

Chapter 2

Political Background

The 4 March 2013 elections were the tenth general elections since Kenya's independence. Elections in Kenya, under universal adult suffrage, began with polls in May 1963 (under British rule) to decide who would lead Kenya into independence. The Kenya African National Union (KANU), led by Jomo Kenyatta, emerged victorious.

Elections were planned for 1968, but were postponed till 1969, and were held on a single-party basis after the Kenya People's Union, formed in 1966, was banned. Kenya thus became a de facto one-party state, and President Kenyatta was re-elected unopposed in 1969 and 1974. He died in office in 1978, and was succeeded by President Daniel Arap Moi.

President Moi was elected unopposed in 1979. Kenya was declared a de jure one party state by the National Assembly in June 1982. President Moi was re-elected unopposed in 1983 and 1988 General Elections.

Elections 1992–2002

Under strong domestic and international pressure, the ruling KANU party held a special conference in December 1991 and agreed to introduce a multiparty political system. New political parties were legally registered and a total of eight contested the 1992 elections. President Moi was re-elected, receiving 36.8 per cent of the vote cast, and KANU, won a large majority in Parliament.

In the run-up to the 1997 election 16 new parties were registered, bringing the total registered parties in Kenya to 27. President Moi won a further term of office in December 1997 with 40.12 per cent of the vote. KANU also won a narrow majority in the parliamentary election.

The 2002 election pitted political veteran Mwai Kibaki, leader of the National Rainbow Coalition (NARC) – an alliance on a 50–50 basis between the National Alliance Party of Kenya and the Liberal Democratic Party of Kenya, led by Raila Odinga, against Uhuru Kenyatta of KANU. Mr Kibaki won a landslide election victory on 27 December 2002, securing 62.21 per cent of the popular vote, while NARC won 132 seats of the 210 elected seats in Parliament. His key campaign promises included a pledge to fight endemic corruption, to address Kenya's economic challenges, and provide Kenyans with a new Constitution within a hundred days.

A Commonwealth Observer Group, led by Professor Adebayo Adedeji, former United Nations Under-Secretary-General and Executive Secretary of the UN Economic Commission for

Africa, was present for the 2002 elections, and concluded: 'we have no hesitation in saying that in our view the electoral process was credible, the conditions existed for a free expression of will by the electors and the results reflected the wishes of the people of Kenya'.

2005 constitutional referendum

The biggest disagreement within the NARC coalition arose over completion of the constitutional review process started under President Moi. President Kibaki promised a new Constitution in 'a hundred days' during his 2002 campaign. A lengthy public consultation process produced a new Draft Constitution (known as the Bomas Draft) in March 2004. But its provisions, notably those reducing the executive powers of the Presidency, proved unacceptable to the Government.

After a protracted legal wrangle, and amid violent protests in Nairobi, the government secured Parliamentary approval for certain key amendments to be made to the Draft Constitution, and a new Constitution Bill was published. This new Draft Constitution was felt by some to have been illegitimately modified, for example, to preserve wide powers for the President, against the spirit of the Bomas Draft.

The new Draft Constitution was rejected by 58 per cent of voters when it was put to a referendum on 21 November 2005. This result was also widely viewed as a vote of no confidence in President Kibaki's government. This prompted President Kibaki to dismiss his entire government and start with a new team which excluded all those Ministers (mainly from Raila Odinga's Liberal Democratic Party faction of the NARC Coalition) who campaigned and voted against the Draft Constitution. Some ministerial nominees rejected their appointments. This effectively marked the end of the NARC Coalition.

The 2007 elections

The then Secretary-General, Don McKinnon constituted a Commonwealth Observer Group, headed by Dr Ahmad Tejan Kabbah, former President of Sierra Leone, which was present for the 27 December 2007 elections.

In controversial and hotly disputed Presidential elections held on 27 December 2007, President Mwai Kibaki, then leading the newly created Party of National Unity (PNU) was declared re-elected, with 46 per cent of the vote. Raila Odinga, then leading the Orange Democratic Movement (ODM), obtained 44 per cent and Kalonzo Musyoka of the Orange Democratic Movement-Kenya (ODM-K) 9 per cent. Other candidates obtained 3.4 per cent collectively. In parliamentary elections held on the same date, ODM won 99 seats, PNU obtained 46, ODM-K 16, KANU 14 and other parties, 35; 2 seats were ex-officio and 12 seats were appointed by the President in accordance with party strength in parliament – ODM 6, PNU 3, ODM-K 2, KANU 1. Kenya faced the biggest crisis in its post-independence history. The country experienced unprecedented levels of violence, following the

announcement of the presidential election results. In the devastation that ensued, approximately 1,300 people were killed and over 600,000 displaced. There was also massive destruction of property.

The Final Report of the Commonwealth Observer Group for the 2007 General Elections in Kenya stated that the 'Electoral Commission of Kenya has not succeeded in establishing the integrity of the tallying process, thereby bringing the validity of the election results into question.' This was despite 'the many positive aspects of the pre-election and polling day procedures, when Kenyans came out in large numbers to vote.'

Good Offices engagement

As Kenya plunged into chaos following the disputed elections, the Commonwealth Observer Group Chairperson, Ahmad Tejan Kabbah switched from electoral observation to Good Offices mode, from 31 December 2007. Mr Kabbah was the first to engage all stakeholders, including President Kibaki with his Party of National Unity (PNU) supporters, Raila Odinga with his ODM supporters, and Kalonzo Musyoka of ODM-K, seeking to promote dialogue, reconciliation and healing.

Other individuals and groups later joined the mediation effort, including then AU Chairperson President John Kufuor of Ghana, a delegation of former African leaders under the auspices of the Africa Forum, led by Joachim Chissano, former President of Mozambique, Ketumile Masire, former President of Botswana, Benjamin Mkapa, former President of Tanzania and Kenneth Kaunda, former President of Zambia. Others similarly engaged included UN Secretary General Ban Ki-moon, Archbishop Desmond Tutu, and US Secretary of State Condoleezza Rice and her Assistant Secretary for African Affairs, Ambassador Jendayi Frazer.

The visit of President John Kufuor, the then Chair of the African Union, to Kenya from 8 to 10 January 2008, resulted in the creation of a Panel of Eminent African Personalities, composed of former UN Secretary-General, Mr Kofi Annan (Chair), former President of Tanzania, Mr Benjamin Mkapa and former South African First Lady, Mrs Graca Machel, to assist Kenyans in finding a peaceful solution to the crisis. Mr Annan arrived in Kenya on 22 January 2008, while Kenya was still gripped by horrific acts of inter-ethnic violence, and inaugurated the Kenya National Dialogue and Reconciliation Talks on 29 January 2008.

After weeks of acrimonious negotiations, the parties, led by President Kibaki and Raila Odinga, witnessed by newly-elected AU Chairperson President Jakaya Kikwete and Kofi Annan, publicly signed an Agreement on the Principles of Partnership of the Coalition Government on 28 February 2008. Its key points were:

- There would be a Prime Minister of the Government of Kenya, with authority to co-ordinate and supervise the execution of the functions and affairs of the Government of Kenya.

- The Prime Minister would be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party did not command a majority.
- Each member of the coalition would nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet would consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition would be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Ministers could only be removed if the National Assembly passed a motion of no confidence with a majority vote.
- The composition of the coalition government would at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition would be dissolved if the Tenth Parliament was dissolved; or if the parties agreed in writing; or if one coalition partner withdrew from the coalition.
- The National Accord and Reconciliation Act would be entrenched in the Constitution.

The National Accord and Reconciliation Act was subsequently passed and entrenched in the Constitution. The conclusion of the Kenya National Dialogue and Reconciliation (KNDR) mediation process on 28 February 2008 marked the end of the post-election violence. It also marked the start of reforms to address the immediate and underlying causes of the violence. The goal of the National Accord and Reconciliation Agreement was to secure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. In addition to providing a basis for the formation of a coalition government, the Kenya National Dialogue and Reconciliation agreed on 4 March 2008 to set up the several bodies, including the Independent Review Committee (IREC) and the Commission Inquiry into Post-Election Violence.

Independent Review Committee

IREC, a non-judicial body, established under the Commissions of Inquiry Act, was mandated to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process. IREC has been. The Chairperson, Judge Johann Christiaan Kriegler was an internationally recognised eminent jurist, and former Head of the South Africa's Independent Electoral Commission which organised the 1994 multi-racial elections. The other two international members of the IREC were Horacio Boneo from Argentina and Professor Marangu M'Marete from Tanzania. The above-mentioned three external members were international experts nominated by the Panel, following consultation with the Government/PNU and the ODM. The PNU and ODM each nominated two members.

The Commission, better known as the Kriegler Commission, found that there were too many electoral malpractices from several regions perpetrated by all the contesting parties to conclusively establish which candidate won the December 2007 Presidential elections. Such malpractices included widespread bribery, vote buying, intimidation and ballot stuffing by

both sides; as well as incompetence from the Electoral Commission of Kenya (ECK), which was shortly thereafter disbanded by the new Parliament.

Commission of Inquiry into Post-Election Violence

The KNDR Agreement also established a Commission of Inquiry into Post-Election Violence. This Commission was a non-judicial body mandated to:

- investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election,
- investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation as necessary, and
- recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission of Inquiry aimed to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya.

The Chairperson of the Commission was Justice Philip Waki, a Judge of Kenya's Court of Appeal. The other two commission members were Gavin Alistair McFadyen, a former Assistant Commissioner of Police in New Zealand and Pascal K. Kambale, a lawyer from the Democratic Republic of the Congo. The Secretary to the Commission was George Mong'are Kegoro, an advocate of the High Court of Kenya and Kenyan Section Director of the International Commission of Jurists.

The post-election violence report, commonly known as the 'Waki Report', was handed over to President Mwai Kibaki and Prime Minister Raila Odinga on 15 October 2008. The Waki Report did not publicly disclose the alleged perpetrators in the report handed to the President. The Waki Commission instead handed the list of alleged perpetrators to Kofi Annan. In July, 2009 Kofi Annan handed the sealed envelope to Luis Moreno-Ocampo, the Prosecutor at the International Criminal Court (ICC). Kofi Annan gave the Kenyan Government one year, beginning July 2009, to set up a Tribunal to deal with the issue. Failure to do this would see the ICC pick up the matter beginning August 2010.

The Kenyan Government did not secure a majority in Parliament to set up a Tribunal. Six Kenyans, Mohammed Ali, Uhuru Kenyatta, Henry Kosgei, Francis Muthaura, William Ruto and Joshua Sang were indicted for crimes against humanity by the ICC on 8 March 2011. Charges against Mohammed Ali and Henry Kosgei were dismissed on 23 January 2012.

New Constitution

A Constitutional referendum was held on 4 August 2010. The New Constitution was approved by a two-thirds majority (67%) and was promulgated on 27 August 2010.

A three-person Commonwealth Secretariat team was present at the referendum on 4 August 2010, at the request of the Interim Independent Electoral Commission (IIEC). The team concluded that the IIEC managed the process in a professional, efficient and effective manner, and that, overall, the IIEC was perceived by the public as being independent and impartial.

It was reported to us that there was minimal prosecution locally linked to post-election violence.

Political environment of 2013 elections

The 4 March 2013 elections were Kenya's first General Elections under a new Constitution and a raft of new legislative measures. These complex elections signalled multiple transitions: the end of the Grand Coalition Government, the ushering in of a new government to carry forward the implementation of the new Constitution, including the creation of new governance structures, layers and levels of representation and institutions. In addition to voting for the President and an expanded National Assembly, Kenyans were to vote for the new elective positions of Women Members of the Assembly, a Senate, County Governors and County Assemblies.

Kenya operates a first-past-the-post electoral system, characterised by intense competition over access to power and state institutions. The new Constitution provides for additional features, including a President elected with 50 per cent plus one of votes cast, together with a requirement to achieve 25 per cent of votes in at least half of the 47 Counties.

The influence of money in politics in Kenya is a key feature of the Kenyan political environment. Despite the fact that the IEBC has the constitutional mandate under Article 88 to broadly regulate the flow of funds during the campaign period, the Tenth Parliament failed to pass the Election Campaign Bill of 2012, thereby perpetuating weak controls over a crucial element of the political system.

Politics in Kenya retains a strong ethnic dimension, with polarisation and divisions along ethnic, regional and other cleavages. Political coalitions and parties are largely built on this basis, around ethnic political barons, with few ideological differences between them. Party-hopping is common, with politicians not reluctant to move from one party or coalition to another, depending on their personal evaluation of prospects of electoral success, inclusion in the future government, or appearing on the ballot paper at all, especially at the point of nominations. Few political parties appear to be able to survive beyond a single election. For example, the political party under which the outgoing President Mwai Kibaki was elected, the Party of National Unity (PNU), is no longer a registered party. The weak institutional capacity of the most political parties in Kenya was amply demonstrated in the sometimes chaotic nomination processes witnessed by Kenyans in January 2013.

International Criminal Court factor

The International Criminal Court indictments against Uhuru Kenyatta and William Ruto were a significant issue in the electoral process. First, there were debates as to whether the indictees were eligible candidates. The Courts ruled in the affirmative. Secondly, the ICC process itself became politicised and ethnicised, with extensive debate on whether the ICC process addressed impunity or challenged Kenya's sovereignty. Lastly, there were extensive debates about the possible consequences of ICC indictees winning the elections.

Security issues

As Kenya prepared for the March 2013 General Election, there was concern about insecurity in some parts of the country. Pre-election violence, comprising inter-communal and resource-based conflicts, had caused human displacement especially in some parts of coastal and northern Kenya. For example, Tana River County has experienced a spate of serious violence since August 2012, with at least 180 deaths in fighting between the agriculturalist Pokomo and the pastoralist Orma communities. An estimated 34,000 people have been displaced. Some of these conflicts were linked to struggles for political power and, in particular, competition to gain control of the devolved system of government. There were also fears of possible terrorist attacks, as a result of Kenya's pursuit of al-Shabab militia in southern Somalia.

Confidence in institutions

In contrast to the period after the post-election violence in 2008 when Kenyans reportedly lost confidence in key institutions, transformation of key institutions after the promulgation of the new Constitution appeared to have rekindled public trust. New laws and institutional arrangements that demand transparent recruitment and procurement processes, and the creation of new oversight mechanisms have begun to transform key institutions and are contributing to the gradual renewal of public confidence and trust in a number of institutions.

Significantly, the Judiciary enjoyed increased public confidence. Bold rulings and administrative and technical changes made over the past year have asserted the political and institutional independence of the Judiciary. The Independent Electoral and Boundaries Commission (IEBC) was also highly rated by Kenyans ahead of the elections, with surveys indicating that the vast majority of Kenyans had confidence in the IEBC, and believed that the IEBC was independent enough to conduct the elections. However, there were concerns, ahead of the elections, that the IEBC has been inconsistent with deadlines and the requisite managerial capacity of the IEBC to conduct elections was yet to be properly tested.

Public confidence in the police was relatively lower compared to the Judiciary and the IEBC. The appointment in December 2012 of an Inspector General of Police and the appointment of a National Police Service Commission, alongside promises to undertake further

fundamental reforms, including addressing understaffing and poor equipment, were developments that were positively received by Kenyans.