

CHAPTER 3



Preparations for the Elections

Registration and Register of Voters

A fair and efficiently conducted registration of voters is a *sine qua non* for a free and fair election under a multi-party system. The reports which we received from opposition political parties suggested that there were many imperfections in the register compiled during June–July 1992. A very serious allegation was that between one and three million potential voters were unable to register because they had not been issued with Identity Cards (ID) which were a prerequisite for registration. We also noted that some opposition parties boycotted the registration process initially, and that that action also must have had an adverse effect on the final registration list in some areas.

The complaints we received were consistent with those presented to a Commonwealth technical mission which the Commonwealth Secretary-General had sent to Kenya in July 1992 to observe the closing stages of the registration process. That mission, we were advised, identified a number of weaknesses in the registration procedures, including the following:

- (a) lack of consistency in the procedures adopted and criteria applied for dealing with applications at the registration units due to inadequate training of registration officials;
- (b) some registration units did not maintain a list of applicants; in others partial lists were compiled leaving details of applicants incomplete;
- (c) clerical errors were discovered in the entries recorded in both the registration unit books and on some voters' cards;
- (d) no proper verification procedure had been laid down for the District Registration Officer to check the number of applications received at his office with the number recorded at the registration unit in their records for any given day;
- (e) inadequate checks were implemented for residential qualification and age requirement of voters. There was some evidence of multiple registration, some cases of which resulted in successful prosecutions in court; and
- (f) failure to issue ID cards on a timely basis or at all was undoubtedly the most persistent and, indeed, the most serious complaint received from

aggrieved individuals and political parties. This problem caused the registration period to be extended twice, but most of the opposition parties remained of the view that much more time should have been allowed in order to improve the accuracy of the register.

The Constitution of Kenya provides that to qualify for registration, a person must be a citizen of Kenya and be at least 18 years of age on the date of registration. The person must also be resident at an address within Kenya for not less than one year or must reside for an aggregate period of not less than four years in the past eight years. He or she must have been, for a period aggregating not less than five months in the preceding 12 months, ordinarily resident in the constituency, or have carried on business, or have been employed, or have possessed land or residential buildings within the constituency.

Persons who are of unsound mind, are undischarged bankrupts, or are detained in lawful custody or have been convicted of an election offence within the past five years are disqualified from registration.

As already noted, registration had taken place in June–July 1992. We learned of the complaints on our arrival. We were unable to verify the repeated complaints that a large number of persons had been denied registration because of deliberate delays in the issuance of identity cards. We noted the complaints that persons under the age of 18 had had IDs issued to them and thus were able to register and be given voters' cards. However, we did not observe any under-age person in the queues on polling day.

We had nonetheless taken up these issues with the Electoral Commission, which denied that the registration exercise had been seriously flawed. The Commission contended that of an estimated population of 24 million, of whom some 40 per cent could be estimated to be of voting age, the voting population should be some 9.6 million; 7.9 million people had been registered, and this could be considered reasonable. The Commission also pointed out that the system of registration was a voluntary one and so many persons may have chosen not to register.

An opposition party, however, pointed out that the figures for the last census held in 1989 had not yet been made available – an omission which had important implications for the demarcation of constituency boundaries and parliamentary representation. The estimate of 24 million might well have been too low. In 1984 there had been 7.2 million on the register and an increase of only 0.7 million over eight years was obviously far too low. Real estimates of the population were probably closer to 26 million³ giving an estimated voting age population of 10.4 million and a shortfall of 2.5 million – a figure which could indicate serious shortcomings in the registration process.

However, caution must be exercised in any evaluation of registration

³ *Encyclopaedia Britannica Yearbook 1992* put the estimated population in 1991 at 25,905,000.

numbers, since low numbers might be reflective of unwillingness or disinterest on the part of potential voters, or as a result of earlier opposition attempts to boycott the process. Additional difficulties were posed by the stipulation that the place of registration should be the place of voting: transportation from rural areas during the holiday period and residence requirements to be fulfilled were two of the more pertinent.

On the other hand, all reports indicated that in June and July 1992, the Electoral Commission had not yet established that standard of openness and willingness to communicate which marked the subsequent conduct of its operations. If such complaints could be verified, they would indeed seriously affect the fairness of the elections. General satisfaction with the registration process could not be inferred from the fact that the opposition parties contested the elections on the existing register. No constructive alternative was available. On polling day itself, however, the register was not observed to be a contentious issue.

Controversy Over Shortening of Election Period

The opposition parties were taken unawares by the very short period between the date of the publication of the notice by the Electoral Commission (3 November 1992) and the date on which they were to nominate their candidates (9 November 1992). In their understanding of the law a period of not less than 21 days should have been allowed. They protested vigorously.

In response, the Electoral Commission drew their attention to a gazetted notice stating that the words 'not less' than 21 days had been changed to 'not more' than 21 days in Section 13 of the National Assembly and Presidential Elections Act. This change had been made by the Attorney-General purporting to act under a power vested in him by Section 13 of the Revision of Laws Act. In fact, this provision enabled the Attorney-General in effect to correct only clerical or printing errors in editions of the *Revised Laws*.

Although the notice of the change was gazetted, it was apparently not published in the national press, appearing as it may have seemed to be a mere legal technicality, nor was it brought specifically to the attention of the opposition parties. As a result of the short time period, the opposition parties found themselves in considerable difficulties in organising the primary elections for selecting candidates for nomination.

One of the opposition parties, FORD-Kenya, filed a suit for a declaration that the purported amendment of the Revision of Laws Act by the gazetted notice was null and void. The judge granted the declaration prayed, noted in his judgement that there was no error in Section 13 to be rectified, and that the notice had effected a substantial change which had been "sneaked in mischievously". He also held that the purported amendment by the Attorney-General was "a misuse, if not an abuse, of the powers conferred upon him by his office"

These pronouncements by a High Court Judge reinforced the suspicions of

the opposition parties that the powers of senior officials of the State generally were being used to obstruct the process of holding free and fair elections. The fact that the Electoral Commission, headed by a former experienced Justice of Appeal, had accepted this obviously invalid exercise of the amending power of the Attorney-General as proper and had allowed the short period to be fixed, confirmed the opposition's suspicions that the Commission was acting in collaboration with the authorities. In their view, even though the law had been changed from 'not less' than 21 days to 'not more' than 21 days, the Commission could have allowed the maximum of 21 days and not fixed the unrealistically short period of seven days for organising the primaries.

The Court ordered the Electoral Commission to set new dates which it did: 7 December for the holding of primaries for nomination of Presidential and Parliamentary candidates; 9 December for nominating candidates for the Parliamentary elections; 14 December for the nomination of candidates for the Presidential elections and 29 December for the holding of the Presidential, Parliamentary and Civic elections.

Some of the technical aspects of the organisation and planning of the preparatory programme for the elections were embarked upon while the registration process was being conducted during June–July 1992. The Electoral Commission had sought technical assistance from the Commonwealth Secretariat and also from the International Foundation for Electoral Systems (IFES). In July 1992, the Commonwealth Secretary-General at the request of the Government and the Electoral Commission sent a technical mission to assist the Commission to draw up an election budget, including the budget for a training programme for election officers and a voter-education programme. The mission also discussed several other technical issues, such as the requirement for election materials, including the number of ballot boxes and ballot papers required, and options for the screening, selection, and appointments of each category of election officers. Some training assistance was provided by consultants from Britain. In addition, there were offers of financial support from donor countries.

Despite such assistance from overseas, the Commission failed to appreciate the complexity of its task and consequently disorganisation and confusion reigned at most polling stations at the opening of the polls.

The Nomination Process

The procedure for nomination of candidates to Parliamentary elections as provided in the electoral regulations begins with the publication of a notice fixing a date and time for the submission of nomination papers by prospective candidates, all of whom must be supported by a political party. Nomination day must be a date not less than 21 days before the date fixed for polling in Parliamentary elections (Rule 14). Each candidate must be supported by a proposer and seconder and by not less than seven nor more than 18 other persons. The nomination papers are prescribed forms to be filled out by the

candidate and delivered personally or by an agent to the Returning Officer for the constituency at the place designated as the nomination centre, between 8 a.m. and 1 p.m. on nomination day. The subscribers to a candidature must be registered in the constituency concerned and be members of the same political party. The prospective candidate has to deposit KSh 5,000 with the nomination paper.

A candidate cannot be nominated in more than one constituency. The candidate must be properly identified in the nomination paper which must bear the electoral number of each of the subscribers.

The Returning Officer may reject the nomination paper as invalid on any one of the following grounds:

- (a) that the particulars of the candidate or subscribers contained in the paper are not consistent with 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.

The Returning Officer is required to give a decision immediately on an objection to a nomination paper. Where a Returning Officer decides that a nomination paper is invalid, he/she must immediately record on the paper both the decision and the reasoning and append his/her signature. The rules are silent on what recourse (if any) an aggrieved prospective candidate would have when the nomination paper is rejected by the Returning Officer.

At the close of the nomination, if only one candidate is validly nominated, the Returning Officer must declare the candidate to be duly nominated and must certify to the Electoral Commission that that candidate has been duly elected as a member of Parliament for that constituency. The Commission thereafter is required to publish the certification in the Gazette.

Where two or more candidates are validly nominated, the Returning Officer must, by a notice in the Gazette, publish the day, and the hours, when the poll will be taken. The notice must state the names, in alphabetical order of surnames, addresses and occupations or descriptions of the candidates as set out in their nomination papers; the names of the subscribers to the nomination papers; the situation of each polling station, and the description of the electors entitled to vote at each polling station.

In the case of the Civic (local government) elections, the basic procedural steps for the nomination of candidates are as follows:

- (a) every candidate must be a member of a political party that has proposed and seconded him/her;

- (b) there must be not less than five and not more than seven persons other than the proposer and seconder;
- (c) the delivery of nomination paper, along with a statutory declaration made not earlier than one month before nomination day;
- (d) a fee of KSh 1,000 in cash or banker's draft;
- (e) the subscribers to a nomination paper must be persons who were registered as electors for the electoral area concerned; and
- (f) no candidate may be nominated for more than one election, nor can one person subscribe to more than one nomination.

A candidate at a Presidential election must be nominated by a political party on the day and within the hours fixed for delivery to the Electoral Commission of the prescribed nomination form. The form must be signed by the candidate and by a proposer and seconder, both of whom must be electors and also national officials of the political party concerned. It must describe the candidate so that he or she can be adequately identified. The electoral numbers and the constituency of the proposer and seconder must appear on the form which is to be submitted to the Commission by the proposed candidate or his/her proposer or seconder. At the time of the delivery of the nomination form, the person so doing must provide evidence of support by 1,000 electors by handing in 40 standard sheets of foolscap paper serially numbered and headed in a prescribed form each bearing the signatures of 25 electors and their respective electoral numbers.

A Presidential nominee must be a citizen of Kenya who has attained the age of 35 years. He/she must be registered in a constituency as a voter in elections to the National Assembly and has to be nominated by a political party. The winning candidate for President is the one who receives a greater number of valid votes cast in the Presidential election than any other candidate and who also receives a minimum of 25 per cent of the votes cast in at least five of the eight provinces.

Nomination day for the Presidential election was 14 December 1992. The Chairman of the Electoral Commission received the nomination papers. The process was carried out without incident. Eight candidates were nominated.

The successfully nominated Presidential candidates each addressed large numbers of supporters at rallies which were peacefully conducted. The proceedings sometimes assumed a carnival atmosphere with simultaneous television coverage.

The nominations of candidates for the Parliamentary and Civic (local) elections took place on 9 December 1992. A total of 188 Parliamentary and 1,879 Civic seats were to be contested.

The Secretariat's advance team monitored the activities on nomination day and visited a limited number of centres to witness the proceedings. At two of the centres visited, the team noted that the proceedings were conducted efficiently. One Returning Officer explained that he had settled the procedure

with each candidate prior to nomination day and as a result the process at that nomination centre went smoothly. The team noted the presence of large crowds of supporters of the main political parties in the precincts of the centres visited and also a strong presence of the security forces.

The constituency reports received from across the country clearly indicated that widespread violence and irregularities had affected the nomination process in a significant number of constituencies, with adverse consequences for both Parliamentary and Civic candidates. Several prospective opposition candidates complained that they had been forcibly prevented from handing in their nomination papers within the prescribed time period. Some of these persons were reported as having been kidnapped, or having disappeared. Other irregularities included robbing prospective candidates of nomination fees and destroying nomination papers.

It was against this background that 16 Parliamentary seats were finally declared unopposed in favour of KANU, the ruling party. Some nominations were rejected on technicalities while others were time-barred, i.e., prospective Parliamentary candidates had arrived after 1 p.m. and Civic candidates after noon. Reports indicated that some 43 prospective opposition candidates at Parliamentary and Civic levels claimed to have been hindered from presenting their nomination papers. Much dissatisfaction was expressed over the limited time allocated for concluding nominations – a mere five hours in a single day. The point was repeatedly made that that hardly conformed to acceptable practice in many Commonwealth countries where nominations period normally ranged from four to seven days.

The opposition parties reacted with predictable fury. Some threatened to boycott the elections and to take court action to have the nominations in the constituencies concerned declared null and void and to constitute fresh nominations. Lists of those affected, both Parliamentary and Civic, were submitted with supporting evidence to the Electoral Commission.

The initial reaction of the Commission was that it could do nothing to reverse the decisions of the Returning Officers involved and that it was a matter for the Courts to decide. However, after further representations by the parties concerned, the Chairman of the Commission set up a special committee, under his chairmanship, to examine the complaints of the aggrieved persons. The complaints were subsequently classified into three categories:

- (i) those in which the Electoral Commission could intervene. These were cases involving the conduct of the Returning Officers. There were nine such complaints. The Electoral Commission directed the acceptance of the nominations in four of these cases on the basis that the complaints were justified. It rejected five complaints, holding that they were not justified.
- (ii) instances of alleged kidnapping, physical assault, forcible prevention, etc., which constituted offences under criminal law. These needed to be investigated by the Attorney-General and Commissioner of Police. There were 17 Parliamentary and seven Civic cases in this category.

- (iii) cases where the elections were complete, i.e., where candidates had been declared elected. These elections under the Constitution could only be open to inquiry by the Election Court. There were six such cases, and the candidates were advised that petitions to the Court represented the correct procedure.

There were 10 complaints on difficulties experienced with internal party nominations. Eight Civic cases and 14 Parliamentary cases were rejected and the decisions of the Returning Officers were upheld. One case dealt with a candidate who could not hand in his nomination paper on time.

The Chairman of the Electoral Commission confirmed that, in all, a total of 72 cases had been received and processed but the Commission could not entertain any more complaints once the printing of the ballot papers had begun.