

THE  
CARTER CENTER



*Waging Peace. Fighting Disease. Building Hope.*

**CARTER CENTER URGES KENYA’S POLITICAL LEADERS TO AGREE ON KEY CHANGES NECESSARY TO IMPLEMENT COURT RULING FOR NEW ELECTIONS**

On Sept. 1, 2017, in an historic and precedent-setting ruling, the Supreme Court annulled the results of the Kenya presidential election held on Aug. 8, finding that the election was not held in compliance with the Kenyan constitution and the electoral legal framework, and ordered that a fresh election be held within 60 days.<sup>1</sup> Specifically, the court found that the Independent Electoral and Boundaries Commission (IEBC) failed to organize the election in compliance with the constitutional requirement that all elections be simple, secure, transparent, and verifiable.<sup>2</sup>

Following the court’s Sept. 20 written decision detailing its reasoning for annulling the results, specifically citing non-compliance with the electoral provisions governing the transmission of results, the IEBC announced steps to comply with the court’s ruling and pledged to enhance transparency and accountability. The IEBC has scheduled the new election for Oct. 26. The Center welcomes the IEBC’s efforts to engage more openly with key stakeholders and to allow greater access to the commission’s information technology systems.

With the fresh election only weeks away, The Carter Center urges Kenya’s political leaders to engage constructively with the IEBC to discuss and agree on key measures needed to allow fresh, transparent, and credible elections within the constitutional timeframe. The agreed measures should be guided by the court’s written ruling and ensure that the fresh election will be transparent and verifiable, with parties and observers given the required access to observe all aspects of the electoral process and to verify the results on a timely basis.

In addition, the Center urges the two candidates and their respective supporters to focus on the campaign and discuss the issues that affect the daily lives of all Kenyans and the differences between their policy approaches. The Kenyan people deserve this type of campaign.

This statement highlights several recommendations on preparations for the Oct. 26 election to help ensure that it complies with the requirements of the court’s ruling. In addition, it summarizes the Center’s key findings to date, including an analysis of the post-election processes of vote tabulation and resolution of the legal challenge to the presidential results.

---

<sup>1</sup> Chief Justice David Maraga, Deputy Chief Justice Philomena Mwili, Smokin Wanjala, and Isaac Lenaola gave the majority decision, while two judges, Jackton Ojwang’ and Njoki Ndung’u, dissented.

<sup>2</sup> Kenya Constitution, Article 81.

## **The Supreme Court's Decision and IEBC Steps to Implement Key Findings**

On Sept 20, the court released its written decision detailing its reasoning for annulling the results, despite the approximately 1.4 million vote margin between the top two candidates. The court cited several concerns about the IEBC's management of the results, specifically its non-compliance with the electoral provisions governing the electronic results transmission system. It further found that the failure of the IEBC to grant petitioners sufficient access to the computer servers at the National Tally Center to review the transmission and receipt of polling-station and constituency-level result forms was a violation of the constitutional requirement that elections be conducted in a transparent manner.

The 4-2 majority decision found that these violations of the constitution and the law went beyond minor inadvertent errors, as the IEBC claimed, and raised serious doubts about whether the election can be said to have been a free expression of the will of the people as contemplated by Article 38 of the constitution, regardless of the result. In its ruling, the court underscored that numbers alone cannot define an election, because it is not simply an event but rather a complex process consisting of various stages, including boundary delimitation, voter and candidate registration, voting, counting, tallying, and announcement of results. The court found that under Section 83 of the Elections Act, a court could annul an election if it was proven that there was substantial non-compliance with the principles and thresholds laid out in the constitution and the election law.<sup>3</sup>

### *Reactions of Political Parties*

The reaction of both the main candidates and campaigns to the court's decision has not been conducive to the holding of credible elections on Oct. 26. Although President Uhuru Kenyatta initially said that he accepted the court's decision, he and other Jubilee Party officials have since threatened to retaliate against the Supreme Court. In a campaign speech on Sept. 2, President Kenyatta called the judges crooks and said that he would reform the judiciary when he is re-elected. After the release of the detailed ruling, he likened the ruling to a judicial coup. Such attacks on the judiciary simply for exercising its constitutional duty to adjudicate election disputes serve only to undermine the independence of the judiciary and reduce public trust in this institution.

Challenger Raila Odinga and other leaders and candidates of the National Super Alliance (NASA) have focused their attacks on the integrity of the IEBC, despite the court's finding that there was no evidence of criminal liability on the part of the IEBC or its staff. NASA has threatened to boycott or disrupt a fresh election unless certain demands are met. These include the replacement and prosecution of IEBC staff they see as responsible for the problems that led to the nullification of the Aug. 8 election and securing new companies to print the ballot and results forms, and design and oversee the electronic results transmission platform.<sup>4</sup>

---

<sup>3</sup> Article 138(4) of the Kenyan constitution states that in order to win an election in the first round, a candidate must receive 50 percent plus one of the votes cast nationally and at least 25 percent of the votes cast in 24 of the 47 counties in order to be declared the winner. Section 83 of the Elections Act states that "no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

<sup>4</sup> In response to the concerns raised by the NASA coalition, the IEBC recommended to the National Treasury that the United Nations Development Programme manage the procurement process for ballot papers and results forms. This initiative was rejected by NASA, Jubilee, and the treasury.

### *IEBC's Response and Actions*

The IEBC was criticized by political parties, civil society, and international observers for not holding public meetings nor releasing results of votes taken during its decision-making processes surrounding the Aug. 8 election. This lack of transparency eroded the confidence and trust of the electorate, civil society, and political parties, who felt that the IEBC should have communicated more openly about the status of preparations, challenges they faced, and plans for proactively addressing them.<sup>5</sup>

Following the court's written ruling, the IEBC issued a letter to NASA and Jubilee on Sept. 22 pledging to enhance transparency and accountability in their work and outlining the steps it would take to address issues brought up by the court judgement and opposition demands.

As part of its plan for the Oct. 26 fresh election, the IEBC has stated it would embed technical experts from the United Nations and the Commonwealth into their information technology (ICT) team, standardize polling station and constituency result forms (forms 34A and 34B, respectively), transmit the scanned images with the numerical results only, and provide observers and parties with access to all stages of the process, as well as to its servers, databases, and logs.

While NASA has demanded that the IEBC fire staff whom NASA claims were responsible for the irregularities in the Aug. 8 election and that it find a new vendor to replace OT Morpho/Safran, the IT company that supplied the software for the electronic results transmission system, the IEBC has declined to take these actions.

### *Need for Meetings to Agree on Procedural Steps to Implement Court Ruling*

After several postponements, the IEBC scheduled a joint meeting on Sept. 27 with representatives of Jubilee and NASA to agree on the way forward for the fresh elections. However, NASA representatives walked out of the meeting after Jubilee parliamentarians introduced amendments to the election law.<sup>6</sup> The IEBC announced that it will reschedule the meeting only if the principals agree to attend personally. NASA officials announced that they would not attend further meetings with the IEBC and Jubilee until the legislation is withdrawn. The IEBC was scheduled to meet with both presidential candidates separately on Oct. 3.

Jubilee's attempt to introduce amendments to the Elections Act has further complicated the IEBC's efforts to achieve consensus between the two presidential candidates on the procedural changes necessary to comply with the ruling of the court.

Making last-minute changes to an electoral law is contrary to good electoral practice, especially in the absence of political consensus on such changes. Jubilee party officials claim that they introduced the amendments to assure the implementation of the court's ruling. However, the court did not find the law at fault in the Aug. 8 election, instead ruling that the implementation of the law was faulty. Credible elections can be organized under the existing legal framework. While there may be reasons to consider changes to the electoral law for future elections, this should wait until after the Oct. 26 election, when all parties can engage in a thorough review of the

---

<sup>5</sup> Article 81 of the constitution sets out transparency as one of the main principle of free and fair elections. Paragraph 19 of the 2011 UNHRC General Comment No. 34 to Article 19 of the ICCPR calls on states parties to proactively provide access to information on issues of national importance.

<sup>6</sup> As a matter of good practice, election laws should not be changed less than six months before an election. See ECOWAS, Protocol, art. 2(1) and Venice Commission Code of Good Practice in Electoral Matters, II.2.a and b.

comprehensive legal framework through a consultative process with the goal of amending the law well in advance of the next election.

The IEBC is already engaged in the process of making necessary procedural changes based on the court's ruling, including reconfiguration of the electronic transmission kits, or KIEMS (Kenya Integrated Elections Management System). IEBC Chairman Wafula Chebukati has also stated that changing the law at this late stage will impose substantial challenges for the organization of a fresh election. Any changes would not be effective until Oct. 13 at the earliest, leaving the IEBC with less than two weeks to implement changes in procedure based on the amendments and to train polling station personnel accordingly. Because of time constraints, the IEBC has been forced to move forward with several aspects of its preparations, including the printing of ballot papers and changes to the software by the same companies that performed these tasks for Aug. 8, despite NASA's request that new companies perform these tasks.

In sum, the central challenge is for the IEBC to put mechanisms in place to ensure that the fresh election meets the constitutional requirement of being transparent and verifiable, including by allowing parties and observers the required access to observe all aspects of the electoral process and to verify the results on a timely basis. The IEBC's Sept. 22 letter detailing their recommendations for the conduct of the fresh elections and inviting party officials to discuss and agree on corrective measures is a constructive step towards this goal.

#### *Carter Center Mission and Recommendations*

At the invitation of the IEBC, The Carter Center is extending its presence and will observe the fresh presidential election scheduled for Oct. 26. Long-term and short-term observers will join the core team in Nairobi on Oct. 4 and Oct. 20, respectively, to observe critical pre- and post-election processes, as well as voting, counting, and tabulation.

The Center welcomes the IEBC's efforts to engage more openly with key stakeholders, and to allow greater access to the commission's information technology systems. With the fresh election only weeks away, it is essential for Kenya's political party leaders to work with the IEBC to achieve consensus on measures to improve the process and implement the fresh election within the constitutional deadlines.

Below, we share recommendations based on the Center's observations to date to help inform the preparations for the fresh election. We note and welcome the IEBC plans that have already been put into place to address many of the recommendations.

#### **Recommendations**

1. The IEBC should be transparent and involve all key electoral players in the planning process of the fresh elections, including by holding regular consultative stakeholder forums to consult and update the players on its progress. In addition, the IEBC should communicate regularly with the public, providing updates on the electoral planning process and alerting the public to challenges and corrective measures put into place to address them. Political parties should engage constructively with the IEBC to facilitate its work.
2. The IEBC should take the necessary steps based on the court ruling to ensure compliance with the legal provisions in regard to result tallying and announcements. As the court stated, tallying of the presidential results should be preceded by receipt and verification of all form 34As, checked against entries in form 34Bs, as provided for in the Elections Act.

3. It is essential that the IEBC ensure that the constituency result forms (form 34Bs) are standardized, the official form is the form used by returning officers, and that forms bear all security features and signatures of presiding and returning officers and agents. If an agent refuses to sign, an annotation of the same should be made on the form as required by the law. Handover and takeover sections of result forms should also be duly signed and stamped.
4. Training of poll staff should incorporate corrective measures based on the court's ruling so that returning officers are fully aware of their responsibility to follow the electoral law and regulations.
5. The IEBC should comply with the court order and ensure that there is a complementary mechanism in place to guarantee a seamless process in case of technology failure. The IEBC should further ensure that electoral stakeholders are aware of complementary mechanism procedures.
6. It is critically important that political parties stop attacks on the Supreme Court and IEBC and focus on the issues impacting the Kenyan voter. They also should work to ensure broad coverage of political party agents across polling stations and especially at the constituency tallying centers. These agents should be well prepared to monitor the counting, tallying, and transmission processes.
7. To enhance the public trust in the KIEMS system and ensure it is functioning properly for the election, the IEBC should conduct a nationwide public test of the results transmission system before the fresh election. The timely testing of KIEMS and other electronic systems necessary to the successful conduct of the election is of vital importance to identify and correct problems, provide transparency, and enhance public trust in the operation of the system. Deficiencies that contributed to problems with the results transmission that occurred in the August election might have been identified and corrected had sufficient testing taken place.
8. The IEBC should grant access to its IT system for inspection and audit by independent IT experts and those from the political parties, and interested civil society organizations (CSOs) as ordered by the court. This is especially important because the court found that this type of access is constitutionally mandated as part of the transparency requirement.
9. CSOs should continue to play a key role in observing and assessing the electoral process. In the Aug. 8 election, they provided independent and comparative reports, with recommendations for improving the electoral process, providing an important baseline analysis on which to measure Kenya's democratic development. They should continue this activity for the fresh election.

### **Carter Center Election Observation Mission in Kenya**

#### *Background*

As an independent and impartial observation mission, the Center assesses the extent to which the electoral process complies with both the domestic legal framework and international standards for democratic elections. The Center also adheres to the Declaration of Principles for International Election Observation and the accompanying code of conduct.

The Carter Center's observation methodology emphasizes the importance of conducting long-term observation of the comprehensive electoral process. The Center publishes periodic statements based on its observations in the pre-election period. In addition, the Center issues a preliminary statement two to three days following the polls and, when necessary, issues other post-election

statements. Several months after all field observation work is completed, the Center issues a final report with recommendations for improving of the entire electoral process.

### *The Carter Center in Kenya*

In response to an invitation from the Independent Electoral and Boundaries Commission, the Carter Center launched an international election observation mission in April 2017. The Center's core team of six experts has been in place in Nairobi, Kenya, since that time. Their work has been supported by six teams of long-term observers, who were deployed to the field three months in advance of the Aug. 8 election and stayed through late August. A larger team of short-term observers were deployed from Aug. 3-11 to observe the Aug. 8 election day procedures including balloting, vote counting, and tallying.

The Center's short-term election observation mission for the Aug. 8 elections was led by John Kerry, former U.S. secretary of state and Dr. Aminata Touré, former prime minister of Senegal. The mission included more than 100 observers hailing from 34 countries in Africa and around the world. On election day, Carter Center observers assessed the electoral process in 424 polling stations in 185 constituencies across 39 counties, as well as the vote tallying process in 37 constituency tally centers.

The Carter Center's preliminary statement, issued on Aug. 10, noted that while election day voting and counting processes functioned smoothly, the electronic transmission of results from the polling stations to the country's 290 constituency centers proved unreliable. The Center reported that IEBC officials had advised constituency-level officials to revert to the paper-based results forms to tally the official results. As these processes were ongoing, the Center did not offer an assessment of the tabulation process, but noted that if fully implemented, the IEBC's procedures would provide a high level of transparency and accountability.

The Center published a second statement on Aug. 17, noting substantial delays in the IEBC's posting of constituency and polling station results forms. The statement underscored the importance of providing key stakeholders access to official results data so that they could crosscheck and verify the results and exercise their right to petition if necessary. The Center further urged the IEBC to finalize the posting of the 34As as expeditiously as possible, noting the Aug. 18 deadline for filing challenges to the presidential election results.

### **Carter Center Findings Regarding Tabulation and Results Transmission**

International standards call for transparent and verifiable tabulation, transmission, and publishing of election results.<sup>7</sup>

Center observers visited 37 constituency tallying centers after poll closing on Aug. 8 through Aug. 10. The work was slow, and many IEBC officials were fatigued. Despite an initially chaotic process in some centers, IEBC constituency level officials managed the majority of the tally centers in a transparent manner.

In many tallying centers, officials entered the results data into an Excel spreadsheet and then transferred the data to the constituency-level result form. The transmission of scanned polling

---

<sup>7</sup> U.N., ICCPR, art. 19(2); AU, Convention on Corruption, art. 9; OSCE, Copenhagen Document, para. 7.4; CoE (Venice Commission), Code of Good Practice, sec. 1.3.2.xiv.

station results forms to the constituency tally centers appeared unsuccessful in several locations where STO teams observed. Only 30 percent of STO teams reported officials receiving scanned copies of the results forms for each of the polling stations located in the constituency. In many cases, officials attributed this failure to poor internet connections at the polling-station level and scanned the form 34As at the constituency level.<sup>8</sup> Nearly two-thirds of the teams observed officials processing the paper-based 34As at the tally centers in the two days following the polls.

While the data entry of the results from the KIEMS system appeared to transmit successfully to the national tally center, the early display of these tallies was not substantiated by scanned copies of the polling station results forms for the presidential race. Nor were these results clearly labeled as unofficial. STO teams observed a wide disparity in the way officials announced the polling station results at the constituency level or displayed the results from the national level. In one case, observers noted discrepancies between the results announced by the constituency returning officer and those displayed electronically at Bomas.

On the national level, Carter Center core team experts noted the polling station results transmitted by text were not accompanied by the scanned polling station form 34As as required by law. Both the scanned and original polling station results forms were slow in reaching the national tallying center located at Bomas.

The IEBC announced the presidential results using constituency results form 34Bs, without verifying them against the 34A forms. Several days before the deadline for lodging a petition to challenge the presidential results, the IEBC confirmed that several thousand forms remained outstanding. While the IEBC communicated with the NASA campaign regarding its request that the scanned forms be made available, regular updates about the status of the tallying and tabulation process were not provided to the public.

The breakdown in the electronic results transmission system affected the transparency of the tallying process and resulted in questions about the accuracy of the results. The failure of the system to work as expected contributed to NASA's challenge of the results of the presidential election.

### **Election Dispute Resolution: Electoral Petitions and the Supreme Court Decision.**

Efficient electoral dispute mechanisms, including the provision of a fair and public hearing before a tribunal, are essential to ensure that effective remedies are available for the redress of violations of fundamental rights related to the electoral process.<sup>9</sup> Therefore, effective dispute resolution

---

<sup>8</sup> In two tallying centers visited (in Central Imenti and Kaiti), officials reported using satellite phones at polling stations to transmit data.

<sup>9</sup> ICCPR, Art. 2(3): "Each State Party to the present covenant undertakes: (a) to ensure that any person whose rights or freedoms are herein recognized as violated shall have an effective remedy, notwithstanding that the violation has been committed by people acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted." UNHRC, General Comment 32, para. 25: "The motion of fair trial includes the guarantee of a fair and public hearing."

mechanisms are an integral part of ensuring that the will of the people is upheld during an electoral process.<sup>10</sup>

The Center observed the proceedings of the Supreme Court in their entirety and found that they were conducted in a professional and rigorous manner, despite a very tight timeframe – two weeks, as required by the constitution – to issue a decision. The Supreme Court judges conducted the hearings in line with the highest standards of professionalism and integrity necessary for the conduct of electoral litigation, with all parties given the opportunity to present and argue their case. All lawyers involved in the case praised the Supreme Court's dedication to their work. The proceedings were conducted in a transparent manner, with court judgments made public shortly after their pronouncement.

The decision underlined that the IEBC violated Article 138(3)(c) of the constitution when it failed to verify the results before their declaration. According to the decision, the IEBC further acted contrary to the law when it announced presidential results prior to the receipt of all polling station tally forms, basing them instead on the constituency level tally forms. Notably, the court ruled that the IEBC's failure to transmit the results from all the polling stations to the National Tallying Center electronically at the same time as the scanned forms themselves violated Section 39(1c) of the Elections Act. Other violations of the law included using polling station and constituency level tally results forms of questionable authenticity, up to and including the form that was used to tally the constituency results on a national level (Form 34C).

The ruling of the court confirmed that the concerns were limited to the results transmission process, as no evidence had been presented to show that other processes in the election, i.e. voter registration, voter identification, voting, and vote counting, were not conducted in accordance with the law. The court declined to make a finding of criminality on the part of individuals within the IEBC and stated only that there were “systemic institutional problems.”

The Supreme Court concluded that the IEBC disregarded Article 88(5) of the constitution, which requires it to exercise its functions in accordance with the constitution and national legislation, and failed to comply with Articles 86, which mandates that the IEBC conduct elections in a simple, accurate, verifiable, secure, accountable, and transparent manner.

Disregarding the pleadings of the IEBC in which they describe any illegality or irregularity as minor, inadvertent, or caused by human error, the court found that the irregularities and illegalities in the conduct of the election were substantial and that they impacted the integrity of the election, despite a large gap in the number of votes received by the two leading candidates. The court ordered the IEBC to conduct a fresh election, within 60 days, in strict compliance with the constitution and other electoral laws.

As part of its consideration of the petitioner's allegations, the Supreme Court scrutinized the result tally forms. According to the Supreme Court's report on the results of its investigation, there were several errors in the forms submitted for review: Form 34C has neither a watermark nor a serial number, and the form appeared to be a photocopy; out of 291 Form 34Bs, 56 bore no watermark,

---

<sup>10</sup> U.N., UDHR, Art. 21; AU, ACHPR, Art. 7. “Every Individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, law, regulations and customs in force” and “the right to be tried within a reasonable time by an impartial court or tribunal.”



five were not signed by the returning officer, 31 had no serial number, and 32 were not signed by the respective party agents, the handover section of 189 forms had not been filled in, and the takeover section of 287 forms had not been filled in.<sup>11</sup> Additionally, a random scrutiny of 4,299 Form 34As from five counties revealed numerous discrepancies: 481 34A forms were signed carbon copies, 157 were unsigned carbon copies, 269 were original copies that were not signed, 26 were stamped and scanned while one was scanned and not stamped, 15 were not signed by agents, 46 were unsigned photocopies, and 11 had no watermark.

These findings indicate that additional training is needed to ensure that all IEBC staff are fully trained in vote tallying and results transmission procedures and are able to implement them accurately.<sup>12</sup>

The court was also deeply concerned about the failure of the IEBC to comply with its order to grant access to its computer servers for purposes of scrutinizing the log-in trails of different users and the log of scanned forms transmitted in the system. The court concluded that the failure of IEBC to provide required access runs contrary to the constitutional requirement of transparency and verifiability of the electoral process. According to the ruling, the failure of the IEBC to comply with the court order in itself raises the presumption that, as alleged by the petitioner, either IEBC's IT system was infiltrated and compromised, that IEBC officials themselves interfered with the data, or that the officials simply refused to accept that they had bungled the transmission and were unable to verify the data.

Further, the court found that the IEBC failed to supply a sound response to several allegations made by the petitioner, including that several results forms were from polling stations that had not been gazetted as required by law. It also could not explain why there were approximately 500,000 more votes cast in the presidential election than in gubernatorial or parliamentary elections. This failure by the IEBC weighed heavily against it, according to the court.

The constitution provides a two-week timeframe for the court to conduct hearings and issue a decision concerning challenges to the presidential elections. Both the court and the parties to the case found the constrained timeline problematic. The court noted that the 14-day deadline, which has been discussed previously in parliament, is not sufficient for the court to order certain verification exercises, such as a recount of the votes or scrutiny of election materials, which might affect the outcome of the petition.

---

<sup>11</sup> The handover portion of the form should be filled in by the presiding officer when they hand over the form to the returning officer at the tally center. The takeover portion should be filled in by the returning officer.

<sup>12</sup> In a review of the detailed court report of the 37 constituency tally centers where the Carter Center observed, none of the form 34Bs had the takeover section signed; 43 percent had the handover section signed; all forms were signed by the returning officers and by party agents; 16 percent did not have a watermark, and 8 percent did not have a serial number.