Press Statement

Nairobi, Friday 3rd November 2017

Preliminary Findings of the 26th October Repeat Presidential Election in Kenya

The Kenya National Commission on Human Rights (KNCHR) has been monitoring compliance to human rights principles in the fresh Presidential polls. This time as part of its monitoring strategies, the Commission deployed a total of 540 monitors spread out in all the 47 counties. The Commission monitored the campaigns and political protests in the run up to the fresh Presidential polls after the Supreme Court decision. The Commission also monitored the events before, during and after the 26th October polls.

The Supreme Court on Friday 1st September 2017 ordered:

(i) _That IEBC conducts the fresh Presidential Elections in strict conformity with the Constitution and election laws within 60 days._

The annulment of the Presidential vote by the Supreme Court set a record for Kenyan and African democracies at large. The Presidential election was initially gazetted to take place on Tuesday 17th October 2017 and later changed to Thursday 26th October 2017.

While the Jubilee Party embarked on a spirited campaign trail, the National Super Alliance (NASA) embarked on demonstrations calling for electoral reforms before the fresh polls could be held. As the weekly demonstrations took root, the country witnessed and relived
the dark days of ugly confrontations between civilians and the security agents, some of which resulted in excessive use of force by security agents while others were instigated by unruly civilians who contravened the rule of law.

**Constitutional Provisions and International Standards**

Article 38 of the Constitution bestows every Kenyan the inalienable right to a free, fair and credible elections. For this right to be realized in totality, there must be compliance to minimum international standards including among others;

- That the electoral process must be conducted in an accountable and transparent manner, and it must represent the real and informed choice of voters;
- That all citizens should enjoy their fundamental rights and should be able to cast their votes **without intimidation, violence or administrative interference**;
- That officials carrying out the tasks of counting and tabulation should do so impartially, efficiently and accurately\(^1\) and
- That the voter register must be accurate, transparent and inclusive.

It is upon this basis that the Commission embarked on monitoring the extent to which the fresh Presidential polls complied with human rights standards and the following is a summary of our preliminary findings:

1. **Pre-polls phase**

   a) **The Right to Demonstrate, Picket and Assemble**

   Article 37 of the Constitution of Kenya 2010 guarantees that every person has the right, **peaceably and unarmed**, to assemble, to demonstrate, to picket and to present petitions to public authorities.

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\(^1\) Office of the High Commissioner for Human Rights (OHCHR) Manual on Human Rights Elections Monitoring, p.8
Following calls by the National Super Alliance (NASA) leaders for electoral reforms and human resource changes at the Independent Electoral and Boundaries Commission (IEBC) ahead of the repeat Presidential election on 26th October 2017, NASA supporters participated in street protests in major towns including Nairobi City, Kakamega, Bungoma, Kisumu, Siaya, Migori and Homa Bay Counties. The Commission also documented these protests in Makueni, Embu and Narok counties although they were low key.

The Kenya National Commission on Human Rights had its monitors on the ground during each of the protests and recorded cases of injuries and fatalities. It is important to note that this was notwithstanding the five month nurses’ strike which hindered many of the victims from accessing immediate and quality medical care resulting in suffering and loss of lives. The Commission notes that majority of the affected victims are from poor backgrounds and depend on daily wages. Thus, many could not afford private medical services. The Commission has been holding dialogue sessions with the nurses’ union with a view to initiating mediation talks and welcomes the move to end the strike with hopes that sustainable solutions will be forthcoming for our health sector.

The Commission conducted preliminary investigations into the allegations of violations in order to establish the facts, the nature, the trends, the patterns and extent of the human rights violations. Subsequently, the Commission documented violations to:

- The right to life,
- The right to freedom and security of the person,
- The right to human dignity,
- The right to work,
- The right to peacefully protest, demonstrate and present petitions to public authorities,
- The freedom from torture and cruel, inhuman or degrading treatment or punishment,
• The right to property and
• The right to health, among others.

The Commission noted that most of the protests turned violent leaving in their wake deaths, people with gunshots and blunt object wounds, looting, destruction and closure of businesses, disruption of learning and destruction of learning institutions, fear and uncertainty among the general populace. Further, the Commission noted that IEBC officials were subjected to acts aimed at instilling fear or intimidation in the course of their work. The Commission also documented cases of destruction of polling equipment, which was in some places occasioned by the running battles between the police and the protesters. The Commission also received reports of some police officers who suffered injuries while on duty.

During the protests that occurred between 2nd and 16th October 2017, the Commission recorded a total of five (5) deaths as a result of the use of excessive force by police: that is one (1) in Kisumu, a minor aged 17 years old, and four (4) in Siaya Counties. During this period, the Commission recorded more than ninety (90) persons including a 2 years old who sustained various forms of injuries, including gunshot wounds, soft tissue injuries and fractures, with many seeking treatment in hospitals and dispensaries. It is important to note that one of the Commission’s monitors was injured when they were assaulted by police officers during the demonstrations. She sustained injuries and was hospitalized.

b) Attacks on security agents and IEBC officials by Politically Mobilized Youths

The Commission documented cases in which IEBC officials especially in Kisumu County were physically assaulted by youths while undertaking the refresher training. The Commission also obtained information from the National Police Service that some police officers were injured during these protests. Between 2nd and 16th October
2017, thirteen (13) police officers, (9) from Kisumu and four (4) from Homa Bay counties were attacked and assaulted by protesters and sustained injuries. Most of these officers were treated and discharged. Two (2) police vehicles’ windscreen were shattered, one police officer overpowered and his gun burnt, and there was an attempt to invade a police station by protesters in Kisumu County.

2. The Polling phase and aftermath

The fresh Presidential polls were conducted on the 26th of October 2017. The Commission notes that while some parts of the country proceeded with the polls, some sections of the country embarked on protests and boycotts of the fresh Presidential polls. The following are the findings of both scenarios;

a) Protests and boycotts of the Polls

In the counties that had protests, the Commission documented the use of firearms and excessive force by security agents. Freedom from torture and cruel, inhuman or degrading treatment or punishment is a non-derogable right under Article 25. The right to freedom and security of the person under Article 29 is integral in the promotion of human rights to ensure that people are not subjected to arbitrary arrests, violence, torture whether physical or psychological, corporal punishment, cruel, inhuman or degrading treatment or punishment. Further Article 244 obligates the National Police Service to comply with Constitutional standards of human rights and fundamental freedoms in the course of their service delivery.

The Commission noted heavy deployment of police in opposition areas including Nairobi City, Kisumu, Homa Bay, Migori, Bungoma, Vihiga, Kakamega and Busia Counties.

Between 25th and 27th October 2017, the Commission documented twelve (12) cases of deaths; one (1) minor and eleven (11) males aged between 18 and 45 years. Sixty (60) injuries, the youngest victim being
a 10 year old were also documented and the injuries ranged from wounds caused by blunt objects and gunshots. The Commission is still investigating cases of more deaths and injuries and these numbers are likely to rise. For instance, the Commission has received reports of 20 dead people who remained marked as unknown from Kisumu County, and once we conclude our investigations on the circumstances that led to these deaths, we shall make our findings on the same public.

The Commission notes and appreciates the challenging circumstances that our police officers operated in trying to manage and quell the unruly crowds from either harm’s way or in the protection of other people’s property. We however, as a Commission condemn the continued use of excessive force, excessive use of tear gas even in closed buildings and into people’s homes and schools, and the insensitive use of the baton to clobber protesters even after they had surrendered.

The Commission calls upon the Inspector General to adequately instruct all his police officers to operate strictly within the rule of law which includes, the National Police Service Act specifically the 6th Schedule, the National Police Service Standing Orders especially on Chapters 47 and 58 on lawful use of force and firearms and the Public Order Management.

The Commission documented the excessive use of force in Nairobi City (specifically in Kibera and Kawangware), Kisumu (specifically in Nyamasaria, Kondele, Manyatta, Seme, Kopere, Chemelil, Mamboleo, Awasi and Nyalenda), Homa Bay (specifically within the town and Mbita), Migori, Bungoma, Vihiga, Kakamega and Busia Counties. The Commission calls upon the Independent Policing and Oversight Authority (IPOA) and the Office of the Director of Public Prosecutions (ODPP) to investigate these incidences of excessive use of force and prosecution of the officers involved in the human rights violations.
The Commission is also concerned by the presence of too many security officers in medical facilities where injured persons are being attended. While the Commission acknowledges that it is vital for police officers to gather evidence, the same must not be used at the pretext to obstruct or intimidate the health professionals and other members of the public who are assisting the patients. This has been noted especially in cases where security agents suspect that bullets are still lodged in the victims’ bodies. This insensitivity has made injured members of the public to fear to go for specialized treatment immediately to their own peril. It has also discouraged them from lodging complaints with the relevant authorities.

It should be noted that the principle duty of a Police Officer after an injury or fatality has occurred, in respect to the dead, to report that fatality immediately to IPOA subject to the Sixth Schedule of the National Police Service Act and Section 25 of the IPOA Act failure to which it amounts to an offence. In respect to the injured person a police officer shall ensure that first the victim receives immediate first aid subject to Chapter 7, Section 5 of the National Police Service Standing Orders, and secondly the victim is transferred to the immediate hospital for further and specialised treatment.

b) Civilians’ Violations of Human Rights

The Commission condemns the violent actions by civilians in various parts of the country namely; Nairobi City (especially in Kibera, Kawangware and Kariadudu in Ruaraka), Kisumu (especially in Nyamasaria, Kondele, Manyatta, Seme, Muhoroni, Mamboleo, Awasi and Nyalenda), Homabay (especially in the town and Mbita), Migori, Busia, Bungoma, Vihiga and Machakos Counties. In a majority of these areas, the marauding youths barricaded entrances to polling stations with stones, sticks, handcarts, human faeces and some even welded the gates shut thereby hindering access by IEBC staff and voters. These acts were unconstitutional and amounted to electoral offences and contravention of Articles 38 of the Constitution of Kenya 2010.
We note with great concern also the unlawful actions by civilians who hurled stones, wielded machetes and other crude weapons, lit bonfires using tires on public roads and areas, destroyed and looted of personal property, and mounted roadblocks to extort money from innocent pedestrians and motorists. These acts of hooliganism are against the spirit of the Constitution in respect to the freedom to demonstrate which obligates all to be unarmed and peaceful, Article 38 on the right to political participation, the Penal Code and the Election Offences Act.

The Commission is also increasingly concerned over the rise of politically instigated vigilante groupings that have mounted attacks on members of the public.

The Commission reminds all those who continue to disregard the rule of law that rights come with responsibilities. In the same breadth that people claim rights, they must be aware that infringing other people’s rights - including violently targeting security agents who are on duty - is a violation of the Constitution.

c) IEBC’s management of the 26th October Polls

Where the polling proceeded, the Commission notes that in all the stations monitored, the IEBC officers opened the polling stations on time and provided all the relevant electoral materials including the manual register and KIEMs supervisor validation form which substituted Form 32A used during the August 8th 2017 General Election. The Commission further noted a great improvement at the polling stations which were properly labelled and well demarcated. The line marshals had also improved the process of identification and prioritization of vulnerable voters.

Similarly, we noted that at the Constituency Tallying Centres, an improved environment was provided for the observers to monitor the
process and capturing the results in the requisite Forms 34A and 34B. It was noted that once Form 34A was received and verified by the Constituency Returning Officer, the same was immediately announced. Forms 34B were also availed to observers. We noted that the IEBC staff exhibited more confidence and know-how in their work even in situations where the KIEMS failed to work.

However, the Commission noted low voter turnout especially in the areas where there had been political declarations of boycotting the elections. Further, the Commission also noted that IEBC changed the venues of more than fifty (50) Constituency Tallying Centres without gazettlement as required by the Election (General) Regulations, 2012, Regulation 7. However, the provision requires changes to be gazetted three (3) months prior to an election, yet the IEBC only had 60 days to conduct fresh election. In some places it was necessary to substitute the Constituency Tallying Centres which were learning centres given that the schools were in session.

Further, the Commission noted that in all polling stations monitored, there were only Jubilee agents and due to this gap many presiding officers called on the voters present to witness the accountability process in respect to opening and closing of the ballot boxes. Also in a majority of the polling stations, there were few observers who were mainly representatives from ELOG, CJPC, KHRC, among others. The absence of other agents and reduced number of observers was a departure from the norm.

Violation of the Rights of the Child
The Constitution of Kenya under Article 53 provides for the protection of the child’s best interest as being paramount. It is also mandatory to protect children from all forms of violence and abuse. Contrary to these provisions, the Commission noted with grave concern the escalating involvement and the participation of children during the political protests where many fell victim as casualties during the
ensuing running battles. The Commission also documented several cases, where children who were either in school including in kindergarten like in Nyalenda in Kisumu County and also in the privacy of their homes, sprayed with tear gas during the running battles between the police and the protestors. They indeed bore the brunt of the use of excessive force due to inhaling of the toxic gas, harassment of their parents at home and the stray bullets that killed two (a 17 year old and a 14 year old) and injured a number, the youngest being two years old. The Commission also notes with concern that in some areas children also joined in celebratory demonstrations where some ended up suffering injuries as was in one of the reported cases in Mai Mahiu, Nakuru County.

The Commission calls on all actors to put in centrality the rights and needs of the children in the current political context as they are the future of our generation. In situations where the National Police Service is called upon to ensure public order and safety, appropriate mechanisms must be put in place to ensure that no child is affected as a result of the police actions as envisaged in the National Police Service Standing Orders. The Commission calls on the relevant agencies to investigate these actions and hold all the individual Police Officers culpable of these child rights violations. The Commission further calls on all the County Commissioners to work closely with County Children Coordinators in rehabilitating through psychosocial support services, monitoring and reporting all child rights violations during this post-election period. In addition, we call on all parents, guardians and the general public to take appropriate measures to ensure children remain safe even during this post-election period. Any violations of children rights should be reported to the Commission’s toll free hotline 0800 720 627 or the Child Help Line 116.

**Rights and Roles of the Media**
The Commission lauds the media for their professional conduct and electoral updates all through the electoral process. We also acknowledge the difficult environment in which many of the reporters
and correspondents operated in to ensure that they reported first-hand and even live updates as events unfolded in many of the counties. A number of these reporters also assisted the Commission in responding to distress calls especially where the monitors were not present.

However, the Commission noted the critical errors that were made during the display of election results from some Constituencies. At one point, one of the media houses displayed one consistent figure for Lamu West, Wundanyi, Rabai, Ganze and Mwatate constituencies. This, though a mistake, was quickly captured and made several rounds on social media. The parallel tally of the polls by the media houses if not carefully monitored and mistakes replicated in future pose the danger of fueling tension and denting the credibility of the election process.

Further, the Commission takes issue with the threats to the security of members of the media fraternity. The Commission condemns the threats to media houses by politicians and the rising attacks of journalists with the most recent case as witnessed live on 31st October 2017 where two journalists from Citizen TV and Nation TV were attacked and assaulted at the political party headquarters of Wiper Democratic Party. We also condemn all acts of violence that have been directed to the media by the security officers as well as from the civilians. We ask for speedy investigations and prosecution of the perpetrators by the National Police Service and Office of the Director of Public Prosecutions. It should be noted that a threat to the media is an affront on the people’s right to information under Article 35 of the Constitution and a threat to democracy.

**Current Political Situation**
The IEBC announced the Presidential winner on Monday 30th October 2017. This announcement has been received with mixed reaction with varied positions that have continued to create uncertainty and threaten our stability as the Republic of Kenya. Indeed under the law,
the results can be challenged at the Supreme Court within seven days of declaration of the winner hence the country is still in an electioneering period.

We note the remarks made by both Jubilee and NASA leaders, each having opinions and positions that have continued to deeply polarize and divide the nation especially along ethnic and regional lines. Such a hostile political environment provides room for escalation of gross human rights violations especially on the vulnerable members of society especially women, children, elderly and persons living with disability. The Commission calls upon all the leaders of both the political divides to put the Kenya citizens and Kenya first and embark on interventions that will restore the integrity, peace, love and unity of our beloved nation, Kenya.

The Commission insists, that the rule of law and Constitutionalism must be applied by all to restore the spirit of our democratic societies. Any disputes or misunderstands are best resolved through dialogue or through the Judiciary. We urge all parties to engage in dialogue with a singular view of addressing once and for all the seemingly endemic challenge of conducting free, fair and credible election at every general election cycle.

The Commission monitors remain on the ground monitoring the post-election environment. The Commission continues to promote and call for a culture of human rights in the Republic of Kenya by all public and private organs as well as the general public.

Finally, the Commission reminds all actors that the KCSE exams are on-going. We must do everything we can to ensure that the candidates complete their exams in a conducive environment. We owe them a duty of care.

Kagwiria Mbogori
Chairperson
Kenya National Commission on Human Rights