

# FREE, FAIR AND CREDIBLE?

## *An Assessment of Kenya's 2017 Election*

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### ABSTRACT

*Periodic, free, fair, and credible elections are one of the undisputed principles of liberal democracy. Kenya embraced multiparty democracy at independence in 1963 and has since used periodic elections as a means of selecting leaders to office. Focusing on Kenya's national election held on 8 August 2017, this paper evaluates the fundamental requirements for a free, fair, and credible election. To this end, the paper assesses Kenya's electoral legal framework and its application during the 2017 national elections. In addition, the paper uses primary data by Afrobarometer to explore public opinion on the performance of the Independent Electoral and Boundaries Commission (IEBC), political parties, and the media towards free, fair, and credible elections. This study finds that despite some institutional challenges, Kenya's 2017 national elections were conducted under a comprehensive electoral legal framework and met the threshold of free, fair, and credible as affirmed by the citizenry through Afrobarometer's public opinion survey. The positive assessment of universally accepted electoral practice indicators by most of the people affirms that, notable challenges notwithstanding, Kenya's 2017 national elections were free, fair, and credible, thus endorsing the legitimacy and authority of elected leaders. This argument is cognisant of the election outcome as a fundamental factor in shaping public perception of freeness and fairness in the electoral process.*

**Keywords:** Kenya, democracy, election, free and fair; credible

### INTRODUCTION

Kenya's democracy dates back to the country's independence in 1963. Periodic elections have subsequently defined political leadership as enshrined in the country's constitution. Indeed, a majority of Kenyans (74%) interviewed during the Afrobarometer Round 8 survey preferred a regular, open, and honest election as an approach to selecting leaders for office (Afrobarometer 2019). The process of

consolidating democracy through periodic, free, fair, and credible elections has however been faced with a myriad of challenges, as the country grapples with weak institutions and ethnically instigated political divisions.

The promulgation of the country's second Constitution in 2010, and the subsequent enactment of electoral laws by Parliament was perceived as a new dawn for Kenya's democracy. The 2010 Constitution broadened representation by creating a devolved structure with two levels of governance, that is, national and county governments. In addition, the Constitution addressed the question of gender representation and equality by providing a gender quota, constitutionally referred to as the two-thirds gender rule. Special seats through nomination, and an affirmative seat for a county woman member of parliament are some of the legal strategies for increasing women's representation in political leadership. Article 97(1b) provides that Parliament shall consist of "...forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency" (Constitution of Kenya 2010).

Kenya conducted two national elections (2013 and 2017)<sup>1</sup> under the 2010 Constitution, both of which had the presidential election results decided by the Supreme Court of Kenya. While the Court upheld the presidential results declared by the Independent Electoral and Boundaries Commission (IEBC) in 2013, the 2017 results were annulled, leading to a fresh presidential election on 26 October 2017. The incumbent, President Kenyatta, condemned the Supreme Court for acting against the will of the people, but opposition leader Raila Odinga defended the Court against this accusation (Kanyinga & Odote 2019). This was the first time in the history of Kenya's democracy, and indeed in Africa, when a presidential election was annulled, more so for an incumbent president seeking re-election.

Determining whether an election was free, fair, and credible requires a broad investigation of institutions and their complex interaction during the entire electoral process. This paper underscores the centrality of public trust in institutions and the rule of law in defining a free, fair, and credible election. Findings from this study point to perceptions of the voter as instrumental in enhancing the credibility and legitimacy of an election outcome. I therefore argue that the determination of whether elections are free, fair, and credible is based not so much on universal standards, but on the perception of the primary participant, the voter. In the case of Kenya, political party affiliation and leadership, and election outcome, were core in shaping voter opinions in the August 2017 national elections. This notwithstanding, I posit that a free, fair, and credible election enacts legitimacy to power and authority in a democracy. To advance this argument,

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1 Kenya conducted two elections in 2017; the first was held in August while the repeat of the presidential election was held in October. This paper focuses on the elections in August 2017 which involved all levels of elective leadership positions.

the study focuses on four main institutions: the electoral legal framework, the Independent Electoral and Boundaries Commission (IEBC), political parties, and the media.

### CONCEPTUALISING FREE, FAIR AND CREDIBLE ELECTIONS

Free, fair, and credible elections are the principle upon which other indicators of democracy are evaluated. Lindberg (2004) posits that a free and fair electoral process enacts an important component of distributive justice in relation to power and enhances authority and legitimacy of a democratically elected government. Lindberg's argument underscores the importance of elections as a primary means through which the ruled (the people) select and establish a binding social contract with their leaders (rulers), and the government as an institution. In adopting the Declaration on Criteria for Free and Fair Elections, 1994, the Inter-Parliamentary Council (IPC) acknowledged that the authority of any government derives from the will of the people expressed through free, fair, and periodic elections based on universal, equal and secret suffrage (Inter-Parliamentary Council, 1994).

A free and fair process enhances the credibility of election outcomes. Bush and Pruther (2018, p. 662) define an election as credible when 'people trust its results and believe that it produces an outcome that reflects the will of the people'. Thus, credibility is built on people's perceptions of how free and fair the electoral process was, to the extent that the results are perceived as reflecting the will of the people. More often than not, opinions of the people are founded on their vote choice, with the winners perceiving an election as having been credible and the losers holding a contrary opinion. Shah (2015) perceives the legitimacy of elected leaders and government as grounded on the voter's trust of the entire electoral process and related institutions. This is particularly so as the citizenry have broad experience of interacting with the entire electoral process.

The parameters upon which the freeness, fairness and credibility of an electoral process are measured remain contested. Shah (2015) observes that though there is consensus on free and fair elections as a primary measure of emerging and mature democracies, there is a lack of agreed indicators upon which the level can be measured. It is generally agreed that the government should not only create conditions that enable free, fair, and credible elections, but should also develop institutional capacity necessary for the practice of democratic politics (Goodwin-Gill 2006). Attainment of free, fair, and credible elections therefore remains elusive as indicators may be contextual, because there is a lack of overtly agreed measurement tools. In other words, what is free, fair, and credible should take cognisance of unique and different realities such as a democracy emerging from internal conflicts or electoral violence. This was the case of Kenya in 2013, where the presence of peace was the measure for a free and fair election (Shah 2015).

Bishop and Hoeffler (2016) regard free and fair elections as democratic conduct characterised by the right to vote, the registration of voters, freedom to vie for an elective position, freedom to conduct campaigns without intimidation, and access to media. Accuracy in vote counting, timely transmission of results, and impartiality in the management of disputes are imperative in legitimising elections. Goodwin-Gill (2006, p. 73) conceptualises free and fair elections as follows: ‘... as a concept, free is about participation and choice; fair is about equality of participation and of the vote; and about impartiality and non-discrimination; together, they imply respect for human rights at large, and absence of coercion’. In 1994, the Inter-Parliamentary Council (IPC) acknowledged and endorsed the fundamental principles relating to periodic, free, and fair elections. Such principles were identified as:

[the] right of everyone to take part in the government of his or her country directly or indirectly, through freely chosen representatives, to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views, individually or in association with others.

(Inter-Parliamentary Council 1994)

Elklit (2005) posits that the legal and institutional framework, the political context and ‘levelness’ of the electoral playing ground are important in assessing the equality of elections. This also implies that meaningful assessment of a free and fair process should take consideration of all activities and relevant institutions, as opposed to focusing on voting day(s). Referring to Kenya’s 2013 national election, Shah (2015) notes that most Kenyans’ conception of a free and fair process was based on their experience of electoral violence in the 2007/2008 elections. The presence of peace was therefore used as a measure of a free and fair election. However, free, fair, and credible elections should not be interpreted as an end, but as a basis on which fundamentals of democracy such as popular participation, equality, social justice, and non-discrimination are built.

Goodwin-Gill (2006) summarises free and fair as a concept that is used depending on the context, noting that there is no coherent way of measuring the freeness and fairness of an election, apart from the fact that it is a judgement from either an observer, or a participant. Thus, the credibility of an election is relative, and what may be conceived as free, fair, and credible today, may not be so tomorrow, or in a different context. What is important to take note of, according to Goodwin-Gill (2006), is that any discrepancies in the electoral process should be identifiable as per the law, acceptable by principle, and can be corrected through political dialogue and the rule of law.

This paper conceptualises free, fair, and credible elections as a complex process defined by the experiences of the primary participant, the voter, as guided by established electoral institutions. Acknowledging the complex number of variables used to define what a free, fair and credible election is, this paper limits its analysis to the electoral legal framework, the election management body, the Independent Electoral and Boundaries Commission (IEBC), political parties, and the media to assess Kenya's national elections in 2017. The paper opines that a free, fair, and credible election, whether perceived as universal or contextual, legitimises power and authority for those elected to office and the government as an institution.

### KENYA'S 2017 ELECTION IN CONTEXT

On 8 August 2017, Kenya held its sixth elections since the restoration of multiparty democracy in 1991, and the second under the dispensation of the country's second Constitution, promulgated in 2010. The newly promulgated Constitution expanded representation through the establishment of a devolved structure of governance. In this new structure, there are six elective seats, that is, the president, governor, member of parliament, senator, woman member of parliament, and a member of the county assembly.

As in many African countries, ethnicity is a tool for organising politics in Kenya, a situation that occasionally leads to conflictual identities of us versus them. Indeed, the 2017 presidential election was a closely contested race between two ethnically constituted coalitions, the National Super Alliance (NASA) consisting of the Orange Democratic Movement, Wiper Democratic Party, and Amani National Congress; while the Jubilee Alliance Party (JAP) was established through a dissolution of The National Alliance (TNA) and the United Republican Party (URP). Ethnically, NASA drew its support base from the Luo, Luhya, and Kamba communities, while Jubilee was mostly supported by the Kikuyu and the Kalenjin.

In terms of regions, the NASA alliance had the support of Nyanza, Western and lower Eastern, while JAP had the backing of the Mount Kenya, Rift Valley, and the Northeastern regions. Regions with multiethnic populations such as Mombasa and Nairobi had their support divided among the two main alliances. Findings from the Afrobarometer Round 8 survey indicate that JAP was supported by 89% and 75% of the population in Central and Rift Valley regions respectively, while the Orange Democratic Party, an affiliate of NASA, had 72% backing from the Nyanza region (Afrobarometer 2019). The ethnic and regional backing of political parties had ramifications for public perceptions on the credibility of the election, as will be discussed later in this paper.

Just as in 2013, the 2017 presidential election outcome declared by IEBC was disputed. Three days after voting was completed, the IEBC declared Uhuru

Kenyatta as the winner with 54.3% against NASA's Raila Odinga who had garnered 44.7% of the total votes. NASA, under the leadership of Raila Odinga, questioned the validity of results based not on the tallying but on the failure of the IEBC to follow the laid-down procedure (Burbidge 2020). Throughout the electoral process, the IEBC had faced intense scrutiny on the auditing of the voter register, printing of ballot papers, and the commission's use of digital and paper technology in counting of the votes (Cheeseman et al. 2019).

On 1 September 2017, the Supreme Court of Kenya annulled the presidential election results and ordered another presidential election to take place within sixty days, as per the Constitution. The Supreme Court decision was based on three key issues: failure by the IEBC to follow the laid-down procedure, illegalities and irregularities in managing the process, and the IEBC's neglect of responsibilities in discharging its strategic obligations under the law (Supreme Court of Kenya 2017). The nullification of the presidential election results did not legally affect the gubernatorial and parliamentary results. However, the cancellation had indirect ramifications on the legitimacy of the entire election outcome leading to an increase in the number of election petitions. Kanyinga and Odote (2019) describe the 2017 election as the most litigated in Kenya's democratic history.

The 2017 elections were conducted under the scrutiny of regional and global election observer groups, whose reports are instrumental in legitimising elected governments. Bush and Pruther (2018) note that election observer missions enhance credibility of elections, particularly when observers are perceived by the public as unbiased and capable. In other words, election observers create a sense of confidence in an electoral process conducted by the locals through dispelling fraud, and assuring the public of their capacity to detect and deal with fraud when it occurs. Reports by most observer missions described Kenya's August 2017 elections as having been relatively free and fair, albeit with institutional challenges. For example, the African Union Election Observer Mission noted that the elections were conducted in a legal framework that provided the necessary requisites for a regular, free, and fair election, but raised concerns over an election environment that was characterised by lack of dialogue and trust among stakeholders (African Union 2018). This view was alluded to by the Election Observer Group (ELOG), which noted that the election environment was relatively volatile for the stakeholders, especially for the IEBC, as ethnic and regional groupings heightened expectations and anxiety prior to the actual voting day. ELOG however noted that the August 2017 elections were conducted peacefully with no serious, systematic, or planned pattern of irregularities that could have compromised their credibility (ELOG 2018).

According to the Carter Center election observer mission for Kenya, the August elections, especially the voting and tallying process, was well

administered with challenges emerging only in the results transmission. The IEBC did not use the ten-day provision to ensure that all procedures were taken into consideration in declaring the presidential results. There was a delay in transmitting results, a lack of transparency, and the IEBC failed to declare that electronic results were not official as they needed verification (Carter Center 2018). Observation by the Carter Center underscores the centrality of the IEBC, and the importance of following established procedures for a free, fair, and credible election. This view was shared by the European Union Election Observer group, which acknowledged that the August elections were largely peaceful and well managed, but were faced with challenges of tallying, transparency, and transmission. There was also lack of trust in the IEBC by the opposition, and the unfortunate late appointment of the IEBC management put immense pressure on the electoral body (European Union 2018).

Election observer groups generally acknowledged that the August 2017 elections met the basic requirements for being free and fair. The observer groups noted challenges such as delays in vote tallying, and the IEBC's failure to use the necessary procedures for declaring election results. Such omissions compromised the credibility of the election, as will be discussed in the subsequent sections of this study. In the following section, the paper explores Kenya's electoral legal framework as a foundation for free and fair elections.

### KENYA'S LEGAL FRAMEWORK FOR ELECTIONS

A comprehensive electoral legal framework is the basis for credible elections. Election laws articulate the rights and privileges for individual citizens as candidates or voters, and the guidelines along which elections are conducted. Electoral laws further spell out what is to be considered irregular, fraudulent or a misconduct in elections, and the management of disputes at all levels. Bishop and Hoeffler (2016) describe election laws as simply the rules of the game. Mueller (2011) posits that laws are a necessary constraint for politicians who are willing to use any means, including violence, to win elections.

Kenya's 2017 elections were conducted under the following laws; the Constitution of Kenya, 2010; Elections Act, 2011; The Independent Electoral and Boundaries Commission Act, 2011; Political Parties Act, 2011; Election Campaign Financing Act, 2013; and the Leadership and Integrity Act of 2012, among others. All laws were enacted after 2010 when the country's second Constitution was promulgated. While these laws focus on specific electoral issues, they are interdependent and have regular overlaps in various phases of an electoral process.

Kenya's 2010 Constitution is the supreme law upon which all other laws are enacted. The Constitution spells out political rights and privileges of the

people and confers obligation upon the government to ensure that such rights are protected. For instance, Article 38 outlines the political rights of every Kenyan citizen, including the right to form or participate in a political party, recruit members, and campaign for a political party. Article 38 (2) specifies that ‘Every citizen has the right to free, fair, and regular elections based on universal suffrage and free expression of will...’ Furthermore, the 2010 Constitution provides for the right to be registered as a voter and to exercise the right of voting through a secret ballot, and to vie for any elective office they qualify for. Article 81(2) addresses the question of gender equity by providing for a two-thirds gender rule to be applied in all elective seats. Such provisions, and many others, broaden the democratic space for public participation, and for the citizenry to exercise their sovereign right of voting their preferred leaders into office. Implementation of the Constitution is, however, challenged by the lack of political will. For example, while the Constitution is explicit on the two-thirds gender rule in elective positions, Parliament is yet to pass legislation on how this is to be achieved. This means that the 11<sup>th</sup> and 12<sup>th</sup> parliaments founded under the 2013 and 2017 elections were technically unconstitutional as women were underrepresented (Kaburu 2019).

Parliament enacted several electoral laws based on the 2010 Constitution, including the Elections Act of 2011. This Act focuses on the conduct of elections and referenda, and the registration of voters. It further identifies possible election offences and provides mechanisms for resolving electoral disputes. The Act emphasises universal suffrage, in terms of which every adult Kenyan has a right to vote if they are registered. Article 3(1 and 2) for example provides that ‘An adult citizen shall exercise the right to vote as specified in Article 38 (3) of the Constitution...’, and that the citizen is registered in the Principal Register of Voters’. Article 4 underscores the need for a comprehensive voter register comprising:

- a poll register in respect of every polling station;
- a ward register in respect of every ward;
- a constituency register in respect of every constituency;
- a county register in respect of every county; and
- a register of voters residing outside Kenya (Kenya Election Act 2011).

The Independent Electoral and Boundaries Commission Act of 2011 (IEBC Act) is another law that informs the conduct of elections in Kenya. The IEBC Act defines the independence and composition of the commissioners and outlines the duties and responsibilities of the election management body. The primary role of the IEBC, according to the Act, is to facilitate voter registration, maintain the voter register, and conduct elections as per the provisions of the Constitution. Article 25(e) of the IEBC Act clearly articulates the principles under which the

Commission must operate, which include ‘...free and fair elections which are by secret ballot, free from violence, intimidation, improper influence, or corruption, conducted independently, transparent, impartial, neutral, efficient, accurate, and accountable manner’ (IEBC Act 2011). Other election laws include the Election Offences Act, 2016, which defines all forms of electoral offenses and outlines the possible consequences. The Election Campaign Financing Act of 2013 regulates the expenditure and accountability of election campaign funds, and sets limits on party spending. The Leadership and Integrity Act of 2012 emphasises Chapter Six of the Constitution on leadership and integrity of state officers. This Act is used by the IEBC to vet individuals’ suitability as per the law before they are accepted to run for any elective seat. Table 1 provides a summary of electoral laws in Kenya.

**Table 1. Summary of domestic electoral laws in Kenya**

1.	The Constitution of Kenya, 2010	The supreme law upon which all other laws are founded.  The Constitution articulates the political rights of every citizen, including periodic, free, and fair elections as a means of establishing governments.
2	The Election Act, 2011	Spells out the conduct of elections, voter registration, election offences and dispute resolution.
3	The Political Parties Act, 2011	Regulates the formation, registration, and operations of political parties.
4	The Independent Electoral and Boundaries Commission Act, 2011	Establishes, and regulates the operations of the IEBC as the national election management body.
5	Election Campaign Financing Act, 2013	Provides for the regulation, management, expenditure, and accountability of election campaign funds.
6	Leadership and Integrity Act, 2012	Articulates leadership qualities and requirements as per Chapter Six of the Constitution.
7	Election Offences Act, 2016	Outlines election offences and legal consequences.

The electoral legal framework illustrated in Table 1 above indicates that Kenya is not short of laws to deliver a free and fair election. However, weak institutional structure and the lack of political will remain a challenge. For example, while the Political Parties Act of 2011 emphasises that parties should have a national outlook, most political parties bear an ethnic or regional outlook and are personalised, as opposed to having an institutional posture with a clear governance structure (Wanyama & Elklit 2018). The law is also clear on voter registration and the principal voter register, but claims of missing names have been persistent. In

addition, large numbers of deceased voters on the principal register can be interpreted as sheer negligence by the IEBC, or a strategy for election malpractice and fraud resulting in tension among contending parties. For example, the voter register used during the 2007 election that resulted in unprecedented violence had over one million registered deceased voters (Elklit 2011; International Federation for Human Rights 2008). Like previous elections, the voter register in the 2017 election was a point of contention among parties (The Carter Center 2018; Wanyama & Elklit 2018; Cheeseman et al. 2019). Since the voter register is a key determinant of who votes or who doesn't vote, it can be argued that the realisation of a free and fair election is dependent on good management of the Principal Register, which did not seem to have been the case in 2017.

Another notable gap in electoral laws relates to the time frame for handling election-related disputes. For example, the Supreme Court is expected to handle any disputes arising from the presidential election results within fourteen days. This is a very short period for the judges to engage thoroughly with the bulk of files containing evidence from the contending parties before arriving at a judgement. Furthermore, disputes arising from party primaries are managed by individual political parties using internal mechanisms. Unfortunately, the legitimacy of such a process is undermined by the weak institutional structure and personalisation of the political parties. Thus, most disputes are handled in a discriminatory manner, and in most cases they are ruled in favour of those considered close to the party leader (Wanyama & Elklit 2018). Occasionally, financial factors have been used in such cases, leading to the exclusion of financially vulnerable groups from securing nomination by the dominant political parties (Kaburu 2019).

Successful implementation of the election laws is also dependent on other state institutions, including the judiciary and parliament, that work in collaboration with IEBC. Unfortunately, public trust in such institutions is undermined by the perception that they are marred by corruption. For example, findings from the Afrobarometer Round 8 survey indicate that 41% of Kenyans do not trust the courts, with 37% believing that 'most' or 'all' judges and magistrates are involved in corruption. Equally, 47% of Kenyans are of the view that most or all members of parliament are involved in corruption (Afrobarometer 2019). The findings in this study regarding electoral laws point to the fact that Kenya has a comprehensive legal framework, but there is need for a deliberate move to strengthen institutions and ensure implementation of laws towards a free, fair, and legitimate election.

## FREE AND FAIR?

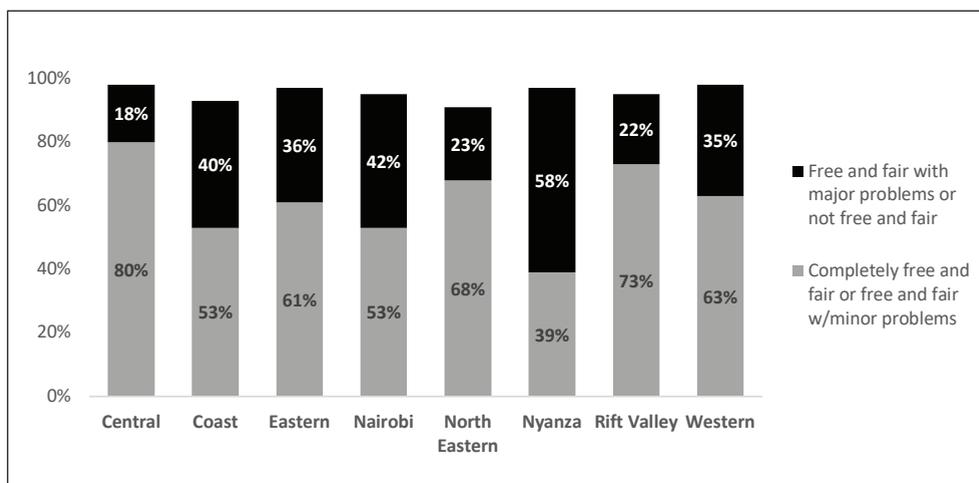
### *Public Opinion on Kenya's 2017 National Elections*

Public opinion plays a fundamental role in legitimising election outcomes. As Barkan argues (2013), elections that are flawed or perceived to be flawed impede

rather than enhance the process of democratisation. The public, in this case the voters, are instrumental in legitimising election results, particularly if elections are closely contested and losers accept the outcome as representing the will of the people.

As a research network, Afrobarometer seeks public opinion on among other things, elections and governance, by conducting national surveys in over 36 countries in Africa. In 2019, Afrobarometer conducted a Round 8 national survey in which 2 400 Kenyans interviewed. The findings of that survey have been used in this section of the paper to explore the opinion of Kenyans regarding the 2017 national elections. One of the many issues included in the survey was the question of whether the elections were free and fair. Survey findings indicate that 62% of Kenyans considered the 2017 elections as having been free and fair (Afrobarometer 2019). However, a further analysis based on regions revealed a significant disparity in opinion between respondents from Nyanza and those from Central Kenya.<sup>2</sup> For example, 80% of respondents from Central and 73% from the Rift Valley were of the view that the election was free and fair, while 58% of respondents from Nyanza held a contrary opinion, as illustrated in Figure 1 below.

Respondents were asked: *On the whole, how would you rate the freeness and fairness of the last national election, held in 2017?*



Source: <https://afrobarometer.org>

**Figure 1. Regional ratings of freeness and fairness in Kenya's 2017 national elections**

<sup>2</sup> Central and Rift Valley regions supported the Jubilee party that had won the election, while Nyanza region supported the Orange Democratic Movement that lost election under the NASA alliance.

The opinions illustrated in Figure 1 are based on people's experiences and perceptions during the 2017 national elections in Kenya. Using Afrobarometer data sets, this section delves deeper to assess the opinion of Kenyans on the performance of the national election management body, the IEBC, political parties, and the media, in realising a free and fair national election or otherwise in 2017.

### THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) AND THE 2017 NATIONAL ELECTIONS

Kenya's election management body, the IEBC, is a constitutional body that is independent of any other government institution. The IEBC, like any other election management body, is required to be impartial, independent, and accountable to election law, and should set electoral boundaries that do not favour any candidate or political party (Bishop & Houfler 2004). By law, the IEBC is entrusted with the responsibility of ensuring that the elections are free and fair. A free and fair election is to be realised through creating a favourable environment for each registered voter to (IEBC Act 2011).

Since its establishment the IEBC has conducted two national elections, in 2013 and 2017. In both elections, the presidential results were contested in the Supreme Court with claims of election malpractice, fraud and negligence cited by the contending parties, and the IEBC identified as the respondent. While the court upheld the 2013 election results by the IEBC, the 2017 results were annulled based on the failure by the IEBC to follow the specified procedure, illegalities, and irregularities in managing the process, and the IEBC's neglect of responsibilities in discharging its strategic obligations under the law (Supreme Court of Kenya, 2017).

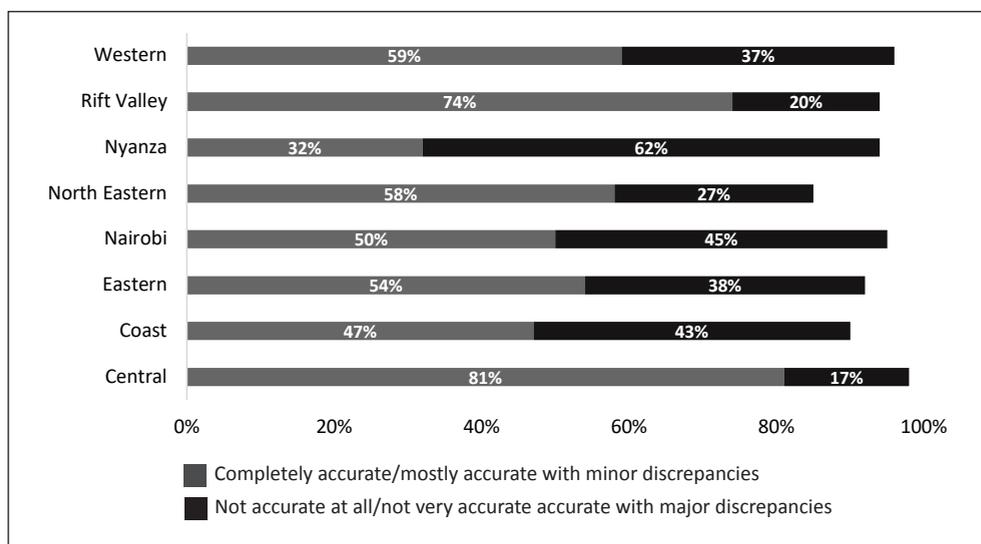
The opportunity for a citizen to vote is one of the fundamental indicators of a free and fair election. Thus, one of the primary roles of the IEBC is to provide the necessary electoral infrastructure for Kenyans to exercise their sovereign right to vote. A sizeable majority (77%) of Kenyans report voting in the 2017 national elections, with the 6% of the 23% that did not vote having been too young to vote (Afrobarometer 2019). Accurate counting and announcement of results are key to defining a free and fair electoral process. While 67% of Kenyans were of the view that votes were generally accurately counted, only 59% were confident that the results announced by the IEBC mirrored the votes counted in August 2017 (Afrobarometer 2019).

A deeper analysis of the data reveals discrepancies based on regional groupings, party affiliations and the election outcome. A majority of respondents from Central (81%) and the Rift Valley (74%) had confidence in the accuracy of results released by the IEBC, compared to only 32% from the Nyanza region, as illustrated in Figure 2. As noted earlier, politics in Kenya are ethnically and

regionally organised. Political party affiliation and election results are therefore likely to shape public opinion on the performance of the IEBC. The regional discrepancies illustrated in Figure 2 reflect how an election outcome impacts the perceptions of the citizenry. This observation resonates with arguments by Goodwin-Gill (2004) who opines that measuring the freeness and fairness of an election is based on the judgement of either an observer or a participant; in this case the evaluations are based on the voter as the primary participant.

Respondents were asked the following question:

*With regard to the last national election in 2017, to what extent do you think the results announced by the Independent Electoral and Boundaries Commission or IEBC, accurately reflected the actual results as counted?*



Source: <https://afrobarometer.org>

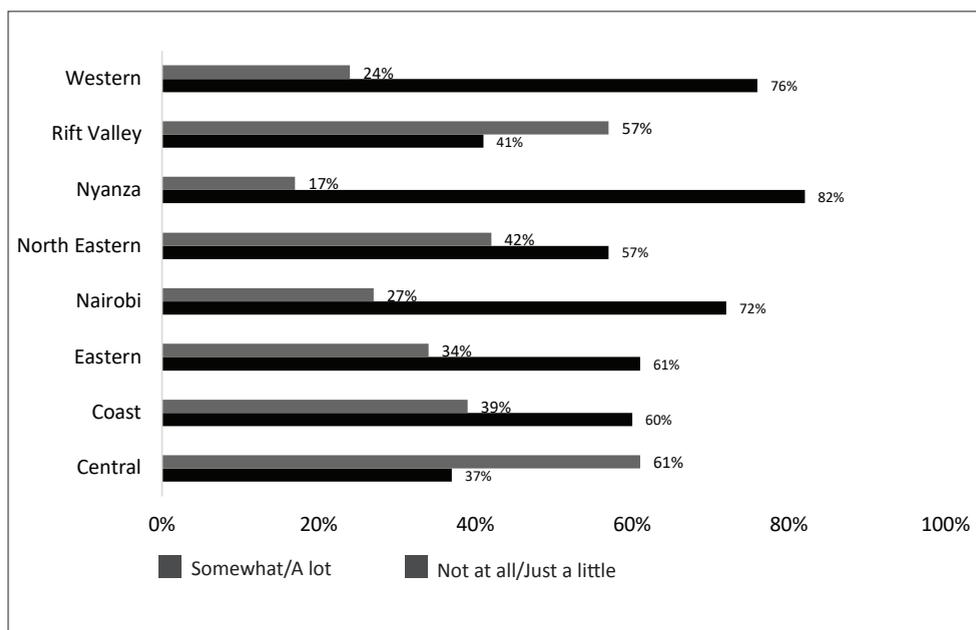
**Figure 2. Accuracy of votes counted and announced by the IEBC in Kenya's 2017 elections**

Using a secret ballot in voting is another aspect that enhances public confidence in a free and fair election. The Election Act of 2011 stipulates that elections in Kenya are to be conducted thorough a secret ballot with the IEBC bearing the responsibility for making the ballot boxes accessible to the voters. Indeed, the 2017 national elections were conducted by using a secret ballot, with 73% of Kenyans being confident that powerful individuals were not likely to have known who they had voted for. Apart from use of a secret ballot, the IEBC adopted the Kenya Integrated Management System (KIEMS), an electronic voting system that would

limit any possible cases of electoral malpractice, including voting more than once. This move was reassuring to the public, with a large majority of Kenyans (81%) being confident that people had not voted more than once. In addition, 64% were not afraid of any political intimidation or violence during the voting process (Afrobarometer 2019).

Public trust in an election management body is fundamental for the legitimacy of an election outcome. Though the public assessment of most aspects of the 2017 elections was largely positive, a majority of Kenyans (58%) did not trust the IEBC as an institution. Further analysis reveals that the level of public trust also differed across regions, as illustrated in Figure 3 below. Regions like Central and the Rift Valley that voted largely for the ruling party, Jubilee, had more respondents affirming their trust for the electoral body, compared to Nyanza. For example, 82% of the respondents from Nyanza did not trust the IEBC, while 61% of respondents from Central Kenya trusted the IEBC as an institution (Afrobarometer 2019). Western, Coast and Nairobi regions also registered minimal trust for the electoral body, as illustrated in Figure 3 below.

Respondents were asked the following question: *How much do you trust each of the following, or haven't you heard enough about them to say? The IEBC*

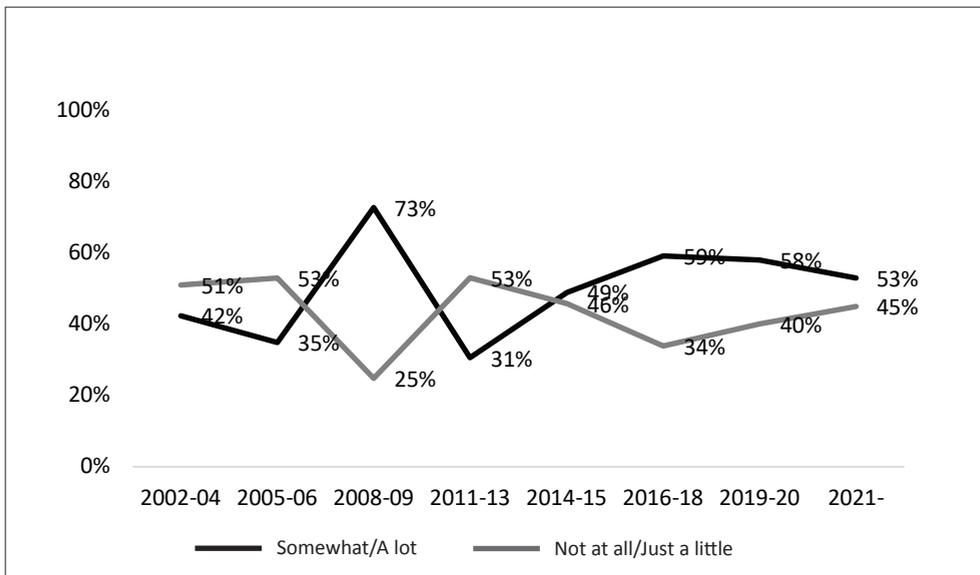


Source: Afrobarometer <https://afrobarometer.org>

**Figure 3. Public trust of the Independent Electoral and Boundaries Commission (IEBC) Kenya/2019**

Lack of public trust in the electoral management body has existed over many years, as illustrated in Figure 4. Although the IEBC cannot be compared to the defunct Election Commission of Kenya (ECK) in terms of its institutional independence, Kenyans remain sceptical of the electoral management body. In most cases the scepticism may be linked to the process of vetting and appointing the commissioners by the president. For example, the Afrobarometer Round 2 survey carried out between 2002 and 2004 indicates that 51% of the public trusted the defunct Election Commission of Kenya. However, there was a decline in public trust from 51% to 35% and then to 25% in the subsequent rounds of Afrobarometer survey, as illustrated in Figure 4. Key events associated with the decline in public trust were probably the failed constitutional referendum in 2005, and the botched national elections in December 2007 that resulted in post-election violence. Kenya's new constitution in 2010, together with the establishment of a new electoral body, the IEBC, impacted positively on public trust in the electoral body which increased from 25% to 53% between 2008 and 2013. The trend however seems to have reversed since 2014 and the subsequent years as illustrated below, with 2016–2018 registering a low of 34%.

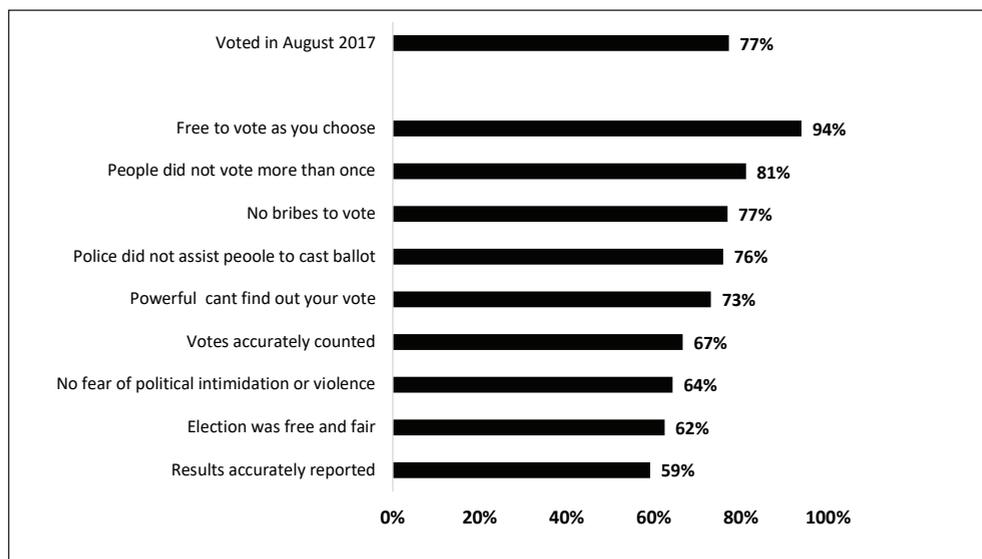
Respondents were asked the following question: *How much do you trust each of the following, or haven't you heard enough about them to say?*



Source: Afrobarometer, <https://afrobarometer.org>,

**Figure 4: From ECK to IEBC: Public trust of the national election management body over the years**

While the IEBC bears responsibility for credible elections, it is important to acknowledge the complex interaction between the commission and other state institutions in conducting national elections. For example, the police department provides security for the smooth running of elections, and police officers are expected not to interfere with the voting process in any way, including assisting voters to cast their ballot. Findings from the public opinion survey indicate that 76% of Kenyans did not witness the police or soldiers assisting anyone to cast their ballot in 2017 (Afrobarometer, 2019). In general, the 2017 elections attracted positive assessments from the public on key electoral issues, as illustrated in Figure 5 below. Afrobarometer sought public opinion on the extent to which the election was characterised by freedom of choice, freedom from voter intimidation, accuracy in counting and reporting of votes, among other aspects that define a free and fair electoral process. In general, Kenya's 2017 national elections attracted a positive public assessment.



Source: Afrobarometer <https://afrobarometer.org>

**Figure 5. Public opinion on various election indicators in 2017**

The positive assessment of the identified election management indicators in Figure 5 point to the fact that, despite some challenges, the IEBC met the minimum threshold of free and fair elections in 2017. The Afrobarometer (2019) findings echo those of international electoral observers such as the European Union, the Carter Center, and the African Union, as was discussed earlier in the paper (African Union 2018; Carter Center 2018; European Union Election Observer Mission 2018).

It is also important to take note of the 23% of the respondents who did not vote as per Figure 5. While a small percentage (6%) were underage in August 2017, 17% of Kenyans that did not vote based on other reasons, and fear of political violence, cannot be ignored in this case. For instance, as illustrated in Figure 5, 64% of the respondents expressed no fear of intimidation or violence while the remaining 36% indicated otherwise.

Referring to political violence between the Pokomo and the Oromo of Tana River months before the 2013 national elections in Kenya, Bekoe and Burchard (2017) note that the timing, motivation and target of such conflicts depicts political violence as a tool that powerful individuals are willing to use to influence election outcomes. The choice of not to vote can also be associated with voter apathy resulting from unkept promises by previous governments, or previous electoral malpractices that interfere with voter confidence.

## POLITICAL PARTIES AND ELECTIONS

### *Many political parties expanded choices for Kenyans*

At the core of democracy are political parties that are driven by the need to capture and maintain state power (Lipset 1994). As institutions, political parties provide a platform for citizens to exercise their sovereign right of electing their preferred leaders to office. Kenya embraced multiparty democracy at independence, with the Kenya African National Union (KANU), and Kenya African Democratic Union (KADU) as the two dominant political parties. Internal political dynamics and a series of constitutional amendments witnessed a shift in Kenya's political organisational structure. After a few years of independence, Kenya transitioned from being a multiparty to a *de facto* one-party state that lasted until 1982, when Section 2A<sup>3</sup> was introduced through a constitutional amendment. This amendment transformed Kenya's political landscape, from a *de facto* to a *de jure* one party democracy (Wanyande 2006; Adar & Kaburu 2020). Multiparty democracy was restored a decade later through the repeal of Section 2A in 1991 (Adar 2008; Chege 2018a; Bratton & Kimenyi 2008; Wanyama & Elklit 2018).

Since then, the number of political parties has grown steadily. For example, the 2017 elections witnessed the participation of over fifty political parties from county to national levels of representation, with parties joining hands to form pre-election pacts through political alliances. Twenty-one political parties secured seats in the National Assembly, with Jubilee and the Orange Democratic Party (ODM) taking the larger share of 140 and 62 members respectively, as illustrated in Table 2 below. Notably, the ODM had worked with three key political parties

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3 Section 2A stated: There shall be in Kenya only one political party, the Kenya National African Union.

during the 2017 national elections, the Wiper Democratic Movement, Amani National Congress, and Forum for Restoration of Democracy, within the National Super Alliance (NASA). Each of these parties secured a significant number of seats in the National Assembly (see Table 2), making NASA's influence on parliamentary business unquestionable. It is equally important to note that the number of legislators elected as independent candidates has been on the rise since 2013. For example, the 2017 elections had thirteen members of parliament elected as independent candidates, as illustrated in Table 2; a significant growth compared to the four that were elected in 2013.

**Table 2: Elected members of National Assembly per political party and independent candidates in the 2017 national elections**

	Political Party	Political Alliance*	Number of seats won in National Assembly
1	Amani National Congress	National Super Alliance (NASA)	12
2	Chama Cha Mashinani	-	2
3	Chama Cha Uzalende	NASA	1
4	Democratic Party of Kenya	-	1
5	Economic Freedom Party	-	4
6	Forum for Restoration of Democracy – Kenya	NASA	10
7	Frontier Alliance Party		1
8	Jubilee Party	JAP	140
9	Kenya African National Union	-	8
10	Kenya National Congress	-	2
11	Kenya Patriots Party	-	2
12	Maendeleo Chap Mendeley Party	-	3
13	Muungano Party	-	1
14	National Agenda Party of Kenya	-	1
15	New Democrats		1
16	Orange Democratic Party	NASA	62
17	Party for Development and Reform	-	3
18	Party of National Unity	-	1
19	Peoples Democratic Party	-	2

20	Wiper Democratic Movement-Kenya	NASA	19
21	Independent Candidates	-	13
	Total		289
	*(There was no election in Kitutu Chache South Constituency on 8 August 2017 due to death of one of the contestants)		

**Source:** Independent Electoral and Boundaries Commission

\* There were two main political alliances; although parties did not officially join a political alliance, they endorsed a presidential candidate from either of the two main alliances depending on ethnic and regional backing.

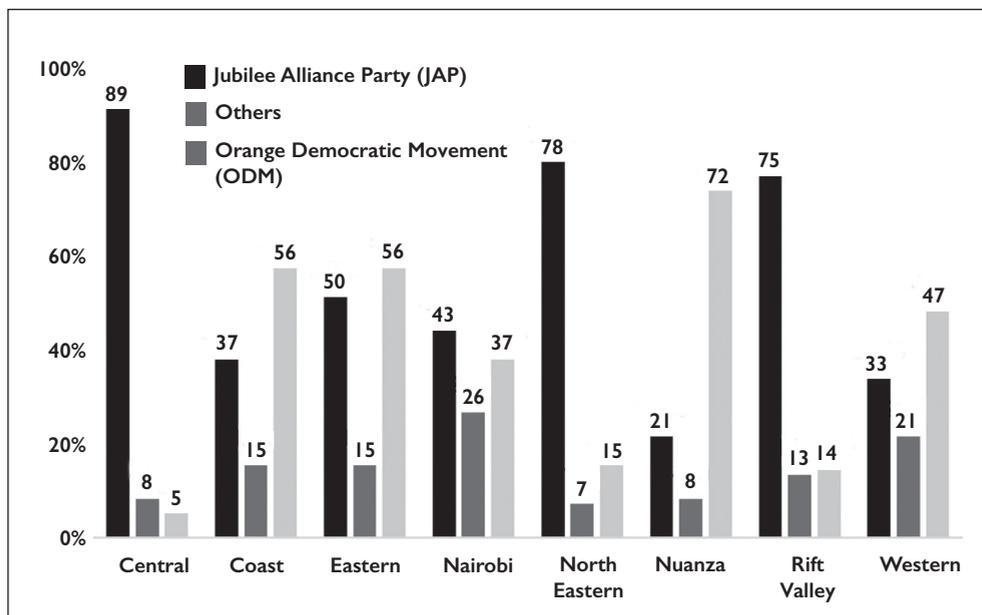
The increased number of political parties may not have translated into free, fair, and credible elections, but it has broadened the choices for the electorate. The Afrobarometer public opinion survey revealed that a majority of Kenyans (71%) prefer to have many political parties during elections as they provide broader choices for leader (Afrobarometer 2019). These opinions may be founded on the country's political history, especially during the 1980s when Kenya was constitutionally a *de jure* one-party state, limiting voters' choice during elections.

One notable characteristic of political parties in Kenya is their ethnic and regional grounding, a reality that informs voting patterns in national elections. For example, during the 2017 election, of the 49% of the respondents who said they were close to a political party, 87% from Central Kenya and 75% from the Rift Valley chose the Jubilee Alliance Party, as illustrated in Figure 6 below (Afrobarometer 2019). The Orange Democratic Movement (ODM) led by Raila Odinga<sup>4</sup> enjoyed the backing of 72% of the people from his home region in Nyanza. Nairobi region had more balanced political party preferences because of the multiethnic nature of the population in the capital city.

Determined to win the election, political parties merged and formed pre-election alliances through party coalitions. For instance, ODM, Wiper, and Amani National Congress (ANC) were the principal parties in the National Super Alliance (NASA). What is most obvious from the public opinion survey is that divergence in opinion is founded on regional and party affiliations and election outcomes, and not necessarily on objective analysis of the various institutions and their role in the entire electoral process. The Afrobarometer Round 8 survey results locate the public assessment of freeness, fairness, and credibility in the August 2017 elections as more contextual than founded on identifiable indicators and processes that are universally recognised.

4 Raila Odinga was the former Prime Minister during the Government of National Unity (GNU) formed after the 2007/2008 post-election violence.

Respondents were asked: *Which political party are you close to?*



Source: Afrobarometer <https://afrobarometer.org>

Note: The percentages exclude 51% of respondents who said they were not close to any political party.

**Figure 6: Preferred political parties in regions**

## MEDIA AND THE 2017 GENERAL ELECTION

### *Fair coverage of candidates?*

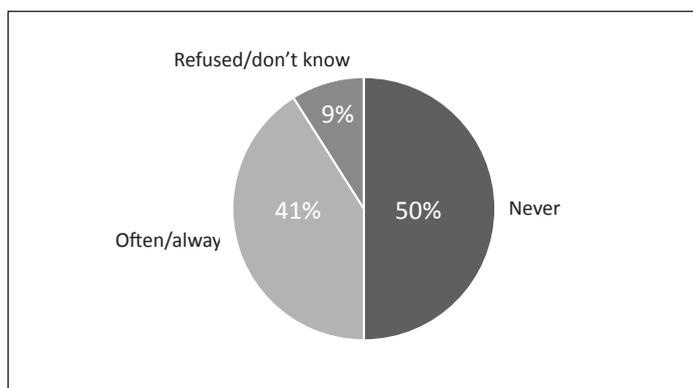
The media plays a fundamental role in consolidating democracy. As a tool for agenda setting, the media provides individual candidates and political parties with the necessary visibility and a platform to solicit support from the electorate. Kenya’s electoral law underpins the importance of media during national elections. Article 41 of the Elections Act of 2011 requires that state-owned media be accessible to all political parties participating in national elections, and airtime should be allocated equitably to all parties, including the independent candidates, during the campaign period. The Election Act emphasises the need for impartiality by both the print and electronic media. Article 41(3) states that ‘Every state-owned print or electronic media which publishes any information relating to the electoral process shall be guided by the principle of total impartiality and shall refrain from any discrimination in relation to any candidate’ (Elections Act 2011).

Kenya has a vibrant media with numerous companies running television, radio, and print media, and that enjoys a significant level of freedom from

interference by the state. Regarding elections, however, there are concerns about the extent to which the Kenyan media has managed to uphold such standards during elections over the years. At the core of this concern is the fact that most media companies are privately owned and are closely linked to political elites (ELOG 2018). Thus, the vitality of the Kenyan media is challenged by a lack of impartiality in political reporting during the electioneering period. For example, ownership of media companies has a significant impact on what and how reporting is to be done. Lack of objectivity and impartiality in reporting has resulted in blame being placed on local media for fanning ethnic tension and political violence, as was the case in the 2007/2008 post-election violence (Ismael & Deane, 2008). Of importance, however, is the ability of the media to convince the public of the credibility of electoral process and outcomes, or otherwise offer fair coverage of candidates and political parties.

Access and fair media coverage of candidates and political parties is critical for a free, fair and credible electoral process. Impartial media provides a level ground for candidates and political parties. However, during the 2017 national elections a majority of Kenyans perceived the media as lacking fairness in the coverage of candidates, as illustrated in Figure 7. A majority of Kenyans (50%) were of the view that the media never, or only sometimes provided fair coverage to all candidates. In these cases the media was usually perceived as having unfair coverage in that some candidates were given more visibility, giving them an advantage over other candidates.

Respondents were asked: *During the last national election campaign in 2017, how often did the media provide fair coverage of all candidates?*



Source: Afrobarometer <https://afrobarometer.org>

**Figure 7: Access and fair media coverage for candidates**

Findings on media and elections in Kenya by Afrobarometer (2019) relate to the argument by Gathara (2017), whose opinion piece in the *Washington Post* observed that in the August 2017 national elections, Kenya's media went against the principle of freeness and fairness in elections by running advertisements in favour of the ruling Jubilee Alliance Party. Gathara noted:

By law, the government is forbidden from advertising its achievements in any media during the election period. However, this did not stop Kenyan media houses from making money in the weeks before the election, for allegedly broadcasting illegal advertisements from the President's Delivery Unit, some of which even bore the tagline 'Jubilee Delivers' and 'Uhuru, 2017'.

Equally, several election observer missions noted the lack of impartiality and unequal coverage of candidates but applauded the media for their continuous advocacy for a peaceful election in 2017.

## CONCLUSION

Attaining a free, fair, and credible election remains an uphill task for most democracies, Kenya included. Although there are universally accepted indicators to assess the credibility of elections, including the extent of freedom and fairness, contextual factors are likely to shape public opinion on the electoral process. This paper focused on Kenya's 2017 national elections with the aim of assessing whether these were free, fair, and credible. To this end, the paper has explored Kenya's electoral legal framework as the foundation for a free and fair election. In addition, the paper used a public opinion survey by Afrobarometer (2019) and previous data sets to assess and underscore the importance of the people's opinion in validating election outcomes and the elected governments. The paper has also assessed the significance of two electoral institutions, that is, the IEBC and political parties, as well the media, in the realisation of a free, fair, and credible electoral process.

The study finds that Kenya has a comprehensive electoral legal framework that covers most, if not all, of the aspects of an election. However, there is a lack of political will in implementing the law which impedes the realisation of a free, fair, and credible electoral process. The public opinion survey by Afrobarometer reveals that the election management body, the IEBC, lacks public trust. Identifiable gaps in the 2017 national elections such as the announcement of a presidential election without following the established procedure compounded the credibility problems of the IEBC as an institution. Ironically, a majority of Kenyans had confidence in most of undertakings by the IEBC, including vote counting and the provision of necessary voting equipment.

Challenges notwithstanding, the study finds that the management of the 2017 national elections by the IEBC met the basic threshold of a free, fair, and credible election. Findings from the 2019 Afrobarometer survey point to the fact that public opinion on the 2017 elections was significantly shaped by regional groupings, party affiliations and leadership, and election outcomes. Therefore, ethnic groupings and regions whose preferred political party lost the election exhibited a more negative assessment of various electoral indicators compared to their counterparts that supported the winning political party.

This study concludes that the achievement of a free, fair, and credible election in Kenya is progressive. The complex interdependence among institutions, and their vital role in a national election, make it difficult for the IEBC to be solely accountable for a credible election. Seemingly, public opinion on the credibility of elections in Kenya is determined by election results with winners approving the process, while the losers express dissatisfaction. The study finds that there is need for institutional strengthening to enhance efficiency of the IEBC and political parties as the primary actors in national elections. In addition, there is a need for impartiality in the implementation of electoral laws, and media coverage and accessibility to candidates as a means of realising fairness in the election.

The paper contributes to the debate on periodic, free, fair, and credible elections as a means of consolidation democracy in Africa.

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