

## **CARTER CENTER URGES**

### **The Supreme Court 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 IEBCs 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

*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

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, through the necessary legal process.



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.

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 casrlyitl tally unofficial

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



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.