



**Memorandum to the Senate Standing Committee on Justice, Legal Affairs and Human Rights
12 March 2019, County Hall, Parliament Buildings, Nairobi**

Introduction

The Kenya ICT Action Network (KICTANet) is a non-profit organization, which acts as a multi-stakeholder platform for individuals and institutions interested and involved in ICT policy and regulation. The network aims to act as a catalyst for reform in the ICT sector in support of the national aim of ICT enabled growth and development.

As the authoritative ICT policy platform in the country, KICTANet focuses on how ICTs can be used effectively for a better society. This is achieved through bringing the stakeholders together, or crowdsourcing for ideas to monitor and suggest the best policy options that support ICT growth and development. This approach promotes cooperation and collaboration among its diverse membership of academia, business, government, civil society, media and technical experts.

In the run-up to the August 2017 general election, KICTANet contributed to the process in a number of ways. In 2016, KICTANet contributed to a national discussion on election laws through the submission of a Memorandum on the Election law (Amendment) Bill) 2016 to the Senate Committee. Further, the Network made several recommendations among them the need for IEBC to develop a system that safeguards the integrity of the vote as well as efficiency of transmission.

During the 2017 elections, the Network observed the use of ICT in areas such as the registration of voters, verification of voter details in the register, the use of online spaces for electioneering, election policy and legal processes, IEBC engagement with ICT community, deployment and implementation of the Kenya Integrated Elections Management Systems (KIEMS) in voter identification and in the transmission of results.

The following are the proposals by the Network on the Election Laws Amendment (No. 2) Bill (Senate Bills No. 37 of 2018):

Issue	Proposal
<p>1. No Description of Election Technology in the Law</p> <p>All aspects of the design and operation of the integrated electronic electoral system to biometric voter registration, electronic voter identification and electronic transmission of results are currently not sufficiently described under section 44 of the Elections Act.</p>	<p>1. Describe and Provide for the Operation of the Election Technology in the Law</p> <p>We propose that Senate develops regulations that clearly outline, describe and elaborate the design, features and operations of the system, otherwise known as the Kenya Integrated Election Management System (KIEMS).</p>

<p>Further, there are very limited provisions that provide for the use of technology in elections such as sections 6A, 39 (1) (C) and 44 (4), (5) and (7) of the Elections Act.</p> <p>The result was that there has been confusion over the form of technology that was adopted and the purposes which it was meant to achieve. Further, it has resulted in misinterpretation of the the few provisions in most matters that have been brought before courts, thereby affecting the development of jurisprudence, the credibility of elections and diminishing the important role of technology in elections.</p>	<p>The Senate should amend section 44(2) and remove the discretion IEBC has in developing technology, and as such requiring it to comply with the law.</p> <p>Technology as a core aspect and an integral part of the elections. A wholesome description of the system will provide clarity that is currently missing. Further, it will ensure that the technology adopted is simple, accurate, verifiable, secure, accountable and transparent as required under Art. 86 of the Constitution.</p>
<p>2. Weak Recognition of Results in Electronic Format</p> <p>Currently, the prescribed forms are only provided for in paper, and have several security features. However, the Section 39 of the Election Act requires that the results of an election are transmitted in the prescribed form. The challenge is that the results transmitted electronically, are not in the 'prescribed form' but are mere scans of the prescribed forms.</p> <p>There has been confusion over what to term the results that are keyed into the KIEMS devices, or those displayed on the IEBC elections portals. In some cases, the same have been described as "mere statistics" or "provisional results". Section 2 of the Elections Act describes "ballot paper" means a paper used to record the choice made by a voter and shall include an electronic version.</p> <p>Section 39 (1) (C) (a) to do was to elevate manual result transmission over electronic transmission and undermine the verifiability of the result. Further, the requirement is only applicable to the</p>	<p>2. Strengthen Recognition of Results in Electronic Format and their Transmission.</p> <p>We propose that the Senate requires IEBC to develop the KIEMS system in such a way that it shall provide prescribed forms in electronic format. Hence, at the point of keying-in results on the KIEMS device, the software interface shall carry and bear all aspects of the prescribed forms at all relevant stages.</p> <p>Hence, there should be a electronic Form 34A, for example, to be filled-in at the polling station to provide a reliable means of verification of the results at each polling station.</p> <p>Note that the electronic forms should be distinct from the hand-filled paper-based Form 34A's which are scanned at the polling stations.</p> <p>Further, that once the results are keyed-in on the electronic form, the interface should provide for the verification and digital signing of the form by Agents. Moreover, once verified and signed, the electronic form shall be</p>

presidential election.

Hence, results sent in electronic format, should have the same status as the paper results contained in the prescribed forms and as announced at the polling stations.

sent simultaneously and in real-time to the IEBC, the agents present and the relevant candidates, whose contact details the IEBC should have obtained. The electronic form should also have adequate security features, as the paper form.

We propose that the result transmission system should work like mPesa (or similar mobile money products), such that, as soon as the results are keyed-in and sent, the election officials receive a confirmation message that the results have been sent and received. Likewise, the candidates and their agents, equally receive the results, and the same are also displayed simultaneously on the online portals.

The system should also be developed with capacity to compile and compute results entered in the Form 34A and automatically generate subsequent prescribed forms, without requiring the results to be keyed-in by the officers. This will allow stakeholders to compare and verify the electronically sent prescribed forms with those filled-in by hand at the polling stations.

Where results are amended, the supplementary form can be sent, showing the changes made, the details of the changes and the officials(s) who made the changes.

In addition, the IEBC should develop a portal where each candidate can view and download all electronic prescribed forms (as distinct forms from the scanned hand-filled forms) that the IEBC has received.

A similar portal should be provided for election officials to upload and review and confirm the results sent through the electronic system.

Further, providing for electronic

	<p>prescribed forms, will eliminate requests to “open servers” and “scrutinise” the KIEMS system. The electronic forms will provide an accurate and verifiable mechanism upon which hand-filled forms can be compared against.</p> <p>Further, Section 39(1)(C) should be amended to provide that all results for all elective positions, should be transmitted electronically and in the prescribed form. It should also make it an offence not to transmit results through the electronic system.</p>
<p>3. Weak Complementary System</p> <p>The complementary mechanism for the identification of voters provided for under Section 44(A) is not comprehensive and provides a loophole that can be exploited during an election process. This is because it allows the biometric system for the identification of voters to be by-passed, and as such opens the door to manipulation.</p>	<p>3. Strengthen Complementary System</p> <p>A paper system should not be the backup of the digital system. Instead, the law should require that complementary system be technology-based and not paper based. This will ensure that technology system put in place shall not be by-passed by an opaque paper system.</p>
<p>4. Preparation</p> <p>Poor design and implementation of technology affects trust, integrity and security of the systems. Equally, poor preparation, late deployment of technology and substandard training of staff can affect their performance in an election.</p>	<p>4. Preparation</p> <p>The IEBC should be required to have a functional system and capacity no less than 9 months prior to a general election.</p>

Contact Person

Grace Githaiga
 Convenor,
 Kenya ICT Action Network
ggithaiga@kictanet.or.ke
info@kictanet.or.ke
 +254722701495
 @kictanet