Press Statement

9th October 2017

Preliminary Report

*Mirage at Dusk: A Human Rights Account of The 2017 General Election*

Article 1 of the Constitution of Kenya clearly states that all sovereign power belongs to the People of Kenya and that the said power shall be exercised only in accordance with the Constitution. In a representative democracy like ours, one of the critical ways of exercising the people’s sovereign power is through direct and universal suffrage where every eligible voter participates in electing his or her leaders in a free, fair and credible electoral process. When Sovereign Power derives from the people, it means that citizens are empowered to democratically elect their leaders through the ballot. The meaning of the ballot must be extrapolated to go beyond the literal meaning of the physical ballot paper used to vote on Election Day. A credible ballot must be transparent and accountable. Comprehensive measures must be taken to ensure that the right to vote is secured and that every valid vote cast truly counts.

In Kenya, General Elections are not only guided by the Constitution but also by specific election laws and guiding principles aimed at strengthening the pre-election, the Election Day and the post-election environments. These laws establish the Elections Management Body, the Independent Electoral and Boundaries Commission (IEBC) whose specific mandate is to ensure that elections are free, fair and credible. In discharging its mandate, the IEBC is expected to collaborate with both state and non-state actors so that the outcome of any election is anchored on an all-inclusive electoral process that ultimately leads to enhanced legitimacy for the elected leaders.
As a National Human Rights Institution (NHRI) mandated with monitoring the adherence of human rights standards in the country, the Kenya National Commission on Human Rights (KNCHR) embarked on monitoring the 2017 General Election to ensure that human rights principles guided the rights of Kenyans to vote or to be voted for. Through a number of advisories and public presentations, the Commission remained (and will continue to remain) at the forefront of electoral laws amendments that took place in 2016 and 2017. Our advisories and submissions have always been geared towards ensuring that human rights principles, especially those related to elections, are well-infused in any proposed electoral laws amendments.

From the political party primaries, to the election campaign period to the Voting Day and to the post-poll environment after August 8\textsuperscript{th} 2017, Kenyans have witnessed what has arguably been one of the most intense and drawn-out electioneering periods. As would be expected, such an election was likely to be the theater of a number of human rights violations. The Commission was therefore keen to point out any election-related human rights violations from the outset for purposes of forestalling further violations or calling for the violators to be held accountable. The first step that the Commission took was to map out areas enumerated as ‘hotspot areas’ where our work would be focused in order to lay the ground for accurate and efficient information gathering.

The Commission then proceeded to set up an Electronic Information Management System to capture key human rights issues which included the following: misuse of public resources, incitement, bribery, actions and inactions by security organs, unequal access to public resources and facilities, appropriateness and accessibility of polling venues, violence and security. The information generated by monitoring the foregoing parameters was collected from 33 Counties.

Today, we are proud to launch our report aptly titled: \textit{Mirage at Dusk: A Human Rights Account of the 2017 General Election}, which is a culmination of 6 months of intense monitoring efforts by the KNCHR. As we all know, a mirage is only visible during the day and not at dusk. A mirage is a moving target. Our title therefore, is a reflection that despite the best intentions and efforts, from our findings, Kenya is yet to achieve the democratic reality of an election unmarred by irregularity and violence. As a country, we must move away from chasing the mirage. We must strengthen our legal and institutional structures aimed at
securing a free, fair and credible election, and commit ourselves to fully delivering on the same. It is therefore, our hope that the summary of our findings will go a long way in enriching our future electoral processes.

Findings from Campaign Period:

1. The Commission commends the police for their conduct in managing crowds in several places and even in tough instances where the situation threatened to get out of hand. The National Police Service exercised restraint and thus security provision around the campaign period indicated a National Police Service that is growing in understanding its role in safeguarding the security of Kenyans during the electioneering period. The participation of the National Police Service in community dialogues as documented by the Commission went a long way in building confidence between the police and the citizenry. That minimal cases of violence were recorded amidst heightened political temperatures is an indication that the security agencies worked seamlessly with various partners, including grass-root networks, to ensure the electoral campaign environment was safe for the Kenyan voter to enjoy the fruits of our democracy. However, the provision of security during the campaign period was not entirely without blemish. There were two reported deaths at the hands of the security officers during the campaign period. These cases have been referred to IPOA to investigate and ensure justice is done.

2. With the exception of Cabinet Secretaries and members of the County Executive Committees, Section 23 (1) of the Leadership and Integrity Act prohibits State and Public Officers from engaging in any political activities that may compromise or may seem to compromise their political neutrality. The Commission however, is of the view that this provision should be revised as it opens avenues for abuse. It was used to perpetuate misuse of state resources. State Officers used their offices to campaign through food donations, launching of roads and water projects amongst others. On the same note, some top county officials used taxpayer monies to conduct their campaigns, which included use of County and National Government vehicles as well as blocking their competitors’ access to public facilities and campaign rally venues.
3. As is characteristic of political elections, bribery of voters was noted during the campaign period, with this year’s campaigns having been gone a notch higher with Politicians using sophisticated voter-bribery methods which included use of branded items, including basic items such as bread and water. Peculiar cases were recorded in Machakos and Makueni where strangers would walk to a public place, call passers-by and hand out to them unsolicited amounts of money for purposes of wooing them to vote for particular candidates. Citizens also received calls from persons who promised to give them money if they turned up to vote. The rest of the bribery cases were outright dishing out of money, and with the new strategy of *door to door* campaigning witnessed in 2017 it is impossible to quantify the magnitude of bribery in the just concluded General Election.

4. The Cabinet Secretary, Ministry of Education, Science and Technology, Dr. Fred Matia’ngi issued a directive on 30th January 2017 to County Directors, Sub-County Directors and School Heads to desist from disrupting the learning activities of students by allowing them to participate in political events by way of singing to politicians and moving out of schools to cheer politicians by the roadsides among others. The order was aimed at protecting children from possible interruption of learning, violence and also safeguarding their innocent minds from the politicians’ uncalled for, and at times, age-inappropriate public utterances. The Commission noted a breach of this rule even by many politicians across the political divide. On one or two occasions they even campaigned at school grounds with school children in attendance.

5. It is unfortunate that despite the consistent monitoring by various State and non-state institutions, some politicians continued to play the ethnic-hatred card as a campaign and voter-mobilization tool. Ethnically-charged utterances have contributed to fear and despondency in some regions of the country, where in the run up to Election Day, there were reported cases of persons moving to places they considered safer areas for fear of political reprisals.
Findings of the Polling Day
On 8th August 2017, millions of Kenyans turned up to exercise their right to vote in the 40,883 gazetted Polling Centres countrywide. Anxiety was rife over the performance of the Kenya Integrated Elections Management Systems (KIEMS) that would see Kenyans put to use electronic processes for the second time, since 2013.

As was expected, Kenyans took to the queues as early as 2.00 a.m. hoping to be on time for the 6.00 a.m. opening of the polling centres.

1. From the Commission’s findings, over 95% of the 1,218 Polling Centres monitored by its personnel opened at 6 a.m. and the first voters were able to cast their votes by about 6.15 a.m. There were few recorded cases of polling centres that opened as late as 8 a.m. largely due to password hiccups and configurations of KIEMS by Presiding Officers. However, the POs were able to compensate voters with the same amount of time lost during the opening and no cases were recorded by our Commission of voters who were denied access to vote due to early closure of the Polling Centres.

2. Prior to the elections, the Commission had raised concerns with the IEBC on the level and quality of training that was to be offered to Polling Officers. The Commission’s reservation was that hurried sessions during such a critical process would be detrimental to all other gains that may have been made to secure a free, fair and credible election. During the Polling Day monitoring, the Commission noted challenges in the usage of the KIEMs by Polling Officers, especially on the implementation of the three-step method of voter identification. The first having been the thumbprint, secondly through alpha-numeric identification and thirdly the scanning of the identification card. For the latter two, a voter had to complete and sign form 32A to be allowed to cast their ballot. Our findings show that in some stations, the Polling Officers did not understand how and when to utilize Form 32A. In some Polling Stations, the Form was overused while in others, it was not utilised. We noted cases of voters who were permitted to cast their ballots despite having failed to be identified through all three means.

3. In respect to campaigns during August 8th 2017 Polling Day, the Commission observed that politicians restrained themselves except in a few cases that are documented within specific pages of our report. However, there were considerable cases of display of posters at the entrances of Polling Centres,
and the same will be forwarded to the relevant offices for action within the confines of the Elections Offences Act 2016.

Findings from the Post-Polling Period

1. By the 9th of August 2017, Kenyans were peacefully waiting and looking up to the IEBC to deliver the final results especially for the Presidential election. However, tension began to rise when the leading opposition coalition- NASA addressed the nation with allegations of system hacking and other malpractices they claimed to have unearthed. In their submission, they demanded the NASA opposition candidate to be declared President. With these sentiments, pockets of the country, specifically in Nairobi City and Kisumu counties experienced unrest with voters demonstrating in reaction to the pronouncement by the opposition. During that night, two people (2) were reported to have lost their lives in the said regions.

2. On 11th August 2017 at 10.00 p.m. the IEBC made the declaration of the Presidential results and what followed soon thereafter were gunshots and teargas in, Mathare, Kibera, Dandora, Lucky Summer and Kawangware in Nairobi City County and Manyatta, Kondele, Nyamasaria in Kisumu County as police tried to disperse demonstrators under the cover of darkness.

3. So far the Commission has documented thirty-seven (37) cases of Kenyans who lost their lives during the three-day unrests. The dead included a six 6-month-old baby who was clobbered by armed security agents whilst under the care of its mother in Kisumu County. Other deaths were attributed to police using live bullets and a few from police bludgeoning using truncheons. Dozens more recuperated in hospitals and at home with various degrees of injuries as documented in our report and perhaps some continue to languish in silence.

Attacks on Civil Society and Development Partners

During this electoral period, civil society members and organizations played a pivotal role in monitoring the continuous enjoyment of the right to vote. They updated the nation on their findings through periodic reports and press conferences. They also filed and supported various cases that touched on election and sought interpretations of electoral laws through our courts of law.
Although a number of CSOs played a commendable role in enhancing the credibility the electoral process, a few institutions were singled out and targeted by the state for their stance which challenged the credibility of the presidential election outcome. Letters of deregistration were issued to AfriCog and the KHRC by the defunct NGO’s Coordination Board. These letters were clearly aimed at intimidating the Civil Society and more so, the action of the NGO Board was evidently against the rule of law. The Commission moved to challenge these actions in a press briefing held on the 18th of August 2017.

The contribution of Development partners towards expanding the culture of democracy and the rule of law in Kenya cannot be gainsaid. Both National and County governments, state agencies and other private actors have been beneficiaries of both financial and technical support extended by local and international development partners. It is indeed important to safeguard the important role of development partners in the Country by shielding them from unnecessary or unwarranted attacks. The Commission notes with concern that some international development partners such as IFES and IDLO have fallen afoul to measures from the State calling for the suspension of their activities in the Country. The move to bar them goes against the international best practices.

**On-going Interventions by KNCHR in the Run-up to the October 26th 2017 Presidential Election**

The findings and challenges notwithstanding, we as a country have exactly 17 days to go to the fresh presidential elections as ordered by the Supreme Court of Kenya. The 139 KNCHR monitors are still on the ground sharing information about the on-going campaign activities and we will use the information being collected for our final report.

However, the Commission notes with concern attempts aimed at curtailing progress towards the realization of the fresh Presidential election. We condemn attacks on the Judiciary, especially from the political class, which attacks have now trickled down to the citizenry and are being actively reflected on social media. These acts and utterances are a recipe for anarchy and have the potential for destabilizing the Judiciary. The political class must lead by example and remain true to the Electoral Code of Conduct that specifically calls upon them to condemn, avoid and take steps to prevent violence and intimidation.
Cases of police brutality were recorded and called out during the 2017 post-election violence period with the assumption that security agencies would employ caution while dealing with the citizenry. As was noted during the recent raids at the University of Nairobi, some security agencies continue to deploy their powers with impunity. The Commission has from time to time called upon security organs to strengthen and employ intelligence gathering in their policing strategies to avert circumstances that may lead to the violation of human rights of innocent citizens. The Commission also wishes to remind all Kenyans that rights come with responsibilities and they must act at all times within the limits of the law in their civic engagements such as demonstrations, picketing and rallies.

In conclusion, the Commission makes the following recommendations in respect to the upcoming October 26th 2017 Presidential Poll:

**To the IEBC:**
1. That to avoid a Constitutional crisis, the IEBC must conduct the fresh presidential elections in strict compliance with the majority decision of the Supreme Court judgement.
2. That the IEBC should work closely with security agencies to ensure security for all Presiding Officers and Constituency Returning Officers, and adequate security personnel especially at the Polling Stations and Constituency Tallying Centres.
3. That IEBC inducts the Presiding Officers, Constituency Returning Officers and their respective clerks on voter identification especially in respect to form 32A, documenting the results in the respective forms 34 A, B and Cs and the simultaneous transmission of the results.
4. That IEBC ensures proper education of their Election Officials of the role and presence of the local, regional and international observers to facilitate their smooth access to polling stations for efficient monitoring.

**To the Political Parties**
1. Ensure that their members do not violate the law and that those who do so are immediately investigated, arrested and prosecuted by the relevant agencies.
2. That political parties conduct their demonstrations within the principles enshrined in Article 37 on being peaceful and unarmed.
To the National Police Service

1. That the Inspector General of Police ensures adherence to the spirit and letter of Article 37 and its guiding principles by his officers. The use of excessive force has already caused harm to many and even led to loss of lives. Any officer who misuses his or her firearm must be held individually responsible. Investigations by IPOA, followed by criminal charges by the ODPP should lead to convictions of the offending officers.

To the General Public

Prepare to vote on 26th October with your national identity card or passport in the polling center you voted at on 8th August 2017. While you do so, desist from making irresponsible utterances especially in social media, engaging in hate speech or violent behavior.

We call upon all members of the public to immediately report any violations through this FREE HOTLINE number 0800 720 627 and SMS 22359. However, we caution everyone on the use of these lines to make faux or fake emergency calls. KNCHR will not hesitate to report those that do so to the relevant authorities for investigation and prosecution. Kenya is our country. Let us do everything we can to salvage its pride.

May Service to our nation be our collective and earnest endeavor!

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Chairperson,
Kenya National Commission on Human Rights