



# Kenya in 2013: the Elections, the Constitution and the Jubilee Government - lessons from the first 8 months

Charles Hornsby



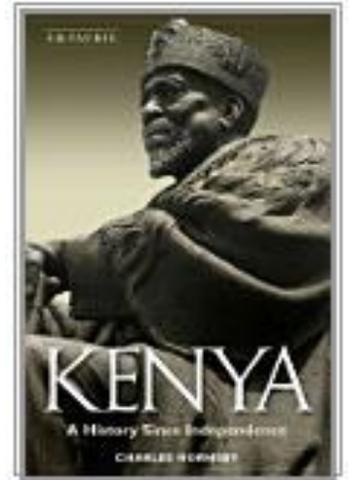
# Some Disclaimers

- My thoughts, not that of my employer
- Not a review of Kenya's history since independence
- Not an academic assessment but a dynamic and personal perspective  
...as an observer and occasional participant

Ms Mugo and Mr Muigai's petitions at the High Court in Nairobi challenge the TJRC findings, saying they are based on hearsay, are "biased and aimed at tarnishing their reputation."

The TJRC says Ms Mugo was mentioned in the works of writer Charles Hornsby and should not be blamed for its "third party" allegation.

- Assumes some knowledge of Kenya
- Picks up where the book left off, as the elections unfold



Kenya  
Charles Hornsby

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Author says GSU boss Ben Gethi and other officers had accosted JM Kariuki outside a Nairobi hotel before he disappeared

Updated Wednesday, November 6th 2013 at 22:18 GMT +3

# ...The Story So Far

- A disputed election in December 2007 triggered major violence in January 2008 and forced a power sharing agreement between the two main parties (ODM and PNU)
- A new constitution in 2010, with devolution and stronger division of powers, but returning to a single President and abolishing the Prime Minister's role
- Incumbent President, Mwai Kibaki, not standing (two term limit)
- The 2013 election— one of the “worst of all” scenarios
  - A gladiatorial conflict between two alliances
  - Other candidates faded or were crippled –a predominantly ethno-regional conflict
  - A ‘head to head’ Kikuyu-Luo, repeating the 1960s
  - A Kenyatta versus an Odinga
  - The son of the first President versus the son of the first Vice President
  - One side - “Uhuruto” - indicted by the ICC for war crimes
  - A close contest, with the risk and fear of state abuse real
  - Deep fears of a repeat of 2007-8
- But...
  - the Uhuru-Ruto alliance was holding and offered peace, at a price.



# 2013 Election – Peaceful but Controversial



- 8 candidates
  - but only 3 true players
  - only 2 possible winners
- Huge foreign interest
  - with dominant narratives of corruption, tribal violence, the ICC and election rigging

## • Controversial because:

- Complexity of 6 elections and a new IEBC
- The candidates (Kenyatta and Ruto)
- The procedural mess of polling and counting
- The results - a clear and - to some - surprising win for Jubilee and Uhuru
  - ...but which only just met the threshold for avoiding a second Presidential round
- The delay in releasing the results of the other 5 elections

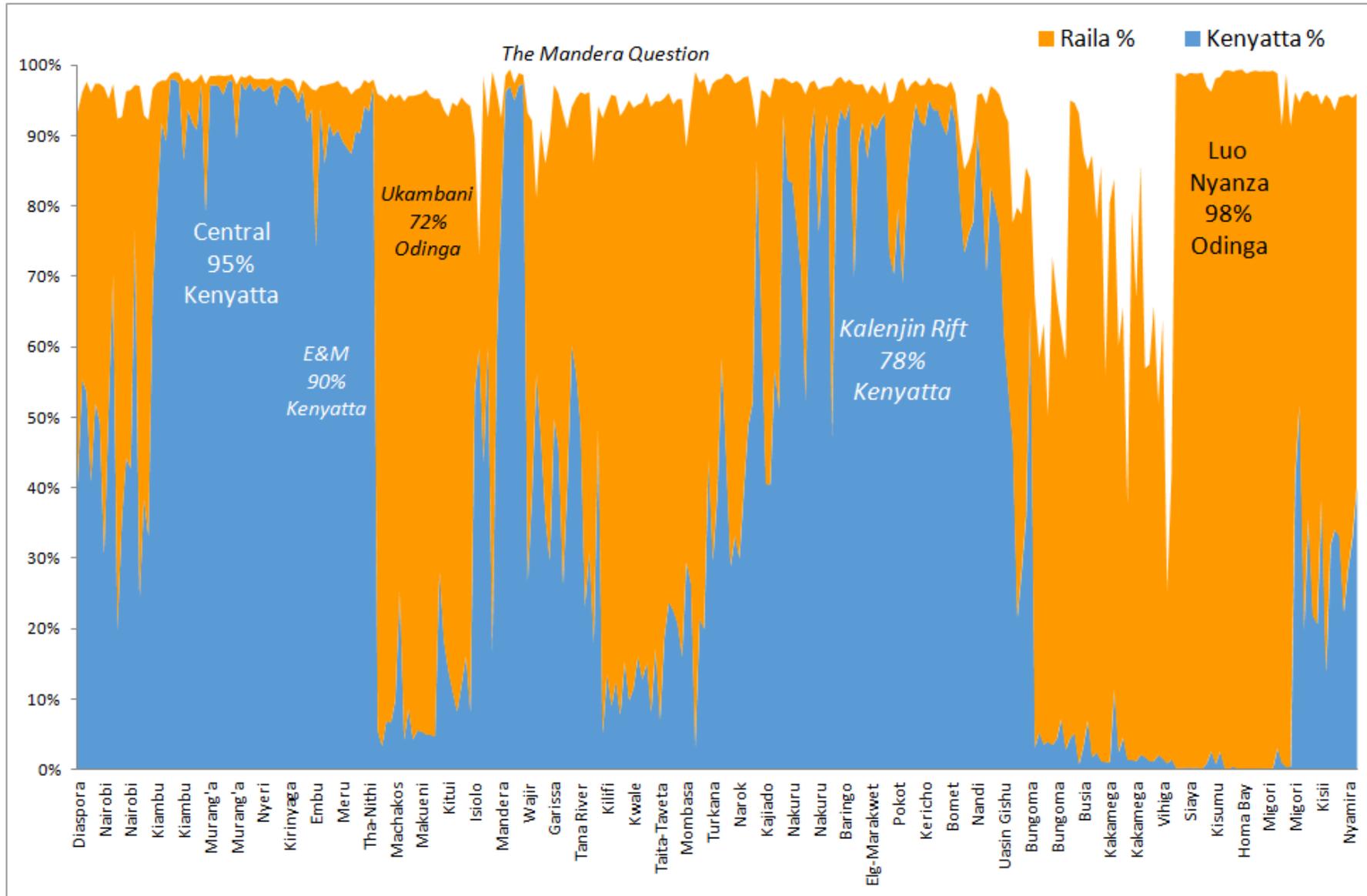
CORD	Luo, Kamba, some Luhya, Mijikenda
Jubilee	Kikuyu, Kalenjin, some pastoralists
Amani	Some Luhya, some Kalenjin

# Election Day and the Count

- Mostly peaceful.
- Turnouts very high
- Electronic register failed over much of the country
- Presidential tallying a disaster
  - Electronic communications systems from polling stations failed progressively
  - Tabulation reports of spoilt votes were massively incorrect (multiplied by 8)
  - Entire system not properly tested and database malfunctioned (plus allegations of potential compromises)
  - Tallying had to be restarted and completed manually
  - No-one had realised the law for “50%+1” was undefined re spoilt ballots
- IEBC CEO recently arrested on corruption-related charges
- Tensions high, many allegations, but commitment everywhere to avoid violence
- CORD /ODM petitioned the Presidential results immediately

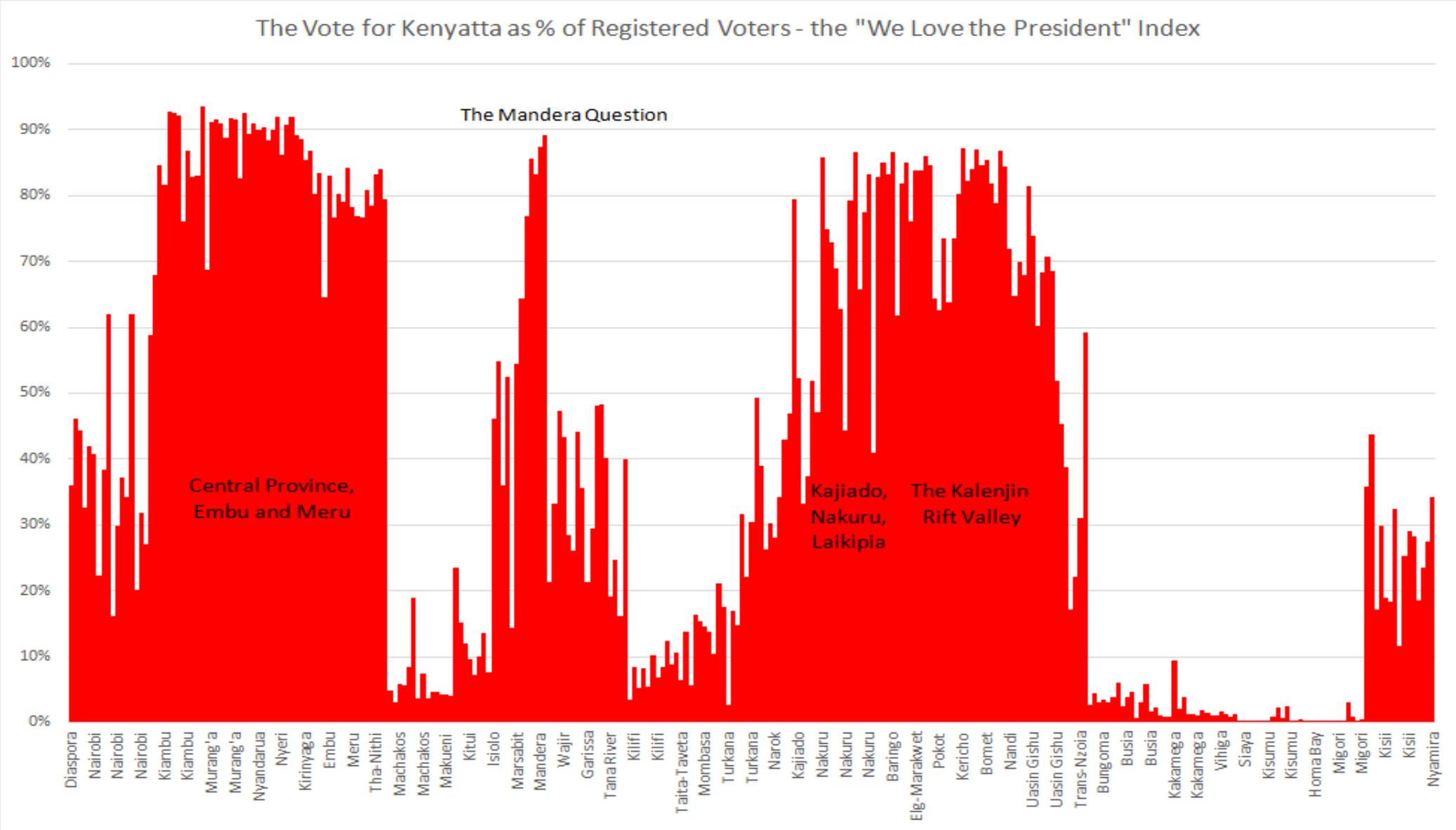


# Presidential Results



- 50%-43% victory for Kenyatta and Ruto
  - Just over the new “50%+1” rule
- Elog observers parallel count confirmed “within margin of error”
- Mostly a “census vote” in Kikuyu, Kalenjin, Luo (Kamba).

# Kenyatta – "We Love the President" Index

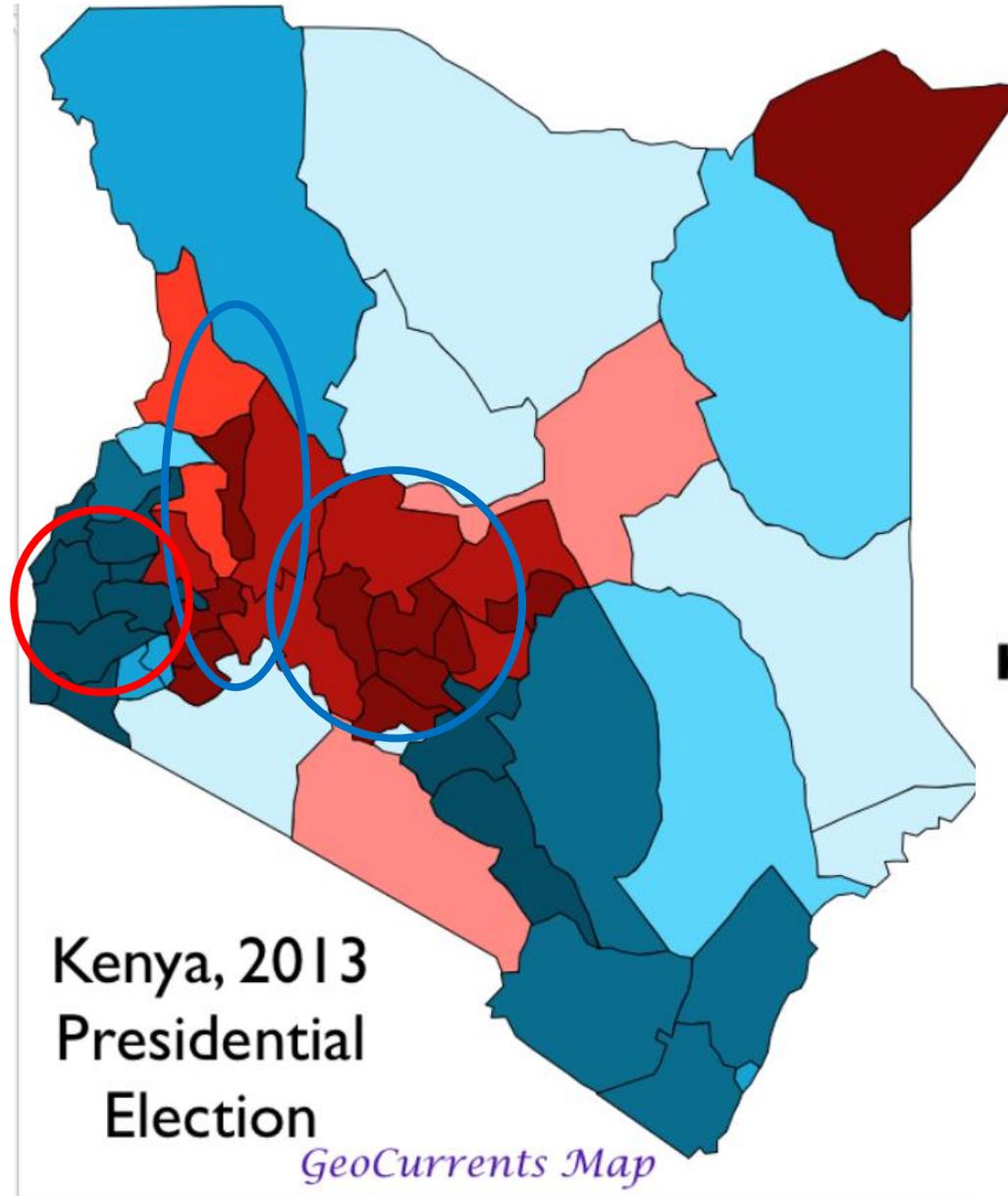




# The ODM Petition

- Unanimously rejected by Supreme Court, 30 March
  - To some surprise
  - Preferred unanimity despite differing views, to send a clear message
- Insufficient solid evidence of rigging
  - Little time to collect it (large supplementary submission ruled time barred)
  - Focus on IT systems a red herring as final tabulation had to be manual
  - Register challenges would have invalidated all elections, not just Presidential.
  - Some evidence of incorrect/odd/badly documented presidential results, but not enough to bring the result into question

# Presidential Results by County, 2013



Ethnicity has been the single most effective predictor of political preference in Kenya, overtaking class, religion, gender, occupation, education and age (though all play a role)

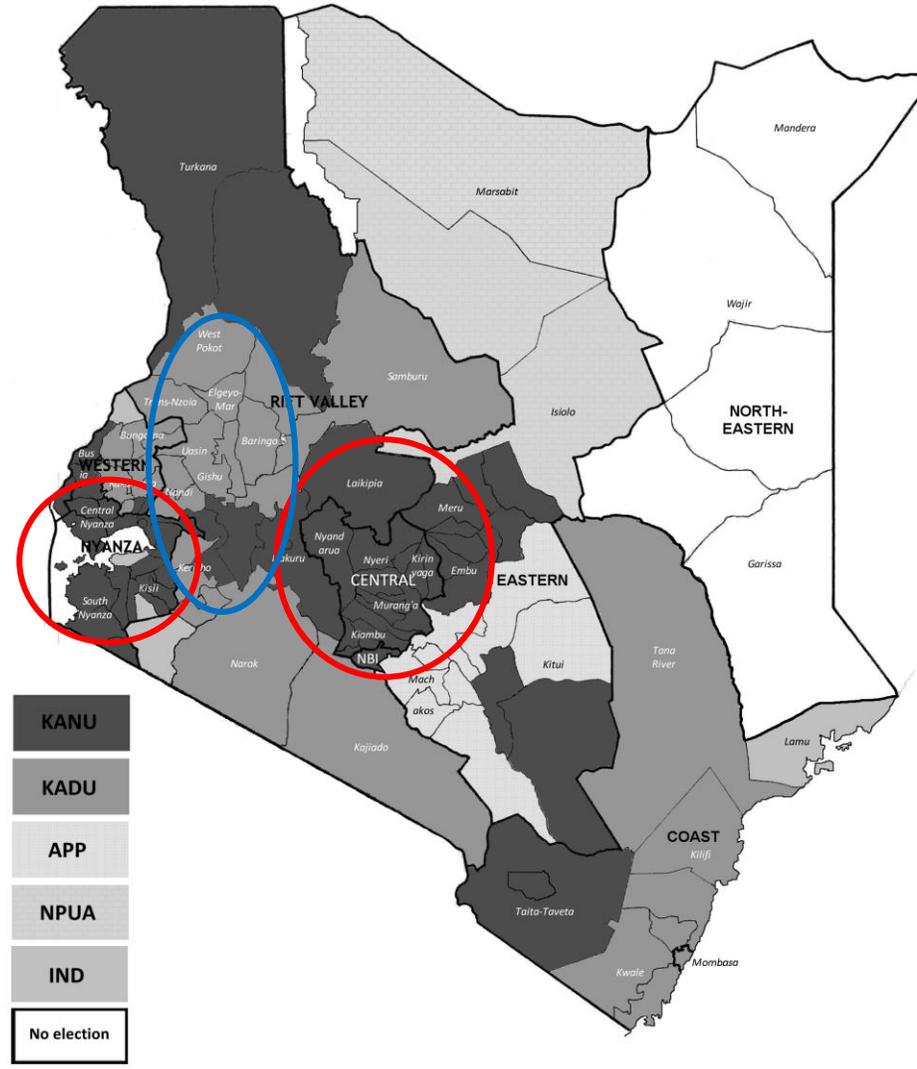
But “intensity of preference” is not equally distributed

Patterns of alliance and competition have evolved, with three core communities (Kikuyu, Luo, Kalenjin) each at the “core” of a shifting alliance

The relative political position of these three communities has driven politics in Kenya since 1960

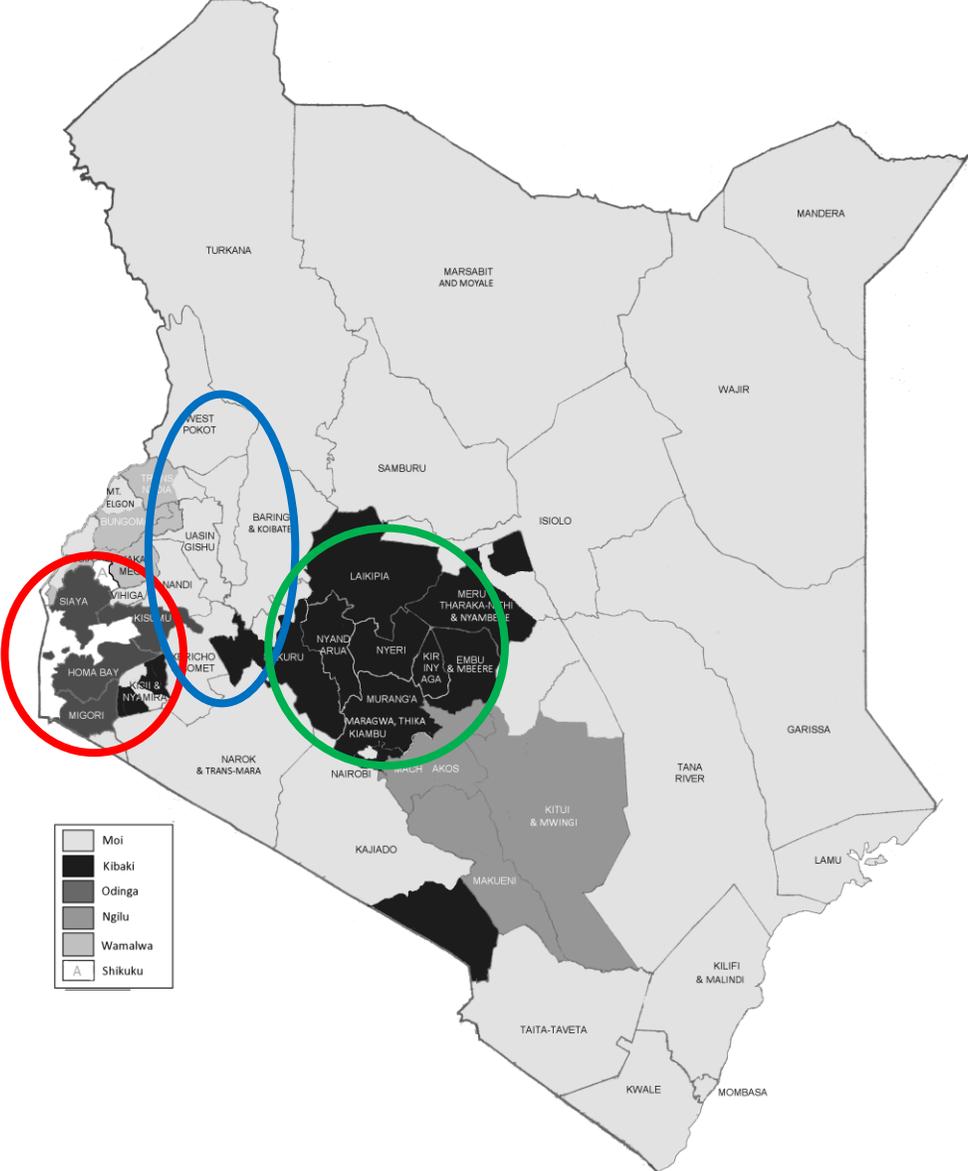
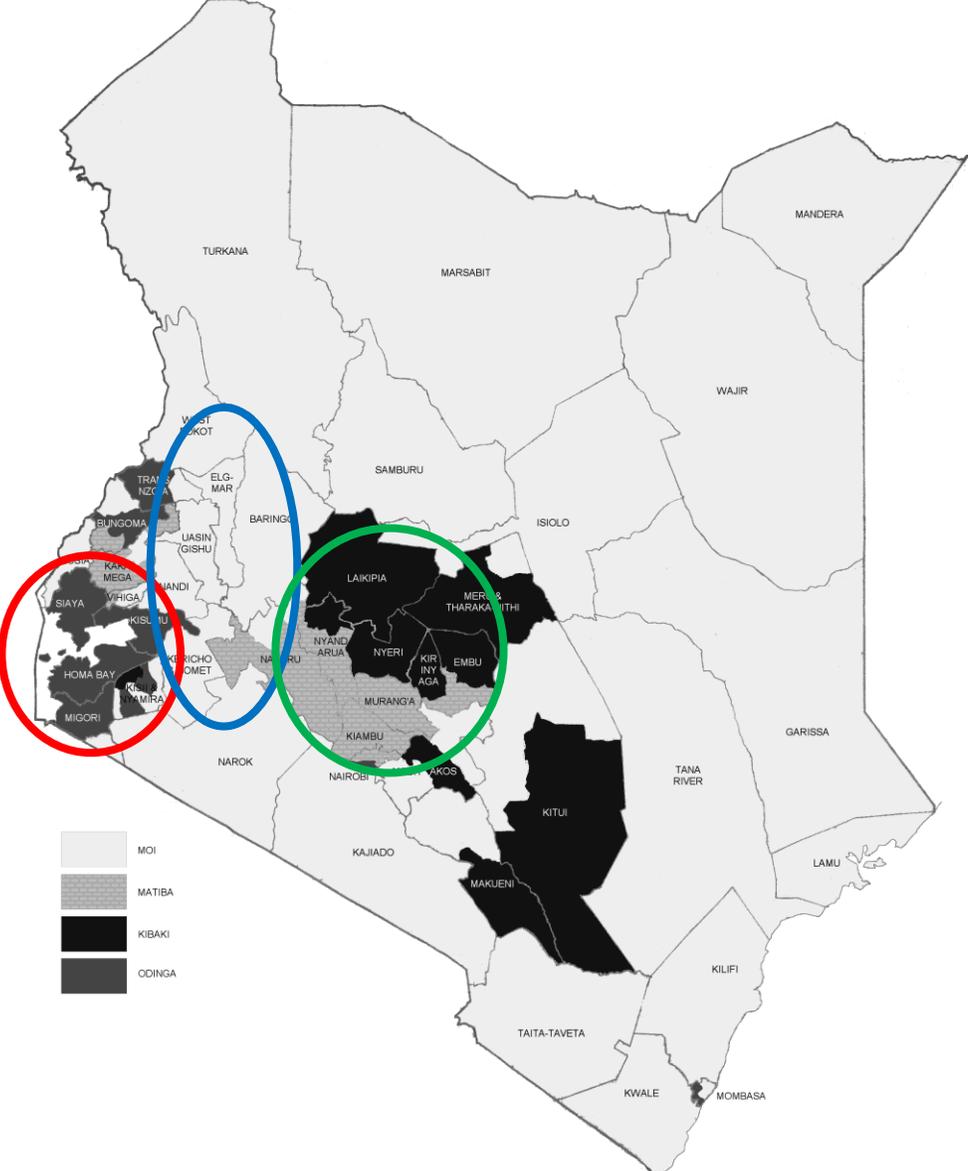
# 1961 and 1963

Kikuyu-Luo (red) alliance (KANU)  
 vs Kalenjin-Coast-some Luhya (KADU)  
 - KANU wins



# 1992 and 1997

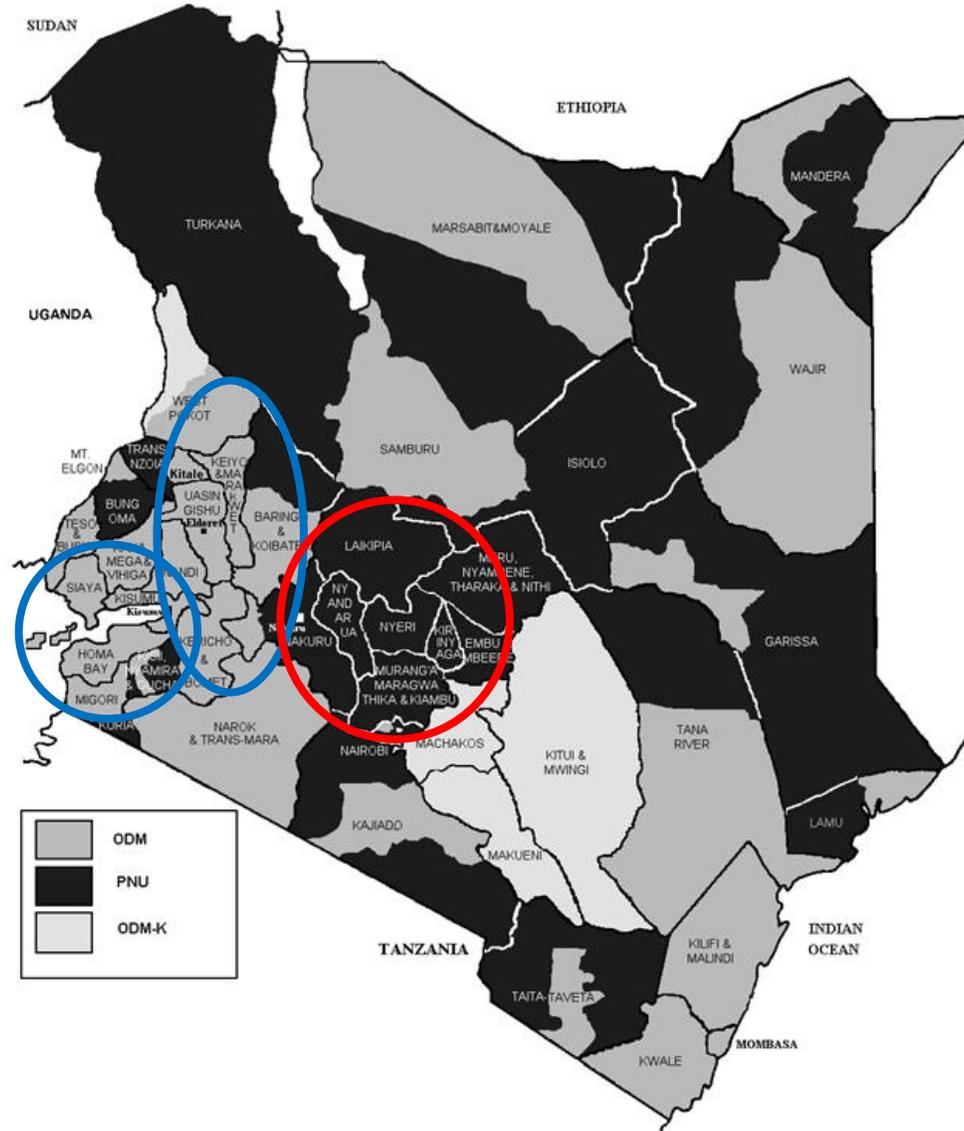
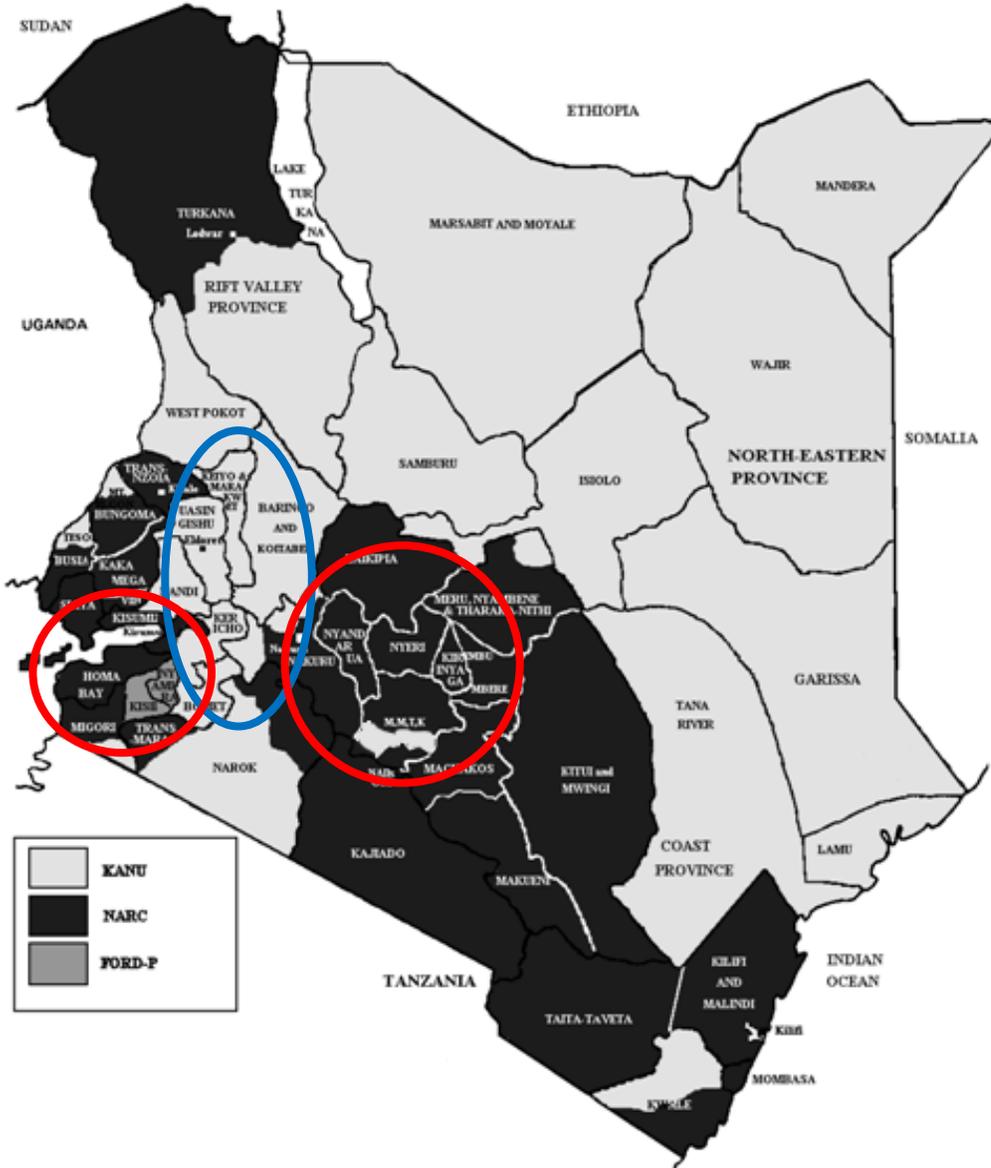
Kikuyu, Kal, Luo each centres of different alliances  
- Incumbent Kalenjin-led govt (KANU) wins



# 2002 and 2007

2002 – (most) Kikuyu, Luo alliance - NARC wins

2007 – Kalenjin-Luo alliance loses (surprisingly)



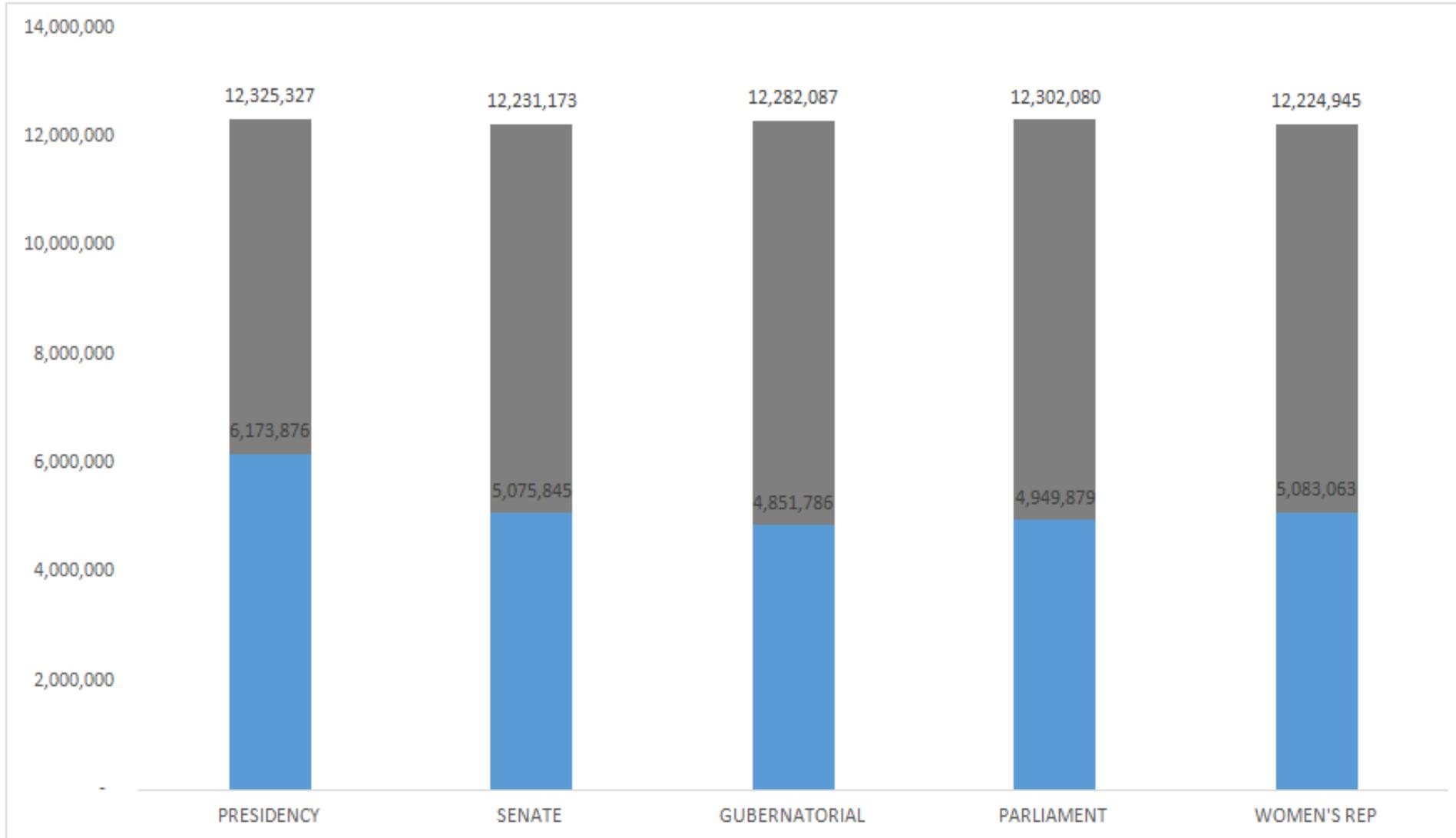
# Official 2013 Results

- Presidential results were published immediately (March 2013)
- Parliamentary, Governor, Senator, Women's Rep and Civic did not emerge for several months
  - Many rumours of integrity problems, linked to ODM protests
  - "1 million votes more for presidency than the other elections"
- When they did emerge
  - Many results had been retallied (not recounted) as many errors found
  - Good match in general between the various elections
  - Overall picture was little contested or criticised

# Do the IEBC's Results make sense ?

- Are the results of the five elections (excluding civic) comparable in:
  - total votes cast
  - Votes cast for the various parties?
- Are there cases where:
  - the “wrong” candidate won,
  - the votes cast for a candidate was very different from that expected regionally?
- Is the turnout reasonable and consistent?
- Given Kenya's long electoral history, including 4 previous multiparty elections since 1992, is there a logical explanation for the results and how they changed from 2007 ?

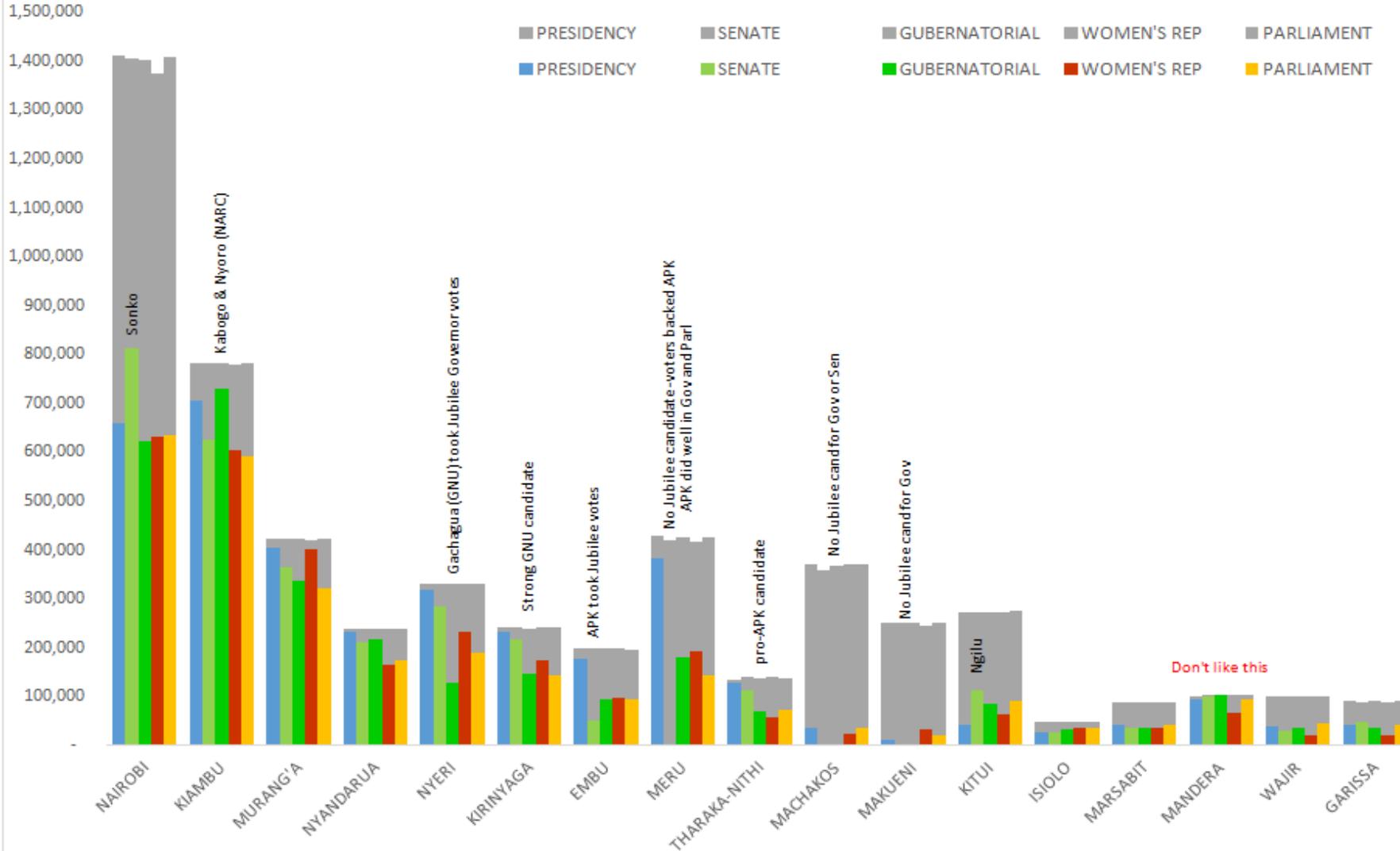
# The Five Official Results –A Comparison



- 100,000 more presidential votes than Senate and Women's rep.
- Parl and Presidential virtually identical.

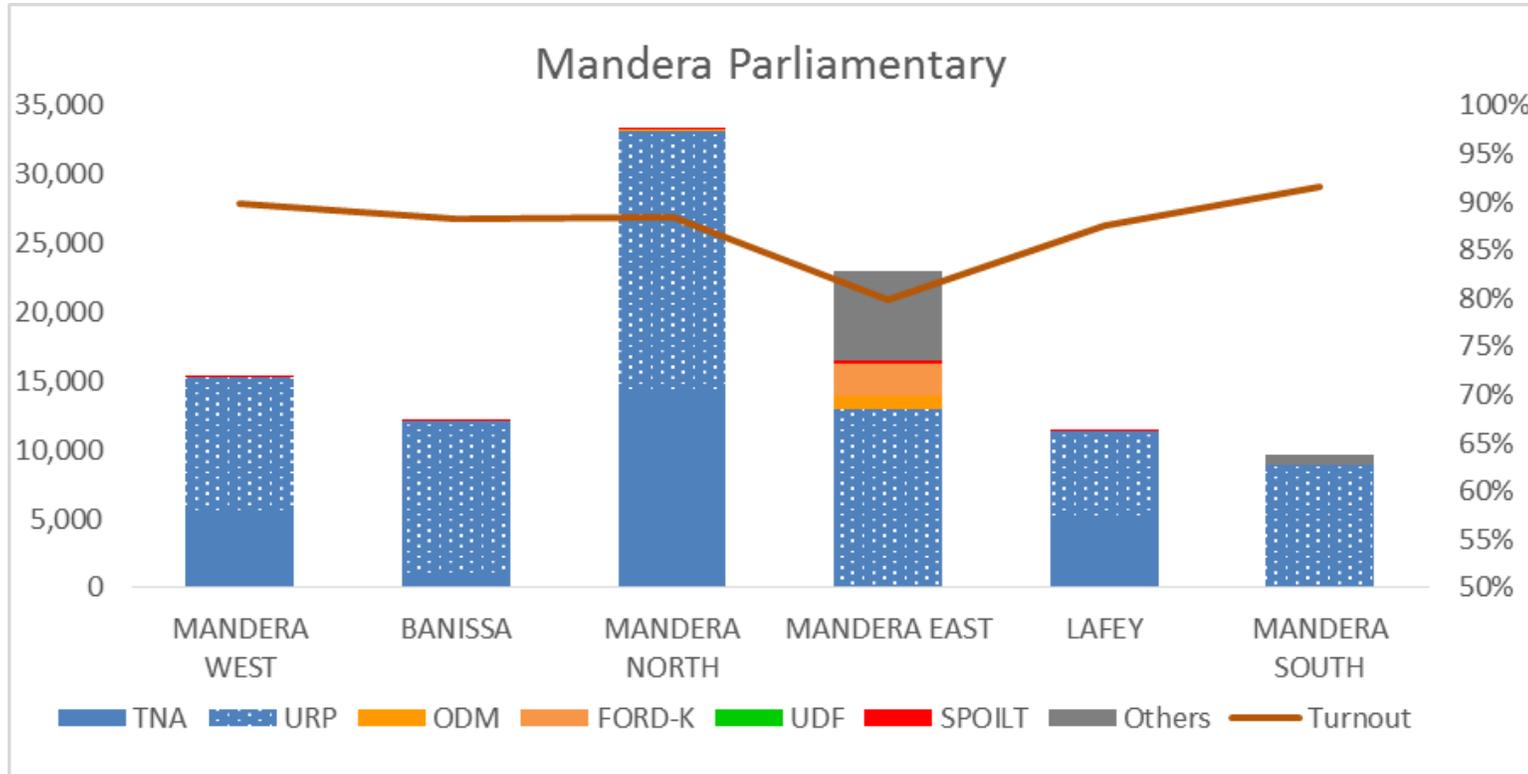
# What do the Official Results tell us ? (1)

Jubilee - Kenyatta vs. Senate vs. Governor vs Women's Rep vs MPs Results [TNA, URP, NARC, RCP] - Nairobi, Central, Eastern, North-Eastern



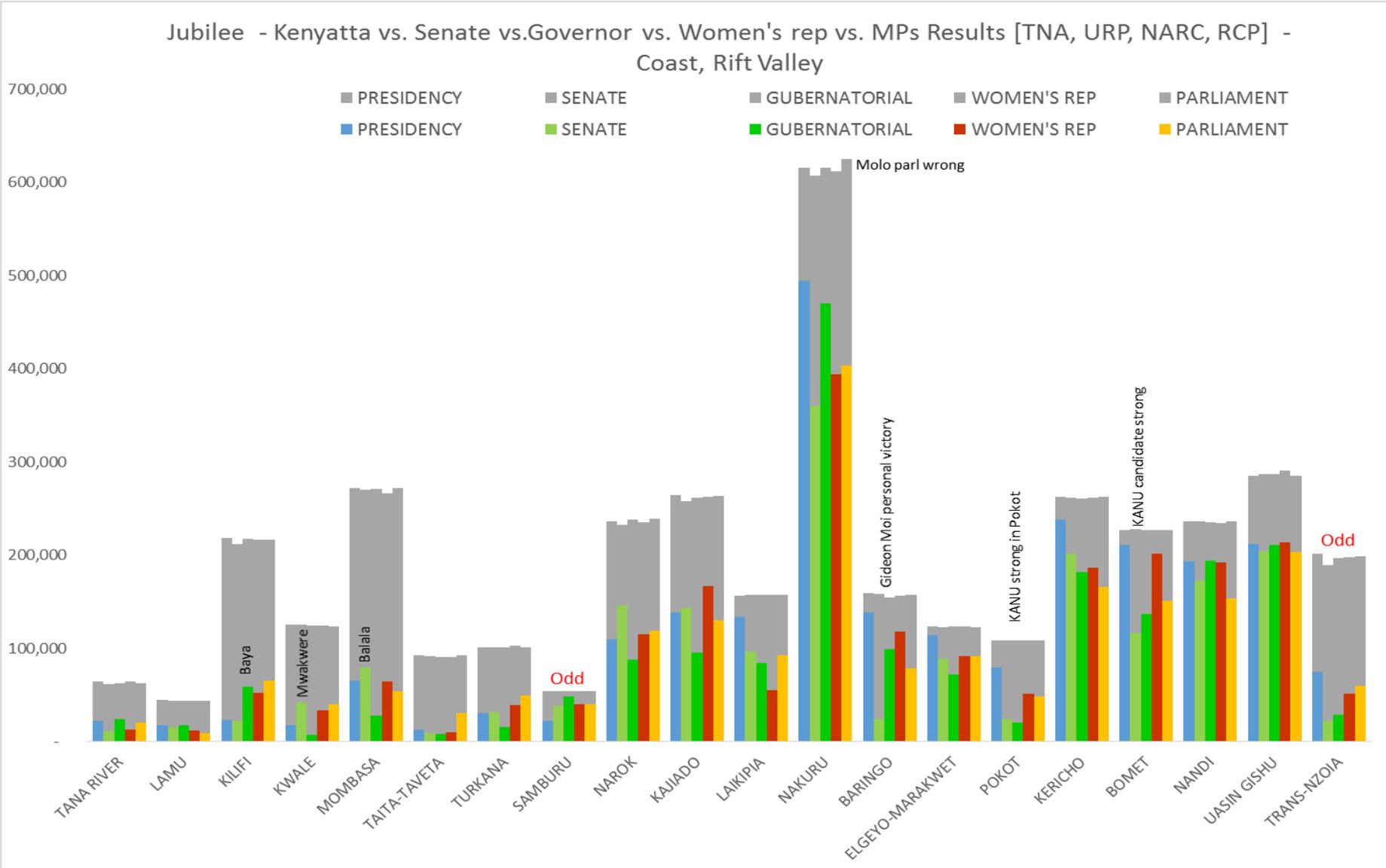
- Kenyatta outperforms his candidates in Central, Embu, Meru (as expected)
- Some small anomalies in total votes cast
- Most results look logical.
- Mandera results look wrong.

# The “Mandera Question”



- Turnouts are astonishingly high for a pastoral region
- All the votes go to Kenyatta (almost)
- They fall 10% in the one constituency with a strong non-Jubilee presence

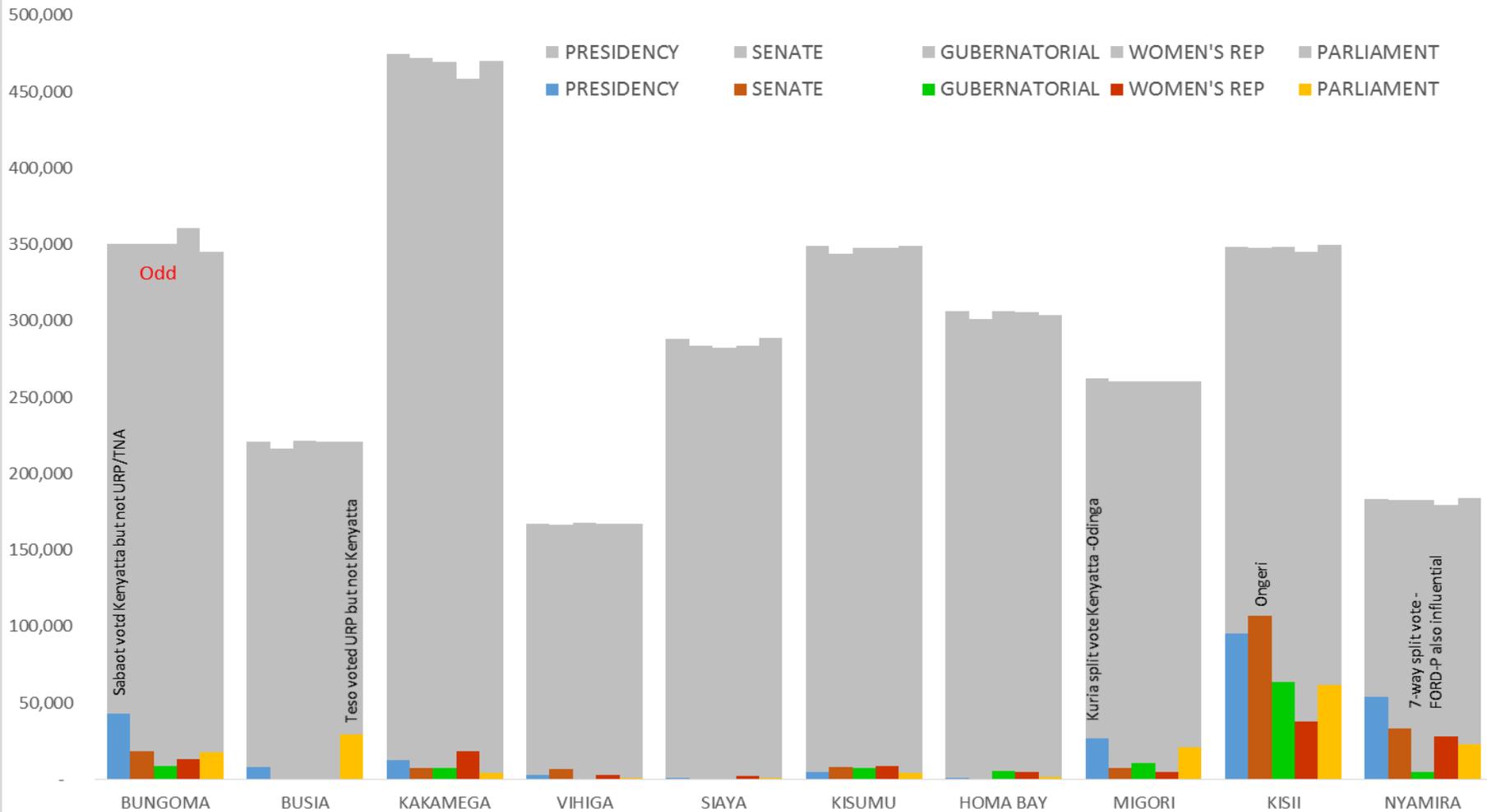
# What do the Official results tell us ? (2)



- Molo Parl result was still wrongly recorded even in the official results
- Trans-Nzoia and Samburu are odd

# What do the Official results tell us ? (3)

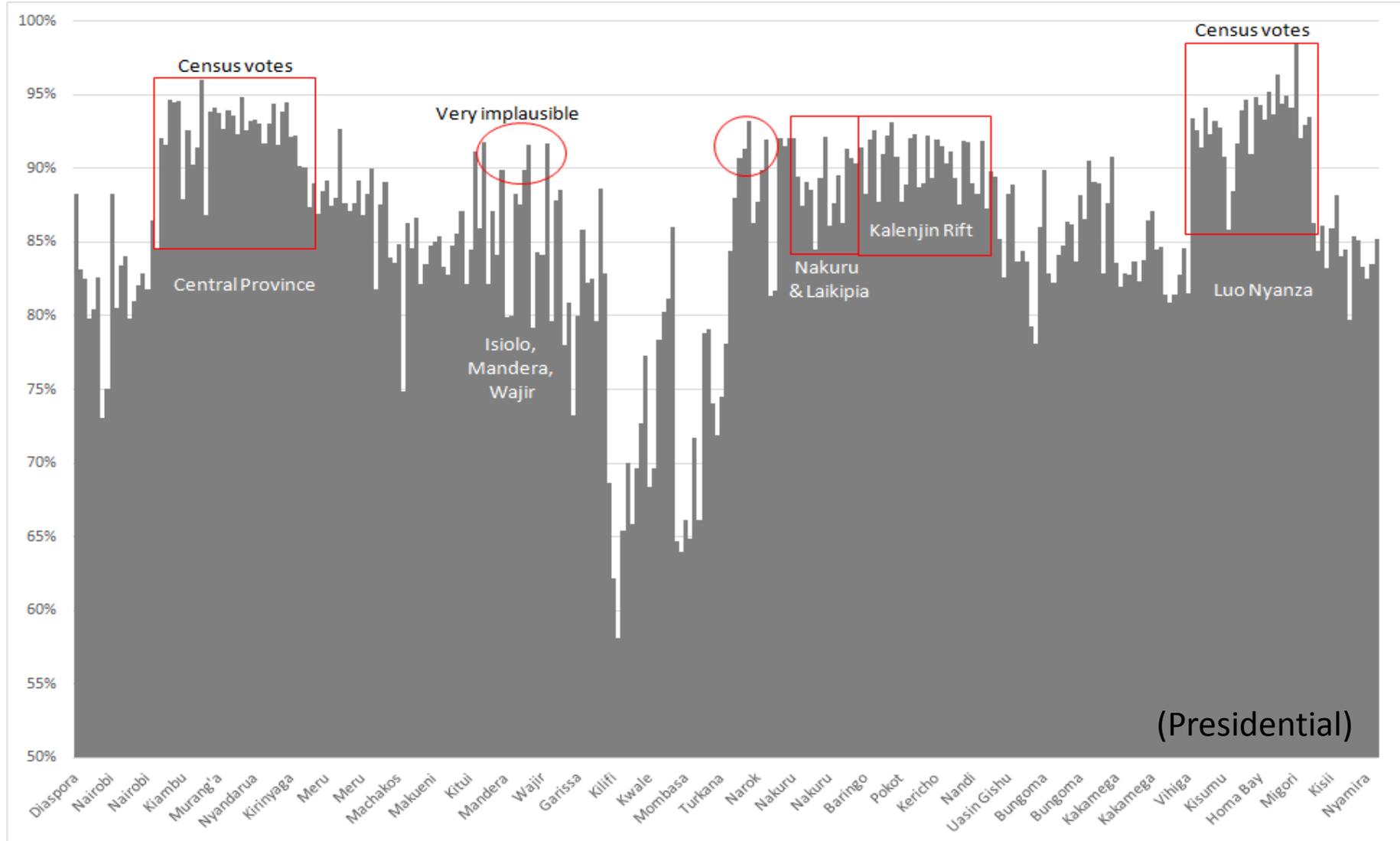
Jubilee Results - Kenyatta-Senate-Governor-Women's Rep- MPs (Western, Nyanza)



- Busia Iteso results surprising

# Turnouts

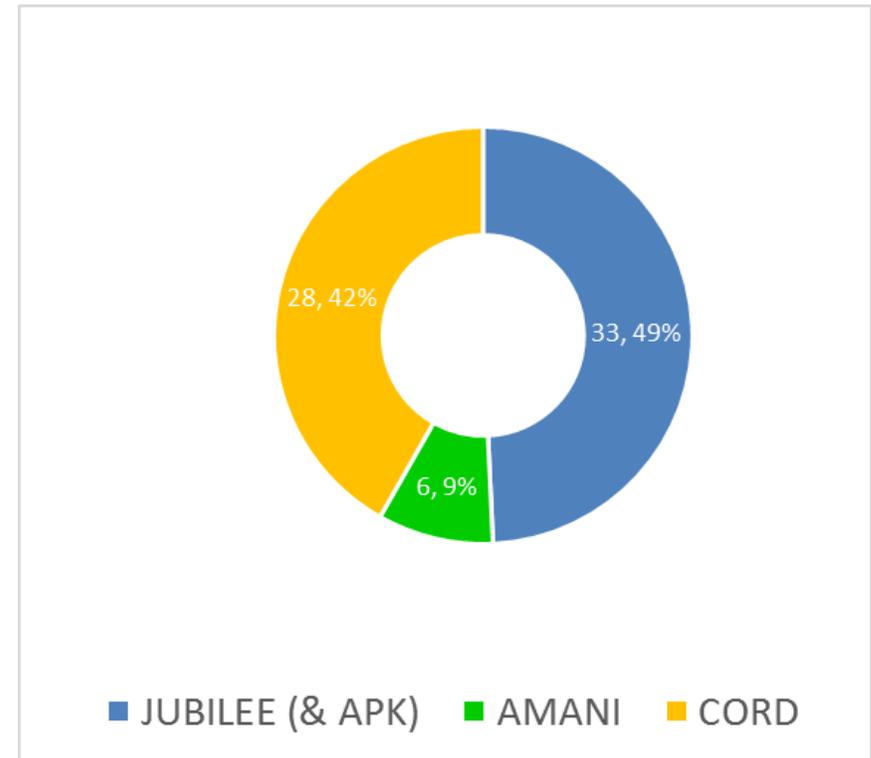
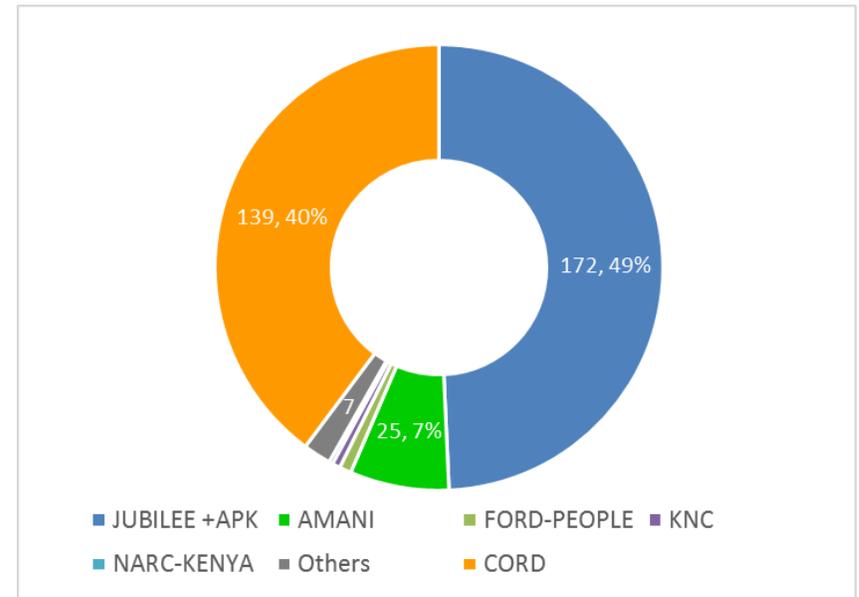
- Were they reasonable ? No



- Register is new, smaller and voluntary
- But mass stuffing in the three homelands and some pastoral seats likely.

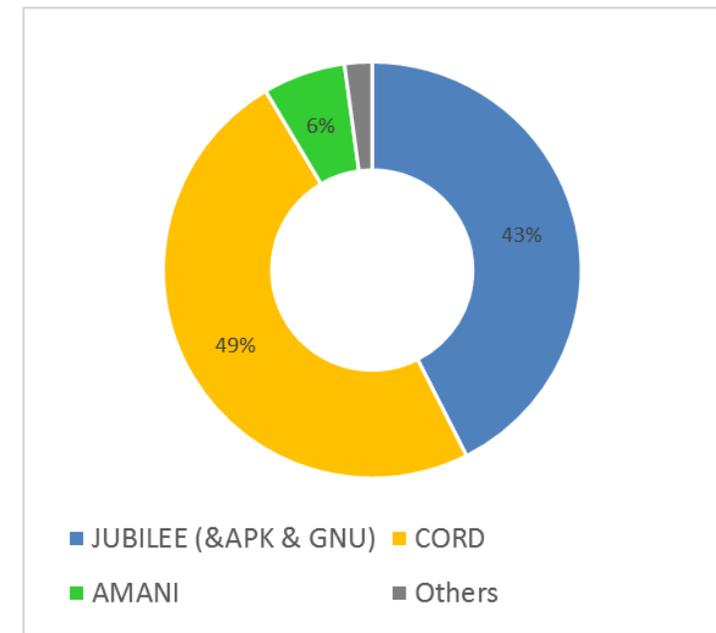
# Parliamentary Results

- National Assembly – no overall majority
  - But Jubilee (49%) has control via alliances
  - Won vote for Speaker 219-129
  - Several seats petitioned but no mass protests
  
- Senate
  - Similar result. No overall majority
  - But Jubilee (49%) won Speaker vote 38-29
  - (KANU, UDF, others voted with Jubilee)



# Kenya's 47 Governors

- Mostly followed the ticket vote pattern, but exceptions
  - Nairobi – Kidero (ODM) bucked mostly pro-TNA trend
  - Kajiado URP in Senate, ODM for Governor.
  - Garissa TNA for Senate, Wiper for Governor
  - Kakamega UDF for Senator, ODM for Governor
  - Bungoma CORD for Senator, Amani (new Ford-K) for Governor
  - Lamu TNA Senator UDF for Governor
  - Baringo KANU (Moi) for Senator, URP for Governor
- Slightly more pro-CORD (logical, as CORD was a more vocal and consistent supporter of devolution)
- Mix of professionals, civil servants, ex-MPs
- All men



# Were the Official Results Manipulated ?

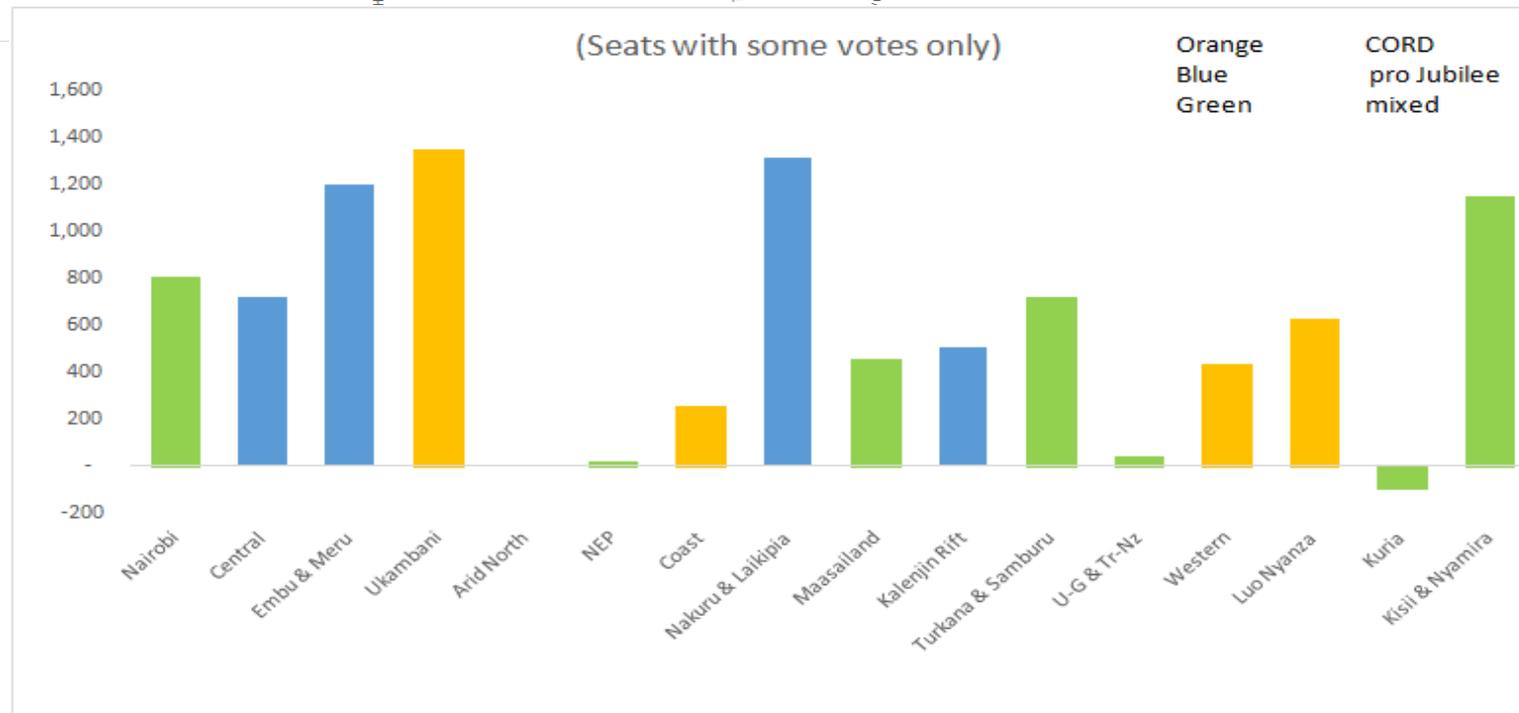
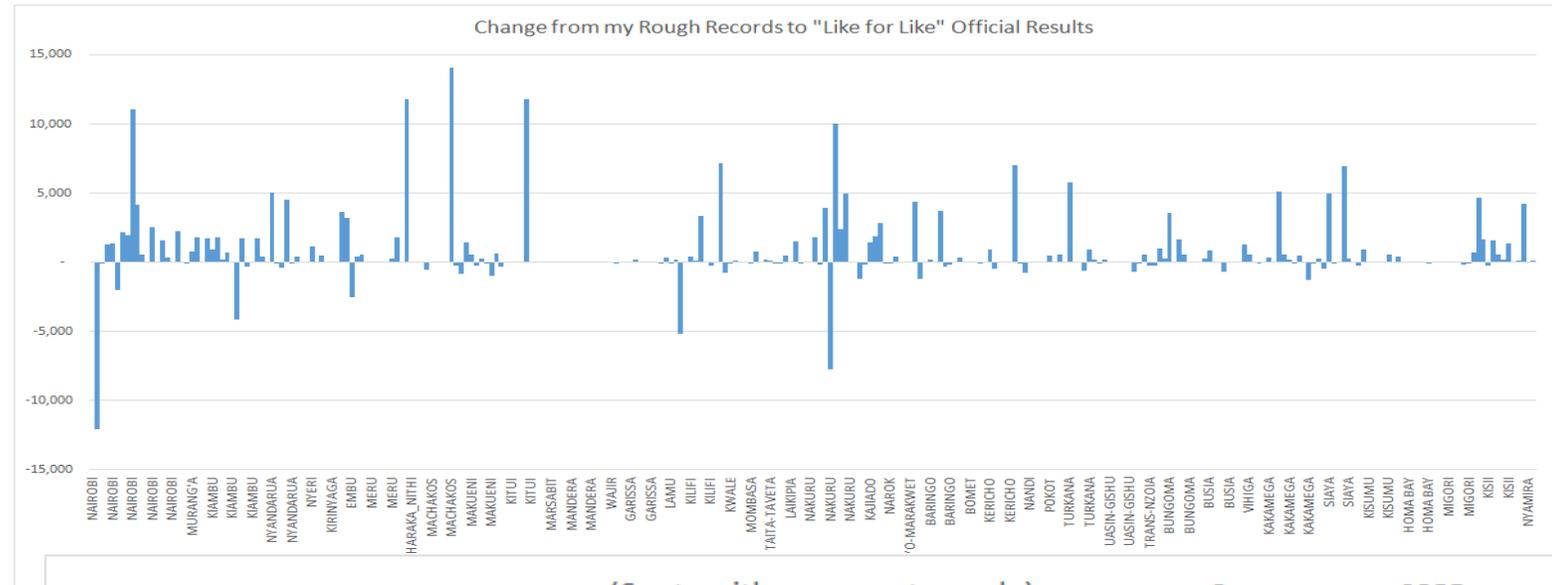
- Would take large-scale, consensual fraud across IEBC (and courts)
- Frequently alleged, but no-one seems to have produced an analysis supporting it
- My approach – compare press reports on the day versus final figures
  - Focus on Parliament, because the hardest to “tweak”
  - But data inevitably incomplete
  - Needs manipulation to create comparable results (remove missing candidates, spoilt votes etc)
- Conclusions
  - Some concerns, but no smoking gun. If it was done, it was subtle and sophisticated
  - Results are clearly wrong in some places
  - Petitions confirm basic arithmetic incompetence under pressure (lesson of 2007)
  - IEBC retallying changed majority of results
  - Most changes are trivial or obviously correct (i.e. media misrecording)

# Were Parliamentary results post-hoc adjusted ?

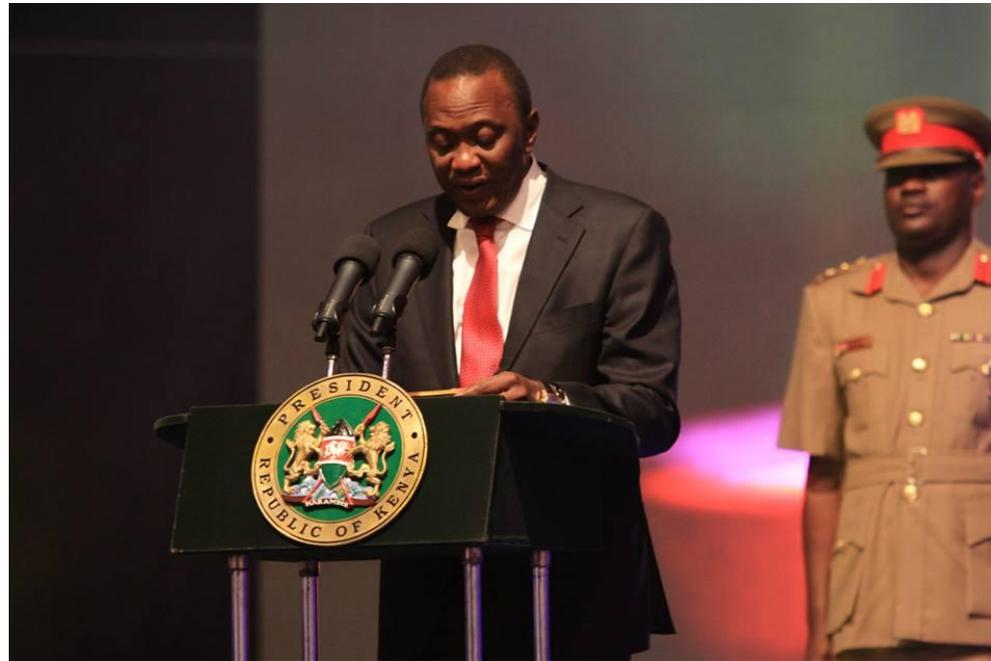
No obvious sign that they were ...yet  
But retallying almost always up

## Example of Methodology

County	Constituency	My Rough Total	Official Like for Like (excl spoil)	Adjustments for missing candidates in original	Net Official
NAIROBI	STAREHE	108,490	108,490	0	-
NAIROBI	MATHARE	66,232	68,593	-14415	12,054
NAIROBI	RUARAKA	71,797	71,747	0	50
NAIROBI	EMBAKASI NORTH	64,199	65,515	0	1,316
NAIROBI	EMBAKASI CENTRAL	57,791	83,682	-24500	1,391
NAIROBI	EMBAKASI EAST	71,853	78,517	-8705	2,041
NAIROBI	EMBAKASI WEST	75,991	84,220	-6022	2,207
NAIROBI	EMBAKASI SOUTH	76,108	78,059	0	1,951
NAIROBI	ROYSAMBU	82,387	93,463	0	11,076
NAIROBI	KASARANI	86,324	90,482	0	4,158
NAIROBI	MAKADARA	87,083	87,618	0	535
NAIROBI	KAMUKUNJI	71,127	71,127	0	-
NAIROBI	KIBRA	73,465	75,973	0	2,508
NAIROBI	LANGATA		78,208		
NAIROBI	WESTLANDS	95,638	97,246	0	1,608
NAIROBI	DAGORETTI NORTH	77,298	85,541	-7907	336
NAIROBI	DAGORETTI SOUTH	75,311	75,311	0	-
MURANG'A	KIHARU	80,874	83,104	0	2,230
MURANG'A	KANGEMA	36,873	36,873	0	-
MURANG'A	MATHIOYA	39,608	40,598	-991	1
MURANG'A	MARAGWA	62,512	63,270	0	758
MURANG'A	KIGUMO	55,330	57,144	0	1,814
MURANG'A	KANDARA	68,074	72,186	-4097	15
MURANG'A	GATANGA	66,598	68,321	0	1,723



# The Post-Election Picture



# Four Key Themes of The First 8 Months

- Continuing Political Conflict
- The ICC
- Devolution
- The Business of Government

# The Struggle Continues - Election Petitions

- A heavy burden on judiciary
- But a commitment to clear in six months, unlike 2007, when some were still unheard 5 years later
- 116 petitions (Excluding Presidency and county wards)

Election	CORD	JUBILEE	NEW FORD-K	UDF	IND	GNU	FORD-PEOPLE	JUBILEE & CORD	APK	KANU	KNC	KADU-ASILI	Grand Total
GOVERNOR	15	4		2		2			1				24
MP	31	23	5	4	2		2			1	1	1	70
SENATOR	6	4											10
WOMEN	5	2	2										9
SENATE NOMINATION	1	1						1					3
Total	58	34	7	6	2	2	2	1	1	1	1	1	116

- 26% of all elections challenged. 32% of CORD victories challenged, 17% of Jubilee
- Most were dismissed by courts (8 dismissals still being appealed mid-Oct)
- Only 9 nullified or reversed
- CORD suffered the most results

## Election Nullifications (excluding petitions versus Senate nominations)

CORD	5 (9% of petitions successful)
Jubilee	1 (3%)
FORD-P	1
Ind	1
UDF	1

# Political Divisions remain Deep

- The CORD-Jubilee division remains deep and ethnicised.
- Pro-ODM communities (Luo, Kamba, Mijikenda) are angry and frustrated and convinced they were robbed of victory somehow.
- Odinga did not retire gracefully despite third defeat, but continues to glower from the sidelines

# Oranges are not the only Fruit

- Odinga, Musyoka, Mudavadi are jobless –not sustainable
- Smaller parties immediately pledged to back Jubilee
  - Amani coalition of UDF, KANU and New Ford-Kenya
  - APK, Ford People (expected)
  - Peoples Democratic Party, Muungano and Chama Cha Uzalendo from CORD (cynically)
- Signs of wavering in CORD
  - “Our region cannot afford to be in the Opposition for too long” (Kiilu)
  - Defections loom (Nkaissery of Kajiado); Kidero working with Jubilee in Nairobi
  - MPs searching for scapegoats and accusing own leaders of secretly supporting Jubilee
  - Claiming marginalisation of Nyanza
- But
  - CORD has won back every seat in 4 by-elections and Increased its share of vote in each
  - Mudavadi’s support for Jubilee is dividing UDF (some closer to CORD)



# The ICC

- Government doing **everything in its power** to protect the President (and Deputy President)
  - **Diplomatically**
    - ICC withdrawal and AU withdrawal campaign;
    - UN Security Council request to defer;
    - Westgate security argument
  - **Legally**
    - Ruto's case under way, but Kenyatta's already delayed 4 months
    - allegations of prosecution witness interference
  - **A PR blitz**
    - Move forward, "forgive and forget"
    - "MPs called for the prosecution of any witness who has appeared before the court and given false information against Uhuru, Deputy President William Ruto and journalist Joshua arap Sang"
    - ICC "a toy, a plaything of declining imperialist powers" [Uhuru]
  - **Extra-judicially**
    - killing of Mungiki and witness protection concerns;
    - documented bribery attempts and GoK protection for alleged bribers
- Dominating the agenda, diverting resources from productive activity

# ICC - Implications

- Whether they are guilty or innocent is becoming lost in the noise
  - Ruto's case depends on showing **causality and intent** to link him to the Kalenjin mass killings of Kikuyu.
  - Kenyatta's depends on whether he ordered Mungiki "self-defence" attacks in Nakuru and Naivasha Rumours are that he did, under community pressure (but the evidence is from western intelligence sources – is it admissible?).
  - This is one of the reasons why he became so popular with the Gikuyu after 2008
- Culture of impunity will continue - Kenyatta will not "go to the Hague" under any circumstances
- Govt is not focussing on the business of government
- Relations with Western countries difficult
  - Western politicians conflicted - many
    - Are sympathetic to the "head of state problem",
    - Recognise Kenya's security importance (realpolitik),
    - Are sceptical of the ICC
  - But
    - ICC is independent of political interference (in principle)
    - Politically difficult to support those accused of mass killings
- China is not so fussy

# Devolution

- A huge raft of political, administrative and fiscal problems
- Jubilee
  - perceived to be ambivalent on devolution
  - But national mood strongly in favour (so far) and Jubilee is publicly committed
- Ministries being restructured and rationalised
- Some services and entities devolved.
- 'Centre' versus County Governments is the main line of tension
- URP Governor Isaac Ruto had led attack as Chairman of Governors Council

# County Government–Main Fault Lines

## 1. Transfer of Functions

- Under way but situation confused. Which parastatals and services are moving not clear (to me)
- Some entities (e.g. Rural Road authority) should move to counties but haven't
- Access to funding for those which have moved unclear

## 2. Money

- Counties are spending beyond their means (salaries, cars, offices, houses) . Governors are “running the counties as if they were personal property” (Ephraim Maina)
- Only 8 counties have provided balanced budgets, 39 have not (Nov 2013). Will automatically forfeit some funds.
- Duplicating functions between centre and county
- Counties creating competing services rather than sharing (e.g. each having own local contractors for local works) and competing for foreign aid and investment
- Calls for referendum to increase budget for devolved govts from 15% to 40%

## 3. Role of provincial administration

- To be abolished eventually, but being restructured. A power struggle

## 4. Institutionalising Tribalism

- Counties choosing preferred contractors by ethnicity
- Allegations of discrimination against outsiders and minorities beginning (e.g. In Marsabit–alleged “discrimination and intimidation in the provision of services and equal opportunities in development”)...Balkanisation
- Campaign against one man one vote - “tyranny of numbers”.

# Other Issues with Division of Powers...

- Senate versus House
  - Arguments over roles and powers e.g. revenue allocation
  - Senate already coming under pressure
- Parliament versus Executive
  - Vetting producing tensions, though mostly Parliament works with Presidency
  - Ministers aren't present and have to operate through Parliamentary Committees.
  - Ngilu case
- Commissions versus Ministries
  - National land Commission versus Ministry of lands
  - Who has authority to issue title deeds?

# Staffing the New Government

- Kenyatta-Ruto alliances remains strong and deep
  - Ruto is fully consulted and makes key decisions (so far...)
- Ministers (now Cabinet Secretaries)
  - Appointments generally well received
  - Mostly “non-political” as hoped
  - Gender balance good
  - Ethnic balance not so good.
  - Balala and Ngilu (the defeated principals in Jubilee) had a parachute but no others
  - Parliamentary Vetting worked but process slow
  - Cabinet didn’t meet until early June
- Permanent (now Principal) Secretaries, Members of Commissions also appointed and vetted by parliament



# The Business of Government

- Finances remains stable –inflation and exchange rate under control
  - No “post-election crash”
  - Economic growth robust and domestic demand strong (4.3% or so since 2010) but
- Central Government Finances
  - Very unclear
  - New structures proving expensive and seems K is short of cash
  - Risk of double taxation to support competing functions
  - Too many well paid politicians, judges, commissions (out of control ?)
  - VAT on milk and other processed products –controversial.
- Delivering on promises
  - Free maternity services introduced for mothers
  - Lots of title deeds being issues at the coast (including Kikuyu IDPs?)
  - “Laptops for every child” delayed
- Infrastructure Investments
  - Kibaki-Raila era work continues
  - LAPSSET (peak of interest 2012)- status ?
  - Planning reconstruction of railways on standard gauge.

# Services and Development

- A potential oil boom
  - A new, major source of state revenue
- But the resource curse is a real threat
  - Balance of payments (“Dutch disease”)
  - Located in some of the poorest and most marginalised regions – likely to trigger conflict
  - Already tensions with Turkana over jobs and CSR investments
  - The theft and access problems (Nigeria)
- Resource nationalism a real issue
  - Oil and water in Turkana
  - Mining licenses in Kwale
  - Land everywhere



# So, the Government faces real challenges

- No honeymoon
- Slow to get started because of petition, then parliamentary vetting
- **Finances**
- **Devolution**
- Domestic support **polarised**
- Foreign relations and **ICC**
- **Security** - Al Shabaab and the war in Somalia
  - Attacks inside Kenya (Mandera)
  - Westgate and police follow-up and harassment of Somali
  - Killing of cleric in Mombasa
- **TJRC** Report inconvenient - Implementation mandated to begin within 6 months
- **Unrest** - Teachers' strike
- **Corruption** -remains a potent issue –Ksh 300 billion allegedly unaccounted for in 2012

# It appears brittle and aggressive in response

- Playing nationalist cards
  - Press freedom (Kenya Information & Communication Bill)
  - Security monitoring of calls
  - NGOs – foreign funding cannot exceed 15%
  - ICC defence
  - Delays in issuing work permits to expatriates
- Spinning heavily
  - Strong culture of personality
  - PR against governors and country government
  - Disputes over Odinga and his inconvenient continued role
  - “Pictures of matching ties and laughing buffoons coupled with lurid tales of political bogeymen” {Betty Njoroge}
- A difficult few months to follow; ICC and devolution must be resolved somehow to “deblock” other initiatives

Thank you