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## INTRODUCTION

The restoration of multi-party elections in Kenya in 1992 after many years of one-party rule saw important changes to the Constitution and the National Assembly and Presidential Elections Act.

Various constitutional amendments enacted during 1991 and 1992 not only did away with the existence of a sole legal political party system but also laid the foundation for a multi-party system to develop.

In particular the amended Constitution addressed the role and status of the Electoral Commission which is the body responsible for the conduct of free and fair elections.

The National Assembly and Presidential Elections Act was amended to bring it in line with election laws which are consistent with the holding of free and fair multi-party elections.

### — *Section 1* —

#### RELEVANT CONSTITUTIONAL PROVISIONS

##### 1.01 Electoral Commission

The Constitution provides for the establishment of an Electoral Commission which consists of a chairman and not less than four other members appointed by the President. The Commission is required to elect a vice-chairman from among its members.

A person is not qualified to be appointed a member of the Commission if he is a member of the National Assembly or if he holds or is acting in any office in the public service or in the armed forces of the Republic.

The office of a member of the Commission becomes vacant –

- (a) at the expiration of five years from the date of his appointment; or
- (b) if circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified to be appointed as such.

A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with this provision.

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A member of the Commission must be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under these provisions and the tribunal has recommended to the President that he ought to be removed from office for inability or for misbehaviour.

If the President considers that the question of removing a member of the Commission ought to be investigated, then –

- (a) the President must appoint a tribunal, which consists of a chairman and four other members selected by the President from among persons –
  - (i) who hold or have held the office of judge of the High Court or judge of appeal; or
  - (ii) who are qualified to be appointed as judges of the High Court; or
  - (iii) upon whom the President has conferred the rank of Senior Counsel; and
- (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to him whether the member ought to be removed.

If the question of removing a member of the Commission has been referred to a tribunal, the President may suspend that member from the exercise of the functions of his office, and any such suspension may at any time be revoked by the President, and must in any case cease to have effect if the tribunal recommends to the President that the member should not be removed.

In the exercise of its functions under the Constitution the Commission is not subject to the direction of any other person or authority.

The Commission may, by rules or otherwise, regulate its own procedure, and with the consent of the President may confer powers or impose duties on any public officer or authority for the purpose of the discharge of its functions.

The Commission may act notwithstanding a vacancy in its membership or the absence of a member, and its proceedings shall not be invalidated by the presence or participation of a person not entitled to be present at or to participate in those proceedings; provided that any decision of the Commission shall require the concurrence of a majority of all its members.<sup>1</sup>

## **1.02 Constituencies**

Kenya is divided into such number of constituencies having such boundaries and names as may be prescribed by order made by the Electoral Commission.

Parliament may prescribe the minimum number of constituencies into which Kenya is to be divided (which must not be less than 188) or the maximum number of constituencies (which shall exceed the minimum number by at least twenty), and until Parliament has so prescribed the minimum number of constituencies shall be 188 and the maximum shall be 210.

All constituencies must contain as nearly equal numbers of inhabitants as appears to the Electoral Commission to be reasonably practicable, but the Commission may depart

from this principle to the extent that it considers expedient in order to take account of –

- (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;
  - (b) population trends;
  - (c) the means of communication;
  - (d) geographical features;
  - (e) community of interest; and
  - (f) the boundaries of existing administrative areas,
- and the number of inhabitants of any part of Kenya must be ascertained by reference to the latest census of the population.

At intervals of not less than eight and not more than ten years, and whenever directed by Act of Parliament, the Commission must review the number, the boundaries and the names of the constituencies into which Kenya is divided, and may, by order, alter the number, the boundaries or the names to the extent that it considers desirable in the light of the review.

Whenever a census of the population has been held in or whenever a variation has been made in the boundary of an existing administrative area, the Commission may carry out a review and make an alteration to the extent which it considers desirable in consequence of that census or variation.

Every order made by the Commission under these provisions is required to be published in the Kenya Gazette and take effect upon the next dissolution of Parliament after it is made.<sup>2</sup>

### **1.03 Conduct of Elections**

The Electoral Commission is responsible for –

- (a) the registration of voters and the maintenance and revision of the register of voters;
- (b) directing and supervising the presidential, national assembly and local government elections; and
- (c) such other functions as may be prescribed by law.<sup>3</sup>

## **— Section 2 —**

### **ELECTION ADMINISTRATION**

#### **2.01 Staff of Electoral Commission**

As seen above, the Constitution established the Electoral Commission with responsibility to organise and conduct elections. The National Assembly and Presidential Elections Act provides for the appointment of a Director of Elections and other staff of the Commission. The Commission is required to appoint a Director of Elections, a Deputy Director of Elections and such other officers as it may deem necessary to assist the Commission in the

discharge of its functions. The officers may, subject to the general or special directions given by the Commission, exercise any or all of the duties and powers conferred or imposed upon it by the Constitution and the Act.

The term “officer” includes the Director of Elections, a Deputy Director of Elections, a returning officer, a presiding officer, a bill clerk and any other person employed in the holding of an election.<sup>4</sup>

## **2.02 Returning Officers**

The Electoral Commission is required to appoint a returning officer for each constituency and may appoint such deputy returning officers for the constituencies as it may consider necessary. Every appointment must be published in the Gazette and in such other manner, if any, as the Electoral Commission may deem necessary in order to bring it to the attention of persons who may be affected thereby.

A deputy returning officer has, subject to the general direction and control of the returning officer to whom he is a deputy, all the power, and may perform all the duties, of the returning officer.<sup>5</sup>

## **2.03 Presiding Officers and Agents**

Whenever an election is to be held in a constituency, the returning officer, in consultation with the Electoral Commission, must appoint a presiding officer to preside at each polling station, and such deputy presiding officers as he may consider necessary; but no person must be so appointed if he has been employed by or on behalf of, or has in any manner whatsoever assisted, any candidate in or about that election.

A returning officer may preside at a polling station and in that case he is deemed to be the presiding officer of that station.

A deputy presiding officer may perform any act (including the asking of any question) which his presiding officer is required or authorised to perform; but no deputy presiding officer has power to order the arrest of any person, or the exclusion or removal of any person from a polling station.

The returning officer must require every presiding officer, deputy presiding officer, clerk, interpreter and agent authorised to attend at a polling station, as soon as he has made the oath of secrecy, to make before the returning officer a declaration that the officer making the declaration understands that he must not prompt any elector whom he is empowered to assist, and must strictly follow the provisions of the regulations, and any instructions which may lawfully be given to him, relating to the election concerned.

Every agent appointed by a candidate must at all times during the performance of the duties authorised by the candidate wear the official badge or uniform of the political party sponsoring the candidature of the candidate at the election.<sup>6</sup>

— *Section 3* —

**REGISTRATION OF ELECTORS**

**3.01 Register of Electors**

The Electoral Commission may, after consultation with the Minister, by order, direct that a register of electors is to be prepared in the prescribed manner in respect of all constituencies or in respect of such constituency or constituencies as may be specified in the order.<sup>7</sup>

**3.02 Prohibition of Multiple Registration**

No person shall at any time be registered as an elector in more than one constituency and no person shall be registered as a elector more than once in any register of electors.

A person who –

- (a) being registered as an elector in a register of electors, applies to be registered as an elector –
  - (i) in any register of electors, otherwise than in substitution for his subsisting registration; or
  - (ii) in the same register of electors; or
- (b) having made an application to be registered in a register of electors which has not been either granted or rejected, applies to be registered in the same register of electors or in another register of electors; or
- (c) makes simultaneously two or more applications to be registered as an elector, is guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding five thousand shillings or to both.<sup>8</sup>

**3.03 Qualifications and Disqualifications for Registration as a Voter**

A person is qualified to be registered as a voter in elections to the National Assembly and in elections of a President if, at the date of his application to be registered he –

- (a) is a citizen of Kenya who has attained the age of eighteen years; and
- (b) has been ordinarily resident in Kenya either –
  - (i) for a period of not less than one year immediately preceding that date; or
  - (ii) for a period of, or periods amounting in the aggregate to, not less than four years in the eight years immediately preceding that date; and
- (c) has, for a period of, or periods amounting in the aggregate to, not less than five months in the twelve months immediately preceding that date, been ordinarily resident in the constituency in which he applies to be registered, or has for such a period or periods carried on business there, or has for such a period or periods been employed there or has for such a period or periods lawfully possessed land or residential buildings there.

No person is qualified to be registered as a voter –

- 
- (a) if, under any law in force in Kenya, he is adjudged or otherwise declared to be of unsound mind; or
  - (b) if he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt;
  - (c) if he is detained in lawful custody; or
  - (d) if he is disqualified therefrom by Act of Parliament on grounds of his having been convicted of an offence connected with elections or on the grounds of his having been reported guilty of the offence by the court trying an election petition.

Where a person is qualified to be registered in more than one place as a voter in elections, he must register only in the first of those places in which he applies to be so registered, and Parliament may provide for the punishment of a person who, being already registered in one place as a voter in the elections or having applied to be so registered there and not having had that application finally rejected, applies to be registered in another place as a voter.<sup>9</sup>

### **3.04 Additional Disqualification for Registration**

A person is disqualified for registration as an elector if he has within the preceding five years been convicted of an election offence or been reported guilty of an election offence (defined to mean a corrupt practice, an illegal practice or any offence under section 3 or 4 of the Election Offences Act) by the election court.<sup>10</sup>

### **3.05 Appeal against Disqualification**

Where a person has been adjudged or declared to be of unsound mind, sentenced to death or imprisonment, adjudged or declared bankrupt or convicted of an election offence, and he is thereby disqualified from being registered as an elector, then, if it is open to him to appeal against the decision (either with the leave of a court or other authority or without leave), that person must not be thereby disqualified for being so registered until the expiry of thirty days after the date of the decision or such further period as the Minister in his discretion may, at the request of the person, direct in order to enable the person to appeal against the decision.<sup>11</sup>

### **3.06 Registration Officers**

The Electoral Commission is required to appoint suitable persons to be registration officers, each for a registration unit, and may appoint as many suitable persons to be assistant registration officers as it considers necessary. The same person may be appointed for more than one registration unit.

An assistant registration officer has all the powers and duties of the registration officer whom he is appointed to assist, and any reference to a registration officer, unless the context otherwise requires, includes a reference to an assistant registration officer.<sup>12</sup>

### **3.07 Procedure for Registration of Electors**

To set the registration process in action, the Electoral Commission is required to publish in the Gazette a notice in the prescribed form calling upon all persons qualified to be registered

as electors and who wish to be registered to make application for registration within a specified period, which period shall not be less than thirty days.

Instead of publishing in the Gazette one notice in respect of the whole of Kenya, as provided above, the Electoral Commission, may publish in the Gazette a number of notices, each for one or a number of registration units, and each specifying the same or different periods within which application for registration may be made.

The Electoral Commission may at any time, by notice in the Gazette, amend a notice given and published under these provisions, by substituting a later date for the specified date appearing in the notice or in any other manner.

Every application by an individual must be in the prescribed form, and the declaration in the prescribed form shall be made before the registration officer.

A registration officer may receive an application at a place other than one of the places of registration appointed in the notice.

A registration officer may close a place of registration before the last date appointed in the notice for the receipt of applications at that place, if he considers that the volume of applications does not warrant keeping the place of registration open, but if he does so he shall exhibit thereon a notice saying at what other place of registration in the same division applicants may attend.

For the purpose of satisfying himself as to the qualifications of an applicant to be registered as an elector, a registration officer may require of the applicants such further information, and may make such inquiries, and may take such advice as he may deem necessary.

Every registration officer must, as soon as practicable after the latest closing date in any registration unit has passed, prepare a register of electors, in such form as the Electoral Commission may direct, for the registration unit for which he is appointed.

In preparing the register of electors, the registration officer must register therein, in such manner as the Electoral Commission may direct, the name and address of every person from whom an application has been received and who appears to him to be entitled to be registered therein as an elector.

The names of the persons registered in the register of electors must be arranged in such order, and shall be numbered in such manner, as the Electoral Commission may direct.

The registration officer for a registration unit shall, when a person applies to be registered as an elector for that registration unit, and if he is satisfied that person is entitled to be so registered, issue to that person an elector's card in the prescribed form.

Where a person who has been registered in a register of electors loses his elector's card, or where his elector's card becomes unserviceable, the registration officer of the registration unit in which he is registered may, upon application to him and upon such proof as he may

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require, issue a duplicate elector's card to that person; but no duplicate elector's card must be issued on a day fixed for polling in the registration unit.

On the completion of the register of electors for his registration unit, the registration officer must publish the register by –

- (a) making it available for inspection at the office of the District Officer within whose division the registration unit lies;
- (b) publishing, at the District Officer's Office, a notice that the register is so available and specifying the times when it is so available, and specifying the manner in which and the time within which claims and objections may be made.<sup>13</sup>

### **3.08 Claims**

A person who has duly applied to be registered and whose name is not included in the appropriate register of electors may submit a claim to the registration officer in the prescribed form and manner and within the prescribed time.

A claim is determined by the registration officer in the prescribed manner, and an appeal shall lie, in the prescribed manner, to the High Court.

Every claim must be in the prescribed form and is required to be delivered, together with a fresh application for registration in the prescribed form, to the registration officer within a period of fourteen days after the date of publication of the notice published in respect of the registration unit.

At the end of seven days after the expiration of the period of fourteen days, the registration officer shall publish, at the office of the District Officer within whose division the registration unit lies, a notice of the names and addresses of all persons who have made to him a claim and shall thereafter consider and determine every claim.

The registration officer when considering a claim may require the attendance of the claimant.

Every appeal to the court must be in writing and signed by the appellant. It must state briefly the grounds of appeal and be delivered to the registration officer, together with the prescribed fee, within ten days from the date of the decision appealed against.

The registration officer must forthwith forward the appeal to the court, which shall cause the parties to be given not less than four clear days' written notice of the date, time and place of the hearing of the appeal, and at the hearing, may hear additional evidence.<sup>14</sup>

### **3.09 Objections**

A person who is registered in a register of electors may, in the prescribed manner, object to –

- (a) his registration; or
- (b) the registration in that register of electors of any other person; or

- (c) the registration in that register of electors of a person who has made a claim to a court.

The objection is determined by the court, and no appeal lies from the decision of the court. "Court" means a subordinate court of the first class having jurisdiction in the constituency.

Every objection must be in the prescribed form and be delivered, together with the prescribed fee, to the registration officer of the registration unit, and must be so delivered within a period of one month after the date of publication of the notice published in respect of the registration unit, or, in the case of an objection to the registration of a person who has made a claim, within fifteen days after the day on which the notice of the names and addresses of claimants is published in respect of the registration unit.

Whenever the registration officer receives an objection, he must as soon as practicable thereafter send to the person in regard to whom it is made, notice of the objection in the prescribed form and at the same time forward the objection to the court.

The court is required to determine, as soon as practicable all objections which have been sent to it, causing each objector and each person in regard to whom objection has been made to be given not less than seven days' notice.

If an objection is made, and is disallowed by the court, and in the court's opinion the objection was made without reasonable cause, the court may order the objector to pay to the person in regard to whom objection was made such sum, not exceeding (100 shillings), as it considers will compensate the person for any loss of time or inconvenience the person has incurred by reason of the objection, and a decree for the payment of the money must be drawn up and approved by the court and is deemed to be a decree for the purposes of the Civil Procedure Act.<sup>15</sup>

### **3.10 Amendment of Register**

When the court has determined the appeals which have been lodged with respect to claims, and all the objections, it shall cause to be forwarded to the registration officer a statement containing the particulars of the persons who it has decided must be registered in the register of electors and of the persons who it has decided ought not to be so registered, and the registration officer must amend the register of electors accordingly.<sup>16</sup>

## **— Section 4 —**

### **HOLDING OF ELECTIONS**

#### **4.01 Issue of Writs**

For the purposes of a parliamentary election –

- (a) consequent upon a dissolution of the National Assembly; or
- (b) to supply a vacancy arising from any cause other than the dissolution of the National Assembly,

the Speaker is required to issue a writ under his hand in the prescribed form addressed to the returning officer of each constituency in which an elected member is to be returned.

The Speaker must issue the writs –

- (a) in the case of an election consequent upon the dissolution of the National Assembly, within fourteen days after dissolution;
- (b) in the case of an election consequent upon a determination by the election court, within one month after the determination; and
- (c) in any other case, within four months after the occurrence of the vacancy.

The Speaker may, after consultation with the Minister, by notice in the Gazette, extend the periods specified in sub-paragraphs (b) and (c) to facilitate the proper organisation and holding of the ensuing elections.

Every writ must be delivered to the Electoral Commission which must, within ten days after receiving it –

- (a) transmit the writ to the returning officer to whom it is addressed; and
- (b) cause to be published in the Gazette a notice in the prescribed form which must specify –
  - (i) the day or days upon which each political party is required to nominate candidates to contest parliamentary elections in accordance with its constitution or rules which shall not be **more than** twenty-one days after the date of publication of such notice.<sup>17</sup>
  - (ii) the day or days on which the poll is to be taken for the parliamentary election, if it be necessary, which must not be less than fourteen days after the day fixed for nomination. Where more than one writ is issued a composite notice may be published.<sup>18</sup>

#### **4.02 Holding of Elections**

After receiving a writ with respect to a parliamentary election, the returning officer to whom it is addressed is required to proceed to hold the election according to the terms of the published election notice.<sup>19</sup>

### **— Section 5 —**

## **PREPARATIONS FOR PARLIAMENTARY ELECTIONS**

### **5.01 Nomination by a Political Party**

Independent candidates who do not belong to a political party cannot contest a parliamentary seat.<sup>20</sup>

A person is deemed to be nominated by a political party for election as a member of the National Assembly if he is selected in the manner provided for in the constitution or rules of

the political party concerned relating to members of that party who wish to contest parliamentary elections.

No person can be nominated by a political party unless he is qualified in all respects to be an elected member of the National Assembly.

Each political party must bear the expenses relating to the nomination of candidates for contesting parliamentary elections.

Regulation 14 (which seems to be at variance with the above-mentioned provision of the Act but see note 17) requires the Electoral Commission to specify the day for the nomination of candidates by each political party taking part in the parliamentary elections which must not be less than twenty-one days before the date fixed by such notice for the holding of the parliamentary elections.<sup>21</sup>

### **5.02 Nomination of Candidates**

For the purposes of nomination of candidates at a parliamentary election every candidate must be:

- (a) proposed and seconded and supported by not less than seven and not more than 18 persons other than the proposer and seconder; and
- (b) nominated by the delivery by the candidate or his duly appointed agent to the returning officer of the constituency between the hours of eight o'clock in the morning and one o'clock in the afternoon of the nomination day for election of a nomination paper in the prescribed form.

There must be delivered to the returning officer together with the nomination paper a statutory declaration in the prescribed form made not earlier than one month before the nomination day.

The subscribers to a nomination paper must all be persons who are registered as electors for the constituency concerned and who are members of the political party whose endorsement the candidate is seeking.

Every application for nomination for candidature at a parliamentary election must be accompanied by a nomination fee (of five thousand shillings) in cash or banker's draft, which fee shall be refunded to the candidate –

- (a) where the returning officer holds a nomination paper invalid; or
  - (b) where the candidate withdraws his candidature,
- but not otherwise.

If a person stands nominated as a candidate in more than one constituency all nominations of that candidate are void.<sup>22</sup>

### **5.03 Nomination Papers and Procedures**

A nomination paper is required to:

- (a) contain such description of the candidate as is sufficient to adequately identify the candidate; and
- (b) show the electoral number of each of the subscribers thereto.

Where the nomination paper bears the signatures of more than the required or permitted number of persons as proposing, seconding or supporting the candidate, the signature or signatures, up to the required or permitted number, appearing first on the paper in each category must be taken into account to the exclusion of all others in that category.

No person is to be a subscriber to more than one nomination paper in respect of the same parliamentary elections and if any person subscribes to more than one such paper his subscription is inoperative on all such papers. This provision does not apply to the subscription of a person by reason only of his having subscribed a nomination paper of a candidate who has died or who has withdrawn his candidature before a second nomination paper subscribed by that person has been delivered to the returning officer.

When a nomination paper has been delivered to a returning officer no further nomination papers can be accepted in respect of the same candidate unless the first paper has been declared invalid.

A returning officer is required to supply free of charge to any elector of his constituency a form of nomination paper upon a request made in that behalf at such place and time as is specified in a notification, but it is not necessary for a nomination form to be on a form so supplied as long as it otherwise complies with the requirements of the Regulations.

Except for the purpose of assisting the returning officer, and at his request, no person is allowed to attend the proceedings taking place during the time fixed for the delivery of nomination papers unless he is a candidate or the agent or the proposer or seconder of a candidate; but only two such persons are entitled to so attend at any one time in respect of any one candidate, whether one of those two is the candidate himself or not.

A person entitled to attend the proceedings is also entitled to inspect, and to object to the validity of, any nomination paper delivered in his presence.

Nothing contained in this provision prevents the Electoral Commission from authorising observers duly approved or accredited by the Electoral Commission from attending the nomination proceedings.

Where an application has been made for nomination then, unless the returning officer holds a nomination paper invalid, or the candidate withdraws his candidature, the candidate named therein stands validly nominated.

A returning officer is entitled to hold a nomination paper invalid on any of the following grounds, but not otherwise:

- (a) that the particulars of the candidate or subscribers contained in the paper are not as required by the Regulations;
- (b) that the paper is not subscribed as required by the Regulations;
- (c) that the candidate is not qualified, or is disqualified by law from being nominated, or for being elected as an elected member of the National Assembly; or
- (d) that the proposer or seconder, or so many of the supporters as would reduce the number of qualified supporters to less than seven, are not qualified to be subscribers.

A returning officer must give his decision immediately on an objection to a nomination paper.

Where a returning officer decides that a nomination paper is invalid he must immediately record that decision and the reasons therefor on the paper and add his signature thereto.<sup>23</sup>

#### **5.04 Withdrawal of Candidature**

At any time before the close of nominations, but not later, a candidate whose nomination paper has been delivered to the returning officer may, by notice in writing signed by him and delivered to the returning officer, withdraw his candidature.<sup>24</sup>

#### **5.05 Close of Nomination**

If, after the close of nominations, no person stands validly nominated, the returning officer is required to –

- (a) certify accordingly to the Electoral Commission in the prescribed form;
- (b) publish a statement countermanding the holding of the election concerned.

If, after the close of nominations, only one candidate stands validly nominated, the returning officer shall –

- (a) declare the candidate to be elected; and
- (b) certify accordingly to the Electoral Commission in the prescribed form.

Upon receipt of a certificate under the foregoing provisions, the Electoral Commission must publish a notice in the Gazette in appropriate terms and, where two or more certificates are received at substantially the same time, such notice may be a composite one.

If, after the close of nominations, two or more candidates stand validly nominated, the returning officer must publish a statement in the Gazette and in such other manner as the Electoral Commission may deem necessary, stating:

- (a) the names, in alphabetical order of surnames, addresses and occupations or descriptions of such candidates as given in their nomination papers;

- 
- (b) the names of the subscribers to the nomination papers;
  - (c) the day or days upon which, and hours during which, the poll will be taken; and
  - (d) the situation of each polling station and the description of the electors entitled to vote at each polling station.<sup>25</sup>

### **5.06 Election Procedure**

Every election is required to be by ballot wherein the votes of electors consist of ballot papers. No person is allowed to vote in a constituency other than that in respect of which he is registered as an elector.

No person is permitted to cast more than one vote at any particular election.<sup>26</sup>

### **5.07 Polling Station Materials and Equipment**

The returning officer is required to provide each presiding officer with such number of ballot boxes and ballot papers as the returning officer considers necessary for the effective carrying out of the provisions of the Regulations relating to the election concerned, and in the case of a joint election shall ensure that the ballot boxes relating to the presidential election and the parliamentary election are separately and clearly identified and placed as far away as possible from each other.

Every ballot box shall be constructed:

- (a) with an aperture which is large enough to receive a ballot paper but which is no larger; and
- (b) so as to be capable of being sealed so that ballot papers cannot be taken out of the box so long as the seal is unbroken.

The returning officer must provide each polling station with:

- (a) materials to enable electors to mark their ballot papers in elections where marking is necessary;
- (b) instruments for stamping the official mark on ballot papers;
- (c) a bottle or container of indelible ink;
- (d) a seal of the Electoral Commission;
- (e) a copy of the register of electors or such part thereof as contains the names of the electors entitled to vote at that polling station; and
- (f) a sufficient number of compartments in which electors can mark their votes screened from observation.<sup>27</sup>

### **5.08 Keeping Order at Polling Station**

It is the duty of the presiding officer to keep order at his polling station. If a person misconducts himself in a polling station, or fails to obey the lawful instructions or orders of the presiding officer, he may immediately be removed, by order of the presiding officer, from the polling station by a police officer, and a person so removed must not re-enter the

polling station during the continuance of the poll without the permission of the presiding officer.

A person removed from the polling station may, if charged with the commission in the polling station of an offence, be dealt with as a person taken into custody for an offence by a police officer without a warrant.

The presiding officer may order the dispersal of any gathering of persons which appears to him to be intimidating or interfering with electors, and any such order is sufficient authority for a police officer, or any other person authorised by the order, to effect the dispersal.

The powers conferred by these provisions must not be exercised so as to prevent an elector who is entitled to vote at the polling station from having an opportunity of peaceably voting thereat.<sup>28</sup>

### **5.09 General Procedure at the Polling Station**

Immediately before the commencement of the poll, the presiding officer must show the ballot box or ballot boxes to those persons lawfully present in the polling station, and allow those of the candidates and their agents as may wish to do so to ascertain that the box or boxes are empty, and must thereupon close the box or boxes so that they may not be opened without breaking the seal.

After a ballot box is sealed, the presiding officer must cause it to be so placed in the polling station that it can at all times be in the view of himself or a deputy presiding officer and of the candidates or their agents.

On the adjournment of the poll in a polling station to another day, or on the close of the poll at one station with a view to transferring a ballot box to another station, and at any other time when a ballot box is not in use for the purpose of receiving ballot papers, the presiding officer must close up the aperture used for the insertion of the ballot papers into the box and place his seal on it in such a manner as to prevent the insertion of ballot papers without breaking the seal.

After a box has been sealed the seal must not be broken or the aperture opened until broken and opened in the presence of those persons lawfully present in the polling station where polling is about to recommence.

Where a presiding officer affixes his seal on a ballot box or aperture thereof, he must permit any candidate or agent of a candidate who so wishes to affix his seal on the box or aperture.

A presiding officer may postpone or adjourn the proceedings at his polling station where they are interrupted by a riot, open violence, flood, natural catastrophe or other cause, but when he does so he must start or restart the proceedings at the earliest practicable moment. These powers of a presiding officer include a power to transfer the proceedings to another polling station in the same constituency, and where he does so –

- 
- (a) he must advise the fact in such manner as he thinks sufficient to bring it to the notice of electors; and
  - (b) the polling area for the polling station from which the proceedings are transferred is deemed to be part of the polling area of the polling station to which the proceedings are transferred.

A presiding officer may extend the hours of polling at his polling station where polling has been interrupted or for good cause, and must, where polling in that station has started late, extend the hours of polling by the amount of time which was lost in so starting late.

Before the delivery of a ballot paper to an elector –

- (a) the ballot paper must be stamped with the official mark of the Electoral Commission;
- (b) the number and name of the elector as stated in the copy register must be called out;
- (c) the electoral number of the elector must be marked on the counterfoil of the ballot paper;
- (d) a mark must be placed in the copy register against the electoral number of the elector to denote that a ballot paper has been delivered but without showing any particulars of the paper; and
- (e) the elector's card of the elector must be stamped to show that a ballot paper has been delivered to him.

Upon receiving a ballot paper, an elector is required to –

- (a) submit to having a particular one of his fingers immersed or dipped in ink of a distinctive colour which, so far as is possible, is sufficiently indelible to leave a mark for the period of the election; and
- (b) submit his identity card to be impressed with the seal of the Electoral Commission leaving a permanent impression on the card.

After receiving a ballot paper an elector is required to cast his vote without undue delay and then immediately leave the polling station.<sup>29</sup>

### **5.10 Method of Voting**

An elector must, upon receiving a ballot paper, go immediately into one of the compartments of the polling station and there secretly mark his ballot paper and fold it up so as to conceal his vote, and must then put the ballot paper into the ballot box in the presence of the presiding officer.

A presiding officer, on the application at the polling station of –

- (a) an elector who is incapacitated by blindness or other physical cause from voting in accordance with the normal procedure; or
  - (b) an elector who declares orally that he is unable to read or otherwise requests the assistance of the presiding officer,
- may, with the assent of the elector, cause the vote of the elector to be cast on his behalf and

as he may direct, and must thereupon record in the copy register, by means of a symbol placed opposite the name of the elector, the fact that the vote was so cast and the reason therefor; and the presiding officer must allow one representative of each candidate to witness the marking of the vote.

An elector who has inadvertently dealt with his ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and proving to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the paper so delivered, and the spoilt ballot paper must immediately be cancelled and the counterfoil thereof marked accordingly.

A presiding officer shall require a person applying for a ballot paper to produce his identity card issued under the Registration of Persons Act and the elector's card issued by the Electoral Commission.

If a person representing himself to be a particular elector applies for a ballot paper and produces an elector's card purporting to be issued in his name which has not been stamped and either –

- (a) some other person has already been issued with a ballot paper in the name of that elector and the person so applying produces satisfactory evidence of his identity as that elector; or
- (b) the presiding officer is satisfied that the person duly applied for registration as an elector and was qualified for registration but that his name was omitted from the register of electors by mistake; or
- (c) that person does not produce to the presiding officer evidence satisfactory to the officer of his identity when so requested, but produces a written declaration, in a form acceptable to the presiding officer, as to his identity,

the presiding officer must allow that person to vote, but must record a statement of the particulars of the case.<sup>30</sup>

### **5.11 Close of Poll**

Immediately after the close of the poll at his polling station the presiding officer must make a written statement of –

- (a) the number of ballot papers issued to him;
- (b) the number of ballot papers, other than spoilt ballot papers, issued;
- (c) the number of spoilt ballot papers; and
- (d) the number of ballot papers remaining unused.

Immediately after the completion of this statement, the presiding officer, in the presence of those candidates or their agents as are then present with him, must make up into separate packets –

- (a) the spoilt ballot papers, if any;
- (b) the marked copy register;

- 
- (c) the counterfoils of the used ballot papers; and
  - (d) the aforesaid statement and any other statement required to be recorded,
- and must seal with his own seal each of the packets, and must so seal each of the ballot boxes in use at the polling station in such a manner as to prevent the introduction of any matter into the boxes or the opening thereof, and must allow any candidate or agent who may so desire to affix his seal to the packet or box.

The presiding officer must, as soon as practicable, deliver the ballot boxes, with keys (if any) attached, and the sealed packets to the returning officer who must take charge thereof, and the presiding officer must permit candidates or their agents to accompany the ballot boxes and sealed packets in the course of delivery to the returning officer.<sup>31</sup>

### **5.12 Counting the Votes**

At the counting of votes at an election any ballot paper –

- (a) which does not bear the official mark; or
- (b) on which votes are given for more than one candidate; or
- (c) on which anything is written or so marked as to be uncertain for whom the vote has been cast,

is void and cannot be counted.

A ballot paper on which a vote is marked –

- (a) elsewhere than in the proper place; or
- (b) otherwise than by means of a cross; or
- (c) by more than one mark,

is not by that reason only thereof void if an intention that the vote is for one or other of the candidates clearly appears, and the manner in which the paper is marked does not itself identify the elector and it is not shown that the elector can be identified thereby.

A returning officer must, so far as practicable, proceed continuously with the counting of votes.

A returning officer must not commence to count the votes unless he is of the opinion that he can conveniently complete the count, and any recount if it appears to him to be likely, without a break, but having commenced the count, he may if he considers it desirable and after consultation with such of the candidates or their counting agents as are present, exclude the hours between seven o'clock in the evening and nine o'clock of the following morning.

The counting of votes shall be carried out at the constituency level and the returning officer shall ensure that votes from the polling stations in the constituency are counted separately.

During any recess in the counting proceedings, the returning officer must place the ballot papers and other documents relating to the election under his own seal and the seals of those

of the candidates and their counting agents as may desire to affix their seals, and must otherwise take all due and proper precautions for the security of such papers and documents.<sup>32</sup>

### **5.13 Recount**

A candidate or counting agent, if lawfully present when the counting or any recount of votes is completed, may require the returning officer to have the votes rechecked and recounted or again recounted, or the returning officer may, on his own initiative, have the votes recounted or again recounted.

No steps must be taken on the completion of a count or recount of votes until the candidates and counting agents present at the completion have been given a reasonable opportunity to exercise this right.<sup>33</sup>

### **5.14 Rejected Ballot Papers**

Every rejected ballot paper must be marked with the word “rejected” by the returning officer, and, if an objection is made by a candidate or counting agent to the rejection, the returning officer is required to add the words “rejection objected to”.

After the counting of votes is finally concluded, the returning officer must draw up a statement showing the number of rejected ballot papers under the following heads of rejection as may be applicable –

- (a) want of official mark;
- (b) voting for more than one candidate;
- (c) writing or mark by which the elector might be identified;
- (d) unmarked or void for uncertainty,

and any candidate or counting agent must, if he so desires, be allowed to copy that statement.

Upon the completion of a count (including any recount), the returning officer must seal up in separate packets –

- (a) the counted ballot papers; and
- (b) the rejected ballot papers together with the statement relating thereto.<sup>34</sup>

### **5.15 Returns of Persons Elected**

When the count, including any recount, of votes at an election is completed, the returning officer must announce the result to the persons then present and must, as soon as practicable, forward to the Electoral Commission –

- (a) in the case of a presidential election, whether or not forming part of a joint election, a certificate in the prescribed form showing the total number of votes cast for each candidate;

- 
- (b) in the case of a parliamentary election, whether or not forming part of a joint election, a certificate in the prescribed form showing the name of the candidate who was elected.

Upon receipt of a certificate showing the name of the candidate who was elected, the Electoral Commission must –

- (a) in the case of a presidential election, whether or not forming part of a joint election, hold the certificate until the results of that election in every constituency have been received and thereafter publish a notice in the Gazette declaring the person who has received the greatest number of votes in the election, and has complied with the provisions of the Constitution, to have been elected President; and
- (b) in the case of a parliamentary election, whether or not forming part of a joint election, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected.

Where an election results in a tie, the Electoral Commission must notify the Speaker accordingly and the Speaker shall issue the appropriate notice or writ for a fresh election.<sup>35</sup>

## — Section 6 —

### PETITIONS

#### 6.01 Election Court

An application to the High Court under the Constitution to hear and determine a question whether –

- (a) a person has been validly elected as President; or
- (b) a person has been validly elected as a member of the National Assembly; or
- (c) the seat in the National Assembly of a member thereof has become vacant, must be made by way of petition and must be tried by an election court consisting of three judges.<sup>36</sup>

#### 6.02 Presentation of Petition

A petition –

- (a) to question the validity of an election, must be presented within twenty-eight days after the date of publication of the result of the election in the Gazette;
  - (b) to seek a declaration that a seat in the National Assembly has not become vacant, must be presented within twenty-eight days after the date of publication of the notice that the seat has become vacant;
  - (c) to seek a declaration that a seat in the National Assembly has become vacant, may be presented at any time,
- provided that –
- (i) a petition questioning a return or an election upon the ground of a corrupt

practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his election agent may, so far as respects the corrupt practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;

- (ii) a petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person, or his election agent, in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be presented at any time within twenty-eight days after the date of the alleged payment or act;
- (iii) a petition questioning a return or an election upon an allegation of an illegal practice in relation to a return of expenses may, unless a condoning order excusing what would otherwise be an illegal practice has already been obtained, so far as respects the illegal practice, be presented at any time within twenty-eight days of the notice of reception of the return having been exhibited by the returning officer.

A petition presented in due time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with leave of the election court within the time which the petition questioning the return or the election upon that ground may be presented.<sup>37</sup>

### **6.03 Security for Costs**

Not more than three days after the presentation of a petition, the petitioner must give security for the payment of all costs that may become payable by the petitioner.

The amount of security is (fifty thousand shillings) and must be given by deposit of money.

If no security is given as required, or if an objection is allowed and not removed, no further proceedings are possible on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.<sup>38</sup>

### **6.04 Procedure of Election Court**

Upon receipt of a petition the election court is required to peruse the petition and –

- (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or
- (b) fix a date for the trial of the petition.

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In the exercise by an election court of its jurisdiction –

- (a) witnesses must be summoned and sworn in the same manner or as nearly as circumstances admit as in a trial by the High Court in the exercise of its original civil jurisdiction and must be subject to the same penalties for the giving of false evidence;
- (b) the election court may compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy, and a person refusing to obey the order is guilty of a contempt of court;
- (c) the election court may examine a witness so compelled to attend or any person in court, although the witness is not called and examined by a party to the petition; and after examination the witness may be cross-examined by or on behalf of the petitioner and respondent, or either of them;
- (d) the election court must decide all matters that come before it without undue regard to technicalities.

Unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with a petition may be dealt with and decided by any judge.<sup>39</sup>

#### **6.05 Attorney-General to Attend Trial of Petition**

Where the Attorney-General is not the petitioner or the respondent in a petition, he or a person appointed by him must attend the trial of the petition for the purpose of ascertaining whether an election offence has been committed and for any other purpose he thinks fit.

Where the Attorney-General or a person appointed by him attends the trial of a petition, he has the same power to call witnesses, and to examine or cross-examine witnesses, called by parties to the petition, as those parties have.<sup>40</sup>

#### **6.06 Prohibition of Disclosure of Vote**

No elector who has voted at an election must, in proceedings to question the election, be required to state for whom he has voted.<sup>41</sup>

#### **6.07 Votes to be Struck Off at Scrutiny**

On a scrutiny of votes at the trial of a petition, the following votes only must be struck off –

- (a) the vote of a person whose name was not on the register or list of electors assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
- (b) the vote of a person whose vote was procured by bribery, treating or undue influence;
- (c) the vote of a person who committed or procured the commission of personation at the election;
- (d) the vote of a person proved to have voted in more than one constituency;

- (e) the vote of a person who, by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election;
- (f) votes given for a disqualified candidate by voters knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious.

The vote of a registered elector must not be struck off at a scrutiny by reason only of the voter not having been or not being qualified to have his name entered on the register or list of electors.<sup>42</sup>

### **6.08 Non-compliance with Law**

No election shall be declared to be void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election.<sup>43</sup>

### **6.09 Costs**

An election court may, in its discretion, award against the petitioner the costs of and incidental to a petition which is dismissed or rejected.<sup>44</sup>

### **6.10 Certificate of Court**

At the conclusion of the trial of a petition, the election court must determine the question raised in the petition and must certify its determination to the Speaker.

Upon receipt of a certificate, the Speaker is required to give the necessary directions for altering or confirming the return, and must issue any writs which may be necessary.<sup>45</sup>

### **6.11 Report of Court as to Election Offences**

At the conclusion of the trial of a petition, the election court must also report in writing to the Speaker whether an election offence has or has not been proved to have been committed by any person and descriptions of the persons, if any, who have been proved at the trial to have been guilty of an election offence.

Before a person, not being a party to an election petition or a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election court, the election court must give that person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

The Speaker must cause a copy of any report to be published in the Gazette, and every registration officer must forthwith peruse the report and delete from the register of electors the name of every person who is thereby disqualified for being registered in that register of electors.<sup>46</sup>

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### **6.12 Procedure to be Followed in Presenting Petition**

The presentation of an election petition must be made by delivering it at the office of the Registrar, and the Registrar or the officer of his department to whom the petition is delivered must give a receipt therefor in the prescribed form.

An election petition must contain the following statements –

- (a) it shall state whether the petitioner is entitled to petition;
- (b) it shall state the holding and results of the election, and shall briefly state the facts and grounds relied on to sustain the petition.

The petition shall be divided into paragraphs, each of which must be confined, as nearly as is practicable, to a distinct portion of the subject, and every paragraph must be numbered consecutively, and no costs must be allowed for drawing or copying any petition not substantially in compliance with the rule, unless otherwise ordered by the election court.

The petition shall conclude with a prayer as, for instance that some specified person should be declared duly elected or nominated, or that the election should be declared void, and shall be signed by all the petitioners.

Evidence need not be stated in the petition, but the election court may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial, upon such terms as to costs and otherwise as may be ordered.

Where more petitions than one are presented relating to the same election or nomination, all such petitions shall be dealt with as one petition, so far as the inquiry into the election or nomination is concerned.<sup>47</sup>

### **6.13 Where Seat or Nomination Claimed by Unsuccessful Candidate**

When a petitioner claims the seat or the nomination for an unsuccessful candidate, alleging that he has a majority of lawful votes, the party complaining of or defending the election shall, seven days before the day appointed for trial, deliver to the Registrar, and also at the address (if any) given by the petitioner and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Registrar shall allow inspection of office copies of those lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the election court, upon such terms as to amendment of the list, postponement of the inquiry and payment of costs as may be ordered.<sup>48</sup>

### **6.14 List of Objections in Recriminatory Case**

The respondent in a petition, complaining of an undue return and claiming the seat or the nomination for some person, may lead evidence to prove that the election or the nomination of that person was undue, and in that case the respondent must, within seven days before the

day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioner, a list of the objections to the election or the nomination upon which he intends to rely, and the Registrar must allow inspection of office copies of those lists to all parties concerned; and no evidence must be given by a respondent of any objection to the election or the nomination not specified in the list, except by leave of the election court, upon such terms as to amendment of the list, postponement of the inquiry and payment of costs as may be ordered.<sup>49</sup>

### **6.15 Appointment of Advocate by Petitioner**

With the petition the petitioner or petitioners must leave at the office of the Registrar a writing, signed by him or them, giving the name of an advocate or stating that he or they act for himself or themselves, as the case may be, and in either case giving an address in Kenya at which notices may be left; and if no such writing is left all notices may be given by leaving them at the office of the Registrar.<sup>50</sup>

### **6.16 Appointment of Advocate by Respondent**

A person elected or nominated may at any time after he is elected or nominated send or leave at the office of the Registrar a writing, signed by him or on his behalf, appointing an advocate to act as his advocate in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left; and if no such writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar.<sup>51</sup>

### **6.17 Service on Respondent**

Notice of the presentation of a petition, accompanied by a copy of the petition, must, within ten days of the presentation of the petition, be served by the petitioner on the respondent.

Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent or by posting them in a registered letter to his address so that, in the ordinary course of post, the letter would be delivered within the time stipulated, or if no advocate has been appointed, or no address was given, by a notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar.<sup>52</sup>

### **6.18 Time and Place of Trial**

The time and place of the trial of each election petition shall be fixed by the election court, and not less than fourteen days' notice thereof must be given to the petitioner and respondent by letter directed to the address left by the petitioner or respondent with the Registrar, or if no such address has been left, by notice in the Gazette.

The election court may, from time to time by order made on the application of a party to the petition, postpone the beginning of the trial to such day as the court may specify; and the order, when made, shall forthwith be published by the Registrar in the Gazette.

No formal adjournment of the election court for the trial of an election petition is necessary, but the trial stands adjourned, and may be continued from day to day until the trial is concluded; and, if one judge is disabled by illness or otherwise during the trial, the trial may be continued and concluded by the other judges.<sup>53</sup>

### **6.19 Withdrawal of Petition**

An election petition must not be withdrawn without the leave of the election court, and leave may be given upon terms as to the payment of costs and otherwise as the election court may think fit.

Before leave for the withdrawal of an election petition is granted, there must be produced affidavits, by all the parties to the petition and their advocates: provided that an election court may, on cause shown, dispense with the affidavit of any particular person if it seems to the election court on special grounds to be just to do so.

Each affidavit must state that, to the best of the deponent's knowledge and belief no agreement or terms of any kind whatsoever has or have been made, and no undertaking has been entered into in relation to the withdrawal of the petition; but if any lawful agreement has been made with respect of the withdrawal of the petition, the affidavit must set forth that agreement, and must make the foregoing statement subject to what appears from the affidavit.

The affidavits of the applicant and his advocate must further state the ground on which the petition is sought to be withdrawn.<sup>54</sup>

### **6.20 Substitution of Another Petitioner**

On the hearing of the application for withdrawal any person who might have been a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted, as petitioner for the petitioner desirous of withdrawing the petition.

The election court may substitute any such applicant as petitioner; and may further, if the proposed withdrawal is, in the opinion of the election court, induced by any corrupt bargain or consideration, by order direct that the security given on behalf of the original petitioner must remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum named in the security the original petitioner is liable to pay costs of the substituted petitioner.

If no such order is made with respect to the security given on behalf of the original petitioner, security to the same amount as would be required in the case of a new petitioner, subject to the same conditions, must be given on behalf of the substituted petitioner before he proceeds with his petition, and within three days after the order of substitution.

A substituted petitioner stands in the same position, as nearly as may be, and shall be subject to the same liabilities, as the original petitioner.

If a petition is withdrawn, the petitioner is liable to pay the costs of the respondent.

Where there are more petitioners than one, no application to withdraw a petition can be made except with the consent of all the petitioners.<sup>55</sup>

### **6.21 Death of Petitioner**

An election petition shall be abated by the death of a sole petitioner or of the survivor of several petitioners. The abatement of a petition does not affect the liability of the petitioner or of any other person to the payment of costs previously incurred.<sup>56</sup>

### **6.22 Countermanding Notice of Trial**

After receiving the petitioner's application for leave to withdraw or notice of the respondent's intention not to oppose, or of the abatement of the petition by death, or of the happening of any of the events such as death of the respondent or vacation of his seat, if the notice is received after the notice of trial has been given and before the trial has commenced the Registrar must forthwith countermand the notice of trial.

The countermand must be given in the same manner, as nearly as practicable, as the notice of trial.<sup>57</sup>

### **6.23 Recovery of Costs**

Costs must be taxed by the Registrar upon the order of the election court in the same manner as costs are taxed in the High Court, but subject to such express directions, whether general or specific, as the election court may give; and costs when taxed may be recovered in the same manner as the costs in civil proceedings.

The election court may direct that the whole or any party of any monies deposited by way of security may be applied in the payment of taxed costs.

There must be paid in respect of all proceedings the same court fees as are payable in respect of civil proceedings in the High Court in so far as the same are applicable.<sup>58</sup>

## **— Section 7 —**

### **ELECTION OFFENCES**

#### **7.01 General Offences**

Any person who –

- (a) knowingly makes any false statement on or in connection with any application to be placed on any register of electors; or
- (b) forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to a returning officer any nomination paper knowing it to be forged; or
- (c) forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot

- 
- paper or the official perforation, stamp or mark on any ballot paper; or
- (d) without due authority supplies any ballot paper to any person; or
  - (e) sells or offers to sell any ballot paper to any person or purchases or offers to purchase any ballot paper from any person; or
  - (f) not being a person entitled to be in possession of any ballot paper which has been marked with any official perforation, stamp or mark has any such ballot paper in his possession; or
  - (g) puts into any ballot box anything other than the ballot paper which he is authorised by law to put in; or
  - (h) without due authority takes out of the polling station any ballot paper or is found in possession of any ballot paper outside a polling station; or
  - (i) without due authority destroys, takes, opens or otherwise interferes with any ballot box, ballot paper or packet of ballot papers in use or intended to be used for the purposes of an election; or
  - (j) without due authority prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election; or
  - (k) for the purposes of an election, manufactures, constructs, imports, has in his possession, supplies or uses, or causes to be manufactured, constructed, imported, supplied or used, any appliance, device or mechanism by which a ballot paper may be extracted, affected or manipulated after having been deposited in a ballot box during the polling at any election; or
  - (l) not being authorised to do so under the provisions of the Election Offences Act, makes any mark on any ballot paper issued to any person other than to himself; or
  - (m) votes at any election when he is not entitled to vote thereat,
- is guilty of an offence.<sup>59</sup>

### **7.02 Offences by Election Officers**

Any officer, clerk, interpreter or other person having any duty to perform pursuant to any written law relating to any election who –

- (a) makes, in any record, return or other document which he is required to keep or make under such written law, any entry which he knows or has reasonable cause to believe to be false, or does not believe to be true; or
- (b) permits any person whom he knows or has reasonable cause to believe not to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons, as the case may be; or
- (c) refuses to permit any person whom he knows or has reasonable cause to believe to be a blind person or an incapacitated person to vote in the manner provided for blind persons or incapacitated persons, as the case may be; or
- (d) wilfully prevents any person from voting at the polling station at which he knows or has reasonable cause to believe such person is entitled to vote; or
- (e) wilfully rejects or refuses to count any ballot paper which he knows or has reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law; or
- (f) wilfully counts any ballot paper as being cast for any candidate, which he knows or has reasonable cause to believe was not validly cast for such candidate; or

(g) is without reasonable cause guilty of any act or omission in breach of his official duty, is guilty of an offence.<sup>60</sup>

### **7.03 Maintenance of Secrecy at Elections**

Every officer, clerk, interpreter, candidate and agent authorised to take part in any proceedings connected with the issue or receipt of postal ballot papers or to attend at a polling station, or at the counting of the votes, shall before so attending make an oath of secrecy in the prescribed form.

Every officer, clerk, interpreter, candidate and agent in attendance at a polling station shall maintain, and aid in maintaining, the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of electors of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark, but the total number of voters who have voted at any station at any time before the poll is closed may in the discretion of the presiding officer be divulged to a candidate or his agent authorised to attend at the polling station.

No such officer, clerk, interpreter, candidate or agent and no other person shall attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number of the ballot paper given to any voter at such station.

Every officer, clerk, interpreter, candidate and agent in attendance at the counting of the votes shall maintain, and aid in maintaining, the secrecy of the voting, and shall not attempt to ascertain at such counting the number of any ballot paper or communicate any information obtained at such counting as to the candidate for whom any vote is given by any particular ballot paper.

No person, except a presiding officer acting for a purpose authorised by any written law relating to any election or a person authorised by the presiding officer and acting for such purpose as aforesaid, shall communicate or attempt to communicate with any voter after such voter has received a ballot paper and before he has placed the same in a ballot box.

Every person attending any proceedings in connection with the issue or receipt of ballot papers for persons voting by post shall maintain and aid in maintaining the secrecy of the voting and shall not without lawful excuse –

- (a) communicate, before the poll is closed, to any person any information obtained at those proceedings as to any official perforation, stamp or mark to be used in connection with any ballot paper; or
- (b) communicate to any person at any time any information obtained at those proceedings as to the number of the ballot paper sent to any person; or

- 
- (c) attempt to ascertain at the proceedings in connection with the receipt of ballot papers the number on any ballot paper; or
  - (d) attempt to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings.

Every person who acts in contravention of these provisions is guilty of an offence.<sup>61</sup>

#### **7.04 Corrupt Practices**

##### ***Personation***

Every person who at an election applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person or who, having voted once at any such election, applies at the same election for a ballot paper in his own name, is guilty of the offence of personation.

A person who has applied for a ballot paper for the purpose of voting in person is deemed to have voted.

##### ***Treating***

Every person is guilty of the offence of treating who corruptly, by himself or by any other person on his behalf, either before, during or after an election, directly or indirectly gives or provides or causes to be given or provided, or is accessory to the giving or providing, or pays or engages to pay wholly or in part the expense of giving or providing, any food, drink, refreshment or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote, whether to a particular candidate or not at such election or on account of any such person or any other person having given or refrained from giving, or being about to give or refrain from giving, his vote, whether to a particular candidate or not, at such election, and every elector or voter who corruptly accepts or takes any such money or ticket or who adopts such other means or device to enable the procuring of such food, drink, refreshment or provision.

##### ***Undue Influence***

Every person is guilty of the offence of undue influence who directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens any force, violence or restraint, or any temporal or spiritual injury, damage or loss, or any fraudulent device, trick or deception, for the purpose of or on account of –

- (a) inducing or compelling a person to give or refrain from giving his vote, whether to a particular candidate or not, at an election; or
- (b) otherwise impeding or preventing the free exercise of the franchise of an elector or voter; or

- (c) compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or
- (d) impeding or preventing a person from being nominated as a candidate for an election or from being registered as a voter.

### ***Bribery***

Every person shall be guilty of the offence of bribery who –

- (a) directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or voter, or to or for any person on behalf of any elector or voter or to or for any other person, in order to induce any elector or voter to give or refrain from giving his vote, whether to a particular candidate or not, or corruptly does any such act as aforesaid on account of such elector or voter having given or refrained from giving his vote at any election, whether to a particular candidate or not; or
- (b) directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to give or refrain from giving his vote, whether to a particular candidate or not, or corruptly does any such act as aforesaid on account of any elector or voter having so given or refrained from giving his vote at any election; or
- (c) directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election; or
- (d) upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any elector or voter at any election; or
- (e) advances or pays or causes to be paid any money to, or to the use of, any other person with the intent that such money or any part thereof shall be expended in bribery at any election or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election; or
- (f) being an elector or voter, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place or employment, for himself or for any other person, for giving or agreeing to give or for refraining or agreeing to refrain from giving his vote, whether to a particular candidate or not, at any such election; or
- (g) after any election, directly or indirectly, by himself or by any other person on his behalf, receives any money or valuable consideration on account of any person having given or refrained from giving or having induced any other person to give or to refrain from giving his vote, whether to a particular candidate or not, at any such election; or

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- (h) directly or indirectly, by himself or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to such candidate, or to his agent or agents, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or
  - (i) directly or indirectly, by himself or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if he has become a candidate, gives or procures any office, place or employment, or agrees to give or procure or offers or promises to procure or to endeavour to procure any office, place or employment, to or for such other person, or gives or lends, or agrees to give or lend, or offers, or promises to procure or to endeavour to procure any money or consideration to or for any person or to or for such other person, or to or for any person on behalf of such other person.<sup>62</sup>

### **7.05 Punishment and Incapacities for Corrupt Practice**

Every person who –

- (a) commits the offence of personation, treating, undue influence or bribery; or
- (b) prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer and publisher; or
- (c) makes or publishes, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate; or
- (d) makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate, any false statement of withdrawal of any other candidate at such election,

or aids, abets, counsels or procures the commission of or attempts to commit any such offence is liable, in the cases referred to in sub-paragraph (a), to imprisonment for a term not exceeding five years, and in any other case, to imprisonment for a term not exceeding four years.<sup>63</sup>

### **7.06 Illegal Practices**

No payment or contract for payment shall, for the purpose of promoting or procuring the election of a candidate in any election, be made –

- (a) on account of the conveyance of electors or voters to or from the poll, whether for the hiring of vehicles, vessels or animals of transport of any kind whatsoever, or for railway fares, or otherwise; or
- (b) to or with an elector or voter on account of the use of any house, land, building, or premises for the exhibition of any address, bill, or notice or on account of the exhibition of any address, bill or notice.

If any payment or contract for payment is knowingly made in contravention of these provisions either before, during or after an election, the person making such payment or contract is guilty of an illegal practice, and any person receiving such payment or being a party to any such contract, knowing it to be in contravention of these provisions, is also guilty of an illegal practice.

A person shall not let, lend or employ for the purpose of conveyance of electors or voters to and from the poll any vehicle, vessel or animal of transport knowing that it is intended to be used for the conveyance of electors or voters to and from the poll, and if he does so he is guilty of an illegal practice.

However, where it is the ordinary business of a voter as an advertising agent to exhibit for payment bills and advertisements, a payment to or contract with such voter which is made in the ordinary course of business, shall not be deemed to be an illegal practice.

Where voters are unable at an election to reach their polling stations from their places of residence without crossing the sea or a branch or arm thereof or a river, means may be provided for conveying such voters to their polling stations, or to enable them to cross in order to reach their polling stations: provided always that such means of conveyance shall be made available equally to all such voters who wish to avail themselves thereof.

Every employer shall, on polling day, allow to every elector in his employ a reasonable period for voting, and no employer shall make any deduction from the pay or other remuneration of any such elector or impose upon or exact from him any penalty by reason of his absence during such period.

Any employer who, directly or indirectly, refuses or by intimidation, undue influence, or in any other manner, interferes with the granting to any elector in his employ, of a reasonable period for voting, as in these provisions, is guilty of an offence.

These provisions do not apply to such categories of employees as the Minister may from time to time by notification in the Gazette designate nor to any employee who at the election in question is acting as an election officer.

No person shall furnish or supply any musical instrument or loudspeaker to any person with intent that it shall be used by any person in any way or used in or upon vessels, animals, motor cars, trucks, or other vehicles as or for the purpose of political propaganda on polling day and no person shall with any such intent use himself or use in or upon any vessel, animal, motor car, truck or other vehicle any such musical instrument or loudspeaker on polling day. Any person who contravenes the provisions of this paragraph is guilty of an offence.<sup>64</sup>

## NOTES

1. Constitution of Kenya, see section 41
2. Ibid., see section 42
3. Ibid., see section 42A
4. National Assembly and Presidential Elections Act, see sections 2 and 3
5. Presidential and Parliamentary Elections Regulations, see regulation 3
6. Ibid., see regulation 10
7. National Assembly and Presidential Elections Act, see section 4
8. Ibid., see section 5
9. Constitution of Kenya, see section 43
10. National Assembly and Presidential Elections Act, see section 6
11. Ibid., see section 7
12. National Assembly Elections (Registration of Voters) Regulations, see regulation 3
13. Ibid., see regulations 4-7
14. See section 9 of the National Assembly and Presidential Elections Act and regulations 8 and 9 of the National Assembly Elections (Registration of Voters) Regulations
15. See section 10 of the National Assembly and Presidential Elections Act and regulations 10 and 11 of the National Assembly Elections (Registration of Voters) Regulations
16. National Assembly Elections (Registration of Voters) Regulations, see regulation 12
17. The words “not more than” were purported to be substituted by the Attorney-General to correct an error on the face of the provision which originally read “not less than” etc. The matter was taken to court and the correction was held to be invalid. Presumably the provision reads “not less than” etc and not “not more than” etc as is carried in the 1992 Revised version of the law. See regulation 14 of the Presidential and Parliamentary Elections Regulations for the correct version.
18. National Assembly and Presidential Elections Act, see section 13
19. Ibid., see section 14
20. Constitution of Kenya, see section 34
21. See section 17 of the National Assembly and Presidential Elections Act and regulation 14 of the Presidential and Parliamentary Elections Regulations
22. Presidential and Parliamentary Elections Regulations, see regulation 15
23. Ibid., see regulations 16-18
24. Ibid., see regulation 19
25. Ibid., see regulation 20
26. Ibid., see regulation 21
27. Ibid., see regulation 22
28. Ibid., see regulation 24
29. Ibid., see regulations 25, 27 and 29
30. Ibid., see regulations 30-33
31. Ibid., see regulation 34
32. Ibid., see regulation 36
33. Ibid., see regulation 37
34. Ibid., see regulations 38 and 39
35. Ibid., see regulation 40
36. National Assembly and Presidential Elections Act, see section 19
37. Ibid., see section 20
38. Ibid., see section 21
39. Ibid., see sections 22 and 23
40. Ibid., see section 24
41. Ibid., see section 25
42. Ibid., see section 26
43. Ibid., see section 28
44. Ibid., see section 29
45. Ibid., see section 30
46. Ibid., see section 31
47. National Assembly Elections (Election Petition) Rules, see rules 3-6
48. Ibid., see rule 7
49. Ibid., see rule 8
50. Ibid., see rule 9
51. Ibid., see rule 10
52. Ibid., see rule 15
53. Ibid., see rules 18-20
54. Ibid., see rule 21
55. Ibid., see rule 26
56. Ibid., see rule 27
57. Ibid., see rule 31
58. Ibid., see rule 33
59. Election Offences Act, see section 3
60. Ibid., see section 4
61. Ibid., see section 5
62. Ibid., see sections 7-10
63. Ibid., see section 11
64. Ibid., see sections 12-14