



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 61 OF 2017

GEOFFREY OKUTO OTIENO. APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT1ST RESPONDENT

GEORGE OCHOLA. 2ND RESPONDENT

KENNEDY ONAM. 3RD RESPONDENT

(An Appeal from the Decision of the Political Parties Dispute Tribunal in Case No. 177 of 2017 delivered on 18th May, 2017 by Kyalo Mbobu, James Atema and Hassan Abdi)

BETWEEN

REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTE TRIBUNAL

CASE NUMBER 177 OF 2017

GEOFFREY OKUTO OTIENO. APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT1ST RESPONDENT

GEORGE OCHOLA. 2ND RESPONDENT

AND

KENNEDY ONAM. INTERESTED PARTY

J U D G M E N T

The Appellant **Geoffrey Okuto Otieno**, **George Ochola**, 2nd Respondent and **Kennedy Onam**, the Interested Party are members of the 1st Respondent, Orange Democratic Movement Party. They along with others participated in the party nomination exercise held on 30th April, 2017 for Member of County

Assembly Hospital Ward within Mathare Constituency, Nairobi County. After the conclusion of the exercise the Returning Officer Mr. Jared Owade declared Appellant the winner having obtained 351 votes. Kennedy Onam 323 and George Ocholla 210, Seth Kobioa 54 and Daniel Otieno 16. Kennedy Onam filed a petition to the County Appeals Tribunal which ruled that the matter be referred back to the 1st Respondent ODM's party National Election Board to make a decision. Dissatisfied with the decision Appellant appealed to the Political Parties Dispute Tribunal which by ruling dated 18th May, 2017 directed that the matter be referred to the 1st Respondents National Election Board to determine.

The Appellant was dissatisfied with the decision and filed this appeal in the following main grounds.

1. That the Learned Tribunal erred in Law and fact in its judgment delivered on 18th May, 2017 erred in both law and fact by totally ignoring the evidence presented before it to wit; the tallying sheets, the Mathare Constituency Returning Officer's affidavit, Mr. Jared Owade, the country Returning Officer's affidavit Mr. Thomas Owiti, the video footage of the counting exercise and the Provisional Nomination Certificate that was presented to ODM by the Appellant as proof of his win in reaching its impugned judgment.

2. The learned tribunal erred in law and fact by abdicating its duty of determining who the winner of the nomination exercise was and instead chose to subject the Appellant to a fresh nomination process which process the Appellant has no control of whatsoever.

3. The learned Members of the Tribunal erred in law and fact by imputing violence when there was no evidence whatsoever in justifying its decision to nullify the otherwise peaceful elections.

4. The learned tribunal erred in law and fact by ignoring the precedent set in its earlier decisions that the results as declared by the Constituency Returning Officer are final. The results as announced by the constituency returning officer showed that the Appellant herein had won the nominations for the member of County Assembly of Hospital Ward Mathare Constituency.

5. The learned Tribunal erred in law and fact by disputing the win announced by Mr. Jared Owade yet in Complaint 132 of 2017 the court reaffirmed that Mr. Jared Owade was the Constituency Returning Officer for Mathare Constituency.

6. The learned tribunal erred in law and fact by showing open bias against the Appellant by totally disregarding the evidence that was tabled before it by the Appellant and thereby violating his right to be heard as enshrined under Article 50.

The Appellant prays that: -

a) The appeal herein be allowed.

b) The judgment, orders and decree delivered by the Political parties Dispute Tribunal of Kenya at Nairobi delivered on 18th may, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi in Complaint No. 177 of 2017 be set aside/vacated and substituted with a n order allowing the Appellant's Appeal.

c) The 1st Respondent be compelled to issue the Appellant with the final nomination certificate for the position of the Member of County Assembly Hospital Ward Mathare Constituency.

d) The 1st Respondent be compelled to submit the Appellant's name to the IEBC as its nominee

for the position of the Member of County Assembly Hospital Ward, Mathare Constituency.

e) The Respondents do pay the Appellant's court of this appeal.

f) Any other or other alternative relief and/or order that this court may deem fit and just to grant.

Prof. Ojienda S. C for the Appellant submitted in support of the appeal. He submitted that the appeal is against the order of the tribunal to revoke the nomination certificate of the Appellant and directions that the 1st Respondent National Elections Board to determine the nominee for Member of County Assembly for Hospital Ward Mathare Constituency. He submits that from the tallying sheets prepared by the Returning officer, and submitted to the 1st Respondent, the Appellant garnered 351 votes, 3rd Respondent 323 votes and 2nd Respondent 210 votes. He submits that it is clear who won the nomination by garnering the highest number of votes and the winner issued with a Provisional Nomination Certificate by the Returning Officer, the Political Parties Dispute Tribunal ought to have made a finding that Appellant was the winner. He submitted that the allegation that Kennedy Onam also had been issued with a provisional Nomination Certificate by another person other than the Returning Officer should have been investigations and had the Tribunal done so would have found it was not valid as it was issued by unauthorized person who was not the Constituency Returning Officer.

Counsel further submitted that the Political Parties Dispute Tribunal imputed electoral malpractices in the nomination process that was not supported by evidence and finally he faulted the tribunal for abdicating its duty in determining the nominee based on the evidence before it. Counsel referred to several authorities to buttress his submission.

Mr. Wandati for the 1st Respondent, Orange Democratic Movement submitted that before the votes were tallied, they had been recounted 3 times during which time there was commotion. He submits that the court should not consider only the numbers in the tallying sheet but also how the counting and tallying was done. He supported the decision of the tribunal in as much as it gave the party the liberty to undertake a nomination process that is credible and which will ensure the will of the people is upheld.

Mr. Otich for 2nd Respondent George Ocholla submitted that at the Political Parties Dispute Tribunal the Appellant, 3rd Respondent and 2nd Respondent each claimed that he had won the nomination. The 2nd Respondent was issued a provisional nomination certificate by one Thomas Odoyo Omune the Returning Officer Mathare Constituency. He submitted that the Political Parties Dispute Tribunal would not determine who was the Returning Officer and which of the provisional Nomination certificate was genuine which issue can only be determined by the ODM party and hence the order to refer the matter to the National Election Board.

Mr. Aduda counsel for Kennedy Onam, the Interested Party submitted that the tribunal found that there was evidence of police interference in the counting of the votes, which evidence had not been challenged. He submitted that having found that the process was flawed, the Political Parties Dispute Tribunal was right in its ruling.

This is a first appeal. The duty of the first appellant court is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the tribunal are to stand or not and give reasons either way.

From the submission of the parties, I find that three (3) issues command themselves for determination in this appeal.

1. Was the Nomination process free and fair"

2. Was there a clear winner during the tallying of the votes cast and

3. What orders should this court give"

The Political Parties Dispute Tribunal in its review application ruling dated 18th May, 2015 stated: -

"The upshot is that we allow the application for review. It is apparent that a fresh nomination exercise will leave all parties satisfied and justice shall be served. This Tribunal has power to issue any order that is just and fair in the interest of justice. As a consequence, we make the following orders: -

a) The Notice of Motion application dated 12th May, 2017 is hereby allowed.

b) This Tribunal judgment delivered on 11th May, 2017 is hereby recalled, reviewed and set aside.

c) The 1st Respondent's nomination primaries held on 30th April, 2017 for Member of County Assembly, Hospital Ward, Mathare Constituency, Nairobi County are hereby revoked.

d) The Provisional Nomination Certificate issued by the 1st Respondent's Returning Officer to Geoffrey Okuto Otieno is hereby revoked.

e) The Provisional Certificate issued by the 1st Respondent to George Ochola is hereby revoked.

f) The 1st Respondent's National Elections Board is directed to determine the Party Nominee for Member of County Assembly, Hospital Ward, Mathare Constituency in a manner compatible with the party constitution, Election and Nomination Rules within the next 24 hours of this judgment.

g) In the interests of party unity, each party shall bear its own costs."

Counsel for the 1st Respondent submitted that the process was marred by interference by police and therefore, the results of the tallying was not free and fair.

Prof. Ojienda in response submitted that there was no evidence of such interference and that if there was as alleged the Returning Officer would not have been able to obtain the results and that this would not have affected the results for Member of County Assembly only but also for other nominations particularly for Women Representative and Parliamentary Results.

The issue of police interference is contained in the affidavit of Kennedy Onam, the Interested Party in an affidavit sworn on 2nd May, 2017 where he depones at length how the Appellant caused commotion. The Tribunal considering this piece of evidence found that it was not denied and considered the same as established. This was the only affidavit. The Appellant in his supplementary affidavit sworn on 10th May, 2017 deponed that the counting of the votes were done thrice and he gave the votes for each contestant. It was in the last tally when he obtained 351 votes. He confirmed that the re-counting was done in the presence of Police Officers. It is, therefore, common ground that the counting was done three (3) times in the presence of police officers.

The second issue is on who had the highest number of votes cast" Prof. Ojienda submitted that there was evidence in forms of tallying sheet signed by the Presiding Officer and the Constituency

Returning Officer which showed that the Appellant is the one who had the highest number of votes. He submits that that was confirmed by the submission of his name as among the aspiring candidates in the ODM Nomination for Mathare Constituency forwarded by Jared Owade the Returning Officer. He submits that that being the case, the Appellant was the only validly nominee for Member of the County Assembly for the Hospital Ward, Mathare Constituency. The same report was confirmed by Thomas Owiti the County Returning Officer. Prof. Ojienda submits that these tallying sheets were conclusive proof that the Appellants won the nomination and the Political Parties Dispute Tribunal should have declared him so. I agree with the submissions of Prof. Ojienda that the results as tallied by the Returning Officer and announced by him are final. This issue is not seriously contested even by the Respondents. What, if I understand this well they are stating is that the recounting of the votes was marred by violence and interference by police officers to the extent that the results so obtained cannot be stated to have been obtained in actual fact.

It is not disputed that the recounting of the votes was done three times. The sequence of events leading to the recount is deponed of by Kennedy Onam in his affidavit sworn on 2nd May, 2017. The fact that the counting was done thrice is confirmed by the Appellant in his further affidavit sworn on 10th May, 2017 in which he deponed: -

“The counting was done thrice. During the first counting Kennedy Onam got 433 votes, because the clerk who was counting skipped from 209 to 290. A recount was done by Kennedy Onam got 323 votes. The agents were discontented and a recount was done. The recount showed that he had 323 votes. The clerks then proceeded to count my votes where I got 351 votes. All the recounting was done in the presence of Police officers.”

These assertions by the Appellant in my view lends credence to the claims by Kennedy Onam that there was interference on the counting of votes by the police officers. I, therefore, uphold the concurrent finding of the Special Tribunal and the Political Parties Dispute Tribunal that there was police interference in the counting process and that the result of that counting and tallying was not credible as to reflect the will of the ODM members of Hospital Ward, Mathare Constituency.

Where the results announced by a returning officer in an election are not a product of a free, fair and transparent process of election or nomination, the results are null and void and any declarations made on the basis of more results cannot be a basis for award of nomination certificate.

For these reasons, I find no merit in this appeal which is hereby dismissed. I hereby order that the 1st Respondent Orange Democratic Movement party to undertake fresh nomination process for Member of County Assembly, Hospital Ward, Mathare Constituency, in accordance with the Party’s Nomination Rules within **Forty Eight (48) Hours** from the time of delivery of this judgment. I make no order as to costs.

Dated, signed and delivered at Nairobi this 25th day of May, 2017.

.....

S N RIECHI

JUDGE



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