

Independence of Electoral Commissions and Electoral Commissioners: Reflections of a former Elections Chief.

By

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Note: This is a long post and contains personal accounts familiar to some Election chiefs, which is used to illustrate certain principles. It also contains a sneak preview of contents that will appear in an upcoming memoir. It is not a research paper but rather a narrative reflection. The writing style is free to flow and conversational. It was presented at a past symposium for election chiefs.

1. Background

In December 2007, Kenya held its General Elections following a highly divisive referendum 2 years earlier and a tense campaign period leading to the Elections itself. The results of the Presidential Elections were disputed amid claims of rigging and state capture of the Elections. The aggrieved parties expressed a lack of trust and confidence in the Election Dispute Resolution (EDR) process and called for nationwide protests and mass action. This degenerated into a near Civil War with hundreds of deaths from the use of lethal force by the police against protesters and inter-communal violence and revenge attacks. There was massive destruction of property and thousands of internally displaced.

It took the intervention of the African Union (AU), European Union (EU), the United States (USA) and the United Nations (UN), through a mediation effort led by Dr.Kofi Annan, former Secretary-General of the UN, to bring peace to the country. The warring factions signed a national accord on 28-02-2008 and a coalition government was established based on a power-sharing agreement that created the office of the prime minister for the leader of the opposition party. The Grand Coalition Government commonly referred to as the “*Nusu Mkate*” Government, set up an Independent Review Commission to inquire into the post-election violence chaired by Court of Appeal Judge, Justice Phillip Waki: (The Waki Commission Report). The government also set up another commission led by Justice Kriegler (Former South African Elections Chief) to inquire into the disputed Elections. This Commission recommended reforms in the Electoral System, Electoral Administration, Regulation of Political Parties, Civil Society and Media (Kriegler Commission Report). This report was thereafter selectively implemented when the opposition, already unhappy with the Electoral Commission for the conduct of the disputed Presidential Elections, started a clamor to disband the electoral body as part of the wider Constitutional and Electoral reforms

The Electoral Commission of Kenya (ECK) was the Elections Management Body (EMB) responsible for elections in Kenya. Established under article 44 of the Constitution of Kenya. It was a constitutional body with a chairperson and 22 commissioners appointed by political parties in proportion to their strength in parliament. Once appointed, the commissioners enjoyed the security of tenure for their 5-year term and could only be removed through a process similar to that of removal of a High Court Judge.

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Following the post-election violence that followed the disputed presidential elections in 2007, the Electoral body and its chairperson became a convenient scapegoat for blame. They were subjected to a very public trial by and through the media and condemned unheard. The chairperson of the ECK, the late Samuel Kivuitu, bore the brunt of the attacks. He was quoted out of context by a media house who edited his answer to a question he was asked, ***“Do you think President Kibaki won fairly?”*** He had answered, ***“I don’t know because winning fairly entails more than just having the most votes”*** and went on to explain the precepts of fair elections and level playing field. The media houses edited this answer and just took the first two words ***“I don’t know”***, and went on to create the impression that the election chief did not know who won the presidential elections of 2007. An interview of several minutes was edited, sexed-up and reduced to a two-word sound bite for the desired effect.

After 10 months of persistent and sustained attacks on the ECK, protests and political rallies by politicians, the stage was set for the sacrifice of the EMB. In December 2008, Parliament passed by more than the required 2/3 majority, an amendment to the constitution by deleting section 44 which established the ECK and inserting a new section 44A that established the Interim Independent Electoral Commission(IIEC). This effectively meant the dissolution of the ECK (established since 1992) and ending the tenure of office of all the commissioners and the 650 members of staff forming the secretariat. This amendment was a short cut to avoiding the long process of appointing tribunals for each of the commissioners to confirm the guilt of whatever misconduct they were being accused of. The ECK commissioners challenged the constitutionality of the process and obtained injunctive orders from the high court but the speaker insisting that the court could not stop the legislature from doing its work ignored this.

After the disbandment/dissolution of the ECK in December 2008, Kenya did not have an EMB for 4 months until May 2009, when the Chair and 8 commissioners were appointed to form the IIEC. I was appointed the Chair of this Interim Commission after going through a public interview and vetting by parliament. My professor of Law on learning of my appointment called me and told me of his dilemma of ***“whether to congratulate you or offer you my condolences!”*** This witty comment by my Law Professor turned out to be prophetic, as I will later find out. The appointment was for a period of 24 months and the key functions of the body were to establish an effective and efficient secretariat, conduct fresh registration of voters and hold a referendum for a new constitution that was to be adopted the following year.

The IIEC enjoyed the same constitutional status as the ECK and additionally, section 44A emphasized its independence to the effect that, ***“in the exercise of its functions it shall not be under the control or supervision of any person or authority.”***

2. Threats to Administrative, Decisional, Functional and Financial Independence of the Electoral Commission.

“Which part of the word Interim do you have difficulty understanding?”

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As chairperson of the Interim Independent Electoral Commission, I quickly discovered the push and pull and the tension that develops between the political class and the EMB, and their intolerance to the Independence of the Commission. The politicians never missed an opportunity to remind us that they were the “boss” and if we “grew horns”, they could easily deal with us the way they dealt with our predecessor, the ECK. Other mischievous political actors will point out to us the oxymoron that was our name – Interim and yet Independent.

As the country prepared to adopt a new constitution, the commission commenced the voter registration exercise for a period of 30 days, time being of the essence. On the last day of the exercise, the media reported long lines of people waiting to be registered. This was against the previous weeks’ where the voter registration centers were reporting zero visitors. Some in the government wanted the exercise extended by the commission for 2 more weeks. I was invited together with my Chief Executive Officer/Head of the Secretariat, to attend a meeting chaired by the Prime Minister and attended by the Attorney General, 6 cabinet ministers, 6 permanent secretaries and other senior government officials ostensibly to discuss the extension of the period of voter registration. Unknown to me, the media was already invited to cover the press conference that we shall be addressing later to announce the extension of the voter registration exercise. When I was asked to go along with this and to basically rubber-stamp a decision already made, I refused and reminded those in the meeting that the commission was independent and will not take instructions from any person or authority. Further, I said that such a request would have to be considered by the whole commission after input from its technical staff. When the treasury boss in the meeting said he was ready to give a cheque for any amount of money required for the extension, I said we would prefer ***“a cheque for two weeks!”*** This did not please the chair of the meeting who was visibly annoyed but took note of my position and closed the meeting. As I left the meeting, a senior official in his office escorted me to the lift and asked me, ***“Mr. Chairman, why are you being difficult? Don’t you know you are interim?”*** to which I replied, ***“Yes”***. He then asked me, ***“So which part of the word Interim do you have difficulty understanding”***. Having understood the message contained in the pregnant statement I replied, ***“Yes I understand that I am chairman of an Interim body but it’s also independent. Which part of the word independent do you have difficulty understanding?”*** I asked. [The commission later met and announced an extension of the exercise for 4 days].

The new constitution provided for the permanent commission (IEBC) that was to replace the Interim one (IIEC) and it was expected that with our experience and for continuity, we would apply to be reappointed to the IEBC. Obviously, such an appointment will not be divorced from the political forces as the new commissioners will be approved by parliament and appointed by the President (in consultation with the Prime Minister), hence the above exchange with the aid of the Prime Minister. I will later come to feel the weight of the threat implicit in the statement

when we were transiting to the IEBC. Although I had the full support of the prime minister to continue as the chairperson, some of his aids and surrogates did the opposite.

As chair of the Interim Electoral Commission, I had several other run-ins with the political class in the executive, especially in the run-up to the referendum in August 2010. The Ministry of Finance and the Justice Ministry provided several instances that tested the limits of our independence as the former was in charge of the national purse and the latter purported to be our parent ministry and tried to act like one! Technocrats and Bureaucrats at Treasury, for instance, would routinely ignore commission recommendations and slash the budget irrationally and almost always delayed exchequer releases even for the approved budget. The commission tried to mitigate the problem with the treasury by inviting the desk officers in the treasury to observe the elections to get a better understanding of the electoral process without much success.

As we prepared for the referendum, it became increasingly clear to us that the Coalition Government was not fully united in support of the new constitution. Some were opposed to it or wanted to delay its enactment and tried every effort to use the Commission to achieve their goal while avoiding public blame. These ministers were called “watermelons” because of their perceived hypocrisy pretending to support the new constitution in public but doing the opposite in their inner circles. The symbol for YES to the constitution was **GREEN** and no was **RED**, hence the name watermelon! These watermelon ministers almost derailed preparations for the referendum when they used the office of the President to generate a false alarm that not enough eligible voters were registered to legitimize a referendum. The Commission had to prepare a position paper on international best practice on the referendum and assured the President that if 60% of eligible voters were registered, a referendum could be held. To his credit, the Prime Minister was supportive of the Commission and the constitution-making process and was instrumental in getting the government to support fully the commission in the conduct of the referendum for the new constitution. He was the catalyst for the adoption of the new constitution.

In the run-up to the 2010 referendum vote, the Cabinet, without consulting the Commission, decided that Kenyans in the diaspora would not be allowed to vote in the referendum. This was an intolerable violation of and flagrant affront to the independence of the commission as the cabinet was usurping the role of the commission as well as giving directions to the commission. There were strong objections to this by the commission and Kenyans in the diaspora. In the end, the commission forced the government to provide funding to enable the commission to allow Kenyans residing in the East African region to register and vote in the referendum.

(3) “Next time you come to parliament, you will check your independence at the door.”

The political class in parliament, on both sides of the aisle, will always try to cow and intimidate the EMB and its head to achieve their narrow, parochial and selfish interests, jointly or severally. **They are equal opportunity offenders when it comes to undermining the independence of the EMB.** Members of parliament, unhappy with any decision of the EMB, often sometimes conspire to frustrate the efforts of the EMB in approving proposed electoral reforms, regulations or the budget. They can also use their oversight role through the committees to summon the heads of the EMB for **grilling** before them in open sessions covered by the media. They then use that opportunity to dress down or put down the EMB, make political statements, ask all sorts of infantile questions, and make snide and insipid remarks

and polemic speeches all in an enterprise to score some points against the EMB or its head or both. Attempts by the commission to get MPs from the relevant parliamentary committee to observe elections in other countries so that they appreciate the electoral process better did not bear many fruits.

The new Constitution of Kenya was adopted on 4th August 2010. It introduced reforms in the Management of Elections and Administration of Justice in Kenya. It established the IEBC as an independent body that was constitutionally more protected than the previous electoral commissions like ECK and IIEC. The Chairperson and Commissioners were appointed through a competitive merit-based and transparent process and once appointed enjoyed security of tenure for their term of office of 6 years (non-renewable). Removal was for cause and under the grounds set out in the constitution. To disband the commission became difficult for parliament. The commission was entrenched in the constitution and it could only be disbanded after a positive vote in a referendum that was to be conducted by the IEBC.

The process of appointing Commissioners to the IEBC was full of intrigues, backstabbing and high drama. Sections of the political class started a campaign to discredit me and the commissioners to reduce our chances of being reappointed. There were a series of negative op-eds and articles in the print media, including one under a fake name of Boaz Gikonyo. Some of these negative stories on us were later linked to the Chief Executive Officer (CEO) who had prepared a dossier on the commissioners and was the source of the leaks. He was motivated by a fear that if the commissioners were reappointed they were certainly going to remove him. He, therefore, sought protection from politicians from his community to whom he had sold the notion that he was going to be there to defend and protect their interests. These politicians openly prosecuted this scheme in and out of parliament. This came out in the open during the debate on the enactment of the IEBC Act, which was enacted with individuals in mind that were pitting me against the CEO. The qualifications for appointment as chairperson was raised from being qualified to be appointed a High Court Judge (as it was since 1992) to a judge of the Supreme Court, in the expectation that I did not qualify. After they realized that I still had the qualifications, new amendments were introduced on the floor of the house without success. They were determined so much that they almost wanted the Law to bar me specifically from reappointment if they could get away with it. They behaved this way because they knew I had a lot of goodwill and support for my reappointment. Even the Law Society informally endorsed me as the sole candidate as was shown by the applications once the Vacancies for Commissioners and Chair of IEBC were advertised. No qualified lawyer applied for chairperson while many, including some who were my seniors, applied for commissioner. Only 2 people other than myself applied for the position of chairperson while over 400 applied for commissioner. Re advertisement for the position of chairperson attracted 5 others.

In November 2011, after many political intrigues and other drama designed to spoil my candidature, I was again reappointed to chair the IEBC. My commissioners at the IIEC were not lucky either. Out of the 8 commissioners, only one was appointed back to the IEBC. A constitutional provision underlining their re-appointment for continuity and institutional memory was disregarded for political expediency. I contemplated not accepting this appointment when only one commissioner was reappointed from the IIEC. In retrospect, I wish I did but I did not.

The first task of the commission was to undertake the Boundary Delimitation (or redistricting) exercise for 290 Constituencies and 47 County Assemblies based on criteria listed in the constitution. The incumbent members of parliament had a lot of interest in this exercise and several attempted to influence the process and force through their gerrymandering plans and the redrawing of their electoral areas to benefit them. The IEBC had the final authority on the delimitation of boundaries of the electoral areas after taking into account the views from the public. The commission published its final report for the 290 constituencies and 1450 county assembly wards. The report was submitted to parliament. Members of parliament, through the committee of legal affairs, summoned the heads of the commission to a retreat and strongly urged us to accept their proposal to increase the county assemblies from 1450 to 1550. The additional 100 wards selectively given to areas represented by MPs who were members of the legal affairs committee and other leaders of the house such as the speaker, his deputy and chairs of powerful committees. When the report came back to the IEBC from parliament with the proposed changes, the commission rejected them and instead went ahead to gazette the 1450 county assembly wards. ***“IEBC DEFIES PARLIAMENT”*** screamed the newspaper headlines the following day. Though the majority of Kenyans supported this, it was not what the parliamentarians wanted. We received great support for our stand from the public but not from the MPs. We anticipated the loss of their political goodwill but in hindsight, it is clear we underestimated how bad this was going to be. I received a call from a fuming chairperson of the parliamentary committee on legal affairs, who also doubled up as Chairman of the Parliamentary Select Committee on the Constitution (PSC) demanding to know why we ignored parliament’s recommendations. I replied that we considered them but did not agree with them and that on the boundary delimitation issues, we were not bound to follow the parliament’s proposal. I reiterated the constitutional provision on our independence and then he uttered the following statement, ***“Next time you come to parliament you will check your independence at the door.”*** This subtle threat was going to pass when the commission presented its budget for the 2013 general elections to both the legal affairs and budget committee of parliament. We were subjected to ridicule and harassment by the MPs when we appeared before them. They displayed a lot of bad faith and hostility. They alleged that we had presented a bloated budget that was going to fund the most expensive elections in Africa. It was clear to us that they were punishing the commission as revenge for the boundary delimitation issue. They departed from the tradition and conducted the committee hearings in public and with the press in attendance. Out of spite and sheer blooded mindedness, they reduced the election budget in areas that later came to affect the electoral operations. They also amended the Elections Act to take away from the commission the power to make regulations for the conduct of elections. It was made subject to the approval of parliament.

We also received similar, but far worse, treatment before the Public Accounts Committee, which is chaired by the opposition party by parliamentary tradition. A legitimate function of considering the audited accounts of the commission was weaponized and turned into an inquiry into the conduct of the elections of 2013 and a fault-finding one. They became investigator, judge and jury all rolled into one. They also departed from tradition and summoned the accounting officer and officers under him and all the commissioners to appear before them separately and answer a wide range of issues that had nothing to do with the audited accounts. It was the most unprofessional and the worst parliamentary committee that I ever appeared before in my tenure of office. This committee engaged in conduct that clearly was a misuse of parliamentary powers and privileges. It went overboard so much that some commissioners

contemplated refusing to appear before it anymore and accept any punishment for the so-called “**contempt of parliament**” offense. The corruption level in this committee was so high with some of its members brazenly demanding bribes and extorting money in exchange for not condemning public officials while some did not even pretend to hide their partisanship and bias. In one incident, two members of the committee who were known to me told me that the leadership of the committee wanted an equivalent of \$300,000 in bribe as an inducement to tone down their harsh stance. These extortionists even had the guts to suggest that we raise this bribe money from the budget of the Commission. My attempt to get the Anti-corruption Commission to trap them using me, as the bait did not succeed, as they did not want to risk upsetting parliament and face dire repercussions including disbandment. We did not pay up but we went through hell with this committee. To put this committee’s reputation in context, the National Assembly disbanded the first Public Account Committee (PAC) established after the 2013 General Elections following bribery allegations in the committee. It is near impossible to assert and maintain independence with an intransigent parliament or a rogue parliamentary committee like this one.

(4) Judicialization of politics and politicization of the judiciary.

A strong and independent Judiciary that has the confidence of the people is a good foundation for the Rule of Law in the country. However, in a polarized society where there are political intolerance and dishonesty, there is always the danger and risk of judicialization of politics and politicization of the judiciary. Sometimes politicians and Political parties take political cases to the judiciary instead of seeking a political settlement in the political arena with their counterparts. When the matter affects the elections and the electoral calendar, the body that will suffer the most is the EMB. Judicial activism and exuberant exercise of judicial independence sometimes results in judicial overreach and judges issuing injunctions that have serious implication on the electoral calendar. In this scenario, it is not uncommon for the head of EMB to be cited for contempt of court with attendant publicity when court orders are not implemented due to circumstances beyond the control of the EMB or its head. I experienced this in the 2013 Elections when a candidate in the National Assembly Elections obtained an *ex parte* mandatory injunction order from a commercial court judge directing the commission to include his name on the ballot paper. This order was made two weeks to the election and when printing of ballot papers had finished. The commission could not comply and I had to contend with contempt of court proceedings amid sensational media coverage.

There are also instances of judicial intervention in the electoral process that is perceived as partisan and favoring a particular political divide. This is especially the case when judges intervene late in the day and issue orders that have a direct bearing on the elections. Though this may open the judiciary to accusations of being politicized, ultimately the body that ends up holding the sharp end of the stick becomes the Electoral Commission.

Some Civil society Activists went to the High Court seeking orders to bar two candidates, who had been charged at the International Criminal Court (ICC) at The Hague, from contesting for the Presidential Elections. They based their petition on the provisions of the Leadership and Integrity Chapter in the new Constitution, which sets certain standards for Public Service. The Court took the view that the two suspects were presumed innocent until proven guilty or convicted and because they had not yet presented themselves as candidates for the Presidential

Elections the Court could not bar them in advance. They left that decision to the IEBC when the nomination phase of the elections starts.

In this instance, the court played safe and transferred the problem to the IEBC. The commission cleared the said candidates to contest the elections using the same legal prescription as that of the High Court and yet it ended up being accused of lowering the bar of integrity for them. The High Court in another instance issued an order that stopped the Commission from conducting a By-Election that was scheduled before less than a week to the election date, throwing the Commission plans into disarray and occasioning the loss of funds on the postponed By-Election. I, together with the CEO of the commission, considered becoming “unavailable” to avoid the court process server but we were advised that once the information became public we were deemed to have constructive notice of the court order.

The High Court ordered the IEBC to register prisoners as voters and allow them to vote in the upcoming National referendum. Despite a lot of time, effort and money spent on the exercise, the outcome was not good as only a few prisoners became eligible to be registered. This public interest litigation may have been popular and earned a few brownie points for the NGO concerned catapulting its head to the national limelight, (she will become a member of parliament later) but it was not necessary at that time.

(5) “IEBC must go protests and teargas Mondays”.

In spite of strong legal protections for the independence of the EMB and the security of tenure of office of the Electoral Commissioner, the political class will employ all sort of tactics, including illegal and unconstitutional ones, to achieve any desired political objective whether or not this will undermine the basic foundational principles of democracy and the rule of law. In March 2013, the IEBC conducted the first-ever six-tier general elections in Kenya under the new constitution (presidential, parliamentary, senatorial, governor, women representative and county assembly). As chairperson of the commission, I was the Returning Officer for the Presidential Elections. After the announcement of the Presidential election results, the losing candidate filed a petition in the Supreme Court. The Court unanimously upheld the election results declared by the commission and dismissed the petition. The opposition leader said he did not agree with the Supreme Court but will accept the decision. He maintained his stand that the Election was rigged and the commission aided and abetted the theft of his victory. This was not going to be smooth sailing for the IEBC. It became the object of condemnation by this politician and his army of supporters and followers in the country. This politician was very influential, charismatic with near messianic following.

What followed was a concerted effort by the opposition leader, who had lost in the presidential election, with his supporters in the Civil Society, International Think Tanks and Media to destroy the credibility of the Supreme Court and the IEBC. The Chief Justice and I as Chair of IEBC were particularly singled out for special criticism. In a country with no culture of conceding electoral defeat, these oppositionists spent the next three and half years honing a sense of victimhood to the effect that the presidential elections were rigged. (*Professor Bitange Ndemo, Daily Nation July 7, 2017*). A false narrative was created and repeated over so many times that it acquired the character of truth. Every act of the Commission was seen in a negative light and no efforts were spared to portray the EMB and its chair as incompetent, in bed with the governing party or as persons without integrity. I was caricatured in cartoons and became the

subject of many editorials, talk shows, op-eds and commentaries by so-called analysts and partisan hacks.

Just like the ECK before in 2007/2008, we were subjected to vicious and unfair trial by media and condemned unheard. Nothing we said or did seemed to persuade those who were aggrieved with the loss of the presidency and the lack of basis of the alternative facts and false narrative that they had created and started believing in. The Chief Justice perhaps fed up completely with public lynching, chose to retire early one year before his term ended. However, we did not have that option. We dismissed calls from the oppositionist for us to resign because we had rigged the presidential elections and demanded that those who wanted us out of office must follow the Law on our removal. Although I bore the brunt of all the negative coverage and attacks on the commission, I decided to stay strong and insist on respect for the rule of law in removing the Chair and Electoral Commissioners from office. I aimed to protect the office of the Chairperson so that in the future, one could not just rush to demand resignation of the Chairperson without any legal basis. I believed if I stepped down under, the conditions I will be succumbing to intimidation and give credence to the false claims and allegations made against us. Instead, I faced accusations that I was being overly defensive, abrasive and arrogant.

The opposition party then supported a civil society activist who filed a petition for our removal from office in 2014. The grounds for our removal in the petition was a cut and paste copy of the grounds of the 2013 presidential election petition. Parliament heard the petition and our defense and dismissed the petition as lacking in merit. Again, in 2016, another petition was filed for our removal based on all things on the content of a post-election evaluation done by the commission and again after a full hearing by parliament, it was dismissed. The opposition party then decided to sponsor a petition for a referendum for the people to decide on disbandment and reconstitution of the IEBC among other issues. The petition, which was named “**okoa Kenya**” (save Kenya), was brought to IEBC as required by law for approval. The petition was to be signed by at least 1 million registered voters. The commission found that it had only 800,000 registered voters and therefore announced that the initiative had collapsed by operation of law. The Commission refused a request by the proponents to have more time to top up the difference of 200,000 voters. This was perhaps the politically correct course of action if we were to appease them but we chose fidelity to the Law.

They first declared they would stage a sit-in at IEBC offices until their demands for approval of the petition for the referendum were met. They later changed this to a demand for us to go. (“**IEBC must go**”). They staged a public protest at IEBC offices every Monday and the police used tear gas to disperse them (teargas Monday) who declared these protests illegal. It was sad watching from our offices as the protest leaders led by the former Prime Minister, Vice President and other senior political leader’s stage a sit-in on the tarmac along university way next to the commission offices before being dispersed by teargas and water cannons from the anti-riot police. I watched from my 6th-floor office as this played out in our front yard – as the doyen of opposition politics and a champion of multiparty democracy in Kenya sat on the tarmac road protesting. The teargas fumes that wafted up to our floor quickly interrupted my thoughts and we had to close our windows to avoid toxic fumes.

It was a spectacle to watch demonstrators outside our offices with all manner of offensive banners such as, “**IEBC MUST GO**”. “**We don’t want thieves**”; “**JUBILEE = IEBC**”; “**ISSACK HASSAN GO BACK TO MOGADISHU**”, “**WANTED DEAD OR ALIVE** –

ISSACK". The last two banners were particularly troubling. One was a threat while the other was considered as an ethnic slur and a play on my ethnicity as a Kenyan Somali. I had never been to Mogadishu but the underlying insult was that I was not Kenyan enough. This became a point of controversy with political leaders from my home district accusing the protest leader of engaging in identity politics. I bumped into the Somalia Ambassador to Kenya who jokingly told me that they had just set up an electoral commission in Somalia and would not mind if I went there as an Adviser. In a strange twist, I will later end up becoming a consultant for the UN in Somalia after leaving the office (Integrated Electoral Support Group). This was indeed a difficult time for the members and staff of the commission, and especially myself as the head of the EMB.



Figure 1: Kenyan police use water cannon to disperse protesters from the opposition party CORD

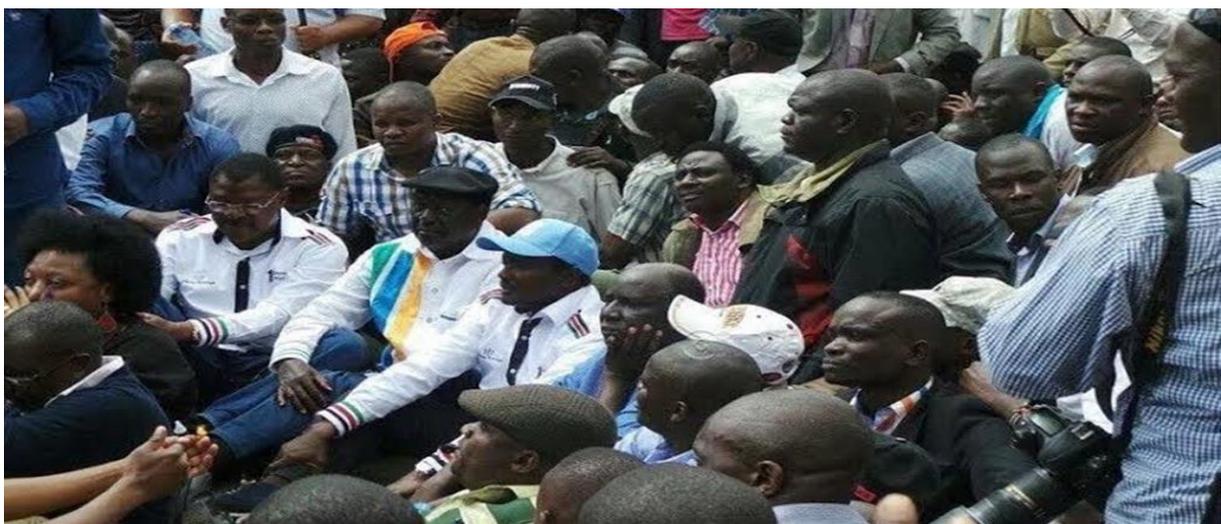


Figure 2: Cord leaders stage a sit-down outside IEBC offices.

The demonstrations became violent and unruly with thieves taking advantage and looting shops. The police also used force to disperse them and in one incident, at least 6 of the protesters were killed. The city almost came to a standstill every time the demos took place. There was a stalemate and it was made worse by the brinkmanship of the opposing groups. The government was adamant that it would suppress the protests with the interior minister, a retired army general known for his witty humor, saying the police had imported new tear gas and anti-riot gear that they will want to test on the protesters. He further told them not to shower on Sundays if they will protest on Monday, as the police will provide “*showers*” in the form of the water cannons meant to disperse them. We were also firm in our resolve that we will not succumb to intimidation and threats of street protests to accept misconduct we were not guilty of. We demanded due process. A statement I made in a social media forum for Lawyers that, “***You don’t quit school because a bully taking your lunch box***”, became a news item. The Private Sector Alliance and Religious leaders then came in to mediate. In a clear indication of the soft power of some western governments, the U.S and U.K envoys joined the other leaders of other sectors of the society in the mediation. Finally, a political compromise was reached. Then in July 2016: a joint parliamentary select committee was established to deal with the crisis. This Bipartisan committee conducted public hearings and invited views from all parties. When we appeared before this committee we raised objections on the constitutionality of the proceedings and filed our written responses to all the issues addressed to the commission ([submissions by IEBC to the joint parliamentary select committee on matters relating to IEBC](#))

The committee recommended several reforms to the election laws and ruled that the allegations against the chair and the other commissioners were without any basis or proof. It recommended that we be requested to offer to resign and we receive a dignified exit from the commission by compensation for payment for the remainder of the term of office. We were convinced this was a fair political compromise given the circumstances. We had made our point that one could not just push out Independent office holders through extra-legal means. It was necessary to avoid the looming political confrontation and save the institution from further cannibalization. It was also necessary to give the staff the time and space necessary for them to prepare for the elections and to put an end to the near obsessive-compulsive disorder that characterized the conduct of the media to get the commissioners out by continuous negative coverage.

While the media in Kenya is very defensive and protective of the right to free speech and freedom of the media as guaranteed in the constitution, they did not seem to have any problem with the use of unconstitutional and extra-legal means to force the IEBC commissioners out of office. They amplified a manufactured perception of lack of trust in the Commission by the people. This was a self-fulfilling prophecy of the media that the Commission had lost the confidence of the people while they kept up the negative tirade and vitriol against the commission. Furthermore, it was clear to everyone that we had become sacrificial lambs. The sober, among the political class and civil society, knew that the IEBC commissioners were the best ones suited to conduct the upcoming elections because they had the experience and had all the motivations to do a better job to exit the stage thereafter as compared to gambling with a new team so close to the election. Those who were intent on getting the commissioners to resign by the threat of continued protests and civil disobedience drowned these sober voices. I met with and spoke to the main players in this matter, and established some sort of understanding on how to solve the stalemate. I then convinced my commissioners to accept the

same. Therefore, on 3rd August 2016 at 3 p.m. at County Hall in Parliament Buildings at the close of the public hearings of the Joint Parliamentary Select Committee, we succumbed to pressure put on us to publicly state that we were ready to resign. This was an unnecessary display of public humiliation of the IEBC and its commissioners. Some of our secretariat staff in the hall could not hold back tears at this public lynching of their Chairman and commissioners. The news caught them unaware, as we had not informed them earlier. The media was already announcing this as breaking news and some of the journalists covering the proceedings were muttering “finally!” as if they had won something. As I offered to resign, I was reminded of a quote I read in the memoir of Condoleezza Rice, to the effect ***“If you focus too much on the headlines of tomorrow, you will lose sight of the judgment of history.”*** I did not care then about the media headlines and their biased reporting of our exit. I was, however hopeful that history and posterity would judge us better than the media did.

I was personally saddened by the whole charade and how the Kenyan public was duped to believe that what was being done to IEBC was good and in the public interest. Nobody spoke out against the unconstitutionality of the whole exercise. My lawyer even advised me against challenging the constitutionality of the process in the High court. He rightly pointed out the fact that the court will be swayed by the manufactured public anger and opinion against the commission created by the media and that the court will not be inclined to grant orders against the proceedings. Trampling upon the rights of the IEBC commissioners and their security of tenure was normalized. The media even did a spin on our exit package, calling it a sweet deal as if we did not deserve anything. That night when I went home, I recorded the following in my personal diary, ***“The 8th of August 2016 marked a dark day for the future of IEBC as an independent institution. The political class raped the infant constitution in its own house (constitutional pedophilia), with the consent of the owners of the house (public), the security guards (media and civil society) and the clergy prayed on it. The anesthetic used to deaden the pain of the rape was the national interest. The consequences of this rape will become apparent in one year in August 2017 when the bastard child will be born if no abortion will not have been done before then.”***

The below cartoon which I found on social media much later correctly portrayed my mental image at the time.



Figure 3: *Constitutional pedophilia.*

[At the time of writing these reflections, the country held its elections as scheduled on 8th August 2017. A few weeks before the election, the head of IT Security in the commission was abducted, tortured and killed together with his girlfriend in an attempt to portray the killing as a crime of passion. The Supreme Court annulled the results of the presidential elections and ordered a repeat. The repeat poll was boycotted and the commission conducted the election in an environment that was violent. There was low voter turnout. A few weeks to the repeat of the elections, a commissioner resigned and fled the country citing fear for her life. Some few months after the elections, 3 other commissioners including the deputy chairperson, also resigned this time blaming their chairperson. A few months after that the remaining commissioners fired the CEO, who sued them for wrongful termination. The High court also stopped the recruitment of the new CEO].

As part of the process of preparing to exit the commission, I decided to tour all the 17 regions of the IEBC and bid the staff farewell. They received me well, listened to me and shared with me their fears, hopes and aspirations. I told them how honored and privileged I felt to be their leader and my pride in their professionalism as the nation's election personnel. My Assistant, a devout born again Christian, shared with me a verse from the Holy Bible in the book of 2nd Timothy chapter 4 verse 6-7 which struck a chord in me and I found it quite appropriate ***“For I am already being poured out like a drink offering and the time of my departure is at hand. I have fought the good fight. I have finished the race. I have kept my faith. From now on the crown of righteousness is laid up for me which the Lord, the righteous judge, will award to me.”***

The joint parliamentary committee prepared a report that sanitized the whole charade of forcing out the commissioners. In an attempt to mask the main aim of the committee process, the report

also recommended some amendments to the IEBC and the Elections Act, which were then rushed through parliament and enacted into law less than 6 months to the elections. The government thereafter formed a committee to work with the IEBC commissioners to agree on the modalities of their dignified exit as recommended in the report. I, therefore, stepped down from office on 20th January 2017 after serving in office for 7 years and 10 months. The new chairperson and 6 commissioners were then appointed in January 2017. On the day I handed over the office to the new chairperson, a cartoon in one of the newspapers aptly captured the situation by depicting me getting out of a burning chair made of jiko with smoke billowing from my backside with the caption –good luck to my successor. The experience of the removal of the IEBC Commissioners has left an indelible mark on me as I sit back and reflect on it. My judgment is subjective and perhaps I am too jaded about politics in the country but the truth is that the principle of Independence of the Electoral Commission and the Electoral Commissioners was severely undermined and dealt a blow that will be felt for years to come. Repeatedly the electoral commissioners were being sanctioned and penalized for exercising the administrative, functional and decisional independence that was required of them in fulfilling their mandate.

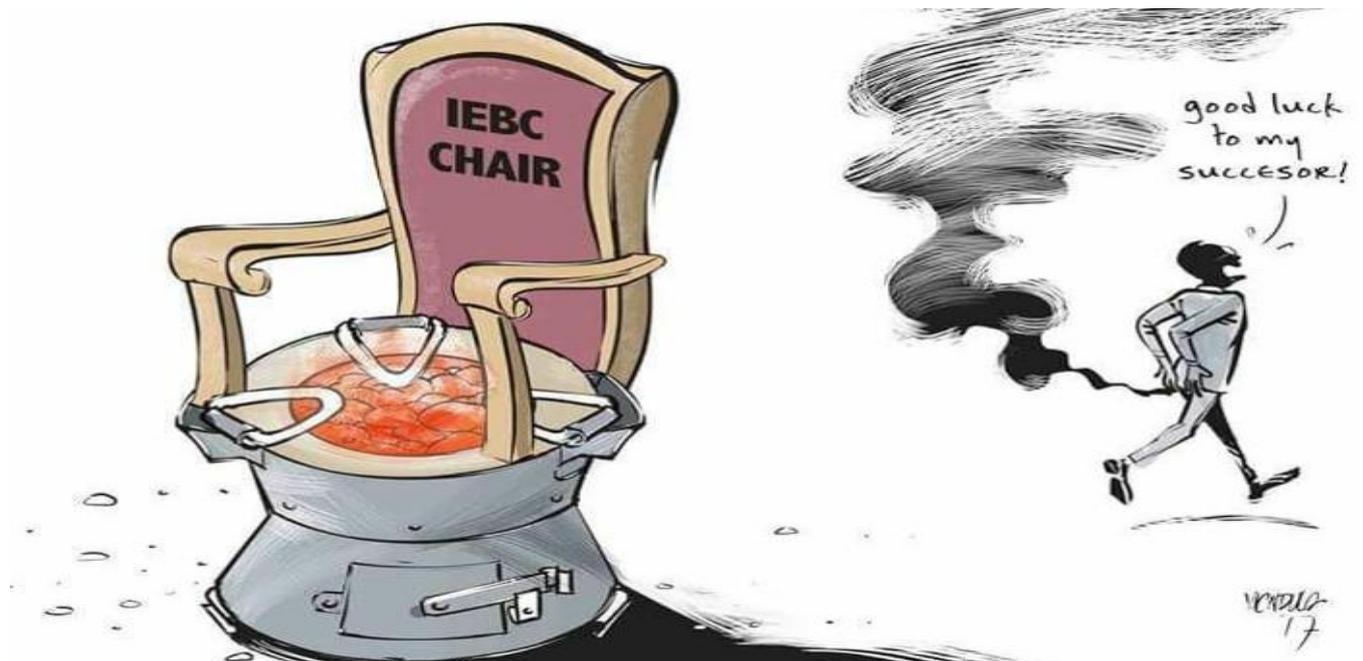


Figure 4: The IEBC'S hot seat. A cartoon that appeared on one of the dailies on the day of handing over office to the new chairperson.

The following are some of the lessons that I have learned and my reflections on the subject of Independence of Electoral Commission and Electoral Commissioners:

- 1) The Administrative, Decisional, Functional and Financial Independence of the Electoral Commission and Electoral Commissioners are never guaranteed. It comes

under many challenges from the Executive, the Legislature and the Judiciary directly and indirectly. These challenges manifest themselves in the following manner;

- a.) The EMB being deprived of the power to make regulations for the conduct of elections and reduced to waiting for an approved version from the Legislature, especially one that is intent on micromanaging the electoral process. Through the powers of judicial review and constitutional interpretation, the Superior courts can also assert a direct influence on the decision of the EMB. In Kenya, one senior election official has even described the high court as the last “electoral commissioner” with veto powers.
- b.) The EMB being frustrated by recruiting its staff and setting a competitive remuneration package for its staff to attract and retain qualified and competent staff. In other cases, the EMB is under a lot of pressure to sack its staff or sacrifice them because of pressure from political actors in the country.
- c.) The EMB being denied the right to have its budget approved and charged on the consolidated fund or establishing a fund to which all funds allocated to it goes in. The Executive, through the Ministry of Finance and Parliament, desire to have control over the budget of the EMB. Treasury sometimes does not appreciate the electoral timelines and the urgency involved. The red tape and bureaucracy associated with the treasury do not encourage the adequate and timely release of funds to the EMB.
- d.) Funding of Elections is a matter of National Sovereignty and the EMB requires guaranteed funding to do elections. Sometimes the National Treasury may allocate meager resources for areas such as voter education, training, international cooperation etc. thereby necessitating the EMB to seek donor support which comes with certain express or implicit conditions.
- e.) The provision of security-seconded staff from the civil service and the provision of office space to the EMB at its head office and in its regional offices by the Government creates the perception of the EMB being part of the Government or dependant on Government.
- f.) Travel restrictions on the Electoral Commissioners where they are treated like the mainstream public service and therefore require permission to travel out of the country for official duties. This can be used to undermine the independence of the EMB if the Prime Minister or some other senior official has to approve the travel of the electoral commissioner. In Kenya, with the new constitution, the practice has changed from seeking “*permission to travel*” to “*notification of travel*” where members of independent constitutional commissions notify the Government of their travels.
- g.) The EMB, as a public institution, is of course, subject to annual audits by the Auditor General. The Auditor is supposed to be a Watchdog and not a Blood Hound. In some cases, the EMB and its officials are actually subjected to politically motivated audits that are extraordinary, and border on a witch hunt and a fault-finding exercise; so much so that the fear of such audit creates paralysis in decision making and delay in the implementation of activities in the commission out of fear

of victimization. I was the victim of such audits when, immediately after the 2013 general elections the Auditor General, first singled me out for audit of my airtime compelling me to refund back some money he claimed was irregularly paid to me as airtime. In a special audit of the procurement of biometric equipment, he made adverse findings against me without considering the Law and the facts on my side. I believed this was politically motivated and I appealed to the High Court, which ordered the Auditor General to expunge the impugned paragraph from the report. He ignored this order and submitted the report to parliament. I filed contempt of court proceedings against him ultimately forcing him to comply. ([*Petition No. 356 of 2014 Ahmed Issack Hassan vs Auditor General*](#)). The auditor general also ordered an audit of all my local and international travel to see whether there was value for money for the trips. When the staff in the finance department protested at this outright witch-hunt of the chairperson through the audit, they decided to do a 100% audit of all the accounts of the commission. I do not think the office of the auditor general treated the commission or me fairly after the 2013 elections. His actions certainly did not promote independence of the commission but undermined it.

- h.) The setting of the terms and conditions of service of the Electoral Commissioners, if done by National Treasury or another equivalent Government body, is another area that exposes the vulnerability of the EMB Vis a Vis its independence.
- 2) Independence is only possible in a country that has a mature and established democracy and where there is good political hygiene and morality among the electorate and the political leaders. Independence cannot be practiced in the abstract. It depends on the society and its political maturity. In Africa, Ghana, Nigeria, Mauritius, Seychelles and Zambia provide positive examples of Election loss by opposition or by an incumbent, especially for presidential elections, where the EMB or its head did not suffer a major political backlash, blame and witch-hunt.
- 3) If a country's politics is ever to enter the mature stage, national politicians, particularly major presidential candidates, need to internalize a culture of accepting that they can be defeated in a free and fair election and that the culture of repeatedly dismissing defeat as the product of theft of elections or "rigging" only stunts the nation's journey to democratic maturity. (*Professor Bitange Ndemo, Daily Nation July 2017*).
- 4) The conduct of Elections in a transparent and accountable manner and the acceptance of the election results as a reflection of the will of the people enhances the level of confidence in the EMB. The confidence of the people, in turn, acts as a shield for the EMB and protects its independence. It is, however, a difficult task to conduct an honest election in a dishonest society.
- 5) ***Independence of the EMB is what the Election Chief is. What he does and how he does it. The officeholder embodies and personifies the independence. The way the head of the EMB discharges his office without fear or favor will shape the way the EMB is seen as being independent or not; impartial or not.***
- 6) Effective and timely Information and Communication to the public and to all other stakeholders helps in reinforcing independence. Responding to falsehoods, correcting

any erroneous statement and other misconceptions is key. Never allow others to define you or the institution. However, in spreading falsehood and propaganda, it is hard to match a strong political opposition or a charismatic political leader who has a large following and has perfected propaganda into art.

- 7) A landslide victory is indeed an election manager's best friend. It encourages concession by a loser and minimizes criticism of the EMB or its head. Conversely, managing elections in close contests, especially where the margin of victory is close to the margin of error, makes the job of the election chief even more difficult. The smaller the margin, the bigger the scope of conflict and dispute.
- 8) No amount of consultation, engagement or explanation will change a politician or political grouping that has taken a specific stand against the EMB or its head. Statements of facts or statistics will not change. It will be like whistling in the wind or sending smoke signals in the wind when dealing with this kind. They can be unforgiving, vindictive, hateful and bloodthirsty.
- 9) Being an Election Chief is an honor and privilege allowing one to serve his country in a high-profile position. One is a newsmaker and public persona under the office. This attracts both negative and positive attention depending on the politics of the country. It can be fulfilling, prestigious and satisfying and at the same time or other times, it may become stressful, lonely and thankless. In the latter case, insomnia, lack of appetite, hypertension and other ailments associated with the stress of the job may affect the election chief. Depending on the circumstances, one can be made a good role model, a hero, a villain, a victim or all at different phases of the electoral cycle.
- 10) It is important to stand up to intimidation in to protect the independence of the office and speak truth to power whether it is the incumbent in power, the opposition or in the civil society in the public space. It is futile to please or appease politicians by giving them indulgence in the exercise of discretion. It is almost certain that after an election there will be those who will be unhappy with the election results. Transferred aggression is likely to come your way. American diplomat, Benjamin Franklin said, ***“Any society that would give up a little liberty to gain a little security will deserve neither and lose both.”*** One should never sacrifice the independence of the office of Election Commissioner for anything, including a so-called promise of political protection.
- 11) Politicians, if unchecked, unfortunately, turn the office of Election Chief into a poisoned chalice, and the EMB as a graveyard of careers and reputation. It may be a prudent thing therefore for one to join the EMB not at his prime age but closer to retirement age so that he ends it at the EMB and retires to his 3Gs- Golf, Garden or Grandchildren. If, after leaving office, the Election Chief is appointed to another position in the public service, those out to discredit him can claim it as a reward for being partisan to the appointing authority while in office and raise objections. Conversely, one could also be denied such an appointment for not toeing the line as punishment for being viewed too independent by those in authority. Serving a non-renewable term in office for a fixed period or until reaching a prescribed age (e.g. 6years or until retirement age) is better than serving for a renewable short term. Those seeking renewal can be punished for their independence or be accused of playing safe to appease

the re-appointing authority and this influences the independence of the officeholder and the perceptions thereto.

- 12) Elections are more likely to be regarded as free and fair if there is a landslide victory and the loser concedes defeat or if an incumbent in power loses to the opposition party. In Africa, if an incumbent retains power in an election, it is far easier to sell the theory that the elections were stolen or rigged than that it was free and fair. This undermines the integrity and independence of the EMB and its head.
- 13) In close election contests in a tribal or a polarized society, the EMB and its chief will become an object of scorn and hate by the supporters of the losing candidate. This situation is worsened if the loser is better in propaganda and the winner is unable or ineffective in promoting, protecting and defending his victory. In such a situation, one will soon realize that public service is neither public nor a service but public humiliation and trial as prosecuted by the aggrieved politician or his supporters.
- 14) A partisan, unethical and unprofessional media can be used and misused by politicians to undermine an EMB and its head for their political ends. They can make or break an EMB or its Chief in furthering certain political interest. I was a victim of defamation of character when the media houses were used to manipulate public opinion and make me as the chief architect of a corruption scandal that involved procurement of election materials even when it was clear that I was not the accounting officer and had no role in procurement or financial matters. This scandal was christened the “*chicken gate*” because the officials involved in procurement used chicken as a code word for bribes. The matter is now in court after 4 people were charged following investigations. The media used my image prominently in all their coverage of this story to create the impression that I was the guilty one. In response to this story, I said that I was brought up in a nomadic pastoralist community that keeps camels, cattle and goats and if I was to use an animal as a code word for bribe, I would have used “*camel*” or “*cows*” and it would have been “*camel gate*”. One of the persons later charged in Kenya ended up coming from a community known for their love of chicken in Kenya. Matters were made worse when a court in the UK convicted some suspects charged for the same corruption. The evidence given in the UK court showed clearly, who was given the “*chicken*” and to me, it showed that had the UK Serious Fraud Office (SFO) Investigators had been allowed to interview all of us in the commission, a lot of confusion and grief would have been avoided. For example, in one instance there was a reference to a Mr. Hassan who was said to be the chair of the tender committee, who allegedly met with the agent of the UK supplier together with other tender committee members where the issue of kickbacks was discussed. A later reference to Hassan and the chairperson that was meant for the tender committee member was assigned to me as the chair of the commission (*prosecution opening statement in Regina vs Nick Smith and others*).

The media coverage of the IEBC was so choreographed as to hypnotize and capture the public mind to believe that whatever allegation made against us was true. They tried and convicted us in the court of public opinion. They behaved like the proverbial mourner who screams louder than the bereaved. The moment they start labeling you as, “*besieged*”, “*beleaguered*” or “*embattled*”, you know that they are setting you up for

attacks by the political sharks. In our case, they took up the case of ousting the IEBC Commissioners as if the opposition had outsourced them to do so. Our study of the behavior of media houses showed that they had a certain pattern. The Editors and some of the senior political reporters appeared to be supporting certain political positions out of ethnic affinity or political bias. We came to distrust the media and felt it was a waste of time engaging them. We felt helpless in the face of the endless partisan drivel directed at the Commission. In the end, I was reminded of one piece of advice that I got from a senior editor in the media who told me that, ***“the media is neither your friend nor your enemy- It is a business and you cannot fight it unless you are one or own one.”*** There is no doubt that there is corruption in the media industry and checkbook journalism is prevalent. Newspapers headlines are sometimes alleged to have been bought or paid for while in some cases stories are sensationalized or killed depending on who is paying for it. I witnessed this when the ***“chicken gate”*** story broke. I went to see a lawyer for legal advice on how to deal with the story when I bumped into a Managing Editor of one of the leading Dailies in the office of the Lawyer. He openly told me that if I did not pay cash 500,000 (equivalent to \$5,000) to the Editors of his paper, including himself, then I would suffer the consequences. I did not pay up and I saw how the reporting was slanted against me and others who did not pay, and it was favorable to others.

- 15) Civil society has been defined as that space between the Government and the ordinary citizen. In a constitutional democracy, civil society organizations play an important role in giving the ordinary citizen a voice and a platform to advocate for any particular set of issues. However, some civil society organizations, especially those in the governance sector, are neither civil nor a society but are indeed individuals who are part of the army of supporters of politicians and political parties. They are political parties in disguise. The traffic in partisanship while pretending to be impartial. Political activity is then disguised as activism or social good. The protest industry has become their fishing ground and instituting public interest litigation that has political ends has become a means to an end. This situation was amplified in the aftermath of the 2013 general elections when one of the civil society organizations that had been accredited by the commission to observe the elections filed a petition in the Supreme Court challenging the presidential election results declared by the commission thereby betraying lack of objectivity and bias in the first place. Two particular civil society leaders/activists became prominent critics of the commissioners and me. Their op-eds on Saturday dailies were predictably biased and partisan. They later roped in two academics based in Oxford and Warwick University in the UK to write similar op-eds in an attempt to disguise their notoriety and make their cause appear international. This UK based academics were unfortunately sucked into the hyperactive partisan analysis of the 2013 presidential election results and they joined the lynch mob as the name of one of them suggested. A media personality I met in London who had observed the Elections under the commonwealth told me that she was also approached to write critical articles and op-eds against the Commission in return for payment. A senior editor working for a television station in Kenya was coordinating this.

- 16) Electoral system that is proportional and inclusive and a parliamentary system of government that allows the Prime Minister to emerge by virtue of the seats won by the party in parliament as opposed to presidential system where the election chief has to declare the winner is a far better choice on the person who is the head of the EMB. The exclusionary nature of the winner takes it all electoral system and government makes the EMB and its head the object of the transferred aggression of the losing parties. Proportional representation and parliamentary system of government deflect attention from the Election Chief as opposed to the Presidential system of Government where the Election Chief has to announce the winner and perhaps issue a certificate. You will then become the face to be associated with the loss or victory by either parties or their supporters.
- 17) Politicians can be a very selfish and malevolent lot who have no qualms swallowing their words, feigning ignorance or developing selective amnesia in the application of the law and paying lip service to the constitution and its safeguards to the security of tenure and independence of constitutional offices. They cannot see a belt without hitting below it and watch a back without stabbing it. It is far easier for them to compromise and sacrifice the independence of the EMB or its head so long as this serves their mutual interests. On matters election, if any blame was to be apportioned, politicians from across the divide are likely to agree on someone to blame other than themselves and that person will most likely be the EMB or its head or both. During protests against IEBC in 2016, I was always available for consultations with the political players of the time. One of them revealed their complete lack of honor and good faith when he told us that whether we resigned or not, they will still win. He said, ***“If we win the next election we will say you were doing your job and if we lose the election we will say you rigged the elections.”*** No credit was to go to the EMB. On the other hand, a member of the ruling party told us in a committee that they do not mind us being sacrificed to stop the protest because they were confident of winning the next election and did not want their win to be questioned because of the dispute over the commissioners. It is, therefore, justified for one who has dealt with such politicians to conclude that they are heartless characters who have no honor or good faith. Political satire has the adage about a gravestone with the inscription, ***“Here lies a politician and a gentleman,”*** to which one person asks, ***“why did they bury two men in the same grave?”*** These are some of the political jokes that we share amongst ourselves as election chiefs when talking about political masters and stakeholders. The only problem with political jokes is that sometimes they get elected. Today more often than not.
- 18) Maintaining unity in the commission among its commissioners and staff is extremely important for the survival of the institution especially at times of political crisis where the commission is under attack and is facing an existential threat. During my tenure, the commission only voted once. The norm was a consensus. Throughout the period IEBC was under attack, the commissioners and staff never wavered in their unity in the defense of the work of the EMB. No cracks appeared between and within the members and staff of the commission. It was possible to have this unity because we all had a clear conscience and knew that the truth was the glue that made us stick together. In contrast, the ECK lacked this cohesion during the 2007 disputed elections. A few days before the chairperson of ECK, the late Samuel Kivuitu announced the results of the

presidential elections, three of his commissioners had addressed the press casting doubts on those results. When the push to disband ECK reached a fever pitch in late 2008, the staff abandoned the commissioners in the belief that they will survive the putsch but to no avail. That there is strength in unity for the EMB cannot be emphasized more.

- 19) In discharging work as Election Chief and to foster impartiality and fidelity to the law, it is good to remember the oath of office you take when assuming office – ***“To discharge your duties impartially without fear or favor, ill-will or disaffection.”*** This is even more important when you feel unfairly profiled and attacked by an important **stakeholder** who has turned into a **“stick holder.”** It is human to resent those that treat you unfairly and are destroying your integrity but one must accept this as part of the occupational hazards of the job.
- 20) It is only another election chief like you or real professionals in that field who can empathize and understand the challenges you face when dealing with difficult stakeholders like politicians. There may be occasions when the pressure becomes too much and you may require support from those who know or can understand what you are going through. I have found a lot of support in the great men and women I met at the Cambridge conference and I have found solace and strength in their understanding, empathy and encouragement and above all from the Director of the conference, to whom I am very grateful. Therefore, my advice to EMB chiefs facing unfair trials and tribulations in the work is to reach out for the help and support of their peers from the Cambridge Network. It is the only forum that I am aware of that deals with the individuals that head the EMB and provides a forum for the exchange of ideas and lessons learned by peers.
- 21) Meetings with politicians should be regulated by a clear code of conduct. **Electoral Commissioners have become endangered species dealing with these dangerous species called politicians.** It is important to formalize meetings with politicians with a document trail. Meet them in the office and not alone. Where possible issue a statement before they leave to close any space for misreporting later.
- 22) Inviting both domestic and international observers and local and international media to observe and cover your elections without undue hindrance and subject to the code of conduct applicable to them is useful and their reports have been of great help in our defense.
- 23) Allowing professional and impartial local civil society groups and domestic election observers to conduct a parallel vote tabulation (or swift count) for the presidential elections is an exceptionally good practice, especially in close elections where the margin of error is equal to the margin of victory, as their report can support your election results. In the 2013 elections in Kenya, the Government, through the National Security Council (NSC) and National Security Council Advisory Committee (NSAC) was considering to ban the civil society initiative of parallel vote tabulation on security grounds. This initiative was supported by the U.S and E.U and I became a strong advocate for the parallel vote tabulation after being satisfied with the bona fides of the said initiative. I appeared before the NSAC to convince the Securocrats about the

importance of the initiative. Their report came in handy on several occasions when the commission was responding to the claims of the rigging of the presidential elections.

- 24) The head of the EMB will be held politically responsible when there is blame to be apportioned in the event of any disputed electoral contest. This is irrespective of whether the head of the EMB had the legal competence or not. Where a commission has a dual executive with a chairperson of the commission and a Chief Executive who is the head of the management and the accounting officer, there is always the risk of the chairperson getting the blame for the failures of the Chief Executive and vice versa. If the buck is to stop with the head of the EMB, then such head should be the Chief Electoral Commissioner as well as the Chief Executive of the commission. Good examples in Africa are Nigeria, Ghana, Mauritius, and Sierra Leone. A mischievous CEO can undermine the Head of EMB, deflate attention and scrutiny from himself and outsource his incompetence or misconduct to the head. During my tenure, I worked with four CEOs and I can trace almost all my problems to the time when one of them was in office and he became adept at deflecting attention from himself and outsourcing his incompetence and mischief to myself as chair.
- 25) It is good practice to keep records personally and write a memoir to document your tenure in office, set the record straight, and share experiences with others. Writing a memoir is a debt you owe to society and history. My predecessor always regretted not writing his memoirs. He died before he could do so. However, care should be taken on the release of such memoirs especially if the players involved are still active in the field. It may be wise to release them much later for posterity and historical record.
- 26) To reinforce the impartiality of the Commission, it may be a good practice if the Chairperson and Electoral Commissioners do not vote in the elections. The sight of Electoral commissioners leaving a polling station with a mark of indelible ink on their left finger can, unfortunately, be fodder for those who want to paint the Electoral Commissioner as partisan and having already taken sides.
- 27) Where there is a petition filed in a superior court challenging the election result and the head of the EMB is joined as a co-defendant, the defense strategy employed by the EMB and the head is important. As a rule, the EMB and its head should use the same lawyer in defending them and the head of the EMB should closely monitor the work of the lawyer. The defense counsel must be aware of the importance of maintaining the impartiality of the EMB and its head. Since the lawyer will be speaking for you in court, you must ensure he does not bring his personal bias into your defense. In the Presidential election petition in Kenya, I was sued as the first respondent in the petition. The Election petition in the Supreme Court in Kenya is like the Oscars or Emmy Award ceremonies of Legal practice. Lawyers display themselves and stars are born from this gladiator legal fight. The lawyer engaged to defend me filed statements of defense under my name and in one paragraph said, ***“The petitioner is a perennial loser who does not accept defeat and looks for others to blame for his electoral losses.”*** ([*Supreme Court petition No.3 of 2013 Raila Odinga vs Ahmed Issack Hassan and 5 others*](#)). Though I had not approved of this, I was still accused of being partisan and impartial as evidenced by the statement of defense filed by my lawyer. This became a handy exhibit for my detractors to refer to in support of their claim that I was partisan.

I later met with this politician while coming back to Kenya from an overseas trip. We were both in transit and boarded the same plane to Nairobi. I sat next to him during the 5-hour journey and discussed many issues on elections. I offered my apology for the statement made by my lawyer in Court. He accepted the apology and told me he knew the lawyer was trying to be attractive to the opposing side and gain political mileage out of insulting him. I assured him of my deep respect for his role in advancing democracy and the promotion of human rights in Kenya. I undertook to work with him at all times to deepen the democracy in Kenya. We even did some shopping on the inflight duty-free in the plane. His supporters did not know about these and have continued to operate on the assumption that I had disparaged their leader.

- 28) Managing Elections in a Polarized Society is more about Managing Suspicion, Dishonesty and Mistrust among and between the competitors. For this reason and to mitigate the situation, it may become necessary for the election chief to be able to contact and be contacted by the major political actors, especially in a presidential election. In the 2013 elections, the commission resolved to have the contacts of all the 8 presidential candidates and their running mates to ease communication with them. The upside to this was that you were constantly on the phone with them or their surrogates. Whether an election chief wishes to be able to talk directly to political leaders or not is sometimes an individual choice but in other instances, the nature of the society in which one is operating may dictate otherwise.
- 29) Establishing and maintaining a good working relationship with international organizations, Envoys of Nations supporting the country of the EMB, and other multi-lateral institutions is prudent, as they can become useful allies in an effort to protect the independence of the EMB. In Kenya during the 2013 General Elections, some of the envoys of western nations in Kenya expressed their adverse opinion against the candidacy of two of the candidates who were contesting for elections of the presidency. These two suspects were charged with war crimes and a crime against humanity in the international criminal court (ICC) in The Hague, A senior US diplomat was quoted to have said, ***“Choices have consequences”***. The UK high commissioner was also quoted in the local media as saying that they will only have ***“essential”*** contacts with the suspects if they were elected in office. The German and the Netherlands ambassadors were also reported to have expressed their objections to the candidacy of these two suspects. This put the commission in a difficult position as some of these envoys represented countries that were supporting the electoral process. In the end, we managed to continue to engage in a very professional manner.
- 30) The Election Chief should aspire to be a bridge between the old and the new, the former and the incumbent commissioners. For institutional memory and the integrity of the office, respect and co-operation between the former and current Election Chief are useful. One should avoid the tendency to trash the legacy of his or her predecessor, however populist and politically expedient this may be. One should aim to build on and improve upon the work of the predecessor in the firm knowledge that the tenure of office is finite and there will be a successor. The focus should be on strengthening the institution as an enduring legacy. Invest in strengthening the institution of the EMB and its secretariat who form the civil service of the electoral commission. Retired election Chiefs should similarly give their immediate successor support and advice whenever

sought. Where the EMB is facing internal and external threats it is not uncommon for the opinion of the previous election chief being sought for. In this scenario, one should remember his successor deserves his support and silence and not to second-guess the one in office.

- 31) One of the benefits of serving as Election Chief is that you have a front-row seat to the political theatre, shenanigans and drama that is associated with the elections. One gets a good understanding of the politics of the country, get clarity on many issues, and separate the truth from the lies and hypocrisy of the political class. Politicians are supremely ignorant of the electoral process and are adept at covering this with hyper pole and theatrics. A former Election Chief can be a well-informed defender of the EMB and speak some things that cannot be said by the incumbent election chief. On electoral matters, the role of the Electoral Commissioner as voter educator should not stop but continue through opinion pieces (op-eds) in newspapers, commentaries and public forums, where the environment allows for this.
- 32) The personal safety of the Election Chief is also important for the exercise of independence in the discharge of the duties of the office. One becomes a high-profile target and politically exposed. Threats of sexual assault against female election chiefs or violence to the life and limb of the Election Chief or to his or her loved ones is not uncommon when one presides over an election in a polarized society. Depending on the severity of these threats, one becomes a Very Important Prisoner (VIP) because of the security cordon thrown around you by the state. (Safehouse, chase car and additional security). In the same vein, withdrawal of security can also be used by the state to undermine the Election Chief.
- 33) There will be intense scrutiny of the conduct of the Election Chief by those seeking to discredit the EMB. This scrutiny will be in mainstream media and even worse in social media, where online attacks on the election chief and commissioners have become the new normal. This scrutiny violates the privacy rights of the person beyond the limits expected from the officeholder. This leads to self-censorship on one's freedoms thereby influencing the independence. Fake news, Cyber Stalking, Photoshopping, Cyber Bullying, Trolls and Bots on Twitter, Facebook and WhatsApp is the new norm. A fake Facebook and Twitter account was opened in my name and was being operated before my attention was drawn to them. The effect is to shock you and silence you, to make you cower and lose your voice. One must learn the ways of the new media and digital age to deal with these abusive bloggers, digital/keyboard warriors, click baiters and their ilk. Fake accounts under my name were opened on Facebook and twitter forcing me to lodge complaints against them. Three particularly nasty bloggers were maliciously spreading fake stories about my health such as suffering from a heart attack, cancer and being paralyzed and confined to a wheelchair. In a highly digitized media era in Kenya, it is becoming the norm to use the face or name of former Election Chiefs to advance certain Political views by certain partisan bloggers. In the 2013 general elections, there was a meme on social media showing me with Jack Bauer of "24" the TV series holding a pistol to my head demanding for the release of the presidential election results. I have been a victim of this.



During the same week of the meme, another hashtag on twitter that was trending was one that said: *“someone give Hassan a hug”*. In the run-up to the 2017 elections, I saw another post on social media with my photo and a very partisan statement being attributed to me.



I am also aware of similar experiences by the chairperson of the electoral commissions of Ghana, Nigeria, Zambia, Uganda and Malawi.

- 34) The budget of the Electoral Commission is always big especially during the election year or when the commission is making major procurement. Dishonest people tend to think or believe that everyone else is as dishonest. It is common to read allegations of financial impropriety against election chiefs during or after the elections. If the election budget was so many millions of shillings, some will think you got part of that money. They then make up stories of money stashed abroad or property allegedly bought by the election chief. This has become the new norm in this era of social media and citizen journalism. Irresponsible politicians who do not care about the truth of the allegation but only to make a headline then repeat this. The result is that the seeds of doubt are slowly planted in the mind of the public to lose trust, faith and confidence in the EMB and its officials. After the 2013 presidential elections, it was alleged that I had received Ksh 200M from the president who won the elections and that the other commissioners were paid.

This was posted on many social media platforms but we ignored it. Gullible minds believed this baseless drivel to the extent that subsequent secondary lies told thereafter were also believed - for example, that I owned a chain of high-end apartments in Mombasa or that I owned a petrol station in Garissa, my hometown. A member of parliament from Garissa, who was also a member of the public accounts committee, told me that a lot of them believed the fake story that we were paid millions in bribes. Others believed that at the minimum we must have taken 10% of the total election budget of 250 million USD.

THE END