**AFRICAN UNION**



**AFRICAN UNION ELECTION OBSERVATION MISSION**

**TO THE 8 AUGUST 2017 GENERAL ELECTIONS**

**AND**

**THE 26 OCTOBER 2017 FRESH PRESIDENTIAL ELECTION**

**IN THE REPUBLIC OF KENYA**

**FINAL REPORT**

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The African Union Election Observation Mission (AUEOM) to the Republic of Kenya expresses its appreciation to the various stakeholders and institutions whose support and cooperation contributed to the success of the Mission.

The AUEOM is particularly grateful to the Government of Kenya and the Independent Electoral and Boundaries Commission (IEBC) for their assistance throughout the duration of the Mission.

The AUEOM appreciates the valuable leadership provided by His Excellency, Thabo Mbeki, former President of the Republic of South Africa. The Mission is also thankful to the Chairperson of the African Union, His Excellency Moussa Faki Mahamat, and the Commissioner for Political Affairs, H.E. Minata Samate-Cessouma, for deploying their good offices to support the implementation of the mandate of the AUEOM in Kenya.

Finally, the Mission appreciates the dedication of its technical team from the African Union Commission and the Electoral Institute for Sustainable Democracy in Africa (EISA), as well as the commitment of its observers, whose diligent reporting on the electoral process was crucial to the success of the AUEOM.

**ACRONYMS**

**ACDEG** African Charter on Democracy, Elections and Governance

**APRM** African Peer Review Mechanism

**AU** African Union

**AUC** African Union Commission

**AUEOM** African Union Election Observation Mission

**BVR** Biometric Voter Registration

**COMESA** Common Market for Eastern and Southern Africa

**CSOs** Civil Society Organisations

**EAC** East African Community

**ELOG** Election Observation Group

**EU** European Union

**EVIDS** Electronic Voter Identification System

**ETR** Electronic Transmission of Results

**EISA** Electoral Institute for Sustainable Democracy in Africa

**FPTP** First-Past-the-Post

**HoM** Head of Mission

**ICGLR** International Conference of the Great Lakes Region

**IEBC** Independent Electoral and Boundaries Commission

**IGAD** Intergovernmental Authority for Development in Eastern Africa

**KIEMS** Kenya Integrated Election Management System

**KPMG** Klynveld Peat Marwick Goerdeler

**LTOs** Long-Term Observers

**NASA** National Super Alliance

**NDI** National Democratic Institute

**NCIC** National Cohesion and Integration Commission

**NTC** National Tally Centre

**ODM** Orange Democratic Movement

**PAM** Pre-election Assessment Mission

**PAP** Pan African Parliament

**PWDs** People Living with Disabilities

**STOs** Short-Term Observers

**TCC** The Carter Center

**EXECUTIVE SUMMARY**

On 8 August 2017, the Republic of Kenya held General Elections to elect a President, Members of the National Assembly, Women Representatives of the National Assembly, Senators, Governors and Members of County Assemblies. The IEBC declared the Hon. Uhuru Kenyatta elected as President. However, following a petition to the Supreme Court by the opposition National Super Alliance, the Supreme Court on 1 September 2017 nullified the results of the Presidential election and ordered a fresh Election that was subsequently held on 26 October 2017.

At the invitation of the Government and the Independent Electoral and Boundaries Commission (IEBC) of the Republic of Kenya, the Chairperson of the African Union Commission deployed an African Union Election Observation Mission (AUEOM) to both Elections.[[1]](#footnote-1) This followed a pre-election assessment mission (PAM) conducted in Kenya from 18 – 27 June 2017. The objectives of the AUEOMs were, among others, to provide an independent, objective and impartial assessment of the preparations and conduct of the 2017 elections and assess the extent to which the general elections complied with the legal framework of Kenya as well as regional, continental and international instruments for democratic elections that Kenya has ratified. Other objectives were to offer recommendations for improvement in future electoral processes, contribute to the consolidation of peace and stability in the country and demonstrate the African Union’s solidarity and support for Kenya’s democratic and electoral processes.

Following its observation, the AUEOM concluded that the IEBC of the Republic of Kenya conducted the elections within a context characterised by lack of trust and limited dialogue among electoral stakeholders. Notwithstanding these limitations, the AUEOM commended the people of Kenya, political parties and candidates for their commitment to entrenching democracy through the ballot box.

Based on its observations and findings, the AUEOM offers the following recommendations to improve future electoral processes.

***To the Executive***

* Strengthen national mechanisms for reconciliation, national cohesion and integration among the various ethnic groups in the country, and address the important challenge of gender equality; and
* Take steps, in collaboration with the legislature, to ratify the African Charter on Democracy, Elections and Governance (ACDEG).

***To the Legislature***

* Grant legal backing to the regulations submitted for the implementation of Section 6 of the Party Campaign Finance Act; and
* Enact legislation that enables the full implementation of the 2/3 Gender principle.

***To the IEBC***

* Undertake a comprehensive audit of the voter register in collaboration with relevant stakeholders before the next elections;
* Strengthen stakeholder engagement and dialogue especially with political parties via the Interparty Committee to facilitate the amicable resolution of disputes and, where possible, avoid lengthy court proceedings;
* Evolve new processes to facilitate continuous stakeholder engagements long before the election period;
* Revisit the transmission, reconciliation and counting procedures to eliminate any grounds for the Courts to invalidate elections because of technical errors;
* Periodically train polling officials on the use of Kenya Integrated Election Management System (KIEMS) to ensure their familiarisation with the equipment;
* A thorough review of technology used to maximise electoral integrity and advance planning and operationalisation of new technology to allow enough time for public consultation, field and security testing as well as training;
* Intensive and timely civic and voter education to educate voters, aimed at reducing the number of stray ballots;
* Consider making special arrangements for People Living with Disabilities(PWDs) and the aged to facilitate easy accessibility to polling stations;
* Consider the revision of the election regulations to guarantee the secrecy of votes for assisted voters;
* Ensure that the results transmission process is clear and understandable to all stakeholders; and
* Distinguish ballot box lids in subsequent elections to avoid confusion when voters have to choose candidates for different positions.

***To Political Parties***

* Adopt measures aimed at improving women’s participation and representation in elected positions and address gender equality through internal party regulations and structures;
* Provide sufficient and continuous training of party agents on electoral processes;
* Refrain from the use of divisive language during campaigning;
* Encourage members to participate in political activities in a peaceful manner;
* Desist from forming and organising party youth groups with the intention of stirring up election-related violence; and
* Avoid public announcements of election results before their formal announcement by the IEBC.

***To the Media***

* Ensure more equitable, balanced and unbiased reporting of electoral campaigning and political party activities;
* Strive for responsible and ethical reporting of electoral processes to contribute to a peaceful atmosphere before, during and after elections; and
* Develop appropriate self-regulatory mechanisms.

1. **INTRODUCTION**

At the invitation of the Government and the Independent Electoral and Boundaries Commission (IEBC), of the Republic of Kenya, the Chairperson of the African Union Commission (AUC), His Excellency Moussa Faki Mahamat, deployed the African Union Election Observation Mission (AUEOM) to observe the 8 August 2017 General Elections and the 26 October Fresh Presidential Election in Kenya.

The African Union Election Observation Mission (AUEOM) was led by His Excellency, Thabo Mbeki, former President of the Republic of South Africa. The AUEOM deployed to the 8 August General Elections, 90 Short-Term Observers (STOs) and 14 Long-Term observers (LTOs). AU observers were drawn from the African Union Permanent Representatives Committee (PRC), the Pan-African Parliament (PAP), Election Management Bodies, Civil Society Organisations (CSOs), Think Tanks and Academia.

The AUEOM derived its mandate from the principles and standards for the conduct of democratic elections enshrined in the African Charter on Democracy, Elections and Governance (ACDEG); the OAU/AU Declaration on Principles Governing Democratic Elections in Africa; the African Peer Review Mechanism (APRM); the Guidelines for AU Electoral Observation and Monitoring Missions; the Declaration of Principles on International Election Observation; and the legal framework for the conduct of elections in Kenya.[[2]](#footnote-2)

The objectives of the AUEOM were, among others, to provide an independent, objective, and impartial assessment of the preparations and conduct of the 2017 elections and assess the extent to which the general elections complied with the legal framework of Kenya as well as regional, continental, and international instruments for democratic elections that Kenya has ratified. By offering recommendations as we do in this report, the AUEOM is also contributing to the improvement in future electoral processes and thus contribute to the consolidation of peace and stability in the country. The AUEOM was also a practical expression of the concept and practice of African solidarity.

To achieve its objectives, the AUEOM adopted the following methodology:

* From 18 – 27 June 2017, the African Union deployed a Pre-Election Assessment Mission (PAM) to Kenya to assess the state of preparations ahead of the General Elections by institutions and stakeholders, and to examine the political climate within which the elections were to take place. The PAM also offered recommendations that informed the scope of the African Union’s engagement in the electoral process including the deployment of election observers and preventive diplomacy engagements.
* Prior to the 8 August General Elections, a High-level pre-election visit was undertaken to Kenya by the Chairperson of the African Union, H.E. Moussa Faki Mahamat, the Head of Mission (HoM), H.E. Thabo Mbeki and the Commissioner for Political Affairs, H.E Minata Samate-Cessouma. During the visit, consultations were held with the incumbent President of Kenya and presidential candidate of the Jubilee Party, H.E. Uhuru Kenyatta; the leader of the main opposition group and presidential candidate of the National Super Alliance (NASA), Rt. Hon. Raila Odinga; members of the African diplomatic corps; the Inspector General of the Kenyan Police Service; and other key stakeholders in Kenya. Assurances of the AU’s support to the electoral process were given to key stakeholders.
* The Mission deployed 14 LTOs to 29 of the 47 counties of Kenya from 3 July to 26 August 2017 to assess key elements and progress of the electoral process. During this period, the LTOs held meetings with representatives of political parties, the IEBC, the Kenya Police Service, CSOs and other relevant electoral stakeholders at national and county levels. The LTOs also observed key aspects of the electoral process before the arrival and departure of STOs. These included political party campaigns, training of electoral personnel, distribution of election materials by the IEBC, Election Day procedures as well as the simulation of the transmission of results from polling stations and constituency tallying centres to the National Tally Centre (NTC).
* The LTOs were joined by 90 STOs who were deployed from 6 to 14 August 2017. Prior to their deployment, the short-term observers participated in a three-day pre-election orientation programme during which they received briefings from Kenyan stakeholders and a refresher training on the AU methodology for observation as well as the code of conduct for election observers.
* On Election Day, 43 AU observer teams visited 464 polling stations spread across 33 of the 47 counties. Observers were equipped with smart tablets with which they transmitted their observations in real time.
* On 2 August 2017, the AUEOM issued a statement on its findings on the pre-election phase.[[3]](#footnote-3) On 10 August, it issued a preliminary statement on its findings up until the close of polling on 8 August 2017.[[4]](#footnote-4)
* During the immediate post-election period of 8 August 2017 General Elections, the LTOs continued observing post-electoral developments, including results collation, announcement and electoral dispute resolution processes until 26 August when they departed the country.
* In consideration of the context of the Fresh Presidential Election, the AUEOM adopted a methodology that allowed long-term technical assessment of the process through the deployment of a core team of five thematic experts from 29 September to 9 November 2017.
* The methodology also included an assessment of the polling and results tallying procedures through the deployment of 40 STOs from 24 to 28 October 2017. Prior to deployment, the STOs underwent a two-day briefing and orientation programme.
* On the day of the Fresh Presidential Election (26 October 2017), 19 AU observer teams visited 195 polling stations spread across 18 of the 47 counties in Kenya.
* In response to the lessons learnt from the Supreme Court Judgement of 1 September, an expert on elections information technology was included in the technical support team to enable the AUEOM to make an informed assessment of the use of technology in the Fresh Presidential Election.
* On 31 October the Mission issued a preliminary statement on its observations up until the announcement of the results of the Fresh Presidential Election.[[5]](#footnote-5)
* The LTOs remained in the country to assess the immediate post-election environment of the Fresh Presidential Election until their departure on 9 November 2017.
* Prior to both election days, the HoM among other briefings held high-level consultations with national stakeholders such as the Acting Cabinet Secretary at the Ministry of Interior, Commissioners of the IEBC, leaders and key representatives of political parties and CSOs. The HoM also engaged in coordination meetings with heads of international election observer missions including The Carter Center, the Commonwealth Observer Group, European Union, National Democratic Institute (NDI), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Intergovernmental Authority for Development in East Africa (IGAD) and the International Conference of the Great Lakes Region (ICGLR). Joint communiqués were issued after each meeting.[[6]](#footnote-6) These consultations further contributed to the AUEOM’s assessment of the process. President Mbeki also issued two public statements ahead of Election Days. These statements generally urged support for the electoral process while calling for a peaceful conduct of the elections.

This final report of the AUEOM presents a detailed account of its findings, overall assessment of the 2017 General Elections and fresh Presidential election and recommendations for future elections in the Republic of Kenya.

1. **PRE-ELECTION FINDINGS**

## Legal and Institutional Framework

The Republic of Kenya practices a Presidential system of government in which the President exercises executive authority with the assistance of the Vice/Deputy President and Cabinet Secretaries. Legislative power is exercised by Parliament made up of the National Assembly and Senate. There is a Judiciary, which is independent of the Executive and the Legislature. The country runs a multiparty democracy where the President is constitutionally allowed to serve a maximum of two five-year terms. The incumbent president was elected in 2013 and was therefore seeking a second term mandate.

The legal framework governing elections in Kenya provides for and guarantees the holding of regular and periodic elections in conformity with regional, continental and international conventions to which Kenya is party. The legal framework includes *inter alia*: The Constitution of the Republic of Kenya 2010 (the 2010 Constitution); The Political Parties Act 2011, The Elections Act 2011, The Independent Electoral and Boundaries Commission Act 2011, The Elections Offences Act 2016, Leadership and Integrity Act 2012, Supreme Court Act No. 11 of 2011, Electoral Regulations/Subsidiary Law Number 24 of 2012, and the Public Order Act, 1951.

The 2010 Constitution upholds Kenya as a unitary state with a devolved system of government involving 47 counties and a bicameral legislature with reserved seats for female representatives and special interest groups. The Constitution also provides for County Assemblies in each of the 47 Counties. However, unlike a federal political system where the federal government and its states share sovereignty, state sovereignty in Kenya resides in the central government. Under the current political system, the power devolved to the County governments is only in respect of specific functions listed under the Fourth Schedule of the Constitution, as well as Article 192, which confers to the President, the power to suspend a county government under certain conditions.

Under Article 1 of the Constitution, all sovereign power belongs to the people of Kenya and should be exercised only in accordance with the Constitution. The people of Kenya may exercise their sovereign power either directly or through democratically elected representatives. The Constitution further provides for the conduct of regular elections that are free from violence, intimidation or corruption; the right to freedom and security for everyone; equal protection before the law, and the right to vote in an election or referendum by universal, direct and secret suffrage. Provision is made for diaspora voting and voting by prisoners in the Presidential election. The date for general elections is enshrined in Article 101 (1) as the second Tuesday of August every 5th year.

The underlying principles of the electoral system are stipulated in the Constitution. For instance, Article 81 (e) outlines the principles of free and fair elections as characterised by secret ballot, freedom from violence, intimidation or corruption; conducted by an independent body; transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. Article 138 further establishes procedures for presidential elections, including the grounds for declaring winners. Article 140 also provides the grounds on which the validity of presidential elections can be challenged.

Article 88(1) of the Constitution establishes the IEBC. The IEBC Act of 2011 operationalises the IEBC. The IEBC is also empowered to introduce regulations consistent with the general legal framework. The Elections Act No. 11 of 2011 regulates the management of elections by the IEBC including registration of voters, receipt of nominations, regulation of campaigns and the conduct of polls in line with international standards. It regulates the conduct of elections for different elective offices and referenda. It also contains the Electoral Code of Conduct. The Code enjoins candidates, political parties and officials, among other undertakings, to condemn, avoid and take steps to prevent violence and intimidation. The Act also contains regulations, which outline the procedures for implementing the provisions relevant to elections.

Public officers are prohibited from engaging in activities of political parties or acting as a political party or candidate agents under Section 43 of the Elections Act. The Elections Act also prevents public officials from engaging in political campaigns or other political activity or use public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county. The prohibition under Section 43 does not include Cabinet Secretaries.

The Elections Offences Act, 2016 also reinforces the legal framework for the elections by outlining the various electoral offences. These include offences relating to registering a voter; offences relating to multiple registrations as a voter; offences relating to voting; offences by members and staff of the IEBC; maintenance of secrecy at elections; and issues regarding impersonation, bribery and undue influence, among others. Section 24 of the Elections Offences Act lays out the penalties for breach of the provisions, including a fine, prison term and ineligibility for election or nomination in an election for a period of five years following the date of conviction.

In addition, the Constitution establishes independent commissions, which play critical roles in providing independent oversight on aspects of the electoral process. This includes the National Cohesion and Integration Commission (NCIC), which monitors the use of hate speech during the same period and the Kenya National Human Rights Commission (KNHRC), which monitors violation of human rights during the election period. The Ethics and Anti-Corruption Commission (EACC) is also an important stakeholder in the electoral process for purposes of ensuring the integrity of the election process as well as those who contest for various elective positions. The EACC in its observations of the 08 August elections took note of 26 cases of voter bribery by candidates and their associates in Garissa, Meru, Busia, Wajir, Nyamira and Machakos Counties.[[7]](#footnote-7)

The AUEOM notes that sufficient domestic remedies are included in the legal and institutional framework to ensure the successful conduct of elections. Further, Kenya’s legal framework complies with the standards set out in article 4 of the OAU/AU Declaration on the Principles Governing Democratic Elections as it provides for the conduct of regular, free and fair elections conducted by an independent management body under a system of separation of powers that guarantees the independence of the judiciary.

However, the Mission noted that while Kenya has taken important steps to bring its legal framework in line with its international and regional obligations, it has yet to ratify the African Charter on Democracy, Elections and Governance (ACDEG).

1. **The Electoral System**

The 2010 Constitution provides for six elective positions, specifically, President, Governors, Senators, County Women Members to the National Assembly, Members of the National Assembly and Members of the County Assemblies. The President of the Republic is elected by direct suffrage through a two-round majoritarian system that requires an absolute majority of the valid ballots cast (50%+1), as well as 25% of the votes cast in at least 24 of Kenya’s 47 Counties. In the event that no candidate obtains the required absolute majority, a run-off election is held between the two candidates with the highest votes in the first round.

Members of Kenya’s bicameral parliament (the Senate and National Assembly) are elected for a mandate of five years by a mixed electoral system that includes majoritarian single member constituency system and a closed-list proportional representation system for special seats.

The National Assembly consists of 350 members of which 290 are elected by the first-past-the-post (FPTP) system in single-member constituencies; 47 women representatives elected in single-member constituencies; 12 members representing special interest groups nominated through party lists and allocated in proportion to the seats won by parties in parliament under the FPTP system; and the Speaker who is an *ex-officio* member. The Senate consists of 68 members of which 47 are elected through the FPTP system in single-member constituencies, each county being a constituency for senatorial elections; 16 women senators nominated through party lists; 4 members representing youth and persons with disabilities (2 men and 2 women); and the Speaker who is an *ex-officio* member.

The AUEOM concluded that the electoral system guarantees the democratic principles of inclusivity and non-discrimination. The AUEOM particularly commended the provision of quotas to guarantee the representation of women, youth and persons with disability. While these quotas provide a level of representation, these groups have remained historically under-represented in the political space in Kenya.

The AUEOM, however, noted gaps in the implementation of the legal framework including significant challenges to the implementation of the two-thirds gender parity principle in elective public positions and the fact that the results of the elections did not reflect the 2/3 gender parity principle.

1. **Election Management**

In line with the OAU/AU Declaration on the Principles Governing Democratic Elections, Article 88(1) of the 2010 Constitution and the Independent Electoral and Boundaries Commission Act, 2012 (as amended) provides for the conduct of elections by an independent body – the IEBC.

The IEBC consists of a chairperson and six other members appointed by the President with the approval of the National Assembly (article 250(4) of the Constitution). Members of the Commission serve on a full-time basis for a single term of six years and are not eligible for re-appointment.

The Commission has a mandate to conduct and supervise referenda and elections to an elective office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Specific responsibilities of the Commission are voter registration: boundary delimitation, regulation of party activities and finance; election dispute settlement; candidate registration; voter education; facilitation of election observation, monitoring and evaluation; supervision of candidate nomination; and development of a code of conduct for candidates and parties.[[8]](#footnote-8)

Members of the Commission are recruited through an open recruitment process. Article 254 of the Constitution guarantees the independence of the Commission and precludes it from the control of any person or authority. Article 251 guarantees the security of tenure of members of the Commission as their removal is subject to a petition procedure through the National Assembly and a tribunal, which allows a fair hearing.

The AUEOM assessed the institutional framework for the conduct of elections in Kenya and found these to be compliant with its international obligations and standards as it guarantees the institutional and fiscal independence of the IEBC and security of tenure of its members.

## Political Party and Campaign Finance

The AUEOM noted that the legal framework provided for political party funding through the Political Parties’ Fund, which is administered by the Office of the Registrar of Political Parties (ORPP) and only parties that meet the ORPP’s criteria for access to funding are eligible for consideration. The criteria require that the fund is distributed to parties that would have secured at least 5% of the total number of votes at the preceding general elections and parties with more than two-thirds of its registered office bearers being of a different gender.

Benchmarks set in the law for access to the Political Party Fund were however noted to be too high such that only a few parties qualified for the funds. The Mission considered this as disadvantageous to smaller political parties that do not have equal access to resources. Furthermore, it completely alienates independent candidates who are ineligible to access the fund even though they are required to meet the same requirements as party candidates.

In line with recommendations offered by the AU after the 2013 elections, the Election Campaign Financing Act of 2013 aimed at regulating campaign finance was enacted.TheAct requires that candidates, their agents and a political party campaign financing committees must be registered by the IEBC eight months before the General Election. The Act grants the IEBC the right to make regulations prescribing the manner in which records are to be prepared and maintained, among other requirements. The implementation of Section 6 of the Act which sets out limits on campaign spending was however suspended on the basis of a High Court ruling following a petition by Orange Democratic Movement (ODM) in January 2017. The AUEOM was informed that the petition was influenced by the IEBCs attempt to implement Section 6 of the Act through the publication of a gazette notice setting down expenditure limits by candidates and parties for the campaign period between 8 February and 8 August 2017. ODM argued in its petition that the Election Campaign Financing Act (2013), which came into force on 7 December, 2016 was likely to disenfranchise many candidates and that if the court failed to intervene, the rights to fair competition would be violated. It also argued that the decision by the IEBC to set limits for campaign spending was unfair and discriminatory and that the IEBC’s requirement for all candidates for elective posts to appoint authorized persons and form campaign finance committees was unreasonable. ODM further argued that the IEBC was acting in a vacuum since Parliament had not enacted the laws to enforce the provisions of Section 6 of the Act**.**

The AUEOM noted that the suspension of the Campaign Financing Act, 2013 opened the process to the unregulated use of money during the campaigns, thus impacting on the fairness of the process by tilting the scales in favour of parties and candidates that had access to more resources. Thus, similar to the 2013 elections, the 2017 general elections were conducted without a clear framework for campaign finance regulation. The situation was further compounded by cases of use of state resources during the campaigning period. While the AUEOM was cognisant of provisions of the Leadership and Integrity Act, 2012 which permit the use of state resources by duty bearers, there appeared to be a thin line between political party campaigning and government activities that transformed into party campaigns.

1. **Voter Registration**

In line with its international obligations, the legal provisions for eligibility to vote and criteria for registration of voters guarantee the right of all Kenyan citizens to vote. It also upholds the principle of Universal Adult Suffrage. To be eligible to register as a voter, the law requires an individual to be an adult citizen who is of sound mind and has not been convicted of a crime in the past 5 years. The law also requires a valid passport or national ID card in order to register.

The IEBC undertook continuous registration of voters through the Mass Voter Registration (MVR) exercise conducted in early 2016 and 2017 respectively. At the end of the process, 19,611,423 voters were registered out of which 53% were male, and 47% female.[[9]](#footnote-9) The registration figures showed a 36% increase in the number of registered voters in comparison to the 2013 registration figures of 14,388,781. The total number of youth voters was 9,930,315 representing 51% of the entire voting population. The Commission also recorded 5.2 million new registrants for the elections.

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The compilation of the voters’ register was not without disputes. The AUEOM took note of allegations that the register was bloated with names of deceased voters, multiple registrations as well as underage and illegal registrants. In order to audit, clean and validate the register of voters, the law requires an independent audit of the register.[[10]](#footnote-10) The IEBC awarded the tender for this process to Klynveld Peat Marwick Goerdeler (KPMG) Kenya between 31 March to 30 June 2017 (90-days), to conduct an audit of the voters register in accordance with sections 8 (A) of the Elections Act 2011(as amended). The report of the audit released by KPMG identified 92,277 deceased persons on the voter register. The report also highlighted voter apathy resulting in the failure to register about 6,000 voters including the diaspora community. The AUEOM however, noted that the IEBC complied with recommendations of the audit to expunge 88,602 deceased voters, narrowing the outstanding figure to 3,765. The Mission noted in its pre-election statement that the report of the independent audit was not fully implemented before the elections.

In line with the principle of transparency, a national voter registration display exercise was undertaken from 11 May to 9 June 2017. A similar exercise was undertaken from 15 to 30 May 2017 for the diaspora in five countries namely Burundi, Rwanda, South Africa, Tanzania and Uganda. The display exercise allowed for public inspection and verification of the Register. The AUEOM was informed of the use of the KIEMS technology for voter identification. The Mission took note of the IEBCs belief that the use of the technology and the implementation of the recommendations from KPMG would ensure accuracy for the August general elections. Following the inspection and verification exercise, the IEBC indicated that 5,427 persons could not be identified by their biometrics as opposed to the 36,000 in 2013. Interlocutors indicated that the non-identification of biometric details could have been due to excessive contact of fingers with rough or corrosive surfaces. The Mission noted in the lead up to the elections, dissatisfaction with the amendment, certification and publication of the voters register amongst some stakeholders.

The AUEOM noted that the IEBC implemented various administrative and technological steps to promote the transparency and credibility of the register. Specifically, the Mission noted attempts made by the IEBC to comply with the recommendations from the KPMG audit that required expunging illegitimate voters from the register. The AUEOM was however cognisant of the fact that some of the recommendations could only be effected after the elections. In spite of the IEBC’s attempts at enhancing public confidence in the credibility of the voters’ register, it was noted that the delay in the publication of the final voters’ register (the final register was published on the IEBC website on 21 July 2017 -16 days before Election Day) provided grounds for doubts about the credibility of the register going into the elections.

1. **Party Registration and Candidate Nominations**

Articles 91 and 92 of the Constitution provide for the formation of political parties, while the Political Parties Act of 2011 regulates political party activities. The Constitution requires all political parties to be national in character and to promote the principles of democracy, good governance, active participation and inclusivity. For any political party to be registered, Section 6 of the Act requires the mandatory obligation of a full membership list disaggregated according to ethnicity, regional spread, gender equality and special interest groups to be placed with the Office of the Registrar of Political Parties (ORPP). All political parties are obliged to uphold the constitution, human rights, rule of law, and democratic internal elections.

To be eligible for registration, the Political Parties Act requires political parties to show evidence of membership of not less than 1,000 members, who are registered as voters, in at least half of the counties in Kenya. Therefore, a political party must show membership in at least 24 of the 47 counties, that is at least 24 000 members who are registered voters. For the 2017 General Elections, there were 67 registered political parties in Kenya.

To qualify to run for the office of President, the Constitution requires candidates to be Kenyan citizens by birth, not holding a public office, hold a university degree and be eligible for election as a member of parliament. For other positions, candidates are required to have been Kenyan citizens for the last 10 years. The law provides for party-sponsored candidates and independent candidates.

The AUEOM assessed the legal framework for party registration as compliant with the principles of inclusivity and non-discrimination. Furthermore, the AUEOM assessed the candidature eligibility criteria as a sufficient guarantee of the right to stand.

The six categories of elective positions in the 8 August General elections were contested by a total of 14, 523 candidates,[[11]](#footnote-11) of which 8 candidates (5 parties and 3 independent candidates) contested the presidential election. According to the IEBC, independent candidates and political party aspirants submitted their nomination papers for clearance to the Commission's Returning Officers at the constituency level between May 28 and June 2, 2017. The AUEOM was informed, however, that the primaries conducted earlier in the year had resulted in large numbers of dissatisfied candidates and rejected nominations. This resulted in an increase in the number of independent candidates during the elections. For the gubernatorial elections for instance, out of a total number of 246 contestants, 63, constituting 25 percent, were independent candidates.[[12]](#footnote-12) For the senatorial contest, 86 out of the total number of 349, constituting about 25 percent, were also independent candidates. For the Member of the National Assembly, 605 out of the total 2078, constituting 29 percent, were independent candidates and for the Membership of the County Assemblies, 2918 out of the 12060, constituting 24 percent, were independent candidates. In spite of earlier indications of a good performance by the independent candidates, the AUEOM noted that independent candidates performed quite poorly in the contest for the various elective seats. In the gubernatorial race, for instance, only one (1) independent candidate won. There were no recorded victories for the senatorial contests for any of the independent candidates whilst the membership of the National Assembly recorded nine (9) out of the 300 seats available.

The AUEOM in its assessment of the nominations, however, considered the high number of candidates in the elections as an indication of the competitiveness of the elections and openness of the political process for participation in public affairs.

1. **Civic and Voter Education**

The IEBC has the mandate to conduct civic and voter education in Kenya. The Commission established mechanisms for the provision of continuous voter education and developed a voter education curriculum. While this is commendable, the AUEOM noted that the rollout of the voter education programme was too close to the elections. The Commission also established partnerships and accredited key institutions to provide voter education. The AUEOM noted efforts by the IEBC to bring on board media agencies to accelerate voter education through television and radio. AU LTOs reported that the impact and reach of these agencies was limited especially at the grassroots. Voter education was an important aspect of the 2017 electoral process because of the number of elective positions contested, inclusion of new voters in the register and the introduction of new procedures such as the electronic voter identification system.

Based on the consultations and observation of its LTOs, the AUEOM noted efforts by the IEBC to provide information on voting procedures on its website. The Mission, however, noted the limitations of online outreach and the need for more intensified outreach at the grassroots. Stakeholders consulted by the AUEOM also raised concerns about the inadequate coverage of the voter education initiatives with only two educators deployed per ward across the 1450 wards. The AUEOM noted that the effect of this inadequacy might have accounted for the high number of rejected ballots (403,380)[[13]](#footnote-13) recorded in the 8 August General Elections. With regard to the adequacy of civic education, although the turnout of 79.40% was lower than the 2013 turnout of 85.91%, the Mission considered it as commendable.[[14]](#footnote-14)

The AUEOM noted that ahead of the 26 October 2017 Fresh Presidential Election, voter education efforts were not as intense as prior to the 8 August elections. Furthermore, the highly polarised political context ahead of the election overshadowed non-partisan voter education and mobilisation efforts.

1. **Dispute Resolution**

Kenya’s legal system provides for robust administrative and judicial electoral dispute resolution mechanisms. These include internal political party mechanisms, the Political Parties Dispute Tribunal, the IEBC Elections Dispute Resolution Committee and the Judiciary.

Political parties are required under Section 23 of the Political Parties Act, Second Schedule, to provide political party dispute resolution mechanisms. Section 6 of the Electoral Code of Conduct requires political parties to take reasonable steps to discipline and restrain their party office bearers, employees, candidates, members and persons who support the political party with regard to contravention of the Code or electoral laws.

The Political Parties Dispute Tribunal (PPDT) is a quasi-judicial body established under the Political Parties Act of 2011. Members of the Political Parties Dispute Tribunal (PPDT) are appointed by the Judicial Service Commission with a mandate to resolve disputes between members of a political party; political parties; independent candidates and a political party or coalition partners as well as decisions of the Political Party Registrar. The Tribunal applies rules of evidence and procedure under the Evidence Act and Civil Procedure Act with the necessary modifications. Decisions of the PPDT are not final. Aggrieved parties can approach the High Court on points of law and further appeal to the Court of Appeal and Supreme Court.

The IEBC, pursuant to Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act, has a mandate to settle all electoral disputes excluding election petitions and disputes subsequent to the declaration of election results. The IEBC has the power to prosecute and impose sanctions against a person who commits election offences. The IEBC developed rules and procedures on settlement of disputes in 2012. The rules provide for the procedure of filling, hearing and determination of claims, complaints, challenge or contest relating to any stage of the electoral process (excluding election petitions and disputes subsequent to the declaration of election results).

An Electoral Code of Conduct Committee was established pursuant to section 15 of the Electoral Code of conduct to address complaints received with regard to infringement of the provisions of the Electoral Code of Conduct. The Electoral Code of Conduct Committee may issue a formal warning; a fine as determined by the Commission; and/or issue an order for a specific period or permanently, prohibiting the political party or candidate from using public media, holding particular meetings; demonstrations or marches; entering specified electoral areas for purposes of canvassing for membership or for any other electoral purpose, etc. The Commission is also empowered to institute proceedings in the High Court in case of any alleged infringement of the Code.

The AUEOM, however, noted that the Constitution, the Elections Act 2011 and the Political Parties Act 2011 created overlapping jurisdiction, especially between the IEBC and the PPDT. To this end, the IEBC and PPDT signed a Memorandum of Understanding (MOU) that detailed responsibilities of pre-election disputes arising from party primaries and nominations ahead of the 8 August elections.

The AUEOM noted that the IEBC made crucial interventions in resolving election disputes in the 8 August elections. Concerns were, however, raised by some people regarding an apparent crackdown on opposition offenders while offenders from the ruling parties generally avoided penalties. These claims were noted by the AUEOM.

The Supreme Court handles disputes contesting the result of the Presidential elections. Supreme Court (Presidential Election Petition) Rules 2017 were developed to provide for the process of filing a petition, timelines for hearing and determination of a Presidential election petition under Article 140 of the Constitution.

Article 165 of the Constitution provides the High Court with unlimited original jurisdiction in criminal and civil matters. Disputes can be framed as a violation of the Constitution and political rights (for example, the right to form, participate in forming a political party, participate in the activities of a political party, right to free, fair and regular elections; to be registered as a voter; and to be a candidate for public office or within a political party).[[15]](#footnote-15)

Under Article 87, electoral petitions should be filed within 28 days after the declaration of elections results by the IEBC. The law requires that the judiciary shall hear and determine those matters speedily; and within six months. Article 23(2) of the Constitution devolves original jurisdiction of the High Court to the Magistrates Courts. 92 Magistrates were gazetted to handle election offences. Training for judges, magistrates and judicial staff on electoral dispute resolution was conducted.

The AUEOM observed that the electoral environment was marked by legal contestation on several aspects of the electoral process. The AUEOM noted that the increase in litigation before, during and after the elections was because of deeply entrenched grievances, a deficit of trust in institutions, high levels of competition for positions and the inability of stakeholders to fully utilise non-judicial platforms to resolve disputes. Further, the AUEOM noted that the IEBC faced constraints in addressing stakeholder concerns directly and in good time. Late amendments to the legal framework regulating the elections also compounded the challenges.

1. **THE 8 AUGUST 2017 GENERAL ELECTIONS**

## Background and context

Ahead of the 8 August 2017 General Elections, the environment was marked by general mistrust and breakdown in constructive dialogue and consultation among some of the key electoral stakeholders. This heightened political tensions at both national and local levels. Attacks by the Al Shabaab terrorist group in the northern parts of the country were considered high risk, and some citizens in the north-eastern parts of the country voluntarily migrated to other parts of the country for fear of terrorist or election-related violence. The heavy deployment of security personnel ahead of the elections was observed.

Ethnicity remained a key element in Kenyan politics, as was seen during the campaigns ahead of the elections. The AUEOM particularly noted the entrenched nature of the influence of ethnic formations in the political campaigning. It, however, expressed concern about the proliferation of politically-aligned vigilante groups and the exploitation of ethnic divisions through polarising messages, which could threaten the stability of the state before, during and after the elections.

The AUEOM also noted the legal and electoral reforms implemented based on lessons learnt from the 2013 elections. This included the introduction of the KIEMS that made it possible to send scanned copies of forms 34A and 34B in addition to the raw statistics to the NTC. The AUEOM noted that this system was introduced to address questions of manipulation of results during the process of results transmission from the polling stations to the constituencies and the NTC. The AUEOM also noted the ruling by the Court of Appeal that made constituency-level results final. This was also seen as a means of addressing allegations of results manipulation at the NTC.

The Mission noted with regret the death of Mr Chris Msando, an ICT Manager at the IEBC (under circumstances alleged to be criminal), less than a week to the August Election Day. The Mission, in a statement, called on the IEBC to take steps to ensure that his death did not disrupt the operations of the Kenyan Integrated Election Management System (KIEMS). The Mission noted the IEBC’s public assurances that steps were taken to prevent a disruption in the operations of the KIEMs.

The pre-election period was also characterised by litigation on different aspects of the electoral process. The AUEOM considered these actions as indicative of an open democratic space where citizens were able to seek redress through the Courts.

The AUEOM’s assessment of the pre-election context also highlighted keen contestation among the various political actors at the national and county levels as confirmed by the high number of candidates on the six ballots. The AUEOM, therefore, assessed the context as conducive to the conduct of competitive elections. The Mission, however, registered its concerns about the following challenges:

•Exploitation of ethnic divisions through the use of deeply polarising campaign messages by candidates and their supporters during the campaigns;

•Existence of politically aligned vigilante groups;

•Persistent attacks on the integrity of the Judiciary, IEBC and the Security Service by some political actors; and

•Reports of declining public confidence in the preparedness of the IEBC to conduct the polls.

1. **Electoral Campaigns**

The campaigns were regulated by the Code of Conduct for Political Parties. The official campaign period for the 2017 general elections was from 27 June to 5 August 2017. Many of Kenya’s political parties devoted significant attention to campaigning on social media, with parties employing attractive audio-visuals to augment their messaging.

During the period of deployment, AU LTOs observed 19 campaign events across 13 counties (table 1). The AUEOM noted that political parties were able to conduct their campaign activities without major disruptions except in few cases.

***Table 1: AUEOM Schedule of Campaign Events Attended.***

|  |  |  |  |
| --- | --- | --- | --- |
| **No** | **Date** | **Campaign Candidate/party** | **Location** |
| 1 | 14/7/17 | ODM / NASA; Raila Odinga& Others | Manyatta Ward, Kisumu central constituency |
| 2 | 15/717 | 9 candidates from different parties vying for different positions | Murungu Primary School, Taita Taveta |
| 3 | 17/77 | Jubilee Party; Governor, MP,  Women’s Representative and Senator aspirants | Kivwe, Manyata Constituency |
| 4 | 17/7/17 | Kanu Party; Women’s Representative | Kivwe, Manyata Constituency |
| 5 | 18/7/17 | Jubilee Party; Uhuru Kenyatta & others | Frere Town, Nyali Constituency |
| 6 | 21/7/17 | Jubilee Party; Governor Lusaka | Nzoia Sugar Company, Bungoma |
| 7 | 25/7/17 | NASA Party; Raila Odinga & others | Chuka Market, Meru |
| 8 | 26/7/17 | Independent MP Candidate; J.M Waiganjo | Ol’Jorok Constituency , Nyandarua County |
| 9 | 27/7/17 | Jubilee Party ; John Munene Wabigu, Governor Candidate | Kiruyoga, Kirinyaga Constituency |
| 10 | 27/7/17 | Independent MP Candidate; Lawrence Kamanda Muriwu | Sagala, Kirinyaga Constituency |
| 11 | 30/07/17 | Jubilee Party; Patrick Munene Parto | Chuka, Igambang’ombe Ward, Meru Constituency, |
| 12 | 30/07/17 | NASA Coalition; Raila Odinga & others | Afraha Stadium, Nakuru County |
| 13 | 31/07/17 | Jubilee Party; Uhuru Kenyatta & others | Bomet Town: Green Stadium,  Bomet County. |
| 14 | 2/08/17 | Jubilee Party; Uhuru Kenyatta & others | Bungoma County |
| 15 | 2/08/17 | Jubilee Party; Uhuru Kenyatta & others | Tononoka Grounds, Mombasa |
| 16 | 3/08/17 | NASA Coalition – Raila Odinga & others | Bukhungu Stadium, Kakamega County |
| 17 | 3/8/17 | NASA Coalition Rally | Manyata Ward, Kisumu Central Constituency |
| 18 | 05/08/17 | Jubilee – Uhuru & others | Uhuru Park, Nairobi |
| 19 | 06/08/17 | NASA – Raila Odinga & others | Uhuru Park, Nairobi |

While the campaign messages often reflected ethnic sentiments and the integrity of political actors the AUEOM noted police vigilance in addressing hate speech and provocative language as well as the IEBC’s efforts at enforcing the Code of Conduct. In Nairobi, the IEBC Disputes Committee penalised some candidates found in violation of the Electoral Act, which states that a person shall qualify to be nominated as an independent candidate for presidential, parliamentary, and county elections if that person has not been a member of a political party for at least three months preceding the date of election. It was against that background that some independent candidates were fined for putting up posters that had party symbols or colours alongside their own.

The AUEOM observed that the suspension of the Campaign Financing Act, 2013 and the absence of campaign expenditure ceilings created an uneven playing field for parties and candidates during the campaigns. Allegations regarding the use of state resources during campaigning were also made. This included propagation of party ideals and promises at official Government functions. While this was difficult to regulate, the AUEOM noted that it contributed to the perception of an uneven playing field in the pre-election environment. Access to the media during the campaigns was also assessed by the AUEOM as tilted in favour of the bigger political parties with limited coverage for the activities of smaller parties.

1. **Preparedness of the IEBC**

The AUEOM noted that the reconstitution of the IEBC about seven (7) months before the elections might have impacted on its preparedness for the 8 August General Elections. Against the background of the alleged declining public trust in the Commission, the new Commission faced the daunting task of preparing for the general elections whilst working to build public confidence in its impartiality and technical capacity to deliver credible and transparent elections.

The lead-up to the elections was also characterised by legal challenges to operational regulations and decisions of the Commission. These included contestations over the finality of polling station results and the printing of the presidential ballot papers. While applauding political stakeholders for resorting to legal channels in the settlement of electoral disputes, the AUEOM noted that the various court cases against the IEBC and the strict constitutional provision of 8 August as Election Day, limited the timeframe available for the IEBC to prepare for the elections. Assurances from the IEBC of its operational and technical readiness to deliver democratic, credible and peaceful elections were however noted.

The AUEOM further noted that some of the issues that were challenged in court and which lingered throughout the electoral process could have been addressed through an effective inter-party dialogue, the absence of which left political parties in doubt about the capacity and credibility of the Commission to deliver on its mandate.

There were efforts made by the Commission to address the technical failures experienced in 2013 through the development and adoption of the Kenya Integrated Election Management System (KIEMS) which comprised of three elements: The Biometric Voter Registration (BVR), Biometric Voter Identification (BVI) and Electronic Transmission of Results (ETR). The alleged murder of Chris Msando, the IEBC ICT Director, less than one week to the elections raised concerns about the management of the KIEMS, particularly following the postponement of a planned nationwide simulation exercise for transmission of results August Elections. The IEBC, however, took steps to reassure the public that his death would not negatively influence the operational functionality of the KIEMS. Despite these assurances, the credibility of the result management process was questioned by the NASA, based on allegations that the late Msando’s log-in credentials were used to access the KIEMS by unknown persons during the results management process.

The AUEOM observed the dry run of the results transmission process from selected constituencies to the NTC. To set up infrastructure to facilitate and strengthen transmission of results, the IEBC contracted three telecommunication network providers namely, Airtel, Safaricom and Telkom. Based on its observation of the voting procedures, the AUEOM noted that the BVI aspect of the KIEMS functioned in 91.6% of the stations visited by observers on Election Day, albeit with a slow start.

The AUEOM noted the High Court’s ruling that allowed the IEBC to deploy an alternative backup system should there be a breakdown of the KIEMS. The AUEOM also received concerns by some stakeholders regarding the lack of clarity on what constituted the ‘complementary system’ and the grounds for deploying the complementary system[[16]](#footnote-16). Specifically, adequate information on the grounds on which the presiding officers would resort to the complementary system was lacking. This contributed to allegations made by some stakeholders that the system could be manipulated.

Ahead of the election, the IEBC established 40,833 polling stations across the country and recruited and trained 360,000 staff for election duty. AU LTOs observed some training sessions in Nairobi, Nakuru and Kakamega.

In its assessment of the preparedness of the IEBC for the elections, the AUEOM was of the view that the mechanisms adopted by the Commission to ensure the operational success of the elections were satisfactory. Concerns from some key stakeholders about the Commissions capacity and credibility were however noted.

1. **Dispute Resolution**

The AUEOM observed that the electoral environment was marked by legal contestation regarding numerous aspects of the electoral process. The AUEOM noted that the increase in litigation before, during and after the elections was as a result of deeply entrenched grievances, a deficit of trust in institutions, high levels of competition for positions and the inability of stakeholders to fully utilise non-judicial platforms to resolve disputes.

Three key rulings ahead of the 8 August election enabled the IEBC to advance in its preparations for the elections and avoid a constitutional crisis that would have arisen out of its inability to meet the Constitutional deadline. In the first ruling the High Court on 19 July 2017, ruled to dismiss an application to nullify the procurement of the Kenya Integrated Election Management System (KIEMS) on the grounds that its procurement by IEBC failed to meet the standards set in law namely simplicity, accuracy, security, accountability and transparency. The High Court ruled that the IEBC’s Technical Committee worked in consultation with relevant agencies to ensure that the devices were procured in line with relevant Kenyan laws. The Court also found that the IEBC demonstrated that there was public participation sufficient enough to satisfy the requirements of Public Participation as per Article 10(2) of the Constitution of Kenya.[[17]](#footnote-17)

In the second ruling, a five-member panel of the Court of Appeal[[18]](#footnote-18) sitting on 20 July 2017, unanimously ruled that the High Court exercised its discretion wrongly in ordering for the re-tendering of the printing of the presidential election ballots without due regard to the constitutional timelines within which the elections must be held. The Court of Appeal further ruled that public participation was not a mandatory requirement in law that regulates direct procurement. It therefore ruled that the IEBC, which had used a direct tender to award Al Ghurair the contract for the printing of the presidential ballots, was not in breach of Article 10(2) of the Constitution which calls for public participation in the tendering process.

The Court of Appeal overturned the High Court’s ruling that timelines for the procurement of ballots were operational and not statutory. The Court determined, in that regard, that the issue of timelines was statutory since the tendering process was well spelt out in the Public Procurement and Disposal Act. The Court argued that if the IEBC had to restart the tendering process of the procurement of ballot papers, which could mean surpassing the set constitutional requirement that the elections would have to be held on 8 August. Having upheld the High Court’s decision that NASA had failed to prove any improper association between Al Ghurair and President Uhuru Kenyatta, the IEBC’s contract with Al Ghurair for the printing of the presidential ballots was restored.

In the third key pre-election ruling, a NASA application at the High Court that sought an order to stop the deployment of a complementary system in the event of a failure of the KIEMS was dismissed. Had the application succeeded, it would have compelled the IEBC to exclusively use the electronic system on polling day. In its ruling on 21 July 2017, the Court declined to give orders as prayed for by NASA arguing that if there was no alternative mechanism to allow Kenyans to vote and the IEBC to transmit results, the entire election could be thrown into jeopardy. The Court also agreed with the arguments advanced by the IEBC that such an action would disenfranchise voters and run counter to the political rights of citizens as enshrined in the constitution.

These three judicial rulings in favour of the IEBC gave the Commission some momentum going into the 8 August elections. For the judiciary, however, the judgement attracted praise and condemnation from respective sides of the political divide depending on whose interests the judgements were deemed to be in favour of. The AUEOM expressed concern that statements from political actors that impinged on the integrity of the judiciary also had the tendency to reduce public confidence in the neutrality of the judiciary.

Apart from the Courts, the AUEOM also noted that the IEBC Complaints Committee made crucial interventions in resolving election disputes. These included rulings which bordered on contraventions of the Electoral Code of Conduct. Concerns were however raised regarding an apparent crackdown on opposition offenders while offenders from the ruling Parties avoided penalties. These claims were noted by the AUEOM.

1. **Election Day Observations**

On Election Day, 43 AUEOM teams observed procedures in a total of 464 polling stations across 33 Counties of Kenya. The AUEOM observed that Election Day was largely peaceful except for an isolated incident reported in Mombasa where shots were fired to disperse a crowd at the Frere Town Primary School polling station in Nyali constituency.

The AUEOM observed that Kenyans commendably showed much enthusiasm and willingness to participate in the process as indicated by the long queues witnessed at the opening of the polls. However, 19 of the 41 polling stations observed opened late mainly due to slow preparations by polling officials. The AUEOM noted with satisfaction the flexibility demonstrated by the IEBC in extending the voting period for the polling stations that opened late to make up for lost time. The AUEOM assessed the opening of the poll to be conducted in a transparent manner in line with the stipulated regulations, albeit with a slow start as a result of technical challenges with logging on to the BVI devices.

The AUEOM assessed the stipulated voting procedures as largely upholding the secrecy of the ballot. However, in the case of voters requiring assistance, the secrecy of their ballot was compromised as party agents were required to witness the assistance provided by polling officials when requested.

For ease of voting, the colour of ballot papers was aligned to the colours of the ballot box lids.[[19]](#footnote-19) The AUEOM however observed that the colours of the ballot box lids were not clearly distinguishable, as the selected colours were quite pale and similar, for instance colours like yellow and cream. It was therefore observed that voters required strict guidance on placing their ballot in the appropriate boxes to avoid invalidation of their ballot as ‘stray ballot.’ The AUEOM observed that the use of transparent ballot boxes marked with the category of election made it easier for voters to identify the boxes besides the colours of the lids. It also contributed to the transparency of the process. There were, however, few cases where the Presiding Officers had placed the wrong colour of lid on the labelled boxes. Such cases were resolved in agreement with party agents that the presiding officers should re-label the boxes with the category of election matching the colour of lid placed on the already sealed boxes.

Overall, the AUEOM assessed the use of technology and the complementary means of verification as flexible enough to prevent exclusion of eligible voters on the basis of non-verification of their identity by the BVID. Efforts by the IEBC and the Government of Kenya to make arrangements for prisoners and the Kenyan Diaspora in five selected countries[[20]](#footnote-20) to vote was commendable and were considered by the AUEOM as a milestone towards inclusive elections. The Mission expressed hope to see an extension of out-of-country voting to other countries in future elections.

The AUEOM assessed the voting process as transparent and largely peaceful, albeit with a slow start. All voters were granted free access to all polling stations across the country to cast their votes in secrecy. Priority was given to the aged, persons with disability, expectant and nursing mothers. The AUEOM did not observe any irregularities during the voting process.

The AUEOM observed that polling officials undertook their duties in a professional and neutral manner in the stations visited. The Mission, however, noted gaps in their familiarity with the use of the BVI system, which contributed to the slow start of the process. The AUEOM, however, commended the efforts of Presiding Officers to process the voters in the queues as quickly as possible. Whilst there were lengthy queues in the first 5 hours of polling, it was observed that the queues had significantly reduced and in some cases, the queues had disappeared in the last 3 hours of polling.

AUEOM observers were present at the closing and counting in 41 polling stations and observed that closing and counting procedures were followed in accordance with the law. The observers noted that few stations did not close at the stipulated closing time, inured to make up for lost time at the opening as provided by IEBC guidelines. The counting proceeded in a generally orderly manner in the presence of independent observers and party agents in most stations visited with the exception of Mombasa where AU observers reported sporadic gunshots outside Frere Town Primary School polling station in Nyali constituency. The Mission equally noted reports of isolated incidences of disruption in some other polling stations. Observers noted that all party agents who were present at the count consented and signed the results before it was scanned and transmitted electronically and a copy posted outside the station by the Presiding officers.

1. **Results Management**

At the end of voting, result tabulation commenced with the presidential ballots. The process was conducted peacefully across the country in the presence of polling officials, political party agents and observers. Data from the forms 34A, were keyed into the KIEMS devices and also scanned and transmitted electronically to the constituency and national tally centre. The AUEOM noted that some scanned copies (over 36,000) of forms 34A were uploaded on the public portal on the IEBC website.[[21]](#footnote-21) The final declaration of results was based on inputted data from forms 34A from all 40,883 polling stations, form 34Bs from the 290 constituencies and the final form 34C at the NTC.[[22]](#footnote-22) The Mission also noted controversies around the authenticity of the scanned forms that were uploaded and the IEBC’s inability to upload scanned images of form 34A from all the 40,883 polling stations.

The AUEOM noted that the tabulation process was well secured with noticeable police presence across the country. AU LTOs reported that in the centres visited, the process was conducted in line with stipulated laws and election regulations in Kenya. AU LTOs reported that transmission of results from the polling stations to the constituency tally centres (CTC) and NTC was largely successful with limited cases of failed transmission recorded across the country. Transmission of results from polling station to the constituency, county and NTC was largely successful with limited incidences. The AUEOM noted slow transmission in Busia and Kakamega. Electoral officials attributed the slow speed to network congestion during transmission of results to the NTC. The mission noted smooth tabulation processes at the constituency tally centres visited in Kisumu, Kisii, Migori, Siaya, Homa Bay and Nyamira Counties.

Verification of constituency results was conducted at the NTC at the Bomas of Kenya. The eventual submission of form 34B from the 290 constituency returning officers (CROs) to the NTC was aggregated on to form 34C at the NTC.

The set-up at the NTC allowed for Chief Party Agents to verify final results and compare with the electronic data earlier transmitted by the presiding officers and CROs. LTOs observed receipt of results (electronic and physical) from the polling stations and constituencies to the NTC. The results were serialised, tallied and verified at different clusters before being processed into form 34C.

The AUEOM observed the commitment of the IEBC to ensure that results were accurately collated. LTOs at the NTC reported that the Commission had received and verified over 40,000 polling stations results and 288 form 34Bs before announcing the final presidential election results. Discrepancies were noted in the transmission of results in some constituencies. For example, in Kanduyi in Bungoma, an incident was reported where the result on the KIEMS kit did not match the Form 34A. Another incident was recorded where the total number of votes cast exceeded the number of registered voters at the polling station, the KIEMS kit therefore failed to transmit the results. In Likimili, the presiding officer mistakenly took a snapshot of a copy of the registered voters instead of the form 34A. This was later rectified and the correct result form was re-sent to both the CTC and the NTC. The AUEOM also noted delayed counting and delivery of form 34As from some polling stations.[[23]](#footnote-23)

1. **Announcement of Results**

On 11 August 2017, the IEBC Chairman, who is also the returning officer for the presidential elections announced the results and declared Uhuru Kenyatta winner of the 8 August 2017 presidential elections with 54.17 5 of the total valid votes cast and having obtained 25% of votes in more than 50% of all counties in Kenya. The IEBC indicated that out of 19,611,423 registered voters for the 2017 elections, 15, 073, 662 voters cast their ballots representing 78.91% of the registered voters.

***Table 2: Final Tallied Results for the 8 August 2017 Presidential Election.***

|  |  |  |  |
| --- | --- | --- | --- |
| Presidential Candidate | Political  Party/Organization/Independent | No. of valid  Votes Polled by each candidate | % of total valid votes cast. |
| UHURU KENYATTA | Jubilee | 8 222 861 | 54,17% |
| RAILA ODINGA | Orange Democratic Movement | 6 821 515 | 44,19% |
| JOSEPH WILLIAM NTHIGA NYAGAH | Independet | 38 019 | 0,25% |
| MOHAMED ABDUBA DIDA | Alliance For Real Change | 37 997 | 0,25% |
| JOHN EKURU LONGOGGY AUKOT | Thirdway Alliance Kenya | 27 399 | 0,18% |
| JAPHETH KAVINGA KALUYU | Independent | 11 774 | 0,08% |
| SHAKHALAGA KHWA JIRONGO | United Democratic Party | 11 280 | 0,07% |
| MICHAEL WAINAINA MWAURA | Independent | 8 870 | 0,06% |
| Valid Votes |  | 15 179 715 |  |
| Disputed Votes |  | 5 193 |  |
| Rejected Votes |  | 403 495 | 2,59%4.62% of total votes cast |
| Objected Votes |  | 2 814 |  |
| Total Votes Cast |  | 15,591,217 | 79.17% of total  Registered voters |
| Spoilt |  |  |  |

**Source: Website of the Independent Electoral and Boundaries Commission of Kenya:** [**https://www.iebc.or.ke/resources/?2017\_Poll\_Results**](https://www.iebc.or.ke/resources/?2017_Poll_Results) **Accessed 17/08/2017**

While the AUEOM commended the IEBC for the timely announcement of the final results, it also noted the incomplete and untimely manner in which the scanned images of forms 34A were transmitted and made available to the public. The Mission reiterated the importance of access to official results data to interested parties for validation and verification of results as a crucial step in promoting the transparency and credibility of the process.

Contentions around the announcement of the presidential results was made worse by NASA’s allegations that the IEBC server for compiling results had been hacked. NASA specifically requested for the IEBC to physically produce all forms 34A. The IEBC’s verification and counter-argument of the system hack exposed uncertainties in the IEBC’s result management system. Based on its dissatisfactions, NASA boycotted the final announcement of the results at the NTC.

The AUEOM noted that forms 34A continued to trickle in on the IEBC’s portal after the declaration of final results. Although the IEBC publicly explained the increase in the presidential votes as the results from the last 41 polling stations where the KIEMS devices had challenges. The Commission also indicated that it had received all signed hard copies of those results. The continued uploading of scanned images of forms 34A after the announcement of results raised eyebrows in public discussion, which further strengthened NASA’s claims that the IEBC server was not appropriately secured. Further, the AUEOM noted the challenges faced by the IEBC in producing hard copies of forms 34A as earlier indicated.

1. **Post-election context for the 8 August General Elections**

The announcement of the results of the presidential elections resulted in the simultaneous eruption of violence in selected parts of the country. The post-election environment was worsened by initial statements by NASA leaders alleging that the results were rigged and calling on supporters to stand ready for a call to action. Attempts at mitigating the heightened tension were observed by the AUEOM. These included the victory speech by Uhuru Kenyatta which was perceived by sections of the Kenyan public as well as the international community as reconciliatory; statements by the Chairperson of the African Union Commission; the United Nations (UN) Secretary General and the former Secretary General of the UN Kofi Annan, among others.[[24]](#footnote-24) Attempts by national stakeholders such as the National Cohesion and Integration Commission (NCIC) and the Interreligious Council of Kenya to calm down the growing tensions within the post-election environment while urging the use of legal channels for redress were also observed. On 16 August 2017, the AUEOM noted the announcement of NASA’s decision to pursue claims regarding the manipulation of election results at the Supreme Court of Kenya.[[25]](#footnote-25)

The AUEOM observed that geographically concentrated violence in Kisumu County as well as the Mathare and Kibera slums in Nairobi County, all strongholds of NASA, affected security in the post-election environment. Effects of protests in the NASA strongholds were felt in the Central Business District and other parts of Nairobi as commercial activities slowed down and businesses shut down. The AUEOM was informed that the attitude of the people was as a result of a general sense of insecurity largely influenced by Kenya’s previous instance of post-election violence.

The AUEOM also noted concerns raised about the response of the police to political protests in parts of the country. With a history of police engagement in violent clampdowns, the AUEOM was categorical that the stability of the security environment also depended on the operational tactics of the police.

## Complaints and Appeals

Following the declaration of results, the AUEOM observed some concessions and contestations of the results. The Mission noted intentions to challenge results of gubernatorial elections in five (5) counties namely Nairobi, Kisumu, Machakos, Busia and Transnzoia. With regard to the presidential elections, the AUEOM noted that the presidential candidate of the Third Way Alliance, Ekuru Aukot, on 16 August 2017 revoked his concession of defeat citing “disturbing trends unveiled in his tabulation of the election results.”

The AUEOM also noted, that in response to its internal dynamics and calls by international observer missions for peaceful resolution of election disputes, NASA presidential candidate and his deputy moved to challenge the results of the presidential elections at the Supreme Court of Kenya. The decision to legally contest the results of the election was contrary to earlier statements from NASA principals that the alliance would use means other than the judiciary.

# The 1 September 2107 Judgement of the Supreme Court

The Constitution under Article 140(3) provides that any person is free to file a petition in the Supreme Court to challenge the election of the President–elect within seven days from the date the IEBC announces the results. On 18 August, Messrs Raila Odinga and Kalonzo Musyoka filed a petition[[26]](#footnote-26) challenging the election of President Uhuru Kenyatta. On 1 September, the Supreme Court handed down a ruling that declared the 8 August Presidential elections null and void and ordered that a Fresh election be conducted within 60 days. The detailed judgment was given on 20 September with a majority of four judges concurring[[27]](#footnote-27) and two[[28]](#footnote-28) delivering dissenting opinions. In its ruling, the Court noted that elections are not events but processes. The Court determined that irregularities and illegalities in the Presidential election of 08 August were substantial and significant and therefore affected the integrity of the election. The consequence of the judgment was that Uhuru Kenyatta was not validly declared as the President-elect and thus the declaration was found to be invalid.

The petition was anchored on the grounds that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the Constitution, electoral laws and regulations. Regarding the burden of proof, the Court highlighted that the legal and evidential burden of establishing the facts and contentions remained constant throughout the case. However, once the Court was satisfied that the Petitioner had adduced sufficient evidence to warrant impugning an election, the burden of providing evidence shifted to the respondent (usually the EMB) to rebut the assertions made and demonstrate compliance with the law.

The petitioners averred that the IEBC had *inter alia* failed in the entire process of relaying and transmitting election results as required by law and committed errors in the counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result and generally committed other contraventions and violations of the electoral process. These actions by the IEBC contravened Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya and the Elections Act (No. 24 of 2011).

With regards to the statutory forms, the petitioners argued that Forms 34A and 34B which bore the tabulated results of an election for the President from polling station to constituency and the National Tally Centre were materially tampered with, resulting in improper and invalid returns. The petitioners further averred that there were discrepancies in the numbers of rejected and spoilt votes as displayed on the public portal of the IEBC.

In response, the IEBC submitted that the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results. IEBC urged the Court to find that the petitioners did not substantiate the claim that the said irregularities affected at least 7 million votes. The IEBC refuted as baseless, the petitioners’ claim that it established secret polling stations that were not gazetted. It contended in that regard that pursuant to Regulation 7 (1)(c) of the Election (General) Regulations 2012, it published in Gazette Notice Number 6396 of 26 June 2017 specifics of the polling stations established in each constituency.

IEBC also submitted that all Forms 34B were executed by duly gazetted and accredited Constituency Returning Officers in accordance with the applicable Regulations. IEBC contended that all Forms 34A and 34B were signed and/or stamped as required under the law. The refusal by the party agents to sign the said forms, the IEBC argued, therefore did not invalidate the results announced.

As regards the contention by the petitioners regarding the lack of security features on the statutory forms, the IEBC submitted that all Forms 34A and 34B issued to presiding and returning officers had serial numbers, barcodes and the IEBC watermarks. In addition, Forms 34A, the IEBC argued, were carbonated to ensure that only one Form was filled by the presiding officer to generate 6 copies. These security features were meant to help authenticate the results at the polling centers before transmission.

In its ruling, the Supreme Court noted there was no evidence placed before it to suggest that the processes of voter registration, voter identification, manual voting and vote counting were not conducted in accordance with the law.

The Court, however, found a systemic institutional problem within the IEBC. It noted for instance that the IEBC Chairperson declared the final results for the elections of the President before IEBC had received all Forms 34A from all 40,883 polling stations contrary to the Constitution and applicable electoral law. The results were therefore declared solely on the basis of Forms 34B, some of which were of dubious authenticity in violation of Regulation 87(1) (b) of the Election Regulations. Many forms 34A and 34B were also found to lack handover notes in the prescribed manner, a violation of Regulation 87(1) of the Elections Regulations. Furthermore, a number of the forms 34A and 34B were not standardised and found to contain different layouts and security features. Others were found to have had no serial numbers, bar codes, official stamps, water marks and anti-copying.

Some of the issues identified from the Scrutiny ordered by the Court were that some of the Forms 34A were carbon copies, while others were original Form 34As but did not bear the IEBC stamp. Some forms were scanned while others were photocopies. The Court scrutinised 4,229 Forms 34A. Of these, many were not stamped, yet others were unsigned by the presiding officers, and many more were photocopies. Out of the 291 Forms 34B scrutinized, 56 forms bore no watermark, 5 forms had not been signed by the returning officer, 31 forms had no serial numbers, 32 forms had not been signed by the respective party agents, the “hand over” section of 189 forms had not been filled and the “take over” section of 287 forms had not been filled.

The Court further found that the IEBC had disregarded the provisions of section 39 (1c) of the Elections Act by either failing or neglecting to electronically transmit, in the prescribed form, the tabulated results of an election of the President from many polling stations, to the National Tallying Centre. The IEBC was also deemed to have failed to provide certified copies of the certificates of Penetration Tests conducted on the Election Technology System prior to and during the election. (Regulation 10 (Elections Technology Regulations).

The AUEOM noted that the Supreme Court was unable to find specific fingerprints of individuals who may have played a role in the commission of illegalities. The Court did not also impute any criminal intent or culpability on the part of the IEBC, its Chairperson, any other Commissioner or member, nor did it find any evidence of misconduct on the part of H.E. Uhuru Kenyatta. The Court did not also hold any service provider responsible for any of the anomalies observed.

The AUEOM noted that the Supreme Court ruling was met with mixed reactions. These included attacks on international election observers, individual judges, judicial officers and staff on mainstream and social media platforms. Senior Members of the Executive also made remarks that were deemed as undermining to the integrity of the judiciary. For example, on 21 September while addressing Jubilee Party members from Northern Kenya, President Uhuru called the decision by the Supreme Court to nullify the 8 August Presidential elections, a ‘coup by four people sitting in court.’ Interlocutors criticised the declarations by the Executive as regrettable and unfortunate. Notwithstanding the verbal attacks on the Judiciary, the Executive reiterated its respect for and acceptance of the decision of the Court.

The Mission took note of a statement by the Judicial Service Commission (JSC) that condemned attacks as well as demonstrations outside the Supreme Court building following the Supreme Court judgement. The JSC indicated that the demonstrations bordered on violence and were clearly intended to intimidate the Judiciary and individual judges. The JSC reiterated its resolve to prevent manipulation of its processes and the discharge of its mandate as given by the people of Kenya under the Constitution.

# THE 26 OCTOBER FRESH PRESIDENTIAL ELECTION

1. **Political Context Ahead of the 26 October Fresh Presidential Election**

The political context in the lead-up to the 26 October elections was dictated by a number of controversies emerging out of demands and counter-demands from key stakeholders, allegations of manipulation or attempts to manipulate the IEBC, issuance of statements generally deemed as undermining to key electoral stakeholders like the Judiciary and the IEBC, attempts by the IEBC to build consensus and generate confidence in its processes among the general public, public demonstrations by NASA to push for electoral reforms, threats of a boycott of the elections and the withdrawal of the NASA presidential candidate from the elections. Attempts by the Jubilee majority in Parliament to amend the electoral laws further contributed to a heated political context.

The AUEOM noted that subsequent to the Supreme Court ruling that nullified the Presidential election of 8 August 2017, NASA called for electoral reforms and issued a list of reforms it titled “irreducible minimum reforms” without which the elections should not, in their view, proceed. In a statement issued on 12 September 2017, NASA called for a number of reforms in all areas of the electoral process, including the security features on the statutory Forms, printing of the ballot papers, recruitment of Election Monitors and Returning Officers, the results transmission process and the ICT infrastructure for the elections. The NASA statement also identified personnel of the IEBC that they alleged were complicit in the bungled election and subsequently called for their dismissal from the IEBC. The AUEOM noted that to drive their demands, NASA organised weekly and bi-weekly protests in the Central Business Districts of Nairobi, Kisumu and Mombasa.

The AUEOM noted that the protests were often characterised by violence and rioting. The Kenyan Police acted firmly in some cases to stop the protesters from destroying property. The AUEOM noted several calls to the Police to be humane in its dealings with protestors. The Mission also noted attempts by the Executive to resort to legal means to manage the effects of the protests on economic activities in the Central Business Districts of Kisumu, Mombasa and Nairobi.

The AUEOM noted that the tension in the political environment was further poisoned by the resignation and subsequent flight to the US of IEBC Commissioner Roselyn Akombe, over claims of having received numerous death threats, and claims that the elections would not be free and fair as well as public statements by the IEBC Chairperson alleging attempts by some stakeholders to manipulate the IEBC. The Chairperson of the IEBC suggested quite strongly, that should attempts to manipulate the IEBC continue, he could not guarantee the IEBC’s capacity to deliver a fair and credible election. The Chairperson also called on the IEBC staff that were mentioned adversely as being responsible for colluding in the bungled 8 August election to step aside and help instil both political and public confidence in the Commission.

The confluence of these incidents and the protracted electioneering period contributed to a political context characterized by polarization, the adoption of hardline positions among political players, highlighting of historical tribal fissures and a campaign political rhetoric shaped around tribal propaganda.

On 10 October 2017 the NASA presidential candidate announced his withdrawal from the Fresh Presidential Election, citing IEBC's failure to meet their demands for electoral reforms. The AUEOM noted that the statement announcing the NASA candidate’s withdrawal also made declarations on the way forward for the IEBC, based on some statements made by the Judiciary in the 2013 election petition case. The interpretation of NASA, the AUEOM gathered, was that with their withdrawal, the IEBC had to reschedule the proposed elections and start the process afresh.

The AUEOM noted attempts by the Jubilee Majority in both the Houses of Representatives and Senate to make some amendments to the electoral laws. While recognising the role of the legislature in making laws, the Mission decried attempts to change the rules of the elections in the middle of the process and called on both the Legislature and the Executive to exercise good judgement as regards the passage of the amendments.

1. **Legal Issues and Court Pronouncements**

The period leading up to the 26 October election was characterised by legal challenges in which the judiciary played an important role in the settlement of disputes and interpretation of the law. The key legal questions that emerged after the Supreme Court ruling included inter alia the definition of a ‘Fresh Election’ under Article 140 (3) of the Constitution; whether a fresh election entails fresh conduct of electoral cycle processes such as voter registration, inspection of the register of voters, updating of the register of voters; tendering processes; nomination, campaign period, amongst others, as outlined in the Elections Act. The AUEOM noted questions that arose regarding a constitutional crisis if the IEBC failed to conduct the election within the stipulated sixty-day time frame, as well as the status of the Presidency in the event that the elections were not held within the stipulated time frame.[[29]](#footnote-29) The AUEOM noted decisions of the judiciary that provided the guidance to the IEBC on issues such as the meaning of a fresh election, the candidates to contest in the fresh election and the role of the IEBC Chairperson in the verification of results.

Multiple petitions were handled by the High Court, Court of Appeal and Supreme Court regarding different facets of the electoral process in the lead up to the 26 October election. A detailed table of petitions is attached as part of the annexes to the report highlighting key cases that the AUEOM followed.

On 19 October, the Jubilee Party filed an application[[30]](#footnote-30) before the Supreme Court seeking to hold Raila Odinga and Kalonzo Musyoka in contempt of court for actions taken to prevent the implementation of the Supreme Court ruling for Fresh Elections to be held. The applicant sought a jail term for a period of 6 months as provided for in the Contempt of Court Act. The applicant alleged that despite asking for orders of invalidation of the 8 August election, Raila Odinga and Kalonzo Musyoka embarked on a calculated scheme to ensure that fresh elections scheduled for 26 October did not take place. The applicant outlined how the respondents had organised and led violent protests in their strongholds as well as in Nairobi. The protests had also led to destruction of property and loss of lives and were aimed at creating an environment where it was not possible to hold an election. The petitioner averred that the protests, which were accompanied by demands for dismissals of IEBC Commissioners and officials, were meant to intimidate the IEBC to ensure that they were rendered incapable of implementing the Supreme Court Orders for a Fresh Presidential Election.

On 22 October, a petition[[31]](#footnote-31) was filed at the Supreme Court by three voters requesting that the scheduled election be postponed because the prevailing environment could not guarantee a credible poll. The petitioners also sought a declaration that Mr. Odinga’s withdrawal made the election invalid, as well as an Order that the IEBC and its Chairperson conduct fresh nominations and issue notice of a new election. A hearing was scheduled to take place on 25 October. However, on the date of the scheduled hearing, an order was made by the President and Chief Justice of the Court that the matter could not proceed to hearing as earlier scheduled because there was no quorum as required by Article 163 (2) of the Constitution. The matter was adjourned to be heard at a later date to be determined by the Registry of the Supreme Court.

The Supreme Court also ruled on an application by the IEBC and its Chairperson seeking clarity on their role in the verification of results in a Presidential election. The Supreme Court maintained that the Chairperson’s duty was to declare the results as they were, without any amendments. The Court directed that discrepancies should be pointed out to the Chairperson who had the responsibility of indicating whether the discrepancies affect the overall result. The Court maintained that only an election court could determine the effect of the inaccuracies in an election.

Thirdway Alliance candidate, Dr. Ekuru Aukot[[32]](#footnote-32) filed a petition at the High Court seeking to be included as a candidate in the 26 October election. In his submission, Dr. Aukot challenged the IEBC’s decision to limit the electorate to just two choices of candidates for the Fresh Presidential Election. On 11 October, the Court ordered the IEBC to include Dr. Ekuru Aukot in the scheduled Fresh Election. In its ruling, the High Court distinguished between a Fresh Election under Article 138 of the Constitution which is defined as a run-off and a Fresh election under Article 140(3)[[33]](#footnote-33) which is defined as a “new” election, in which fresh nominations should take place. The Court indicated that the 60-day timeframe within which a Fresh election should be conducted was not adequate for fresh nominations; therefore, it was in the interest of the public if those who participated in the invalidated election, contested in the Fresh Election.

In another petition, the High Court issued conservatory orders[[34]](#footnote-34) allowing the National Super Alliance (NASA) protests to continue pending a determination on the petition challenging the constitutionality of the directive by the Acting Cabinet Secretary for Internal Security and National Coordination, to ban protests within the Central Business Districts of Nairobi, Kisumu and Mombasa.

The High Court also issued a permanent injunction[[35]](#footnote-35) restraining the Government from advertising its achievements on the Kenya Government Delivery website ([www.delivery.go.ke](http://www.delivery.go.ke)). The achievements were popularly posted using the hashtags *#Jubilee Delivers.* The Court ruled that the advertisement of achievements on various programmes and projects undertaken across the country in the last four years by the National Government during the election period was unconstitutional and unlawful as it involved the unlawful use of public resources.

The Centre for Rights Education and Awareness (CREAW) and the Community Advocacy and Awareness Trust (CRAWN) filed a petition at the High Court[[36]](#footnote-36) against the Speakers of the National Assembly and Senate and the Attorney General challenging the composition of Parliament. The petitioners sought a declaration that the composition of the National Assembly and Senate failed to meet the constitutional threshold of ‘not more than two-thirds gender principle’ contemplated under Articles 27 (8) and 81(b). The petitioners argued that the current composition amounted to a violation of the rights of women to equality and freedom from discrimination.

1. **Technical Preparations by the IEBC**

The AUEOM noted the controversies around the dates of the fresh presidential election. The IEBC initially set 17 October 2017 as the date for the fresh elections, however, the need for comprehensive and careful preparations in light of the Supreme Court ruling coupled with pressure from stakeholders for greater consultations and dialogue compelled the Commission to eventually postpone the election date.

As part of its preparation for the conduct of the Fresh Presidential Election, the IEBC announced a seven-member team of senior officials of the Commission charged with the responsibility of managing the 26 October polls. The new team excluded the CEO of the IEBC, Ezra Chiloba and other officials whose participation in the management of the elections had been challenged by NASA.

The Mission noted the resignation of IEBC Commissioner, Roselyn Akombe on 17 October 2017 citing the inability of the IEBC to hold a credible election within the timeframe directed by the Supreme Court as well as the partisan nature of IEBC plenary meetings where “Commissioners come ready to vote along partisan lines and not to discuss the merit of issues before them.”

The AUEOM noted concerns raised by stakeholders regarding the general readiness of the IEBC, weak communication strategy and failure to implement reasonable minimum reforms demanded by stakeholders. The Mission, however, noted attempts by the IEBC to implement key reforms prior to the Fresh Presidential Elections.

Specifically, the IEBC developed an administrative document called the National Returning Officers Diary to record inconsistencies and discrepancies from Forms 34A and 34B. The AUEOM noted this as an improvement of the previous process. The AUEOM also noted the Commission’s resolve not to reconfigure the Results Transmission System (RTS) to accommodate new candidates due to time constraints. Consequently, the RTS text results (provisional results) were not collated and displayed on the screens and the IEBC website as previously done in the 8 August elections.

The AUEOM further noted efforts by the IEBC to standardize Forms 34A and 34B, clarification of what constitutes the complementary mechanism and the publication of result paths including live media coverage of results from the Constituency Tallying Centre (CTC) and unfettered access to observers and party agents at all stages of the election day process. However, the AUEOM noted delayed electronic transmission of some polling station results.

The AUEOM also observed standardized training of all Returning Officers (ROs) and Deputy Returning Officers (DROs) at one venue in Nairobi and efforts by the Commission to hold residential training for all Presiding Officers (POs) and Deputy Presiding Officers (DPOs) in quasi and semi-quasi polling areas. The AUEOM, however, noted with concern the disruption of some of these training sessions by sympathisers of the NASA following the boycott of the elections by the NASA Presidential Candidate.

## Election Day Observations 26 October 2017

The AUEOM’s Election Day deployment for the Fresh Presidential Election took into account security considerations. The Mission deployed observers to 20 selected Counties, where the observers visited 195 polling stations spread across 71 constituencies. In its assessment of the polling procedures, the Mission noted that overall; the stipulated procedures for opening, voting, closing and counting were largely complied with.

The Mission also noted improvements in the technical conduct of the election, for example, the availability of hard copies of the voters’ register at all stations. Voter turnout was notably lower in the Fresh Presidential Election. The absence of agents of the opposition party was also noted at all the stations visited.

At the polling stations visited, there were 26 observed instances of failure of the BVI devices (KIEMS) to identify voters. In these instances, the Validation of Identity Forms (form 32A) was completed as required in 6 while the alphanumeric search was resorted to in 16 instances. Observers noted that the few party agents who were present at the counting consented and signed the results before the Form 34A was transmitted electronically to the Constituency Tally Centre (CTC) and a copy was posted outside the station by the presiding officers. The Mission also noted the negative impact of the poor weather conditions on the polling process.

The Mission noted with concern the acts of violence in some parts of the country, which prevented the conduct of the elections in such places, notably in Homa Bay, Siaya, Migori and Kisumu. The AUEOM condemned the destruction of property, injuries and loss of lives that were reported during these events. Due to these unfortunate events, the AUEOM noted the decision of the IEBC, acting on the basis of the provisions of Section 55b of the Elections Act, indefinitely to postpone polling in Homa Bay, Kisumu, Migori and Siaya Counties for security reasons. In the end, it was impossible for the IEBC to hold elections in those Counties, due to insecurity.

## (e). Tallying and Announcement of the results

On 27 October, AU observers visited 19 CTCs. In its assessment of the tally process, the Mission noted that the staff complied with the stipulated procedures to a large extent. Similar to the Missions’ observation at polling stations, the absence of opposition party and candidates’ agents at constituency tally centres was noted. The electronic transmission of Forms 34B from these centres was successful. Furthermore, through the engagement of its IT expert with officials at the Bomas of Kenya, the Mission verified that the transmitted forms 34B from the constituency tally centres visited by AU observers matched with the data at the National Tally Centre.

The AUEOM noted the amended transmission and tally procedures, which included the use of scanned images of the forms. The transmission of numbers was discontinued by the IEBC because particulars of other candidates who came late into the process as a result of the court judgement could not be loaded on the KIEMS. The Mission also observed the detailed manner in which the results were verified at the National Tally Centre. Original Forms 34A and Forms 34B were checked one by one, and the verified results were announced thereafter. At the completion of the verification process, the National Returning Officer compiled Form 34C.

On 30 October 2017, the IEBC Chairperson announced the results of the Fresh Presidential elections and declared President Uhuru Kenyatta as President-elect with 98.26% of the votes cast. The results were announced within the stipulated timeframe provided for in the law. The results, however, excluded votes from 25 constituencies where voting was indefinitely postponed by the IEBC due to security concerns.

In his announcement of the results, the Chairperson of the IEBC noted that there were discrepancies between the results from CTCs and the NTC, which accounted for a difference of 273 votes. In its assessment of the amended results tally process, the AUEOM noted that the new system could be more susceptible to human error because of the need to manually enter the data at constituency tally centres. The process was also more time consuming, as it required a number of checks and verifications.

## (f) Complaints and Appeals

A petition filed on 27 October 2017 by Okiya Omtatah Okoiti[[37]](#footnote-37) challenged the validity of the October 26 election and sought to have the election declared unconstitutional, null and void. The petition also sought a pronouncement that the withdrawal of Raila Odinga and his running mate from the Fresh Election was illegal.

Njonjo Mue and Khelef Khelifa filed a petition[[38]](#footnote-38) challenging the nomination and subsequent candidature of the president-elect as IEBC did not conduct any fresh nominations of presidential candidates in accordance with the Constitution and law.

A petition was filed on 6 November by John Mwau[[39]](#footnote-39) challenging the validity of the election of the President-elect. The petitioner sought a declaration that the Fresh Presidential election was held in violation of Article 138(2) of the Constitution as there was no nomination. The petitioner challenged actions undertaken by IEBC in gazetting extension of the campaign period, accepting candidates without nomination and subsequent addition on the ballot of candidates who had been disqualified (Shakalaga Kwa Jirongo).

The Institute for Democratic Governance filed a petition[[40]](#footnote-40) that sought a declaration that NASA principals (Raila Odinga, Stephen Musyoka, Musalia Mudavadi and Moses Wetangula) and Senator James Orengo jointly and severally committed electoral offences and engaged in serious malpractices and irregularities in a Presidential election. The Petitioners argued that the NASA principals implemented a well-calculated, deceptive and carefully choreographed scheme to derail, undermine and subvert the Fresh Presidential Election. The petitioners therefore asked that the NASA principals and Senator Orengo be held liable for the loss and damage arising from acts of violence and intimidation occasioned during the period of the fresh Presidential election.

1. **Determination Supreme Court Presidential Election Petitions Nos.2**[[41]](#footnote-41) **& 4**[[42]](#footnote-42) **of 2017 (Consolidated on 14/11/2017)**

The Supreme Court on 20 November gave a determination on a consolidated petition filed by Harun Mwau and Njonjo Mue challenging the election of President-elect Uhuru Kenyatta under Article 140 (3). By an order of the Supreme Court, the petitions were consolidated on 14 November and heard together with each party allowed to submit on those issues that they had separately raised.

The legal questions raised in both petitions included whether the petitions were properly filed as Public Interest Litigation; whether the IEBC was required to conduct fresh nominations prior to the presidential election held on 26 October 2017 and what steps were required to be undertaken; whether the nominations conducted for the presidential candidates for the elections held on 8 August were valid, after nullification of that presidential election by the Supreme Court; impact of timeframe provided under Article 140 (3) of the Constitution for the holding of a fresh election on the conduct of nominations; whether another electoral cycle should have been commenced after the elections held on 8 August 2017. The petitioners also sought a pronouncement of the Court on the effect of a declaration of invalidity of a Presidential election under Article 140 of the Constitution, the criteria for qualifying candidates to participate in a fresh election; the legal effect of withdrawal of a Presidential election candidate before election; the legal consequences of elections not being held in each constituency as stipulated under Article 138 (2) and the effect of the Election Laws (Amendment) Act 2017 on the conduct of the Presidential election held on 26 October.

155. The Supreme Court in a unanimous decision[[43]](#footnote-43) determined that the petitions were without merit and subsequently dismissed them with each party paying their costs. Consequently, the Supreme Court upheld the Presidential election of 26 October and the election of Uhuru Kenyatta.

## (g). Political Context after the 26 October 2017 Fresh Presidential Election

The political context in the immediate post-election period was largely characterised by the announcement by the NASA formation that it had formed what it called the National Resistance Movement, with the objective of forcing a change in the politics of Kenya. The AUEOM also followed conversations among key stakeholders within the opposition on the need for the opposition strongholds to secede from the rest of Kenya.

The AUEOM also observed attempts by NASA to cause a national boycott of products of organisations and companies deemed associated with the Jubilee Party. In the first of its announcement of the boycott, NASA leaders identified Safaricom, Bidco and Brookside as some of the firms whose products and services should be boycotted by opposition sympathisers.

The post-election period also saw the IEBC Chairperson issue an invitation to the Director of Public Prosecutions to investigate claims by a group of observers that there were anomalies in the repeat presidential poll in Garissa County. The coalition (Kura Yangu Sauti Yangu) cited inconsistencies in the register and the number of valid votes cast. It also claimed there were vote addition errors.

The period after 26 October also witnessed NASA leader Raila Odinga take his drive for electoral reforms to the United States. NASA co-principal Moses Wetangula said Odinga’s trip to the United States was intended to set the record straight about the political crisis in the country. He said Mr Odinga, was scheduled to leave the country for Washington, DC, primarily to seek the backing of the United States Congress in ensuring democracy prevails in Kenya.

The AUEOM also noted allegations that were made that some state agencies had tried to intimidate sections of the NGO community. The allegation was made that the crackdown appeared to target non-governmental organisations deemed to be friendly with the opposition.

1. **ASSESSMENT OF CROSS-CUTTING ISSUES**
2. **Gender and Inclusivity issues**

Section 56 of the Constitution of Kenya provides for affirmative action to guarantee the representation of historically under-represented groups in governance and other spheres of life. Specifically, Section 81 provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. It further recognises the fair representation of Persons with Disability (PWDs).

The AUEOM noted that women constituted only 9.4% of all candidates who contested in the 2017 General elections. This was a slight increase compared to the 2013 elections. None of the eight presidential candidates were women and only 4.3% of gubernatorial candidates were women. At the end of the 2017 electoral process, only 3 women were elected into Senate, representing 6% of the elective senatorial positions and 3 women won gubernatorial seats, representing another 6% of the 47 seats contested. With regard to the National Assembly, of the 290 elective seats, 22 were won by women representing 7.5%, an increase over the 16 seats won in 2013.

The Mission also noted that none of the eight presidential candidates were women in the fresh presidential election This outcome leaves Kenya’s political space with a gap in the implementation of the constitutional commitment to guarantee equal opportunity to participate in formulation of government policy as provided for in the African Union Protocol on Human and People’s Rights on the Rights of Women in Africa, the 2004 Solemn Declaration on Gender Equality in Africa and Convention on the Elimination of all Forms of Discrimination against Women.

The AUEOM noted modest improvement in the inclusion of under-represented groups such as women, youth and PWDs in the electoral process of Kenya. For example, Persons living with disabilities are allocated special nominated seats in both the Senate (2) and National Assembly (4). These provisions, however, remain inadequate in addressing the inclusion of historically under-represented groups. The AUEOM was also concerned about the failure of political parties to meet the inclusivity requirement stipulated in the Law.

The AUEOM observed that 88% of the polling stations visited were accessible to all voters including people living with disability (PWD). However, some of the polling stations were inaccessible as they were located upstairs. Assistance was provided to PWDs, aged voters and others requiring assistance in line with stipulated Election Regulations. Observers however noted that the requirements for party agents to witness the assistance provided to voters compromised the secrecy of the assisted person’s vote. The Mission also noted the absence of tactile ballots for visually impaired voters.

## (b). Civil Society

The AUEOM noted the engagement of Civil Society Organisations (CSOs) in the lead up to the general elections. This was In spite of the non-implementation of the Public Benefits Organisations Act 2013. Selected CSOs such as the Domestic Election Observation Group (ELOG) and the Interreligious Council of Kenya (ICK) were noted to have made key interventions in support of the election process, notably during the period of public engagement on the reconstitution of a new IEBC between October and November of 2016.

The deployment of both long term and short-term observers by the Elections Observation Group (ELOG) and the role the civil society initiative played in enhancing confidence in the electoral process during the general elections was generally commendable. For the 8 August General Elections ELOG deployed approximately 8,300 observers across all 47 counties and 290 constituencies on Election Day to engage in a nationwide parallel vote tabulation. These numbers were substantially reduced during the Fresh Presidential Election.

**(c) Restrictions on Civil Society Organisations After the 8 August 2017 General Elections**

The AUEOM noted the history of the two organisations in challenging the 2013 results and reports that suggested that both KHRC and AFRICOG were engaged in consultations within the civil society to determine whether they would file a petition to challenge the results of the presidential polls at the Supreme Court of Kenya.

Following an application to the High Court of Kenya, the directive for closure by the NGO Coordination Board was temporarily suspended by the Court. The AUEOM however, noted that prior to the Court order, the Acting Cabinet Secretary for the Ministry of Interior, Fred Matiang’i, in correspondence with the Executive Director of the NGO Coordination Board, ordered a temporary suspension of the directive for closure for up to 90 days. It was noted that the order from the Cabinet Secretary was to enable a Committee to work with the organisations to meet the regulatory and compliance needs of the NGO Coordination Board to “avert any distraction of their activities.”

## (d) The Media

The media landscape has changed significantly since the promulgation of the Constitution of Kenya 2010. The freedoms guaranteed in the Constitution have enhanced the freedom of the media. The Constitution of Kenya, 2010 specifically provides for Freedom of Expression (Article 33), Right of Access to Information (Article 35) and Freedom of the Media (Article 35). The AUEOM considered such guarantees as critical to the development of democracy. The Mission further observed that the legal framework has given room to the proliferation of private and community media outlets as well as activism as regards social media.

In the lead up to the election, media managers in Kenya signed the Elections Reporting Guidelines designed to guide the media in its coverage of the 8 August General Elections. The AUEOM noted that the media largely upheld the reporting guidelines developed by the Media Council of Kenya (MCK) the Independent Electoral and Boundaries Commission (IEBC), the National Cohesion and Integration Commission (NCIC), media professionals and organisations such as the Kenya Union of Journalists (KUJ), the Kenya Editors’ Guild (KEG), the Association of Media Women in Kenya (AMWIK), the Kenya Correspondents Association (KCA) and development partners. The guidelines largely reflected the Code of Conduct for the Practice of Journalism in Kenya that was developed by the Media Council of Kenya. It also adhered to the requirements of the Constitution of Kenya (2010) and other pieces of legislation.

The AUEOM also noted the polarization of the media as well as the limitations within the regulatory framework governing the conduct of the media. The role of the MCK and the Communications Authority around content regulation was considered as unclear and one which required harmonisation and clarity.

The AUEOM further noted instances of political affiliation especially among media outlets at the grassroots - broadcasting in local languages and extensive paid media campaigns that promoted parties and candidates with more access to resources, especially incumbents. The AUEOM observed that perceived and observable bias by sections of the media compromised media neutrality and in some instances exposed the media to public attacks.

The AUEOM also noted concerns by stakeholders regarding the use of social media, which although vibrant, was equally polarized and difficult to monitor and manage. It was highlighted as often propagating hate speech and fake news. The NCIC had developed guidelines on the use of social media. It recorded 176 cases of violation before Election Day. The AUEOM noted the efforts made by the NCIC to bring perpetrators to book.

In the run-up to the Fresh Presidential Election, there were reports of the proliferation of fake news. Of particular concern was the emergence of fake websites of known news outlets such as CNN and the use of fictitious Twitter accounts for purposes of misinformation.

Of further concern were the reports of attacks on journalists. This included a journalist from the Citizens Media Group who was attacked after the Fresh Presidential Election during a NASA event. The Mission noted the potential of such events to intimidate the press and impact on its capacity to freely undertake its duties.

## (e) Security

Threats of terrorism and violent extremism in some parts of the country presented a security challenge in the pre-election period. In the run-up to the general elections, terrorist attacks were reported in some counties notably Garissa, Lamu and Tana River, which share a border with Somalia. The AUEOM noted that the security situation resulted in the imposition of dusk to dawn curfew in parts of Lamu, Garissa and Tana River counties from 9th July to 9th October 2017 (Legal Notice no. 107). It was however noted that on Election Day, voters in these areas were able to cast their votes.

Security concerns noted by the AUEOM prior to the general elections also included the proliferation of politically aligned vigilante groups; the politicisation of long-standing intra-communal conflicts in some counties; long-standing inter-ethnic group contestation in counties such as Laikipia and Lamu; and the exploitation of ethnic cleavages by all sides of the political divide and its implications on the stability of the Kenyan State.

The AUEOM received assurances of preparedness by the Kenyan Police prior to both the general elections in August 2017 and the fresh presidential election in October 2017. It, however, noted concerns about an alleged heavy deployment of police at opposition strongholds and suggestions by the opposition that such deployment was aimed at preventing people from turning up to vote. Assurances from the Police and the Interior Ministry, however, guaranteed the Mission of the general readiness of the police to maintain law and order. There were further assurances to the AUEOM that deployment to Counties and constituencies were largely influenced by requests from the IEBC. The Mission also noted concerns about government’s plans to deploy the Kenyan Defence Forces to opposition strongholds and the denials from the Government.

In the run up to the fresh presidential election, the AUEOM noted growing concerns regarding the safety of electoral officials in NASA strongholds, some of whom requested to be transferred, whilst others withdrew from training. The Mission also noted the shortage of staff in opposition strongholds as a result of security concerns and how this posed a challenge for the IEBC in terms of effectiveness and efficient polling operations.

## (f) Use of Technology

Section 44 of the Election Act (2011) permits the use of technology by IEBC in the electoral process. The Kenya 2010 Constitution also dictates that the system that the Commission adopts must be simple, accurate, verifiable, secure, accountable, and transparent.

The AUEOM noted the introduction of the combined use of biometric voter authentication and electronic results transmission technologies, jointly referred to as Kenyan Integrated Election Management System (KIEMS) by the Electoral Commission during the August 2017 general elections and fresh presidential election. The mission also noted the use of hand-held devices for authenticating voters based on the national identification card and fingerprint data, known as the Electronic Voter Identification Devices (EVIDs).

The AUEOM noted that as part of the preparation of the fresh presidential election, IEBC signed contracts with Safaricom, Safran and OT Morpho to provide software upgrade for the Electronic Voter Identification (EVI) and network coverage for Results Transmission System (RTS), respectively.

The AUEOM also noted that the absence of an Elections ICT expert during the 8 August Elections negatively affected the extent to which the Mission interpreted ICT related issues. In light of this gap, the AUEOM, with the technical assistance of Electoral Institute for Sustainable Democracy in Africa (EISA), acquired the services of an Elections ICT expert to provide technical support to the AU mission by assessing the transparency and the credibility of the KIEMS.

Specifically, the AU Elections ICT Expert had the following responsibilities:

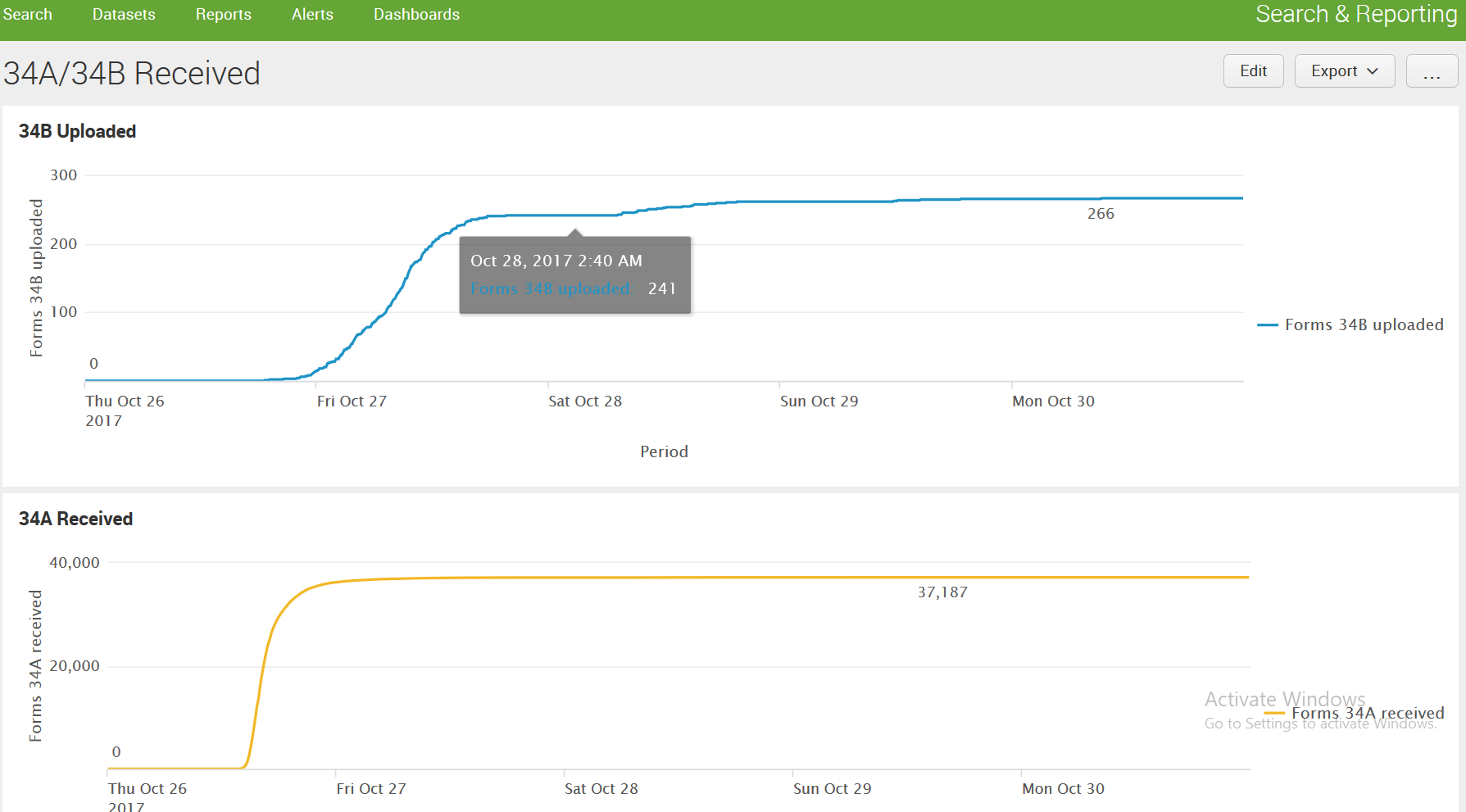
* accompanying the AU election expert to represent the AUEOM at the technical meetings of the IEBC that are focused on the use of technology in the 2017 elections;
* conducting an assessment of the Kenya Integrated Election Management System (KIEMS) and providing a written brief on the transparency and credibility of the system based on the principles for democratic elections;
* briefing AU observers and the AU mission leadership on the procedural aspects of the use of technology in the electoral process and its implications on the integrity of the process;
* supporting the AUEOM technical team in the development of key questions for AU observers to ask in their assessment of the procedural aspects of the use of technology on election day, including counting, and during results aggregation; being present at the National Tally Center during the results aggregation process to assess the transparency and integrity of the process; and
* providing a written brief of his/her assessment of the results aggregation process ; and contributing to the drafting of the section on ‘Use of Technology’ in the AUEOM final report.

With regard to methodology, the Elections ICT Expert undertook a number of processes including analysis of the electoral process as it relates to the Polling Station, the Constituency Tally Center and the National Tallying Center and the declaration of results and observing to ascertain whether the equipment used met the expected standards, the process of the election and its expectations. It also included the scrutiny of the certifications of the solutions as it concerns the penetration test as declared by the court; validation of the results by comparing the results of 34A series that formed the 34B series with the 34C that will be used to create the 34D used in declaring the winner.

**(h) Findings at the Polling Station**

The AUEOM noted that on the Election Day, during the identification of the voters, the system performed substantially in compliance with the regulation set out by the IEBC.

The counting and the collation of the results were done successfully in the places visited. The AUEOM noted that the imputing of figures in the KIEMS were not done based on the regulations of the Commission for the October elections. The Mission understood that the company OT MORPHO having configured the system for two parties could not configure it for eight parties due to time constraints. In effect, only images of 34A as captured were transmitted. The AUEOM, however, noted from the polling stations visited by observers that the Forms 34A were transmitted successfully.



***Fig 1 Graph of 34A and 34B received***

The above graph shows the total number of 34A received and the time it was received. The AUEOM accessed the graph through the Backend structure of the KIEMS network. From the graph gotten from the backend infrastructure, a total of 37187 Form 34A were received in total. Worthy of note is that most of the forms were transmitted between Thursday 26 October, and Friday 27 October, can be seen from the graph above. The AUEOM deduced from these statistics that networks for the transmission of results performed optimally as most of the Forms 34A were transmitted in between the days of 26and 27 October 2017 (See fig 1 above).



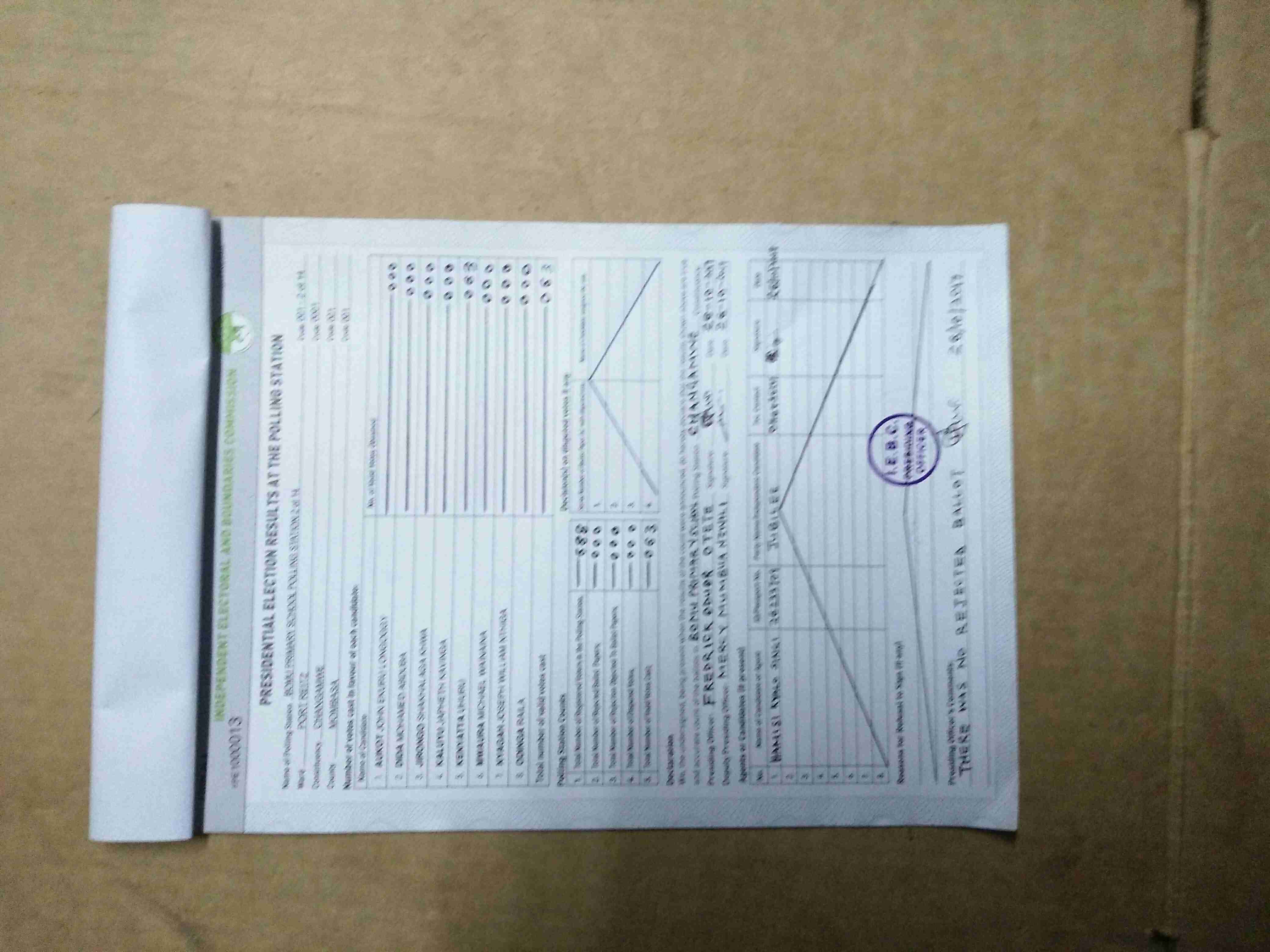
***Fig 2 Cloud and Networks Performance Data***

The AUEOM also noted, having been granted access to the system performance statistics, and on the basis of the Cloud and Networks Performance Data, that all the networks were active. The Airtel, Morpho/IEBS tunnel, Safaricom 2, Safaricom1, Telkom, and the satellite (Thruway) were all active during the elections and performed during the transmission of results. The CPU usage performance is also shown in the graph of fig 2. The Mission, therefore, confirmed that the Networks performed optimally.

1. **Findings at the Constituency Tally Centers**

The process at the Constituency Tallying Center was the receipt of the 34A forms that had been transmitted to the center. This was then compared the Hard Copy of the 34A submitted physically by the Presiding Officers from the Polling Stations. If the comparison is of the same form, the Data Clerk generated the 34B manually by inputting data into an excel format. The Political Parties Agents then reconfirmed the correctness of the inputted figures in the 34B generated. In effect, the AUEOM noted that the collation and transmission of results at the Constituency Tally Center were watered down to a mostly manual system. However, the 34B generated at the center was transmitted as a scanned copy to National Tally Center (BOMAS). The AUEOM noted that 37,187 Form 34A from the polling stations were transmitted through the Constituency Tallying Center and the National Center. The 34B forms created and signed and transmitted to the National Tally Center were 266, based on fig1 above. The Mission accessed the backend sample as shown in Fig. 3 below.

A detailed analysis of the process at the Constituency Tally Center proves that the network is secured and the process of creating the 34Bs at the center is corroborated and signed by the Political Agents. In effect there could not be intrusion without being seen by the Political Agents when creating the 34B. However, there could be human error as a vulnerable hole in compiling the 34B but that had to be in connivance with all the participants and stakeholders at the Constituency Tallying Center.



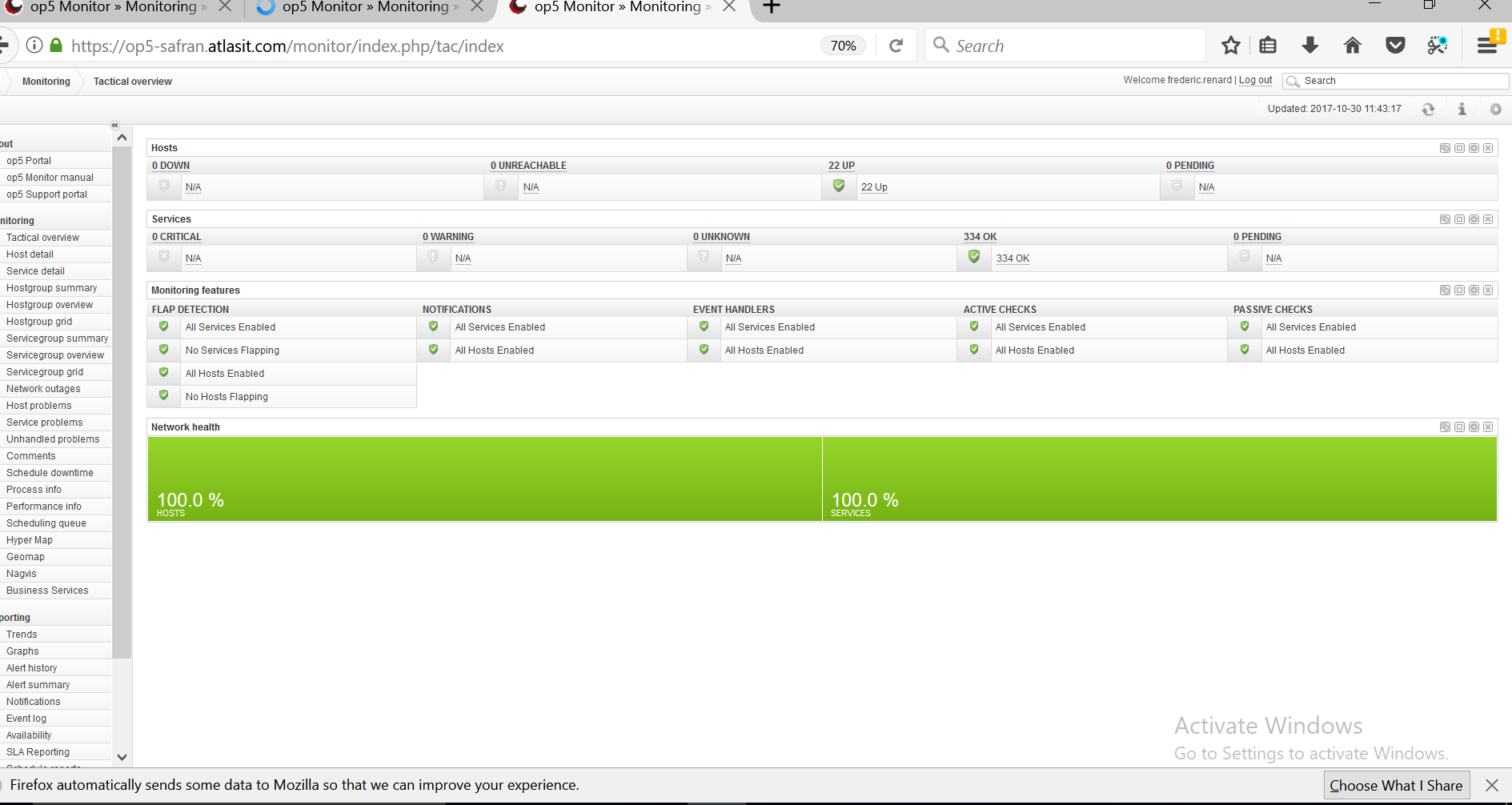
***Fig 3 Form 34A received at the Backend and at Constituency Tallying Center***

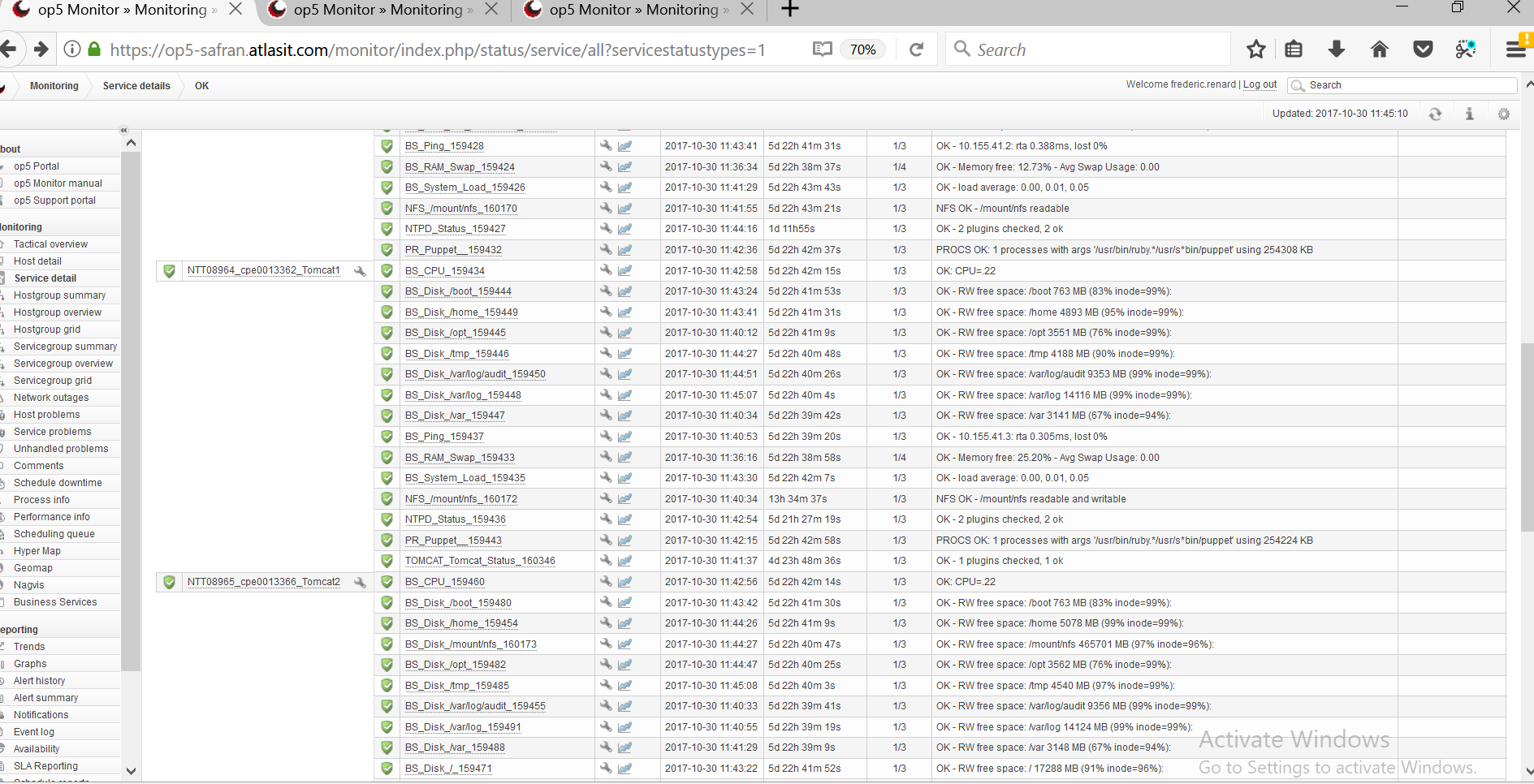
**iv) Findings at the National Tally Center**

The National Tallying Center was the place where the 34B series were collated to form the 34C. All the Political Parties’ agents, International and local observers, media and others are allowed access, based on accreditation, to witness the process. The AUEOM was present at the National Tallying Center (BOMAS) and was given access to see the process. The National Tallying Center was the final point of collation and also the final dump of the transmitted results from the Polling Stations and Constituency Tallying Center. Forms 34A and 34B were, therefore, verified for the creation of 34C.

The AUEOM noted that the process started by a manual checking of the 34A sent from the Polling Stations and the 34B from the Constituency Tallying Center. The process however assumed the use of technology through the use of excel for the creation of the Form 34C. The AUEOM confirmed that the twenty servers used for the process were active and processing. The Screenshots of the Servers are shown below in fig 4.

The 34C generated was announced at the National Tallying Center and has been posted at the IEBC Portal. See <http://forms.iebc.or.ke> for all the forms (34A, 34B, and34C).





***Fig. 4 The Screenshot of the Servers***

The AUEOM confirmed that the total number of Forms 34A received was 37, 183 while the total number of 34Bs received was 266. This was the exact figure announced by the Chair of the IEBC in his announcement of the results of the Fresh Presidential Election.

1. **Assessment of Compliance of the KIEMS to the Supreme Court Decision and the Elections Act 2011 (No. 24)**

The Elections (Technology) Regulations 2017 provided certain compliance standards for the use of technology. The AUEOM assessed the extent of compliance and concluded as follows: Section 4.2 of the regulation on Acquisition, Storage, and Deployment states that “The specifications developed under sub-regulation (1) shall ensure that the election technology is accessible to and inclusive of all citizens, including persons with disabilities and persons with special needs, to participate in the election process”. The AUEOM confirmed that the system used was accessible to persons with disability and special needs and where fingerprints were not available for authentication, there were other methods to check availability.

Sections 8, 9 and 10 relating to Testing and Certification of the Elections ICT system makes it mandatory for the Commission to carry out timely end-to-end testing of election technology before deployment for the election process. It further mandates the IEBC to issue a public notice specifying the date, time and place of the testing of the ICT system and invite stakeholders to attend. Furthermore, the Law requires the IEBC to publish the information required regarding the testing and certification process on its official website; through electronic and print media of national circulation; by posting the notice outside of the Commission’s offices; and assign any other easily accessible mechanism.

Further, on the transparency of the ICT system, the regulation governing the use of ICT mandates the IEBC, after the conduct of the necessary testing, to prepare a report to certify that the election technology meets the user requirements and specifications developed under regulation 4 and that it is accessible. The regulation also mandates the IEBC to request assurance by a professional reputable firm to certify that the election technology meets user requirements and specifications developed under regulation 4. The AUEOM noted that the IEBC did not conduct the end to end testing however, OT Morpho conducted the testing using the following companies IBM, VERIZON, and Orange. IBM conducted the testing for functionality and performance; Verizon conducted the testing on performance while Orange conducted the Penetration tests for hacking purposes. The AUEOM also noted that there were no public notices as far as the ICT processes were concerned.

The AUEOM noted that there was no audit of the system. The IEBC’s technical team explained that the audit had not been conducted because the operation of the system had not reached the required one year. The AUEOM was, therefore, unable to make any observations or findings.

Relevant sections relating to the Information Security and Data Storage mandates the Commission to put in place mechanisms to ensure data availability, accuracy, integrity, and confidentiality as set out in the First Schedule. It also states the responsibility of the IEBC to adopt tools to detect, prevent and protect against attacks and compromise of the election technology. The AUEOM was informed about a Penetration (intrusion test) conducted by the Orange company. The Mission, however, had no documentation regarding the test.

Regulations regarding the use of ICT for the elections also state that all electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act and the Kenya Information and Communications Act, 1998. The AUEOM’s observation of the system set up both in the cloud and the local Data Center shows that the records can be retained for the next three years.

With regard to Access to Software codes, the regulations indicate that access to the source codes shall, for proprietary software, be in accordance with the Industrial Property Act, 2001and section 44 (3) of the Act. It further entrusts the IEBC with the responsibility of ensuring that access to open source codes is in accordance with procedures prescribed by the Commission under regulation 15. The AUEOM, however, noted that most of the software is proprietary and not Open Source and therefore raises issues regarding ownership.

Regarding the use of Telecommunication Networks as part of the elections ICT system, the AUEOM noted relevant sections of the regulations governing the use of ICT in the elections that state that the Commission in collaboration with a telecommunication network service provider or providers shall put in place the appropriate telecommunication network infrastructure to facilitate the use of election technology for voter validation and results transmission and shall publish the network coverage at least forty-five days before the date of a general election. The regulations further note that the telecommunication network service providers shall ensure the security, traceability and availability of the network during the election period or during any other period as may be required by the Commission. The AUEOM did not observe a publication of telecom networks to carry out services on the Commission website. The Mission however deduced from the backend access obtained that the Telecom networks engaged were Safaricom1 and Safaricom2, Telkom, and Airtel, including Satellite communication. Furthermore, the AUEOM confirmed that service providers had been informed of their obligation to ensure traceability; security and availability of the network. This is verifiable by the snapshot from the backend access (see Figure 2 on Cloud and Networks Performance Data above).

The regulations governing the use of ICT for the elections also provide for Data Recovery and Operations Continuity by mandating the IEBC to establish an operations continuity plan to provide mitigation and contingency measures, including preparedness, prevention, response and recovery measures for potential failures of technology. The AUEOM noted that for the 26 October election Data Recovery was provided both locally and in the cloud.

The AUEOM noted that as far as the use of the ICT for the Fresh Presidential Election was concerned, the AUEOM observations are summarised as follows:

1. The KIEMS equipment is built and loaded to the expected specifications such as the AFIS, Camera Resolution, etc. but it could only be used indoors. Outdoor use is not advised. The weight of the equipment is good for carriage.
2. The EMC/Safety Standards for the equipment is CE and FCC which are European and American standards. The equipment is understood to be RoHS compliant. The MBTF is in excess of 50,000 hours. It shows that this equipment can be used in good condition in excess of 5 years.
3. The Device Cloud Security is stricter because three unique attributes of the KIEMS were whitelisted (IMEI, IMSI, Location). So at all times, the Cloud security will request for the three namely IMEI, IMSI, and the location of the equipment before allowing it access to the backend.
4. The processes of Identification and the authentication of the voters were substantially successful. However, there are also instances where manual methods were used. The collation and the transmission of the results from the KIEMS to the Backend were substantially successful. The cloud and the GSM networks performed optimally. The introduction of the Satellite contributed to the reduction of the number of polling stations not covered. (See Annexure 2).
5. All the 34A and 34B forms from Polling stations and the Constituency Tallying Center were received at the Backend and could be seen posted at IEBC Portal. However, some were not transmitted at the polling station possibly because of network coverage.
6. The Servers at the Data Center were all active as could be seen through the credentials loggings given to the AUEOM by the Commission.
7. The Commission seems to have complied with the sections of the Elections ACT 2011 and also complied with some of the paragraphs mentioned to have been violated by the Supreme Court of Kenya.
8. **CONCLUSIONS AND RECOMMENDATIONS**
9. **Conclusion**

The 2017 Elections in the Republic of Kenya were a significant step in the consolidation of democracy and stability of the country. On 8 August and 26 October 2017, Kenyans turned out in significant numbers to exercise their franchise in a peaceful manner.

The 2017 lead up to the Fresh Presidential Election was quite divisive and challenging. The AUEOM enjoined all Kenyans to respect the rule of law and refrain from actions that obstructed constitutionally mandated institutions in the conduct of their duties. The Mission recognised the role played by the Police in safeguarding Kenyans during the electoral process. The security agencies were however enjoined to act to protect all Kenyans; and to act in accordance with the laws of Kenya in their dealings with protesters.

Whilst the AUEOM noted the significant concerns expressed by some key stakeholders which led to filing a petition at the Supreme Court of Kenya, and without prejudice to the outcome of that judicial process, the AUEOM concluded that the IEBC of the Republic of Kenya conducted the elections within a context characterised by lack of trust and limited dialogue among some electoral stakeholders. This notwithstanding, the AUEOM commended the people of Kenya, political parties and candidates for their commitment to entrenching democracy.

1. **Recommendations**

Based on its observations and assessment 8 August 2017 General Elections, the AUEOM makes the following recommendations.

***To the Executive***

* Strengthen national mechanisms for reconciliation, national cohesion and integration among the various ethnic groups in the country, and address the important challenge of gender equality; and
* Take steps, in collaboration with the legislature, to ratify the African Charter on Democracy, Elections and Governance.

***To the Legislature***

* Grant legal backing to the regulations submitted for the implementation of Section 6 of the Party Campaign Finance Act; and
* Enact legislation that enables the full implementation of the 2/3 Gender principle.

***To the IEBC***

* Undertake a comprehensive audit of the voter register in collaboration with relevant stakeholders before the next elections;
* Strengthen stakeholder engagement and dialogue especially with political parties via the Interparty Committee to facilitate the amicable resolution of disputes and, where possible, avoid lengthy court proceedings;
* Evolve new processes to facilitate continuous stakeholder engagements long before the election period;
* Revisit the transmission, reconciliation and counting procedures to eliminate the grounds for the Courts to invalidate elections because of technical errors;
* Periodically train polling officials on the use of KIEMs to ensure their familiarisation with the equipment;
* A thorough review of technology used to maximise electoral integrity and advance planning and operationalisation of new technology to allow enough time for public consultation, field and security testing as well as training;
* Intensive and timely civic and voter education to educate voters aimed at reducing the number of stray ballots;
* Consider making special arrangements for PWDs and the aged to facilitate easy accessibility to polling stations;
* Consider the revision of the election regulations to guarantee the secrecy of votes for assisted voters;
* Ensure that the results transmission process is clear and understandable to all stakeholders; and
* Distinguish ballot box lids in subsequent elections to avoid confusion when voters have to choose candidates for different positions.

***To Political Parties***

* Adopt measures aimed at improving women’s participation and representation in elected positions and address gender equality through internal party regulations and structures;
* Provide sufficient and continuous training of party agents on electoral processes;
* Refrain from the use of divisive language during campaigning;
* Encourage members to participate in political activities in a peaceful manner;
* Desist from forming and organising party youth groups with the intention of stirring up election-related violence; and
* Avoid public announcements of election results before their formal announcement by the IEBC.

***To the Media***

* Ensure more equitable, balanced and unbiased reporting of electoral campaigning and political party activities;
* Strive for responsible and ethical reporting of electoral processes to contribute to a peaceful atmosphere before, during and after elections; and
* Develop appropriate self-regulatory mechanisms.

1. The AUEOM deployed to the 8 August General Elections, 90 Short-Term Observers (STOs) from 28 July to 15 August and 14 Long-Term observers (LTOs) from 3 July – 26 August 2017. For the 26 October Fresh Presidential Election, the Mission comprised of a core team of five thematic experts, deployed from 21 September to 9 November 2017 and 40 STOs deployed from 19 October to 1 November 2017. [↑](#footnote-ref-1)
2. . The Constitution of 2010; The Political Parties Act, 2011; The Elections Act, 2011; The Independent Electoral and Boundaries Commission Act, 2011; The Elections Offences Act, 2016; The Leadership and Integrity Act, 2012; The Supreme Court Act No. 11 of 2011; The Electoral Regulations/Subsidiary Law Number 24 of 2012; and the Public Order Act, 1951. [↑](#footnote-ref-2)
3. <https://au.int/en/pressreleases/20170803/pre-election-statement-african-union-election-observation-mission-kenya%E2%80%99s>/. [↑](#footnote-ref-3)
4. <https://au.int/en/pressreleases/20170810/preliminary-statement-african-union-election-observer-mission-2017-general>. [↑](#footnote-ref-4)
5. .<https://au.int/en/pressreleases/20171101/preliminary-statement-african-union-election-observation-mission-26-october>. [↑](#footnote-ref-5)
6. .See annexure 4 for joint statements issued by Heads of international election observation missions. [↑](#footnote-ref-6)
7. . EACC Final Press Statement on observation of the August 2017 General Election http://www.eacc.go.ke/. [↑](#footnote-ref-7)
8. . (www) IEBC website. https://www.iebc.or.ke/iebc/?mandate. Accessed 13 August 2017. [↑](#footnote-ref-8)
9. . Detailed statistics disaggregated by county, constituency, CAW, polling centre and polling station available at www.iebc.or.ke. [↑](#footnote-ref-9)
10. . In accordance with sections 8(A) of the 2011 Elections Act as amended in 2016. [↑](#footnote-ref-10)
11. . 210 Governor seats, 256 Senate Seats, 299 Women Representatives, 1,893 National Assembly, 11, 857 MCA. [↑](#footnote-ref-11)
12. . Political Parties and Independent Candidates Summary available at <https://www.iebc.or.ke/uploads/resources/UUaCk0NJJL.pdf>. [↑](#footnote-ref-12)
13. . Available at www.iebc.or.ke. [↑](#footnote-ref-13)
14. . Available at www.iebc.or.ke. [↑](#footnote-ref-14)
15. . Judiciary Working Committee on Elections. [↑](#footnote-ref-15)
16. . For purposes of identification, IEBC put in place a complementary method of Alpha Numeric search that identifies voters that have their biometrics destroyed within the electronic system. [↑](#footnote-ref-16)
17. . Under Article 10(2)(a) participation of the people is one of the country's values and principles of governance. Article 232(1)(d), also instructs public servants to include citizens in the process of policy making. Article 174(c) stipulates that an object of devolution is to "*enhance the participation of people in the exercise of the powers of the State and in making decisions affecting them*." Article 184(1)(c) further requires that mechanisms "for participation by residents” be included in national legislation to urban areas and cities governance and management. [↑](#footnote-ref-17)
18. . Civil Appeal 224 of 2017 (Being an appeal from the Judgement and Order the High Court of Kenya at Nairobi (Ngugi, Odunga & Mativo, JJ -Judicial Review No. 378 of 2017) dated 7 July 2017. [↑](#footnote-ref-18)
19. . Colour for ballot box lids: presidential- white; member of national assembly-green; member of county assembly- tan/ cream; senator-yellow; woman member national assembly- pink; and governor- blue. [↑](#footnote-ref-19)
20. . Burundi, Rwanda, South Africa, Tanzania and Uganda. [↑](#footnote-ref-20)
21. . Form 34As are available at HTTPS://PUBLIC.RTS.IEBC.OR.KE/. [↑](#footnote-ref-21)
22. . Form 34Bs are available at https://forms.iebc.or.ke/form34b. [↑](#footnote-ref-22)
23. . At Kangaru School in Embu County, LTOs reported that tabulation had not begun as at 2pm on Wednesday 9 August as they were awaiting results from most polling stations. Counting was equally delayed in most polling stations due to late arrival of the Kithinji and Kiragu Gubernatorial ballot papers. [↑](#footnote-ref-23)
24. .<http://www.kofiannanfoundation.org/supporting-democracy-and-elections-with-integrity/statement-kofi-annan-elections-kenya/>.

    <https://eeas.europa.eu/election-observation-missions/eom-kenya-2017/31010/statement-hrvp-following-general-elections-kenya_en> [↑](#footnote-ref-24)
25. .<https://au.int/sites/default/files/pressreleases/32778-pr-supplement_to_the_preliminary_statement_of_the_aueom-11.pdf> . [↑](#footnote-ref-25)
26. Petition 1 of 2017 Rt. Hon. Raila Amolo Odinga (1st Petitioner) H.E. Stephen Kalonzo Musyoka (2nd Petitioner) And Independent Electoral & Boundaries Commission (1st Respondent); The Chairman of Independent Electoral & Boundaries Commission (2nd Respondent); H.E. Uhuru Muigai Kenyatta (3rd Respondent) And Dr. Ekuru Aukot (1st Interested Party); Prof. Michael Wainaina (2nd Interested Party) and The Attorney General (1st Amicus Curiae); The Law Society of Kenya (2nd Amicus Curiae). [↑](#footnote-ref-26)
27. Maraga, CJ & P, Mwilu, DCJ & V-P, Wanjala, and Lenaola SCJJ [↑](#footnote-ref-27)
28. Ojwang,Njoki SCJJ [↑](#footnote-ref-28)
29. . The Constitution does not provide specific guidance on what happens if a Fresh election under Article 140 (3) is not held within the sixty-day stipulated timeframe. [↑](#footnote-ref-29)
30. .Petition 1 of 2017 - Application by Jubilee Party for contempt of Court. Petition filed under Sections 4 and 5 of the Contempt of the Supreme Court Act, Section 28 (4) and (5) of the Supreme Court Act, Article 22(d), 48 and 160 of the Constitution [↑](#footnote-ref-30)
31. . Petition 17 of 2017 Khelef Khalifa, Samuel Mohochi, Nahashon Kamau vs Chairperson of the IEBC, & IEBC [↑](#footnote-ref-31)
32. .Ekuru Aukot was a presidential candidate during the General elections of 08 August 2017. Aukot joined the NASA petition as an interested party and after the invalidation of the Presidential election, he was not included among the presidential candidates for the Fresh elections. Aukot challenged the decision by the IEBC to limit the fresh poll to President Uhuru Kenyatta and Raila Odinga as a misapplication of the law. On 21 September 2017, Aukot filed a petition at the Supreme Court on whether he can participate in the Fresh Presidential Elections. The matter was dismissed by the Supreme Court and referred to the High Court for interpretation. [↑](#footnote-ref-32)
33. . If the Supreme Court determines the election of the President-elect to be invalid, a Fresh Election shall be held within sixty days after the determination. [↑](#footnote-ref-33)
34. . Petition 515 of 2017: Norman Magaya vs Inspector General of Police and 2 others. [↑](#footnote-ref-34)
35. . Petition 162 of 2017: Apollo Mboya vs Attorney General. [↑](#footnote-ref-35)
36. . Petition 397 of 2017. [↑](#footnote-ref-36)
37. .Petition 1 of 2017 Okiya Omtatah Okoiti (Executive Director of Kenyans for Justice and Development Trust) Vs IEBC and Chairperson of the IEBC. [↑](#footnote-ref-37)
38. .Supreme Court petition 4 of 2017, Njonjo Mue and another v the Chairperson of the IEBC and 3 others. [↑](#footnote-ref-38)
39. .Supreme Court Petition 2 of 2017 Hon. John Mwau v IEBC & 2 Others. [↑](#footnote-ref-39)
40. . Petition 2 of 2017 Institute for Democratic Governance Vs Raila Odinga & 4 Others. [↑](#footnote-ref-40)
41. . Hon. John Mwau v IEBC & 2 Others. [↑](#footnote-ref-41)
42. . Njonjo Mue and another v the Chairperson of the IEBC and 3 others. [↑](#footnote-ref-42)
43. . DK Maraga (CJ); PM Mwilu (DCJ); JB Ojwang, SC Wanjala, NS Ndung’u and I Lenaola. [↑](#footnote-ref-43)