Case Number:	Election Petition Appeal 1 of 2014
Date Delivered:	11 Aug 2014
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Nestehe Bare Elmi v Sarah Mohamed Ali & another [2014] eKLR
Advocates:	Mr Nderitu for the Appellant. Mr Wachira for the 1st Respondent. Mr Mwangi for the 2nd Respondent.
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	E K Nyutu - PM
County:	Nairobi
Docket Number:	-
History Docket Number:	11 of 2013
Case Outcome:	Appeal dismissed.
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

ELECTION PETITION APPEAL NO. 1 OF 2014

NESTEHE BARE ELMI.....……..APPELLANT

VERSUS

SARAH MOHAMED ALI…….1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISION.....2ND RESPONDENT

(Being an Appeal from the Judgement of the Chief Magistrate's Court, Makadara delivered on 5th February, 2014 in Milimani Chief Magistrate's Court Election Petition Number 11 of 2013, Hon. E K Nyutu, Ag. PM)

JUDGEMENT

1. Article 90 of the Constitution bestows upon the Independent Electoral and Boundaries Commission, the 2nd Respondent herein (hereinafter referred to as the IEBC) the responsibility for the conduct and supervision of elections for seats provided for, *inter-alia*, the members of the county assembly under Article 177 (1) (b) and (c) of the Constitution, which shall be on the basis of proportional representation by use of party lists. Following the conclusion of the General Elections held on 4th March 2013, the IEBC allocated the National Vision Party (hereinafter referred to as the Party) one slot for nomination to the County Assembly of Mandera under the gender top up category.

2. By a list received by the IEBC on 18th January, 2013, the party submitted the name of the 1st Respondent herein as a nominee for Madera. However, it is clear that the said list did not indicate the position for which the 2nd Respondent was nominated. Vide another list received by the IEBC on 12th March 2013, the party submitted the name of the 1st Respondent under the category of the marginalized group. By another list received by IEBC on 22nd April 2013, the same party submitted the appellant's name under the gender top up category.

3. The IEBC accordingly gazette the appellant as the party's nominee for the slot of the gender top. It was this decision which provoked the petition before the Magistrate's Court from which this appeal arose. The said appeal was instituted by the party and the 1st Respondent.

4. After hearing the said petition, the learned magistrate delivered his judgement on 5th February, 2014 though the copy contained in the record of appeal herein is wrongly dated 5th February, 2013.

5. In his judgement the learned trial magistrate found that the IEBC had failed to demonstrate its reason for resorting to the resubmitted list in which the appellant's name appeared when it was clear that the original list had a female nominee for the County. According to the learned magistrate, if the IEBC determined that the party did not qualify for marginalized category slot, there is no reason why it did not settle for the names already provided to identify a candidate for gender top up. In the alternative it ought to have asked the party to suggest a name for gender top up amongst the names appearing on the original list.

6. The learned trial magistrate proceeded to consider the evidence before him relating to party membership and found that apart from the original list submitted by the party to the IEBC in which the 1st Respondent's name appeared, there was no other list submitted by the party to the IEBC three months prior to the nomination of the appellant as required under section 28 of the ***Election Act*** (hereinafter referred to as the Act) in which the appellant's name appeared. Apart from that though section 35(1) of the Act required the party to submit on the day of the nomination its candidates its party list 45 days prior to the elections which according to the learned magistrate ought to have been done in the beginning of January, 2013. According to the learned magistrate from the list of political party members of the party produced as evidence by the 1st Respondent herein, whereas the 1st Respondent's name appeared therein, the appellant's name was not there. Further the list forwarded by the party on 18th January, 2013 while containing the 1st Respondent's name did not have the appellant's name. The correctness of this evidence, according to the learned magistrate was not challenged by both the Respondents before him despite having had an opportunity to do so.

7. It was the view of the learned magistrate that the IEBC failed to demonstrate the legal provision which entitled the IEBC to call for an extra list where the original list had not been exhausted. According to him, the law makers required that if the party had omitted to indicate to indicate their preferred candidate for the gender top-up category, the IEBC ought to have pointed out this omission to the party and directed it to name one from the existing list. The Court then held that it was irregular for the IEBC to have admitted the appellant's name yet it was clear that the appellant's name did not feature in the originally submitted list.

8. The Court then considered the academic qualification of the appellant and the 1st Respondent and found that whereas under section 22(1)(b) of the Act for a candidate to be eligible for nomination as county assembly he/she ought to have held a post-secondary school qualification recognized in Kenya. In this case however, the appellant admitted that she had only attended primary school up to class four and had difficulty communicating in Swahili. The Court therefore found that the appellant did not meet the education threshold envisaged under the party nomination rules. While appreciating that the said education qualifications were relaxed in respect of the first elections vide section 2A of the ***Elections (Amendment) (No. 3) Act***, the Court was of the view that it was intended that representative of such interests must have some basic education which the appellant lacked. Relying on **The National Gender and Equality Commission vs. The Independent Electoral and Boundaries Commission & Another [2013] eKLR** and **Micah Kigen Case [2012] eKLR**, the Court held that even assuming that the appellant was regularly nominated, she nevertheless did not qualify for election on the ground of her education status. The Court then proceeded that since Regulation 54(4) of the ***Elections (General) Regulations, 2012*** (hereinafter referred to as the Regulations) authorised the IEBC to reject an unqualified nominee, by failing to exercise this authority, the IEBC acted negligently and that had it been diligent, in its duty, it would have noted that the appellant's name did not appear in the party membership list submitted to it before the elections.

9. The learned magistrate proceeded to declare that the appellant was illegally and irregularly nominated and that the 1st Respondent was the duly nominated representative of the party in the county.

10. It was this decision that triggered the instant petition in which the appellant has raised the following grounds:

1. **1 THAT the learned Magistrate erred in law and in fact in finding that the 2nd Petitioner was entitled to nomination for a Gender Top Up Slot when indeed the National Vision Party had nominated her for nomination to represent Marginalised Category.**

2. **THAT the learned Magistrate erred in law and in fact by holding that the 1st Respondent had the mandate and the power to compel the National Vision Party to transfer a nominee for the Marginalised Category List to the Gender Top Up List.**

3. **AT the learned Magistrate erred in law and in fact by holding that the 1st Respondent was compelled by law to use a list of nominees submitted by the National Vision Party on 24th January, 2013 to nominate the 2nd Petitioner, which list did not comply with the law.**

4. **AT the learned Magistrate erred in law and in fact in holding that the 1st Petitioner was the sole female nominee in the lists submitted by the National Vision Party on 24th January 2013 and 12th March, 2013.**

5. **THAT the learned Magistrate erred in law and fact by holding that the educational qualifications of the 2nd Respondent were relevant for purposes of her qualification for nomination.**

6. **AT the learned Magistrate erred in law and fact by holding that the 2nd Respondent was not a member of the National Vision Party when the evidence of her membership was on record.**

7. **THAT the judgement consists of grave miscarriage of justice and should be set aside.**

11. The appellant in support of the said grounds filed written submissions which were highlighted by his learned counsel **Mr Nderitu**.

12. According to the appellant, the first listed submitted by the party did not conform to the law since it did not indicate whether it related to the marginalised category or the gender top up slot. The second list was however in respect of the marginalised group. It was submitted that by submitting a second list the party must have recognised that the first list was defective. However this second list did not provide for gender top up and that the only list which provided for the gender top up was the third list in which the appellant was indicated as the party's nominee for the slot.

13. It was submitted that since there was no name submitted in respect of the gender top-up which was the only slot which the party was entitled to the IEBC as it was entitled under section 37(2) of the Act as read with Rule 55 of the Regulations called for additional list and following an explanation by the party on the absence of the list. It was therefore submitted that the finding by the Court that the original

list had not been exhausted was erroneous because up to 22nd April, 2013 there was no list in relation to the gender top up and the list which did not conform to the law could not be relied on.

14. On behalf of the appellant it was submitted that any nomination must be related to the particular category and a candidate cannot be transferred from the marginalised list to gender list.

15. On the educational qualifications, it was submitted that prior to the elections section 22 of the Act was amended and the application of the qualifications therein were removed with respect to county assembly representatives. Similarly the party nomination rules provided for the minimum standards provided in the Act. In any case, the nomination rules of a party cannot override the express provisions of the law. It was therefore submitted that the Court erred in making a detailed consideration of the appellant's educational qualifications based on the party's nomination rules and that by the amendment of the Act, the said rules were automatically amended.

16. With respect to the issue of party membership, it was submitted that none of the parties produced the list of membership that ought to have been submitted to the IEBC 28 days before the election. However, the appellant produced party membership card which was not challenged. In any case the responsibility for the submission of the list was that of the party and not the appellant. Thirdly, the party confirmed that the persons which were nominated were members of the party hence it was clear that the appellant was a member of the party. According to the appellant, the list which emanated from the Registrar of Political Parties was not the list envisaged under the Act which ought to have been submitted by the party.

17. The appellant therefore prayed that the appeal be allowed and the appellant be reinstated as the duly nominated party representative for the slot of gender top up.

18. In support of her submissions the appellant relied on **Linet Kemunto Nyakeriga & Another vs. Ben Njoroge & 2 Others Civil Appeal No. 266 of 2013** , **Patricia Cherotich Sawe vs. Independent Electoral and Boundaries Commission Civil Appeal No. 178 of 2013** and **Daniel Kibet Chumo & Another vs. Independent Boundaries and Electoral Commission Nairobi High Court Petition No. 149 of 2013**.

19. The appeal was supported by the IEBC and on its behalf, while relying on the written submissions filed herein and while reiterating the submissions made on behalf of the appellant, it was submitted by **Mr Mwangi**, its learned counsel that it would have been wrong for the IEBC to compel the party to pick a nominee from the existing list. According to learned counsel by his decision the learned trial magistrate substituted the 1st Respondent for the appellant which was a miscarriage of the law. In support of this submission counsel similarly relied on **Patricia Cherotich Sawe vs. Independent Electoral and Boundaries Commission** (supra) and **Beatrice Nyaboke Oisebe vs. IEBC & 2 Others [2013] KLR**.

20. On the burden and standard of proof in election petitions, it was submitted that the learned trial magistrate failed to address his mind to the same and to the holding in **Raila Odinga vs. IEBC & Others Supreme Court Election Petition No. 5 of 2013**.

21. The appeal was, as expected, opposed by the 1st Respondent. In so doing written submissions were filed on her behalf which were highlighted by her learned counsel, **Mr Wachira**.

22. Apart from the defect in the record which according to the 1st Respondent included documents which were expunged and omitted crucial documents, it was contended based on **Imelda Nafula Wanjala vs. IEBC High Court Petition No. 239 of 2013** that there was no evidence adduced before the

trial court by IEBC to justify their failure to apply the law when they called for another list of nominees from the party after the elections yet there was a qualifying nominee in the original list submitted before the elections. According to the 1st Respondent as long as the original list had a qualifying nominee the IEBC had no right to call for another list as the first list did not distinguish between the marginalised and the gender top up nominee and the original list had not been exhausted.

23. On the educational qualification of the appellant it was submitted that since the party nomination rules were first in time while the amendment took effect later, the law did not suspend the educational requirements enshrined in the nomination rules and regulations.

24. It was also submitted that the finding by the learned trial magistrate that the appellant was not a member of the party was supported by the evidence.

25. In support of her submissions the 1st Respondent relied on the **National Gender and Equality Case** (supra), **Micah Kigen Case** (supra) and **Imelda Nafula Wanjala Case** (supra).

26. I have considered the fore going and this is the view I form of the matter.

27. As is clear from the grounds of appeal all the grounds of appeal except one start with the phrase "the learned Magistrate erred in both law and fact". This phrase was considered by the Court of Appeal in **Patricia Cherotich Sawe vs. Independent Electoral and Boundaries Commission** where the Court expressed itself as follows:

"….It is therefore quite strange and improper that each of the seventeen grounds, without exception commences with a standard expression, "the judge erred in fact and law" or "the learned judge erred in law and in fact". Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."

28. The jurisdiction of an appellate court in election disputes is not only provided in statute, but was also litigated upon at the Supreme Court which determined that the appellate court shall only determine aspects of law. See the case of **Frederick Otieno Outa vs. Jared Odoyo Okello and 4 Others Petition No. 10 of 2014**.

29. On what exactly is matter of law and that of fact, our Supreme Court in the **Frederick Otieno Outa case (supra)** cited with approval the holding of the Supreme Court of the Philippines, in **Republic vs. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345** and **New Rural Bank of Guimba vs. Fermina S Abad and Rafael Susan; G.R No. 161818 (2008)** that:

"We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites

calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation."

30. From the outlined grounds of appeal, the following are, in my view, issues for determination:

1. **Whether the list received by the IEBC on 18th January, 2013 was valid for the purposes of the party's gender top up slot and whether the IEBC was justified in calling for another list.**

2. **Whether the appellant was a member of the National Vision Party and therefore qualified to be nominated.**

3. **Whether the appellant possessed the required academic qualification required for her to be nominated.**

31. I wish to deal with the issue whether the appellant was academically qualified to be nominated as a member of the County Assembly of Mandera. It is not in doubt that the legal requirement under which the qualification for a person to be elected as a member of the county assembly of post-secondary education was a amended with the effect that the same was nolonger a requirement. That being the position any rule purporting to require such qualification would have been contrary to the Act and the mere fact that the party nomination rules were promulgated earlier than the said amendment is inconsequential. As soon as the amendment came into effect any party rule which was contrary to the legal provision became null and void to the extent of its inconsistency. I therefore I agree with the submissions made on behalf of the appellant that the party nomination rules had to be read as if the same were amended accordingly by the Act.

32. To treat party nomination rules to be superior to national legislation would defeat the very purpose for which the electoral legislation and by extension the Constitution are promulgated. Any restriction of the political rights enshrined in Article 38 of the Constitution which is not underpinned by the law and which is contrary to the law would itself be unlawful and cannot be upheld. A party constitution including its rules must be in conformity with the national legislation. Accordingly, it is my view and I so hold that the appellant was academically qualified to be nominated as a Member of the County Assembly of Mandera and the learned trial Magistrate erred in holding otherwise.

33. The next issue for determination is whether the appellant was a member of the National Vision Party. It was agreed that none of the parties before the trial magistrate produced evidence that the party strictly complied with sections 28 and 35(1) of the Act with respect to the timelines for the submission of the party membership list to the IEBC. Based on that the learned trial magistrate considered the evidence which was presented before him such as the records from the Registrar of Political Parties as well as the party membership card and found as a fact that the appellant was not a member of the National Vision Party.

34. That finding was a finding of fact and as already held hereinabove this court is only entitled to interfere with matters of law. Whereas a finding based on complete lack of evidence would constitute a question of law, where a Court is confronted by two sets of evidence and it decides to believe one set and not the other this Court in these kinds of appeal is not entitled to interfere on the basis that if it was the trial court it would have arrived at a different conclusion.

35. Accordingly there is no basis upon which this court would be entitled to interfere with the finding of the learned magistrate thereon.

36. The next issue for determination is the validity of the list submitted to the IEBC on 18th January, 2013 for the purposes of the nomination of the party's gender top up representative in Mandera County Assembly.

37. It is not in doubt that the said list did not distinguish whether it was in respect of the marginalised groups or gender top up category. Section 34(4) provides:

A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article(1)(b) and (c) of the Constitution. [Underlining mine].

38. It is noteworthy that the provision talks of a party list and not party lists at the time of the submission of the list.

39. Section 35 of the Act provides:

A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the

nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution.

40. What the section requires in my view is that the list submitted ought to comply with the relevant provisions of the law.

41. Section 37(2) of the Act provides:

Notwithstanding the provision of section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty-one days.

42. The aforesaid provision was clearly only applicable to situations where the names in the list submitted by a party had been exhausted yet there was\were other slot(s) available for the party.

43. On the other hand Regulation 55 provides:

(1) The party list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.

(2) The Commission may reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.

(3) The political party whose party list or nominee has been rejected by the Commission under subregulation (2) shall resubmit the party list or nominee within such period as the Commission may specify.

(4) A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.

44. The issue for determination is whether a list which does not specify the position for which a person is intended to be nominated ought to be deemed not to comply with the requirements of the Constitution, the Act or the Regulations.

45. It is therefore clear that at the time of the submission of the party list the party is not in a position to know for which category it will qualify. Therefore to expect a party at that stage to indicate the categories for the nomination would defeat the very purpose of the submission of the list before the election. What in my view is required is that the list submitted ought to comply with the provisions of section 34 of the Constitution in that it ought to contain the persons who qualify for the positions provided under the law in an order of priority. The Commission would then be enjoined to go through the list based on that priority to satisfy itself on their qualifications for the post. Therefore if for example party qualifies to nominate a man and the party list only had women, the Commission would then be entitled to call for another list. However, if the list had one man even at the bottom, the Commission would subject to the other requirements being met choose that man and would not be entitled to reject that list merely on the ground that the person was not indicated to have been nominated for the position of gender top up.

46. I have considered the decisions relied upon by the appellant. In **Linet Kemunto Nyakeriga & Another vs. Ben Njoroge & 2 Others** the Court was dealing with the issue of priority in nomination of the proposed names in the list. The Court held that the IEBC must adhere to the priority of the names as given by the parties since the list is a closed list and the IEBC has no discretion to decide whom to choose in the list. The Court did not hold that where the party submits a list but does not compartmentalise the persons named therein into specific categories the list would be invalid notwithstanding the fact that from the list one can determine the nominees for particular categories.

47. In **Beatrice Nyaboke Oisebe vs. IEBC & 2 Others** (supra) the holding was that it is the party alone which proposes the list for party nominations which list is not subject to amendment.

48. In **Patricia Cherotich Sawe vs. Independent Electoral and Boundaries Commission** (supra)

the determination was that section 13 of the Act only applies to “candidates” nominated to participate in the elections and not those up for party nominations. The second issue was whether the nomination in question could only be challenged by way of an election petition. Therefore that case did not deal with the issue of particularisation of the names of nominees to specific categories.

49. However in **The National Gender and Equality Commission vs. The Independent Electoral and Boundaries Commission & Another** (supra), it was held that:

“Section 34(6) of the Elections Act, 2011 specifically provides that, “The party lists submitted to the Commission under this section shall be in accordance with the Constitution or the nomination rules of the political party concerned.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances....While the parties have submitted at length on the need to define the terms such as “special interest” to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinise the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.”

50. It is therefore clear that the role of IEBC is limited to ensuring that the party list complies with the Constitution, the laws and the regulations but does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties. In the list submitted on 18th January, 2013, there was at least one person, the 1st respondent who met the gender top up criteria. Accordingly, the list complied with the Constitution, the laws and the regulations in so far as the nomination of the gender top up representative was concerned. In those circumstances there was no reason for the IEBC to look elsewhere for the nominee. It must always be remembered that in election matters, reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering procedural matters. The requirement for the gender top up criteria is meant to ensure the attainment of the principle in Article 175(c) of the Constitution to the effect that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. However in interpreting the provisions of the Constitution one must always keep in mind that the Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual’s full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction. See **R vs. Big M Drug Mart Ltd (1986) LRC 332; Attorney General vs. Momoddon Jobo [1984] AC 689.**

51. In so doing however, while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from time to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text,

by constitutional traditions and by the history, traditions and underlying philosophies of the society. See **Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375.**

52. I am therefore of the view and I so hold that the declaration by the learned magistrate that it was the 1st Respondent who was duly nominated as the representative of the party in the County and not the appellant was correct and cannot be faulted.

53. In the premises this appeal is unmerited and the same is hereby dismissed.

54. On costs, it is clear that the confusion was caused by the National Vision Party which unfortunately is not a party to these proceedings. Accordingly, the order which commends itself to me and which I hereby make is that each party will bear own costs.

55. It is so ordered.

Dated at Nairobi this 11th day of August, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nderitu for the Appellant

Mr Wachira for the 1st Respondent

Mr Mwangi for the 2nd Respondent

Cc Kariuki