



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 79 OF 2017

MAXWEL OCHIENG.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

GEORGE OMONDI.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The appellant approached this court via a Memorandum of Appeal dated 24th May, 2017 challenging PPDT Judgment of 15th May, 2017. The Applicant raises six (6) grounds of appeal. In brief the grounds of appeal can be categorized in two broad grounds; the first being that the Political Parties Dispute Tribunal (PPDT) erred in finding the entire nomination process was opaque, unaccountable and inaccurate; and secondly that PPDT failed to appreciate the evidence adduced before it.

2. The application seeks to have the judgment of PPDT in Complaints No.191 of 2017 and 235 of 2017 (consolidated) of 15th May, 2017 set aside; the 1st respondents be compelled to issue the appellant with the final nomination certificate for the position of Member of County Assembly Nairobi West Ward, Langata Constituency; and the 1st respondent be compelled to submit the appellants name to the IEBC as its nominee.

BACKGROUND

3. The appellant had initially filed a complaint with the 1st respondents Special Appeals Tribunal upon which the Tribunal in its decision instructed the 1st respondent to issue the appellant with the nomination certificate. The 1st respondent however issued the 2nd respondent with the Nomination Certificate thus leading the appellant to file Complaint No 191 of 2017 before the PPDT.

4. The 2nd respondent equally filed a complaint at the PPDT, Complaint No 235 of 2017 which was consolidated with the appellant's Complaint No 191 of 2017 hence being dealt with as one. Upon the PPDT rendering its judgement, it was ordered that the 1st respondent should carry out fresh nominations within 24 hours.

ISSUES

5. Upon hearing the application, I find the following issues in contention:

(1) Whether the entire nomination exercise was opaque, unaccountable and inaccurate.

(2) Whether the Returning Officer upheld his duty to publicly tally, collate and announce the results.

(3) Whether the Returning Officer has powers to alter results received from Presiding Officers.

Whether the entire nomination exercise was opaque, unaccountable and inaccurate.

6. The appellants' contention was that the evidence availed at the PPDT clearly showed that the entire nomination election process were free and fair except tallying by the Returning officer. The appellant contended that the process was a smooth exercise from when the votes were casted, counted, tabulated and announced promptly by all the five presiding officers at the polling centres.

7. The appellant further contends that there was inordinate delay in the announcements of the results by the returning officer and that the returning officer took advantage of that window by holding a private meeting with the 2nd respondent for a period of about 2 hours during which time the results were altered.

8. The appellant's contention is that the votes garnered at the Kariobangi Baptist Polling Station were altered. He contended that he got 49 votes at that polling station which number was given to him by other candidates and agents. He asked the court to note that from the tallying sheet, the record shows that he garnered zero (0) votes which was not correct. It is the appellants' contention that the returning officers' conduct at the tail end of the nomination exercise compromised the credibility of the election and that the results announced were therefore not genuine.

9. The 2nd respondent contended that the appellant had confessed to an irregularity. He drew the courts attention to the confession in the plaint filed by the appellant at PPDT at paragraph 6(c) and the supporting affidavit at paragraph 8. In both paragraphs, the 2nd respondent urged that the appellant confesses that he hired a van for the transportation of the ballot boxes but that it took the intervention of the 2nd respondent to stop him from taking the ballot boxes.

10. The 2nd respondent urged that no one else was allowed to transport the election materials other than the returning officer. Counsel urged that the appellant hired a van to transport the election materials which was illegal and that it was after the 2nd respondent had stopped the appellant from transporting the said election materials, that the appellant claimed the elections were not free and fair. It was the 2nd Respondent submission that the appellant was approbating and reprobating at same time. He contended that on the one hand the appellant contends that the elections were free and fair except the final tally. He should make up his mind whether or not it was free and fair or flawed.

11. The 2nd respondent further took issue with the special county appeals tribunal decision. The 2nd respondent urged that the Special appeals tribunal had termed the said elections as free and fair yet the upshot of their conclusion was that the appeal/ complaint was successful and further revoked the said nominations. This was a contradiction as free and fair elections cannot be nullified.

12. In **Evans Odhiambo Kidero v Ferdinand Ndungu Waititu & 2 others 2014 eKLR** in regard to the yard stick for determining whether an election process was free and fair it was observed:

“Para 304 “did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merits and so distorted as not to reflect the expression of the peoples electoral intent” It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the presidential election.”

13. The appellant cites that authority for the proposition that procedural or administrative irregularities and errors occasioned by human imperfection are not enough to vitiate an election. He then contends that the conduct of the returning officer at the final collation and announcement at the tail end of the exercise should not justify vitiation of the entire nomination process which was largely free, fair and credible. He goes on to suggest that the nullification of the election on the unilateral action of an official was premature as a remedial measure.

14. In regard to this issue, I find that there is no contention that the nomination exercise was free and fair. The only contention is by the appellant that at the tail end of that exercise, there was inordinate delay in the announcements of the results and that the same was preceded by a two hour meeting between the appellant and the 2nd respondent. No evidence was adduced in support of the allegation of the private meeting between the returning officer and the 2nd respondent. The 2nd respondent controverted the allegation in his replying affidavit. He who alleges has the burden to adduce evidence to prove the fact. Without proof, the allegation remains a bare allegation with no probative value.

15. Having considered the submissions before me and the record of appeal, I find that the nomination exercise for the representative of the 1st respondent Korogocho Ward of Ruaraka Constituency was free and fair.

Whether the Returning Officer upheld his duty to publicly tally, collate and announce the results.

16. We have already dealt with this issue and found that even if there may have been a delay in the announcement of the results, it was not inordinate and neither were there any interference with the results. The results were actually contained in the record of appeal, page 91. They are very clear, there is no alteration on the record. The alleged alteration is not apparent from the fact of this record. What the appellant presented as proof of those alterations were the results of voting of persons who were not named. The sources of those results are also unknown. They are therefore wholly unreliable and incredible.

17. I find from the record that the returning officer acted within his duties as prescribed under the ODM election and nomination rules, Rule 4 thereof. He received the results from the presiding officers, collated and tallied and declared the results as was expected of him. The results cannot be contradicted through unrecognised tallying mechanisms. What the appellant said in regard to the declared results that they were opaque, inaccurate and unaccountable has no basis whatsoever.

Whether the Returning Officer has powers to alter results received from Presiding Officers.

18. The appellants' contention is that upon conclusion of results, announcements at each and every polling station, it is open to any person to do the arithmetic of adding up the publicly announced results by presiding officers and determine the final results of the nomination process. It is his contention that it is the presiding officers in exercise of their discretion who can determine whether or not to include a ballot paper in the final count of votes. The returning officers roles are set out under regulation 83(1) of the elections, general regulations and their role is to tally the results without recounting the ballots and where the total valid votes in a polling station exceeds the number of registered valid voters, he should disregard the votes count of that polling station in the announcement of the election results and make a

statement to that effect. The Returning Officers' duty is not to tamper with the results at his own will.

19. The 2nd respondent has urged the court to dismiss the appellant's contention that the results were altered at Kariobangi Baptist Polling Station. He urged that the appellant cannot be allowed to have parallel tallying as that is not recognised. The 2nd respondent urges that there were no alterations in the final results which are to be found at page 91 of the record of appeal.

20. I have examined the facts of the case afresh, and I find that there is no proof that there was any alteration of the results, whether by the presiding officers or the Returning Officer. The results that were announced by the returning officer were accurate, the process was conducted publicly and the entire process was free and fair. I therefore confirm the election of the 2nd respondent. The decisions of the special Appeals tribunal and PPDT were erroneous as the conclusions that they arrived at, were not supported by any evidence before them and cannot therefore stand. The results of the nomination as given by the returning officer for the Korogocho Ward in Ruaraka constituency Nairobi County are hereby confirmed.

21. The upshot of this appeal is that **the same lacks any merit and is dismissed. There will be no orders as to costs.**

DATED AT NAIROBI THIS 2ND DAY OF JUNE, 2017.

LESIIT, J.

JUDGE



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