



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 55 OF 2017

PROF. AYIECHO OLWENY.....APPELLANT

VERSUS

JAMES ONYANGO K'OYOO.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT (ODM) PARTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant has filed this A Memo of appeal dated 19th May 2017 challenging the decision of the Political Parties Disputes Tribunal, hereinafter PPDT, delivered on 9th May, 2017 in Tribunal Case No. 115 of 2017. They have raised six grounds of appeal as follows:-

1. The Honourable Tribunal erred in law and failed in properly evaluating the entire evidence presented before it by the Appellant.
2. The Learned Tribunal erred in law in replying on the terms of a judgment that overtly violated the express provisions of **Order 21 Rule 2(3)** of the **Civil Procedure Rules**.
3. The Learned Tribunal erred in law and in fact in failing to interrogate the author of the alleged judgement dated 5th May, 2017.
4. The Learned Tribunal erred in Law and in fact in failing to annul the nomination results of MP position for Muhoroni Constituency and/or to rule in favour of the Appellant herein as the duly nominated ODM candidate for Muhoroni Constituency in light of the overwhelming evidence tendered before it.
5. The Honourable Tribunal erred in law and in fact in discarding the Affidavit evidence tendered by the 5 presiding officers for Muhoroni Constituency.

6. The Honourable Tribunal erred in law and in fact when it failed to appreciate the fact that no evidence had been tendered by the Respondents herein to upset the evidence adduced by the Appellant herein.

ISSUES FOR DETERMINATION

Whether the Tribunal failed to properly evaluate the entire evidence presented before court by the Appellant.

2. It is the Appellant's contention that the PPDT did not evaluate the entire evidence presented before it. In particular Mr. Mwamu for the Appellant urged that five Returning Officers who tallied the results filed an affidavit through one of them in which they aver that the Results of the Nomination for the Muhoroni Constituency were announced before the five Returning Officers sent the results from then.

B. Whether the PPDT violated the express pious of Order 21 Rule 2(3) of the Civil Procedure Rules.

And whether the PPDT erred in law when it failed to interrogate the author of the judgement dated 5th May, 2017.

3. Secondly it was the Appellant's contention that the judgment of the PPDT was word for word as that delivered by the NAT before it.

4. The Appellant challenged the authenticity of the judgment presented to the PPDT by the 1st Respondent purported to have been delivered by the PPDT urging that by the time the Appellant filed the appeal before the PPDT the NAT had not delivered their judgement. The Appellant relied on the affidavit by the Legal Officer of the 2nd Respondent Mr. Anthony Muturi dated 7th May 2017 in which he apologises for failure by the 2nd Respondent to deliver its judgement.

5. The Appellant contends that the judgement presented by the 1st Respondent even if it was a decision of the 2nd Respondent flouted Rule 19.2.9 of the ODM Nomination Rules having been delivered 10 days late and not within the stipulated 48 hours. Furthermore the judgment was not signed by all the members of the PPDT. The Appellant urged that the judgement did not meet the requirements of Order 21 Rule 2(3) and PPDT Regulations 2017 Rule 29 thereof. It was not read in open court, did not contain a summary of the evidence adduced before court.

6. The 1st Respondent through his counsel Mr. Sagana has opposed the appeal. It was the 1st Respondent's contention that the complaint before the PPDT was six fold but that the Appellant gave evidence only in support of the fifth ground which was that Five Presiding Officers for five wards in Muhoroni Constituency had not given results of their tallying to the Returning Officer by the time the latter declared the 1st Respondent the winner of the nominations. The 1st Respondent contends that the tallying sheets by the five Returning Officers were not before the PPDT or the NAT and further that the only prayer sought before NAT was to have the Appellant declared as the winner.

7. The 1st Respondent contends that the judgment of the PPDT complied with Order 29 of Civil Procedure Rules in that it contained the complaint the evidence, the issues, the ratio decidendi. In any event, the 1st Respondent urged that the issue the Judgment was not one gave grounds in the memo of appeal.

8. The 1st Respondent urged that the NAT considered the allegations of the Presiding Officer and found no evidence to upset the results of the Returning Officer. He urged further that the PPDT agreed with NAT that the witness was not credible. The Appellant in response drew the courts attention to the affidavit sworn by Mr. Peter Oyuko at page 81 of the Record of Appeal in which he deposes that he had authority of the other four Presiding Officers to swear the affidavit on his and their behalf. Indeed at page 80 the 4 Presiding Officers sworn an affidavit of authority to swear giving Oyuko authority to swear the affidavit on their behalf.

9. On the issue of jurisdiction the 1st Respondent urged that the PPDT had no jurisdiction to determine a fresh issue, especially the one that has not been exhausted through the party's IDR. To that the appellant contended that the PPDT had jurisdiction to deal with issues coming from primaries but the issue before this court was the fact that PPDT did not touch on the evidence, nor did it say that it had no jurisdiction.

10. The 2nd Respondent made no submissions in this appeal and left the matter for the court to decide.

11. I have considered the appeal and the issues raised before this court. On the onset the primary issues are very clear. The very first primary issue is whether NAT rendered a verdict after hearing the complaint by the Appellant. I find clear admission by the 2nd Respondent Legal Officer's affidavit that the verdict or judgment had not been rendered and a promise that the same would be rendered "soon". That affidavit sworn by Mr. Anthony Muturi dated 7th May, 2017 was filed before the PPDT in response to the Appellant's appeal before the Tribunal. The deponent averred that the PPDT should stay its proceedings pending the determination by the 2nd Respondent's NAT after the IDRMM completed its work.

12. In light of the affidavit by the 2nd Respondent's Legal Officer, no judgement had been rendered by NAT by the time the PPDT entertained the Appellant's appeal. That therefore means the 2nd Respondent did not own the judgment which the 1st Respondent then annexed to his replying affidavit to this appeal at paragraph 9 as "JOK2".

13. Looking at the judgment itself, it bears signatures of three out of five of the members of NAT. There is no authentication stamp on it. I agree with the Appellant that the PPDT should not have considered that document as a judgement of the NAT.

14. The other key issue has to do with whether the PPDT in its judgment fully evaluated the evidence before it and whether that judgment accords with order 29 of Civil Procedure Rules and PPDT Regulations. Regulation 29(3) sets out what the decision of the Tribunal should contain. It is Reg. 3(d) which forms the bone of contention here. It provides:-

"29(3)(d) a summary of all the relevant evidence produced before the Tribunal and the reasons for accepting or rejecting the evidence."

15. I would not say that there was a failure to evaluate the evidence adduced before it fully. The Tribunal identified the issue for determination. In its analysis it stated thus:

"....."

16. The finding that the Presiding Officer who testified before the PPDT "perpetrated the irregularities that the complainant alleges ..." and the conclusion "Like the Party's IDRMM, this Tribunal attached little credence to the complainant's testimony." Means that the PPDT had before it evidence regarding the nomination processes.

17. The testimony of the Presiding Officer is backed by the affidavit sworn by Peter Oyuka and the copies of all the results from the 5 wards within the Constituency marked "PO1". He averred that he and his other colleagues were still holding the results of the 5 wards and that they had difficulties reaching Returning Officer in order to give him the results.

18. Rule 18.6 gives the responsibility of the Presiding Officers thus:

19. Rule 18.7 gives the responsibility of the Constituency Returning Officer thus:

20. There is no dispute that the five Presiding Officers for the Muhoroni Constituency are the ones set out under paragraph 2 Mr. Peter Oyuko's affidavit. There is no dispute that they presided over the nominations in the five wards comprising the Muhoroni Constituency.

21. In the circumstances it should have interested the PPDT that results in Muhoroni Constituency were declared yet the Presiding Officers were before court on oath swearing that they were still holding them.

22. It is the duty of the IDRMM to investigate

18.6 Presiding Officers shall count and tally votes cast at each Polling Station and forward them to the Constituency Returning Officer who shall make the final tally before announcing result of the elections in respect of the Member of

County Assembly Representatives and Member of National Assembly.

18.7 The Constituency Returning Officer shall submit forthwith the vote tally to the County Returning Officer who shall make the final tally with respect to nominations for Members of Senate, Governor and County Women Representatives before making public the result of Party nomination for County elections.

Analysis

That there were irregularities during the nomination process is undisputed. However, the Complainant's allegations that the results of the five polling stations have not been submitted for tallying to the Returning Officer remain unsubstantiated. Further, one Presiding Officer who offered testimony on behalf of the Complainant before the party's IDR, claimed that he was still in possession of one of the ballot boxes. This officer who testified on the Complainant's behalf, according to his very own testimony, perpetrated the irregularities that the Complainant alleges. This was also noted by the party's IDR which recommended an investigation of the officer by the National Elections Board. Like the party's IDR, this Tribunal attached little credence to the Complainant's testimony.

DATED AT NAIROBI THIS 26TH DAY OF MAY, 2017.

LESIT, J.

JUDGE



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