June as directed by the commission.

The IEBC chairperson said that the commission would publish all names of the nominated candidates between 10th and 17th June as the electoral laws required. However, court battles had consistently affected some of these timelines. The printing and delivery of Ballot papers was scheduled to take place from 28th June to 9th July 2017. This was not the case because of a case filed in court by the Opposition regarding the award of the presidential ballot tender to Al-Ghurair, a Dubai based company. The elections are set to be conducted on 8th August 2017. The Kenyan voters are expected to elect the president and his deputy, legislative members of the Senate and National Assembly and the devolved government members. They include the county governors and ward representatives. The declaration of the election results is scheduled to be between 8th and 17th August 2017. The electoral agency has promised to declare results

within hours after the closure of the voting exercise. The gazettelement of elected leaders in the Kenya Gazette is scheduled for 15th August while the publication of final Election results is set for 5th October 2017.

## **b) Civic Education**

In December 2016, civic education came under attack on the premise that it was a way of foreigners trying to influence the General Elections. After the criticism there was regulatory action on The International Foundation for Electoral Systems (IFES). The executive director of the NGO board, Fazul Mohamed, sent a letter to IFES saying that it had ended its \$20 million program for electoral education. "The purpose of this communication therefore is to direct the International Foundation for Electoral Systems, IFES Kenya office to immediately cease all operations in the country including the implementation of the Kenya Electoral Assistance Program, KEAP 2017 that has been funded by USAID," the letter read. Kenya Human Rights Commission (KHRC) also faced regulatory action. This criticism was leveled on the grounds that civic education by certain civil society organizations was ideologically inclined towards the opposition.

However, the US ambassador to Kenya Robert Godec defended the programs undertaken by IFES and said that they were legal because the firm was registered fully under the Companies Act. "IFES is registered in Kenya under the Companies Act and has legal standing to conduct programs here," Ambassador Godec said. "USAID provides elections assistance under our Development Assistance Grant Agreement with the Government of Kenya, which allows for the issuance of work permits for implementing partner staff, including IFES," he added. Mr. Godec also said that the organization undertook its tasks transparently without favoring any political party or candidate. He expressed his disappointment by the attempt of discrediting the United States' efforts of assisting Kenyans in the conduct of transparent polls.

According to George Kegoro, Executive Director at Kenya human Rights Commission, the rising tension between the government and civil authorities could be viewed as evidence of fear on the part of the political establishment. He also argued that the conflict signaled that whatever the outcome of the election, Jubilee does not intend to give up power any time soon.

On an article on the Sunday Nation Newspaper, Prof Karuti Kanyinga said that NGOs and other civil society groups advocate for specific policies and hence this brings them to a conflict with the government. "They conflict with the government because of doing what the government ought to do; and doing what the government may not want them to do," Prof Karuti said.

Under a keen regulatory environment that was previously largely a bureaucratic rather than

substantive office, civil society has seen its enormous influence on elections diminished leaving political actors battling mostly among themselves without the aid of non political actors.

### **c) Other Election Observation Missions**

The European Union has deployed an Election Observation Mission (EOM) to Kenya. The EOM is tasked with the observation of the General Elections. The EU deployed 30 long-term observers to 13 locations in the country. The team was deployed and began its mission on 27th June. The team is operating in 15 teams of two in observing all aspects of the electoral process. The EU is also set to add an additional 32 short-term observers. The aim of the EOM is to contribute in the enhancement of the transparency of the electoral process and respect of the fundamental freedoms.

The EU has been on the forefront in supporting African efforts to reinforce the democratization process. The Chief observer of the Mission is Ms. Schaake. During the deployment, she said that she was honored to lead the team. "I am honored to lead the EU EOM to Kenya. The forthcoming General Elections will be another defining moment in Kenya's democratic development. Kenya has already achieved impressive progress in terms of democratization and good governance. I trust the Kenyan people will express their political choices in a peaceful and calm environment, thus confirming the significance of democratic institutions. The August polls can further consolidate the democratic record through well-run, transparent, inclusive and peaceful elections, with all sides refraining from any actions or statements that may incite violence."

Additionally, the Common Market for Eastern and Southern Africa (COMESA) deployed 15 election observers in the country. The observers are expected to meet various electoral stakeholders such as the main political parties, IEBC, the security agencies, the media, the judiciary, and the civil society in aim of understanding the preparedness of the various stakeholders and also the political environment in the country. The team is led by former Zimbabwe Minister of Justice, Ambassador Dr. Simbi Mubako. The team is set to observe the various voting stages, vote tallying and election results declaration. After the Election Day, the team is set to issue a preliminary statement of its findings. It will also present its final report which will contain recommendations for the improvement of future poll practices in the country.

### **d) Electoral Laws Amendments**

The Election Amendment Law elicited a number of concerns from various stakeholders throughout the country. The National Assembly passed the Electoral Amendment Laws (Bill) on 22nd December 2016 amidst criticism from the opposition. The major controversy in the law was the adoption of a manual backup to the KIEMS for the polls. On 9th January 2017, President Uhuru Kenyatta signed the amendments to the electoral laws. The amendments allow the

electoral commission to among other things have a complimentary mechanism in cases where there would be failure of the electronic system of voter identification and transmission of results among other things. The Opposition leader described that as a move of allowing dead voters to cast votes. Opposition legislators also accused Jubilee terming the move as a preparation for rigging the August 2017 General Elections. On the other hand, the Jubilee legislators claimed that it was wise to have a backup since the electronic system is prone to failures.

Opposition senators criticized the President on signing the electoral laws. They accused him of forgetting his role as a national symbol as he engaged in partisan politics. The Opposition leaders claimed that some of their leaders are outside Parliament and they should have been consulted. Addressing a news conference at Nairobi on 10th January 2017, accused the president of his intolerance to divergent views. “The president should have paused to listen to the divergent views with an aim of striking a compromise where everybody emerges a winner,” said Senator Mutula Kilonzo Jr.

The judiciary has however affirmed the use of a complimentary system to KIEMS in case of a breakdown in technology. This issue however remains the main fault line under which Kenya’s election will be perceived with either of the two main parties still holding on to their views and preferences.



### III. JUDICIARY

The judiciary has emerged as a major platform for political battle in this election season. Cases have been deployed to both clarify some electoral issues and seemingly to scuttle others depending on the political outfit giving its views. A major fight for the soul of the judiciary has emerged with certain individuals in the bar, on the bench and at the registry coming under intense focus. The discussions around the judiciary have cast it to the forefront as a major player in the elections. It has interpreted the electoral laws to the satisfaction of many clarifying several issues that would have otherwise presented points of crisis at the election. This is welcome and encouraged.

As the roles of other major election management institutions become almost defunct after announcement of the results, the Judiciary will again take centre stage as the ultimate arbiter in many contests. The assurance from the Chief Justice needs to be buttressed with action and movement in their part that should give the country the confidence that the Judiciary is indeed ready for the polls. There have been a number of electoral cases that the Judiciary has dealt with ahead of the polls. Among the major cases are:

#### **a) Presidential Results Tallying**

A five judge bench decided that the August 2017 presidential results tallied at the constituency level would be announced at the constituencies and that they would be the final results. On 24th June 2017, the Court of Appeal upheld the High Court's decision that stated that the Presidential election results that will be announced at the constituency level by the returning officers would be final. The five judge bench unanimously found that giving the IEBC Chairperson the power to alter the electronically submitted results to the national tallying center would be against the constitution. Justice William Ouko presided the ruling. "There is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual," Presiding Judge William Ouko read out. Judge Ouko further added that the five judge bench had unanimously agreed on the ruling and that the final constituency results should only be challenged in a court. "There was near unanimity in opinion that, since the first level of declaration of results is at the polling station, those results should be final and should only be challenged in a court of law; that the form filled out for the declaration of results at the polling station should be the primary election form and all other forms can only be tallies of the final results rather than confirmation forms."

The bench also said that it found it hypocritical that the commission would question the credibility of the results relayed by its own (IEBC) officials. Justice Ouko who presided the session also noted that there was enough safeguards at the tallying centers in each constituency as there will be sufficient election officials. "Any changes to what was counted, confirmed and verified at the constituency level before transmission is manifestly outside his powers and competence.

It could well be tantamount to a serious assault on the will of the people of Kenya and an impermissible breach of the Constitution,” Justice Ouko read.

## **b) Cancellation of the Ballot tender**

The ballot tender has received a number of challenges since its initial award to Al-Ghurair by the electoral agency. Court battles between the electoral body and the various stakeholders such as the opposition had characterized the entire tendering process until the final printing happened. On 13th February 2017, Judge Odunga nullified of the Shs. 2.5 billion ballot tender that had awarded to Al Ghurair Printing and Publishing Company by the electoral agency. The judge said that the tendering process did not comply with the law. The Opposition had filed the case against the electoral agency and the Public Procurement Administrative Review Board. Justice Odunga faulted IEBC for proceeding with the tender award without considering the new regulations that were in place.

On 7th July 2017, the High Court cancelled the Presidential ballot paper printing tender that had been awarded o Al Ghurair by the electoral agency. The three judge bench comprised of Justice George Odunga, Joel Ngugi and John Mativo. In their ruling, the bench ordered that the electoral commission should start a new procurement process for the Presidential ballot papers. “We order that the IEBC commences the procurement process for printing of election materials for presidential elections scheduled for August 8 so as to ensure free, fair and transparent elections,” Justice Ngugi read.

However, the electoral agency successfully filed a petition in the court of Appeal. The Court of Appeal allowed Al-Ghurair to print the presidential ballot papers. The judges ruled that the commission was justified to directly procure as they explained the impossibilities of an open tender due to the electoral timelines. “A cursory glance and simple arithmetic calculation of the timelines provided for in the procurement regulations demonstrate that if the presidential election is to be held on August 8, 2017, and backward calculations of time lines is done, it is manifest that a procurement method other than direct procurement will not lead to award of tender before the constitutionally ordained date for the conduct of presidential elections,” the judges said.

## **c) Postponement of Elections in case the Electronic System Fails**

The Opposition (NASA) had filed a court to case in which it sought to have the election halted in places where the electronic election system failed. In its petition, NASA argued that the electoral body had failed to have a complementary system in place as stipulated by the law. Nevertheless, a 3 judge bench ruled that it was impossible for the country to run on an electronic system purely. “Finally this court has to consider the impact or the consequences if exclusive electronic system fails.

It would throw the entire election into jeopardy and imperil our democracy,” the three judge bench ruled. The bench dismissed NASA’s case citing Kenya’s elections as “fragile”. “We therefore find that it would not be feasible to declare that the elections to be held on August 8, 2017 be exclusively electronic. It is clear that when the electronic system fails there should be a fallback system to avoid the entire system falling into shambles,” the bench stated.

#### **d) Preparations for Petitions**

The Chief Justice has on numerous occasions stated that the Judiciary is well prepared to handle election petitions that are expected to arise after the polls. On 13th January 2017, Chief Justice David Maraga reiterated the commitment of the Judiciary to diligently and expeditiously deal with electoral disputes in a move of safeguarding the country’s democratic right. The CJ was speaking when he chaired his first full sitting of the Judicial Service Commission (JSC) this year. He said that any unsatisfied party as a right of appeal. The Chief Justice further requested Kenyans to promote and respect the Judiciary’s independence in resolving disputes. He also added that the Judiciary the Judiciary is the custodian of the law and hence it is bound in guiding the country towards a peaceful, orderly and credible elections. More so the JSC Secretary and Chief Registrar of the Judiciary, Anne Amadi, expressed outrage over the public lynching of judges or magistrates for their decisions. This was in reference to the National Assembly Majority Leader Aden Duale’s remarks on Judge Odunga over a court matter he handled in December 2016. The Judiciary Service Commission also discussed instances of disobedience to courts and warned against irresponsible exercise of power since it may undermine the public confidence.

On 13th June 2017, CJ Maraga noted that over 400 judges and magistrates had been trained to handle electoral petitions ahead of the polls. “Over 400 judges and magistrates who are likely to handle election petitions have been trained and all the administrative and logistical arrangements have been put in place,” the CJ said.

On 21st June 2017, the CJ gazetted stiff rules that are set to tame election petitions. Those who will challenge the presidential election are expected to pay SH 1 million as security and a further 0.5 million non-refundable fee for filing the case. The rules set are supposed to bring order and they will guide the magistrate courts and High court.

On 27th July 2017, the judiciary election committee said that it was fully prepared to handle any election petitions. The committee also said that complainants will have seven days after the results declaration to file petitions, two days to serve and the respondents will have up to four days to file their responses. More to than, the recount of vote will be done at the IEBC warehouse.



## IV. CAMPAIGN FINANCING

Kenya's biggest election yet has seen depressed campaign spending as compared to the last two elections. Aggressive spending has taken a back banner for intense media platform battles mostly fought out in the nightly news, online media and other traditional media. This unpaid marketing has perhaps emerged as the most significant aspect in campaign spending with perpetual media wars taking the place of other strategies that would have been costly. New campaign financing regulations, hardly implemented to the book, with the possibility some campaigns have completely ignored them, have greatly curtailed the flow of money. These new financial regulations have curtailed the movement of huge sums of money through banks. Unsupported over the counter transactions and reporting of sums larger than Kshs 1 million have also affected the spending and movement of money to campaigns. Designation of bank accounts for campaigns has affected spending as for the first time, campaign financing has come under the spotlight of anti money laundering financial regulations. The capping of money to be spent in a campaign, although generous, has also severely affected campaign financing.

The use of state resources has moved from being a preserve of the party in power to the opposition as well through county governments under their control. The underwriting of national campaigns by local campaigns under governors in their territory has emerged as a new form of campaign financing that should fall within the purview of observers and campaign laws experts.

### a) Less Money Spent

On 7th December 2016, the electoral body asked political parties and independent candidates to submit bank account details that were to be used in the August polls as it sought to regulate campaign financing. The electoral commission sets campaign spending limits as stipulated by the Election Campaign Financing Act. The IEBC capped expenditure by any political party at Ksh 15 billion.

Presidential candidates spending was capped at Ksh 5.2 billion. Senators, Governors, and Women representatives for Nairobi were allowed to spend over 400 million. On the other hand, National Assembly members were allowed to spend Ksh 33 million on the upper limit and Ksh 2 Million on the lower limit. Members of the County Assemblies were allowed to spend an upper limit of Sh 10 million and a lower limit of Ksh 66000. "The limits were arrived at after extensive consultations with stakeholders including political parties, civil society, state agencies and the media. The Commission therefore purposed to set the limits at a fairly permissive level to encourage conformity by candidates and political parties," said Andrew Limo, Manager, Communication and Public Affairs.

## **b) State Resources**

The electoral agency also warned public servants against the use of state resources in financing their campaigns. IEBC noted that such practices violated the Section 44 of the Election Offences Act, 2016. “Be notified that persons who fail to comply with the provisions of this law commit an offence and are liable on conviction,” IEBC Chairperson, Wafula Chebukati said. He also said that those who violated the law would be fined Sh 2 million or jailed for six years. Mr. Chebukati also noted that the commission would impound any state resources that will have been used unlawfully in the campaigns. He also asked Governor, MP, Deputy Governor and MCA aspirants to declare the state assets that were assigned to them. “Those who wish to participate in the elections should provide a list of the said facilities to IEBC by May 2,” he stated.

The Commission on Administrative Justice (Ombudsman) also reiterated that Public officers who engaged in campaigns and used state resources to do so were going against the law and that amounted to disqualification of the political party and candidates that they supported. “In our view, the question of accountability of public officers should be continuous and not summative to coincide with the electioneering period since this blurs the line between accountability and political campaign,” the Ombudsman’s acting chairperson Regina Mwatha said. The Ombudsman was reacting to the stand by State House which had ruled that Cabinet Secretaries were exempted from the ban. The participation of public officers and use of public resources in political activities politicize, and create anarchy and patronage in the public service and other appointive positions thereby undermining the Constitution,” added Dr. Mwatha.

## **c) CBK Regulations on Withdrawal of Large Sums**

The Central Bank of Kenya (CBK) issued strict guidelines about over the counter cash transactions on 5th January 2016. The CBK issued the guidelines under the Banking Circular NO 1 of 2016 – Additional Guidelines on Large Cash Transactions. The set guidelines require that for over-the counter transactions that exceed Ksh 1 million, the customer is expected to complete the “over the counter large transaction form”. The form requires the customer to declare information such as the reasons for the money withdrawal, the source of the deposited money, nature of the customer business, destiny and use of the money, reason for not electronically transferring the money and the identities of the money beneficiaries among other requirements.

The law by the CBK has been a major challenge for many politicians around the country especially during the campaign period. “We are having a serious problem at the moment with that cap, politicians are not having it easy,” MP Junet Mohammed said. Why should I be limited on the amount of my money that I should withdraw? The regulations have totally no standing in the law, and I will sue the bank should they block me from accessing my money,” MP Kimani Ichungwa said. “It has really made life difficult for us. At the moment, we need to pay people

whose cars we hire for campaign tours, tents, chairs and other items. “When you have a big function and the bills of all these surpass Sh1 million, what do you do? Nobody trusts a cheque from politicians, especially during this campaign period, we have to pay in cash,” MP Kimani added.



## V. SECURITY

New concerns for electoral security are emerging besides the old and known concerns. Terrorism continues to be a big threat to electoral security. The emergence of the vote protection and voter turn out strategies that involve assembly and movement of people in groups present a new form of security concern. While these strategies remain crucial to political mobilization and need to safeguard a credible election, they represent possible infringement of certain rights pertinent to an election. Protect the vote strategies may intimidate other voters from exercising their right to vote while turn out strategies may infringe on the right to a voluntary and free choice at the ballot. Such scenarios present a challenge to the security services whose function is to also safeguard the rights of all. These two scenarios present election day with a security challenge that has hitherto not been an issue save for certain pockets. The security services reassurance of a deployment that will ensure electoral security throughout the country is welcome. It is important for Kenya to understand that no matter their political affiliation, they will all depend and call upon the security services to ensure the entire electoral period is secure to guarantee a free, fair and credible election.

### a) Electoral Security/Violence Incidents

In July 2017, a number of political intolerance cases were reported in the country. During a Jubilee rally in Kisumu County, President Kenyatta was jeered at by the crowd that had turned up for the campaign rally. The crowd sung in unison that they did not want DP Ruto to address them. In what was seen as a revenge mission, NASA Presidential candidate, Raila Odinga was jeered at by Baringo residents. On 13th July 2017, Raila's rally in Thika was disrupted by rowdy youths. Residents armed with rungs and stones heckled at the NASA flag bearer before they threw stones at him and his entourage. The police were forced to use teargas to disperse the rowdy crowd. Raila was forced to abandon his rally and flee the area.

In Githurai, he (Raila) was forced to leave abruptly after he faced hostility from the residents who threw stones at his entourage. Mr. Odinga condemned the political intolerance. "Such violence has not been witnessed in this campaign season, and Odinga condemns it in the strongest terms. Peaceful protesting is a legitimate expression that people can employ to air their views to political leaders," his adviser Salim Lone said.

The IEBC noted its disappointment with the increasing incidents of violence witnessed in campaigns. "The violence witnessed in the presidential campaigns in Kisumu, Kabarnet and Thika is disturbing. This show of political intolerance should not be condoned in a democracy like ours," Mr. Chebukati said. The IEBC boss said that the commission would take stern action on any political player found violating the electoral code of conduct. "The Commission could take several measures including fining offenders, suspending campaigns in areas prone to violence or barring candidates participating in elections," warned Chebukati. "The Commission has

dispatched a team of investigators to collect more information on the areas that have depicted intolerance,” Chebukati added.

## **b) Political Incitement to Violence**

National Cohesion and Integration Commission (NCIC) listed Narok County as one of the counties likely to experience electoral violence during the August polls. The June 2015 commission communique quoted “inequitable distribution of county resources, competition (for) scarce resources, cattle rustling and incitement by politicians” as the threatening factors in Narok County. The leaders and investors in the county are now concerned about the rising political intolerance. Narok County is a multi-ethnic county though the Maasai community dominates. The Kipsigis is the biggest non-maasai group in the county. It has been reported that political leaders re mobilizing young people in the region to spur violence. Political players are said to mobilize the young people in the region. A certain youth leader from the Purko clan of the Maasai said that the victory for the incumbent governor would be totally unacceptable. The youth leader also said that the youths were planning on an alternative remedy if they felt that the outcome of the election did not restore leadership to the youth group.

On 15th June 2017, Opposition chief Raila Odinga made remarks in Kajiado County that have were viewed as hate speech. Mr. Odinga told Kajiado residents to protect their lands and refrain from the selling their lands to outsiders. “...until now there is no land because of poverty...we want to change that so that people don’t sell their parcels.” “Keep your land with you so that you don’t cry foul later on...let the buyers remain at their places of origin,” Raila said. Few days after Mr. Odinga’s remarks hundreds of hate message leaflets that called for the eviction of certain communities were circulated in Kajiado County. The message on the leaflets called for the vacation of certain communities from the region if Mr. Odinga wins the August polls.

Kameme FM was also under probe over a controversial advert it aired. There were claims that the radio station was circulating ethnic divisions by airing a controversial voter registration advertisement. The audio was said to have been run by Kameme FM urging Mt. Kenya region residents to register as voters. Gatonyewa Mbugua, Head of Kameme Radio dismissed the audio and termed it as a way of tainting the company’s image. “The artist is not a Kameme employee and it is contracted by real estate to voice adverts which played across numerous radio stations,” he said. The recording is heard telling off the kikuyu for not “taking a back seat and giving the opposition leeway to unseat President Uhuru in the upcoming polls.” The audio is 90 seconds long gives the reasons Kikuyu community should vote in large numbers to defend “their throne” as referred to by the presenter. The presenter also said that people in central Kenya who are above 18 years and do not have a voter’s card are useless. The NCIC boss said his officers would

analyze and interpret the audio. "I do not understand Kikuyu but the audio has been sent to my officer for transcription," he said.

Majority leader in the National assembly was also on the spot for hate speech remarks ahead of the 2017 General Elections. A sound clip had been circulating on social media where a voice calling for the barring Kamba's from registering as voters in Garissa. On 6th January 2017, six Ukambani leaders led by Kitui Senator David Musila called for the arrest of Mr. Duale, accusing him of incitement and hate mongering. "You should have five youths at every polling station and if you are arrested because of violence, you will be released. I will pay your bills and all costs," says the man alleged to be Mr. Duale in the clip. Mr. Duale dismissed the sound clip as a fake, saying it was the work of his political detractors. He said the clip is neither audible nor verifiable. "An audio clip in circulation online is fake and crude propaganda. It's the work of a bygone era politician attempting to cook fake news," Duale posted on his Twitter account. On 6th January 2017, the National and Integration Commission (NIC) said that it had launched investigations into allegations that Aden Duale was recorded inciting locals against a certain community in Garissa.

### **c) Safety of population in Rallies**

The safety of Kenyans who attend political rallies has been of concern recently due to the rising cases of injuries. On 21st May, a man was shot dead by police in Isiolo County by the police after a political rally led by the President turned violent. Supporters of rival political candidates for regional government positions clashed and this caused a major violence. On 27th July 2017. Three people were injured in Marsabit after the police fired warning shots and tear gas to disperse the crowd after President Kenyatta's campaign rally. There was a fight between Jubilee Party supporters and the Frontier Alliance Party supporters which turned violent, forcing the police to use force.

### **d) Politicization of Security**

NASA has on several instances accused the security forces of planning to rig the August polls. The opposition has alleged that the government is planning to use different state security agencies to ensure that it remains (Jubilee) in power. Earlier in the year, Mr. Odinga accused the NIS of rigging claims. "We have credible information that the National Intelligence Service (NIS) is once again heavily involved in the ongoing voter registration with the aim of influencing the result in August, the same way it did in 2007 and 2013," Mombasa Governor Hassan Joho also echoed Mr. Odinga's remarks. "They have turned KDF officers, NIS officers, police and civil servants into Jubilee campaigners. Let them be warned that we are taking their names and will reveal you. Don't dare steal vote, and if you do we will deal with you ruthlessly," Mombasa Governor Hassan Joho said.

On 20th June 2017, NASA released a press statement that accused the Jubilee administration of dragging the security agencies in the country into the August polls rigging plans. NASA flag bearer Raila Odinga said that the government is using the Kenya Defense Forces (KDF) in its (government) plans to rig the polls in favor of the incumbent administration. Mr. Odinga said that since the High Court's ruling in April that the presidential election results that will be announced at the constituency level will be final, jubilee leaders have been involved in various activities that the opposition finds disturbing prior to the August polls. Mr. Odinga claimed that KDF and police officers were being trained to work as polling clerks during the polls in a bid of rigging the elections.

On 20th July 2017, Mr. Odinga released names of 42 police officers who he claimed have been stationed as agents so as to cause chaos during the polls. He said the officers were picked from GSU, Kenya Airport Police Unit, traffic and the dog unit. "The officers have been assigned what the Kenya Police Service calls 'special duties' via a circular dated June 23," he said in a statement. "They have been issued with clearance certificates and asked to report to headquarters to be issued with discharge certificates before July 2. Their identification cards have been withdrawn." "Information at our disposal indicates these officers will be recruited as polling clerks of the IEBC," he added.

#### **e) The security Services Plans for Security Deployment**

The security forces have expressed their preparedness ahead of the coming the polls. On 26th July 2017, 2000 police officers were flagged off by the Directorate of Operation Intelligence within the national police service. The officers will freely mingle with the citizens in the areas that they were deployed. They are also tasked with listening and analyzing hate messages in the violence prone areas and relaying the information to the headquarters.

On 4th August 2017 during a press briefing, Interior PS Karanja Kibicho and Inspector General Joseph Boinett said that IEBC would get 150,000 police officers required for security during the polls. The Interior PS assured Kenyans that all necessary security measures were taken care of.

☒ - yes  
☐ - no  
☐ - don't know

## VI. PUBLIC OPINION POLLING

Public opinion surveys commonly referred to as opinion polls have come under intense focus in this electoral period and have largely descended to become political propaganda tools rather than the informative research based tools they are supposed to be. A public opinion survey on certain issues regarding the elections commissioned by this observer group and released to the public was hardly published by news media.

The emergence and steady decline into bias by certain firms has also largely eroded the space for opinion polls. The new law on opinion polls has also been ineffective in regulating the sector with numerous polls released and publicized without publication of financing, methodologies and full reports as required by law. A critical scientific tool is going through erosion with a few select firms at the top enjoying exclusive media attention. Lack of public scrutiny and peer review has also been a major issue with Kenyan public polling. The laws need to be more specific and provide regulations that have regard to the publication of opinion surveys, with penalties for those found to have been deliberately misleading the public.

### **a) The Enforcement of Law on Polling**

The Electoral Opinion Polls Act, 2012 guides on how opinion polls in the country should be conducted. The leading opinion pollsters in the country (Ipsos and Infotrak) have been on the spotlight as some political leaders have accused them of not observing the law. With the last poll released on 1st August 2017, the poll bodies were in line with the law which prohibits any person to publish any electoral opinion poll on the Election Day or five days prior to the election date. The opinion poll bodies are also expected to publish the name of the sponsors of the polls. This is a law that most of these bodies have been accused of violating.

### **b) Varying Results from Polling Companies**

There has been a huge difference between the polls conducted by the two leading opinion pollsters. The poll results released by Ipsos and Infotrak have been giving conflicting figures on President Kenyatta's approval and that of his major opponent Raila Odinga. On 23rd July 2017, Ipsos placed President Kenyatta ahead with 47 percent against Mr. Odinga's 43 percent. The opinion poll indicated that five percent of the voters were undecided. The poll had a margin error of 20.9 percent. On the other hand, Infotrak's opinion poll released on the same day indicated that Raila was leading at 47 percent while President Kenyatta followed closely with 46 percent. Six percent of the voters were undecided. The poll had a margin error of 2.19 percent.

The last opinion polls released on 1st August 2017 showed sharp differences between the two pollsters. Infotrak indicated that Raila was leading at 49 percent against President Kenyatta's 48 percent. Ipsos on the other hand, indicated that president Kenyatta was leading with 44 percent

while Raila was at 44 percent.

### **c) Lack of Public Scrutiny and Peer Review**

The data and methodology used by most of the opinion poll firms is subject to question as these opinion poll bodies do not invite the public and other researchers to scrutinize the methodology used and also verification of the data used. The authenticity of the information is therefore not verifiable. The sampling methods are also of concern.

### **d) Decline in Public Trust**

There has been a decline in public trust of the opinion polls released. Numerous allegations have emerged that the political class finances some of the opinion poll agencies so as to release results in their favor. On 22nd July 2017, the Zogby Poll was released. It was the first poll that was paid for by a political outfit (NASA) to be published ahead of the August polls. Jubilee leaders dismissed the poll and termed it as “Orchestrated and paid for by Nasa”. “What we are really questioning is the credibility of these opinion polls especially those where there are undeclared interests,” said Kikuyu MP Kimani Ichungwa.



## VII. DEMOCRATIZATION OF MEDIA

The fragmentation of media and the emergence of online media competing with traditional media has seen a disparate campaign with more of targeted rather than bold universal messages. The rise of fake news, primarily driven through online media has also had a huge effect on campaign messaging and public perceptions. The rise of numerous analysts, most without solid foundations has seen the public lack an anchor to political events taking place. The controversial management of the Presidential Contenders Debates and boycott by certain candidates does not bode well for a media fraternity that has hitherto been Kenya's most trusted voice. Complaints by both presidential campaigns of bias by media houses should be a cause of concern with some publishing and disseminating reports of media coverage their campaigns have received. Journalists with outright political bias on their private media accounts but feigning neutrality on media houses also eroded the trust the public has on the media. The control of messaging released to incite by media houses is commendable but continues to be a major concern as other platforms nevertheless carry it. The media's role in framing, tallying and transmission of results will be crucial and will largely contribute to the post election scenarios that will be experienced. The media is expected to discharge its public trust with a duty of care over the entire nation, not sections of it.

There has been a tremendous growth in the number of TV and radio stations in Kenya. The number of vernacular TV and radio stations is becoming increasingly notable. A number of established radio stations that are privately owned broadcast in vernacular languages. These platforms are currently being used as campaign and political channels. Among the vernacular stations are Inooro TV and radio, Meru TV, Weru TV, Njata TV, Gikuyu TV, Baite TV, Kass TV and Kameme TV among others. The stations have also been instrumental in enhancing voter education in the country as most Kenyans can get the messages in their local languages.

### a) The Presidential Candidates' Debate Debacle

The first presidential debate that was scheduled for 10th July 2017 was cancelled by the organizers. Debate Media Limited said that it had cancelled the debate so as to allow enough time for consultations following an advice given by the High Court. "Following the Court's decision, the Steering Committee is engaging various campaign teams to set up briefing sessions on the debate format and other logistical issues, the statement read. Jubilee Party's Vice Chairman David Murathe had earlier stated that President Kenyatta would not attend the debate. Jubilee's Secretary General Raphael Tuju went further to state that the President would participate in the debate only when more consultations were made. On the other hand, NASA flag bearer Raila Odinga said that he would also not attend the debate because of the proposed format of the debate.

On 17th July, only one candidate turned up for the running mates debate. Eliud Muthiora Kariara, the running mate to Dr. Japheth Kvinga had the entire time to himself as the other running mates snubbed the debate. For the 8 pm debate that was scheduled to take place between DP Ruto and Kalonzo Musyoka, none of them turned up.

On 24th July 2017, the Presidential Candidates Debate went on as scheduled despite some of the candidates not showing up. The first debate was among three candidates while the three others did not attend. At the 8 pm debate, Mr. Odinga was on stage alone. President Kenyatta had earlier indicated that he would not turn up for the debate.

### **b) Political Party Complaining of Media Bias**

Politicians in the country have accused the media of biasness ahead of the polls. Jubilee's Secretary General cited that the party's presidential candidate would not attend the planned debate because some issues were not clear. Mr. Tuju claimed that the "whole thing smells of conmanship". "On whose behalf are the organizers acting, and what mandate do they have to organize the debate?" he wondered.

Presidential candidate Abduba Dida also cited media bias as the reason for him not participating in the presidential debate. Mr. Dida had earlier sued Debate Media Limited and the Media Council of Kenya over categorizing the debates into two categories. Mr. Dida was demanding for equal treatment of all the presidential candidates because they had been cleared by the electoral commission.

State House Messaging Director Eric Ngeno also accused Debate Media Limited of colluding with the opposition leaders to distort the truth. "For the media to bandy accountability against a politician who endure endless blistering media coverage, just for choosing to skip a private function, is vulgar and disturbing," he stated.

DP Ruto said that there was biasness in the manner the entire debate strategies were handled and that was the reason for him not showing up. "I am surprised no one has engaged me on the debate. Courtesy demands that date, time, rules of engagement would have been made available," he said. "Is alright! Anyway, good luck with those who were engaged. I guess there must be reasons why the unequal treatment," he added.

Despite the biasness claims, media houses responded by increasing the coverage of political activities which include the campaign rallies. The Kenyan media has largely covered the campaign rallies conducted by Jubilee and that of its major opponent NASA. Little is covered concerning other presidential aspirants.





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