



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, KIAGE & GATEMBU JJ.A)**

**CIVIL APPEAL NO. 194 OF 2013**

**BETWEEN**

**ALICE WAHITO MWANGI NDEGWA ..... 1<sup>ST</sup> APPELLANT**

**MARY AROOT OKEDI ..... 2<sup>ND</sup> APPELLANT**

**PETER NYAKONA NYAKONA ..... 3<sup>RD</sup> APPELLANT**

**ABDI IBRAHIM ..... 4<sup>TH</sup> APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL BOUNDARIES**

**COMMISSION .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya*

*At Nairobi (Ngugi, Korir & Majanja JJ.) delivered in Nairobi on the 12<sup>th</sup> day*

*July, 2013*

*in*

***HIGH COURT PETITION NO. 305 OF 2013)***

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**JUDGMENT OF THE COURT**

1. This is the Judgment of the Court in respect of an appeal from the decision of the High Court (Ngugi, Korir and Majanja JJ) given on 12<sup>th</sup> July 2013 dismissing the appellants, petition for orders that IEBC, the 1<sup>st</sup> respondent, should include the appellants names in the final list for nomination to various County Assemblies. Specifically:

- a. The first appellant seeks an order to be included in the final list of nominees to the Laikipia County Assembly representing Gender Top Up in place of Jennifer Koinanate Kitarpei.
- b. The second appellant seeks an order to be included in the final list of nominees to the Busia County Assembly representing Gender Top Up in place of Mary Beatrice Okedi.
- c. The third appellant seeks an order to be included in the final list of nominees to the Kisii County Assembly representing Persons with Disability in place of Richard Mokaya Bosire.
- d. The fourth appellant seeks an order to be included in the final list of nominees to the Uasin Gishu County Assembly representing the marginalized in place of Cheruiyot Maritim.

## **History**

2. The appellants were among 22 petitioners who unsuccessfully petitioned the High Court to nullify nominations by political parties to various county assemblies after IEBC's Disputes Resolution Committee rejected their complaints.
3. **Alice Wahito Mwangi Ndegwa**, the first appellant, aspired to be a special representative of Laikipia County in the County Assembly following the 4<sup>th</sup> March 2013 general elections. She contends that her political party TNA nominated her to do so but IEBC unfairly and unjustly removed her name from TNA's "gender top up" party list and replaced her with one Jennifer Koinanate Kitarpei based on the false allegation that she was not a member of TNA.
4. Her complaints to IEBC's Dispute Resolution Committee like her petition to the High Court were rejected.
5. **Mary Aroot Okedi**, the 2<sup>nd</sup> appellant applied to her party, UDF political party, for nomination to Busia County Assembly under the gender top up list. She contends that she was duly nominated but IEBC erroneously published the name of Mary Beatrice Okedi in her place despite a request by UDF to IEBC to correct the error. An imposter by the name Mary Beatrice Okedi, who hails from Nambale constituency of Busia County, emerged to claim the seat that was reserved for Teso North Constituency from where the appellant comes.
6. Her complaint to IEBC's Dispute Resolution Committee was not successful following which she unsuccessfully petitioned the High Court.
7. **Peter Nyakona Nyakona**, the 3<sup>rd</sup> appellant, a person living with disability, applied to his party Progressive Party of Kenya (PPK) for nomination to the County Assembly of Kisii. His party nominated one Richard Mokaya Bosire, who, according to the appellant, is not a person living with disability and his nomination does not, therefore accord with the Constitution and the nomination rules of the Party. His plea before the High Court was not successful.
8. **Abdi Ibrahim**, the 4<sup>th</sup> appellant a member of the URP political party applied for nomination to Uashin Gishu County Assembly. His political party forwarded his name to IEBC under the gender column of the top up list as opposed to under the marginalized column.
9. IEBC selected one Cheruiyot Maritim who according to the appellant is aged 48 years and does not qualify as a "youth". The appellant contended that the selection of Cheruiyot Maritim was therefore in breach of the Constitution.

10. His plea before the High Court was dismissed.

### **Proceedings in the High Court**

11. After the rejection of the appellants' complaints by IEBC's Dispute Resolution Committee the appellants petitioned the High Court. Before the High Court, the appellants contended that the adjudication of the complaints by IEBC's Dispute Resolution Committee did not meet the constitutional threshold under Article 47 of the Constitution; that IEBC denied or violated the appellant's right to fair administrative action in that the vetting process and determinations, were not lawful, reasonable or procedurally fair; that the appellants' rights to a fair hearing under Articles 25 and 50 of the Constitution were violated; that IEBC violated the appellants' right to access to justice; that the review by IEBC's Dispute Resolution Committee was not by an impartial and independent tribunal; that the appellants' right to legitimate expectation under Articles 10, 27, 50 and 159 were shattered and that the appellants rights to equality and from discrimination were violated.
12. Dismissing the petition in respect to the 1<sup>st</sup> appellant **Alice Wahito Mwangi Ndegwa**, the High Court observed that the nomination of Jennifer Koinanate Kitarpei, who the 1<sup>st</sup> appellant claimed was nominated in her place on the basis of false allegations, was challenged before the IEBC Dispute Resolution committee and subsequently in the High Court and rejected at both forums.
13. Regarding **Mary Aroot Okedi** the 2<sup>nd</sup> appellant, the High Court observed that her complaint regarding the publication of the wrong name was a factual issue that was considered by the IEBC's Disputes Resolution Committee and its decision could not on the evidence be faulted. The High Court observed that the Committee duly considered the evidence and noted that there were two different parties and that it was not a case of a mere typographical error as claimed. Mary Beatrice Okedi swore a deposition in the matter and asserted that the petitioner is an imposter and that she is the proper person nominated by UDF.
14. As for **Peter Nyakona Nyakona** the 3<sup>rd</sup> appellant who had applied for nomination for special interest seat as a person with disabilities and who claimed that a person without disability was wrongly nominated, the High Court held that the finding of fact by the IEBC's Dispute Resolution Committee that there was no evidence to prove that allegation could not be faulted.
15. With respect to **Abdi Ibrahim** 4<sup>th</sup> appellant the High Court took the view that it could not interfere with the Committee's finding of fact on the evidence that the appellant had not proved that the nominee Cheruiyot Maritim was not a youth. In any event, the High Court held that Cheruiyot Maritim was not made a party to the proceedings and it could not make adverse orders against him without a hearing. Regarding the contention that the provisions of Article 90(2)(c) excluded application of regional and ethnic balance the High Court stated:

***“As regards Article 90(2)(c) we agree that the Constitution clearly states that there shall be no requirements that special seats reflect the regional and ethnic balance of Kenya. However, we add that the element of diversity is imposed by Articles 10 and 27 and Section 97 of the County Governments Act (No. 17 of 2012) which provides that inclusion and integration of minorities and marginalized groups as a core principles to govern the county governments. The National values such as ‘inclusiveness’, ‘non-discrimination’, ‘fairness’ and ‘representation of the marginalized and minority groups’ are infused throughout the Constitution and must apply to the process governing the preparing party lists. Whether there has been compliance with this provisions is a matter of evidence. However on the basis of the material before us and the case***

***before the Committee we declined to intervene in the matter.”***

### **Submissions before this Court**

16. Learned Counsel for the appellant Mr. E. Ondieki cited numerous provisions of the Constitution with regard to marginalised groups and persons and prohibiting discrimination. Counsel further submitted that party lists submitted to IEBC by political parties should accord with the Constitution. Counsel also referred us to several authorities.
17. As regards the 1<sup>st</sup> appellant, counsel submitted that the question which this Court “*should answer on the preponderance of evidence is whether the Superior Court independently considered the evidence put before it or simply endorsed the decision of the 1<sup>st</sup> respondent’s committee, thereby denying the appellant her constitutional right to a fair hearing.*” There was also a complaint that each party was given five minutes to present their claims and was thereby denied access to justice.
18. As regards the 2<sup>nd</sup> appellant, counsel submitted that the issue for determination by this Court is whether “*on the preponderance of evidence*” the High Court had jurisdiction to direct IEBC to de-gazette the 2<sup>nd</sup> appellant as the law contemplates that once gazettement is done, the name can only be reversed through an election petition.
19. In relation to the 3<sup>rd</sup> respondent counsel submitted that “*on the preponderance of evidence*” IEBC did not have discretion to include an individual who was not disabled as a person with disabilities.
20. As pertains to the 4<sup>th</sup> appellant, counsel submitted that “*on the preponderance of evidence*” IEBC failed to ensure that URP’s party list for marginalised persons in Laikipia County included minorities within the County.
21. Learned Counsel for IEBC, Miss. Ndegwa submitted that having regard to the circumstances, the appellants were granted a fair hearing before the High Court despite the time limit set by the court; that the mandate of the High Court in exercising supervisory jurisdiction was limited to checking whether IEBC’s Dispute Resolution Committee breached the Constitution or acted arbitrarily or breached the rules of natural justice when considering the appellants’ complaints.
22. Counsel further submitted that the complaint in relation to the 1<sup>st</sup> appellant had already been determined and the appellant was seeking to reintroduce the same issue in yet another judicial proceeding. Further that the 1<sup>st</sup> appellant has petitioned the Magistrate’s Court in Election Petition No. 2 of 2013 in Nanyuki challenging the nomination of Jennifer Koinanate Kitarpei.
23. As regards the 2<sup>nd</sup> appellant, counsel for IEBC submitted that the appellant is seeking to introduce new facts at the appellate stage, as there was clearly no error in the nomination of Mary Beatrice Okedi.
24. Regarding the 3<sup>rd</sup> appellant’s grievances, counsel submitted that the High Court fully appreciated the law governing submission of party lists and without evidence neither the IEBC Disputes Resolution Committee nor the High Court had any basis for intervening in the matter.
25. As to the 4<sup>th</sup> respondent, counsel submitted that the 4<sup>th</sup> respondent did not demonstrate to either IEBC’s Disputes Resolution Committee or to the High Court any wrong doing.

26. Counsel further submitted that to grant the orders sought by the appellants would be tantamount to usurping the functions of IEBC; that persons who were not enjoined in the proceedings before IEBC's Disputes Resolution Committee or before the High Court or before this Court would adversely be affected by the orders sought and should not be condemned unheard; that the removal of persons who are validly elected should only be undertaken in accordance with Articles 82 and 87 of the Constitution and section 75 of the Elections Act.

### **Our Determination**

27. We have considered the appeal and the submissions. The 4<sup>th</sup> March 2013 general elections in Kenya can perhaps be compared to the 27<sup>th</sup> April 1994 general elections in the Republic of South Africa in the sense that both events marked the ushering in of a new democratic order. The description of the South African general elections of 27<sup>th</sup> April 1994 by Justice Z. M. Yacoob as "**historic, indescribably poignant and**

**undoubtedly significant...**"<sup>[1]</sup> is true of the 4<sup>th</sup> March 2013 general elections in Kenya being the first general elections in Kenya held under the 2010 Constitution under which the people of Kenya put in place a devolved system of government and established County Governments in Kenya.

28. Under Article 176 of the Constitution each County Government consists of a county assembly and a county executive. Under Article 177 of the Constitution the membership of each County assembly consists of members elected by the registered voters of the wards during the general election and "**the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender**"(Under Article 177(1)(b) of the Constitution) this is the category of members who have been referred to as 'gender top' up category and the "**number of members of marginalized groups, including persons with disabilities and youth, prescribed by an Act of Parliament.**" (Under Article 177(1)(c) of the Constitution. This is the category of members who have been referred to as 'marginalized top' up category).
29. Under Article 177(2) the special seat members and the members of marginalized groups are nominated by political parties in proportion to the seats received by each political party in that County by the use of party lists in accordance with Article 90 of the Constitution.
30. Under Article 90(2), IEBC is responsible for the conduct and supervision of elections for special members and members of the marginalized groups and is required to ensure that each political party participating in the general election nominates and submits a list of all person who would stand elected if the party were to be entitled to all the seats in the special member and marginalized groups categories.
31. We are alive to the historical, social and political context in which the people of Kenya entrenched provisions for representation of special and marginalized groups and persons in the Constitution. That context is captured in the Judgment of this Court in the case of **Commissioner for Implementation of the Constitution v The Attorney General and two others Civil Appeal No. 351 of 2012** where the Court stated that:

**"The coming into place of a new constitutional order that attempts to inject equity, rationality, objectivity and inclusivity into the process consistent with the dictates of participatory democracy and an attempt, through affirmative measures, to redress the marginalization that had kept certain portions of the populace in the peripheries of the political process."**

32. In a recent decision of this Court in the case of **Rose Wairimu Kamau and three others vs. IEBC CIVIL APPEAL NO. 169 OF 2013** the Court had this to say:

***“The basis for providing for special seats for the disadvantaged groups of people is obvious. The women folk in this country, and the marginalized groups including the youth and persons with disabilities, are a class of people whom the US Supreme Court referred to, in the case of San Antonio School District v. Rodrigues (1973) 411 US 29, as saddled with economic, social, political or other disabilities that relegate them to a position of political powerlessness. With these challenges, these are people who cannot compete fairly for elective positions. In other words, these are groups of people whose interests normal electioneering processes cannot capture and represent and therefore require “extraordinary protection from the majoritarian political process.” It is in recognition of this that our Constitution has provided for their representation by creating special seats for them. Needless to say that the nominations to these special seats should therefore be jealously guarded.”***

33. Cognizant of that context and the need to jealously guard realization of the constitutional objectives for representation of special and marginalized interests, we proceed to examine the grievances by each of the appellants.
34. The appellants aspired to serve in their respective county assemblies as special seat members or as members of marginalized groups. As counsel for the appellants correctly submitted, whether or not the provisions of Constitution and the law were heeded by the nominating political parties and in turn by IEBC with respect to the nomination of special members and members of marginalized groups or persons in the County Assemblies is a matter of fact with respect to each appellant.
35. We begin with the first appellant. Based on the material that was presented by the 1<sup>st</sup> appellant (**Alice Wahito Mwangi Ndegwa**) to the High Court, her complaint has merit. Item 31 of IEBC’s collective ruling relates to Laikipia County. In relation to the gender top up list, IEBC ruled, “*Alice Wahito Ndegwa is removed as she is not in TNA list and replaced by Jennifer Koinante Kitarpei.*” Yet, the 1<sup>st</sup> appellant had sworn an affidavit before the High Court to which she annexed TNA’s party lists and other material which, prima facie, established that she was not only a member of TNA but was duly nominated, though no indication was made in those party lists under which category she was being nominated. The matters deposed to by the appellant in that affidavit do not appear to have been challenged or contested by the respondents.
36. We are also concerned that the decision by IEBC’s Disputes Resolution Committee to remove her from the party list and to replace her with another person was reached without according her a hearing.
37. The High Court in its impugned judgment does not appear to have had regard to those matters. The High Court’s decision was based on the ground that “*the position of Jennifer Koinante was challenged before the Committee in Complaint No. 52 of 2013( Margaret Kamau v TNA)*”, a process to which the appellant does not appear to have been privy.
38. For those reasons, we are persuaded that the High Court erred in dismissing the petitioner’s case and therefore allow the 1<sup>st</sup> appellant’s appeal. IEBC shall accordingly proceed to gazette the 1<sup>st</sup> appellant as the duly elected special member under the general category for Laikipia County Assembly

39. We turn now to the 2<sup>nd</sup> appellant Mary Aroot Okedi. Her grievance, as earlier indicated, was that she was duly nominated by UDF Party and was on the gender top up category of the special member for Busia County; that IEBC made a typographical error by publishing her name as Mary Beatrice Okedi; that at the hearing of her complaint before IEBC's Dispute Resolution Committee a person bearing that name, who comes for Nambale Constituency as opposed to Teso North Constituency for which the slot was reserved, turned up and claimed the slot; that regional balance within Busia County was thereby negated.
40. After hearing the appellant and Mary Beatrice Okedi, IEBC's Dispute Resolution Committee was satisfied that no changes in the party list with respect to gender top up category should be effected. In those circumstances the High Court was right, in our view, in holding that the identity of a party is a factual issue and that the matter was satisfactorily and procedurally dealt with. Accordingly we have come to the conclusion that with respect to 2<sup>nd</sup> appellant, it has not been demonstrated how or in what respect the provisions of the Constitution or the law were violated.
41. The 3<sup>rd</sup> appellant, Peter Nyakona Nyakona, complained that despite having applied to his party, the Progressive Party of Kenya (PPK) for nomination to the Kisii County Assembly as a special member being a person living with disability, the party nominated a person who is not disabled, namely Richard Mokaya Bosire. The appellant was heard both before the IEBC Dispute Resolution Committee and before the High Court. In his submission before the committee the appellant submitted that investigations had been carried out on the basis of which it had been established that the nominee Richard Mokaya Bosire is not a person living with disability and that he had single handedly been picked by the party leader as a person living with disability on the basis of being hearing impaired; he also complained that the nominee under the gender top up came from the same village and regional balance within the County was therefore ignored.
42. We are in agreement with the holding by the High Court that the matters complained of by the appellant are matters of evidence and that upon evaluation there was no material place before the Committee to support the allegations.
43. The appellant was clearly accorded a hearing. We are unable to see how or in what respects the process leading to those decisions is flawed. We accordingly reject the appellants appeal.
44. Abdi Ibrahim, the 4<sup>th</sup> appellant's two pronged complaint that Cheruiyot Maritim, the person nominated by URP party to Uasin Gishu County Assembly under the marginalized category is not a "youth" and that all nominees came from one community, the Kalenjins were considered by the High Court. On the question of the of age of Cheruiyot Maritim, the nominee, the High Court correctly held that as a person who would be adversely affected by a decision that would result in his removal, it would have been imperative to hear him.
45. As regards the question of regional and ethnic balance within the County, the holding by the High Court is consistent with the holding of this Court by a different bench in the case of Rose Wairimu Kamau and three others vs. IEBC [supra] where this Court stated that although:

***"Article 90(2)(c) of the Constitution excludes the criteria of "regional and ethnic diversity of the peoples of Kenya" from consideration in the nominations at the county level...that, however, is no certificate for failure to carry out the nomination exercise fairly. It is no certificate for party officials to pick their cronies or people from one area ignoring all others. Moreover, the criterion set out in Article 90(2)(c), is one of balancing the "regional and ethnic diversity of the people of Kenya." That is not to be understood as obviating any balance in the communities of the county***

**concerned. The selection for nomination from the women, the youth and the people with disabilities at the county level should be done fairly and equitably.”**

46. We are therefore satisfied that the High Court correctly apprehended the question of regional and ethnic balance within the county. We cannot however justifiably interfere with the decision of the High Court having regard to the fact that Cheruiyot Maritim was not heard on the question of his age.

47. Finally we should say that despite the reference by the appellants to numerous provisions of the Constitution which were allegedly violated in this matter, the appellants, with the exception of the 1<sup>st</sup> appellant who demonstrated that she was condemned unheard, failed to establish on a balance of probabilities how and in what specific respects those constitutional provisions and safeguards were breached. It is not enough for a party to cite and invoke provisions of the Constitution or of the law and allege breach without offering any or any adequate evidence of the manner in which those breaches are said to exist.

48. The upshot of the foregoing is that we allow, with costs against the 1<sup>st</sup> respondent the appeal in relation to the first appellant. The appeal by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants is dismissed.

49. In relation to the appeal by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, each party shall bear their own costs of the appeal.

***Dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2013.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

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[1] Z.M. Yacoob; Justice of the Constitutional Court of South Africa in a paper titled “Issues and Debates in the South African Constitutional Negotiations in the Context of the Apartheid Evil and the

struggle for Democracy” presented at the University of Michigan, USA in January 2004.



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