



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO. 80 OF 2017**

**BETWEEN**

**CAROLINE OJENGE OGOT.....APPELLANT**

**VERSUS**

**HYPOLITUS OWITI OBUNGA.....RESPONDENT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> INTERESTED PARTY**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. This is an appeal and cross appeal from the judgment and decree of the **PPDT** dated 20<sup>th</sup> May, 2017. In that judgment, **PPDT** dismissed a complaint filed by **Caroline Ojenge Ogot** (Caroline) and directed the 1<sup>st</sup> respondent, **ODM**, to hold fresh nomination for **MCA** for **Central Nyakach ward**, Nyakach constituency, Kisumu County. **Hypolitus Owiti Obunga** (Hypolitus) was also affected by the same decision because it meant his nomination certificate was invalidated.

2. After hearing the appeal and cross appeal on 30<sup>th</sup> May, 2017, the court dismissed both the appeal and cross appeal and upheld **PPDT**'s decision. The court further ordered the 1<sup>st</sup> respondent, Orange Democratic Movement to hold fresh nomination within 36 hours thus upholding the **PPDT**'s decision and reserved reasons for its decision.

3. According to the record and as admitted by the parties, the 1<sup>st</sup> respondent held nomination for **Central Nyakach Ward** for the position of **MCA** on 26<sup>th</sup> April, 2017. When it came to results, both **Caroline** and **Hypolitus** claimed victory in the nomination. **Caroline** claimed to have garnered **2235 votes** and said that Hypolitus garnered **1116 votes** hence according to her, she emerged the winner and was so declared.

4. When Hypolitus filed a complaint to the **IDRM**, it did not resolve the issue but he was issued with a nomination certificate. Caroline had also been issued with a final certificate. **Hypolitus** filed a complaint before **PPDT** where he claimed to have won with **1116** votes but Caroline had been declared the winner

despite having garnered fewer votes, (327). After considering the complaint, **PPDT** allowed the complaint holding that it was not possible to tell who had won, and directed that fresh nominations be held promoting this appeal and cross appeal.

5. In the memorandum of appeal dated 26<sup>th</sup> May, 2017, Caroline complained that **PPDT** erred in failing to appreciate that **Hypolitus** had not proved that he won the nomination, that **PPDT** erred by shifting burden of proof to her, that there were no justifiable circumstances for nullifying the nomination results, and that **PPDT** was wrong in ignoring evidence. Thus arrived at a wrong decision.

6. In the cross appeal, **Hypolitus** complained that **PPDT** erred in nullifying his certificate issued on 29<sup>th</sup> May, 2017 and that it ignored evidence before it.

7. During the hearing of the appeal, **Mr. Ombwayo** learned counsel for **Caroline** faulted **PPDT** for nullifying his Clients nomination certificate yet she had won the nomination with **2235 votes** against **Hypolitus' 327 votes**. He referred to the affidavit of the returning officer to support their case. He also referred to the tallying sheet which showed that **Caroline** had garnered **2237** votes against **Hypolitus' 327 votes**. He therefore urged that the appeal be allowed and **Caroline's** certificate be reinstated.

8. **Mr. Omollo**, learned counsel for **Hypolitus** submitted that his client produced evidence before the **PPDT** to demonstrate that he had won the nomination with **1116 votes** which were the highest votes and should have been declared the winner. According to **Mr. Omollo**, **Caroline** garnered **327 votes** and therefore she did not deserve to be declared the winner. He also led that his client's cross appeal be allowed.

9. I have considered this appeal and cross appeal as well as submissions by counsel. I have also perused the record myself. What is clear is that both the appellant and respondent claim to have won the nomination. Each has exhibited a tallying sheet to show the votes garnered. **Caroline** claims to have garnered **2237 votes** against her opponent's **1116 votes**, while **Hypolitus** claims to have garnered **1116 votes** against **Caroline's 327 votes**.

10. Both parties to this appeal were issued with certificates making it difficult to ascertain who had won. The purpose for which Political Parties carry out nomination, is to allow party members exercise their democratic right to decide who should represent them in an election, and possibly, be their elected leader after election. In carrying out nominations, political parties are supposed to **embrace democratic principles by holding open free fair and credible nominations**. **Article 91(1)** of the constitution binds political parties to promote principles and objects of the constitution. These principles and objects include democracy and the right to exercise civil and political rights to vote and elect leaders of their choice.

11. The Political Parties Act binds political parties to these principles of democracy. **Rule 18.6** of the **ODM** Party's nomination Rules provides that **presiding officers shall count and tally votes cast at each polling stations and forward them to the constituency returning officer who shall make a final tally before announcing the result of the elections**.

12. The appellant, Caroline, has attached a **handwritten tallying sheet** showing only totals. It has no polling centers. It shows that she garnered **2237 votes** and the respondent, Hypolitus, got **1116 votes**. On the other hand, the tallying sheet produced by the respondent is typed and has all polling centers and votes garnered by each candidate. It is not, however, signed by the presiding officer or returning officer, it is only signed by agents.

13. With this sort of evidence, it is not possible to tell, first, which tallying sheet is the official one, and it

could not be said with certainty that a particular candidate between the appellant and respondent won. The **PPDT** Could not ascertain either, the will of party members of Central Nyakach Ward.

14. I have perused the judgment of **PPDT** and noted that it considered all these facts and came to the conclusion that it was not possible to tell which tallying sheet was the official one, that it could also not understand why two certificated were issued yet one person was supposed to have won.

15. I have given due consideration to this appeal, perused the record and evaluated the evidence on record. I am satisfied that PPDT arrived at the correct decision I see no reason to interfere.

16. Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> Day of June 2017

**E C MWITA**

**JUDGE**



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