



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, AT NAIROBI

ELECTION PETITION APPEAL NO. 62 OF 2017

DAVID KEDENGE DABUAPPELLANT

VERSUS

JARED KAUNDA CHOKWE BARNs..... 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION3RD RESPONDENT

(Being an Appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 19th May, 2017

in Complaint No. 259 of 2017)

JUDGMENT

1. DAVID KEDENGE DABU “the Appellant” and **JARED KAUNDA CHOKWE BARNs** “the 1st Respondent” are both members of the **ORANGE DEMOCRATIC MOVEMENT** (2nd Respondent).

Both of them participated in the party primaries for member of County Assembly, Malindi Town Ward, Kilifi County held on the 22nd April 2017.

2. They each claim to have won the nominations and were each issued with a Provisional Nomination Certificate on 23rd April, 2017. From the documents filed at the Political Parties Dispute Tribunal (PPDT), the 1st Respondent garnered 750 votes. The person who issued the Provisional Nomination Certificate is **Wycliffe R. O. Okoth**.

3. After hearing the parties herein, the PDDT rendered a Judgment on 18th May, 2017 declaring the 1st Respondent the winner and directing the ODM party to issue him with a Nomination Certificate within 24 hours. It is this Judgment that is the subject of this appeal, based on the following grounds;

1. The tribunal erred in law and fact and grossly misdirected itself by relying on an alleged video footage with was neither referred to by the 1st Respondent in the documents filed before the Tribunal, nor was the said footage availed to the Applicant for any comment nor rebuttal whatsoever.

2. The tribunal erred in fact in failing to consider the clear want of explanation for the delay in filing the Petition between the 5th day of May, 2017 and the 12th day of May, 2017 a delay of one week.

3. The tribunal erred in fact in failing to take into account the applicant's Provisional Certificate that was attached to the Affidavit filed in Court on the 18th day of May, 2017.

4. The tribunal erred in its final summations by failing to seek any or any declaration from the 2nd Respondent Political Party.

5. In the totality of the circumstances, the Tribunal's findings are unsupported by an credible evidence whatsoever

4. Both counsels submitted with **Mr. Odera** arguing that he was never served with the further affidavit of the 1st Respondent contrary to the directions of the Court. He objected to the reliance on the electronic evidence introduced through the said affidavit. He submitted that there were contradictions in the Judgment from the PPDT. Finally, he stated that the 1st Respondent had not explained why he had not acted soon as he learnt there was a problem on 5th May, 2017.

Mrs. Osabwa explained the late filing of the further affidavit as per the directions of the PPDT. That they were only able to serve counsel holding brief for Mr. Odera the next day when they came for Judgment.

5. She implored on the Court to consider the electronic (DVD) evidence even if not produced procedurally. She submitted that the delay in filing the claim was not deliberate and that the 1st Respondent's affidavit explained the efforts made. She prayed for the Judgment of the PPDT to be upheld.

6. The 1st Respondent in his supporting affidavit before the PPDT indicated that after receiving the provisional certificate, he waited in vain to be issued with the Nomination Certificate and he started following up and even wrote to the 2nd Respondent over the matter through his advocate.

On the other hand, the Appellant in his replying affidavit at the PPDT he indicated that he had been issued with a provisional certificate but he did not annex it to the affidavit. This affidavit was sworn on 18th May, 2017. He does not mention in it that he was issued with a Nomination Certificate.

7. This is captured clearly at paragraph 13 of the PDDT Judgment which states

"On the other hand, the 2nd Respondent submitted that he was declared the winner with a majority of the votes and issued with the Provisional Nomination Certificate. He neither provided us with a copy of the provisional nomination certificate nor the number of votes garnered."

8. Directions were given on 17th May, 2017 for the Appellant to file and serve his replying affidavit by 12 noon, 18th May, 2017.

The 1st Respondent was given corresponding leave to file a supplementary affidavit by close of 18th May, 2017 if need be.

The record shows that the 1st Respondent filed a further affidavit on 18th May, 2017. It is this affidavit that the Appellant wants the Court to disregard because of the electronic evidence which is a DVD.

9. The further affidavit was filed with the leave of the Court. The only disadvantage caused to the Appellant is that it was not immediately served on the Appellant's Counsel. Had he been served in good time, he could have decided whether to seek leave to file a further affidavit to counter the new evidence on the DVD. This video footing has been referred to in paragraph 12 of the Judgment.

10. In his further affidavit, the 1st Respondent annexed two copies of Nomination Certificates both issued on 29th April, 2017 by the ODM Party. One is in respect of the Appellant and another in respect of the 1st Respondent. Up to this point the Appellant had not disclosed that he had been issued with a Nomination Certificate and neither had he availed to the Court his Provisional Nomination Certificate. It is only in the submissions that his counsel mentions that the Appellant had been issued with a final certificate. Counsel was not giving evidence.

11. The ODM Party was the 1st Respondent in the case before the Tribunal. It is also the 2nd Respondent herein. It did not appear before the PPDT and has also not appeared yet it is to blame for all this mess.

There is in the record of appeal a letter dated 8th May, 2017 written by the 1st Respondent's counsel to the secretary ODM Party (2nd Respondent) in respect of this matter. Apparently, there was no response.

12. This is a matter that should have been resolved by the Party's dispute resolution mechanism had it cared to. The 1st Respondent cannot be blamed for that indolence on the part of the Party. That is why he decided to file this matter before the PPDT which has jurisdiction to hear him under Section 40 (1) (fa) Political Parties Act (PPA).

13. It is now clear that both the Appellant and the 1st Respondent have two certificates each i.e.

- Provisional Nomination Certificate dated 23rd April, 2017; and
- Nomination Certificate dated 29th April, 2017

Had the ODM party (2nd Respondent) appeared in this matter, it could have explained to this Court which of the two sets is genuine or if both of them were genuine.

14. In the circumstances of this case, I find justice will be served to the people of Malindi Town Ward if they go back to the primaries to nominate their representative of choice for the said Ward.

15. I therefore find that the appeal partially succeeds, and I grant the following prayers;

- i. The Judgment delivered on the 19th day of May, 2017 by the PPDT is set aside.
- ii. The Provisional Nomination Certificates dated 23rd April, 2017 and the Nomination Certificates dated 29th April, 2017 issued to both the Appellant and the 1st Respondent are declared null and void.
- iii. There shall be a repeat of the Nominations for Member of County Assembly, Malindi Town Ward, Kilifi County within 48 hours from the date of this Judgment.
- iv. Each party to bear his own costs.
- v. These Orders to be served on the 2nd and 3rd Respondents.
- vi. No orders as to costs.

Orders accordingly.

Delivered, signed and dated this 25th day of May 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE



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