



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, AT NAIROBI

ELECTION PETITION APPEAL NO. 50 OF 2017

JAIRUS OMayA.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

ASHA ABDI SOSSO.....2ND RESPONDENT

(Being an appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 12th May, 2017

in

Complaint No. 155 of 2017)

Between

ASHA ABDI SOSSO.....PETITIONER

AND

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

JAIRUS OMayA.....2ND RESPONDENT

JUDGMENT

1. **Jairus Omayo** “the Appellant” and Asha **Abdi Sosso** “the 2nd Respondent” are both members of the **Orange Democratic Movement** (ODM) “the 1st Respondent”.

The Appellant and 2nd Respondent were contestants in the 1st Respondent’s nominations in respect of the party’s representative for the Lindi Ward.

2. The nominations were conducted on 30th April, 2017. They had challenges and complaints but the Provisional nominations certificate was issued to the Appellant by the 1st Respondent. The 2nd Respondent contested this before the 1st Respondent’s appeals Tribunal, which ruled in her favour and

revoked the nomination certificates to the Appellant.

The 2nd Respondent then moved to the Political Parties Disputes Tribunals (PPDT) to confirm the ruling by the 1st Respondent. A Judgment was rendered by the PPDT on 13th May, 2017 in favour of the 2nd Respondent. This is the Judgment that is the subject of this appeal.

3. The Appellant filed the following grounds of appeal;

a. That the tribunal having found at page 14, that the Appellant's right to be heard had been violated by the 2nd Respondent, it erred in law and in fact by failing to declare that the Appellant was in fact the 1st Respondent's duly nominated Member of County Assembly for Lindi Ward a fact that the 2nd Respondent conceded to under Paragraph 14 of the 2nd Respondent Amended Petition.

b. That the tribunal erred in law and in fact by ordering that the 2nd Respondent be given the nomination certificate without any evidence on record.

c. That the tribunal erred in fact by making determination of fact contrary to the material evidence placed before it, which material were not controverted at the Political Parties Dispute Tribunal.

d. The tribunal erred in law and fact by failing to find and hold that the Appellant was the validly nominated candidate of the 1st Respondent in respect Member of County Assembly of Lindi despite the overwhelming evidence placed before it in support of this.

4. The Memorandum of Appeal and Record of Appeal were served on both Respondents, upon directions being taken. There is evidence that both Respondents were served for hearing on 20th May, 2017, 21st May, 2017 and finally 22nd May, 2017. The hearing could not proceed on the first two dates following the Respondents' absence.

None of the Respondents filed any papers nor appeared before the Court for the hearing. The Court being satisfied that the Respondents had been properly served directed the Appellant to proceed to argue his appeal.

5. **Mr. Ayieko** for the Appellant argued four (4) main issues. These are;

(i) The question as to who was validly nominated as the MCA Lindi Ward;

(ii) Setting aside or declaring void an election already held;

(iii) The standard of proof; and

(iv) Fair administration of actions.

6. On ground (i), he argued that the Appellant garnered 400 votes and was declared the winner. A provisional nomination and full nomination certificates were issued on 1st May, and 3rd May 2017 respectively (page 67 and 68) of the Record of Appeal.

He submitted that the 2nd Respondent only managed 210 votes and came No. 3 way after the Appellant. She acknowledged this at paragraph 14 of her Amended Petition before the PPDT.

7. On issue No. (ii), he asked the Court to look at the documents and the unfair occurrences that would really nullify an election.

He referred to the cases of **Rahim Khan –vs- Kurshid Ahmed & Others 1975 AIR 290, 1975 SCR (1) 643, William O. Oduol –vs- Independent Electoral Boundaries Commission & 2 Others [2013] eKLR John Kiarie Waweru –vs Beth Wambui Mugo & 2 Others [2008] eKLR and Joho –vs- Nyangi & Another [2008] 3 eKLR**, to stress this point.

He submitted that it was the Appellant's legitimate expectation that having won the 1st Respondent's primaries, he should be allowed to enjoy the rights and benefits of a winner. He therefore, urged the Court to declare the Appellant the winner.

8. On issue No. (iii), he submitted that the burden of proving any misconduct of the nominations squarely lay on the 2nd Respondent. This position has been held in a number of cases. See **John K. Waweru –vs- Beth Mugo (supra); Ben Njoroge & Another –vs- IEBC [2013] eKLR**.

It was his submission that the tribunals could not interfere with the democratic rights of the people of Lindi Ward.

9. On issue No. (iv), he submitted that the conduct of the 1st Respondent's County Appeals Tribunal was very unfair as the Appellant was denied a hearing and only learnt of their decision three (3) days after the fact, (page 27 – 28 of the Record of appeal). Their action contravened Section 4 (3) and (4) of the Fair Administrative Actions Act, 2015.

He therefore asked the Court to allow the appeal and grant the prayers sought.

10. I have considered the material in the Record of Appeal, the Ruling by the 1st Respondent's appeals tribunal and the Judgment by the PPDT. The issue I find falling for determination is who was the duly ODM nominated candidate for the Lindi Ward"

Both the Appellant and the 2nd Respondent participated in the 1st Respondent's nominations that took place on 30th April, 2017. As can be evidenced by the Provisional Certificate dated 1st May, 2017 and the Nomination Certificate dated 3rd May, 2017 (page 67 and 68), it is the names of **Jairus Omayo** (the Appellant) which are in both documents.

It is admitted in the 2nd Respondent's amended petition before the PPDT at paragraph 14 that the Appellant garnered 400 votes while the 2nd Respondent only managed 210 votes. It is therefore clear that the issuance of the Provisional Certificate and the Nomination Certificate confirm that it's the Appellant who was declared a winner after the said nominations.

11. The 2nd Respondent exercised her right to challenge the results which she did at the 1st Respondent's appeals tribunal. The Appellant has complained that he was never informed of the complaint and neither was he called at the said tribunal. He only learnt of this when he was served to appear at the PPDT for confirmation of the ruling by the 1st Respondent.

12. The ruling of the 1st Respondent's tribunal is dated 6th May, 2017 and is at page 27 of the record of appeal. It clearly confirms that the Appellant never participated in the said proceedings. This is what the tribunal sated;

“The following are the findings of the Special Tribunal:

1. There was Election malpractices and the voting process was not free and fair.

2. There was sufficient evidence to show that the results declared were not credible.”

13. After making those very serious findings, the tribunal went ahead to revoke the issuance of the Interim Nomination Certificate to the Appellant herein. It then ordered that the Interim Nomination Certificate and the nomination of Lindi ward be awarded to the 2nd Respondent, **Asha Abdi Sosso**.

14. The actions of the 1st Respondent's appeal tribunal were undemocratic and take us back to the pre 2010 Constitution years. Their action was in violation of Article 47 of the Constitution which provides;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

15. The Appellant was never informed of this matter, yet those tribunal members knew that their decision would adversely affect him as he was the holder of the two nomination certificates. From their Ruling, they only relied on the 2nd Respondent's application and what she had stated in it. These were serious allegations which required full proof. Was any offered" Even if it was offered, the Appellant was not in attendance to counter it.

Section 107 of the Evidence Act provides;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. In the case of **Ben Njoroge and Another –vs- Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**, the Court observed at paragraph 3 and 4 as follows;

“The burden of proving any allegation of election breach, misconduct and/or irregularity lies squarely upon the Petitioner. The legal principle is that ‘he ho alleges must prove’. In the case of Gideon Mwangi Wambua vs IEBC & 2 Others EP 4 of 2013, it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petitioner to prove otherwise. This was further buttressed in the case of Joho vs Nyage & Another [2008] 3 KLR E.P, where the court in upholding the position that the burden of proof lies with the petitioner, held that ‘election petitions are no ordinary suites but disputes in rem of great public importance’. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence The burden of proof in Election Petitions lies with the petitioner as he is the person who seeks nullify an election

17. My finding on this is that the proceedings before the 1st Respondent's appeals tribunal was skewed, as it denied the Appellant a right to fair trial by denying him a hearing.

Article 50 (1) of the Constitution provides;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

The right to fair trial is one of the fundamental rights that may not be limited.

Article 25 (c) provides;

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

“(c) the right to a fair trial”.

18. In determining disputes, the PPDT has the duty to ensure fair play and should not act as a rubberstamp, of any political party. Section 41 (4) of the Political Parties Act provides;

“The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap 80) and the Civil Procedure Act (Cap 75) with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.”

19. I have read the detailed affidavit of the Appellant sworn on 10th May, 2017 and filed at the PPDT. None of what he averred was considered by the PPDT in its Judgment.

20. Just before the issuance of the impugned orders, the PPDT notes at page 5 of the Judgment;

“We have found that the initial nominations were terminated in a manner that violated the 2nd Respondent’s right to be heard.”

21. The 2nd Respondent in the said proceedings is shown as **Jairus Omayi** “the Appellant”. That being their finding, why did the PPDT issue an order directing the ODM to issue a nomination certificate to the 2nd Respondent herein instead of confirming what the initial results had shown" The PPDT clearly found that his right to be heard had been violated. Why did they violate it more"

22. Upon analysis of the material before me, I find that;

(i) The 1st Respondent’s appeals tribunal acted in an undemocratic, arbitrary and biased manner in the way it handled the complaint brought before it by the 2nd Respondent.

(ii) The rights of the Appellant to a fair hearing/trial, natural justice, fair administrative action were violated by the 1st Respondent’s appeals tribunal.

(iii) The PDDT did not consider the material before it to arrive at a just decision. Its findings contradict the final orders given.

(iv) The allegations by the 2nd Respondent were never substantiated to enable both tribunals to justify the orders given.

23. For the above reasons, I find that the appeal is merited and it succeeds. I proceed to make the following orders;

(i) The appeal is hereby allowed.

(ii) The decision of the Political Parties Disputes Tribunal in complain No. 155 of 2017 is hereby set aside.

(iii) The decision of the 1st Respondent's National Appeal's Tribunal declaring the 2nd Respondent as the party's nominee is set aside.

(iv) The decision of the Returning Officer Kibra Lindi Ward declaring the Appellant, JAIRUS OMA YA as the nominee of the ODM party Lindi Ward is hereby upheld.

(v) Costs to be paid by the 1st and 2nd Respondents.

Orders accordingly.

Delivered, signed and dated this 23rd day of May 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE



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