

## Independence of Electoral Commissions and Electoral Commissioners: Reflections of a former Elections Chief of Kenya.

By

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(NB: This is a long post and contains personal accounts familiar to some Election chiefs that are used to illustrate certain principles. It also contains sneak preview of upcoming memoir. It was presented at a past symposium for election chiefs).

### 1. Background

In December 2007 Kenya held its general elections. The results of the presidential elections was disputed and those unhappy with the results declared refused to go to the courts to challenge the results as declared and called for protests and mass action. This degenerated into a near civil war with hundreds of deaths, destruction of property and thousands of internally displaced.

It took the intervention of the African Union, European Union, the United States and the United Nations, through a mediation effort led by Koffi Annan, former Secretary General of the UN, to bring peace to the country. A national accord was signed by the warring factions and a coalition government of the opposition and ruling parties was established. The Grand Coalition Government, commonly referred to as the “*Nusu Mkate*” Government, set up an Independent Review Commission to inquire into the post-election violence. It was led by Court of Appeal Judge, Justice Phillip Waki; (the Waki Commission Report). A commission of inquiry led by Justice Kriegler (former South African Elections Chief) was formed to inquire into the disputed elections. This commission recommended reforms in the electoral system, electoral administration, political parties, civil society and media (Kriegler Commission Report). This report was thereafter selectively implemented when the opposition, already unhappy with the Electoral Commission, for the conduct of the elections, started a clamour to disband the electoral body.

The Electoral Commission of Kenya (ECK) was the Elections Management Body (EMB) responsible for elections in Kenya. It was established under article 44 of the Constitution of Kenya. It was a constitutional body with a chairperson and 22 commissioners appointed by political parties in proportion to their strength in parliament. Once appointed, the commissioners enjoyed security of tenure for their 5-year (renewable once) term and could only be removed through a process similar as that of removal of a High Court Judge.

Following the post-election violence that followed the disputed presidential elections in 2007, the Electoral body and its chairman became a convenient scapegoat for blame. They were subjected to very public trial by and through the

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media and condemned unheard. The chairman of the ECK, the late Samuel Kivuitu, bore the brunt of the attacks. He was quoted out of context by a media house who edited his answer to a question he was asked, ***“Do you think President Kibaki won fairly?”*** He had answered, ***“I don’t know because winning fairly entails more than just having the most votes.”*** And went on to explain the precepts of a free and fair elections and level playing field. The media houses edited this answer and just took the first two words ***“I don’t know”*** and went on to create the impression that the election chief did not know who won the presidential elections of 2007. An interview was edited, sexed up and reduced to a two word sound bite.

After ten months of persistent and sustained attacks on the ECK, protests and political rallies by politicians, the stage was set for the sacrifice of the EMB. In December 2008, Parliament passed by more than the required 2/3 majority, an amendment to the constitution by deleting section 44 which established the ECK and inserting a new section 44A that established the interim Independent Electoral Commission(IIEC). This effectively meant the dissolution of the ECK (established since 1992) and ending the tenure of office of all the commissioners and the 650 members of staff forming the secretariat. This amendment was a short cut to avoiding the long process of appointing tribunals for the commissioners to confirm the guilt of whatever misconduct they were being accused of.

After the disbandment/dissolution of the ECK in December 2008, Kenya did not have an EMB for four months until May 2009, when the Chair and 8 commissioners were appointed to form the IIEC. I was appointed the Chair of this Interim Commission after going through a public interview and vetting by parliament. My professor of Law on learning of my appointment called me and told me of his dilemma of, “whether to congratulate you or offer you my condolences!” This witty comment by my Law Professor turned out to be prophetic as I will later find out. The appointment was for a period of 24 months and the key functions of the body was to establish an effective and efficient secretariat, conduct fresh registration of voters and hold a referendum for a new constitution that was to be adopted the following year.

The IIEC enjoyed the same constitutional status as the ECK and additionally section 44A emphasized its independence to the effect that, *“in the exercise of its functions it shall not be under the control or supervision of any person or authority.”*

**Threats to Administrative, Decisional, Functional and Financial Independence of the electoral commission.**

2) ***“which part of the word Interim do you have difficulty understanding.”***

***“which part of the word Independent do you have difficulty understanding?”***

As chairperson of the Interim Independent Electoral Commission, I quickly discovered the push and pull and the tension that develops between the political class and the EMB. The politicians never missed an opportunity to remind

us they were the “boss” and if we “grew horns” they could easily deal with us the way they dealt with our predecessor, the ECK. Other mischievous political actors will point out to us the oxymoron that was our name - Interim and yet independent. We did our work as impartially and professionally as we could and vigorously maintained our independence in word and in action. I will soon come face to face with the intolerance of the political class (both in the executive and in the legislature) to our insistence on our independence and not bowing to undue pressure or political instructions.

As the country prepared to adopt a new constitution, the commission commenced the voter registration exercise for a period of 30 days, time being of essence. On the last day of the exercise long lines of people waiting to be registered were reported by the media. This was against the previous weeks’ where the voter registration centres were reporting zero visitors. Some in the government wanted the exercise extended by the commission for two more weeks. I was invited together with my Chief Executive Officer/Head of the Secretariat, to attend a meeting chaired by the Prime Minister and attended by the Attorney General, 6 cabinet ministers and 6 permanent secretaries and other senior government officials ostensibly to discuss the extension of the period of voter registration. Unknown to me, the media was already invited to cover the press conference that we shall be addressing later to announce the extension of the voter registration exercise. When I was asked to go along with this and basically to rubber stamp a decision already made, I refused and reminded those in the meeting that the commission was independent and will not take instructions from any person or authority. Further I said that such request will have to be considered by the whole commission after input from its technical staff. When the treasury boss in the meeting said he was ready to give a cheque for any amount of money required for the extension, I said we would prefer **“a cheque for two weeks!”**. This did not please the chair of the meeting who was visibly annoyed but took note of my position and closed the meeting. As I left the meeting, a senior official in his office escorted me to the lift and asked me, **“Mr Chairman, don’t you know you are Interim?”** to which I replied, **“yes”**. He then asked me, **“so which part of the word Interim do you have difficulty understanding”**. Having understood the message contained in this pregnant statement I replied, **“Yes I understand that I am the chairman of an Interim body but it’s also independent. Which part of the word independent do you have difficulty understanding?”** I asked. [The commission later met and announced an extension of the exercise for 4 days].

The new constitution provided for the IEBC that was to replace the IIEC and it was expected that with our experience and for the purpose of continuity, we shall apply to be appointed to the IEBC. Obviously, such appointment will not be divorced from the political forces as the new commissioners will be approved by parliament and appointed by the President (in consultation with the Prime Minister), hence the above exchange.

As chair of the Interim Electoral Commission I had several other run-ins with the political class in the executive, especially in the run up to the referendum in

August 2010. The ministry of finance and the justice ministry provided several instances that tested the limits of our independence as the former was in charge of the national purse and the latter purported to be our parent ministry and tried to act like one! Technocrats and Bureaucrats at treasury ,for instance would routinely ignore commission recommendations and slash the budget irrationally and almost always delayed exchequer releases even for the approved budget.

As we prepared for the referendum it became increasingly clear to us that the Coalition Government was not fully united in support for the new constitution. Some were opposed to it or wanted to delay its enactment and tried every effort to use the commission to achieve their goal while avoiding public blame. These ministers were called “watermelons” because of their perceived hypocrisy pretending to support the new constitution in public but doing the opposite in their inner circles. The symbol for yes to the constitution was green and no was red, hence the name watermelon! These watermelon ministers almost derailed preparations for the referendum when they used the office of the President to generate a false alarm that not enough eligible voters were registered to legitimise a referendum. The commission had to prepare a position on paper on international best practice on referenda with regard to the Cunningham amendment rule and assured the President that if 60% of eligible voters were registered, a referendum could be held. To his credit the Prime Minister was fully supportive of the commission and the constitution making process and was instrumental in getting the government to fully support the commission in the conduct of the referendum for the new constitution.

In the runup to the 2013 general elections the cabinet decided that Kenyans in the diaspora will not be allowed to vote in the elections. This was a serious threat to the independence of the commission as the cabinet was usurping the role of the commission and giving directions to the commission. There were strong objections to this by the commission and Kenyans in the diaspora. In the end, the commission forced the government to provide funding to enable the commission allow Kenyans residing in the East African region to register and vote in the elections.

**(3) *“Next time you come to parliament, you will check your independence at the door.”***

The political class in parliament, on both sides of the aisle, will always try to cow and intimidate the EMB and its head to achieve their narrow, parochial and selfish interests, jointly or severally. They are equal opportunity offenders when it comes to undermining the independence of the EMB. Members of parliament, unhappy with any decision of the EMB, often sometimes conspire to frustrate the efforts of the EMB in approving proposed electoral reforms, regulations or the budget. They can also use their oversight role through the committees to summon the heads of the EMB for “grilling “before them in open sessions covered by the media. They then use that opportunity to make political statements, ask all sorts of infantile questions, and make snide and insipid remarks

and polemic speeches all in an enterprise to score some points against the EMB or its head or both.

The new constitution of Kenya adopted on fourth August 2010 established the IEBC under article 88. It established an independent body that was constitutionally more protected than previous electoral commissions like ECK and IIEC. The chairperson and commissioners were appointed through a competitive merit based and transparent process and once appointed enjoyed a security of tenure for their term of office of 6 years (non-renewable). Removal was for cause and under the grounds set out in the constitution and it required a tribunal. To disband the commission was made difficult for parliament. The commission was entrenched in the constitution and it could only be disbanded after a positive vote in a referendum. The referendum was to be conducted by the IEBC.

In November 2011, after many political intrigues and other drama designed to spoil my candidature, I was again appointed to chair the IEBC. {Only two people other than myself applied for the position of chairperson while over 400 applied for commissioner. Re advertisement for position of chairperson attracted 5 others}. My commissioners at the IIEC were not lucky either. Out of the 8 commissioners only one was appointed back to the IEBC. A constitutional provision underlining their re-appointment for continuity and institutional memory was disregarded for political expediency. The first task of the commission was to undertake boundary delimitation (or redistricting) for 290 constituencies and 47 county assemblies based on criteria listed in the constitution. The incumbent members of parliament had a lot of interest in this exercise and several made attempts to influence the process and force through their gerrymandering plans and the redrawing of their electoral areas to benefit them. The IEBC had the final authority on the delimitation of boundaries of the electoral areas after taking into account the views from the public. The commission published its final report for the 290 constituencies and 1450 county assembly wards. The report was submitted to parliament. Members of parliament, through the committee of legal affairs, summoned the heads of the commission and strongly urged us to accept the proposal by parliament to increase the county assemblies from 1450 to 1550. The additional 100 wards were selectively given to areas represented by MPs who were members of the legal affairs committee and other leaders of the house. When the report came back to the IEBC from parliament with the proposed changes, the commission rejected them and instead went ahead to gazette the 1450 county assembly wards.” ***IEBC defies parliament***“ screamed the newspaper headlines the following day. Though this was supported by a majority of Kenyans, it was not what the parliamentarians wanted. We received great social goodwill for our stand from the public but not from the MPs. We anticipated the loss of their political goodwill but in hindsight, it is clear we underestimated how bad this was going to be. I received a call from a fuming chairman of the parliamentary committee on legal affairs demanding to know why we ignored parliament’s recommendations. I replied that we considered them but did not agree with them and that on the boundary delimitation issues, we were not bound to follow the parliament’s proposal. I reiterated the constitutional provision on our independence and then

he uttered the following statement, ***“Next time you come to parliament you will check your independence at the door.”*** This subtle threat was going to pass when the commission presented its budget for the 2013 general elections to both the legal affairs and budget committee of parliament. We were subjected to ridicule and harassment by the MPs when we appeared before their committee and they displayed a lot of bad faith and hostility. They alleged that we had presented a bloated budget that was going to fund the most expensive elections in Africa. It was clear to us that they were punishing the commission as revenge for the boundary delimitation issue. Unlike prior years, they conducted the committee hearings in public and with the press in attendance. Out of spite and sheer blooded mindedness, they reduced the election budget in areas that later came to effect the electoral operations. They also amended the Elections Act to take away from the commission the power to make regulations for the conduct of elections. It was made subject to approval of parliament.

We also received similar but far worse treatment, before the Public Accounts Committee, which is chaired by the opposition party by parliamentary tradition. A legitimate function of considering the audited accounts of the commission was turned into an inquiry into the conduct of the elections of 2013 and a fault finding one. They became investigator, judge and jury all rolled into one. They departed from tradition and summoned the accounting officer and all the commissioners to appear before them separately and answer wide range of issues that had nothing to do with the audited accounts. It was the most unprofessional and the worst parliamentary committee that I ever appeared before in my tenure of office. This committee engaged in conduct that clearly was misuse of parliamentary powers and privileges and went overboard so much that some commissioners contemplated refusing to appear before it anymore and accept any punishment for the so called “contempt of parliament” offence.

#### (4) Judicialization of politics and politicization of the judiciary.

In a polarized society where there is political intolerance and dishonesty there is always the danger and risk of judicialization of politics and politicization of the judiciary. Sometimes politicians and Political parties take political cases to the judiciary instead of seeking political settlement in the political arena with their counterparts. When the matter affects the elections and the electoral calendar the body that will suffer the most is the EMB. Judicial activism and exuberant exercise of judicial independence sometimes results in judicial over reach and judges issuing injunctions that have serious implication on the electoral calendar. In this scenario, it’s not uncommon for the head of EMB to be cited for contempt of court with attendant publicity when court orders are not implemented due to circumstances beyond the control of the EMB or its head. I experienced this in 2013 when a candidate in the elections obtained an exparte injunction order from a commercial court judge directing the commission to include his name in the ballot paper. This order was made two weeks to the

election and when printing of ballot papers had almost finished. The commission could not comply and I had to contend with contempt of court proceedings.

There are also instances of judicial intervention in electoral process that is perceived as partisan and favouring a particular political divide. This is especially the case when judges intervene late in the day and issue orders that have a direct bearing on the elections. Though this may open the judiciary to accusations of being politicised, ultimately the body that ends up holding the sharp end of the stick becomes the Electoral Commission.

**(5) “IEBC Must Go protests and teargas Mondays”.**

In spite of strong legal protection for the independence of the EMB and the security of tenure of office of the Electoral Commissioner, the political class will employ all sort of tactics, including illegal and unconstitutional ones, to achieve any particular desired political objective whether or not this will undermine the basic foundational principles of democracy and the rule of law. In March 2013, the IEBC conducted the first ever six-tier general elections in Kenya under the new constitution (presidential, parliamentary, senatorial, governor, women representative and county assembly). As chair, I was the returning officer for the presidential elections. After announcement of the Presidential election results, the losing candidate filed a petition in the Supreme Court. The court unanimously upheld the election results declared by the commission and dismissed the petition. The opposition leader said he did not agree with the supreme court but will accept the decision. He maintained his stand that the election was rigged and the commission aided and abetted the theft of his victory.

What followed was a concerted effort by the opposition leader, who had lost in the presidential election, with his supporters in civil society, international think tanks and media to destroy the credibility of the supreme court and the IEBC. The Chief Justice and myself as chair of IEBC, were particularly singled out for special criticism. In a country with no culture of conceding electoral defeat, the next three and a half years was spent by these oppositionists honing a sense of victimhood to the effect that the presidential elections were rigged. (Professor Bitange Ndemo, Daily Nation July 7 2017) A false narrative was created and repeated over so many times that it acquired the character of truth. Every act of the commission was seen in negative light and no efforts were spared to portray the EMB and its chair as incompetent, in bed with the governing party or as persons without integrity. I was caricatured in cartoons and became the subject of many editorials, opeds and commentaries by so called analysts.

Just like the ECK before in 2007/2008, we were subjected to vicious and unfair trial by media and condemned unheard. Nothing we said or did seemed to persuade those who were aggrieved with the loss of the presidency and the lack of basis of the alternative facts and false narrative that they had created and started believing in. The Chief Justice, perhaps fed up with the whole public lynching, chose to retire early one year before his term ended. However, we did not have that option. We dismissed calls from the oppositionist for us to resign because we

had rigged the presidential elections and demanded that those who wanted us out of office must follow the Law on our removal. Although I bore the brunt of all the negative coverage and attacks on the commission, I made the decision to stay strong and insist on respect for the rule of law in removing the Chair and Electoral Commissioners from office. I believed if I stepped down under these conditions I will be succumbing to intimidation and give credence to the false claims and allegations being made against us.

The opposition party then supported a civil society activist who filed a petition for our removal from office in 2014. Parliament heard the petition and our defence and dismissed the petition as lacking in merit. Again in 2016 another petition was filed for our removal and again after full hearing by parliament, it was also dismissed. The opposition party then decided to sponsor a petition for a referendum for the people to decide on disbandment and reconstitution of the IEBC among other issues. The petition was brought to IEBC as required by law for approval. The petition was to be signed by at least 1 million registered voters. The commission found that it had only 800,000 registered voters and therefore announced that the initiative had collapsed by operation of law. The commission refused a request by the proponents to be given more time to top up the difference of 200,000 voters. This was perhaps the politically correct course of action if we were to appease them but we chose fidelity to the Law. They were very unhappy with this.

They first declared they will stage a sit in at IEBC until their demands for approval of the petition for the referendum were met. They later changed this to a demand for us to go. (" IEBC must go"). They staged public protest at IEBC offices on every Monday and these protests were dispersed by the police (teargas Monday) who declared these protests illegal. It was a spectacle to watch demonstrators outside our offices with all manner of offensive banners such as, " **IEBC Must Go**". "**we don't want thieves**", "**Jubilee is IEBC**"; "**ISSACK HASSAN GO BACK TO MOGADISHU**", "**WANTED DEAD OR ALIVE - ISSACK**". It was equally sad watching from our offices the protest leaders led by the former Prime Minister, Vice President and other senior politicians stage sit in on the tarmac along university way next to the commission offices before being dispersed by teargas and water canons from the anti-riot police. This was indeed difficult time for the members and staff of the commission, and especially myself as the head of the EMB.

The demonstrations became violent and unruly with thieves taking advantage and looting shops. The police also used force to disperse them and in one incident at least 6 of the protesters were killed. The private sector alliance and religious leaders then came in to mediate. The government was adamant that it will suppress the protests. We were also firm in our resolve that we will not succumb to intimidation and threats of street protests to accept misconduct we were not guilty of. We demanded for due process. A statement I made in a social media forum for Lawyers that, "**You don't quit school because there is a bully taking your lunch box**", became a news item. The mediators were joined by U.S and U.K envoys and other sectors of the society. Then in July 2016, a joint parliamentary

select committee was established to deal with the crisis. This Bipartisan committee conducted public hearings and invited views from all parties. The committee recommended several reforms to the election laws and ruled that the allegations against the chair and the other commissioners were without any basis or proof. It recommended that we be requested to offer to resign and we receive a dignified exit from the commission by compensation for payment for the remainder of term of office. We were convinced this was a fair political compromise given the circumstances. We had made our point that one could not just push out Independent office holders through extra legal means. It was necessary to avoid the looming political confrontation and also save the institution from further cannibalisation. It was also necessary to give the staff the time and space necessary for them to prepare for the elections and to put an end to the near obsessive compulsive disorder that characterised the conduct of the media to get the commissioners out by continuous negative coverage. Furthermore, it was clear to everyone that we had become sacrificial lambs. This happened and new commissioners were appointed in January 2017. I therefore stepped down from office on 20<sup>th</sup> January 2017 after serving in office for 7 years and 10 months.

(5) The following are some of the lessons that I have learnt and my reflections on the subject of Independence of Electoral Commission and Electoral Commissioners:

1. The administrative, decisional, functional and Financial Independence of the electoral commission and electoral commissioners comes under a lot of challenge from the Executive, the Legislature and the Judiciary directly and indirectly. These challenges manifest themselves in the following manner;
  - a) The EMB being deprived of the power to make regulations for the conduct of elections and reduced to waiting for an approved version from the Executive or the Legislature.
  - b) The EMB being frustrated from recruiting its own staff and setting competitive remuneration package for its staff in order to attract and retain qualified and competent staff. In other cases, the EMB is put under a lot of pressure to sack its staff or sacrifice them because of pressure from political actors in the country.
  - c) The EMB being denied the right to have its budget approved and charged on the consolidated fund or establishing a fund to which all funds allocated to it goes in. The Executive, through the Ministry of Finance and Parliament desire to have control over the budget of the EMB. Treasury sometimes does not appreciate the electoral timelines and the urgency involved. The red tape and bureaucracy associated with treasury does not encourage adequate and timely release of funds to the EMB.
  - d) Funding of elections is a matter of national sovereignty and the EMB requires guaranteed funding to do elections. Sometimes the National

treasury may allocate meagre resources for areas such as voter education, training, international cooperation etc. thereby necessitating the EMB to seek donor support with attendant ramifications.

- e) The provision of security, seconded staff and office space to the EMB at its head office and in its regional offices creates the perception of the EMB being part of the Government or dependant on Government.
  - f) Travel restrictions on the electoral commissioners where they are treated like the mainstream public service and therefore require permission to travel out of the country for official duties. This can be used to undermine the independence of the EMB, if the Prime Minister or some other senior official has to approve the travel of the electoral commissioner. In Kenya, with the new constitution, the practice has changed from seeking “*permission to travel*” to “*notification of travel*” where members of independent constitutional commissions notify the Government of their travels.
  - g) The EMB, as a public institution is of course subject to annual audits by the Auditor General. The auditor is supposed to be a watchdog and not a blood hound. In some cases, the EMB and its officials are actually subjected to politically motivated audits that are extraordinary and a witch hunt and a fault finding exercise; so much so that the fear of such audit creates paralysis in decision making and delay in the implementation of activities in the commission out of fear of victimization. (Example- IEBC after 2013 elections) thereby undermining the independence.
  - h) The setting of the terms and conditions of service of the Electoral Commissioners, if done by National treasury or other equivalent Government body, is another area that exposes the vulnerability of the EMB vis a vis its independence.
2. Independence is only possible in a country that has a mature and established democracy and where there is good political hygiene and morality among the electorate and the political leaders. Independence cannot be practised in the abstract. It depends on the society and its political maturity. In Africa, Ghana, Nigeria and Zambia provide positive examples of Election loss by opposition or by an incumbent, especially for presidential elections, where the EMB or its head did not suffer major political backlash, blame and witch hunt.
3. If a country’s politics is ever to enter the mature stage, national politicians, particularly major presidential candidates, need to internalise a culture of accepting that they can be defeated in a free and fair election and that the culture of repeatedly dismissing defeat as the product of theft of elections or “rigging” only stunts the nation’s journey to democratic maturity. (Professor Bitange Ndemo, Daily Nation July 2017)

4. The conduct of elections in a transparent and accountable manner, and the acceptance of the elections results as a reflection of the will of the people enhances the level of confidence in the EMB. Confidence of the people in turn acts as a shield for the EMB and protects its independence. It is however a difficult task to conduct an honest election in a dishonest society.
5. Independence of the EMB is what the election chief is; what he does and how he does it. The office holder embodies and personifies the independence. The way the head of the EMB discharges his office without fear or favour, will shape the way the EMB is seen as being independent or not; impartial or not.
6. Effective and timely communication to the public and to all other stakeholders helps in reinforcing the independence. Responding to falsehoods, correcting any erroneous statement and other misconceptions is key. Never allow others to define you or the institution. However, in spreading falsehood and propaganda, it is hard to match a strong political opposition or a charismatic political leader who has a large following and has perfected propaganda into an art.
7. No amount of consultation, engagement or explanation will change a politician or political grouping that has taken a specific stand against the EMB or its head. Statements of facts or statistics will not change. It will be like whistling in the wind or sending smoke signals in the wind when dealing with this kind. They can be unforgiving, vindictive, hateful and blood thirsty.
8. A landslide victory is indeed an election manager's best friend. It encourages concession by a loser and minimises criticism of the EMB or its head. Conversely, managing elections in close contests, especially in difficult political environment or highly polarized societies, makes the job of the election chief even more difficult. The smaller the margin, the bigger the scope of conflict and dispute.
9. Being an election chief is an honour and privilege allowing one to serve his country in a high-profile position. One is a newsmaker and public persona by virtue of the office. This attracts both negative and positive attention depending on the politics of the country. It can be fulfilling, prestigious and satisfying and at the same time or other times it may become stressful, lonely and thankless. Depending on the circumstances, one can be made a good role model and a hero or a villain or a victim or all at different phases of the electoral cycle.
10. It is important to stand up to intimidation in order to protect the independence of the office and speak truth to power. It is futile to please or appease politicians by giving them indulgence in the exercise of a discretion. It is almost certain that after an election there will be those who will be unhappy with the election results. Transferred aggression is likely to come your way. Those that sacrifice their liberty for temporary security

deserve neither says an American statesman. One should never sacrifice the independence of the office of election commissioner for anything, including so called promise of political protection.

11. Politicians, if unchecked, can unfortunately turn the office of election chief into a poisoned chalice, and the EMB as a graveyard of careers and reputation. It may be a prudent thing therefore for one to join the EMB not at his prime age but closer to retirement age so that he ends it at the EMB (and retires to his 3Gs- Golf, Garden or Grandchildren). If after leaving office, the Election Chief is appointed to another position in the public service, those out to discredit him can claim it was a reward for being partisan to the appointing authority while in office and raise objections. Conversely one could also be denied such appointment for not towing the line as punishment for being viewed too independent by those in authority.
12. Elections are more likely to be regarded as free and fair if there is a landslide victory and the loser concedes defeat or if an incumbent in power loses to the opposition party. In Africa, if an incumbent retains power in an election, it is far easier to sell the theory that the elections was stolen or rigged than that it was free and fair. This undermines the integrity and independence of the EMB and its head.
13. In close election contests in a tribal or a polarized society, the EMB and its chief will become an object of scorn and hate by the supporters of the losing candidate. This situation is worsened if the loser is better in propaganda and the winner is unable or ineffective in promoting, protecting and defending his victory. In such a situation, one will soon realise that public service is neither public nor a service but public humiliation and trial as prosecuted by the aggrieved politician.
14. A partisan, unethical and unprofessional media can be used and misused by politicians to undermine an EMB and its head for their political ends. They can make or break an EMB or its chief in furthering certain political interest. I was a victim of defamation of character when media houses were used to manipulate public opinion and make me as the chief architect of a corruption scandal that involved procurement of election materials even when it was clear that I was not the accounting officer and had no role in procurement or financial matters. This scandal was christened the “chicken gate” because the officials involved in procurement used chicken as code word for bribes. The matter is now in court after 4 people were charged following investigations.
15. Civil society has been defined as that space between the Government and the ordinary citizen. In a constitutional democracy, civil society organizations play an important role in giving the ordinary citizen a voice and a platform to advocate for any particular set of issues. However, some civil society organisations, especially those in the governance sector, are neither civil nor a society but are indeed individuals who are part of the

army of supporters of politicians and political parties. They are political parties in disguise. They traffic in partisanship while pretending to be impartial. Political activity is then disguised as activism or social good. The protest industry has become their fishing ground and instituting public interest litigation that has political ends has become a means to an end.

16. Electoral system that is inclusive and is not a zero-sum game (winner takes all) and a parliamentary system of government that allows the Prime Minister to emerge by virtue of the seats won by the party in parliament as opposed to presidential system where the election chief has to declare the winner, is a far better choice on the person who is the head of the EMB. Examples of Canada, Australia, UK, South Africa as contrasted with Kenya, Nigeria, Ghana, Zambia, Zimbabwe and Malawi.
17. Politicians can be very selfish and malevolent lot who have no qualms swallowing their words, changing positions irrespective of the facts, feigning selective amnesia in the application of the law and paying lip service to the constitution and its safeguards to security of tenure and independence of constitutional offices. They cannot see a belt without hitting below it and watch a back without stabbing it. It is far more easier for them to compromise and sacrifice the independence of the EMB or its head so long as this serves their mutual interests. On matters election, if any blame was to be apportioned, politicians from across the divide are likely to agree on someone to blame other than themselves and that person will most likely be the EMB or its head or both.

During protests against IEBC in 2016 I was always available for consultations with the political players of the time. One of them revealed their complete lack of honour and good faith when he told us that whether we resigned or not, they will still win. He said, *"If we win the next election we will say you were doing your job and if we lose the election we will say you rigged the elections."* No credit was to go to the EMB.

On the other hand, a member of the ruling party told us in a committee that they don't mind us being sacrificed to stop the protest because they were confident of winning the next election and didn't want their win to be questioned because of dispute over the commissioners. It is therefore justified for one who has dealt with such politicians to come to the conclusion that they are heartless characters who have no honour or good faith. Political satire has the adage about a gravestone with the inscription, *"here lies a politician and a gentleman,"* to which one person asks, *"why did they bury two men in the same grave?"* These are some of the political jokes we share amongst election chiefs. The only problem with political jokes is that sometimes they get elected!!

18. Maintaining unity in the commission among its commissioners and staff is extremely important for the survival of the institution especially at times of political crisis where the commission is under attack and is facing an

existential threat. During my tenure, the commission only voted once. The norm was consensus. Throughout the period IEBC was under attack, the commissioners and staff never wavered in their unity in the defence of the work of the EMB. No cracks appeared between and within the members and staff of the commission. It was possible to have this unity because we all had a clear conscience and knew that the truth was the glue that made us stick together. In contrast, the ECK lacked this cohesion during the 2007 disputed elections. Some few days before the chairman of ECK, the late Samuel Kivuitu announced the results of the presidential elections, three of his commissioners had addressed the press casting doubts on those results. When the push to disband ECK reached fever pitch in late 2008, the staff abandoned the commissioners in the belief that they will survive the putsch but to no avail. That there is strength in unity for the EMB cannot be gainsaid.

19. In discharging your work as elections chief and in order to foster impartiality and fidelity to the law, it is good to remember the oath of office you take when assuming office - “To discharge your duties impartially without fear or favour, ill-will or disaffection”. This is even more important when you feel unfairly profiled and attacked by an important stakeholder who has turned into a “stick holder.” It is human to resent those that treat you unfairly and are destroying your integrity but one must accept this as part of the occupational hazards of the job.
20. It is only another election chief like you or professionals in that field who can empathize and understand the challenges you face when dealing with difficult stakeholders like politicians. There may be occasions when the pressure becomes too much and you may require support from those who know or can understand what you are going through. I have found a lot of support in the great men and women I met at the Cambridge conference and I have found solace and strength in their understanding, empathy and encouragement and above all from the Director of the conference, to whom I am very grateful. So, my advice to EMB chiefs facing unfair trials and tribulations in the work is to reach out for the help and support of their peers from the Cambridge Network. It is the only forum that I am aware of that deals with the individuals that head the EMB and provides a forum for exchange of ideas and lessons learnt by peers.
21. Meetings with politicians should be regulated by a clear code of conduct. Electoral Commissioners have become endangered species dealing with dangerous species. It is important to formalize meetings with politicians with a document trail. Meet them in the office and not alone.
22. Inviting both domestic and international observers and local and international media to observe and cover your elections without undue hindrance and subject to the code of conduct applicable to them is useful and their reports have been of great help in our defence.

23. Allowing professional and impartial local civil society groups and domestic election observers to conduct a parallel vote tabulation (or swift count) for the presidential elections is an exceptionally good practice, especially in close elections where the margin of error is equal to the margin of victory, as their report can support your election results. In the 2013 elections in Kenya, the government was considering to ban the civil society initiative of parallel vote tabulation on security grounds. This initiative was supported by the U.S and E.U and I became a strong advocate for the parallel vote tabulation after being satisfied of the bona fides of the said initiative. Their report came in handy on several occasions when the commission was responding to the claims of rigging of the presidential elections.
24. The head of the EMB will be held politically responsible when there is blame to be apportioned in the event of any disputed electoral contest. This is irrespective of whether the head of the EMB had the legal competence or not. Where a commission has a dual executive with a chairperson of the commission and a Chief Executive who is the head of the management and the accounting officer, there is always the risk of the chairperson getting the blame for the failures of the Chief Executive and vice versa. If the buck is to stop with the head of the EMB, then it is better for such head to be the Chief Electoral Commissioner as well as the Chief Executive of the commission. Good examples in Africa are Nigeria, Ghana, Mauritius, Sierra Leone. It is possible for a mischievous CEO to undermine the Head of EMB, deflate attention and scrutiny from himself and outsource his incompetence or misconduct to the head. During my tenure, I worked with four CEOs and I can trace almost all my problems to the time when one of them was in office.
25. It is good practice to keep records personally and write a memoir to document your tenure in office, set the record straight, and share experiences with others. My predecessor always regretted not writing his memoirs. He died before he could do so.
26. In order to reinforce the impartiality of the commission it may be a good practice if the Chairperson and Electoral Commissioners do not vote in the elections. The sight of Electoral commissioners leaving a polling station with a mark of an indelible ink on their left finger can unfortunately be fodder for those who want to paint the electoral commissioner as partisan and having already taken sides.
27. Where there is a petition filed in a superior court challenging the election result and the head of the EMB is joined as a co -defendant, the defence strategy employed by the EMB and the head is important. As a rule, the EMB and its head should use the same lawyer in defending them and the head of the EMB should closely monitor the work of the lawyer. The defence counsel must be aware of the importance of maintaining the impartiality of the EMB and its head. Since the lawyer will be speaking for you in court, you must ensure he does not bring his personal bias into your defence. In the

Presidential election petition in Kenya I was sued as the first respondent in the petition. The lawyer engaged to defend me filed statements of defence under my name and in one paragraph said, " *The petitioner was a perennial loser who does not accept defeat and looks for others to blame for his electoral losses.*" Though I had not approved of this, I was still accused of being partisan and impartial as evidenced by the statement of defence filed by my lawyer.

28. Managing elections in a polarized society is more about managing suspicion, dishonesty and mistrust among and between the competitors. For this reason and in order to mitigate the situation, it may become necessary for the election chief to be able to contact and be contacted by the major political actors, especially in a presidential election. In the 2013 elections, the commission resolved to have the contacts of all the 8 presidential candidates and their running mates to ease communication with them. The upside to this was that you were constantly on the phone with them or their surrogates. Whether an election chief wishes to be able to talk directly to political leaders or not is sometimes an individual choice but in other instances the nature of the society in which one is operating may dictate otherwise.
29. Establishing and maintaining a good working relationship with international organizations, Envoys of Nations supporting the country of the EMB, and other multi-lateral institutions is prudent as they can become useful allies in any effort to protect the independence of the EMB.
30. The Election Chief should aspire to be a bridge between the old and the new- the former and the incumbent commissioners. For institutional memory and the integrity of the office, respect and co-operation between the former and current Election Chief is useful. One should avoid the tendency to trash the legacy of his or her predecessor, however populist and politically expedient this may be. One should aim to build on and improve upon the work of the predecessor in the firm knowledge that the tenure of office is finite and there will be a successor. The focus should be in strengthening the institution as an enduring legacy. Invest in strengthening the institution of the EMB and its secretariat who form the civil service of the electoral commission. Retired election Chiefs should similarly give their immediate successor support and advice whenever sought. Where the EMB is facing internal and external threats it is not uncommon for the opinion of the previous election chief being sought for. In this scenario one should remember his successor deserves his support and silence.
31. One of the benefits of serving as Election Chief is that you have a front row seat to the political theatre, shenanigans and drama that is associated with the elections. One gets a good understanding of the politics of the country and get clarity on many issues and separate the truth from the lies and hypocrisy of the political class. Politicians are supremely ignorant of the electoral process and are adept at covering up this with hyper pole and

theatrics. A former Election Chief can be a good informed defender of the EMB and speak some things that cannot be said by the incumbent election chief. On electoral matters, the role of the Electoral Commissioner as voter educator should not stop but continue through opinion pieces (opeds) in newspapers, commentaries and public forums, where the environment allows for this.

32. The personal safety of the Election Chief is also important for the exercise of independence in the discharge of the duties of the office. One becomes a high-profile target and politically exposed. Threats of sexual assault against female election chiefs or violence to the life and limb of the Election Chief or to his or her loved ones is not uncommon when one presides over an election in a polarized society. Depending on the severity of this threats one becomes a very important prisoner (VIP) because of the security cordon thrown around you by the state. (safehouse, chase car and additional security).
33. There will be intense scrutiny of the conduct of the Election Chief by those seeking to discredit the EMB or its head. This scrutiny will be in mainstream media and even worse in social media, where online attacks on the election chief and commissioners has become the new normal. This scrutiny violates the privacy rights of the person beyond the limits expected from the office holder. This leads to self-censorship on one's own personal freedoms thereby impacting on the independence.
34. Serving a non-renewable term in office for a fixed period or until reaching a prescribed age (e.g. 6years or until retirement age) is better than serving for a short term that is renewable. Those seeking renewal can be punished for their independence or be accused of playing safe in order to appease the re-appointing authority and this impacts on the independence of the office holder and the perceptions thereto.

**THE END.**