



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 45 OF 2017

RONALD MELKIZEDEK MILARE. PETITIONER

VERSUS

MR. FRANKLINE IMBENZI. 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT2ND RESPONDENT

(AN APPEAL FROM THE DECISION OF THE POLITICAL PARTIES DISPUTE TRIBUNAL IN CASE NO. 168 OF 2017 DELIVERED ON 11TH MAY, 2017 BY KYALO MBOBU, JAMES ATEMA AND HASSAN ABDI)

BETWEEN

REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTE TRIBUNAL

CASE NUMBER 168 OF 2017

RONALD MELKIZEDEK MILARE. PETITIONER

VERSUS

MR. FRANKLINE IMBENZI. 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT2ND RESPONDENT

J U D G M E N T

The Appellant, **Ronald Melkizedek Milare** and the 1st Respondent, **Mr. Frankline Imbenzi** are members and were aspirants for the nomination of Member of Country Assembly Harambee Ward under the ODM ticket. That they participated in the 2nd Respondent's nomination exercise for the candidate of Member of Country Assembly Harambee Ward conducted on 30th April, 2017. The Appellant states that the 1st Respondent was irregularly declared the winner and issued with a provisional nomination certificate by the returning officer of the 2nd Respondent after allegedly garnering 402 votes against the Appellant 469 which were announced on the 1st May, 2017.

The Appellant filed an appeal with the 2nd Respondent's Special Appeals Tribunal which delivered its judgment on the 6th May, 2017 revoking the provisional nomination certificate issued to the 1st Respondent and directed NEB to nullify the nomination of the 1st Respondent and issue the Nomination Certificate to the Appellant as the Member of Country Assembly Harambee Ward in Nairobi County.

The 1st Respondent appealed to the Political Parties Dispute Tribunal which set aside the decision of the County Appeals Tribunal that nullified the Appellant's nomination Certificate. Dissatisfied with the judgment, the Appellant filed this appeal.

The appellant filed 3 grounds of appeal: -

- 1. The honourable Tribunal erred in fact and in law in failing to find that the Appellant was indeed the declared nominee of the 2nd Respondent.**
- 2. The Honourable Tribunal erred in fact and in law in directing the 2nd Respondent to issue a nomination certificate to the 1st Respondent without appreciating the overwhelming evidence tendered by the Appellant.**
- 3. The honourable tribunal erred in fact and in law in arriving at a decision that amounted to declaring the 1st Respondent as the nominee of the 2nd Respondent without appreciating the overwhelming evidence on record.**

The 1st Respondent thereafter filed a complaint with the Political Parties Dispute Tribunal in relation to the Appellant's nomination election for the candidate for member of Country Assembly Harambee Ward.

The Political Parties Dispute tribunal delivered its judgment on 11th of May, 2017 and quashed the decision of the National Appeals Tribunal for the sole reason that the 2nd Respondent's National Appeals Tribunal did not accord the 1st Respondent an opportunity to be heard and thus consequently without looking at all material evidence on record, the affidavit of the Returning officer admitting on oath that he occasioned an error at the tallying Centre which eventually made him declare the 1st Respondent the elected nominee of the 2nd Respondent as opposed to the actual winner the Appellant.

The Appellant contends that decision was bad in law and in fact since factually he had the highest votes tallied and it was an act of commission of the Returning officer when he erroneously added 100 votes to the results of the 1st Respondent at Lumumba Social Hall Polling Centre.

The 1st Respondent Franklin Imbenzi filed a response by way of replying affidavit dated 22nd May, 2017 in which the 1st Respondent contends that contrary to Memorandum of Appeal the allegations of the Appellant that he won was not supported by documentary evidence but mere statement sworn by the Appellant and his cronies. That the purported evidence alleged to be from the Returning officer one Wilson Nkurrana is a forgery. He further contends that he came to the conclusion of forgery on the basis that on the face of it, the signatures of the Provisional Certificate issued by the same Mr. Nkurrana and the affidavit in support of the complaint signed by the same person bear a similar signature whilst the Replying affidavit of the Appellant tendered at the Political Parties Dispute Tribunal bears a completely different signature purportedly signed by the said Returning Officer.

The 1st Respondent avers that it is incomprehensible and illogical that the Returning Officer who deposed an affidavit in support of the Complainant also deposed another Affidavit in opposition to the Complaint. Further he avers that from the advice by his Advocates on record, which he believes to be true that the Honourable Tribunal did not error in law for that it upheld the 1st Respondent's rights to fair

hearing and fair administrative action as guaranteed under article 47 and 50 and Section 4 of the Fair Administrative Act. That the Tribunal did not error in fact for reasons that the 1st Respondent herein was never heard in the party's appeals tribunal a fact that was never controverted by the Appellant.

Mr. Wanyonyi for the Appellant filed written submissions which he highlighted. Counsel submitted that the Appellant along with others participated in the primaries. However, an error committed by the Returning Officer Mr. William Nkurruna who tallied the results more specifically at Lumumba Social Hall Polling Station inflated the votes received by the Respondent by 100 votes which caused the Respondent to be declared a winner by the 1st Respondent receiving 502 votes to the Appellants 469 votes. He submitted that the Returning Officer owned up to this mistake. To buttress his argument, counsel submitted that in the same polling station, Women representative whose case was 313, and for Member of Parliament 320 but for MCA position was 402 votes cast. He, therefore submits that due to this error the Appellant was robbed of his victory.

Mr. Noor for the 1st Respondent submitted that the primaries were faulty conducted and the 1st Respondent emerged the winner with 502 votes and was issued with a nomination certificate. The Appellant filed a complaint before the 2nd Respondent IDRM but the 1st Respondent did not participate as he was locked out and the special tribunal gave an ex-parte judgment which was challenged at the PPDT which found that he was not accorded a fair hearing. He on this appeal he submits that the Appellant has not rendered any documents to show that the tallying was changed. He submits that some of the documents purported to be signed by the Returning Officers are forgeries prepared for this appeal.

The main issue in this appeal as agreed by both parties is whether the results declared by the Returning Officer, Mr. William Nkurruna were the correct results or whether they were erroneous. Mr. William Nkurruna swore a further affidavit sworn on 10th May, 2017 in which he deponed

inter alia: -

1. That the process went on smoothly and the results from each polling station were tallied as shown in the table below: -

	Ronald Milare	Jack Olonde	Jackstone Mkabwa	John Oluoch	Frankline Imbenzi	Paul Ogola
Harambee Primary	130	20	15	8	12	7
Jericho Social Hall	42	28	23	4	214	4
Buruburu Girls & Rabai Road	116	135	41	29	60	10
Lumumba Social Hall	112	22	52	9	188	1
Bidii Primary & Baraka Primary School	69	29	42	108	28	10

2. That based on these results, I announced the Complainant as the winner of the elections with 502 votes and presented him with a provisional certificate.

3. That the 1st Respondent subsequently filed a complaint with the Party tribunal and I was contacted because an anomaly had been detected in the final tally figures.

4. That it emerged that the Complainant's votes at Lumumba Social Hall had been inflated by 100

votes as the Complainant had only garnered 88 votes. Therefore, the wrong candidate was declared the winner.

In an earlier affidavit sworn on 8th May, 2017 the same William Nkurruna had deponed:

- 1. That I was the Returning Officer in charge of the ODM Party Nomination exercise for Makadara Constituency, conversant with the facts stated in the complaint and competent to swear this affidavit.***
- 2. That, the nomination exercise was free and fair and devoid of any irregularities whatsoever.***
- 3. That I supervised the nomination exercise on the 30th of April, 2017 where the complainant emerged the winner having garnered 502 votes in Harambee Ward.***
- 4. That I declared him the winner and subsequently sued with the provisional certificate.***
- 5. That there was no violence throughout the nomination exercise.***

These two affidavits sworn by the deponent cannot be accurate. Both parties by consent urged the court to call the Returning Officer to clarify the anomalies. He was asked to attend court through the Appellant's counsel but he failed to attend court and the parties urged the court to act on evidence on record.

The evidence on record is that there was glaring discrepancy in the votes cast at Lumumba Social Hall Polling Centre. This is more so when it is shown that the total votes cast at the Polling Centre for Women Representative 313 and Parliamentary seat 320 are significantly different from all the votes cast for MCA 423 votes. This discrepancy would mean that there were voters who voted for MCA but did not vote for Women Representative and Parliamentary candidates. This in my view is not possible and lends credence to Appellant submissions that the votes at Lumumba Social Hall Polling Station were inflated in favour of the 1st Respondent.

I am therefore, satisfied that from the evidence the ODM nominations at the Member of County Assembly Harambee Ward were not conducted in a fair and transparent manner with the attendance result that it is not clear who won the nomination because even the Returning Officer in affidavit sworn on 10th May, 2017 disowned the results he announced.

I, therefore, allow the appeal and order that the 1st Respondent was not nominated as a MCA for Harambee Ward and the Nomination Certificate issued is hereby revoked. I order the 2nd Respondent, the ODM Party to conduct fresh nominations for Member of County Assembly Harambee Ward, Nairobi County within 48 hours of this order, in accordance with the Party Nomination Rules. I make no order as to costs

Dated, signed and delivered at Nairobi this 23rd day of May, 2017.

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S N RIECHI

JUDGE

23/5/2017



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