



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 21 OF 2017

ISAYA OYOO OPAP.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

JOHN MATUNGA MIRERI.....2ND RESPONDENT

INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION.....INTERESTED PARTY

(Being an appeal from the entire judgment & decree delivered by the Political

Parties Dispute Tribunal on 10th May, 2017 at Nairobi in Complaint No. 83 of 2017)

JUDGMENT

The appellant herein and the 2nd respondent are registered members of the 1st respondent. They both participated in the 1st respondent's nominations held on 24th April, 2017 for the nomination of the member of the county assembly for West Kamagak Ward in Homa Bay County.

It is alleged that the appellant emerged victorious in a free, fair and credible nomination conducted by the 1st respondent by garnering a total of 1113 votes against those of the 2nd respondent's 1027 and he was declared the winner by the Returning Officer, one Mr Shadrack Kiplimo Biama as stipulated under *rule 18.6* of the ODM Election and Nomination Rules following which, he was issued with a provisional nomination certificate.

The appellant further alleges that he learnt of the 2nd respondent's application challenging his nomination for the first time on 6th May, 2017 filed before the Political Parties Dispute Tribunal [PPDT], and upon perusal of the file, he noticed that the County Elections Appeals Tribunal at Homa Bay had heard the 2nd respondent's complaint without notifying him, after which they made a recommendation that the nomination certificate be issued to the 2nd respondent because the margin between them was thin.

That thereafter, the 2nd respondent again sneaked to the PPDT to have the Tribunal issue orders compelling the 1st respondent to issue him with the nomination certificate. The PPDT upheld the decision of the County Elections Appeals Tribunal, and being dissatisfied with the decision by the PPDT, the appellant has appealed to this court vide the memorandum of appeal dated 12th May, 2017 wherein he has listed six [6] grounds of appeal.

Accompanying the memorandum of appeal, is the application dated 12th May, 2017 which sought among other orders; leave to

admit additional evidence which this honourable court heard and granted. As a result of that development, the 2nd respondent was also granted leave by the court to respond, which he did by way of a replying affidavit sworn on 16th May, 2017, in which he raised fundamental legal and factual issues.

The appeal came up for hearing on 17th May, 2017 when the learned counsels made their respective submissions.

On his part, counsel for the appellant sought to collapse the grounds of appeal into two [2] as follows:

- i. *Why the appellant believes the judgment should be set aside; and*
- ii. *Why the appellant believes he is the bona fide winner of the nomination exercise.*

Submitting on the judgment by County Appeals Tribunal [herein referred to as the CAT], he told the court that the same captured the report and brings out the facts of what transpired before that Tribunal. That the respondent had appealed to the CAT to declare him the winner. He told the court that the way the facts are crafted in that judgment, points to the fact the appellant was not involved and did not participate in those proceedings and so were the other parties who participated in the nomination exercise.

He averred that though CAT acknowledged that the appellant was the outright winner, it went ahead to declare the 2nd respondent the winner of the nomination which according to him was speculative as CAT had no solid evidence upon which they based their findings. He urged the court to look at the return forms and appreciate the margin of votes scored between the appellant and the 2nd respondent.

Counsel attacked the findings by the PPDT in which they stated:

“We have found no returns, declaration, provisional certificate or nomination certificate to enable this Tribunal determine conclusively who won the elections.”

He told the court that the documents have now been availed to court to enable it reach a fair determination. The documents include the return forms and extract of the polling results from polling stations. He made reference to the replying affidavit by the 1st respondent wherein he stated that there was no declaration of results and no contestant signed acknowledging defeat though this was disputed by the 2nd respondent through his counsel during submissions. He argued that the 2nd respondent sought to be declared the winner in a process which he said was not credible and in which he claimed that the voters were turned away yet he did not produce evidence to prove that indeed those were his voters.

On the allegation that the return forms annexed by the appellant are not genuine, he averred that the 2nd respondent did not bring any evidence to the contrary and that the said documents are public documents and the 2nd respondent is at liberty to scrutinize them. That the 2nd respondent has blamed the appellant for things that were not within his powers or duties to do, for example allegations that the polling stations in the 2nd respondent's strongholds were closed early and that the appellant colluded with the returning officer to vote the 2nd respondent out. That the 2nd respondent says that the elections were a sham and yet he wishes to be declared a winner. He averred that the manner in which CAT did its investigations was suspect. He relied on the case of **RAHIM KHAN V KHURSHID AHMED & OTHERS, 1975 AIR 290** and that of **JOHN KIARIE WAWERU V BETH WAMBUI MUGO & 2 OTHERS, EP NO 13 OF 2008** and averred that the burden of proving alleges of malpractices was on the petitioner and the burden is usually higher than that of a balance of probability in election petitions. He reminded the court of its duty to tread carefully not to interfere with the democratic process and in support of this contention, he cited the case of **BEN NJOROGOE & ANOTHER V IEBC & 2 ORS.**

On whether or not the appellant won, he submitted that there is sufficient evidence that he won which is borne in the tally forms and also in the judgment of CAT that acknowledged that the appellant won the nomination exercise. He further relied on the replying affidavit of the 2nd respondent dated 16th May, 2017 in which he acknowledged the fact that the appellant won but the 2nd respondent refused to concede because the margin was thin. The counsel also relied on the declaration by the returning officer which shows the total votes garnered by the appellant and the 2nd respondent and the evidence of provisional certificate issued to the appellant showing that he won.

In his concluding remarks, he told the court that by the appellant availing documentary evidence as he has done, he has discharged the evidential burden placed on him and his prayer is that where the people have spoken conclusively by determining their destiny by way of ballots, courts or tribunals should not be used to stifle democracy.

On his part, learned counsel for the 2nd respondent relied on their replying affidavit filed in court on 17th May, 2017 to oppose the appeal. In his opening remarks, he stated that his arguments would be structured on three grounds as follows:

i. The court has no jurisdiction to sit on appeal on a decision by PPDT.

ii. Where sitting in appeal and the court is presented with a conflicting set of facts in the circumstances where the conflicting allegations are capable of resolution in the normal manner, the court cannot make a determination in one way or the other.

iii. Even though this court has jurisdiction to entertain an appeal from PPDT, the court can only act if it is established that the PPDT made an error.

On the issue of jurisdiction, the court was told that it had no jurisdiction to entertain an appeal from ODM's CAT as such appeals, according to the ODM rules should be lodged with the NAT of the party after which, if a member is aggrieved by the decision of NAT, can go to the PPDT then to the High Court. He averred that in this case, the court is being asked to set aside the decision of the CAT whereas its jurisdiction is to listen to the appeals from the PPDT.

On the second issue, the court was told that it has been presented with two different sets of facts and for that reason, it cannot be able to determine the issues at hand. He submitted that on one hand, the appellant is trying to demonstrate that he won while on the other hand, the originals of those documents have not been availed to court. He averred that the documents relied on by the appellant are not available at the party because if they were, this case would not have brought as it would rely on the evidence that it has.

He submitted that if the party has those documents then CAT would have used them. That the evidence before them does not say who won but if the documents were there then CAT would not have had a problem declaring the winner. That either the appellant or the respondent cannot determine the reason behind the CAT's decision. It is only CAT that can tell the court what determined their finding. He told the court that there is no access to the records by CAT and in those circumstances, it is impossible for the court to act. That whether CAT made the right or wrong decision has never been considered as it was not an issue before the PPDT. According to him, it was the duty of the 1st respondent to summon the appellant and that in the affidavit by the 2nd respondent, CAT adjourned the case twice to enable the appellant to appear but he never appeared.

He averred that neither the appellant nor the party challenged the decision of CAT and it was the 2nd respondent who moved the PPDT because he wanted the decision of CAT implemented. He further submitted that the PPDT only confined itself to the issue presented to it and that the 2nd respondent did not have any complaint against the appellant or CAT in the complaint he lodged with PPDT. His complaint was against the 1st respondent for refusing to act on the decision of CAT. That whether the appellant won or not, was not an issue before PPDT and he did not seek to provide such evidence at that material time and it is only being produced before the court for the first time. He supported the decision of PPDT and urged the court to find that the appeal has no merits.

With regard to the authorities submitted by the appellant, the court was told that they are not relevant to this appeal as they relate to an appeal arising out of an election petition and the same ought to have been produced before CAT and not at this stage.

In his brief response, counsel for the appellant reiterated his earlier submissions to the effect that his client was not heard before CAT yet the Tribunal was supposed to ensure that all parties were heard before arriving at its decision. He urged that the court has jurisdiction to hear the appeal on both law and facts. He averred that there is a declaration of results by the returning officer which has not been challenged and the denial by the 2nd respondent of the knowledge of the returns is just a cover up. On the documents submitted to the court he argued that they cannot be expected to have originals as such documents are in possession of the 1st respondent who have chosen not to participate in this appeal.

The court has considered the appeal and the arguments put forth by the learned counsels for the respective parties. Let me start by appreciating that the circumstances in this appeal are unique for reasons that I will address shortly.

The appeal herein arises from ODM party primaries for nomination of the member of the county assembly for West Kamagak ward in Homa Bay County, during which the appellant and the 2nd respondent herein participated as candidates. The appellant was declared the winner by the returning officer. The 2nd respondent challenged the appellant's nomination by lodging a complaint before CAT which after hearing his complaint prepared what it called a report. In the said report, this court is able to summarize the 2nd respondent's complaint's as follows:

- a) *There were irregularities that were committed during the nomination exercise.*
- b) *The 2nd respondent's voters were disfranchised and turned away without voting allegedly because of time constraints.*
- c) *The credibility of the whole nomination exercise was in doubt and that the voter register was not followed.*

He urged the CAT to declare him the winner of the nomination. The findings and recommendations of CAT are, rather interesting and I quote:

"FINDINGS

It appears that many voters at Wire, Agoro Sare and Ranyiinya polling stations which are the strongholds of the petitioner were turned away without voting. Therefore there must have been something fishy because at first he was declared the winner and this was changed shortly thereafter.

RECOMMENDATIONS

The margin between the petitioner's votes and those of the alleged winner was very thin. The tribunal finds that the petitioner must have been the winner.

We recommend that he be given the ODM nomination certificate and not Isaya K Opap."

Submissions were made before me with regard to the proceedings that took place before CAT. First, I wish to make an observation that they have not been signed. Secondly, the said Tribunal made far reaching findings and recommendations without any evidence to support the same. As rightly submitted by the counsel for the 2nd respondent, neither the appellant nor the respondent can tell the court what informed the determination by CAT. What we have on record are mere statements made by the petitioners, among them the 2nd respondent, which were not substantiated at all. That notwithstanding, CAT went ahead and declared the 2nd respondent the winner. From the proceedings, there is no indication as to whether the appellant was aware of what was happening before CAT yet the recommendations that were made had far reaching effect on him. Though the 2nd respondent averred that the appellant was aware of the proceedings before CAT, I can only say that there is no evidence to that effect.

From there, the 2nd respondent moved to PPDT for a declaration that he be declared the winner of the nominations for the position of a county assembly member of West Kamagak ward in Homa Bay County and for an order compelling the 1st respondent in this appeal to issue him with the nomination certificate for that position.

The proceedings before the PPDT and the orders issued therein, were even more interesting. They identified one issue for determination which is:

"Whether or not the complainant was the rightful winner of the nominations for the position of member of county assembly for West Kamagak Ward, Homa Bay County."

With all due respect to the learned members of that Tribunal, this was erroneous in that in the complaint filed by the 2nd respondent, the orders that he sought were declaratory and mandatory in nature. The PPDT had not been called upon to determine who was the winner of the nomination. In fact, it failed to address itself to the issues that were before it for consideration and determination and even the orders that it issued were irrelevant to the complaint before it.

Arising from those orders by the PPDT, one can now appreciate why this court has been put in an awkward position in determining this appeal: But doing the best I can, with the evidence on record, which this court is obliged to consider, the following facts have emerged:

- a) That there were notable irregularities that were committed during the nomination exercise.*
- b) The irregularities rendered the credibility of the nomination exercise very questionable.*
- c) As a result, it is not possible to tell with certainty who between the appellant and the 2nd respondent won the nomination.*

The documents that were availed to this court by way of additional evidence have been disputed. The 1st respondent who could have shed some light on some of the issues that parties are grappling with in this appeal, has been of no help by refusing to participate in the proceedings.

This court now turns to the Constitution to offer some guidance on the way forward in this appeal. **Article 38 (2)** provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:

- (a) Any elective public body or office established under this Constitution.*

The evidence on record shows that voters in some polling stations were turned away and they did not exercise their right to vote thus denying them their constitutional right.

Under **Article 91 (1) of the Constitution**, every political party shall:

“[d]. abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party.

[e]. respect the right of all persons to participate in the political process, including minorities and marginalised groups.

[g]. promote the objects and principles of this Constitution and the rule of law.

[h]. subscribe to and observe the code of conduct for political parties.”

These two articles of the Constitution are so specific on political parties. The evidence on record regarding nomination irregularities is from no other than the 2nd respondent who moved the CAT to declare him the winner which finding the PPDT upheld notwithstanding that there was no clear winner in the nomination which in my humble opinion was erroneous on its part.

Finally, the issue of jurisdiction of this court was raised by the counsel for the 2nd respondent. The powers of an appellate court is donated by **section 78 of the Civil Procedure Act**. Among them are:

- a. To determine a case finally.*
- b. To take additional evidence or to require the evidence to be taken.*

Section 78 (2) provides:

“Subject to the aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

I do find and hold that this court has jurisdiction to entertain this appeal. The reason being that there is already a decision by PPDT which has to be dealt with and this court has to make a determination one way or another using the powers donated to it under *section 78 of the Civil Procedure Rules*.

In conclusion, this court finds that the nomination process conducted by the 1st respondent for the 1st respondent's nominee for member of the county assembly for West Kamagak Ward did not meet the constitutional threshold required of political parties by *Articles 38 (2) and 91 (d), (e), (f) and (h) of the Constitution* and the same are declared null and void.

The judgment and/or order by PPDT dated 9th May, 2017 and that of CAT are set aside. That fresh, fair and credible nominations be carried out by the 1st respondent for a member of county assembly for the West Kamagak Ward within 72 hours from the date of this judgment. No orders are made on costs.

Dated, signed and delivered at Nairobi this 22nd day of May, 2017.

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L. NJUGUNA

JUDGE



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