

# THE SCORECARD REPORT



## IMPLEMENTATION OF THE TWO-THIRD GENDER PRINCIPLE 2013 – 2017

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## Foreword

In promulgating a new Constitution on August 27<sup>th</sup> 2010, the people of Kenya committed to themselves and future generations the desire for a country that values all its citizens and that is free from every form of discrimination in law, practice and conduct. Specifically, the National Values and Principles of Governance enshrined in Article 10 captures the essence of that commitment by recognizing human dignity as a core value. Further, the Bill of Rights in Article 27 enshrines the right to equal treatment and equal opportunities and prohibits discrimination on any grounds. Article 27 (8) sets a minimum threshold for the country to begin its journey towards a more equitable Kenya by requiring that in all elective and appointive positions, there cannot be more than two-thirds of the same gender. It also requires the state in Article 27 (6) to be proactive in redressing the marginalization of persons and groups by putting in place legislation, policies and programs; including affirmative action programs so as to assure equal opportunity, access and benefit.

The right to equal opportunity and equal treatment is fundamental to securing human dignity which is the foundation for the enjoyment of all other rights guaranteed in the constitution. Gender equality and the empowerment of women is a crucial imperative for the development of the country.

This report looks into the implementation of the not more than two thirds gender principle by duty bearers in appointments as wells as in putting in place the required legislations and policies to ensure the actualization of the constitutional provision.

**Daisy Amdany**

**Executive Director-CRAWN TRUST**

## PERFORMANCE OF DUTY BEARERS ON THE IMPLEMENTATION OF THE TWO-THIRD GENDER PRINCIPLE

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### About CRAWN TRUST

Community Advocacy and Awareness (CRAWN) Trust is a Non-Profit Organization registered as a trust in May 2010. CRAWN's vision is a democratic society, founded on informed people, thereby promoting peaceful and cohesive coexistence that respects diversities where citizens enjoy their full human rights and where justice for all is upheld. CRAWN also works to build the capacity of women to participate in decision-making at all levels, to influence policies from a gender perspective and to address inequalities and injustices in social, political and economic sphere in Kenya. Our objectives include among others engaging with existing local level leadership in marginalized areas to address community concerns while encouraging the emergence of leaders amongst women and the youth at all levels of engagement as well as networking with like-minded organizations in information dissemination and advocating for justice and access to basic services. CRAWN Trust hosts the National Women Steering Committee (NWSC) which is a consortium of over 100 Non-governmental organizations spread across the 47 counties that unite in advocating for women advancement in political, social and economic sphere.

## Background

The inclusion of women in positions of elective leadership, general governance and decision making and in relevant spheres of public service is a critical issue. It is important to note that gendered marginalization, as is the case with other multiple exclusions from access to resources or positions of influence, is inextricably linked to lack of representation at the points of determination of access to and use of the resources or positions of influence.<sup>1</sup> To remedy the situation as is, among many other things, there is need to recalibrate our policies, legal instruments and deal with political representation.<sup>2</sup> The Constitution of Kenya 2010 tries to remedy this by requiring that the *State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*<sup>3</sup> This provision is backed up by many other constitutional principles which require compliance with the rule.<sup>4</sup> This paper seeks to do a brief analysis of how we have fared as a country in terms of compliance, the challenges and possible suggestions going forward.

## Current State of Compliance

### a) Policy Institutional and Legal

The Constitution of Kenya 2010 is a milestone in the progress towards a gender inclusive society because of the robust and explicit provisions that require at least a third of one gender to take up elected and appointive positions. Consequently, the question that ought to follow is whether new laws and policies undergirding the process of appointment and election are conducive and

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<sup>1</sup> Patricia Kameri-Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses*, Inaugural Lecture, University of Nairobi, 24 January 2013 available at <http://www.ielrc.org/content/w1301.pdf> accessed on 22/3/2017

<sup>2</sup> Politics is the arena of decision making and is the very Centre of the medicine that we require to treat gender exclusions. As it stands, political parties in Kenya are overtly male dominated in ringing consonance with why politics and parties have come to be termed citadels of male dominance. See M Kimmel, *Misframing Men: The Politics of Contemporary Masculinities*, Rutgers University Press, New Brunswick, New Jersey and London (2010)

<sup>3</sup> See Article 27(8). This is merely but one of the manifold provisions that speak to the need to ensure that there is representation by persons of both genders in governance (both in elective and appointive positions)

<sup>4</sup> These include equality and freedom from discrimination, Affirmative action, Public participation in governance, equity, inclusiveness and sustainable development; for the latter see Melissa Leach, Lyla Mehta and Preetha Prabhakaran, *Gender Equality and Sustainable Development: A Pathways Approach* (UN Women Discussion Papers Series, UN Entity on Gender Equality and the Empowerment of Women, 2016) - See more at: <http://www.unwomen.org/en/digital-library/publications/2016/8/discussion-paper-series-gender-equality-and-sustainable-development#sthash.SLOiFf7X.dpuf> See also Kariuki Muigua, *Attaining Gender Equity for Inclusive Development in Kenya*(May 2015) available at [http://www.kmco.co.ke/attachments/article/155/Attaining Gender Equity for Inclusive Development in Kenya-20th May 2015.pdf](http://www.kmco.co.ke/attachments/article/155/Attaining%20Gender%20Equity%20for%20Inclusive%20Development%20in%20Kenya-20th%20May%202015.pdf) at 18-19

congenial to this cause.<sup>5</sup> The second issue would be the need to review the current policy and legal landscape to ensure that they are compliant with the constitutional standard. This part assesses how we have performed in these critical aspects.

As it stands, the implementation of the two third gender rule has been the subject of intense lobbying. Despite this, there has been only heat but no light. Currently, there is no law to satisfy the requirement of Article 27(8). It is safe therefore to aver that as it stands, we are yet to comprehensively implement the Constitutional requirement on gender inclusivity. The current parliament has roughly of 19.5% women which is below the 33% threshold. This number goes down when we fragment the composition into the elective and non-elective positions. Out of the 290 elective positions, only 16 are directly elected;<sup>6</sup> yet the constitution is clear that whether the posts are elective or appointive, it is illegal for one gender to take up more than two thirds of the total composition.

However all is not lost. In terms of the crafting of laws and policies, there have been spattered attempts to comply post August 2010. For instance, section 25(2) (a) of the Political Parties Act recognizes at Section 2 that women are a 'special interest group'. Further, it provides that a party that does not comply with the two third gender rule is ineligible to receive funds from the Political Parties Fund.<sup>7</sup> This connects the lifeblood of the parties to compliance with the two third gender rule. Further, for purposes of institutional compliance the registration of a political party is also dependent on compliance with gender diversity.<sup>8</sup>

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<sup>5</sup> See Wanjiku Kabira & Kameri Mbote, 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise' in Collins Odote & Linda Musumba (eds.) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging jurisprudence*. (Nairobi, IDLO, 2016) at 206 available at <http://www.idlo.int/sites/default/files/pdfs/publications/Balancing%20the%20Scales%20of%20Electoral%20Justice%20-%20Resolving%20Disputes%20from%20the%202013%20Elections%20in%20Kenya.pdf> accessed on 19/3/2017

<sup>6</sup> See Catherine Muyeka Mumma, Kenya's failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament (IDEA, Constitutionnet June 2016) available at <http://www.constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> accessed 20/3/2017

<sup>7</sup> This fund which was the bone of contention in *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others* [2016] eKLR constitutes not less than 0.3% of the Revenue collected by the Tax man.

<sup>8</sup> See Section 7 of the Act. Further, see section 33 on the Office of the Registrar. It is provided that not more than two of the deputies shall be of the same sex which means by default that the Office will be operating illegally were it the case that there was noncompliance with the provisions of the Act. See also the Code of Conduct annexed as the First Schedule to the Act; RULE 5 (b)

On the other hand, the Elections Act, in relation to County Assemblies requires that the lists provided by Political parties ought to be compliant with the requirement of Article 177(1) (b).<sup>9</sup> The requirement is that the list includes *special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.*<sup>10</sup> The Act also has an electoral Code of Conduct which requires that the agents of these political parties during elections are committed to the promotion of gender equality. To this extent, it is safe to assume that these laws are generally up to speed with the new Constitutional dispensation.

There have been attempts to overhaul the policy landscape in the country under the stewardship of the Technical Working Group that was formed after the *Supreme Court Advisory Opinion No 2 of 2012*.<sup>11</sup> However, these attempts have borne no fruit as of yet. The Bills that have gone to parliament have been and continue to be under intense debate for various reasons the variance in the Bills themselves evidencing the interest the question of gender inclusivity draws.<sup>12</sup> As a matter of fact, the Chepkong'a Bill appears to be seeking to play with definitions and indefinitely postpone the urgent need to comply. It adopts the phraseology of the Supreme Court by seeking to entrench the progressive realization paradigm. This explains the preference shown by stakeholders to the Bill tabled by the Leader of majority in the National Assembly which was unfortunately rejected.<sup>13</sup>

In terms of Policy development, the relevant ministry prepared the 2011 Gender Policy which aimed at the institutionalization of the 2000 Policy on Gender and Development. The reason for a gender policy is stated as being the need to develop *a coherent and comprehensive overall framework for guiding gender mainstreaming within the different sectors and line ministries involved in development*, failure to which resources may continue to be misappropriated.<sup>14</sup> It is noteworthy

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<sup>9</sup> See section 36(7) of the Act.

<sup>10</sup> This is specific to the composition of county governments.

<sup>11</sup> *In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* [2012]eKLR, only Mutunga dissented.

<sup>12</sup> See The Two- Third Gender Rule Laws (Amendment) Bill, 2015 & The Constitution of Kenya (Amendment) (No. 6) Bill, 2015 respectively referred to as the Chepkong'a and the Duale Bill

<sup>13</sup> See Mumma, 2016 *supra* note 5. Furthermore, the Bill seeks to incorporate timelines in the realization of the two third gender rule. It places a tag of 20 years with the option to extend the same by another 10 years. To this extent, it is more appealing and serious relative to the one tabled by the Chairman of the Justice and constitutional Affairs Committee.

<sup>14</sup> See Ministry Of Gender, Children And Social Development (as it then was), Gender Policy, July 2011 available at <http://www1.uneca.org/Portals/ngm/Documents/GenderPolicy.pdf> accessed on 22/3/2017s at 9

that the policy is not only focused on the involvement of women in the political life of the country but also in the intricate running in both public and private spheres.<sup>15</sup>

Apart from the policy initiatives taken above there are various other policy documents that have been prepared under the auspices of the Ministry that are sectorial in approach the aim being to engender pragmatism.<sup>16</sup> These include Adolescent Reproductive Health and Development Policy and Plan of Action (2005-2015) & National Policy for the Abandonment of FGM *inter alia*.<sup>17</sup>

In terms of the interlude between institutional compliance and policy development, the ministry tasks itself with oversight over all public institutions. The specific deliverables under the policy include provision of technical guidance to all ministries and public institutions, creation of an audit mechanism, development of a sexual harassment policy, proper facilities such as toilets, breastfeeding, gendered human resource recruitment, research and development,<sup>18</sup> and overall monitoring.<sup>19</sup> Among the guiding principles is the Constitution of Kenya 2010.<sup>20</sup>

### 1.1 THE EXECUTIVE PERFORMANCE ON THE TWO-THIRD GENDER PRINCIPLE

The Constitution of Kenya defines the national executive as comprising of the President, the Deputy President and the rest of the Cabinet<sup>21</sup>. During the period in review, there have been two sets of Cabinet offices with their respective composition illustrated in Table 1 below.

**Table 1: Summary Gender Composition of the First and Current National Cabinet**

	Total Cabinet Members (Plus Attorney General)	Male Members	Female Members	Percentage of Women
First Cabinet	18	12	6	33%
Current Cabinet	21	15	5	25%

<sup>15</sup> The Ministerial Policy aims at gender *mainstreaming in the development process, capacity building, social protection, community participation and public – private partnerships. These strategies are informed by and consistent with the objectives of the flagship projects under the social pillar of the Kenya Vision 2030*. See Ministry, 2011 Ibid at 9. As a matter of fact, despite politics being the most influential area of decision making, in terms of inclusion, it would take up an almost negligible fraction of the over 50% population of women in the country. This being so, it would be more meaningful in mainstreaming gender inclusion by focusing on other institutions.

<sup>16</sup> However, a more robust and comprehensive Policy on Gender is being developed under the Ministry and will hopefully be out at the end of the year.

<sup>17</sup> Ministry of Gender, Children and Social Development Assessment Report,(as it then was) July 2011 by Jane Kiragu as noted in the 2011 Gender Policy, Supra note 13 at 11

<sup>18</sup>The Ministry has been at the forefront of organizing gender workshops in conjunction with academia and non profit organizations.

<sup>19</sup> See generally, the 2011 Policy

<sup>20</sup> However, the Policy is on assessment not as robust as it ought to be under the Constitution

<sup>21</sup> Constitution of Kenya, Article 130 (1)



In the first cabinet appointment, the President appointed 6 women out of 18 women which constituted 33% of the cabinet composition and thus meeting the minimum requirement for compliance to the gender rule. However, after allegations of corruption and other cabinet readjustments resulted in a cabinet reshuffle, the number of women cabinet secretaries reduced to 5 with both two extra cabinet secretaries appointed leading to a reduction of the percentage women representation in the cabinet to 25%.

Upon taking up office, the Cabinet Secretaries proceeded to appoint directors and chairmen to the various state parastatals under their docket. A random sampling of appointments of directors by the Cabinet secretaries to parastatals was conducted with the following being analysed.

**Table 2: Summary of Parastatal Appointments**

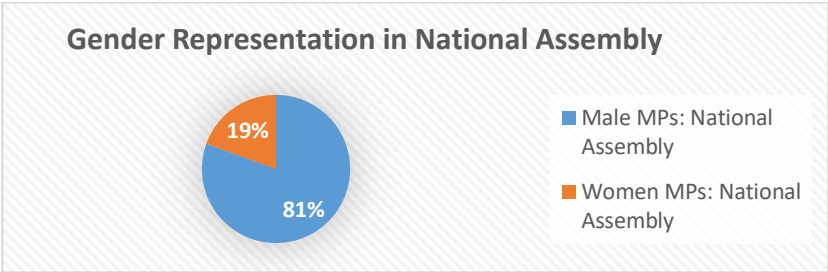
No	Ministry	Parastatal Body	Total of Directors	Male	Female	Male %	Female %
1.	Finance	CBK	6	3	3	50.00%	50.00%
2.	Planning	KIPPRA	17	12	5	70.59%	29.41%
3.	Health	KEMRI	12	10	2	83.33%	16.67%
4.	Agriculture	ADC	11	7	4	63.64%	36.36%
5.	Tourism	Brand Kenya	13	7	6	53.85%	46.15%
6.	Land and Housing	NHC	9	5	4	55.56%	44.44%
7.	Roads and Infrastructure	NTSA	12	11	1	91.67%	8.33%
8.	Energy and Petroleum	KPLC	10	9	1	90.00%	10.00%
9.	Sports, Arts and Culture	SSMB	5	5	0	100.00%	0.00%
10.	Environment	NEMA	11	8	3	72.73%	27.27%
11.	Labour and East African Affairs	NSSF	9	6	3	66.67%	33.33%
12.	Water and Irrigation	Athi Water Board	12	10	2	83.33%	16.67%
13.	Industrialization	KIE	9	6	3	66.67%	33.33%
14.	Education	HELB	8	8	0	100.00%	0.00%
15.	Transport	KPA	13	9	4	69.23%	30.77%
16.	ICT	CAK	12	8	4	66.67%	33.33%
<b>TOTAL</b>			<b>169</b>	<b>124</b>	<b>45</b>	<b>73.37%</b>	<b>26.63%</b>

Out of the total 16 sampled parastatals, 7 of them had complied with the gender rule in terms of the appointments of directors representing 43.8% while the rest, 9, constituting 56.2% had disproportionate gender representation with 2 having zero representation of women in their entire boards and 4, comprising 25% having women representation under 10%. On average, out of the total 169 board members appointed to the 16 state agencies, 124 were men, representing 73.37% and only 45, representing 26.63% being women.

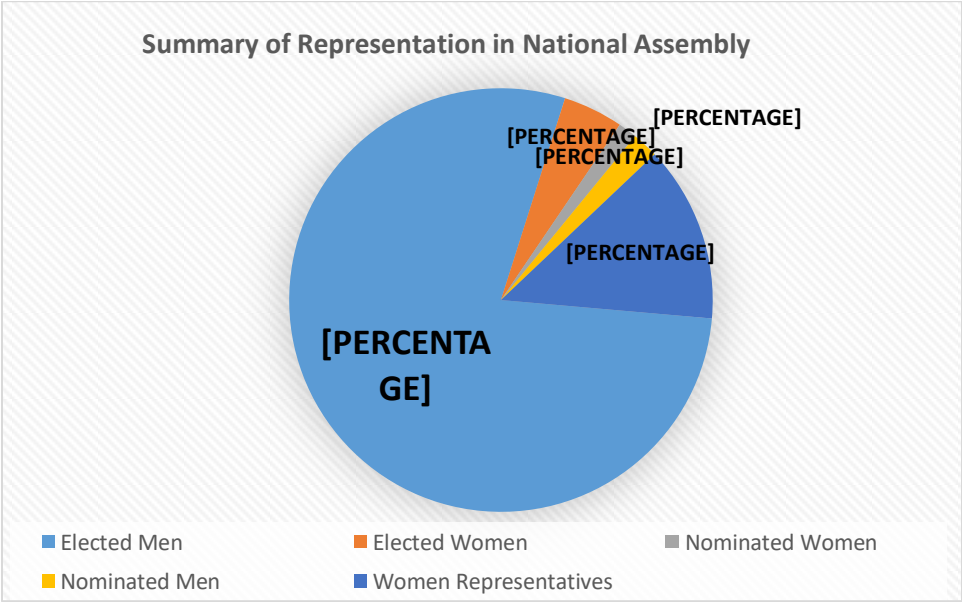
**1.2 THE NATIONAL ASSEMBLY PERFORMANCE ON THE TWO-THIRD GENDER PRINCIPLE**

**Chart 1: Comparison of Percentage Gender Representation in the National Assembly**

The total membership of the current national assembly is 349 members with 281 being male and 68 being women constituting 81% male and 19% women. This is significantly lower from the minimum constitutional threshold based on the two thirds gender principle.



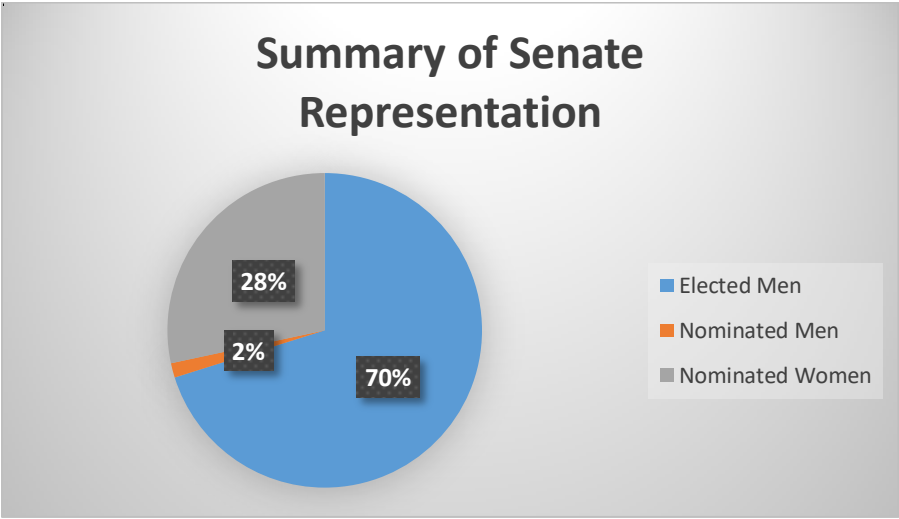
**Chart 2: Summary Representation in the National Assembly**



The 11<sup>th</sup> national assembly has 79% elected men and 2% nominated men constituting a combined percentage of 81% men representation in parliament. With regards to women representation, 13% are elected county women representatives, 1% nominated and 5% elected constituency MPs totalling 19% of women represented in the National Assembly.

**1.3 THE SENATE PERFORMANCE ON THE TWO-THIRD GENDER PRINCIPLE**

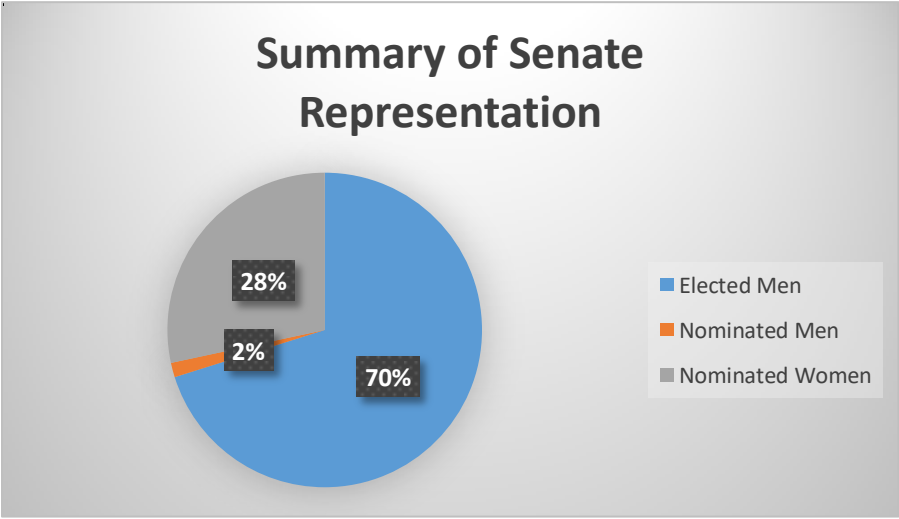
**Chart 3: Summary of Gender Representation in the Senate**



All 47 elected senators in Kenya are men constituting 70% of the total composition of senate and there is 1 nominated male senator increasing the total percentage representation of men to 72%. There being no elected women senators, 19 women were nominated constituting 28% which fell short of the constitutional not more than two thirds gender principle.

**The Senate**

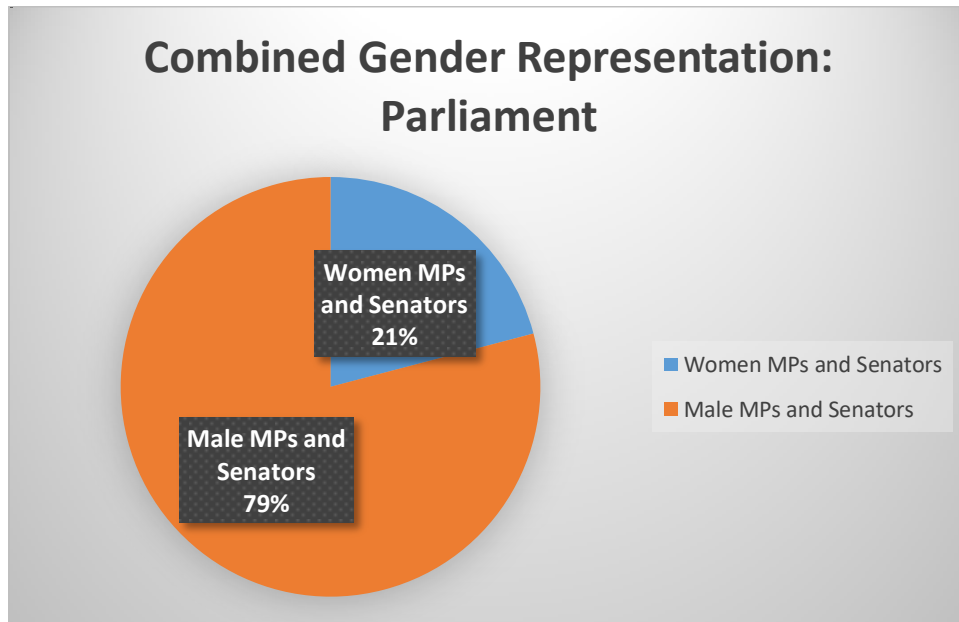
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**Chart 4: Summary Representation in Parliament**



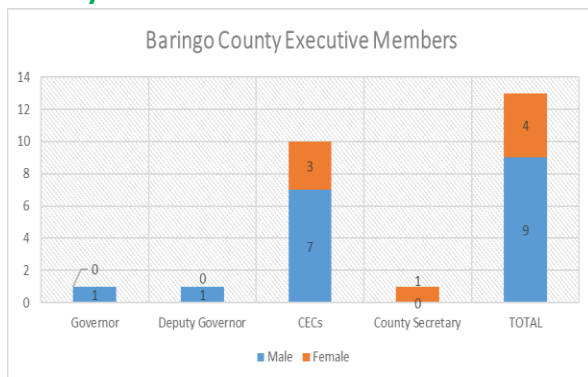
Parliament in Kenya consists of the Senate and the National Assembly with a total combined membership of 416 MPs and Senators. Out of these, only 87 are women constituting 21% with the rest 329 being men and constituting 79% of men.

The overall assessment of parliament in Kenya therefore shows that it does not comply with the two thirds constitutional gender rule falling 12% off from the minimum 33% which is 33%.

**CASE STUDIES: COUNTY ASSEMBLIES**

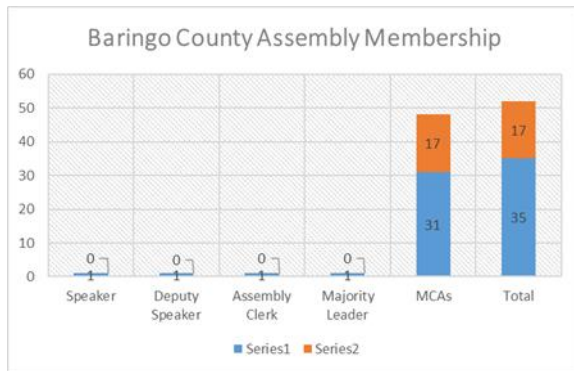
**1. BARINGO COUNTY**

**County Executive**



Baringo County has a county executive of 13 members comprising of the Governor, the Deputy Governor, County Executive Committee Members and the County Secretary. The male members in the executive are 9 constituting 69% of the whole composition of the executive while women are 4 comprising 31% of the membership of the executive.

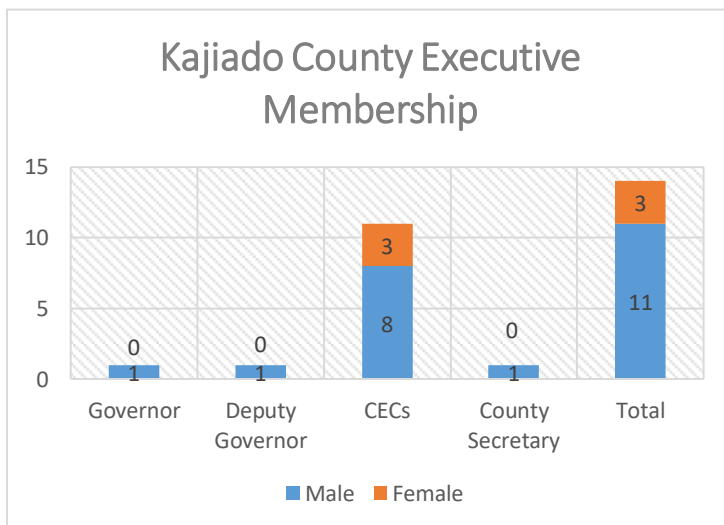
## County Assembly



The leadership and membership of the Baringo County Assembly includes the Speaker, Deputy Speaker, Clerk, leader of majority and the MCAs. All 4 of the leaders are men with 31 out of 48 MCAs being men and 17 being women representing 67% and 33% respectively.

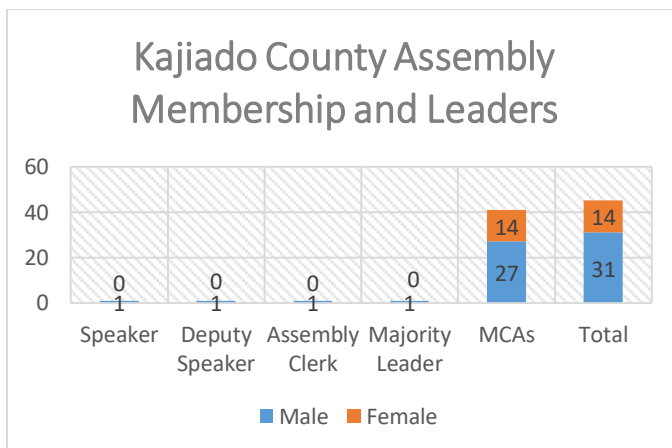
## 1. KAJIADO COUNTY

### County Executive



The Kajiado County Executive has a total of 14 members with a total of 3 women and 11 males. This constitutes 78.6% men and 21.4% women which is way below the constitutional two thirds gender requirement. Further, if the executive composition is examined only in terms of County Executive Committee Members, women comprise 3 out of 11 members which is 27% and thus still not compliant to the gender rule. Women therefore continue to be marginalized in decision making processes in Kajiado

### County Assembly



The Kajiado county assembly leadership is 100% dominated by men with the speaker, deputy speaker, clerk and the leader of majority all being men. Also, there are no elected women in the Kajiado County assembly further disadvantaging women.

However, women comprise 34.15% of the membership of the county assembly with 14 nominated women MCAs thus surpassing the minimum constitutional requirement of 33.3%. This is against 25

## **THE JUDICIAL ACTION IN PURSUIT OF THE IMPLEMENTATION OF THE TWO-THIRDS GENDER PRINCIPLE.**

### **The Cabinet Case**

In petition number 566 of 2012 of Marilyn Muthoni Kamuru, Daisy Jerop Amdany and Centre for Rights, Education and Awareness Versus the Attorney General and The National Assembly, the petitioners sought answers to questions as to whether the nomination by the President and approval by the National Assembly of persons for the position of the Cabinet Secretaries was done in contravention of Article 27(8) of the Constitution and whether the Cabinet of the National Government as currently constituted violates the Constitution for its failure to adhere to the two-thirds gender rule as provided for under the Constitution.

The Court found that the Cabinet as currently constituted had not met the criteria established under Article 27(8) of the Constitution. The Court declared that the nomination by the President and approval by the National Assembly was done in contravention of the principle of the rule of law and good governance as stipulated under Article 27(8) requirement that an appointive body should not have more than two-thirds of persons of the same gender. However, the declarations of the violation were suspended for a period of eight months from the date of judgement.

### **Gender Rule ruling – Parliament & Two Third Gender Principle**

This petition number 371 of 2016 raised the fundamental question on whether or not parliament, which is the Senate and the National Assembly, has failed to fulfil its constitutional mandate by failing to enact legislation to give effect to the two thirds gender rule as stipulated by the constitution. The petition therefore sought to invoke the provisions of Article 261 and allow for petitioner reliefs.

The petition was lodged by the Centre for Rights and Education, Community Rights Awareness Trust (CRAWN Trust) and the Kenya National Human Rights Commission who were the first, second and third petitioners respectively against the Speakers of the National Assembly, the Senate and the Attorney General and who were the first, second and third respondents respectively. FIDA Kenya sought to be enjoined as an interested party with the National Gender and Equality Commission and the LSK being enjoined as amicus curiae.

The petitioners argued that women are marginalized and do not have equal protection before the law and thus continue to suffer political exclusion and denial of the rights to participate in public affairs and decision making. The petitioners also noted that despite the Constitution providing strong safeguards aimed at addressing the gender imbalance, Parliament failed to enact the legislation within the constitutional deadline of August 27<sup>th</sup> 2015. Having failed, the deadline was extended by one year to August 27<sup>th</sup> 2017 which also lapsed without enacting the relevant law. The petitioners therefore opined that the National Assembly and the Senate by

failing to enact the two thirds gender rule were therefore in contravention of the Constitution and that the provisions of article 261 should be invoked.

The respondents submitted their case by attempting to disengage the speakers of the National Assembly and the Senate on account that the speakers do not initiate legislation and therefore cannot be said to have failed to have passed the two thirds gender rule. The respondents also pleaded that Parliament has already passed legislations to give effect to the two thirds gender rule through the Election Laws (Amended) Act of 2016 with the attorney general stating that his office had done everything within the Constitution to facilitate the passage of the legislation.

In his ruling however, Justice Mativo reaffirmed the supremacy of the law and ruled that the petition has succeeded. In allowing the petition, the court ruled that Parliament has failed to enact necessary legislations to give effect to the two thirds gender rule. It declared that parliament has violated the rights of women as per article 27(6) and (8) and article 81 (b) and issued an order of mandamus directing Parliament and the attorney general to ensure the passage of the relevant legislations to give effect to the gender rule within 60 days. The court further ordered that in the event that Parliament fails to pass the legislation, any citizen could write to the Chief Justice to advise the president to dissolve Parliament.

### **Katiba Institute Ruling**

Petition number 19 Of 2017 was filed by Katiba Institute in the High Court of Kenya against the Independent Electoral and Boundaries Commission (IEBC) seeking the following reliefs from the court;

- a. That the court declares that political parties are bound by the provisions of the Constitution to ensure compliance with the provisions of the two thirds gender rule including during conducting party nominations.
- b. To declare that the IEBC has a mandate to enforce the requirements of the Constitution obligating political parties to comply with the two thirds gender rule.
- c. The court to declare that the IEBC has power to reject political party nomination lists if they do not comply with the two thirds gender rule
- d. Restrain the IEBC from accepting and processing party lists that do not comply the two thirds gender rule.

Katiba Institute's case was therefore based on the arguments that women continue to be marginalized and disadvantaged politically despite the creation of 47 special seats for women and nominations which resulted in the composition of women in Parliament falling short of the minimum one third as it now rests at 27%. The petitioner also argued that political parties are bound by the Constitution and must therefore comply with its provisions including national values, principles of governance and the bill of rights all which espouse the two thirds gender rule.

While objecting to the petition, the IEBC submitted their responses arguing that it has no powers to enforce the provisions of the Constitution especially Article 27 (8) and 81 (b). The petitioner also argued that the powers donated to it by the Constitution to give its mandate do not extend to enforcing the two thirds gender rule and lastly, that there is no law currently passed by

Parliament to ensure the realization of the two thirds gender rule and so the petitioner has no legal framework in place to guide its actions with regards to enforcing it.

Upon hearing the submissions from both sides, the Presiding Judge Chacha Mwita ruled that the petition succeeds except for prayer (d) which was abandoned. He ruled that political parties are bound by the constitution to comply with the two thirds gender rule. He also ruled that the powers conferred to the IEBC by the constitution of Kenya obligate them to ensure compliance to the provisions on the two thirds gender rule and lastly that the IEBC has a mandate to reject party lists from political parties where they do not meet the two thirds gender rule.

The court therefore ordered that the IEBC should formulate rules and regulations to actualize the two thirds gender rule within 6 months of the ruling. The IEBC was also ordered to put in place administrative arrangements to ensure to ensure the realization of the two thirds gender principle.

### **Challenges in establishing a legal framework for implementation of the Constitutional Principle on the 2/3<sup>rd</sup> gender rule.**

The 5<sup>th</sup> Schedule of the Constitution 2010 and the Supreme Court advisory opinion of 11<sup>th</sup> December, 2012 gave a specific timeline of August 27<sup>th</sup> 2015 for legislation to be in place to actualize the not more than 2/3rds same gender principle. However to date, there is no legal framework put in place to address the issue. We are now in 2017 and it is clear that the country will not meet the required constitutional gender threshold. This will precipitate a constitutional and political crisis as the legality of parliament will be questioned.

Furthermore there are several efforts that have been put in place by members of parliament to remove the affirmative action principle from the constitution and specifically to remove the requirement of not more than 2/3rds of the same gender in elective and appointive positions. They include the Chepkonga Bill which is seeking a progressive realization of the 2/3rds principle, the popular initiative by Hon. Moses Kuria *Punguza Mizigo* which aims to scrap the 47 women seats, remove all nominations, reduce the number of constituencies from 290 to 210, reduce the number of counties from 47 to 16 and to remove the requirement of 2/3rds in elective positions because in his opinion it is exacerbating the wage bill. Then there is the Hon. Asman Kamama *Boresha Katiba* initiative that seeks the removal of the 2/3rds gender principle in elective offices and the scrapping of the 47 women seats as well as all nominations. These initiatives coupled with the recent cabinet appointments by the president which did not meet the 2/3rds gender principle, are a clear indicator that there is no political will to ensure that a mechanism is in place ahead of the next general elections. Worse is that there is speculation that a referendum question is to be put to Kenyans at the general elections of 2017 as to if the 2/3rds principle



should be scrapped all together as it is being termed as “impossible” to achieve and an impractical requirement.

It is clear that the not more than 2/3rds gender principle as provided for in Articles 27 (8) and 81 (b) are under threat. The Executive working in concert with Parliament by their inaction are conspiring to deny the women of Kenya their constitutional entitlement to equality in political representation.

### **Proposals: Way Forward**

Going forward, to realize the promise of the affirmative action clauses in relation to the two third gender rule, many things need to be done. Chiefly, the semblance of quotas in setting aside certain seats specifically for women ought to be made more robust. For instance, Political parties ought to be required to make provision in their constitutions for ensuring that a third of their aspirants or more are women. This is not during party primaries but in the lists that are forwarded to the Independent Electoral and Boundaries Commission. The consequence of this is that there will be increased chances of women making it into elective positions.

Secondly, in terms of policy development,<sup>22</sup> there ought to be compliance parameters in the case of elective slots. This ought to be at the hazard of the political parties which are the vehicles through which the rule can be realized in elective politics. By now, it is apparent that it is harder for the rule to be realized in elective posts because the masses, despite their awareness or otherwise of Constitutional ideals, determine to choose leaders on the whim of political persuasions; which sadly in our country are foremost tribal then considered. The more whimsical political persuasions determine who gets elected, the more policy makers ought to focus their energies on political parties which are the drivers of the electoral process.

Thirdly, the ignorance referred to in the preceding paragraph means that there is need to have government sponsored political awareness across the country on the need to enhance gender mainstreaming. This is not to suggest that currently there is nothing being done. Quite to the contrary, there is. However, most of the initiatives currently being undertaken are under the

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<sup>22</sup> This policy is the responsibility of the IEBC to guarantee political participation by the Women. See FIDA, 2013 supra note 33 at 71. The policy will also deal with questions such as

auspices of not for benefit organizations. This begs the question of who is primordially responsible for policy making and implementation.

Fourthly, there ought to be standardization of the election rules pre and post the cycles which ensures that all parties are compliant with the rule. This we suggest, may include costly endeavors such as making it possible for parties, at their own cost to have options for seats in order to avert a constitutional crisis. However, this may raise issues of unconstitutionality in terms of the electorate being shortchange. However, we hazard to say that if compliance with the constitution is proper, it must come at a cost. In keeping with the foregoing, the office of the Registrar of Political Parties ought to be granted the mandate to, with the aid of professional governance and legal auditors where necessary, audit political party compliance. Currently, there is an urgent need to audit party constitutions, policies and leadership composition. On top of this they should be given powers to deregister non-compliant political players.

A survey of the legal and policy instruments shows that most provisions do not go further replicating the rule as enshrined in the constitution. This being so, it would be crucial to ensure that they are amended to give actual flesh to the constitution in line with the preceding suggestions for reform. Furthermore, the institutions tasked with compliance, such as the registrar of political parties and the IEBC ought to be given explicit powers to bar parties from participation in elections if they are non-compliant.

## Conclusion

In a nutshell, we suppose that there is a lot that needs to be done. To achieve the proposals set out in this paper, there will be costs. However, the interconnection between gender mainstreaming and sustainable development ought to be sufficient reason for change. At the centre of all this is political will. However, the starting point will be the enactment of legislation that specifically seeks to implement the rule. Such a piece of legislation must take into account the proposals of this paper. However, in the event the political process is enhanced to include gendered perspectives, we surmise that there will be a snow balling effect on institutional arrangements both in the private and public sector.

## ANNEXES

### ANNEX 1: Implementation of the two-thirds gender rule in the appointment of County Executive Committee Members.

Table 4: The number of Female and Male CECs and % of Female of CECs in 30 Counties.

COUNTY	FEMALE CECs	MALE CECs	TOTAL NO. OF CECs	% of Female CECs
Kilifi	3	5	8	37.5%
Lamu	2	6	8	25%
Taita Taveta	3	6	9	33%
Garissa	2	5	7	28.6%
Isiolo	2	5	7	28.6%
Meru	2	3	5	40%
TharakaNithi	3	5	8	37.5%
Machakos	6	5	11	54.4%
Makueni	4	7	11	36%
Nyandarua	3	7	10	30%
Kirinyaga	4	6	10	40%
Murang'a	3	7	10	30%
Turkana	3	3	6	50%
West Pokot	1	3	4	25%
Trans Nzoia	4	6	10	40%
UasinGishu	2	7	9	22%
Elgeyo Marakwet	3	6	9	33%
Nandi	3	7	10	30%
Laikipia	1	3	4	25%
Nakuru	4	5	9	44%
Narok	3	5	8	37.5%
Kajiado	3	7	10	30%
kericho	1	4	5	20%
Bomet	2	5	7	28.6%
Kakamega	3	7	10	30%
Bungoma	3	7	10	30%
Busia	3	7	10	30%
Siaya	2	4	6	33%
Kisii	4	6	10	40%
Nyamira	3	8	11	27%

\*Source: Authors Tabulation (based on information on websites)

From the above table it can be deduced that a majority of the counties have not fully implemented the two-thirds gender rule to the letter.

